

Dispute Settlement in the WTO: The NGO Perspective

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INTRODUCTION

There is much talk about NGOs participation in the World Trade Organisation (WTO) in general and its dispute settlement process in particular. This debate is linked with two approaches viz. pragmatism or negotiation and rule based or adjudication. The contentious issue between these two views is that whether trade disputes could be better resolved by means of negotiations or litigation. The changing perceptions of sovereignty and democracy are, in my opinion, providing doctrinal basis for this debate. As political affairs on national as well as international level are moving from conventional representation to citizens' participation at various levels of decision making, therefore, those favouring NGOs argue that they can provide information, expertise, public confidence and above all democratic legitimacy to the WTO. In order to analyse the issue this essay is divided in three parts. Part I very briefly deals with the doctrinal basis of the debate. In part II the philosophical discussion highlights the two approaches in detail. The historical facts also follow therein. The role NGOs play in the meetings and dispute settlement process of the WTO is analysed in Part III followed by a conclusion.

1. EROSION OF NATIONAL SOVEREIGNTY

The Great Depression of the 1930's coupled with the political aftermath of World War I had put the world economy in shambles. Many countries especially the US had raised tariffs of agricultural products.¹ Between the two world wars there was an economic deterioration. However, the post world war II political scenario moved towards the redirection of international trade.² Based on the reason that the world economy had distanced itself from the society, the opinion prevailed was that the policy of *laissez-faire* was failed in international trade and commerce.³ The proposal of an International Trade Organization (ITO) addressed the issue of international trade regime in order

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1. James Foreman-Peck *A History of the World Economy*, Wheatsheaf Books, 1983, p 213.

2. *Ibid.* p 261.

3. Jens Ladefoged Mortensen, "The Institutional Requirements of the WTO in an Era of Globalization: Imperfections in the Global economic Polity", 6(2) *European Law journal* (2000) p 176-204.

to provide a forum for settlement of trade disputes among states. In the event of ITO's failure to come into life, the General Agreement on Tariff and Trade (GATT) was created as a provisional agreement. Notwithstanding its provisional status, the GATT scored many successes initially to settle trade disputes.⁴

The ever increasing transnational activities, supported by communication technology, has pushed national perceptions to the background, as the concept of national sovereignty is facing a grim challenge to keep itself asserting with traditional supremacy⁵. The fall of communism coupled with the creation of the WTO has opened a floodgate of free market competition throughout the world; it has led to what is popularly known as globalization.⁶ This is badly distressing both domestic economy and polity.⁷ Political and economic scientists are, therefore, arguing that governance based on transparent accountability and participatory democracy is required to be carved out of such a complex situation.⁸ In this respect, NGOs participation in the WTO's meetings, policy -making and dispute settlement mechanism is currently the subject of hectic scholastic debate.

II. PHILOSOPHICAL DISCUSSION

HISTORICAL OVERVIEW

The intentions of the GATT founding fathers was to fight high tariffs and other protective measures that had contributed to the outbreak of the World War II and the Great Depression.⁹ Its aim was also the promotion of free international trade.¹⁰ To achieve this end, the GATT provided a clause for ending discriminatory treatment of goods in global commerce. That is called the Most Favoured (MFN) clause. Its aspiration was to increase the standard of living, employment opportunities and conditions of socio-economic prosperity.¹¹

The history of GATT would demonstrate that such non-state organizations as International Chamber of Commerce (ICC) took part in its meetings, to which no objections were raised.¹² More so, the NGO participation had caught

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4. William Davey, "Dispute Settlement in GATT" 11(1) Fordham International Law Journal (1987), 53.
 5. Jan Aart Scholte, Robert O'Brian and Mare Willam, "The WTO and Civil Society", 33 (1) Journal of World Trade (1999) 107, (hereinafter Scholte); Also see Mortensen, op.cit. P 180.
 6. Alberto Tita, "Globalization: A new political and Economic space Requiring Supranational Governance", 32 (3) Journal of World Trade (1998) p.147.
 7. Mortensen op.cit. p 176.
 8. Ibid p 176 Also see e.g. Scholte op.cit. P 108.
 9. Glen Shleyer "Power to the people": Allowing private parties to raise claims before the WTO Dispute Resolution System" 65 Fordham Law Rev. (1997) p 2275-2311.
 10. William Davey, op.cit. P 53.
 11. W.A Wells, (Director of Information, Emperor Industries Association and British Empire League, 9, Victoria street Sw.1), "The Havana Charter, GATT and the ITO", Torquay Background, BURRUP MATHIESON & CO, LTD, 1950, P10.
 12. Steve Charnovitz, "Opening the WTO to NGO Interest", 24 Fordham International Law Journal (2000), p 173-216.

