On May 10, 2000, the Appellate Body of the World Trade Organization (WTO) issued an important procedural holding that it may accept an *amicus curiae* brief from the public. This ruling is significant because it has the potential to broaden input into the Appellate Body. This may improve decisions and engender greater trust by business and civil society of the WTO dispute settlement process.

Under WTO rules, the complaint process is a State-to-State proceeding. Third-party States (that are Members of the WTO) may file briefs in disputes in which they have a substantial interest. But private individuals, corporations, or non-governmental organizations (NGOs) enjoy no right to be heard. Many commentators have been critical of this closed process.

In its ruling in October 1998 in the so-called *Shrimp-Turtle* decision, the Appellate Body took the first step toward permitting limited public participation in dispute settlement. Because of the importance of the case to global environmental management, three NGO coalitions (from both industrial and developing countries) submitted *amicus curiae* briefs to the first-level panel. The panel rejected them, however, stating that WTO rules prohibited the acceptance of non-requested information from non-government sources. This decision was appealed by the defendant-appellant United States, and the Appellate Body overruled the panel, holding that panels could accept and consider NGO briefs. Panels have no duty to do so however.

The Appellate Body also addressed the acceptance of NGO briefs in an appellate proceeding. Over protests from the plaintiff governments, the Appellate Body permitted the U.S. Trade Representative to append three NGO briefs to its official pleadings. When it handed down its decision, the Appellate Body explained that it accepted the briefs as part of the U.S. submission. This left open the question of whether the Appellate Body would accept NGO briefs when directly filed.

These decisions by the Appellate Body were not met with uniform acclaim. At the risk of overgeneralization, one can say that they have been sharply criticized by developing country governments, criticized by many trade lawyers, supported by some trade lawyers, and welcomed by environmental lawyers. The main criticism is that the Appellate Body acted beyond its competence in granting an opportunity to NGOs not intended by the WTO member governments.

The New Steel Decision

The new decision by the Appellate Body on NGO briefs came in a case against the United States regarding the "Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom." The plaintiff was the European Union (EU). The U.S. government lost in the first-level panel, appealed, and then lost in the Appellate Body. During the proceedings in this case, the panel received an unsolicited brief from the American Iron and Steel Institute. The panel declined to accept this brief, even as it noted that it had the authority to do so. The panel cited the fact that the brief came late in the panel's process (after the second meeting with the parties). Furthermore, the panel stated that accepting the brief at that time would delay the proceeding.

In the follow-up litigation before the Appellate Body, the American Iron and Steel Institute showed that it had learned a lesson. On the same day that the U.S. government submitted its first brief (i.e., February 7), the Appellate Body received an unsolicited brief from the American Iron and Steel Institute. Another unsolicited brief came from a trade association called the Specialty Steel Industry of North America.

The parties to the dispute contested whether the Appellate Body had the authority to accept the briefs directly (rather than as attachments to a government's brief). The claims of the governments are worth noting:

--The European Commission argued that the briefs were "inadmissible" because WTO rules did not provide this opportunity. The EU also argued that the treaty provision permitting a panel to accept non-government briefs (i.e., Article 13 of the WTO Dispute Settlement Understanding) was limited to "factual information and technical advice" and thus would exclude "legal arguments."

--The Governments of Brazil and Mexico, as third-parties in the case, contended that the Appellate Body lacked authority to accept any non-government briefs, factual or legal. Furthermore, Brazil argued that the participating governments were "uniquely qualified to make legal arguments regarding panel reports and the parameters of WTO obligations."

--The U.S. government responded that the Appellate Body has the requisite authority to accept unsolicited briefs and cited the general provision authorizing the Appellate Body to draw up its working procedures (Article 17.9 of the Dispute Settlement Understanding).

The Appellate Body agreed with the U.S. government that the authority to draw up working procedures includes the authority to decide whether to accept unsolicited briefs. The Appellate Body notes that a private person has no "legal right" to have its brief considered by the Appellate Body. Instead, the Appellate Body declares that there is legal authority to accept private briefs when "we find it pertinent and useful to do so."

In the Steel case, the Appellate Body concluded that it was not necessary to take the two briefs into account. It is unclear whether the Appellate Body accepted the briefs, read them, and decided not to use them, or whether the Appellate Body chose not to accept them after underlining its authority to do so.

About a month after the Steel decision, several governments criticized the Appellate Body during a meeting of the WTO Dispute Settlement Body. For example, Japan said it was highly regrettable that the Appellate Body had made this important decision without taking into consideration the opposite positions of numerous governments. India protested that the WTO dispute settlement system was meant to be a mechanism exclusively for governments. Hong Kong China complained that accepting briefs with factual information was problematic because the Appellate Body was set up only to consider appeals to issues of law.

Officials from several countries pointed out that the Appellate Body did not provide sufficient guidance to governments as to when briefs would be accepted. This criticism is also being echoed by members of the trade bar (who often represent small countries in WTO disputes) who worry that they may learn that an adverse amicus brief has been accepted too late to respond. It will be hard to predict when the Appellate Body might find it pertinent to accept an NGO brief.

Implications of this Decision

The new procedural decision on *amicus curiae* briefs has several important implications for the future of WTO dispute settlement:

First, interested private groups now have an opportunity to submit briefs in any WTO case. This will be especially significant in disputes with an important public policy dimension. The opportunity to submit briefs will be most valuable for NGOs that reflect points of view different from any of the governments in the dispute. This can readily occur when there are environmental or consumer interests at stake.

Second, the new opportunities should strengthen WTO dispute resolution by promoting greater public trust in the process. The WTO has now jumped ahead

of the International Court Justice in making it possible for NGOs to submit briefs in contentious cases.

Third, the Appellate Body showed no sympathy for the EU's attempt to prevent non-government groups from offering legal advice to the Appellate Body. Furthermore, the appellate judges did not accept Brazil's arguments that governments have "unique" qualifications to make legal arguments.

Fourth, this procedural breakthrough came through the initiative of trade associations and demonstrates that they learned a lesson from the activism of environmental NGOs in the *Shrimp-Turtle* case. In another episode taking place last November, the Concerned Fisherman and Processors of South Australia became the first private organization to succeed in getting a WTO panel to accept its brief. (This occurred during the compliance review in the Australian Salmon dispute).

Although there will be more grumbling about this decision by governments, the Appellate Body's decision is likely to stand. Because the "legislative branch" of the WTO is so underdeveloped compared to the "judicial branch," dissatisfied governments would have an extremely difficult time overturning this decision. The U.S. government views the new decision as a "positive step in making the WTO a more open organization and enhancing public confidence in the WTO dispute settlement process."

Like many court rulings, the Appellate Body's decision on amicus briefs would not have emerged from the legislative branch (for example, from a WTO Ministerial like the recent Seattle meeting). Judicial decisionmaking that gets way out in front of the views of elected representatives is an old story within national law. But it is a relatively new story in international law, and will be very interesting to watch.

The new WTO Appellate Body decision in the U.S. Countervailing Duties on Steel case can be found at

http://www.wto.org/wto/dispute/2340d.pdf