

PRACTICAL SUGGESTIONS FOR AMICUS CURIAE BRIEFS BEFORE WTO ADJUDICATING BODIES

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ABSTRACT

The evolution of the multilateral trading system, and the creation of the World Trade Organization, has heightened calls by non-governmental organizations to participate in decisions about trade policy, including in WTO dispute settlement as *amicus curiae*, or ‘friends of the court’. *Amicus* briefs have now been received by a number of WTO panels and the Appellate Body, raising an outcry from many WTO Members, and calls by others for the creation of criteria to guide their use. This note explores the practical implications of *amicus* briefs, and suggests criteria for their use in light of current WTO practice, the goals of the WTO and its dispute settlement mechanism, and the practice of other international courts and tribunals. It commences by examining the main WTO disputes in which *amicus* briefs have been received, and the varying responses of WTO adjudicating bodies. It then examines the approach of other international fora – including the International Court of Justice, the human rights tribunals, and the International Tribunal for the Law of the Sea – to involvement of non-parties. Drawing on these experiences, it suggests that WTO panels and the Appellate Body should weigh both substantive criteria (relating, for example, to the character of the *amici*, the nature of its submission, and the characteristics of the case) and procedural criteria (relating to issues such as timing and format) when determining whether, and if so, how to use *amicus* briefs. The note also identifies the mechanisms that may be used to establish criteria to ensure *amicus* briefs promote predicability and procedural fairness in WTO dispute settlement.

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INTRODUCTION

The increasing ramifications of international trade, as well as the creation of the World Trade Organization (WTO), have changed the dynamics of the multilateral trading system. The WTO agreements, unlike the old GATT, are not concerned primarily with tariff reduction and the like, but extend more deeply into the inner workings of the State.¹ The development of the WTO – its far-reaching agreements, the linking of these agreements into a ‘single undertaking’, the truly multilateral nature of the WTO dispute settlement, as well as the possibility of economic sanctions – has led many within civil society to feel more directly impacted by the trading system.

Many non-governmental organizations (NGOs) have thus claimed that the rights and interests of citizens and civil society are inadequately reflected in WTO decisions. They argue that increased access to WTO processes is required to ensure the representation of all affected constituencies. The scepticism of many is arguably heightened by the confidentiality of the WTO’s dispute settlement mechanism, which gives rise to speculation about ‘what happens’ behind closed doors.² In this context, NGOs of many types have requested the right to submit *amicus curiae*³ briefs (*amicus* briefs) to WTO adjudicating bodies.

Amicus briefs have a long history. They evolved under Roman Law, developed with English Common Law, and were exported to the United States, where they flourished.⁴ Although the use of *amicus* briefs *per se* in

¹ The Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade (and its Code of Good Practice), the Agreement on Trade-Related Aspects of Intellectual Property (which addresses private intellectual property rights), and other WTO agreements may have a significant impact on the interests of individuals and communities. On this issue see panel report on US – Sections 301–10 of the Trade Act of 1974, adopted on 27 January 2000, WT/DS152, (US – Section 301) para 7.73 to 7.90 (stating ‘However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places.’)

² This practice of GATT/WTO dispute settlement mechanism ‘à huis-clos’ stems from a long tradition of both inter-state and commercial arbitration. Nowadays inter-state and commercial arbitration still takes place behind closed doors.

³ *Amicus curiae* is defined in the Black’s Law Dictionary to mean ‘literally, friend of the Court. A person with a strong interest in or views on the subject-matter of an action, but not a party to the action, may petition the Court for permission to file a brief . . . Such *amicus curiae* briefs are commonly filed in appeals concerning matters of broad public interest.’ In this note, we use the term ‘*amicus* brief’ to include letters and other information submitted by non-parties to dispute settlement proceedings.

⁴ On the history of *amicus* briefs and their use before the US Supreme Court and other national and international tribunals, see Dinah Shelton, ‘The Participation of Nongovernmental Organizations in International Judicial Proceedings’, 88(4) *Am J Int’l L* (1994), 611; See also, Samuel Kislov, ‘The Amicus Curiae Brief: From Friendship to Advocacy’, Ernest Angell, ‘The Amicus Curiae: American Development of English Institutions’ 16 *Int’l & Comp LQ* (1966), 1017; E. R. Beckwith and R. Sobernheim, ‘Amicus Curiae – Minister of Justice’, 17 *Fordham L Rev* (1948) 38, 40; Karen O’Connor and Lee Epstein, ‘Amicus Curiae Participation in US Supreme Court Litigation: An

France and other civil law countries has been limited, these systems provide organizations that have an interest at stake in a dispute with rights of action and intervention. Today, *amicus* briefs are being used before many domestic courts and to a lesser degree before international tribunals.

Recently, WTO panels and the Appellate Body have received *amicus* briefs. This development has produced an outcry from many WTO Members that are opposed to NGO involvement in WTO dispute settlement. Other Members have noted the need to ensure that WTO adjudicating bodies have guidance about whether they may accept and consider *amicus* briefs, and if so, under what circumstances. Guidance, in the form of criteria and other procedures, could be used to reduce the current uncertainty surrounding the use of *amicus* briefs, and to help promote predictability and due process.

The purpose of this note is to help WTO Members to explore the practical implications of participation by *amici*, and to offer some pragmatic means for panels and the Appellate Body to address *amicus* briefs in light of current WTO practice, the goals of the WTO and its dispute settlement mechanism, and the practice of other international courts and tribunals. It does *not* seek to enumerate the advantages or disadvantages of *amicus* briefs in WTO dispute settlement. Rather, acknowledging that panels and the Appellate Body have already received and considered such briefs, it seeks to find ways to ensure that this participation helps to strengthen the integrity of the WTO dispute settlement system.

This note is divided into four sections. The next section (Section I) examines the current practice of WTO panels and the Appellate Body, and explores some of the issues raised by this practice. The practice of other international fora in relation to involvement of non-parties in dispute settlement, including through the use of *amicus* briefs, is discussed in Section II. Building on experience in the WTO and other fora, the note concludes in Section III by identifying some practical suggestions for the use of *amicus* briefs before WTO adjudicating bodies. It discusses mechanisms that WTO Members, panels, and the Appellate Body may use to establish rules for *amicus* briefs; the nature and objectives of *amicus* briefs in the context of WTO dispute settlement; and some procedural and substantive criteria that may be applied by panels and by the Appellate Body.

I. CURRENT WTO PRACTICE ON *AMICUS CURIAE* BRIEFS

The consideration of *amicus* briefs is a recent development in the context of the multilateral trading system. On a few unreported occasions, non-solicited

Appraisal of Hakman's "Folklore", 16(2) *Law and Society Review* (1981-82), 311; Martin A. Olz, 'Non-Governmental Organizations in Regional Human Rights Systems', 28 *Colum Hum Rts L Rev* 307 (1997). See also Ruth Wedgwood, 'Legal Personality and the Role of Non-Governmental Organizations' in Rainer Hofmann (ed), *Non-State Actors as New Subjects of International Law* (1999), at 26.

briefs of an '*amicus curiae*' type were sent to the GATT Secretariat for consideration by panels. It is understood that these were not considered by panelists, on the basis that the dispute settlement system was strictly government-to-government, and panelists were expected to address only those claims and arguments submitted by parties to the dispute.⁵

The evolution of the GATT into the WTO brought with it many changes to the way trade disputes are resolved.⁶ In particular, the Appellate Body has said that WTO adjudicating bodies may consider *any* argument⁷ they identify as relevant and not merely those raised by the parties.⁸ Panels and the Appellate Body may now find legal support in arguments not invoked by any party. Consequently, all submissions – including non-solicited *amicus* briefs – become a source of ideas and arguments that may affect the outcome of a dispute. *Amicus* briefs, and the practice of panels and the Appellate Body in relation to them, are therefore of considerable importance.

A. Practice in WTO panels

Amicus briefs have now been submitted to a number of WTO panels, and the practice adopted towards them has varied considerably. Non-solicited briefs were submitted to panels in *US – Gasoline* and in *US – Hormones*. These briefs, following previous GATT practice, were not considered by the panels.

In *US – Shrimp*, two groups of environmental NGOs sent briefs to the Panel,⁹ arguing that it was permitted to accept and consider the briefs under

⁵ Under GATT practice, third-party's arguments were addressed only to the extent that they were formally adopted by one of the parties. See the Panel Report on *Japan – Semi Conductors*, BISD paras 4–5; *US – Customs Users fee*, BISD 355/245, para. 129.

⁶ These include the new rule of 'automaticity' (where decisions are adopted unless rejected by consensus of all WTO Members), the *de facto* rule of precedent, the independence of the Appellate Body, and the direct participation of private lawyers to represent WTO Members in dispute settlement. (Private lawyers were admitted for the first time in a hearing before the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R ('*EC – Bananas III*'), paras 5 to 12 and before a panel in *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted on 23 July 1998, WT/Ds 54,55,59, 64/R, para 14.6.)

⁷ Including those raised by the Panel itself.

⁸ See the Appellate Body reports on *EC – Bananas III*, para 141–43 and on *EC – Measures Concerning Meat and Meat Products (Hormones)*, adopted 13 February 1998, WT/DS26,48/AB/R, ('*EC – Hormones*'), para 155. Here a distinction should be made between factual and legal arguments. In *Japan – Measures Affecting Agricultural Products*, adopted on 19 March 1999, WT/DS76/AB/R, (*Japan – Varietals*) the Appellate Body made clear that the evidence obtained by the Panel from the experts could not alter the rules on burden of proof: 'A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU . . . to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party', para 129.