the very legal attention of experts at that time. Article 87 of the Havana Charter provided such a role.¹³

The NGOs attended the session that drafted the charter of the ITO.¹⁴ The background of NGO involvement in the proposed ITO traced by Gabrielle and Penderson amply displays that although the recommendations put forwarded by the Interim Commission for International Trade Organisation (ICITO) and ECOSOC never saw the light of the day. Yet it appears that the issue was worked upon with recognition of its importance. The proposed model visualized an advisory role of NGOs for the ITO to derive benefits from their specialized knowledge.¹⁵ The Executive Secretary of the Interim Commission for the ITO suggested many workable proposals, e.g. their invitation to the annual conference, providing them documents and their suggestion of items for the conference agenda.¹⁶ Furthermore, the Director – General was given power to set up an advisory committee of NGOs representatives.¹⁷ It was also proposed that the Executive Board decide a conflict of opinion between DG and NGO, as to implementation of the proposal.¹⁸ True, the ITO went into nothingness. The proposed model for its relationship with the NGOs was not pursued. But NGOs continued their engagement. They kept themselves in touch with the activities of GATT.¹⁹ On academic front, too, their demand got propped up. John Jackson, a leading international trade laws scholar, while writing in their favour anticipated a role of NGOs in the global trade affairs.²⁰ The NGOs kept a vigilant eye on GATT in the 1980's Uruguay Round of Talks and in the 1990s condemned it as: "GATT astrophe"²¹. In 1990's they criticized the US violation of GATT law in the Tuna-Dolphin case.²² So they shifted their war to environmental protection; and one NGO was reported to have condemned GATT for having shut its doors for private citizen, information and engagement.²³ The Winnipeg principles on trade and sustainable development, among others, adopted a principle pertaining to entertainment of written submissions from NGOs.²⁴

13. "The Organization may make suitable arrangements for consultations and Co-operation with non-governmental organizations concerned with the matters within the scope of this charter." (Italics added) Cited by Gabrielle Marceau and Peter N. Penderson in "Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-Governmental Organizations and Civil Society's Claim for more Transparency and Public Participation" 33(1) J.W.T. (1999) pp 5-49 at 8.

14. Chanovitz op.cit. p 178.

15. G. Marceau & P.Penderson, op.cit. p 15.

16. Ibid. p 20

17. Ibid. p 25

18. Ibid.

19. Ibid.

20. S. Charnovitz, op.cit p 175 Refers to the book of John Jackson *World trade and GATT law* (1969).

21. Ibid.

22. Ibid.

23. Ibid. p 177 The learned author refers to a handbook sponsored by the Environmental Grants makers Association and the Consultative Group on Biodiversity.

24. Ibid.

APPROACHES

As stated above the GATT was successful in its early years. Its first decade i.e. 1948-1958 is generally considered a period of satisfaction.²⁵ It follows that the GATT was inclined to resolve trade disputes on rule based principle. Article 23 which provides that GATT dispute settlement machinery conjures up “prompt investigation, appropriate recommendations” and “giving ruling”²⁶, creates a broad and wide scope²⁷ of rule – oriented solution. Thus an adjudicative mechanism existed in GATT to shelter agreed upon rules.²⁸ The question that whether a rule has been violated, in fact, is a legal one. And the very fact that decision – makers were appointed (whose reports in the latter decades were condemned being biased)²⁹ transpires that the objective was a legal approach. The criticism of panel’s reports reinforces this view. The GATT agreement laid down provisions for negotiated settlement as well which were, however, to be resorted to before setting the adjudicative machinery in motion. As the GATT stepped forward on both the tracks of adjudication and negotiation, a conflict of opinion arose as to which type of dispute settlement it really stood for.³⁰ The supporters of adjudication theory argued that it will encourage compliance with rules, adherence to and implementation of panels’ reports while the advocates of negotiation theory said that the former will adversely affect the latter, render the GATT vulnerable to increased litigation and even lead to filing of wrong cases.³¹ This discussion has a deep reflection on the current issue of NGOs participation in the WTO. The proponents of negotiation do not favour NGOs involvement. Whereas the supporters of NGOs are in favour of adjudication, whose line of argumentation is that it will enhance rule of law, bring transparency and democratic legitimacy.

ARGUMENTS IN FAVOUR AND AGAINST NGOs

There are interesting arguments for and against the NGOs participation. However, the thrust of the debate is in favour of NGOs. The proponents believe that power oriented approach is ghastly becoming ineffectual because the emergence of global democracy is transforming the power of decision making from government to private citizens.³² The pragmatic approach will lead to multiplicity of disputes and perpetuation of conflict as the politico-economic behemoth of the powerful nations will export the benefits of the system.³³ Legalistic model or adjudication that is supportive of NGOs role, on the other hand, will guarantee predictability, certainty, global investment and above all the principle of parity.³⁴

25. William Davey op.cit. p61.

26. Norio Kumoro, “*The WTO dispute settlement Mechanism – Coverage and Procedure of the WTO understanding*” 29 (4) J.W.T. (1995) p 5-95.

