

Amicus Briefs in the WTO: An Uneasy Compromise*

I. Introduction

1. An *amicus curiae* means a “friend of the court” who, though not a party to a lawsuit, provides the court with information or a brief because of his strong interest in the dispute.¹ Since the Appellate Body (“AB”) of the World Trade Organisation (“WTO”) decided that panels may accept *amicus curiae* briefs in 1998,² there has been extensive debate over this issue for 20 years. One of the chief criticisms from Member states of this decision is that allowing non-state actors to access the Dispute Settlement Mechanism (“DSM”) would undermine the “Member-driven” nature of the WTO.³ Notwithstanding such criticisms, the AB has weathered the storms and continually affirmed the power of the WTO adjudicatory bodies to accept *amicus* briefs.⁴ Ironically, despite this steadfast position, they have displayed great reluctance to actually utilise *amicus* briefs.⁵ This seems to be an uneasy compromise to avoid potential political costs in reaction to the explicit protests from Members.⁶
2. Contrary to commentators that commend the AB for its management of the *status quo*,⁷ this paper argues against this uneasy compromise. First, it explores the normative reasons in favour of the acceptance of the *amicus* briefs. Second, it evaluates how the current treatment of *amicus* briefs is unsatisfactory. Third, it offers suggestions to improve the acceptance of *amicus* briefs in order to reap their potential benefits. Finally, this paper concludes with a vision for the future of *amicus* briefs in the WTO.

II. Normative reasons for the desirability of amicus briefs

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¹ Bryan A. Garner, *Black’s Law Dictionary*, (2009, 9th ed., West) at p. 98.

² WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (6 November 1998) (“*Shrimp*”) at [110].

³ Robert Howse, “Membership and its Privileges: The WTO, Civil Society, and the *Amicus* Brief Controversy” (2003) 9(4) *European Law Journal* 498 (“*Howse*”) at p. 505.

⁴ *Id.*, at p. 508.

⁵ Theresa Squatrito, “*Amicus Curiae* Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?”, (2018) *World Trade Review* 17:1, 65-89 (“*Theresa*”) at p. 72.

⁶ Henry S. Gao, “*Amicus Curiae* in WTO Dispute Settlement: Theory and Practice”, (2006) *China Rights Forum*, 51– 67 (“*Henry*”) at p. 55.

⁷ Maya El Khoury, “The Role of Environmentalist NGOs in the Democratisation of the WTO Dispute Settlement Procedure”, (2012) 15 *S. Cross U. L. Rev.* 53 (“*Maya*”) at p. 70.

3. Article 13 of the Dispute Settlement Understanding (“DSU”) is often raised as the source of the panel’s power to accept and consider *amicus* briefs.⁸ As for the AB, this power stems from either Article 17.9 of the DSU or Article 16.1 of the Working Procedures.⁹ However, the legal basis of the rulings have remained controversial because of the creative interpretations of the provisions said to be the source of this power.¹⁰ Regardless of the legal basis, this paper opines that the AB’s insistence on the desirability of *amicus* briefs can ultimately be justified by normative reasons such as:

- (a) Assisting the WTO adjudicatory bodies by contributing to the clarification of WTO law;
- (b) improving the “democratic deficit” by allowing access to parties’ affected by WTO rulings; and
- (c) providing valuable technical expertise.

Therefore, the benefit of greater participation in the WTO DSM should outweigh the party-control concerns such that *amicus* briefs should be accepted.

A. *Contribution to clarification of WTO law*

4. The role of the WTO adjudicatory bodies in clarifying the law under Article 3.2 of the DSU justifies the need to accept *amicus* contributions.¹¹ Apart from its purpose in settling disputes between Members, their broader institutional role of clarifying legal interpretations of WTO law serve as important signalling mechanisms for Member’s actions in international trade and disputes.¹² Access to the most complete available information in making decisions would be beneficial to the development of WTO jurisprudence.¹³ Even public international law is beginning to recognise the importance

⁸ *Shrimp*, *supra* n 2.

⁹ WTO Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (7 June 2000); WTO Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (7 June 2000) at [38] to [42].

¹⁰ *Henry*, *supra* n 6, at p. 54.

¹¹ *Howse*, *supra* n 3, at p. 501.

¹² Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, (20 May 2008) at [158] to [162].

