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## AN ANALYSIS OF THE ROLE OF ECONOMIC ACTORS IN THE WTO DISPUTE SETTLEMENT SYSTEM

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### Abstract

Economic actors are the main trade player in the World Trade Organization, although, the relation between WTO and economic actor is built by trade regulation that is negotiated among the WTO Members. Nothing in the WTO regulates economic actors to involve directly in the WTO, especially in the WTO dispute settlement system. Nevertheless, the debate amongst experts regarding the involvement of economic actors in the WTO dispute settlement system is unavoidable. This article therefore discusses the possibility of the involvement of economic actors in the WTO dispute settlement system, whether there is legal and political point of views. A Nation must providing broad possibility for its economic actors to conduct their activities in the large spectrum such as cross border supply and demand in the sphere of international trade in order to gain their benefits. Prior to it, state should be willing to gain economic relation in the virtue of international economic relation. An interstate economic relation is dealing with coordination of economic policies and cooperation; hence states are building rule of law in international economic relation as the prevailing part of the object of international economic law. To this end, in 1994 over one hundred governments created World Trade Organization. All WTO Members negotiated their national trade and economic policies. National trade policy is mostly implied by economic actors or individual across frontier

Keywords: WTO Agreements; Economic actors; Dispute Settlement System.

### Abstrak

*Pelaku ekonomi adalah pemain utama dalam World Trade Organization, akan tetapi hubungan antara WTO dan pelaku ekonomi dibangun melalui aturan perdagangan yang dinegosiasikan diantara anggota WTO. Tidak ada dalam WTO mengatur pelaku ekonomi untuk terlibat secara langsung dalam WTO, terutama dalam system penyelesaian sengketa WTO. Akan tetapi, perdebatan diantara para ahli mengenai keterlibatan pelaku ekonomi dalam system penyelesaian sengketa WTO tidak dapat dielakan. Oleh karena itu, artikel ini mendiskusikan kemungkinan keterlibatan pelaku ekonomi dalam system penyelesaian sengketa, apakah dalam pandangan politik dan hukum. Suatu negara harus memberikan kesempatan yang luas bagi pelaku ekonomi untuk melakukan aktivitas mereka dalam spektrum besar seperti penawaran dan permintaan lintas batas di bidang perdagangan internasional untuk mendapatkan keuntungan mereka. Sebelum itu, negara harus bersedia untuk mendapatkan hubungan ekonomi dalam hubungan ekonomi internasional. Hubungan ekonomi antarnegara adalah berurusan dengan koordinasi kebijakan dan kerjasama ekonomi; Maka negara-negara tersebut sedang membangun peraturan hukum dalam hubungan ekonomi internasional sebagai bagian yang berlaku dari objek hukum ekonomi internasional. Untuk tujuan ini, pada tahun 1994 lebih dari seratus pemerintah menciptakan Organisasi Perdagangan Dunia. Semua Anggota WTO menegosiasikan kebijakan perdagangan dan ekonomi nasional mereka. Kebijakan perdagangan nasional sebagian besar tersirat oleh pelaku ekonomi atau individu lintas perbatasan*

**Kata Kunci:** Perjanjian WTO; Pelaku Ekonomi; Sistem Penyelesaian Sengketa.

## Introduction

The term of economic actor is defined as exporter, importer, producer, seller or buyer, investor, financing institutions (bank), service provider (telecommunications operator or other service), in the form of Business Corporation, trade enterprise (company or firms), small medium enterprise or multinational company, those who pursue their self-interest. These economic actors are different with Non Profit Corporation who gains profit in a secondary goal or does not pursue any interest or profit.<sup>1</sup> They are predominant economic actors within a state. According to Ostrihansky it is comprehensible if economic actors are holding an important role in economic environment, since these legal entities for some reasons are affecting economic policy both at the level of national and international.<sup>2</sup> The relation between government and its economic actors is leading to the sustained economic growth in every country where most economic actors rely upon national law of credible commitments to them. These economic actors require assurances of their rights despite their obligations. To that end, governments play a critical role in securing these collecting goods by providing them directly a stable coalition between law and its enforcement.

A state is also providing broad possibility for its economic actors to conduct their activities in the large spectrum such as cross border supply and demand in the sphere of international trade in order to gain their benefits. Prior to it, state should be willing to gain economic relation in the virtue of international economic relation. An interstate economic relation is dealing with coordination of economic policies and cooperation; hence states are building rule of law in international economic relation as the prevailing part of the object of international economic law. To this end, in 1994 over one hundred governments created World Trade Organization. All WTO Members negotiated their national trade and economic policies. National trade policy is mostly implied by economic actors or individual across frontier. However, nothing in the WTO Agreements mention directly about rights and obligations of economic actors. It seems

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<sup>1</sup> William J. Pride,[*et.,al.*], *Business* (Western Cengage Learning 2008).[11].