27. William Davey, op.cit. p55.

28. J.G. Castel, “*The Uruguay Round And the Improvement to the GATT dispute Settlement Rules and Procedure*” 38 (4) International and Comparative law Quarterly (1989) p. 834.

29. Norio Kumoro, op.cit. p27.

30. William Davey op.cit. P. 66; Also see Glen Schleyer op.cit. p 2277.

31. Ibid. pp 65-77.

32. Glen Schleyer, op.cit. p 2297.

33. Ibid.

34. Ibid.

The opponents say that NGOs inclusion will distort decision – making or even worse lead to a special interest group.³⁵ While the supporters argue that such a participation may augment decision-making process of the WTO by providing information, advice, and unprejudiced support.³⁶ Hence the question of distortion of decision-making does not arise. Rather the NGOs can be used as one of the models to improve its democratic legitimacy.³⁷ As business enterprises are already occupying place in the WTO, therefore, NGOs can effectively check their undesirable sway to manipulate special interest.³⁸

The opponents' view that NGOs are lacking representative legitimacy and democratic accountability is also not true because NGOs are speaking on issues, which are concerned to the global community at large and call for attention in international echelon.³⁹ So far listening to different views is concerned it is the quality that matters, not the quantity.⁴⁰ Furthermore, not all countries of the world are enjoying democratic set up.⁴¹ Moreover, NGOs mobilization of public awareness and support for such issues as environment, labour, health, etc insinuates their representative status. This also indicates their education value.⁴² They can provide platform for exploring new methods, perspectives and proposals for improvements.⁴³ And stakeholders and free riders may also find a place in the NGOs forum to put forward their concerns regarding trade and commerce.⁴⁴

The argument that only states can talk on trade issues clearly⁴⁵ is also devoid of force because firstly, they can talk on issue which states may not take up.⁴⁶ Secondly, even states are not adequately representing their masses because they do not always listen to the views of every section of society.⁴⁷ Thirdly, they can speak for under represented people.⁴⁸ Fourthly, they can raise related issues such as consumer protection, labour, inflation, low wages, etc.

Another ground of attack on NGOs is that they are already taking part on national level and their participation on international level would mean 'two bites at the apple'.⁴⁹ The NGOs inclusion in the WTO does not affect states

35. Jeffery L. Dunoff, "The Misguided Debate over NGO participation at the WTO" 1 (3) Journal of International Economic Law (1998) 433-456

36. Glen Schleyer, op.cit. 2297 See Also e.g. Scholte, op.cit. p. 107 and Mortensen op.cit. p 180.

37. Markus Krajewski, "Democratic Legitimacy and constitutional perspective of WTO Law", 35 (1) J. W.T. (2001) p. 167.

38. Daniel C. Esty, "Non-Governmental Organizations at the World Trade Organization: Co-operation, Competition or Exclusion", 1 Journal of International Economic Law (1998) 123-147.

39. Dunoff, op.cit. pp 435-440.

40. Daniel C. Esty, op.cit. P 142.

41. Dunoff op.cit. pp 435-440.

42. Scholte, op.cit. p. 111

43. Ibid.

44. Ibid.

45. Ibid.

46. Glen Schelyer, op.cit. p 2305

47. Daniel Esty, op.cit. P 131.

48. Ibid.

49. Dunoff, op.cit. P 439.

nationally as well as internationally.⁵⁰ Rather the WTO is not required to be an inter-state body.⁵¹ Moreover, NGOs are participating in other international organizations but no objection is raised there against them. They already participate in other international organizations why not in the WTO?⁵² Business NGOs had participated in the GATT during 1950's.⁵³

In response to the question that developing countries in the WTO will suffer due to NGOs role, Daniel Esty says that with the information revolution this apprehension is losing ground.⁵⁴