¹³ D. Shleton, “The Participation of Non-Governmental Organisations in International Judicial Proceedings”, 88 AJIL 611 at p. 625.

of alternative sources of information such as the contributions of non-governmental organisations (“NGO”) in shaping international treaties.¹⁴

5. Furthermore, the WTO’s role as a key player in global governance for international trade law includes responsibilities to consider the interest of the citizens of the world.¹⁵ *Amicus* briefs which advocate for the public interest could also be submitted by other civil actors like academics, who broaden the knowledge on which decisions are made.¹⁶ Especially in appellate review, more sources of information that reflect broader considerations of the law can improve the quality of decisions.¹⁷ As such, the member-driven nature of the WTO¹⁸ should not preclude the legitimate aim of the adjudicatory bodies to clarify WTO law.

B. Improvement of democratic deficit

6. “Democratic deficit” is a criticism that the WTO fails to allow access to the parties whose interests are affected by its rulings.¹⁹ Since the negotiations during the Uruguay round,²⁰ civil society actors have advocated the establishment of a “participatory democracy” which would increase the legitimacy of the system.²¹ Essentially, *amicus* briefs allow the input of voices that would otherwise likely have remained unheard, and address this problem of “democratic deficit”.²²
7. For one, NGOs may face practical difficulties in having their interest considered by the WTO adjudicatory bodies when their interests conflict with the government’s goals.²³

¹⁴ *Maya, supra* n 7, at p. 59; Math Noortmann and Cedric Rvngaert, *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge, 1 ed., 2010).

¹⁵ *Ibid.*

¹⁶ Nicola Charwat, “Who Participates as Amicus Curiae in World Trade Organisation Dispute Settlement and Why?”, (2016) *New Zealand Universities Law Review*, Vol. 27. Available at SSRN: <https://ssrn.com/abstract=3021553> (“*Nicola*”) at p. 363.

¹⁷ *Howse, supra* n 3, at p. 502.

¹⁸ WT General Council, *Minutes of WT General Council Meeting*, WT/GC/M/60, 22 November 2000 at pp. 5, 16, 23.

¹⁹ Keller, Joseph, “The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments,” (2005) *International Journal of Legal Information*: Vol. 33: Iss. 3, Article 7, available at: <http://scholarship.law.cornell.edu/ijli/vol33/iss3/7> (“*Keller*”) at p. 457.

²⁰ The Uruguay Round was the 8th round of multilateral trade negotiations (MTN) conducted between 123 countries from 1986 to 1993 within the framework of the General Agreement on Tariffs and Trade (GATT).

²¹ *Maya, supra* n 7, at p. 58.

²² Claudia Franziska Bruhwiler, “Amicus curiae in the WTO Dispute Settlement Procedure: A Developing Country’s Foe?”, *Aussenwirtschaft*, 60 (3). 347-396. ISSN 0004-8216 (“*Claudia*”) at p. 371.

²³ *Keller, supra* n 20, at p. 458.

However, as seen in *EC – Sardines*,²⁴ a UK-based NGO was able to advance its position against its home country through the use of an *amicus* brief.²⁵ This demonstrates a desirable engagement in supranational governance emphasising the consumer’s interests instead of a particular Member state’s interest.²⁶

8. Second, many WTO disputes affect individual economic actors. Allowing *amicus* briefs accords with the aim of protecting individual economic actors as encompassed in Article 3.2 of the DSU.²⁷ For instance, the *Hormones* dispute between the US and EC affected individual economic actors because it concerned the removal of a trade barrier against hormone treated beef.²⁸ Had the ban on hormone treated beef been lifted, individual European consumers would have faced possible health risks. If such interests are left only in the hands of governments which may prioritise trade interests and economic growth over health concerns, this could be potentially detrimental to individuals.²⁹ Thus, it is desirable that *individual* economic actors have the ability to ventilate their concerns through *amicus* briefs before the WTO DSM.
9. Finally, allowing *amicus* briefs improves the transparency of the WTO DSM by allowing the marketplace of ideas to influence decisions that would ultimately impact the wider public.³⁰ This accords with the judicial nature of the WTO DSM that emphasises natural justice and necessitates the inclusion of voices affected by the decision.³¹
10. As such, the acceptance of *amicus* briefs is desirable in response to the critique of the “democratic deficit” and to bolster the legitimacy of the WTO.

²⁴ WTO Report of the Appellate Body, *EC – Trade Description of Sardines*, WT/DS231/AB/R, 26 September 2002 (“*Sardines*”).