<sup>2</sup> R. Ostrihansky, *Settlement of Interstate Trade Disputes – The Role of Law and Legal Procedures* (Netherland,[s.n] 1991).[174].

that the relationship to economic actors do not exist in WTO, because they are not legal subjects of the international legal order. The relation between WTO and economic actor is built by the trade regulation that is negotiated among the WTO Members.

The main objective of the Marrakesh Agreement sets out in the Preamble of Agreement of Establishing the World Trade Organization is that:

*“Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”.*

158 Members of WTO, including industrial countries and developing countries, are bound duty to comply with these objectives. By entering WTO and GATT 1994, these Members committed to reduce and bind most of their tariffs, to suppress many non-tariff impediments to international trade and to avoid discrimination against all economic actors of other state in accordance with non-discrimination and most-favored nation clause. These commitments are conceivable to support their economic actors in achieving better income and benefit, to promote positive result of enhancing welfare, full employment and large volume of real income for individual at the end.<sup>3</sup> Thus, to achieve the objective of WTO, the country members should implement WTO rules within their national legislation.<sup>4</sup>

Charnovitz argued that WTO is similar to every international organization,

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<sup>3</sup> Richard G Shell, ‘Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization’ (1995) 44 Duke Law Journal.[877-878]. Shells argued that WTO rules are a means for globally oriented business interest and their government allies to overcome domestic resistance to free trade, reduce the legal transaction costs that states impose on the movement of goods and services across national borders, and thereby enhance consumer welfare for citizen of all nations.

<sup>4</sup> Implementation of WTO agreements is unable to discharge the interpretation of them, where the interpretation of WTO agreements at the national level is to be found in the way these agreements are translated into national language, re-formulated in domestic legislation, interpreted in national’s tribunals and courts, and actually administered by agents of state. See Qureshi, Asif H., *Interpreting WTO Agreements: Problems and Perspective*, Cambridge University Press – Cambridge/UK, 2006, pp. 70. For example from the vantage point of the legal effect of WTO agreements, the US law promulgated the Uruguay Round Agreements Act, P.L. 103-465, 19 U.S.C.§§ 3501.

it connects in some ways to the economic actors, which inhabit the country. The main impact of the WTO on the economic actors springs up from the substantive disciplines of the trading system. For example, eliminating quotas can change the structure of production and employment within a country. In addition, the WTO also has an important connection to economic actors through its procedural discipline which is implied by the government. For example, GATT Article X contains a sunshine provision calling for the prompt publication of trade laws, regulations, and administrative rulings in order to enable both governments and ‘traders’ to become acquainted with them.<sup>5</sup>

The unique measure in WTO Agreement is Dispute Settlement System. A prominent issue that becomes debate amongst experts is the involvement of non-government entities or economic actors in the WTO dispute settlement system. Although the main player of international trade is economic actors, those legal entities are not plausible to involve in WTO Dispute Settlement Mechanism, because the characteristic of WTO is intergovernmental organization, it is obliged only state member who can appear before the WTO adjudication bodies, such as Panel, Appellate Body and Arbitration. This article therefore will discuss the issue in regard with the role of economic actors in WTO Dispute Settlement System, whether there is possibility for those legal entities to involve in WTO Dispute Settlement System. This article will also discuss whether there are legal or political issues in regard with the involvement of economic actors in WTO Dispute Settlement System.

### **Economic Actors in the WTO Dispute Settlement System, Legal or Political Issues?**

WTO dispute settlement system is merely providing standing to governments on behalf of their trade interests. Private parties or non-governmental entities are not entitled to appear as party in the WTO dispute settlement process. However, Article 13 of DSU states that “each arbitration panel’s has right to seek information

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<sup>5</sup> Steve Charnovitz, ‘Economic and Social Actors in the World Trade Organization’ (2001) 7 ILSA Journal of International and Comparative Law.[259].

and technical advice from any individual or body which is deemed appropriate. However before a panel seek such information or advice from any individual or body within the jurisdiction of a member it shall inform the authorities of that member. A member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the member providing the information. Panels may also seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group”.

