Policy Papers on
Transnational Economic Law

No. 7/2004

Watching "Friends of the Court" Digging Their Own Grave? The Impact of *EC – Sugar* on the Future of *Amicus Curiae* Briefs at the WTO

Karsten Nowrot

Transnational
Economic Law
research Center

Faculty of Law
Martin-Luther-University
Halle-Wittenberg
Universitätsplatz 5
06099 Halle (Saale)
Germany

Tel.: +49 345 / 55 23149
/ 55 23180
Fax: +49 345 / 55 27201

E-Mail: telc@jura.uni-halle.de
www.telc.uni-halle.de

Watching "Friends of the Court" Digging Their Own Grave? The Impact of *EC – Sugar* on the Future of *Amicus Curiae* Briefs at the WTO

Ever since the Appellate Body recognized its own competence (in the decision of *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating from the United Kingdom*, WT/DS138/AB/R, paras. 39 *et seq.*) and that of the Panels (in the October 1998 case of *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 99 *et seq.*) to take into account unsolicited *amicus curiae* briefs submitted by interested non-state actors, the granting of this procedural option for participation in WTO dispute settlement proceedings has been subject to an intensive and controversial discussion not only among international legal scholars, but, first and foremost, also between the members of the WTO themselves. It is well-known, and thus hardly worth mentioning, that especially the developing countries among the WTO members, but also a number of other states, have at various occasions raised considerable objections to this involvement of NGOs, business associations, companies and individuals in the dispute settlement proceedings before the Panels and the Appellate Body.

In this context, the following "incident" – as the Panel itself in its report of 15 October 2004 qualifies it – that occurred in the course of the proceedings in *European Communities – Export Subsidies on Sugar (Complaint by Australia)* (WT/DS265/R, paras. 2.20 *et seq.*, 7.76 et seq.; see also *European Communities – Export Subsidies on Sugar (Complaint by Thailand)*, WT/DS283/R, paras. 2.20 *et seq.*, 7.76 *et seq.*; *European Communities – Export Subsidies on Sugar (Complaint by Brazil)*, WT/DS266/R, paras. 2.20 *et seq.*, 7.76 *et seq.*) is highly likely to further stiffen the already critical attitude of a substantial number of WTO members towards the submission of *amicus curiae* briefs by non-state actors: On 24 May 2004, the Panel received an unsolicited amicus curiae brief from the *Wirtschaftliche Vereinigung Zucker e.V.* (WVZ), a business association representing German sugar producers. On invitation to the parties to make comments thereon, Brazil informed the panelists on 2 June 2004 that the respective *amicus curiae* brief disclosed confidential information, *inter alia* with regard to the cost of sugar production, that Brazil had submitted to the Panel, and requested an investigation as to how this breach of confidentiality occurred – a request that was subsequently supported by Australia, the European Communities, and India. Noting the seriousness of the matter, the Panel, on 10 June 2004, asked for information from the

WVZ "with respect to the exact source[s] (documents, websites, etc.) used for the data referred to" in its *amicus curiae* brief (WT/DS265/R, para. 2.26). In its response to this request, the WVZ on 15 June 2004 indicated that it had been able to examine a respective attachment to Brazil's confidential submission to the Panel. However, the business association continued by pointing out that "WVZ is not in a position to reveal the source of its information regarding the evidence submitted by Brazil" (WT/DS265/R, para. 7.82).

As a consequence of this blunt refusal to reveal the source of the information, which was classified as confidential, the Panel not only declined to consider the *amicus curiae* brief for its final decision, but stated in unprecedentedly clear words that:

> "The Panel regrets this refusal to cooperate which, regardless of the merits (or lack thereof) of WVZ submission, undermines not only elemental fairness to the parties, but also compromises the integrity of the dispute settlement system itself by hindering further openness and the transparency of the dispute settlement process. [...] The WTO dispute settlement resolution confidentiality rules apply to WTO Members, the Panel members and WTO staff involved in the dispute proceedings. Nevertheless, the Panel considers that if the WVZ, though not a party to the proceedings, wanted to be considered a 'friend of the court', it should have followed an appropriate standard of behaviour towards the Panel and the parties together with making possible effort to respect WTO dispute settlement rules, including confidentiality rules. [...] The Panel has come to the conclusion that a breach of confidentiality did occur in the framework of these proceedings. The Panel is therefore concerned and deeply deplores this breach of confidentiality and the disregard of a requirement imposed by the DSU and the Panel's Working Procedures. The Panel considers that it has used its best endeavours to investigate the alleged breach of confidentiality. However, the Panel has not been able to determine the source of the breach. [...] The Panel hereby reports the incident to the Dispute Settlement Body" (WT/DS265/R, paras. 7.83 *et seq.*, 7.98 *et seq.*).