²⁵ Michael Strange, “The discursive (de)legitimation of global governance: political contestation and the emergence of new actors in the WTO’s Dispute Settlement Body”, (2016) *Global Discourse*, 6:3, 352-369, DOI: 10.1080/23269995.2015.1070019 at p. 365.

²⁶ *Ibid.*

²⁷ *Keller, supra* n 20, at p. 459; WTO Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (22 December 1999) at [7.73].

²⁸ WTO Appellate Body Report, *EC — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, (16 January 1998) at [2].

²⁹ Eric Stein, “International Integration and Democracy: No Love at First Sight”, 95 *A.J.I.L.* 489 (2001) at p. 507.

³⁰ *Keller, supra* n 20, at p. 461.

³¹ *Henry, supra* n 6, at p. 55.

C. *Valuable technical expertise*

11. Third, *amicus* submissions can provide valuable expertise which may assist in the quality of dispute resolution. Decisions of the WTO adjudicatory bodies may require knowledge on technical issues such as intellectual property rights, sanitary and phytosanitary standards,³² or complex scientific issues in the areas of health protection and the environment.³³ However, panellists do not always have the requisite knowledge in these specialised fields. Allowing *amicus* submissions would be consistent with the aim of Article 13 of the DSU, which provides for the panel's ability to seek information or consult expert review groups in making their decision.³⁴ Even if the panellists are competent to decide such issues without external aid, this does not detract from the valuable benefits of *amicus* briefs. *Amicus* briefs could bring a specific set of experience or skill set with resources and creativity to assist the adjudicatory bodies of the WTO.³⁵ Consequently, *amicus* briefs could assist the adjudicatory bodies' technical understanding of the dispute, which benefits the dispute resolution and future jurisprudence relied on by industry players.

III. Unsatisfactory state of the treatment of *amicus* briefs

12. Despite the normative desirability of *amicus* briefs, the current treatment of *amicus* briefs is disheartening. This section explores the low utilisation rate of *amicus* briefs by considering the political context, requirements for *amicus* briefs to be considered and the resulting concerns from the current state of affairs.
13. The incredibly low utilisation rate of 18.5% of 98 *amicus* submissions³⁶ shows the WTO adjudicatory bodies' reluctance to meaningfully utilise *amicus* briefs. As can be seen from Table 1 below, the WTO adjudicatory bodies have subtly declined to consider *amicus* briefs due to timing or the lack of necessity or without giving any reasons at all. Even discounting the possibility that some of the *amicus* briefs may be based on irrelevant information or repeat information of the parties' arguments,³⁷ it is extremely rare for *amicus* briefs to be considered by the adjudicatory bodies.

³² *Id.*, at p. 56.

³³ *Maya*, *supra* n 7, at p. 61.

³⁴ *Henry*, *supra* n 6, at p. 56.

³⁵ *Nicola*, *supra* n 17, at p. 340.

³⁶ *Theresa*, *supra* n 5, at p. 72.

³⁷ *Ibid.*

Panel and Appellate Body responses to amicus submissions

Type of response	Percent of amicus
<i>Not considered</i>	81.5%
Reason:	
Reason is not expressed by panel or AB	30.4%
Rejected on grounds that the panel/AB deems it unnecessary to consider	33.7%
Rejected on grounds of timing	15.2%
Other	2.2%
<i>Considered</i>	18.5%

Notes: N = 92. An additional six amicus submission were coded as having an unknown response by the panel or AB.

Table 1: Treatment of *amicus* submissions from 1998 to end 2014³⁸

A. *Political context*

14. The current treatment of *amicus* briefs must be seen in its unique political context. Arguably, the *Abestos* fiasco (as termed by Professor Robert Howse) is the clearest demonstration of the political tension the WTO faces in deciding whether to utilise *amicus* briefs.³⁹ In 2000, the *Abestos* case⁴⁰ was expected to receive many *amicus* briefs because of the grave health effects of exposure to asbestos.⁴¹ Accordingly, the AB introduced a Special Protocol to establish strict time-frames and other procedural requirements for each *amicus* application.⁴² This, however, provoked considerable backlash from the Members.⁴³ A WTO General Council Special Session was held where Members articulated serious opposition to the AB exceeding its authority in its establishment of the Special Protocol.⁴⁴ The Chair of the General Council even expressed the need for the AB to “exercise extreme caution in future cases until

³⁸ *Ibid.*

³⁹ Howse, *supra* n 3, at p. 504.