Article 13 of the DSU authorizes WTO Panel and Appellate Body to seek and accept the ‘solicited’ *amicus curiae*<sup>6</sup> brief from non-government entities. However in some cases, unsolicited *amicus curiae* brief become controversy such as in *the US – Shrimp case*,<sup>7</sup> when some NGOs submitted unsolicited *amicus curiae* briefs to both Panel and Appellate Body. The Panel rejected all of the unsolicited NGO submission, stating that “accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied.” The Panel interpreted the word “seek” in Article 13 to mean only those submissions that were explicitly solicited or requested. However, the U.S. argued

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<sup>6</sup> *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.” See Jared B Cawley, ‘Friend of the Court: How the WTO Justifies the Acceptance of the *Amicus Curiae* Brief from Non-Governmental Organizations’, *Penn State International Law Review* Vol 23 No. 1, summer 2004, p. 47-78. Cawley elaborate the history of *amicus curiae* began with the permission from US Supreme Court to accept *amicus curiae* on behalf of non-party in the dispute as “dramatic and unusual” ( case of *Green v. Biddle*, 21 US 1 (1823). Over years later, the filling of *amicus curiae* brief has also less controversial, and more frequent. The purpose and reasons for such submissions vary, but not largely so. Often, non-parties (whether they are governmental, private-interest groups, or private individuals) file briefs on behalf of constitutional, environmental, and civil rights issues. *Amicus Curiae* become more popular when international tribunal also use the brief submitted by non-governmental entities in the proceeding of court, see also Dinah Shelton, ‘the Participation of Non-Governmental Organizations in International Judicial Proceeding’, (1994) 88 *American Journal of International Law*[611]. Shelton summaries the *amicus curiae* involvement in some international tribunals such as PCIJ, ICJ, EU Court and WTO.

<sup>7</sup> United States--Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Panel, *WT/DS58/R* (May 15, 1998).

on appeal that the Panel in this case had erred in finding the interpretation of Article 13 of DSU by concluding that it only applied to solicited or requested submissions.

The Appellate Body therefore agreed with the U.S. and reversed the Panel's decision on this issue. The Appellate Body stated that "under the DSU, only Members who are parties to the dispute, or who have notified their interests become third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by a Panel. Correlatively, a Panel is obliged in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding". In other words, Appellate Body suggested that under Article 13 of DSU, a Panel has the discretion to look at or ignore any information, including submissions by NGOs, irrespective of whether such information was requested.<sup>8</sup>

Another case referring to the dilemmatic of unsolicited amicus curiae is EC – *Asbestos Case*.<sup>9</sup> In this case the Panel received five written submissions from asbestos victim group and industries. Two of these were appended to the European Communities submission and considered by the Panel as a part of defending party's arguments. The Panel then rejected the remaining three. Canada notified the DSB to appeal. In appeal proceedings, Appellate Body had received thirteen unsolicited amicus curiae briefs regarding the appeal. The Appellate Body then issued Additional Procedure which is only applicable to this particular case, mentioned that "to file an amicus brief stating that the decision to publish the criteria was made in the interest of fairness and orderly procedure in the conduct of the said appeal".

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<sup>8</sup> Padideh Ala'i, "Judicial Lobbying at the WTO: the Debate over the Use of Amicus Curiae Briefs and the U.S. Experience", *Fordham International Law Journal*, November-December 2000, p.62-94. See also Joseph Keller, "the Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments", (2005 ) *International Journal of Legal Information* [449-470]. Keller stated that the Appellate Body in the case of US Lead and Bismuth II, (WT/DS138/AB/R, adopted 7 June 2000) determined that acceptance of amicus curiae briefs filed by the members is a matter of discretion, to be determined on a case by case basis. It seems appropriate for the Appellate Body to consider the underlying purposes of WTO law and dispute settlement in making decisions of this manner. If the Appellate Body finds any amicus brief objectionable or simply not useful in deciding the dispute, it can choose not to consider that brief. This discretion will create a balance of interest by allowing access for amicus submissions while at the same time appropriately limiting the influence of such submissions.

<sup>9</sup> European Communities--Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Panel, *WT/DS135/R* (Sept. 18, 2000).

After issued the Additional Procedures, Appellate Body then rejected and returned all unsolicited briefs, along with the adoption of new additional procedures. The Additional Procedures provided mostly all those who intended to submit amicus curiae briefs would first be required to submit application for leave to file such a submission with the Appellate Body. Only one of these NGOs, the Korea Asbestos Association subsequently submitted a request for leave in accordance with the Additional Procedures.<sup>10</sup>

The WTO Members then accused the Appellate Body of taking actions that were beyond its mandate under DSU. At the Special Session, many WTO Members argued that the issuance of the Additional Procedures to allow acceptance of an unsolicited amicus curiae was only disturbing developments, such as acceptance of amicus curiae briefs in *the United States – British Steel Case*<sup>11</sup> and *US-Shrimp case*. WTO Members in the Special Session consented to declare that the issue of amicus curiae briefs was not procedural, but a substantive one that only Members could decide.<sup>12</sup> Of course this consensus was with contention from the U.S. According to the U.S Representative to the WTO, the Appellate Body did the only thing that it could do by given the number of persons that either had already filed or expressed their intent to file friend of the court briefs.<sup>13</sup> The U.S. considered that the acceptance of amicus curiae from non WTO Members especially from NGO was unavoidable since the submission of amicus curiae brief by outside groups were considered important. In several cases, the number of amicus curiae briefs being filed before the dispute resolution system of the WTO. In an effort to facilitate this procedure,

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<sup>10</sup> European Communities – Measures Affecting Asbestos and Asbestos Containing Products, Communication from the Appellate Body, WT/DS135/9, November 8, 2000. This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the Working Procedures for Appellate Review, and is not a new working procedure drawn by the Appellate Body pursuant to paragraph 9 of Article 17 of the DSU.