⁹ One *amicus* brief was submitted jointly by the Center for International Environmental Law, Center for Marine Conservation, The Environmental Foundation Ltd, The Philippine Ecological Network, and Red Nacional de Accion Ecologia, the second by World Wide Fund for Nature, International, and the Foundation for International Environmental Law and Development.

Article 13 of the Dispute Settlement Understanding (DSU).¹⁰ Article 13, entitled *Right to Seek Information*, authorizes panels to ‘seek information from any relevant source and . . . consult experts to obtain their opinion’.¹¹ The Panel rejected the *amicus* briefs, on the basis that they had not ‘sought’ them as required by Article 13. It stated,

Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material.¹²

The Panel’s legal ruling was, however, overturned by the Appellate Body, which stated:

. . . authority to *seek* information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.¹³

The Appellate Body went on to identify some important factors that are relevant to a panel’s discretion to accept and consider information, including that contained in *amicus* briefs:

It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide *what weight*

¹⁰ Article 13 of the DSU provides: ‘1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks 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. 2. Panels may 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. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.’

¹¹ *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparels and other Items*, adopted on 22 April 1998, WT/DS56/AB/R (*Argentina – Textiles*), paras 84 to 86. The Appellate Body characterized Article 13 as ‘a grant of discretionary authority’ and referred to the ‘sound discretion’ of the panel to determine what is necessary or appropriate within the bounds of its discretionary authority under Article 11 and 13 of the DSU. See also, Appellate Body Report on *EC – Hormones*, at para 103.

¹² Panel Report on *United States – Import Prohibition Certain Shrimp and Shrimp Products*, adopted as amended by the Appellate Body Report on 6 November 1998, WT/DS58/R (*US – Shrimp*), at para 7.8.

¹³ Appellate Body Report on *US – Shrimp*, para 108–10.

to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.¹⁴

Since the decision, *US – Shrimp*, *amicus* briefs have been sent to five WTO panels.¹⁵

In *US – British Steel*, two industrial NGOs – the American Iron and Steel Institute and the Specialty Steel Industry of North America – sent briefs to the Panel after its second meeting. The Panel refused to receive the *amicus* briefs on the basis that they were untimely.¹⁶

In the *Implementation Panel (Article 21.5 DSU) of Australia – Salmon*, the Panel received a non-solicited letter from ‘Concerned Fishermen and Processors in South Australia’.¹⁷ The letter, which was received before the first meeting of the Panel, sought to explain why Australia treated imports of salmon differently from imports of pilchards (for use as bait or fish feed). In a preliminary ruling, the Panel stated that it ‘considered the information submitted in the letter as relevant to its procedures and . . . accepted this information as part of the record’.¹⁸ The panel stated that it ‘did so pursuant to the authority granted to the Panel under Article 13.1 of the DSU’.¹⁹ In its final report, the Panel noted ‘We confirm this ruling recalling, in particular, that the information submitted in the letter has a direct bearing on a claim that was already raised by Canada, namely inconsistency in the sense of Article 5.5 of the SPS Agreement in the treatment by Australia of pilchard *versus* salmon imports.’²⁰

In *US – Section 110(5) of the Copyright Act*, the Panel discussed treatment of information contained in a letter to the USTR from a law firm representing the American Society of Composers, Authors, and Publishers. The letter, which was copied to the Panel and received after its second meeting, contained information responding to one of the Panel’s questions to the parties. The Panel stated:

In this dispute, we do not reject outright the information contained in the

¹⁴ Appellate Body Report on *US – Shrimp*, para 104.

¹⁵ This is current as at the date of writing of this paper.

¹⁶ Panel Report on *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel . . . (US – British Steel)*, WT/DS138/R, para 6.3: ‘The AISI brief was submitted after the deadline for the parties’ rebuttal submissions, and after the second substantive meeting of the Panel with the parties. Thus, the parties have not, as a practical matter, had adequate opportunity to present their comments on the AISI brief to the Panel’. As further discussed in the next section, this case was appealed and the issue of *amicus curiae* briefs was addressed.

¹⁷ Implementation Panel of *Australia – Measures Affecting Importation of Salmon*, adopted on 17 April 2000, WT/DS18/RW (*Implementation Panel of Australia – Salmon*), at para 7.8, citing the Appellate Body Report on *US – Shrimp*, at para 108. Note that since this was an Article 21.5 Implementation Panel, there was only one meeting, but two exchanges of submissions. The letter from the fishermen was sent before the rebuttal submissions.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at para 7.9.

letter from the law firm representing ASCAP to the USTR that was copied to the Panel. We recall that the Appellate Body has recognized the authority of panels to accept non-requested information. However, we share the view expressed by the parties that this letter essentially duplicates information already submitted by the parties. We also emphasize that the letter was not addressed to the Panel but only copied to it. Therefore, while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings.²¹

In *EC – Bed Linen*, the Panel received a non-solicited *amicus* brief written in support of India’s submission on behalf of the Foreign Trade Association. The brief was provided to the Panel before its first meeting and was distributed by the Panel to the parties. The Panel invited comments on the brief, reported that no party made substantive comments, and concluded that ‘[we] did not find it necessary to take the submission into account in reaching our decision in this dispute.’²²

In *EC – Asbestos*, the Panel received non-solicited *amicus* briefs from four NGOs. The first was received from Collegium Ramazzini before the first panel meeting. After this meeting, three others – from Ban Asbestos Network; Instituto Mexicano de Fibro-Industrias AC; and American Federation of Labor and Congress of Industrial Organizations – were received. These briefs were transmitted to the parties for their information. In response, the EC incorporated two of the briefs into its submission, and requested the Panel to reject the two others as lacking relevance. Canada, by contrast, requested the Panel to ignore all *amicus* briefs in light of their general nature and the advanced stage of the proceedings. Canada considered that in the event the Panel decided to accept the briefs, ‘for the sake of procedural fairness, the parties should have an opportunity to comment on their content.’²³ Before the second panel meeting, the Panel stated that it would consider the *amicus* briefs incorporated by the EC on the same basis as the other documents it furnished, and submit them to the scientific experts for their information. At the second panel meeting, the Panel gave Canada the opportunity to reply, in writing or orally, to the arguments set forth in the two *amicus* briefs. At that same meeting, the Panel, without offering reasons, informed the parties that it had decided not to take into consideration the other two *amicus* briefs. After the interim report was issued the Panel received a fifth brief from Only Nature Endures. The Panel decided not to accept this brief at this late stage of the procedure, but copied the brief to the parties and informed them and the NGO of its decision.

²¹ Panel Report on *United States – Section 110(5) of the Copyright Act*, WT/DS/160, adopted 27 July 2000, at para 6.8.

²² Panel Report on *European Communities – Antidumping Duties on Imports of Cotton-type Bed Linen from India (EC – Bed Linen)*, para 6.1 and fn 10.

²³ Panel Report on *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, WT/DS135/R, (*EC – Asbestos*), at para 6.2.

B. *Amicus curiae* briefs before the Appellate Body

The Appellate Body has also considered the question of whether, like panels, it may accept and consider *amicus* briefs. On appeal in *US – Shrimp*, the Appellate Body determined, as part of its procedural ruling,

. . . to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various non-governmental organizations in the three briefs attached as exhibits to the appellant's submission of the United States, as well as the revised version of the brief by the CIEL which was submitted to us on 3 August 1998.²⁴

This ruling raises two issues of interest. The first relates to the treatment by the Appellate Body of the three briefs that were 'attached' to the United States' submission. In relation to these, the Joint Appellees argued that by virtue of their incorporation into the United States' submission, these NGO pleadings were no longer '*amicus* briefs'. The Appellate Body did not respond to this argument directly, but concluded,

We admit therefore, the briefs attached to the appellant's submission of the United States as part of that appellant's submission. At the same time, considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main US appellant's submission.²⁵

Here, the Appellate Body implicitly drew a distinction between *amicus* briefs that are 'attached' to a party's submission and 'unattached' briefs. If attached, the *amicus* brief becomes part of the party's submission. According to the Appellate Body, 'We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission.'²⁶

This aspect of the Appellate Body's decision raises a second issue: the basis upon which the Appellate Body accepted for consideration the revised CIEL brief, which was *not* attached to the United States' submission. Although the Appellate Body noted that it would provide reasons in its final report for this interim procedural decision, nothing was ultimately said about the basis for accepting this brief. It was not until the subsequent decision of *US – British Steel* that the Appellate Body explained how it would approach 'unattached' *amicus* briefs.

In *US – British Steel* the Appellate Body clarified its approach to *amicus* briefs. In this case, the Appellate Body accepted two non-solicited briefs (from the NGOs that failed at the panel level), concluding that it was authorized to do so because Article 17.9 of the DSU makes it clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict

²⁴ Appellate Body Report on *US – Shrimp*, para 83.

²⁵ *Id.*, para 91.

²⁶ *Id.*, para 89.

with any rules and procedures in the DSU or the covered agreements. It also stated that Rule 16(1) of the *Working Procedures* allows the Appellate Body to develop an appropriate procedure where a procedural question arises that is not covered by the *Working Procedures*. It stated:

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 it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.²⁷

The decisions of the Appellate Body in *US – Shrimp* and *US – British Steel* have sparked controversy among WTO Members, many of which have expressed concern that the acceptance of *amicus* briefs raises a series of substantive and practical issues for the WTO dispute settlement system.