⁴⁰ WTO Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos Containing Products* (“*Asbestos*”), WT/DS135/AB/R (12 March 2001).

⁴¹ Howse, *supra* n 3, at p. 504.

⁴² *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11, Additional Procedure Adopted Under Rule 16(1) of the *Working Procedures for Appellate Review*, WT/DS135/9 (8 November 2000).

⁴³ Howse, *supra* n 3, at p. 505.

⁴⁴ WT General Council, *Minutes of WT General Council Meeting*, WT/GC/M/60, 22 November 2000 at pp. 28, 29.

Members had considered what rules were needed”.⁴⁵ In that case, the AB rejected all submissions because the formal requirements were not complied with.⁴⁶ This created the perception that the AB had caved to the political pressure exerted by the Members.⁴⁷ Regrettably, the WTO DSM is not immune from political constraints.⁴⁸ The appointment of members of the AB is politicised because powerful Members can veto certain candidates.⁴⁹ Furthermore, the WTO adjudicatory bodies need to encourage compliance with their decisions, prevent “court curbing” and maintain the AB’s institutional legitimacy.⁵⁰ As such, even though the AB does not yield to political pressure from Members, it may have to take certain strategic decisions to protect themselves from political backlash.⁵¹

15. Since then, the AB has weathered the storm by re-affirming its power to accept *amicus* briefs even from WTO Members in the *EC – Sardines* case.⁵² It has also refused to respond to the criticism by the Members in the Special Session, sending a strong signal regarding its judicial independence.⁵³ By now, it is trite that the WTO adjudicatory bodies do have the discretion to accept and consider *amicus* briefs. However, the political context remains an implicit reminder that the utilisation of *amicus* briefs is frowned upon by many Members. Therefore, the low utilisation rate seems to be an uneasy compromise between maintaining the WTO adjudicatory bodies’ discretion to accept *amicus* briefs and managing the Member’s political concerns.

B. Requirements for *amicus* briefs to be utilised

⁴⁵ *Ibid.*

⁴⁶ P. C. Mavroidis and D. J. Neven, “Amicus Curiae Briefs Before the WTO: Much Ado About Nothing”, in A. von Bogdandy, P. C. Mavroidis and Y. Meny (eds), *European Integration and International Coordination: Studies in Transatlantic Economic Law in Honor of Claus-Dieter Ehlermann* (Kluwer, 2002), 317–329.

⁴⁷ *Howse*, *supra* n 3, at p. 505.

⁴⁸ *Theresa*, *supra* n 5, at p. 73.

⁴⁹ Steinberg, R. H., “Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints”, (2004) *American Journal of International Law*, 98(2): 247–275, at p. 274.

⁵⁰ *Theresa*, *supra* n 5, at p. 73.

⁵¹ *Ibid.*

⁵² *Sardines*, *supra* n 24.

⁵³ *Howse*, *supra* n 3, at p. 506.

16. The low utilisation of *amicus* briefs shows that *amicus* briefs only have “conditional access” to the WTO DSM.⁵⁴ In order for *amicus* briefs to be considered, there seems to be two requirements.
17. First, it is necessary for one of the parties to the dispute to endorse the entire *amicus* brief.⁵⁵ Panels have frequently considered *amicus* briefs that have been appended to a party’s submissions.⁵⁶ The panel in *EC – Salmon* explicitly expressed the view that it would only consider the *amicus* submissions “to the extent that parties decided to adopt” those views.⁵⁷ Where the *amicus* brief was only partially agreed upon by the US, the panel in *US – EC Products* refused to take it into account.⁵⁸ This practice seems calculated to allow the WTO adjudicatory bodies to “shield” themselves behind the position of the disputing parties.⁵⁹ However, this is unsatisfactory because it is rare for a disputing party to agree with a third-party *amicus* brief in its entirety. Consequently, the valuable expertise or public interest of such briefs are often overlooked.
18. Secondly, the briefs must be received in a timely manner and relate to factual determinations.⁶⁰ Late submissions of *amicus* briefs are consistently rejected.⁶¹ Practically, this concern is justified because the lack of time for parties to respond to points in the brief will raise serious due process issues.⁶² Hence, the adjudicatory bodies often invite the parties to respond and express their views on the briefs⁶³ in order to prevent undue advantages to any particular party.⁶⁴ However, it is inherently disadvantageous towards *amici curiae* because timetables of proceedings are usually

⁵⁴ *Id.*, at p. 80–81.