<sup>11</sup> United States--Imposition of Countervailing Duties on Certain Hot-Rolled lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R (May 10, 2000)

<sup>12</sup> Petros C. Mavroidis, 'Amicus Curiae Briefs Before The WTO: Much Ado About Nothing', in Claus-Dieter Ehlermann, Armin von Bogdandy, Petros C. Mavroidis, and Yves Meny (Eds), in *European Integration and International Co-Ordination: Studies in Transnational Economic Law in Honour of (2000) Kluwer Law International—the Netherland*. [317-330].

<sup>13</sup> See PadidehAla'i, *Loc. Cit.*

the U.S. believe that the submission of amicus curiae briefs from NGO should be more formalized to allow for a more uniform and judicial means of submission.<sup>14</sup>

The discussion regarding the NGO in WTO becomes more intractable issues since some authors mention that involvement of NGO will enhance the WTO decision-making process, because NGOs will provide information, arguments and other perspective than the government itself. NGO is also acting as intellectual competitors to government.<sup>15</sup> Van den Bossche mentioned that NGO participation will also increase the legitimacy of the WTO.<sup>16</sup> The legitimacy of WTO and public confidence in the WTO will increase when NGOs have the opportunity to be heard and to observe the decision making process, since the WTO itself as intergovernmental organization has been described as undemocratic and lacking in the transparency. Moreover, by allowing NGO to involve in WTO discussion, the WTO would hear about important issues which may not be adequately represented by any national government. However, this argument is still in contrast with arguments from some developing countries member. Most of developing countries remain object to greater involvement of NGOs in the WTO, because the opposite point of view remarked by NGO mostly inimical their interests, for example on environmental and labour issues. Moreover, developing countries perceive NGOs involvement will dilute their WTO membership rights, since many developing countries lack of resources necessary to fully participate at the WTO then believe that NGOs – especially which is well-funded by European and American exporters- will impinge upon developing countries rights as WTO members.<sup>17</sup>

The pros and contrast arguments regarding the involvement of NGO in WTO –

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<sup>14</sup> Daniel Pruzin, “WTO Appellate Body under Fire for Move to Accept Amicus Curiae Briefs from NGOs”, *International Trade Reporter*, November 30, 2000, p. 1805. In the Shrimp – Turtle case, the Appellate Body decide that the issue of admissibility of amici by the NGO was a separate legal issue, which it felt that the Panel did not specifically address in its report. The Appellate found that the attaching of amici to the material submitted by either the appellant or the appellee, regardless of where that material may have originates, render that material at least prima facie an integral part of that participant’s submission.”

<sup>15</sup> See Daniel Esty, ‘Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion’ [1998] *Journal of International Economic Law*. [123 -147].

<sup>16</sup> See Peter van den Bossche, ‘NGO Involvement in the WTO: A Comparative Perspective, at Mini-Symposium on Transparency in the WTO’ (2008) 11 *Journal of Economic International Law*. [717-749].

<sup>17</sup> Maura Blue Jeffords, ‘Turning the Protester into a Partner for Development: The Need for Effective Consultation between the WTO & NGOs’ (2003) 28 *Brooklyn Journal of International Law*. [937-988].



in particular WTO dispute settlement system- are far from settled. Those arguments are conceivable since the definition of NGO is still ambiguous and inconsistent used by any international institutions. Lindblom mentioned that definition and criterion of NGO basically derived from UN Review Consultative Arrangements with Non-Governmental Organizations that established the definition of NGO as “any international organization which is not created by intergovernmental agreement shall be considered as a nongovernmental organization for the purpose of these arrangements”.<sup>18</sup> Furtherance, Secretary-General of the UN proposed a definition of NGO as “a non-profit entity whose members are citizens or association of citizens of one or more countries and whose activities are determined by the collective will of its members in response to the needs of the members or of one or more communities with which the NGO cooperates”.<sup>19</sup> From the definition above, a question arises whether economic actors are NGO in the context of WTO. It seems logical if economic actors are not NGO according to the UN definition, because economic actors are profitable legal entities.<sup>20</sup> However for some reasons, economic actors are able to be considered as NGO when they interests are represented by business association, for example in the British steel case, The Specialty Steel Industry of North America (SSINA) which represents all the producers of specialty

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<sup>18</sup> E/RES/288(X), “Review of Consultative Arrangements with Non-Governmental Organizations”, 27 February 1950, para. 8, in Anna-Karin Lindblom, *Non-Governmental Organizations in International Law* (Cambridge University Press 2005).[38].