C. Issues raised by current WTO practice on *amicus curiae* briefs

WTO Members have expressed a variety of views about current WTO practice on *amicus* briefs. Many WTO Members believe that panels and the Appellate Body should not accept non-solicited information from non-WTO Members. They insist that acceptance of *amicus* briefs will alter the government-to-government nature of the dispute settlement system and change the rights afforded to parties and third parties.²⁸ Some Members, by contrast, claim to remain ‘open minded’ about the submission of *amicus* briefs, and have identified this as an issue for further discussion by WTO Members.

Virtually all WTO Members have emphasized that acceptance and consideration of *amicus* briefs raises some important practical issues. One is that panels and the Appellate Body have accepted and considered briefs without providing criteria as to the appropriate source and nature of information, or the circumstances under which WTO adjudicating bodies may consider the information ‘pertinent and useful’. Consequently, WTO Members have little guidance as to what practice to expect in future cases. Another issue is that *amicus* briefs may arrive at any time, and panels and the Appellate Body seem to accept them when convenient and do not always explain why they have chosen to accept or reject them. So far *amicus* briefs are only certain to be considered when they have been supported by one of the parties, and as such

²⁷ Appellate Body Report on *US – British Steel*, at para 42.

²⁸ Some WTO Members have argued that the acceptance of *amicus* briefs *diminishes* the rights of WTO Members, because *amici*, but not third-party Members, may participate in Appellate proceedings without first participating at the panel level. It is relevant to note, however, that the DSU provides *only* Members with an explicit right to participate in WTO proceedings, whereas the opportunity to participate as *amici* is subject to the discretion of the adjudicating body. If anything, *amicus* briefs may conceivably *add* to the rights of Members, as they could also submit such briefs. It could also be argued that the capacity to accept *amicus* briefs is inherent in the WTO system (including Article 13) and there is consequently no change to Member’s rights and obligations. See Minutes of the DSB of 14 December 1998 (WT/DSB/M/50) of 7 June 2000 (WT/DSB/M/83), of 19 June 2000 (WT/DSB/M/84), and document WT/DSB/W/137.

become part of a party's submission. A third issue is that WTO Members may not always know which arguments are likely to catch the attention of the panel or the Appellate Body. Developing countries have noted that this may increase the burden on countries that have only limited resources to apply to WTO dispute settlement. To ensure security and predictability, Members need guidance as to the legal value panels and the Appellate Body may attach to such non-solicited briefs. Finally, many WTO Members have raised concern over opening the 'floodgates' to numerous submissions from non-WTO Members. Developing countries are particularly concerned that they may be deluged by submissions from northern NGOs with significant resources to devote to influencing the outcome of WTO disputes, including industry associations and firms.

Many WTO Members have noted the need for guidelines or criteria to address the issues raised by the acceptance and consideration of *amicus* briefs. Criteria, whether developed by WTO Members, or by panels and the Appellate Body, should build on previous WTO experience, and could take into consideration as appropriate the practice of other international fora.

II. PRACTICE IN OTHER INTERNATIONAL FORA

Participation of NGOs (defined here to cover all non-state actors including legal or natural persons) in international courts and tribunals varies considerably depending on the nature of the institution and the kind of matters the institution addresses.

NGOs may participate in three main capacities: as party, as 'intervener', and as *amicus curiae*. As discussed below, NGOs may gain standing as *parties* in certain circumstances. Some human rights tribunals, for example, provide NGOs with the right to initiate disputes, as does the International Center for the Settlement of Investment Disputes (ICSID) Tribunal for firms. Similarly, NGOs may gain standing to *intervene* in disputes (without necessarily being bound by the conclusions), as is the case with the ECJ. In addition to providing standing to NGOs, some of these dispute settlement systems also accept *amicus* briefs from non-parties. By contrast, a number of tribunals (primarily inter-state tribunals such as the ICJ, ITLOS, or NAFTA Chapter 20 where NGOs have no standing) do not have an established practice of accepting *amicus* briefs from NGOs.

It is important to note that where NGOs are involved as either parties or 'interveners', they are granted 'standing'; when they are allowed to act as *amicus curiae*, by contrast, the NGOs do not gain standing per se, but may participate at the discretion of the tribunal. Thus, strictly speaking the term '*amicus curiae* briefs' should be used only when referring to submissions by organizations and individuals that do not gain standing to participate as a party or intervenor.

The following section provides a brief overview of the practice of interna-

tional courts and tribunals in relation to participation by non-state actors, including through *amicus* briefs.

A. The International Court of Justice (ICJ)

The cases heard by the ICJ fall into two categories: contentious cases and advisory opinions. In contentious cases²⁹ standing is provided only to States.³⁰ States may also request permission to intervene if their legal interests may be affected by the decision,³¹ or if a convention to which they are a party is being construed; in such cases the intervener will be bound by the conclusions of the Court.³² Article 34.2 of the Statute provides that the Court may request information from ‘public international organization’ (defined as organization of States)³³ and [the Court] ‘shall receive such information presented by such organizations on their own initiative’.³⁴

Advisory opinions³⁵ can be requested by those ‘public international organizations’ that are authorized by the United Nations Charter. Article 66.2 of the Statute provides that ‘The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or *international organization* considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question’.³⁶ Thus for advisory opinion the term ‘public’ – for international organizations – does not appear in Article 66 of the Statute nor in the Rules of the Court. Although some authors have extended the provisions of the Statute to cover NGOs, it is the general view that Article 66 covers only intergovernmental organizations.³⁷

²⁹ Articles 34 to 64 of the ICJ Statute.

³⁰ Article 34 of the ICJ Statute.

³¹ Article 62 and Rules 81 to 85.

³² Article 63 and Rule 86.

³³ Article 69.4 of the Rules of the Court on advisory opinions provides that ‘the term public international organizations denotes an organization of States’. This clearly excludes NGOs.

³⁴ Article 69.2 of the Rules of the Court provides details on how and when such unsolicited information can be furnished to the Court by public international organizations.

³⁵ Articles 65 to 68 of the ICJ Statute.

³⁶ Article 66.4 adds that ‘States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case.’

³⁷ Roger Clark in his book *The Case Against the Bomb* points out at page 5 that a substantial number of NGOs were interested in the Nuclear Weapons cases, especially ‘The World Court Project’ – a coalition of three NGOs – and that along with other groups and individuals they contributed to ‘public discussions’. They did not however submit anything to the Court: Clark points out: ‘Under ICJ Statute art 66(2), the Court, in advisory proceedings, may receive written and oral statements from NGOs (ibid at 27, n 69). This, however, seems contrary to the views of most other scholars,

Although there appears to be no provision in the ICJ Statute explicitly allowing the Court to request or receive *amicus* briefs or other information from NGOs³⁸ – even for advisory opinions – Shelton reports that in the *1950 Advisory Opinion on the International Status of South-West Africa*, the International League of the Rights of Man requested permission to submit written and oral statements.³⁹ The Court decided that it would receive a written statement if submitted within a particular deadline and confined to the legal questions under consideration by the Court. The League was notified accordingly, but it did not send any communication within the prescribed deadline.⁴⁰ In the *Asylum* case (between Peru and Colombia), a similar request by the same NGO was refused by the Registrar, who stated that the ‘International League of Rights of Man cannot be characterized as a public international organization as envisaged in the Statute’.⁴¹ The same NGO was refused permission in the *1971 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*.⁴²

In the *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* case, the Registrar, following the request of the International Physicians for the Prevention of Nuclear War to submit information as *amicus*, informed the NGO that ‘in light of the circumstances of the case and the scope of the WHO’s request, the Court had decided not to ask the organisation to

and to the general practice of the Court. See also Dinah Shelton’s article, above n 4, at 619. See also Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge, UK: Cambridge University Press 1999), at 9.

³⁸ See Rosalyn Higgins, ‘Remedies and the International Court of Justice: An Introduction’ in Malcom Evans (ed), *Remedies in International Law* (Oxford: Hart 1998), at 1: ‘There is no realistic prospect, for all the reasons already indicated and more of them [NGOs] being litigants. *But it is not impossible that the Court might in the future be able to receive briefs amicus curiae from NGOs or from other knowledgeable persons.* . . . Under the [ICJ] Statute as it stands, NGOs may not directly participate in advisory opinions, any more than in litigation. [In the Nuclear Weapons cases] the Court took an early decision that it would not make the myriad of briefs and memoranda it was receiving from NGOs on the subject of nuclear weapons part of the docket. At the same time they were not simply thrown out. They were placed in the library, and every judge knew week to week what was coming in, and it was up to each judge to decide if he wished to go beyond the already voluminous official pleadings and to read the other material’. (emphasis added)

³⁹ Dinah Shelton, above n 4, at 623.

⁴⁰ *International Status of South-West Africa*, ICJ Rep [1950], at 130.

⁴¹ Dinah Shelton, above n 4 at 623, referring to the Letter from the Registrar, 1950 ICJ Pleadings (2 *Asylum*) 227 (7 March 1950). The Registrar noted the difference in the wording between ‘international organization’ for advisory opinions (Article 66) and ‘public international organizations’ for contentious cases (Article 34).

⁴² *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ Rep.16 on 21 June 1971 taken from Dinah Shelton, above n 4, at 624.

submit a written or oral statement'.⁴³ However, the petitions signed, and other information collected, on the effects of nuclear testing were kept in the library of the ICJ for consultation by the judges. Judge Oda, in his separate opinion, referred to comments made by the International Physicians for the Prevention of Nuclear War and by the World Federation of Public Health Associations.⁴⁴ Similarly, in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Judge Weeramantry, in his dissenting opinion, referred to the Japanese Association of Doctors Against the A- and H-Bombs, and to the various petitions and information submitted to the Court, as evidence of 'the international community's attitude towards nuclear weapons' and the 'unanimous sentiment expressed by the global community'.⁴⁵

B. The International Tribunal on the Law of the Sea (ITLOS)

The ITLOS is responsible for adjudicating disputes concerning the interpretation and application of the United Nations Convention on the Law of the Sea. Under Article 20 of the Statute, only States have standing before ITLOS. Article 31 allows States to intervene in certain circumstances and interveners are bound by the conclusions of the judgment.⁴⁶ Article 289 also provides that in any dispute involving scientific or technical matters, a court

⁴³ Taken from Dinah Shelton, above n 4 at 624, referring to the letter of the Registrar to Dr Barry Levy (28/3/94) in the Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* case.