⁵⁵ *Ibid.*

⁵⁶ *Shrimp*, *supra* n 2; WTO Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (12 June 2007); WTO Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R (18 June 2014), as modified by WTO Appellate Body Report, WT/DS400/AB/R, WT/DS401/AB/R (20 May 2014) at p. 365.

⁵⁷ WTO Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WTO/DS337/R, (17 November 2006) at [1.13].

⁵⁸ WTO Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WTO/DS212/R (31 July 2002) at [76].

⁵⁹ *Theresa*, *supra* n 5, at p. 82.

⁶⁰ Marceau, G. and M. Hurley, “Transparency and Public Participation: A Report Card on WTO Transparency Mechanisms”, (2012) *Trade, Law and Development*, 4(1): 19–44 at p. 30.

⁶¹ WTO Panel Report, *US – Lead and Bismuth II*, WT/DS138/R (23 December 1999) (“*Lead*”); WTO Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R (20 May 2014).

⁶² *Lead*, *supra* n 61, at [6.3].

⁶³ *Theresa*, *supra* n 5, at p. 82.

⁶⁴ McCall Smith, J., “To Dispute Settlement: The Politics of Procedure in Appellate Body Rulings”, (2003) *World Trade Review*, 2(1): 65–100.

kept confidential.⁶⁵ Unless there is greater access to dispute timetables, this remains a difficulty. Furthermore, *amicus* briefs are consistently utilised for only factual determinations as opposed to legal ones.⁶⁶ Accordingly, there is little contribution to the clarification of WTO jurisprudence. Potential *amici* may be deterred from making the financial investment to submit briefs since the lack of defined rules makes their chances of being heard uncertain.⁶⁷ Taken together, such limitations severely limit the benefits of *amicus* briefs in contributing to WTO jurisprudence.

C. Concerns with current treatment of *amicus* briefs

19. This uneasy compromise is an unsatisfactory halfway house because the low utilisation of the *amicus* briefs renders many of its potential benefits nugatory. Yet, it does not assuage the main concerns of the Members which are the possible prejudice to developing countries and the potential abuse of *amicus* briefs.
20. One central concern is the additional burden placed on developing countries to respond to the briefs and the possibility of a widening gap between the influence of developed and developing countries.⁶⁸ This concern arises from the perception that most affluent NGOs and think tanks likely to make *amicus* submissions originate from Western countries and are likely to represent Western interests.⁶⁹
21. Furthermore, *amicus* briefs could potentially be used as a litigation strategy by developed countries to further tax the limited resources of developing countries.⁷⁰ This would arguably have a disproportionate impact on Least Developed Countries whose limited resources may render it unable to respond properly to a large number of *amicus* briefs.⁷¹

⁶⁵ Gabrielle Marceau and Matthew Stilwell, “Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies”, in *Journal of International Economic Law*, 2001, vol. 4, n 1, p. 155-187 (“*Gabrielle*”) at p. 164.

⁶⁶ *Theresa, supra* n 5, at p. 84.

⁶⁷ *Claudia, supra* n 22, at p. 369.

⁶⁸ *Henry, supra* n 6, at p. 56.

⁶⁹ *Claudia, supra* n 22, at p. 353.

⁷⁰ *Keller, supra* n 20, at p. 456.

⁷¹ *Claudia, supra* n 22, at p. 353.

22. These concerns may have merit in light of the large concentration of *amicus* submissions by civil actors in North America and Europe, as seen in Table 2. In fact, 75.5% of those submissions come from high-income countries with a high level of development.⁷²

Civil society submissions by region								
Region	Total	Business Assoc	Corporate Actor	NGO	NGO+	Academic/ Research/ Expert	Pro Assoc	Trade Union
North America	43	9	1	17	4	8	1	3
Europe	21	10	1	6		2	1	1
Asia	10	8	2					
Central and South America	6	4	1			1		
Africa	3	1	2					
Australia	4	2				2		
Multiregional	12	1		10		1		

Table 2: Breakdown of 99 *amicus* submissions by region between 1996 and 2014⁷³

23. However, these numbers do not necessarily equate to prejudice against developing countries. The US and EU extensively use the WTO DSM and most of the disputes that have attracted large numbers of *amicus* briefs involve either the US or EU.⁷⁴ Also, *amicus* briefs are merely one of the tools available to developed countries because these players have the resources, political power and influence to directly influence the Geneva community.⁷⁵ Given the uncertainty of submissions being considered, it is unlikely that powerful developed countries would use it as a weapon against developing countries.⁷⁶
24. NGOs from developed countries also advocate for global issues⁷⁷ which benefit the citizens of developing countries. NGOs from developed countries and developing countries have collaborated to submit joint *amicus* briefs particularly in intellectual

⁷² Nicola, *supra* n 17, at p. 357.