<sup>19</sup> General Review of Arrangements for Consultations with Non-governmental Organizations: Report of the Secretary-General, U.N. ESCOR, 1st Sess., Agenda Item 3, at 4, U.N. Doc. E/AC.70/1994/5 (1994). See also Black’s Law Dictionary defines a non-governmental organization as, in international law, “any scientific, professional, business, or public interest organization that is neither affiliated with nor under the direction of a government; an international organization that is not the creation of an agreement among countries, but rather is composed of private individuals or organizations,”

<sup>20</sup> See Peter van den Bossche.*Loc Cit.*, Bossche explained that in the first Session of the Ministerial Conference in Singapore in December 1996, the WTO Secretariat accredited all non-profit NGOs that could point to activities related to those of the WTO. The accreditation criterion applied was the ‘non-profit character of the NGO. Private companies and law firms were refused accreditation on the criterion of NGO.

steel in North America,<sup>21</sup> filed an unsolicited *amicus curiae* to Panel and Appellate Body on behalf of steel industries in North America.

It emerges the fear from some developing countries regarding the involvement of economic actors indirectly through their associations to dispute settlement system. Some authors argued that private economic actors are lurking the dispute by lobbying their governments to file against another WTO members regarding their inconformity with WTO rules.<sup>22</sup> Thus, if this NGO – which is representing the interest of economic actors – has right indirectly or directly to involve in the WTO dispute settlement system, the balance of fairness will be diminishing. Moreover, if WTO allowed *amicus curiae* which came from industry groups rather than the more traditional NGOs, such as environmental groups, it will put them in disadvantage as the civil society organisation. In addition, developing countries are much fearer about this issue because they much weaker compare to developed countries.<sup>23</sup>

Apart from those arguments regarding the involvement of nongovernmental legal entities in the WTO dispute settlement system; this article will reveal the question whether the involvement of private economic actors in the WTO dispute settlement system is merely political or legal issue. The legal issue in regard with the involvement of non-government entities or NGOs (including business association representing economic actors) in the WTO dispute settlement system, will be divided into three arguments, first is legal issue regarding the acceptance of *amicus*

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<sup>21</sup> SSINA is a business association which the primary mission is to promote the expanded use and a recognition of stainless steel. Activities include: a proactive marketing program focused toward architects, designers, engineers and other materials specifies to increase awareness of the value and potential of stainless steel; a resource for useful information and literature about stainless steel; and a cooperative partnership with other industry trade groups to promote the growth of markets for stainless steel. Available at SSINA, 'No Title' <<http://www.ssina.com/about/index.html>> accessed 20 June 2010.

<sup>22</sup> See Peter van den Bossche. *Loc. Cit.*

<sup>23</sup> Andrea Kupfer Schneider, "Unfriendly Actions: The *Amicus Curiae* Brief Battle in the WTO", in Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy Be Made' (2001) *Widener Law Symposium Journal* 87.[101-107]. Schneider mentioned that the concerns about involvement of NGO in particular business group from some developing countries come in four types: (1) new policy is being made concerning *amicus* briefs by WTO Panels and the members should be deciding that rather than the panels; (2) NGOs will have more rights to participate than Member States; (3) the identity of these non-members is troublesome; and (4) any move away from the state-to-state interaction in the WTO is a bad one.

curiae briefs, second is the involvement in WTO dispute settlement hearing and, third is the permissible of individual to represent the party to the dispute.

### **Amicus Curiae Brief**

As mentioned above, Article 13 DSU provides a possibility for non WTO member to involve in the WTO dispute settlement system by submitting amicus curiae if it is requested by Panel or Appellate Body. The WTO dispute settlement process could find a way to manage a system wherein amicus curiae briefs are accepted. Panels and Appellate Body have authority but not obligation, to accept unsolicited (or solicited) briefs under Article 13 DSU. In fact, some unsolicited amicus curiae are accepted by the Appellate body since the interpretation of Article 13 (2) of DSU means that “panels may consult experts to obtain their opinion”. In the *Shrimp/Turtle case*, Appellate Body determined that Panels could accept amicus curiae briefs under this language, because the briefs, although unsolicited, were part of the government submission, which are admissible.<sup>24</sup> It is similar to the *British Steel* case when Appellate Body observed that “individual and organizations, which are not Members of the WTO, have no legal right to make submissions to or be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited amicus curiae briefs submitted by individuals or organisations, who is not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO Members which are parties or third parties in a particular dispute. We are of the opinion that we have the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal in which we find