⁴⁴ Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* case, ICJ Rep [1996] at 92, para 9.

⁴⁵ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep [1996] 308–12. It is also reported that some States' pleadings were in fact written and strongly influenced by NGOs. On this issue the President Guillaume, in his separate opinion, wrote: '... La Cour aurait pu songer dans ces conditions à ne pas donner suite à la demande d'avis dont elle était saisie. Cette solution aurait trouvé quelque justification dans les circonstances mêmes de la saisine. En effet, l'avis sollicité par l'Assemblée générale des Nations Unies (comme d'ailleurs celui demandé par l'Assemblée mondiale de la Santé) a trouvé son origine dans l'action menée par une Association dénommée 'International Association of lawyers against nuclear arms' (IALANA) qui, de concert avec divers autres groupements, a lancé en 1992 un projet intitulé 'World Court Project' afin de faire proclamer par la Cour l'illicéité de la menace ou de l'emploi des armes nucléaires. Ces associations ont fait preuve d'une intense activité en vue de faire voter les résolutions saisissant la Cour et de provoquer l'intervention devant cette dernière d'Etats hostiles aux armes nucléaires. Bien plus, la Cour et les juges ont reçu des milliers de lettres inspirées par ces groupements et faisant appel tant à leur conscience qu'à la conscience publique.'

Je suis certain que les pressions ainsi exercées ont été sans influence sur les délibérations de la Cour, mais je me suis interrogé sur la question de savoir si, dans ces conditions, on pouvait encore regarder les demandes d'avis comme émanant des Assemblées qui les avaient adoptées, ou si, appliquant la théorie de l'apparence, la Cour ne devait pas les écarter comme irrecevables. J'ose cependant espérer que les gouvernements et les institutions intergouvernementales conservent encore une autonomie de décision suffisante par rapport aux puissants groupes de pression qui les investissent aujourd'hui avec le concours des moyens de communication de masse. Je constate en outre qu'aucun des Etats qui s'est présenté devant la Cour n'a soulevé une telle exception. Dans ces conditions, je n'ai pas cru devoir la retenir d'office.'

⁴⁶ These provisions are similar to those in Articles 62 and 63 of the ICJ Statute.

or tribunal exercising jurisdiction under ITLOS may, *at the request of a party or proprio motu* (on its own initiative), select in consultation with the parties no fewer than two scientific or technical experts, to sit with the court or tribunal but without the right to vote.

C. The International Criminal Tribunals (former Yugoslavia and Rwanda)

Under the International Criminal Tribunals for the former Yugoslavia only the Prosecutor has the authority to initiate prosecution⁴⁷, and only the Prosecutor and the alleged criminal have standing; thus states cannot intervene. *Amicus* briefs are permitted, under Rule 74 of the Rules of Procedure and Evidence, entitled *Amicus Curiae*, which provides '[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.'⁴⁸ The International Criminal Tribunal for Rwanda contains identical provisions relating to *amici*.⁴⁹

D. International Criminal Court

As at the International Criminal Tribunals for the former Yugoslavia and for Rwanda, at the International Criminal Court (not yet in force), only the prosecutor will be permitted to initiate prosecution.⁵⁰ States are not allowed to intervene. Rule 103 of the Rules of Evidence and Procedure of the International Criminal Court, entitled *Amicus curiae and other forms of submissions*, states that '[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.'

E. European Court of Justice ('ECJ') and the Court of First Instance

Article 37 of the Statute of the ECJ provides that any person establishing an interest in the result of any case submitted to the Court may intervene, save

⁴⁷ Articles 16.1 and 18 of the Statute for the ICT for the Former Yugoslavia. Article 17.1 of the Statute of the ICT for Rwanda clarifies that the Prosecutor shall initiate his investigation *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations.

⁴⁸ Rule 74 of the Rwanda War Crime Tribunal is identical.

⁴⁹ For instance, leave to appear as *amicus* was given in favour of an individual in the Tihomir Blaskic case. Similarly, numerous submissions by *amici* were received in the *Blaskic* case regarding the power of the Tribunal to issue subpoenas and binding orders. Submissions by *amici* in the Akayesu case played a role in determining whether charges of sexual assault should be addressed. See Kelly D. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 Am J Int'l L (1999), 97, 106 n 45.

⁵⁰ Article 53.1 of the Rome Statute of the International Criminal Court.

in cases between Member States and/or institutions of the Community, and where the ECJ is requested by a national court to give an interpretative ruling of Community Law.⁵¹ In practice, the possibility for private intervention arises solely in cases where an individual brings a case against a Community Institution.⁵²

Private intervention proceeds on the basis of a 'leave to intervene' and the principal parties are given an opportunity to submit their observations on the application. To intervene the person must show a direct, specific, and economic interest in the outcome of the dispute. The ECJ has held that a moral interest in the proceedings is not sufficient to permit intervention.⁵³ Interveners receive a copy of the parties' submissions and are given an opportunity to make written and oral statements to the ECJ, and to submit relevant evidence. The principal parties have a right of reply.⁵⁴ Although such interveners have 'standing' (thus their participation is distinct from that of the principal parties), interveners must support the claims of one of parties (although on the basis of its own arguments), but they are not bound by the conclusions of the judgments. The rights of intervention seem to exhaust opportunities for participation by NGOs.⁵⁵

F. Regional human rights tribunals

1. Organization of African Unity – African Court of Human and Peoples' Rights
The proposed African Court of Human and People's Rights has been characterized as giving NGOs a significant role in the resolution of human rights complaints.⁵⁶ Article 25(2) of the Draft Protocol Establishing the African Court of Human and Peoples' Rights empowers the Court to accept *amicus* on a case-by-case basis. NGOs and individuals with observer status will be entitled to initiate cases under Article 6(1) where the relevant state

⁵¹ It is relevant to note that any person that is a party or intervener in the national proceedings that led to the ECJ's proceedings is recognized as a party with full rights of participation in the ECJ's proceedings.

⁵² Since 1994, the Court of First Instance has had jurisdiction to hear all such cases, with an appeal lying to the ECJ on points of law. Both courts apply the same rules on intervention. In an appeal from a judgment of the Court of First Instance, and subject to compliance with Article 37, both government and private intervention are permitted before the ECJ, even if the intervener played no part in the proceedings before the Court of First Instance.

⁵³ Thus, the Belgian League for Human Rights was not entitled to intervene in a case, which did not have as its object the protection of an individual's legal rights. See Order dated 13 February 1990 in *X v Commission* [1992] ECR II – 2195 (T-121/89).

⁵⁴ Rule 93 of the Rules of Procedure of the ECJ. See R. Plender, *European Courts – Practice and Precedent* (London: Sweet and Maxwell 1997), 613–44; Dinah Shelton, n 4 at 629.

⁵⁵ Note that the ECJ refers to the submission of the intervener as an *amicus* brief. However when allowed to participate the intervener is given full standing.

⁵⁶ See Abdelsalam A. Mohamed, 'Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights', 8 MSU-DCL J Int'l L 377 (1999).

has accepted the Court's jurisdiction for such cases. Such NGOs would thus have standing. But according to the Draft Protocol, the Court cannot accept cases submitted by individuals unless 'exceptional grounds' can be demonstrated and the NGOs comply with the admissibility criteria contained in Article 56 of the African ('Banjul') Charter on Human and Peoples' Rights.⁵⁷

2. Organization of American States – Inter-American Court of Human Rights

Despite an absence of explicit language in its statute or rules of procedure, the Inter-American Court of Human Rights has developed an extensive practice of accepting *amicus* briefs, both in relation to contentious cases and advisory proceedings.⁵⁸ Article 44(1) of the rules of procedure allows the acceptance of third-party information. However, the Court has generally referred to *amicus* briefs in its opinions without referencing Article 44(1). In practice, the Court accepts nearly all briefs filed, and explicitly refers to the great majority in its rulings.⁵⁹

3. European Court of Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11, authorizes the participation of individuals and NGOs before the European Court of Human Rights. Article 34 of the Convention, which builds on the Court's existing practice of allowing non-state participation, includes a right of action for any individual, group, or NGO claiming to be the victim of state actions that are in violation of the Convention.⁶⁰ The Court's discretion to accept such cases is defined broadly in Article 37 to include the right to accept cases 'for any other reason established by the Court'.

Protocol 11 also formalized the acceptance of such *amicus* briefs. Article 36(2) of the revised Convention now provides that persons other than the applicant may be invited by the President to submit written statements and to participate in hearings as far as the legal person or natural person has an

⁵⁷ Article 56 states: 'Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they: 1. Indicate their authors even if the latter request anonymity, 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter, 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, 4. Are not based exclusively on news disseminated through the mass media, 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and 7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations.'

⁵⁸ Dinah Shelton, above n 4, at 638.

⁵⁹ Mohamed, above n 56, at 390.

⁶⁰ Article 34 of the Convention as amended by Protocol No 11.

interest in the result of the case. These provisions on non-party participation extend more broadly than those usually applying to *amici*, and more closely resemble intervention.