There is an increased tendency of looking at the issue from the angles of accountability, democratic legitimacy, transparency and constitutional rule of law. All these aspects have a common ground of a reformism approach. While the shrinking of the world is gnawing national sovereignty, the concept of national democracy is flowering in the shape of much publicized global democracy. It continues in its essence but its context is varied. While differentiating democracy from oligarchy, Aristotle, the father of political science, says, "Democrats hold if men are equal by birth, they should in justice have an equal share in the office and honour..."⁵⁵ This view runs opposite to the concept of individualism. In the western world the latter philosophy is prevailing since the last three hundred years. But we can say this philosophy is also fading away owing to contemporary information revolution that stresses community participation in decision – making both at the national affairs and international activities. In the western world itself there is a revival of "interest in communitarian ideas".⁵⁶ The European Union, in my opinion is a typical example. What follow is that Aristotelian concept of democracy is still holding ground to understand the new phenomenon of global democracy. In this fashion we can say that Richard Shell advocates amplification of "the civic republicanism" idea from national to global political frontiers.⁵⁷ Philip Nicholas who is the chief opponent of NGOs engagement, counters this estimation on the ground that if national democracy is not representative then how participatory democracy can work at international level.⁵⁸ Charnovitz in reply states that the NGOs issue does not rest on the ineptitude of government at the national level but the point is that civil society involvement will improve the function of international organizations.⁵⁹ Glen Schleyer has quoted P. Nicholas that NGOs participation will undermine politico-societal values of nations, to which his reply is that the very decision of a nation to join the WTO itself reveals its such values.⁶⁰ In my opinion, the socio-political values

50. Daniel Esty, op.cit P 141.

51. Ibid.

52. J. Jackson "The WTO 'Constitution' and proposed Reforms: Seven 'Mantras' Revisited", 4 (1) Journal of International Economic Law (March 2001).

53. Dunoff, op.cit. p 441.

54. Daniel Esty, op.cit. P 142.

55. Aristotle, "Politics" Translated by Ernest Barker, Revised with an introduction and Notes by R.F. Stalley, Oxford University Press, 1995 Republished 1998, Book 3 Part C, Ch.9, P 109.

56. Ibid Introduction: Aristotle Today P 31.

57. Steve Charnovitz op.cit. p 180.

58. Ibid.

59. Ibid.

60. Glen Schleyer op.cit. p 2293.

of nations of which Nicholas is talking, are no longer living in their traditional fashion. Nor they can pull on their old shapes in a world where even a breaking news becomes musty after a few minutes of its having gone on air. Moreover, globalisation of trade and commerce has not only compelled states to join the WTO but also to bring their commercial laws in consonance with the WTO legal order⁶¹. Thus it goes with out saying that the states have ignored their socio-political values. Interestingly, the inroads into societal and political ideals are not being made from the outside frontiers alone but from within the states as well. If, for instance, an action or policy of a state's government finds no support from opinion polls, NGOs, mass media, private enterprises, etc the very legitimacy of the action or policy stands seriously doubtful to garner acceptability.⁶² This political metamorphosis of orthodox representative democracy into post-modernist participatory democracy of "choice and voice"⁶³ has given real autonomy to the people to devise their own conditions of life.⁶⁴ Private citizens are no longer at the receiving end of decision making process. Due consideration to public views gives transparency and legitimacy to decision making.⁶⁵

Philip Nicholas has also denied that the WTO is undemocratic.⁶⁶ If he hints towards the sovereign equality of the members in the WTO, it means he believes in the conservative concept of democracy. Sovereignty had never faced such a big challenge as it is confronted with now. The truth is that the people are now governing themselves.⁶⁷ Like all other fields, information revolution has also closed the gap between the citizen and international law. States are even no longer able to govern their population in strict solitude from the comity of nations⁶⁸.

Interestingly, in a 1996 article Nicholas has argued that empirical legitimacy is one of the serious challenges to the WTO; and has stressed the need of addressing it.⁶⁹ The empirical legitimacy, in the context of the current political changes across the world, does not mean acceptability of the WTO policies and decisions by member states only but by members of all non-state actors including trade unions, private business firms, labour and human rights activities, and their respective NGOs.

61. Scholte op.cit. p 108.

62. Markus Krajewski, op.cit. p 169.

63. Paul Hirst, *From Statism to Pluralism, Democracy, Civil society and global politics*, 1997, UCL Press Ltd, London ch. 1 p 19.

64. Krajewski op.cit. p 171.

65. Ibid pp. 172-173.

66. Steve Charnovitz op.cit. p. 180.

67. Ivan Simanovic "*The Concept of Sovereignty and its Contemporary Challenges*", (Fall 2000) *The Fletcher Forum of World Affairs Journal*, p.163.