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<sup>24</sup> United States--Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Panel, *WT/DS58/R* (May 15, 1998). See also Joel P. Trachtman, “Private Parties in EC-US Dispute Settlement at the WTO: Toward Intermediated Domestic Effect”, in Ernst-Urlich Petersmann and Mark A. Pollack (eds.), *Transatlantic Economic Disputes: The EU, The US, and the WTO* (Oxford University Press 2003).[530]. Trachtmann argued that under a regime of reasonably unrestricted access for amicus curiae, it would be highly impracticable for the dispute settlement system to undertake to recount and to respond each amicus brief in the way that it does for member states brief. It appears that neither panels nor the Appellate Body are obligated to do so. Nevertheless, most member states of the WTO today seem to reject the possibility of amicus curiae.

it pertinent and useful to do so”.<sup>25</sup> This recommendation stressed out the acceptance of amicus curiae from non WTO member if: 1) The amicus curiae brief is requested by Panel or Appellate Body; 2) The amicus curiae brief is deemed as part of each party’s submission<sup>26</sup> ; 3) The Panel and Appellate Body find that amicus curiae brief are pertinent and useful to decide particular case<sup>27</sup> It is clear that the Appellate Body search the interpretation regarding the amicus curiae from Article 13 of the DSU, since the Article 13 of the DSU is the only reference for WTO adjudication bodies to conclude the legal authority under the DSU to accept amicus curiae.<sup>28</sup>

### **The Involvement of Economic Actors in WTO Dispute Settlement Proceedings**

In some cases, economic actors also engage directly as delegation in WTO dispute settlement proceedings as long as their governments appointed them and they are constituted as delegation of the government of WTO members. For example in the *Banana Case*, Appellate Body has been ruling that parties and third parties are free to determine for themselves the composition of their delegation at hearings of Panels and Appellate Body. It should be understood that WTO adjudication body allow the presence of non-party in the dispute settlement proceeding as long as in the context of delegation of WTO member to the dispute. In the case of *Korea – Certain Paper*, Panel rejected the objections of Korea against the presence of representative of the Indonesian paper industry as part of the delegation of Indonesia at the Panel meetings.

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<sup>25</sup> Appellate Body report on *United States - Imposition Of Countervailing Duties On Certain Hot-Rolled Lead And Bismouth Carbon Steel Products Originating In The United Kingdom*, WTO Doc. WT/DS138/AB/R of 10 May 2000.

<sup>26</sup> See case *European Communities-Antidumping Measures on Imports of Cotton-Type Bed Linen from India*, Panel Report, WT/DS141/R (Oct. 30, 2000),

<sup>27</sup> See case *United States-Section 110(5) of the U.S. Copyright Act*, Panel Report, WT/DS160/R 6.3 (June 15, 2000)

<sup>28</sup> Lin Zhengling, ‘An Analysis of the Role of NGO’s in the WTO’ (2004) 3 Chinese Journal of International Law.[485-498]. Zhengling mentioned that there is no consensus on the issue of amicus curiae at the Appellate body level. The Appellate Body has ruled that it is authorized to accept amicus curiae submissions and has determined that is has authority to issue procedural rules with regard to such submissions. To date, however, the Appellate Body has not taken into account any amicus submission that had not already been attached to a party’s submission. For Appellate Body, the submission of amicus curiae is a procedural question, meanwhile for the rest of WTO members it is a substantive question that van only be decided at the General Council level.

In the *Korea – Certain Paper Case*<sup>29</sup> at first substantive meeting with the Panel, Korea was citing Article 18 (2) of the DSU stated that “there were representatives of the Indonesian paper industry in the Indonesian delegation and requested that they leave the hearing room because access to confidential information submitted by Korea would give them an unfair competitive advantage over their Korean counterparts”. However, Panel argued that as provided in paragraph 15 of Panel Working Procedures, Indonesia was entitled to determine the composition of its delegation in these proceedings. Panel also stated that, in accordance with Article 18 (2) of the DSU and paragraph 15 of Panel Working Procedures, Indonesia assumed responsibility for its delegation, including respect for the confidentiality of the submissions made by the Korea in the proceedings. The reason for some WTO Members to include economic actors as part of their delegation merely because some governments, especially from developing countries, are lacking of the resources to fully investigate and develop cases of unfair trade regulation from other WTO Members. Meanwhile, economic actors sometimes have access to information and expertise that governments lack.<sup>30</sup>

### **The Permissible of Individual to Represent the Party to the Dispute.**

The issue of private counsel representation before the WTO dispute settlement proceedings appeared when the Panel report in the *Banana Case* denied Saint Lucia’s request for representation by two private legal advisers who were not full-time employees of the government of Saint Lucia.<sup>31</sup> This issue also appeared in the case of *Indonesian-Certain Measures Affecting the Automobile Industry* when the government of Indonesia declared that its delegation included two private lawyers

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<sup>29</sup> WTO Panel Report, *Korea -- Anti-Dumping Duties on Imports of Certain Paper from Korea (Korea -- Certain Paper)*, WT/DS312/R, Adopted on 28 November 2005.