G. Regional trade agreements

1. ASEAN Protocol on Dispute Settlement Mechanism

The Protocol on Dispute Settlement Mechanism, signed by all ASEAN member states in 1996, applies almost exclusively to economic disputes. Only states have standing.⁶¹ If a dispute cannot be resolved through mediation, then a meeting of senior economic officials may establish an *ad hoc* panel to resolve the dispute. Panels have discretion under Article 6(3) of the Protocol to ‘seek information and technical advice from any individual or body which it deems appropriate’. This language closely parallels that of Article 13 of the WTO’s DSU.

2. North American Free Trade Agreement (NAFTA)

NAFTA Chapter 11 establishes procedures regarding investment disputes between a Party and an investor located in another Party. Article 1116 establishes standing for investors on their own behalf, and Article 1117 establishes standing for investors on behalf of an enterprise that it owns directly or indirectly, but that is located in another Party. Third-party intervention is permitted by Article 1128, in favour of NAFTA Parties only. Article 1133 allows a Tribunal, under certain circumstances, to appoint ‘one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party’.

NAFTA Chapter 20 establishes general procedures for dispute settlement between NAFTA Parties. Third-party participation is available under Article 2013 to NAFTA Parties. Article 2014, entitled *Role of Experts*, provides that ‘the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree. ‘Neither Chapter 11 nor 20 contains explicit references to *amicus* briefs, and so far *amicus* briefs have not yet been considered in NAFTA dispute settlement proceedings.⁶²

Articles 14 and 15 of the North American Agreement on Environmental Cooperation establish a process allowing any citizen or organization to submit

⁶¹ Article 1(1), Protocol on Dispute Settlement Mechanism.

⁶² At the time of writing, an arbitral panel in the *Methanex case* under NAFTA Chapter 11 case (designed to protect foreign investors from expropriation and other unfair treatment) was convened. The tribunal considered an NGO’s request to submit an *amicus* brief, and has requested parties to submit written arguments on whether public interest groups can make representations in the otherwise private proceedings between foreign companies and governments.

a complaint to the Commission on Environmental Cooperation (CEC) against a NAFTA Party for failure to enforce its environmental laws. These submissions will be considered if they satisfy certain criteria. They must: be written in the language of the accused government; clearly identify the submitter; contain sufficient information to allow for review; aim at ‘promoting enforcement rather than at harassing industry’; explain efforts taken to resolve the situation within the relevant State; and be filed by a person or a group within a NAFTA State. In deciding whether to request a response from the relevant NAFTA Party, the CEC may consider whether the submission alleges harm to the person or organization making the submission, and whether study of the submission would further the goals of the Agreement. In the event that an Arbitral Panel is established, the Panel may seek information and advice from experts. Article 30, entitled *Role of Experts*, is similar to Article 2014 described above.⁶³

3. *South American Common Market (Mercosur) – Arbitral Court*

Mercosur was established by the Treaty of Asuncion of 26 March 1991. Disputes under Mercosur are addressed by the dispute settlement procedure established by the Protocol of Brasilia for the Solution of Controversies of 17 September 1991 (the Protocol). The Protocol provides for two different procedures: complaints by States, and Private Party Complaints. As noted below, in these procedures the opportunities for non-state participation are limited.

Under the procedure established in Articles 2–24 only States have standing. Complaints initiated by States must follow three steps. Member States must first notify the Common Market Group of the dispute and enter into negotiations. Second, should negotiations fail to resolve the dispute within 15 days, either party may submit the dispute to the Common Market Group, which should make a recommendation aimed at settling the dispute. Third, when a controversy cannot be resolved through the application of these procedures, any of the State Parties to the controversy can request arbitral procedure. There is no provision in the Protocol that explicitly enables private parties to intervene or to file *amicus* briefs in disputes initiated between States.

Under the rules for Private Party Complaints, established in Articles 25–32 of the Protocol, Private Parties must file their claim to the ‘National Section of the Common Market Group’ of the State Party in which they maintain their usual residency or business headquarters. The claim must include evidence proving its rightfulness, and the existence or the threat of damage. After receiving the Private Party’s claim, the National Section may either contact

⁶³ We note that Article 35 of the North American Agreement on Labor Cooperation contains an identical provision. We also note that NAFTA contains other sector specific dispute settlement procedure that are not of interest in this article.

other National Sections of the Common Market Group, or refer the complaint directly to the Common Market Group. If accepted, the Common Market Group will convene a group of experts to hear the matter. The experts must issue a report with their conclusions within 30 days. In this procedure, Private Parties will be granted an opportunity to be heard and to submit arguments (Article 29.3 of the Protocol)⁶⁴ and is thus provided with some form of standing. On the other hand, private parties have only limited rights to 'initiate' the dispute process, and have little control over its direction, including the involvement of other National Sections, the Common Market Group, or the conduct of the expert group.⁶⁵

H. Public participation in other international instances⁶⁶

The World Bank has at least two adjudication mechanisms that provide rights in favour of non-States: the International Center for the Settlement of Investment Disputes (ICSID)⁶⁷ and the Inspection Panel.⁶⁸ Before these adjudication bodies, individuals and NGOs (in the case of ICSID, firms) have full standing. ICSID rules do not provide for any *amicus* briefs and have never

⁶⁴ Art. 29.3 of the Brasilia Protocol reads as follows: 'Within this time-limit, the group of experts will give the affected party and the State against which a complaint has been filed the opportunity to be heard and to present their arguments.'

⁶⁵ See M. Haines-Ferrari, 'MERCOSUR: Individual Access and the Dispute Settlement Mechanism' in J. Cameron and K. Campbell (eds), *Dispute Resolution in the World Trade Organisation*, 270-84 (London: Cameron May 1998), and M. Haines-Ferrari (ed), *The Mercosur Code* (London: The British Institute 2000).

⁶⁶ Many national courts and tribunals also permit non-solicited *amicus* briefs to be received, either with the consent of the parties, or with the permission of the Court. The United States' Supreme Court permits individuals and organizations to file *amicus* briefs with the consent of all the parties, or to submit a motion for leave to file an *amicus* brief (Rule 37 US Supreme Court). In New Zealand, High Court Rule 81 gives the court discretion to call for *amicus* in cases where the interests of a class of person or the public interest would not otherwise be represented by the parties in the case. In Australia leave to appear as *amici* may be granted to interest groups to raise some issues that have not been raised by the parties or have not been sufficiently canvassed for various reasons (See, *Lange v ABC* (S108/116)). In Canada, Article 18 of the Rules of the Supreme Court provides that 'Any person interested in an appeal or reference may, by motion . . . apply to a judge for leave to intervene upon such terms and conditions as the judge may determine'. Finally, the Supreme Court of India 'may, if for any special reason it thinks desirable to do so, permit any other person to appear before it in a particular case' (Rules of the Supreme Court, Order IV para 1).

⁶⁷ Article 28 of the ICSID Statute under the Conciliation section gives a right of action to any national of a Contracting State. Article 36 gives a similar right for Arbitration proceedings.

⁶⁸ Paragraph 12 of the Resolution Establishing the Inspection Panel provides that requests may be brought by any group of persons who share common concerns or interests in the country where the project is located and can demonstrate that 'its rights or interests have been or are likely to be directly affected by an action or omission of the Bank. Other forms of public participation can take place during an investigation. Representatives of the public-at-large may provide the panel with information if they believe that it is relevant to a request. See R. E. Bissel, 'Recent Practice of the Inspection Panel of the World Bank', 91 Am J Int'l L 741, at 743 (1997). See also *The World Bank, International Financial Institutions, and the Development of International Law*, Brown Weiss, Rigo Sureda, and Boisson de Chazournes (eds), *ASIL Studies in Transnational Legal Policy* no 31.

accepted any. Article 50 of the Operating Procedures of the Inspection Panel provides that ‘ . . . any member of the public may provide the Inspector(s), either directly or through the Executive Secretary, with supplemental information that they believe is relevant to evaluating the request’. Such participation of non-solicited information is of the nature of *amicus curiae*.

In addition to these various dispute settlement systems, many international organizations establish procedures allowing NGOs to ‘register’ and participate in their proceedings. While legally distinct from the participation of NGOs in (quasi)-judicial proceedings through *amicus* briefs, some of the criteria used for the accreditation of NGOs by other international fora may be considered relevant in the WTO context. ECOSOC, for example, requires participating NGOs to ‘be of representative character and of recognized international standing’, and to ‘represent a substantial portion, and express the views of major sections of the population or of the organized persons with the particular field of its competence, covering, where possible, a substantial number of countries in different regions of the world’.⁶⁹ Other models are also possible.⁷⁰

I. Some observations on practice in other international fora

This brief examination of the statutes and rules of international tribunals illustrates a wide spectrum of involvement and participation by non-State actors in international dispute settlement. In some international tribunals, NGOs have significant rights of participation; in others, opportunities to be involved are minimal, or non-existent.

A greater level of involvement occurs in international tribunals such as the Human Rights bodies, the World Bank Inspection Panel, and the International Criminal Court. These tribunals provide fairly considerable rights of participation to non-State actors, including in some cases the right to initiate proceedings, or provide independent evidence as *amicus curiae*. Similarly, the ECJ permits involvement by non-State actors, but only in cases where an individual brings a case against a Community Institution. By contrast,

⁶⁹ ECOSOC – Article 71, Resolution 1296.