This "incident" involving a breach or at least a possible breach of confidentiality is by far not the first of its kind in connection with the participation of non-state actors in WTO dispute settlement proceedings. Al-

ready in December 2000, in the Appellate Body proceedings in the case *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (WT/DS122/AB/R, paras. 62 *et seq.*), a similar occurrence took place involving the *Consuming Industries Trade Action Coalition* (CITAC), a coalition of United States trade associations and companies, having submitted an *amicus curiae* brief in which it had explicitly referred to specific arguments that had been brought forward by Thailand in its confidential appellant submission. Other cases of apparent breaches of confidentiality, which however did not involve the submission of *amicus curiae* briefs by non-state actors, have previously been reported for example in the Panel reports on *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (WT/DS248, 249, 251, 252, 253, 254, 258, 259/R, para. 9.41), *European Communities – Measures Affecting the Importation of Certain Poultry Products* (WT/DS69/R, para. 191), and as early as in November 1996 in the Panel report on *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* (WT/DS24/R, para. 6.3).

Although the Appellate Body as well as Panels have so far considered *amicus curiae* briefs only in a very limited number of cases, the procedural possibility of submitting additional factual information and legal opinions not only provides interested non-state actors with a means of taking part, albeit indirectly, in WTO dispute settlement proceedings and thereby at least potentially influencing the ruling of the relevant Panel or the Appellate Body. In addition – also from the point of view of the WTO and its members – the inclusion of knowledgeable and increasingly influential NGOs, business associations and companies in the decision-making as well as dispute settlement processes should be seen as a valuable contribution which – considering the structural changes in the international economic system and its legal order – is already in the foreseeable future going to become more and more necessary for this international organization in order to fulfil its important regulatory tasks.

Against this background, however, it is of the utmost importance that the existing – and compared to other international organizations such as the United Nations already rather limited – possibilities for non-state actors to participate in the work of the WTO are not discredited by the apparent "misconduct" of a small number of their representatives. Such an outcome would be neither in the interest of the respective private organizations and individuals, nor, as just mentioned, in the long-term interest of the WTO itself. In particular, with regard to the procedural option to submit unsolicited *amicus curiae* briefs, the "incidents" that occurred in *Thailand – H-Beams* and especially now

in *EC – Sugar* are to be deplored in light of the ongoing negotiations aimed at reforming the DSU and the negative attitude of a considerable number of WTO members towards the issue of improving the possibilities for private entities to participate in the activities of the WTO. The extent of disservice done by WVZ and CITAC to the already remote prospect of an enhancement and a further institutionalization of the role of non-state actors in the WTO dispute settlement proceedings hardly needs to be emphasized.

However, the damage being done, it becomes even more important to think about effective mechanisms to prevent such "incidents" from occurring again by enhancing the legitimacy of non-state actor participation in WTO dispute settlement proceedings. A possible solution would be the adoption – by an independent international non-governmental institution or, preferably, by the WTO itself – of a so-called "Code of Conduct" or "Code of Ethics" for the submission of *amicus curiae* briefs by non-state actors in WTO dispute settlement proceedings which would, *inter alia*, prohibit unauthorized disclosure of confidential information. In order to ensure universal adherence to it, such a code should require all private actors wishing to submit an *amicus curiae* brief to execute a statement binding him to adhere to the rules of behavior codified in it, with the Appellate Body and the Panels making the existence of such a statement a procedural requirement for the possibility to consider the respective *amicus curiae* brief. Possible sanctions for a violation of this code would be – in addition to the non-consideration of the brief in the pending WTO dispute settlement proceeding – a disbarment from future proceedings and the publication of the respective private entity on a "black list". It is submitted that the prestige attached to the at least theoretical opportunity to submit *amicus curiae* briefs in a WTO dispute settlement proceeding is very likely to serve as a sufficient incentive for non-state actors to conduct themselves in conformity with the proposed "Code of Conduct for the Submission of *Amicus Curiae* Briefs in WTO Dispute Settlement Proceedings".

Finally, it should be pointed out that the approach suggested in this paper is not without precedent. Already in 1998, similar recommendations have been submitted by the *American Bar Association* and the *Council of the Bars and Law Societies of the European Community* with regard to the representation of parties by private counsel in WTO dispute settlement proceedings (reprinted in: Journal of International Economic Law 2 (1999), 163 *et seq.*, 182 *et seq.*). It is submitted that in light of the "incident" that occurred in *EC – Sugar*, the time is ripe for finally entering at least the drafting phase of such a code of conduct at the WTO. In that case,

the misbehavior of a few – deplorable as it may be – would at least also have a positive side-effect.

Karsten Nowrot, LL.M. (Indiana) is senior lecturer and research assistant at the Transnational Economic Law Research Center (Director: Prof. Dr. Christian Tietje, LL.M.) at the Faculty of Law of the Martin-Luther-University Halle-Wittenberg, Germany.