68. Kofi Annan, UN Secretary General Quoted in Ivan Simanovic, *ibid.* p 171.

69. Philip Nicholas "*GATT Doctrine*" 36 (2) *Virginia Journal of International of International Law*.

III. NGOs ROLE IN THE WTO

PRELIMINARY

To begin with, it is generally said that the WTO is an organization of member states only and its legal document provides mechanism for settlement of disputes between them. If it is a system for the members only what interest NGOs and private parties⁷⁰ have got in the WTO. Firstly, trade and commercial NGOs and private enterprises have got substantial interests in the WTO because trade dispute between member states directly affect their concerns⁷¹ rather it is said that they receive a daily impact on their activities.⁷² Secondly, non-profit NGOs are interested in trade disputes for a variety of reasons, e.g. environmental protection, labour rights, consumer protection, etc. As they represent a vast variety of interests, therefore, some would divide them in three groups. The conformers who recognize the prevailing order and support the WTO; the reformers who want a change in the WTO mainly for social reasons; and, the radicals who are highly critical rather do not accept the WTO at all.⁷³ With little modifications, others would divide them into professional associations, academicians and researchers and non profit NGOs of environment, health, social, women associations development, etc.⁷⁴

THE WTO MEETINGS AND NGOs

It is widely believed that the role of NGOs is legally recognized in the Marrakesh Agreement, which has established the WTO.⁷⁵

GUIDELINES 1996

In these guidelines the WTO has elaborated this role.⁷⁶ The first paragraph merely reproduces the above provision of the Marrakesh Agreement. Paragraph 2 acknowledges the benefits of NGOs participation such as public awareness regarding the WTO and improvement of transparency. The derestriction on documents is laid down in paragraph 3. In paragraph 4, the Secretariat is given the responsibility to arrange symposia to hear the views of NGOs. According to paragraph 5 the chairperson and the WTO council may, on their own participate with NGOs. Paragraph 6 is very important. It says that there is no agreement on direct involvement of NGOs in the WTO work

70. Many scholars look at the issue in a broader perspective by making a distinction between NGO's, private citizens, non-state actors and civic societies. See for example, Jeffery Dunoff op.cit. And Ernesto Hernandez - Lopez, below

71. Ernesto Hernandez - Lopez, "Recent Trends and Perspectives for Non-State Actors Participation in the world Trade Organization Disputes" 35 (3) J.W.T. (2001) p 469-498

72. Glen Schleyer, op.cit. 2293.

73. Scholte op.cit. pp 112-116.

74. Christopher Bellmann and Richard Gerster, "Accountability in the World Trade Organization" 30 (6) J.W.T. (1996) pp 30-74.

75. See at p 6 Article V. 2 of the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Text (Marrakesh Agreement), which says: "The General Council may make appropriate arrangements for consultations and co operation with the non-governmental organizations concerned with matters relevant to those of the WTO."

76. The Guidelines are reproduced in Bellmann and Gerster as Annex. 1 & Marceau and Pendersen as Annex. A op.cit.

and its meetings. Additionally, it refers to their role as effective on national level.

The Guidelines have both pros and cons. The reiteration of the Article V.2 of the Marrakesh Agreement affords further depth and authority to legal acknowledgement of NGOs contribution. One can say that this yields solid progress on the issue and forecloses the chances of irreversibility. Secondly, the derestriction on documents is also presumptuous for transparency.⁷⁷ Thirdly, the Secretariat has been given a manipulative role. Fourthly, a check has been imposed on the chairperson's wish to meet NGOs.⁷⁸ Fifthly, the last paragraph ignores two facts, viz. a) the history of NGOs role in international organizations, most particularly, its broad and institutionalized role envisioned in the recommendations for the ITO and b) the current NGO activism in other international forums such as environment, labour, public health, etc.

MINISTERIAL CONFERENCES: SINGAPORE TO DOHA (1996-2001)

In these Ministerial Conferences NGO's were given wide spread representation. The Singapore Conference was held after about four months of the guidelines were issued. NGOs participation was scrupulously discussed amongst the members ahead of the conference. The method how the NGO's should participate was to be devised by the Secretariat⁷⁹. However, in order to dilute the legal effect that may ensue from their "observer" status, the word "attend" was used instead⁸⁰. More so, it was also decided that their *ad hoc* role as per the guidelines was to be adhered to.⁸¹

The Geneva Ministerial Conference held in May, 1998 showed improvements in many respects, for example, the number of their participation was increased from 108 in Singapore to 128, the Secretariat apprised them of the progress of the Conference, which was not the case in Singapore.⁸²

The Seattle Conference held in December 1999 is known for violence of the NGOs. According to the WTO sources some 700 NGOs attended the conference.⁸³ With a view to further coalesce with the NGOs, at this third ministerial conference, a symposium on "International Trade Issues in the First Decade of the Next century" was also arranged in which the said number of NGOs took part.⁸⁴

The NGO's played very active role at this occasion by raising many important issues, for example, threats to environment, public health, opposition to a new millennium round of trade talks, and the unfair treatment meted out to the third world countries.⁸⁵ The tumultuous demonstrations of

77. Gabrielle and Pendersen, op.cit. p 11.

78. Ibid pp 8-9.

79. Gabrielle and Pendersen op.cit. pp 12-13.

80. Ibid. p 13

81. Ibid. pp 13-17.

82. www.wto.org/english/forums_e/ngo_e/into_e.htm

83. www.wto.org/english/forums_e/ngo_e/into_e.htm

84. Ibid. The aim of the symposium was three pronged: a) awareness, b) opening a platform of discussion, c) contribution of the WTO in this field.