⁷⁰ See, Martin Olz, ‘Non-Governmental Organizations in Regional Human Rights Systems’, 28 Colum Hum Rts L Rev 307 (1997) outlining various definitions of NGOs in international fora. In addition to the definition in ECOSOC, he notes: (1) the proposed definition in the *Encyclopedia of Public International Law*. This follows ECOSOC, except that the requirements for international scope and shared goals with ECOSOC are made less stringent. The result is that transnational corporations would pass muster under the proposed definition, whereas they do not under ECOSOC Resolution 1996/31; and (2) the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations. This convention contains four explicit criteria for NGOs: (a) have a non-profit-making aim of international utility; (b) have been established by an instrument government by the internal law of a Party; (c) carry on their activities with effect in at least two States; and (d) have their statutory office in the territory of a Party and the central management and control in the territory of that party or of another Party.

international courts such as ITLOS, the ICJ, or panels under NAFTA Chapter 20 have not established the practice of accepting *amicus curiae* briefs.

The varying involvement of non-State actors in these international courts and tribunals reflects a variety of different factors, including the historical development of the system, the nature of the rights and obligations adjudicated, the availability of evidence, and presumably also the legal customs of various regions involved. For example, human rights tribunals rely heavily on input by NGOs, reflecting both that individual rights are the subject of adjudication and that non-state actors provide an important (and sometimes the only) source of independent evidence. The ICJ, by contrast, in the absence of explicit provisions for input by NGOs as *amici*, and with its focus on resolving questions of international law at issue between States, has not developed a practice of accepting *amicus* briefs. It appears that international tribunals that do not provide standing to non-State actors have so far tended not to accept *amicus* briefs from non-State actors.

The experience in other international fora may provide WTO Members with some useful points of reference when considering the development of rules or criteria to guide the acceptance and consideration of *amicus* briefs, within the specific context of the WTO dispute settlement system. In all fora, criteria of some sort are applied to define the discretion of the court or tribunal to accept interventions by NGOs and/or solicited or non-solicited *amicus* briefs by NGOs. When standing is provided to NGOs to initiate an adjudication process, rather detailed criteria are used. Before the ECJ (and the Court of First Instance) the intervenor must demonstrate a direct interest, and satisfy criteria related to the nature of its claim. When *amicus* briefs are accepted, participation as *amici* (or otherwise, for example, as experts) is usually subject to criteria that are more general. These may, for example, require the court or tribunal to ensure that granting leave is 'desirable for the proper determination of the case'. Criteria may also establish procedural steps, or define whether it is submitted orally or in writing, or in a certain language. In all cases some form of leave by the court precedes any consideration of the intervention or the *amicus* brief.⁷¹

III. SUGGESTIONS FOR AMICUS CURIAE BRIEFS BEFORE WTO ADJUDICATING BODIES

As noted in Section One, many WTO Members have identified the need for Members to discuss whether *amicus* briefs should be admitted and, if so, under what circumstances. A number have suggested the need to develop rules or criteria to guide the use of briefs by WTO adjudicating bodies.

⁷¹ Martha Haines-Ferrari 'Mercosur: Individual Access and the Dispute Settlement Mechanism' in J. Cameron and K. Campbell (eds), *Dispute Resolution in the World Trade Organisation* (London: Cameron May 1998) 270.

Criteria should address the practical problems identified by WTO Members, by building on existing WTO practice, and taking into account, where relevant, the experience of other international courts and tribunals.

As noted below, there are a variety of ‘mechanisms’ that may be used by WTO Members to develop rules on *amicus* briefs. These rules ought to be developed with a clear view of the nature and objective of *amicus* briefs in the context of the WTO dispute settlement system, and could involve a weighing of both *substantive criteria* (relating, for example, to the character of the *amici*, the nature of its submission, and the characteristics of the case) and *procedural criteria* (relating to issues such as timing and format). To ensure due process, it will also be necessary to give careful consideration to how panels and the Appellate Body use *amicus* briefs in practice, including how they address the initial decision of whether to accept or reject an *amicus* brief, and, if accepted, how to undertake the substantive consideration of the content of the brief.

A. Mechanisms for establishing rules on *amicus curiae* briefs

There are a number of mechanisms available within the WTO system for developing rules to guide whether, when, and how *amicus* briefs may be accepted and used by WTO adjudicating bodies.

1. Rules developed by WTO Members

The ideal approach is for WTO Members to negotiate and agree on criteria and procedures regarding *amicus* briefs. Members may consider a decision by the Dispute Settlement Body⁷² or by the General Council, under Article IX of the WTO Agreement, to guide the use of *amicus* briefs by panels and the Appellate Body. Alternatively, the General Council could agree on a decision under Article IX:2 of the WTO Agreement interpreting Article 13 of the DSU as it applies to panels, and Article 17.3 of the DSU as it applies to the Appellate Body. The most straightforward approach would be for Members to amend the DSU pursuant to Article X:8 of the Agreement Establishing the WTO. Finally Members could also seek an informal arrangement between Members which would be applied on an *ad hoc* basis by each individual panel.

2. Rules developed by panels

Faced with the inaction by Members, panels and the Appellate Body may feel the need to develop their own rules. As noted above, Article 13 grants panels broad authority to receive information from sources other than the parties to the dispute. This provision is arguably a reflection of a more general power of courts to seek information. Panel can certainly receive relevant ‘evidence’

⁷² Possibly under the general administration power of the DSB pursuant to Article 2.4 of the DSU.

through the *amicus* brief.⁷³ Authors have argued that ‘the *amicus* and other forms of third-party participation developed, through exercise of the “*inherent power of a court of law to control its processes*”, with submissions accepted by leave of the court . . . all courts probably have the inherent power to request anyone to assist their deliberations or to refuse volunteers.’⁷⁴ As for the legal arguments that may be contained in *amicus* briefs, it can be argued that, as with articles of doctrine, panels are obliged to apply the ‘law’ as it is, independently of what is argued or submitted by the parties, and in doing so panels (and the Appellate Body for that matter) may be helped by any source in their effort to interpret the WTO provisions.⁷⁵ To guide the exercise of their authority, panels are entitled under Article 12.1 of the DSU, after consultations with the parties to a dispute, to adopt specific working procedures. Panels have, on a number of occasions, been encouraged by the Appellate Body to adopt more detailed and specific rules of procedures.⁷⁶ To avoid surprises and delays in the panel process, working procedures on the administration of *amicus* briefs could be adopted, together with the timetable and other working procedures, during the ‘organization meeting’.

3. Rules developed by the Appellate Body

The Appellate Body is empowered under Article 17.9 of the DSU to develop working procedures for Appellate Review. The Appellate Body has developed general *Working Procedures*, in consultation with the Chairman of the DSB and the Director-General, and has communicated these to WTO Members.⁷⁷ These, however, do not explicitly address *amicus* briefs. Where existing *Working Procedures* do not address a procedural question, Rule 16(1) of the Working Procedures allows the Appellate Body to develop appropriate

⁷³ Keeping in mind the statement of the Appellate Body in *Japan – Varietals* (above, n 8) that the evidence obtained through Article 13 of the DSU cannot alter the rules on burden of proof and cannot be used by the panel ‘to make the case for a complaining party’.

⁷⁴ Dinah Shelton, above, n 4 at 617. On the *compétence de la compétence* see G. Abi-Saab, ‘“Interprétation” et “Auto-Interprétation”. Quelques réflexions sur leur rôle dans la formation et la résolution du différend international’ in Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt* (Berlin, 1995) 10.

⁷⁵ Note that Article 38.1(d) of the Statute of the International Court of Justice recognizes that the doctrine can be a subsidiary source where evidence of rules of international law can be found. *Amicus* briefs do not constitute the doctrine, and panels do not apply international law generally but the point is that panels and the Appellate Body are obliged pursuant to Article 11 of the DSU to apply WTO law objectively and in this context may find it useful to read opinions or authors in journals, books, dictionaries, and *amicus* briefs.

⁷⁶ See, for example, the Appellate Body Reports on *EC – Bananas III*, para 144; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para 95, and *Argentina – Textiles*, para 79.

⁷⁷ WT/AB/WP/1 dated 15 February 1996.

procedures in certain specified circumstances on an *ad hoc* basis. Such new rules should, however, be notified immediately to the parties.⁷⁸

B. The nature and objective of *amicus curiae* briefs – some relevant parameters

Whether developed by Members, panels, or the Appellate Body, criteria applying to *amicus* briefs must promote due process and ensure that *amicus* briefs contribute to the integrity and legitimacy of the decisions rendered by panels and the Appellate Body. In this context, a number of parameters may be drawn from the rules established by the DSU. The first derive from Article 13 itself, which offers some, albeit minimal, guidance to the exercise of panels' discretion to seek information. It requires information to be from an individual or body that the panel deems 'appropriate'. It permits panels to consult with 'experts'. It also permits panels to seek 'information and technical advice'.⁷⁹

Second, is the need to ensure panels can make 'an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements', as required by Article 11. As 'friends of the court', a primary purpose of *amici* should be to assist panels to fulfil their obligations by providing additional sources of objective information.

Third, is the need to strike the balance embodied in the requirement that '(p)anel procedures should provide sufficient flexibility so as to ensure high quality panel reports, while not unduly delaying the panel process', as required by Article 12.2. Criteria for *amicus* briefs should thus ensure that briefs contribute to high quality panel reports by providing relevant and timely information, without unduly delaying proceedings.