<sup>30</sup> Zhengling refers to the Kodak case when to develop Japan’s arguments regarding the anti-competitive conduct in Japan’s photographic film and paper markets, Kodak employed a substantial team of lawyers, economists and translators in Washington as well as “a small army of experts in Japan, including several legal scholars, three Japanese market research firms and nearly a dozen independent translators. See: *ibid.* See also C. Chandler, “*Dream Team*” Helps Kodak Make Its Case; *Trade Lawyers Uncover Crucial Industry* Newsletters, Washington Post, 26 June 1995, A12

<sup>31</sup> See *European Communities--Regime for the Importation, Sale and Distribution of Bananas--Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WTO doc. WT/DS27/ARB (Apr. 9, 1999), Saint Lucia is an ACP state and a third party participant to the case.

who were not permanently employed by Indonesian Government. The United States then argued that Indonesia private counsel should be barred from Panel's meeting.<sup>32</sup>

In the *Banana Case*, Appellate Body granted Saint Lucia's request to be represented by private counsel. The Appellate Body stated that there was nothing in the WTO agreement, the DSU, the Working Procedures, nor in customary international law or the prevailing practice of international tribunals which prevents a WTO member from composing its own delegation to an Appellate Body Proceeding, and to specify who can represent a government in making its representations before the Appellate Body. The Appellate Body also noted that in the interest of member government's representation by qualified counsel in Appellate Body proceedings, the representation by counsel of government's own choice may well be in a matter of particular significance – especially for developing country Members – to enable them to participate fully in dispute settlement proceedings.

*In Indonesia – Autos case*, Panel inclined to accept the private counsel before the WTO dispute settlement proceedings. Panel emphasized that all members of parties delegations – whether or not they are government employees – are present as representatives of their governments, and as such are subject to the provision of the DSU and of the standard working procedures, including Articles 18 (1) and (2) of the DSU and paragraphs 2 and 3 of those procedures.<sup>33</sup> It is similar to the Appellate Body ruling in the EU-Bananas case that permits governmental representation by private counsel in oral hearings before the Appellate Body.

### **Political Issue**

Apart from legal issue regarding the involvement of economic actors in the WTO dispute settlement system, each WTO member is dealing with political issue regarding to the public-private relation in WTO dispute settlement system. According to Shaffer, the vital role of public-private networks play in litigation before the WTO, although only WTO Member States can bring litigation before

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<sup>32</sup> Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* (“*Indonesia – Autos*”), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R.

<sup>33</sup> *ibid.*

the WTO, private actors such as Business Corporation and activities play role in states' decisions about which case to bring.<sup>34</sup> Shaffer therefore mentioned although trade relations are enforced through a formal international agreement in which only states have standing, private economic actors can still be very influential. In the litigation process, economic actors depend on authority of their government for access to the WTO legal proceedings, such as the submission of amicus curiae brief will constitute as part of party's submission, or the government itself is able to include any economic actors as a part of their delegations before WTO meeting. In addition, government or public authority can politically rely on these economic actors for financial and informational support. These networked partners evaluate the costs and benefits bringing a claim and litigating or settling the dispute.<sup>35</sup> In some circumstances, economic actors can also initiate the dispute, for example in the United States, economic actors use formal and informal channels to influence trade dispute settlement. These economic actors can directly send petition to representatives of the U.S government to combat perceived trade barriers and discriminatory policies enacted by foreign governments.

In domestic political sphere, economic actors can initiate dispute by using their domestic influence to get their government to raise the claim. In addition, some governments, such as the United States and the European Union, have instituted formal procedures by which citizens can petition the government to respond to another nation's trade violation.<sup>36</sup> For example, the private economic actors in the U.S may send petition to the U.S. Trade Representative (herein after USTR) to take action against a foreign nation's trade practices under Section 301. The economic actors are able to report the unfair trade from other nations to USTR, and after an investigation, the USTR will decide whether the trade practice in question is violating any trade agreement and, if so, USTR will find what measure should be

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<sup>34</sup> See Gregory C. Shaffer, *Defending Interest Public-Private Partnerships in WTO Litigation* (The Brooking Institution 2003).[10-18].