85. www.twinside.org.sg/title/seattlemain5.htm

NGOs, however, raised rather renewed the question of democratic legitimacy and transparency.⁸⁶

For the latest meeting at Doha the WTO had released a paper relating to interaction with the NGO's as early as in April.⁸⁷ It has been categorically stated that the initiative is taken in the backdrop of the mass fierce demonstrations at the Seattle conference. What is important to note from this paper is that the WTO is realizing to put an end to 'ad hoc' relations by resorting to regular meetings with the NGOs.⁸⁸ Another step forward, delineated in the paper, is the inclusion of NGO's on technical matters.⁸⁹

In a press release of 13 August 2001 issued by the WTO, the Director General Mike Moor has reiterated to continue his engagement with and welcome criticism by the civil society.⁹⁰ The NGOs participation in this meeting is also very large: 647 in number.⁹¹

SYMPOSIA

Beside the Conferences, the WTO has continued its engagement with the NGOs in various symposia. In September 1997 the NGOs took part in a symposium jointly organized by the WTO and UNCTAD on the subject of Trade Related Issues Affecting Least Developed Countries in which NGOs hailing from those countries were particularly welcomed.⁹² The High Level Meeting received their proposals as official documents.⁹³

Another symposium was arranged by the WTO in March 1998 on Trade, Environment and Sustainable development. As many as 150 representatives from environment and development fields were present on the occasion. While academicians and private corporations, whose number exceeded 60 from the member states also took part in it.

March 1998 witnessed another symposium on Trade facilitation with wide spread NGOs input. The symposium provided a forum for discussion on the problems of trade at the time of transfer of goods from one country to another country.

The scholars have considered these symposia as strong and cogent pieces of evidence of WTO's acknowledge of NGOs contributions.

The subsequent steps taken by the Director – General buttress this evidence. He constituted a taskforce for improving interaction with NGOs regular briefing by the Secretariat, forwarding their views to the member states, creation of NGOs web page in 1998, his regular meeting with NGOs to explore means of further improvement of the interaction.⁹⁴

86. Markus Krajewski, op.cit. P 167.

87. www.icstd.org/html/weekly/18-04-01/story2.htm

88. Ibid.

89. Ibid.

90. WTO Press Release 13 August, 2001 at WTO web page.

91. www.chil.wto.ministerial.org/english/thewto_e/minist_e/min01_ngo.e.htm

92. Dunoff op.cit p 451.

93. Gabrielle and Pendersen op.cit. p16

94. Gabrielle and Pendersen op.cit. pp 19-20.

DISPUTE SETTLEMENT MECHANISM

Article XIII.2 of DSU provides answer to the question whether NGOs should participate in the WTO⁹⁵.

No doubt under the WTO law only member states can initiate and fight trade litigation but in order to ensure broad investigation of the facts in issue in a dispute and to guarantee the decision (report) based on sound reasoning, the panels have been equipped with vast powers. While reading Article XIII of DSU in conjunction with Article II of the Marrakesh Agreement, it becomes meticulously clear that the "intention" of the framers was to engage NGOs in the process anyway.⁹⁶ From a legal interpretation, I can say that the word "shall" has been used which means it is mandatory for the panels to seek information and technical advice. A still closer examination of the language makes it comprehensible that no limitation has been put on the panels in this connection.⁹⁷ It is *prima facie* entirely left at the choice of panel to get information or technical advice.⁹⁸ It needs no emphasis that the disputes do require legal interpretation,⁹⁹ which necessitate such information and technical advice as may be deemed relevant by the panel. NGOs can prove handy to the panels for interpretation of law and rules as it has recently happened in the *Shrimp-Turtle* case discussed below.

Moreover, the WTO DSU provides that independent bodies shall decide disputes relating to Preshipment Inspections between PSIs entities and exporters. NGO's can act as such independent bodies.