⁷³ *Id.*, at p. 358.

⁷⁴ *Id.*, at p. 360.

⁷⁵ Keller, *supra* n 20, at p. 465.

⁷⁶ *Ibid.*

⁷⁷ Claudia, *supra* n 22, at p. 370.

property and medicine issues.⁷⁸ In time, such interactions during the submissions of joint briefs could encourage NGOs from developing countries to actively submit independent *amicus* briefs.⁷⁹ Additionally, the fact that a “developing country WTO Member”, Morocco, participated in the *EC – Sardines* case⁸⁰ utilising an *amicus* brief submission as opposed to the formal third-party participation procedure demonstrates that the *amicus* brief submission is a more convenient and cost-effective means of participation for developing Member states.⁸¹ As such, far from “protecting” developing Member states, the low utilisation of *amicus* briefs may in fact harm them.

25. Another main concern is the possible abuse of *amicus* briefs. NGOs may not necessarily advocate for the public interest but seek to advance their own one-sided interests against a particular state’s policies.⁸² Such civil actors could be masking lobbying forces, advancing hidden political standpoints or simply bidding to gain publicity.⁸³ Further, commercial actors account for over 42% of the 99 submissions across 44 disputes between 1996 and 2014.⁸⁴ This hints at the prevalence of commercial interests instead of public interest being advanced through *amicus* briefs. Therefore, the expected benefits from *amicus* briefs to clarify WTO law or advocate for public interest are seldom seen. With the inclusion of WTO Members as potential *amici*, Members may even utilise “ambush style tactics” by withholding significant legal arguments until late in the proceedings.⁸⁵ It is also significantly easier for WTO Members to intervene in disputes since the stringent requirements of third-party intervention need not be satisfied.⁸⁶ Despite such concerns, *amicus* briefs should not be discarded entirely but instead protected through the use of clearly defined mechanisms.

IV. Suggestions to improve the acceptance of *amicus* briefs

26. This paper suggests that a comprehensive set of rules to alleviate the concerns raised by developing countries and guard against the potential abuse of *amicus* briefs discussed above. These improvements must include both substantive and procedural

⁷⁸ *Howse, supra* n 3, at p. 509.

⁷⁹ *Nicola, supra* n 17, at p. 362.

⁸⁰ *Sardines, supra* n 24.

⁸¹ *Howse, supra* n 3, at p. 509.

⁸² *Maya, supra* n 7, at p. 60.

⁸³ *Ibid.*

⁸⁴ *Nicola, supra* n 17, at p. 350, 351.

⁸⁵ *Keller, supra* n 20, at p. 455.

⁸⁶ *Claudia, supra* n 22, at p. 373.

requirements since both play an equally crucial role to safeguard the process. Within the WTO DSM, procedures to regulate the acceptance of *amicus* briefs could be developed by Members, panels or the AB.⁸⁷ Although Members may make an amendment to the DSU under Art X:8 of the Marrakesh Agreement,⁸⁸ the inertia of WTO negotiations make such a scenario extremely unlikely.⁸⁹ Panels may create specific working procedures under Article 12.1 of the DSU provided parties are consulted.⁹⁰ The AB may also develop procedures on an *ad hoc* basis under Article 16(1) of the Working Procedures.⁹¹ However, it must be noted that any such procedures cannot “add to or diminish the rights and obligations” of Members pursuant to Article 3.2 of the DSU.⁹²

A. Substantive requirements

27. There must be the development of clear substantive requirements articulated to determine when *amicus* briefs should be given due consideration. As suggested by the European Communities, *amicus* briefs should:⁹³
- (a) be directly relevant to the factual and legal issues of the dispute;
 - (b) include the direct interest the applicant has in the dispute; and
 - (c) the reasons why the brief would contribute to the resolution of the dispute.
28. The proposed requirement for direct relevance to the dispute seeks to prevent the abuse of civil actors merely wishing to obtain publicity without contributing to the resolution of the dispute. It requires *amicus* to identify exactly why its contribution to either the factual circumstances regarding the dispute or the legal arguments will help the adjudicatory bodies. The brief must also contain a declaration of the applicant’s legal status, objectives, activities and funding.⁹⁴ This would compel applicants to reveal the true nature of their asserted interest⁹⁵ and prevent abuse by Members or commercial

⁸⁷ *Gabrielle, supra* n 65, at pp. 176, 177.