Fourth, the DSU also includes due process requirements that apply to parties, third parties, and experts. For example, Article 12.6 requires each party to submit its written submission to the Secretariat for immediate transmission to the panel and other parties in the dispute. Correspondingly, Article 10.2

⁷⁸ Article 16(1) states: 'In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body.' Many WTO Members have argued that acceptance of *amicus* briefs raises substantive issues, and is thus not within the scope of the Appellate Body's right to develop working procedures. The Appellate Body, in *US – British Steel*, stated that 'as long as we act consistently with the provisions of the DSU and of the covered agreements, we have legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.' (para 39) This issue is likely to continue to be the subject of discussion in future DSB meetings.

⁷⁹ We recall the wide discretion of panels in the application of Article 13 of the DSU.

requires third-party submissions to be transmitted to the parties.⁸⁰ Similar transmission requirements should apply to *amicus* briefs, to ensure that Members are informed promptly of the existence of *amicus* briefs, and have an opportunity to comment on their content.

Finally, any criteria that are developed by panels and the Appellate Body must not ‘add to or diminish the rights and obligations’ of Members, as required in Article 3.2.⁸¹ Criteria must ensure that the acceptance of *amicus* briefs does not affect the rights of Members, including their right to challenge the relevance of any such brief and the right to respond to other submissions made.

Other more general guidance on criteria for acceptance and consideration of *amicus* briefs may also be found in the broader objectives of the WTO as expressed in the preamble to the WTO Agreement, including the reference to sustainable development, and the requirement for positive measures to ensure that developing countries secure a commensurate share in the growth of international trade. Panels and the Appellate Body, when considering whether to accept an *amicus* brief, may wish to consider the need to take into account a variety of relevant viewpoints including those of affected States, as well as key sectors of society, particularly those in developing countries.⁸²

C. Substantive criteria for consideration of *amicus curiae* briefs

Substantive criteria may conceivably relate to the character of the *amici* itself, the nature of its submission, and the circumstances of the case. Panels and the Appellate Body ought to retain discretion to apply such criteria on a case-by-case basis, by weighing and balancing the various factors.

1. Character of the *amici*

In deciding whether to accept an *amicus* brief, WTO adjudicating bodies may wish to consider the character of the prospective *amici*. Relevant factors may

⁸⁰ See also Appendix 3, para 4 of the DSU, entitled *Working Procedures* (stating ‘Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments’).

⁸¹ See text at fn 27.

⁸² Rio Declaration on Environment and Development, 14 June 1992, UN Doc A/CONF.151/5/Rev 1 (1992), reprinted in 31 ILM 874 (1992) (*Rio Declaration*); and Agenda 21, UN Conference on Environment and Development (UNCED), Annex II, UN Doc A/CONF 151/26/Rev 1 (1992). The *Rio Declaration* and Agenda 21 recognize the importance of public participation in decision-making, 13 June 1992 (31 ILM 874). See generally, Agenda 21, Chapter 23 (stating ‘One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged’). See also Ch 27 (stating ‘Society, governments and international bodies should develop mechanisms to allow non-governmental organizations to play their partnership role responsibly and effectively in the process of environmentally sound and sustainable development.’)

include the *amici*'s mandate or terms of reference; its representation of, and accountability to, a significant segment of society; as well as any relevant expertise.

First, participation of *amici* is often permitted in cases involving the public interest.⁸³ As 'friend of the court', and to help panels and the Appellate Body to undertake an objective assessment, many would argue that the *amici* should have a public interest orientation, and no direct financial interest in the outcome of the case. It should be noted, however, that so far, NGOs participating as *amici* have often represented, directly or indirectly, commercial interests. This fact concerns many WTO Members, which believe that participation of *amici* will further shift the balance of WTO dispute settlement towards developed countries, their NGOs, and their multinational corporations.⁸⁴ It thus remains to be considered whether NGOs with purely commercial interests – as opposed to non-profit or other public interest organizations – should be encouraged to submit *amicus* briefs.

Second, the representation and accountability of NGOs may help to confirm their character and the interests they represent. Organizations expressing views of the major sections of the population may help to confirm the legitimacy of the decisions rendered by the dispute settlement system. In many cases, the value of *amicus* briefs will be to provide information on the broader implications of a decision on development, health, the environment, or other facets of general welfare. The *amici* ought to be able to perform such a task.

Third, demonstrated expertise in the area or special knowledge may also be a relevant factor. In some cases an NGO will have factual or legal expertise that can help panels render a high-quality report, and undertake an objective assessment of the matter.

2. *Nature, quality, and relevance of the amicus brief*

Also important is the nature and quality of the brief, and its relevance to the dispute. To ensure that *amicus* briefs contribute to high-quality panel reports without unduly burdening the dispute settlement process, they may need to present evidence or arguments that have not been submitted by the parties. Information may be accepted where it has a 'direct bearing' on the case.⁸⁵

⁸³ As noted in the definition of *amicus curiae* in fn 1, *amicus* briefs are often permitted in cases involving questions of the public interest.

⁸⁴ India, commenting on the Appellate Body's decision in *US – British Steel*, argued that the Appellate Body's interpretation '... was resulting in a situation in which not only non-governmental voluntary organizations, but also powerful business associations, like in this dispute, would be able to intervene in the dispute settlement process. This was not a good development for the long-term functioning of the dispute settlement system . . .' Minutes of Dispute Settlement Body, 7 June 2000, (WT/DSB/M/83). Some have also noted that opening participation as *amici* to firms seems more likely to open the floodgates to numerous submissions that may often closely parallel those of the parties, and so add to the burden of panels, without adding significantly to the quality of their decisions.

⁸⁵ Implementation Panel (Article 21.5 DSU) of *Australia – Salmon*, para 7.9.

Correlatively, it may be rejected where it ‘essentially duplicates information already submitted by the parties’.⁸⁶ Criteria for accepting and considering *amicus* briefs may include whether the brief adds a new perspective, reveals longer-term implications of possible decisions that the parties did not bring to the adjudicating body’s attention, or reinforces or elaborates upon incomplete or inadequate submissions.⁸⁷

3. *Circumstances of the case*

Panels may also consider the circumstances of the case – its political sensitivity or socio-economic importance – when deciding whether to accept *amicus* briefs. They may assess the need for *amicus* briefs in light of the number of parties, the presence and number of experts, or delays encountered or expected. They may also consider whether an interest group is likely to be adequately represented by the parties’ submissions in the disputes.⁸⁸ Without challenging the authority of Member governments, such criteria would ensure that all views are heard, and that the panel can undertake an objective assessment of the matter.

D. Procedural criteria for *amicus curiae* briefs

In addition to these suggested substantive criteria, there are a number of procedural criteria that could be applied to *amicus* briefs. Members could agree to establish criteria relating to the timing of a submission, its length and format, and notification of the brief to parties. The process for administering *amicus* briefs should include at least two stages: *prima facie* admission of the brief (‘first stage’) – where leave to submit would be granted; and substantive consideration of its contents (‘second stage’). The procedural criteria should be established to ensure this process.

1. *Timing of submission*

Due process requires that briefs should be submitted as early as possible in the process to allow parties and the adjudicating body to evaluate and determine how to approach the brief. Ideally, briefs should be submitted before the first meeting of the parties (usually within 10 weeks from the composition

⁸⁶ *US – Section 110(5) of the Copyright Act*, para 6.8.

⁸⁷ See, for example, Diane P. Wood, *A US Perspective on Ducks* (World Trade Forum 2000): the Role of Judges, at 5 (stating ‘the extra reading would be worth it if the *amicus* brief added a new perspective or revealed longer term implications of possible outcomes that the parties somehow did not bring to the courts attention’).

⁸⁸ For example, in the *US – Section 110(5) of the Copyright Act*, the Panel addressed information submitted for the American Society of Composers, Authors, and Publishers, while the US law at issue appeared to protect the interests of another interest group (the bars and restaurant that were using the work of such composers and authors).

of the panel). As was the case in *US – Shrimp*, panels may, as part of their inherent capacity to control the timetable of the process, wish to give the parties additional time to consider new materials.⁸⁹ *Amicus* briefs submitted after the second meeting have generally been rejected. In *US – British Steel*, the panel rejected the brief on the basis that parties had not had an ‘adequate opportunity to present their comments on the AISI brief to the Panel’.⁹⁰ The only exception to this approach was *US – Section 110(5) of the Copyright Act*, in which the panel stated that ‘while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings’.⁹¹ One difficulty in ensuring that *amicus* briefs are submitted early is that panels and Appellate Body timetables are confidential. Consequently, *amicus* briefs have often been sent late in the panel process, and are not always provided before the closure of the period for receiving evidence. To ensure that *amicus* briefs do not delay the adjudication process, Members may wish to consider making the panels’ timetables more easily available.

2. Length and format

To streamline the panel process, criteria may also define the length and format of *amicus* briefs. Members could, for example, agree that briefs are to be accompanied by a short covering note (or ‘motion to submit’) that sets out the information relating to the substantive criteria above, including a description of the *amici*, its interest in the subject matter of the dispute, relevant expertise, and a summary of factual and legal arguments raised. Such a covering note would assist panels to quickly evaluate the brief and determine whether they may want to formally ‘seek’ it, i.e. whether they should grant leave to submit the *amicus* brief for its eventual consideration. A similar procedure could also be used before the Appellate Body.

3. Notification to parties and translation

In many cases, *amicus* briefs are sent directly to the panel. To ensure transparency, there should also be a requirement that *amici* simultaneously send their briefs to all parties to the dispute. Briefs should also be made available to all Members upon request, as is the practice with non-confidential summaries of parties’ submissions to WTO dispute settlement (pursuant to Article 18

⁸⁹ See, *Argentina – Textiles*, paras 80 and 81, noting that panels have inherent discretion to accept any type of evidence at any time, so long as the panel does not commit an abuse of discretion amounting to a failure to render an objective assessment of the matter as mandated by Article 11 of the DSU. As noted above, in *US – Shrimp* the *amicus* briefs were received between the first and second meeting. In this case, the panel gave the parties two additional weeks to consider the materials (which were attached to the US submission). Panel Report on *US – Shrimp*, at para 7.7.