AMICUS CURIE BRIEFS

Amicus brief, a latin word – is " a person.... Not a party to a law suit. But petitions the court or is requested by the court to file brief... that person has a strong interest in the subject matter."¹⁰⁰ The fact that amicus curie briefs are beneficial for drawing sound and correct findings, has been acknowledged by judicial forums nationally as well as internationally.¹⁰¹ It is not only time saving and protective of the un-represented but can also provide the tribunal effective and substantial technical advice.¹⁰²

In the WTO dispute settlement process some NGOs have submitted amicus briefs in a few cases. Amongst them the *US-Shrimp turtle* case is very famous and important. Leading NGOs like World Wide Conservation of Nature (WWF) and Marine Conservation in the US submitted amicus briefs before the panel but were not considered under Article XIII of the DSU. However, the panel observed that if a party wishes to incorporate these briefs into its contention, it is at liberty to do so. Perhaps considering it of some legal help,

95. Its relevant part says: "*Panels may seek information from any relevant source and may consult Experts to obtain their opinion on certain aspects of the matter...*"

96. Bellmann and Gerster op.cit. p 36.

97. Ernesto Hernandez – Lopez op.cit p 478.

98. Marceau and Pendersen op.cit p 34.

99. Ibid.

100. Black Law Dictionary 17th Edition 1999, West Group pm83.

101. Dina Shelton, "*The Participation of non-governmental organizations in international proceedings*", The American Journal of International Law, Oct. 1994, (88 A.J.I.L. 611) p 640.

102. Ibid p 64.

the US attached the briefs as exhibits alongwith its submissions before the Appellate Body. The Panel's finding regarding rejection of amicus briefs was one of the issues. The AB while setting aside the panel's report and allowing amicus briefs, held that the panel read the word 'seek' in the DSU in 'too literal a manner'.¹⁰³ The AB further observed that the panel has got broad discretionary powers to depart from or add to the working procedure for seeking information¹⁰⁴. In their motion ¹⁰⁵ submitted to the Panel, NGOs explained the advantages of the amicus briefs.

The AB has also expressed similar opinion in the Bismuth Carbon dispute by holding that panel is empowered to acknowledge amicus briefs which it has not requested for.¹⁰⁶ Although the amicus briefs submitted in this dispute were not considered by the AB yet it ruled that the authority to consider them in the appellate proceedings did rest with it under Article XVII. 9 of the DSU.¹⁰⁷ In the Asbestos case¹⁰⁸ the AB went a step further and issued procedural guidelines under rule 16 (1) of the working procedures for Appellate Review for NGOs in submitting amicus briefs.

Although the AB specified that the said procedure was adopted by it for the purpose of the said appeal yet there is little doubt that this is a solid step forward to allow a space for the NGOs. There is every possibility that in future this decision may have impact on disputes.

Response

The AB's pro NGOs inclinations have attracted a bitter sarcastic response mostly from developing countries. Pakistan, India, Malaysia and Thailand who were complainant party in the shrimp case condemned the AB vociferously. They said that the AB findings have traveled beyond the

103. WTO United States – import prohibition of certain Shrimp and Shrimp product, Appellate Body Report para 107 www.worldtradelaw/search/searchReports.HP.asp.

104. Ibid

105. Motion to Submit Amicus Curie Brief to the Panel onus Shrimp case at www.ciel.org/Tae/second.html. They were: the amicus briefs offer expert and technical information within the contemplation of Article XIII DSU including significant additional technical, scientific and legal information to the panel's deliberations; the brief analyses the applicability of multilateral environmental agreements, develops the WTO jurisprudence and enhances the standard of review in the system; it is supported by the contemporary principles of International law as well as international institutions; it enhances public participation and, it also imparts legal expertise.

106. WTO Appellate Body Report, Us-imposition of countervailing duties on certain hot rolled lead and bismuth carbon steel products originating in the United Kingdom, AB 2001-WT/DS138/AB/R (00-1896) Adopted by DSB 7 June 2000 at <http://www.ciel.org/journal/curdevs/sr10/html>.

107. Ibid.

108. WTO Appellate Body Report, WT/DS 135/9 8 Nov. 2000. "European Communities – Measures Affecting Asbestos and Asbestos containing products" www.wto.org/English/newse/news_oo_e/ds'359.doc. It says the applicant seeking leave to file brief must, inter alia, show:

1. its legal character, objectives, the nature of activities it is doing;
2. financial sources;
3. which interest it has got in the matter in dispute;
4. the reasons for leave to file briefs;
5. specific issues of law and legal interpretation which it want to address;
6. its relationship, if any with any party or third party plus whether it has or will receive any kind of assistance including financial in connection with the application.

premises of Article XIX.2 of the DSU that it has led to the creation of new rights.¹⁰⁹ The opposition is based on both legal and political grounds. Legally, it is the power of the panel alone to seek information from any quarter under Article XIII of the DSU.¹¹⁰ Secondly, appellate body proceedings are required to be confidential; permitting NGOs will affect it.¹¹¹ Thirdly, the question of participation in DSM is the power of the member states.¹¹² On political score, they say that NGOs involvement may give them rights that even the members do not enjoy.¹¹³ Furthermore, it will open new vistas of lobbying for vested interest groups.¹¹⁴