⁸⁸ *Ibid.*

⁸⁹ *Henry, supra* n 6, at p. 55.

⁹⁰ *Gabrielle, supra* n 65, at p. 177.

⁹¹ *Id.*, at p. 178.

⁹² *Id.*, at p. 179.

⁹³ Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding: *Communication from the European Communities*, TN/DS/W/1, 13 March 2002.

⁹⁴ *Ibid.*

⁹⁵ *Keller, supra* n 20, at p. 464.

actors for illegitimate purposes. Disputing parties will not be able to abuse the process by arranging for other entities to bombard the adjudicating body with multiple *amicus* briefs. Such knowledge would ensure that the adjudicatory bodies have the necessary context in which weight should be assigned to particular arguments.

29. Additionally, the WTO adjudicatory bodies should also assess the potential contributions of the briefs with regard to the objectives of the WTO such as sustainable development, the need for positive efforts to help developing countries and the aim of improving the standards of living.⁹⁶ This would assist the development of WTO jurisprudence by taking into account broader perspectives. Furthermore, the substantive requirements guide potential *amici* to prepare their briefs with the intention to contribution to the decision-making.

B. Procedural requirements

30. There should also be practical procedural requirements for *amicus* briefs. For instance, the timing of submissions, length and format should be clearly prescribed.⁹⁷ In order to prevent due process concerns, commentators Gabrielle Marceau and Matthew Stilwell suggested that briefs should be submitted within 10 weeks from the composition of the panel.⁹⁸ This would eradicate the current practice of arbitrarily refusing to accept *amicus* briefs on the basis of the lack of time for parties to respond. Defining the length and format of *amicus* briefs to include an executive summary of the relevant substantive requirements above,⁹⁹ the resources needed by developing countries or the adjudicatory bodies to manage such submissions would be reduced. As such, this would allow a more cost-effective way of managing *amicus* submissions.
31. In any case, the last layer of defence against abuses of the *amicus* process is judicial caution.¹⁰⁰ In deciding whether to admit particular *amicus* briefs, potential considerations such as corporate interests, fairness to developing countries with a lack of resources and unfair litigation tactics should be given thorough consideration.¹⁰¹

⁹⁶ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), Preamble.

⁹⁷ *Gabrielle, supra* n 65, at p. 176, 177.

⁹⁸ *Id.*, at p. 181.

⁹⁹ *Id.*, at p. 182.

¹⁰⁰ *Keller, supra* n 20, at p. 464.

¹⁰¹ *Ibid.*

Where it is necessary to reject *amicus* submissions, the WTO adjudicatory bodies should explain their decision with reference to the substantive and procedural requirements. With these precautions, there would be no need for the WTO adjudicatory bodies to exhibit reluctance in considering *amicus* briefs. Instead, the rules should seek to encourage relevant and useful contributions from *amicus curiae* to WTO jurisprudence.

V. Conclusion

32. In a nutshell, the WTO adjudicatory bodies have had a tumultuous relationship with *amicus curiae* briefs. In managing the political pressures surrounding an international trade organisation, it has settled into an uneasy compromise by allowing *amicus* briefs but seldom meaningfully using them. After 21 years, the time has come for the WTO adjudicatory bodies to address the current unsatisfactory treatment of *amicus* briefs. In view of the normative reasons for the acceptance of *amicus* briefs, the low utilisation rate of *amicus* briefs does not stand up to scrutiny. The displeasure of the Members should no longer serve as back door motivations to reject *amicus* briefs. Instead, the WTO DSM needs to confront the challenge by creating clearly defined supporting structures to assuage Member's concerns and encourage meaningful contributions from *amici*. Instead of treating the "friends of the court" with suspicion, the WTO should welcome these friends with open arms albeit with the caveat that its house rules must be obeyed.

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