<sup>35</sup> *ibid.*

<sup>36</sup> See Glen T. Schleyer, 'Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System' (Fordham Law Review).[2275-2311].

taken.<sup>37</sup> Similar to the U.S., the European Union adopted Regulation 2641/84 in 1984 which gives the right to send petition to the EU Commission to investigate harmful foreign trade practices. According to Regulation 2641/84, the Commission will initiate an investigation of the offending trade practice if it deems necessary in the interest of the EU.<sup>38</sup>

The economic actors have broad discretion to approach their governments in political dimension to support them to gain broader benefits under WTO rules. Economic actors therefore are able to lobby their governments to involve in international trade or when the dispute arise these economic actors can use political approach to involve indirectly to the dispute, by either providing financial and informational support. Nevertheless, the political issue seems very delicate matter to confront in the domain of WTO rules, since the WTO itself will ignore this issue and leave it to each WTO Member. Indeed, the main objective of WTO rules is enhancing trade benefits of WTO Members which in the end the constraint of that international trade puts on states thus directly benefit, or concern, economic actors.<sup>39</sup>

## Conclusion

From all arguments regarding the involvement of economic actors in the WTO Dispute Settlement System both from legal and political point of views, enhance the notion that economic actors will not have any sufficient parts to involve in the WTO dispute settlement system unless their governments are willing to bring them in to it. Although some authors tend to support the direct involvement of economic

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<sup>37</sup> Rules A Lyne Puckett and William L. Reynolds, 'Sanctions and Enforcement Under Section 301: At Odds with the WTO?', (1996) 12 *American Journal of International Law*. [678-79]. The authors mentioned that the Section 301 is an inadequate method for private parties to protect their rights is that there is no guarantee that USTR will take action.

<sup>38</sup> Wolfgang W. Leirer, 'Retaliatory Action in the United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84' [1994] *North Carolina Journal of International Law and Commercial Regulation*. [41-96]. The adoption of Regulation 2641/84 was largely a response to the United States use of section 301, however this regulation will less use since the decrease of Section 301 actions and the sparring of WTO dispute settlement system.

<sup>39</sup> See Stefan Ohlhof and HannesSchloemann, 'Transcending the Nation-States? Private Parties and the Enforcement of International Trade Law', in J.A. Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, (2001) 5 Kluwer Law International 2001. [675-734].



actors to stand before the WTO adjudication bodies, but as intergovernmental organization, WTO Member has exclusive right beyond interference of individual or citizen from any WTO Member. Some arguments are leading to the possibility of opening up of the WTO dispute settlement process for observers representing legitimate interests in the perspective procedures to promote full transparency of WTO.<sup>40</sup> The Former Member and Chairman of the Appellate Body, James Bacchus also has expressed the view that “We must open the doors of the WTO, and let in the light of public scrutiny. We must let the five billion people in the world who are served by the WTO see the WTO. For, if we do not, the Members of the WTO will never secure the increased public support that will be needed worldwide to continue to maximize all the mutual gains made from trade through a rule-based world trading system”.<sup>41</sup> The characteristic of WTO is an intergovernmental organization that is established by an interstate agreement. The WTO Members decide to create WTO for handling trade relation at the intergovernmental level, although at the end the governments of WTO Members have to make the laws regulating the behavior of the individual citizens,<sup>42</sup> thus the enforcement of WTO rules is solely in the hand of WTO Members.

The analysis then draws a conclusion that both legal and political issues cannot be detached from the process of the system itself. In the legal point of view, DSU provides clear arrangement for the involvement of economic actors in WTO Dispute Settlement System. It is significantly seen from the Article 13 of DSU that Panel and Appellate Body have wide discretion in order to accept the involvement of non-state actor in case per se. A disputant party has also discretion in term of relation between the interest of economic actor and its dispute. Some Cases even

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<sup>40</sup> International Law Association, Resolution No 2/2000 (Declaration on the Rule of Law in International Trade).

<sup>41</sup> James Bacchus, Open Doors for Open Trade: Shining Light on WTO Dispute Settlement, Remarks to the National Foreign Trade Council (Mayflower Hotel, Washington D.C.) (29 January 2004).

<sup>42</sup> For basic theory of international organization see Henry G. Schermers, *International Organizations*, in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospect (Part I)*, (Unesco & Martinus Nijhoff Publisher 1991).[67-96].

is using the name of economic actor such as Kodak-Fuji Case and Boeing Case. It is seen that those cases emerge after the interest of those economic actors were violated. From the perspective of political issue, some cases are pertinent to the interest of economic actors. A member of WTO will initiate the dispute in regard with the violation of its right due to the report of their economic actors. However, this political issue will not take effect on any process of dispute settlement in WTO, since it is merely a decision of government to proceed the dispute. The influence of economic actors is significant for the willingness of WTO Member politically.

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