⁹⁰ See fn 14.

⁹¹ See fn 20, at para 6.8.

DSU). As the WTO operates in three languages, *amici* may also be requested to provide a translated version of their *amicus* brief.

E. Use of *amicus curiae* briefs by panels

As noted by the Appellate Body in *US – Shrimp*, panels have significant discretion to determine the need for information and advice, ascertain its acceptability and relevancy, and decide what weight to ascribe it.⁹² The application of this discretion in relation to *amicus* briefs is, however, yet to yield a consistent practice.

To promote predictable and consistent practice, the process of accepting and considering *amicus* briefs could be divided into two stages: first, the reception and preliminary acceptance of the *amicus* brief, which should consider basic procedural criteria and involve *prima facie* consideration of substantive criteria; and second, the consideration of the content of such brief, which could be based on a detailed assessment of substantive criteria of the kind identified above.

1. *Prima facie* admission of *amicus* briefs – the first stage

A first issue arises when the panel initially receives the *amicus* brief. Panels, as with any evidence or submission, are required to provide parties with a copy. At this stage, panels should consult with the parties and then issue a preliminary ruling on *prima facie* admissibility or non-admissibility.⁹³ If the panel decides to *reject* the brief (for example, because of lateness), then it should inform the parties of its decision. The parties may anyway decide to adopt the brief, in which case it would become part of their own submission. If, on the other hand, the panel decides to admit the brief, then it becomes part of the record for later consideration by the panel. The parties would retain the opportunity to later convince the panel that the brief lacks relevance, or otherwise comment on its weight. Alternatively, the panel may, before making its decision, request further information from the *amici*, or suggest that parties may wish to adopt the brief as part of their submission.⁹⁴ During this first stage of *prima facie* admission, the panels would not consider the substance of the brief as such, but merely offer an initial ruling on whether it has satisfied the procedural requirements and appears facially relevant to the dispute, in light of the allegations included on its covering note. Technic-

⁹² Appellate Body Report on *US – Shrimp*, para 104.

⁹³ We note that, where a brief is clearly irrelevant or received too late in the process, the panel may choose to reject the brief outright without first asking the parties to comment, in which case the panel would merely inform the parties of its decision and provide them with a copy of the brief.

⁹⁴ There are also other courses of action. Rather than accepting the *amicus* brief as a whole, the panel may decide to accept it in part or on conditions, or may decide to use questions at a later stage in the proceedings to guide input from *amici* on specific issues.

ally, this would be their decision to ‘seek’ or grant leave for the *amicus* brief to be offered to the panel (and the parties) under Article 13 of the DSU.

2. *Consideration of amicus brief – the second stage*

If a panel agrees to admit an *amicus* brief, then a second stage is required during which the panel considers, in greater detail, the facts and/or legal arguments put forward by the brief. At this stage panels may (and, if requested by the parties, should) offer a ruling (‘second ruling’)⁹⁵ to inform the parties of which evidence, arguments, or sections of the brief it considers relevant to the dispute. Such a ruling is required to ensure that parties, especially developing countries, are given adequate notice of the aspects of the brief that should be addressed in their submissions. Due process also suggests that a panel should notify parties if an *amicus* brief raises material arguments that are being considered by the panel, but that have not been addressed by the parties. As part of their Article 11 DSU duty to be objective, panels should ensure that all relevant arguments are fully addressed by the parties. This obligation can be fulfilled by addressing additional questions to the parties. The panel should also exercise its discretion to discuss with the parties the weight that is accorded to evidence and arguments submitted in the brief.

Finally, the reasoning of panels on all these matters should be reflected in their final panel reports. Such findings are necessary for the parties’ right of appeal and the Appellate Body’s review. If parties’ submissions are annexed to a panel report, then the *amicus* brief could be as well. Alternatively, if the panel report contains a classic descriptive part, then reference to the content of such brief could be included.

F. Use of *amicus curiae* briefs by the Appellate Body

In addition to reviewing the panels’ decisions to accept and consider or to reject *amicus* briefs,⁹⁶ the Appellate Body will require criteria to guide its own administration of *amicus* briefs. The procedural and substantive criteria identified above, as well as many of the issues relating to how panels use *amicus* briefs, apply equally to the Appellate Body. However, a number of additional issues arise as a result of the Appellate Body’s specific responsibilities in WTO dispute settlement.

First, whereas panels may consider issues of fact and law, the mandate of the Appellate Body is limited to considering questions of law.⁹⁷ Consequently,

⁹⁵ In some circumstances and in light of time constraints, the first and second (if any) ruling could take place at the same time.

⁹⁶ As with all panel decisions, the acceptance by panels of solicited or non-solicited *amicus* briefs will have to be made on an objective assessment of the facts and the law, pursuant to Article 11 of the DSU, and as such will constitute revisable decisions by the Appellate Body.

⁹⁷ As noted in Article 17.6 of the DSU, appeals shall be limited to issues of law covered in the panel report and to legal interpretations developed by the panel.

whereas *amicus* briefs submitted to panels may include both issues of fact and law, briefs offered to the Appellate Body should be limited to legal questions. Arguments should therefore be based on the facts already on the record (in the descriptive part of the panel report) and *amici* may not seek to introduce new factual material.

Second, an issue arises as to whether an *amici* that did not submit a brief to the panel proceedings, may be permitted to submit a brief to any subsequent Appellate Body proceedings.⁹⁸ At the panel level in *US – British Steel*, the *amicus* brief was submitted after the interim report was released, and so was not considered. This failure, however, did not preclude the Appellate Body from accepting an *amicus* brief from the same organization on appeal.

CONCLUSIONS

Even those who argue that panels and the Appellate Body have an inherent right to administer the adjudication process agree that Members have the primary responsibility for adopting rules regarding *amicus* briefs. Failing this, however, WTO adjudicating bodies will increasingly feel the need to fill the void and develop appropriate procedures and criteria. In any case, it is hoped that practical suggestions included in this note (and summarized below) will help WTO Members when considering how to address the use and consideration of *amicus* briefs in WTO dispute settlement.

1. WTO Members should negotiate and agree on rules regarding the acceptance and consideration of *amicus* briefs by panels and the Appellate Body – not to do so in the circumstances is to maintain the present state of legal uncertainty.
2. Failing this, panels and the Appellate Body will be under pressure to develop rules of procedure regarding the acceptance and consideration of *amicus* briefs.
3. To ensure that any *amicus* briefs do not come too late in proceedings, and do not unduly burden the dispute settlement process, the timetable (or part thereof) should be made public.
4. For panels, these specific rules of procedure for *amicus* briefs should be confirmed in consultation with the parties at the organization meeting. At that time the panel may decide to call for *amicus* briefs on specific issues and thus impose criteria, conditions, and time-limits.
5. *Amici* should always notify their briefs (solicited or non-solicited) directly and simultaneously to parties, third parties and to the panel. The

⁹⁸ As noted above in fn 51, the European Court of Justice permits intervention by private parties and governments, even if the intervener played no part in the proceedings before the Court of First Instance.

panel should ensure that this due process requirement is complied with.

6. The process for administering *amicus* briefs should include at least two stages: *prima facie* admission of the brief ('first stage'); and substantive consideration of its contents ('second stage').
7. At the *first stage*, panels should examine whether the brief satisfies basic *procedural* criteria, and that it satisfies, on a *prima facie* basis, certain *substantive* criteria, and rule accordingly.
8. *Procedural* criteria should ensure that briefs are: received before the closure of the period for receiving evidence; accompanied by a brief cover page (or motion to submit) describing the *amici* and its main evidence/arguments; and notified to the parties and third parties.
9. *Substantive* criteria should take into account the character of the *amici* (relevant interest in the case, or appropriate expertise); the nature and quality of the brief(s) submitted and their relevance; and the specific needs of the panel in light of the circumstances of the case.
10. In light of the parties' comments, the panel may reject the brief, or recommend that it be attached to a party's submission, ask for further information, or accept the brief, in full or part of it.
11. At the conclusion of the first stage, the panel should issue a preliminary ruling (with reasons) on whether an *amicus* brief is admissible or inadmissible. (Borrowing from the second stage, in light of time constraint the preliminary ruling (of the first stage) may include an indication by the panel of aspects of the briefs that could appear *prima facie* to be relevant.)
12. At the *second stage*, the panel may decide, or may be requested by the parties, to issue another ruling as to which, or which parts of any, *amicus* briefs are considered particularly relevant. This will require a more in-depth analysis of the briefs submitted.
13. Panels, through specific questions should invite parties to comment on any material arguments or evidence submitted by an *amici* (that are being considered by the panel), but that have not been addressed by the parties.
14. Substantive criteria should also be used by adjudicating bodies when considering the content of the brief, the weight of arguments and evidence, and their implication for the case, while striking a balance between high-quality panel reports and avoiding undue delay of the panel process
15. Where an *amicus* brief is 'attached' to the submission of a party or a third party, it becomes an integral part of the submission and should be considered by the panel accordingly.

16. In its final report, the panel should inform the parties of whether it took into account elements of the *amicus* brief, and offer reasons for its decisions. Such findings are necessary (among other reasons) for the parties and the Appellate Body to identify the origin of factual assessment in light of the rules on the burden of proof.
17. The *amicus* brief(s) should either be annexed to the panel report or described in the descriptive part of the report.