OTHER NON-STATE ACTORS

Private parties like industries, too, are participating in the WTO DSM. The Kodak Fuji and Reformulated Gasoline disputes are examples in point. The US photographic film company – Kodak-complained of unfair market access in Japan. It submitted an application under section 301 of the US Trade law. Fuji, on the other hand, also resorted to politico-legal manoeuvring in the Japanese government. With the passage of time the sinews of trade war activated and the matter reached the WTO dispute settlement machinery. Although formally the US and Japan contested in the capacity of member states but in the real sense Kodak and Fuji fought the legal battle. Both the states contested almost the entire proceedings under the umbrella of help right from formulation of written submissions to engagement of legal consultants and oral arguments provided by the said two companies.¹¹⁵ Similarly, in the *Gasoline case*, the private business firms galvanized the efforts of their respective governments during the proceedings.¹¹⁶

CONCLUSION

Keeping in view the efforts of the WTO to keep relations with the NGOs at the meetings and symposia level coupled with the information it makes available to public and NGOs, it can be safely concluded that the NGOs are already playing their role in the WTO albeit informal. In this connection Jeffery Dunoff is right to say that the state of the debate should be shifted from 'whether' to 'how' i.e. how the NGOs should play their role.¹¹⁷ I think he strengthens his argument by saying that this discussion would undermine the

109. Steve Charnovitz op.cit. p 185.

110. Marceau and Pendersen op.cit. p 36.

111. Chakravarti Raghavan, "NGO's have more rights now than the WTO members" At www.twinside.org.sg/title/members.htm

112. Chakravarti Raghavan, "Appellate Body asserts rights to receive amicus briefs" at www.twinside.org.sg/title/amicus.htm

113. Ibid.

114. 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?" (Fall 1999) The Transnational Lawyers, (University of Pacific, Mc George School of Law)

115. Dunoff op.cit. pp 446-447.

116. Ibid. p 450.

117. Ibid. p 456 see also Gabrielle and Pendersen op.cit. p 45.

significance of the role they are already playing.¹¹⁸ In the dispute settlement machinery, too, NGOs have been involved with a considerable degree of alacrity. However, it is this area where it can effectively play a double – edged role. Their own legitimacy and accountability are major bottlenecks in their way. They are not as representatives as the states are irrespective of the states' own political worth at home or abroad. This is the whole truth. The input of the NGOs in the Kodak-Fuji and Reformulated gasoline disputes no doubt, not only helped the WTO panel but also their own states. Yet one cannot help assume that they moved forward primarily for their own business motives having had already preoccupied with their vested (special) interest. Further, the argument that the US might have used the platform of NGOs in the *Shrimp – Turtle* dispute in order to grind for its won axe, also can not be plainly dismissed. It is commonly known that NGOs in the developed countries are very strong. As such if they slip into the hands of those countries simply as their spokesmen, they can successfully elbow out the vital economic interests of the developing countries, which fact may dither the very legitimacy of the Organisation. The WTO should realize the benefits and pitfalls of NGOs.¹¹⁹ This means their role need to be streamlined and institutionalized. We can say that the AB guidelines adopted in the *Asbestos case* amounts to some spadework in this direction. Amicus briefs, open hearing and derestriction of documents have come up as issues worth consideration for the review of the DSU.¹²⁰ It is also said that the current *ad hoc* role will level the ground for special interest group.¹²¹ The most active supporters of NGOs also demand a direct role for them and private business parties in the dispute settlement machinery.¹²² But the NGOs, too, should make sure that they are pursuing clear objectives, and are no affiliated in any way whatsoever, to a party to the dispute. The WTO on the other hand, is required to bring about what may be called behavioural change in dealing the NGOs at par with each other and shun suspicious look at them. It should create appropriate role of NGOs in the process of institutionalization.

The WTO dispute settlement process is though legalistic to a considerable extent but it is not an end in itself. The aim of this system is to promote free trade. This is the political overtone of the Organisation. It guarantees a smooth, transparent, acceptable and amicable solution of dispute for which the doors of negotiations are always open to the parties. The political dimension is, therefore, lying at the core of the WTO; the dispute settlement is of secondary importance. Pursuing assimilation of NGOs at the cost of political ideals will jeopardise it all. The two courses of legalism and pragmatism must run in concord to push the system forward.

118. Ibid.

119. J. Jackson, op.cit.

120. Kim Van Der Borgh "The Review of the WTO DSU: some Reflections on the current debate", 14 (4) American University International Law Review, (1999) p 1223.

121. Dunoff op.cit p 457.

122. Jeffery Waincymer, "International Economic Law: Transparency of Dispute Settlement within the World Trade Organisation" 24 U.R.L. Melbourn University Law Review (2000).