

**DECISION BY THE APPELLATE BODY CONCERNING  
*AMICUS CURIAE* BRIEFS**

Statement by Uruguay at the General Council  
on 22 November 2000

The following statement was made by the delegation of Uruguay at the meeting of the General Council held on 22 November 2000 with regard to *amicus curiae* briefs, with the request that it be circulated to Members.

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Before beginning the substantive part of our statement, we should like to thank you and the Secretariat for the factual report that has been made available to us. This has proved useful for our analysis, although it has not essentially changed it. In fact, it has given rise to some additional concerns that we shall mention below and it identifies the moment when, in our opinion, a different procedure should have been followed.

I should also like to thank the Ambassador of Egypt who, in her capacity as coordinator of the Informal Group of Developing Countries, requested this meeting and introduced the subject. We shall develop further some of her arguments from our own point of view.

The delegation of Uruguay supported the calling of this special meeting of the General Council since it believes that this is a subject of fundamental systemic importance for the World Trade Organization. We consider that this is the proper forum to debate it, since it is the highest body of the Organization when the Ministerial Conference is not in session, and the only body authorized to interpret the Agreements.

The dispute settlement system of this Organization has been described as the "jewel" of the achievements of the Uruguay Round. We must not allow this jewel to lose its brilliance or its value. If the Members cease to have confidence in this dispute settlement system – which is unique at the international level – they will lose a fundamental tool for the defence of their interests and will find themselves worse off than before.

It is for this reason that we view this debate not as a means of questioning the Dispute Settlement Understanding nor as an attempt to weaken the institutions that govern this process, but as a way of clarifying and reaffirming the powers or terms of reference of each of the parts that allow the multilateral trading system to operate. In concrete terms, we are initiating a process which, we hope, will help to carry out the task of interpreting the Agreements and consequently strengthen the WTO.

The WTO is an agreement of a contractual nature that is qualitatively different from other international agreements in the sense that the obligations that flow from this contract include the strict

fulfilment of the decisions of the Dispute Settlement Body to the extent of diminishing the decision-making capacity of the Members. Insofar as the Members are mainly States, the political effect of this situation is of no little consequence.

It is for this reason that any decision by the bodies that make up the system cannot be taken lightly, but must be firmly based on the provisions of the Agreements that were duly signed and ratified by the respective governments and parliaments.

It is in this context that we view with very great concern the appearance and mass circulation outside the Organization of document WT/DS135/9 in which the Appellate Body has established an additional procedure for the submission of written briefs from persons or institutions that are neither parties nor third parties in a particular dispute that is at the appeal stage. Our concern is based on the fact that notwithstanding the positive intention that inspired this document its form, its substance and the way it has been handled affect the rights and obligations of the Members of the Organization and, moreover, alter the relationship between the bodies within the system.

Let us consider the following points:

1. Article V.2 of the Agreement Establishing the WTO states: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". In our opinion, that means that it is the General Council which has the statutory right to decide the forms that relations with NGOs will take, including those concerning the settlement of disputes.
2. Article IX.2 of the same Agreement provides that the General Council shall have "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". This is a point that we have already mentioned.
3. Article 17.3 of the Dispute Settlement Understanding states that the Members shall elect to the Appellate Body "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered Agreements generally". We have no doubt whatsoever as to the suitability and expertise of those persons presently serving on the Appellate Body.
4. Article 17.6 of the DSU also states that an appeal shall be limited to "issues of law covered in the panel report and legal interpretations developed by the panel". The concrete and specific function of the Appellate Body is thus clearly determined.
5. Paragraph 9 of this same Article states that the working procedures of the Appellate Body shall be drawn up in consultation with the Chairman of the DSB and the Director-General. The application of this provision is a matter of great importance.

Let us now examine the situation taking these provisions into account.

Although this document is presented to us as an explanatory note under Rule 16(1) of the Working Procedures, its practical effect is that the Appellate Body is adopting decisions on relations with NGOs, and such decisions, as we have already noted, statutorily belong to the General Council. Consequently, this is not a matter of clarifying procedures, but of upsetting the balance of the functions of each body involved.

In view of this practical outcome, we do not agree that it is a matter of procedure, but rather, in our opinion, a matter of substance which affects the working procedures and which should at least

be subject to consultation with the Chairman of the DSB and the Director-General, in accordance with the above-mentioned Article 17.9.

So much for the question of form.

As for the substance, we believe that the practical effect has been to grant individuals and institutions outside the Organization a right that the Members themselves do not possess. In fact, this procedure allows such institutions to present their points of view and possibly even influence a purely legal and interpretative decision of the rules in a specific case, while that right is reserved solely to the parties and third parties to a dispute, even being refused to the other Members of the Organization. We consider this to be highly inappropriate because it alters an Agreement negotiated and adopted multilaterally and, in particular, because this subject was discussed during the negotiations of the Uruguay Round, but was not incorporated into the DSU.

Furthermore, the procedure limits the rights of the parties and third parties. The last paragraph of Section 1 of the factual background note states that the decision gives the parties and the third parties a full and adequate opportunity to comment on and respond to the submissions. However, the fact is that this is not possible within the short and mandatory time-limits which the Appellate Body has to meet in its work.

Moreover, we believe that the members of the Appellate Body have the capacity, knowledge and experience necessary to take the legal decisions incumbent upon them without any outside help.

We come now to the way this communication has been handled. The Secretariat in its factual background note draws attention to its own procedures for increasing the knowledge and understanding of the interested institutions and individuals. We are not questioning these procedures *per se*. However, we believe that the Secretariat cannot act on "automatic pilot" on sensitive issues, especially in the case of the procedures for the settlement of disputes. Secretariat officials need to have a fine sense of how to adapt their communications to needs and know when they should be proactive and when they should exercise self control or show moderation. The different divisions cannot act in ignorance of what is happening in the areas of competence of other divisions and still less in ignorance of the atmosphere prevailing in the Organization and the feelings of its Members.

In conclusion, Mr. Chairman, the preceding analysis, although extensive, has been necessary to justify the following positive conclusions:

- (a) The decision of the Division of the Appellate Body in this case, despite its praise-worthy intentions, together with premature action on the part of the Secretariat, has had the practical effect of altering the agreements, which it is not in its terms of reference to do.
- (b) The Appellate Body must restrict itself to establishing whether a Panel has correctly applied or interpreted the rules in a specific case. However, insofar it knows that its decisions will set precedents, when it identifies difficulties that arise from the wider interpretation of the Agreements it should inform the General Council so that the latter may take the decisions incumbent upon it. [Thus, we believe that in the *US – Shrimp* case, referred to in the Secretariat's background document, when the Appellate Body decided to reject the Panel's interpretation of its powers under Article 13 of the DSU, it should have informed the General Council of this situation so as to obtain an interpretation that could be applied in other cases].
- (c) The General Council has begun today its consideration of the *amicus curiae* briefs sent to the Panels and the Appellate Body. This is a matter of interpretation having

systemic effects that is the responsibility of the General Council. Consequently, we request that this matter be placed on the regular agenda of the General Council and that the Chairman take the appropriate measures in the case so that this Council can adopt an interpretation of general application.

- (d) Panels and the Appellate Body should refrain from acting in this matter until the General Council has given its interpretation.

I request that this statement be published as an official document of the General Council and circulated as a background document when this matter is discussed at the forthcoming meetings of the General Council.

Thank you very much.

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