AMICUS CURIAE IN WTO DISPUTE SETTLEMENT: THEORY AND PRACTICE

BY HENRY S. GAO

Debate continues over the right of non-governmental organizations and other third parties to petition the World Trade Organization in dispute settlements. Two precedent cases, in particular, open the door for NGOs to weigh in on trade agreements on the basis of environmental issues—an area where China may be increasingly vulnerable.

Amicus curiae, a Latin term which literally means "friend of the court," is defined in Black's Law Dictionary as "[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."[1]

Ever since the Appellate Body of the World Trade Organization (WTO) ruled in the 1998 U.S.–Shrimp case[2] that panels could accept *amicus* briefs, the admissibility of these briefs has become one of the most controversial issues among WTO researchers and practitioners.

Why is the issue important? What are the arguments for and against the admission of *amicus* briefs? What are the current rules on this question as announced by the Appellate Body (AB) and Panel? This article answers these questions by surveying the development of this issue from both the theoretical and practical perspective.

A short history of *amicus curiae*

Like many other concepts in common law, *amicus curiae* also has its origin in Roman law, which allows the court to invite third parties to provide legal or factual information on unfamiliar issues.[3] The *amicus curiae* mechanism was first introduced into Common Law in the fourteenth century.[4] In the seventeenth and eighteenth centuries, the participation of *amicus curiae* was widely reported in All England Reports,[5] indicating that participation of *amicus curiae* during this period had the following features:

1) The main functions of *amicus curiae* were to clarify factual issues[6] explain legal issues[7] and represent certain groups of litigants (such as infants).[8]
2) An *amicus curiae*, dealing with factual as well as legal issues, did not necessarily have to be lawyer.[9]
3) An *amicus curiae* unrelated to either the plaintiff or the defendant could still have an interest in the case. As Krislov has pointed out, the *amicus curiae* mechanism addresses a major shortcoming of the adversarial common law system, which is its inability to effectively protect the interests of third parties.[10]
4) As permission to participate as *amicus curiae* has always been a matter of grace rather than right,[11] courts have from the outset avoided a precise definition of the perimeters and conditions justifying utilization of the mechanism.[12] This has not only increased judicial discretion, but has also given maximum flexibility to the system.[13]

In the United States, the courts were long reluctant to allow the participation of *amicus curiae* in litigation. It was not until the case of Green v. Biddle in the early nineteenth century that the federal courts opened the door for *amicus curiae*.[14] In the twentieth century, *amicus curiae* have played a key role in many landmark cases in American legal history, such as civil rights and abortion case. According to a study done in 1998, *amicus curiae* participated in more than 90 percent of the cases before the U.S. Supreme Court.[15]

Another more recent development is the participation of *amicus curiae* in cases before international dispute settlement tribunals. While the typical *amicus curiae* in domestic courts are individuals or non-governmental organizations (NGOs), *amicus curiae* before international tribunals also include states and international organizations. Generally speaking, international tribunals vary in their treatment of *amicus curiae*, depending on a number of factors, in particular the nature and jurisdiction of the international organization that establishes the tribunal,[16] the history of the organization, the relationships between the rights and obligations of the organization, the difficulty of collecting evidence, and the legal tradition of the territories under the tribunal's jurisdiction.[17]

Amicus curiae in the WTO Dispute Settlement Mechanism

Although the participation of *amicus curiae* has only recently been brought to the limelight, it is by no means a new issue in

the GATT/WTO system. Even during the GATT era, *amicus curiae* briefs were submitted to the GATT secretariat for consideration by panels.[18] These briefs were never actually considered by the panels, however, because the panels regarded the GATT dispute settlement system to be strictly inter-governmental in nature, and believed they should address only those claims and arguments submitted by parties to the dispute.[19]

The establishment of the WTO in 1995 brought improvements not only to the substantial rules of trade regulation, but also to the dispute settlement system. To quote Professor Andreas F. Lowenfeld, the WTO dispute settlement system is now "the most complete system of international dispute settlement in history."[20] It is hardly surprising, therefore, that NGOs of all kinds have made serious attempts to gain access to this system as a means of achieving their individual goals.

Amicus curiae briefs were submitted in the very first case brought before the WTO Panel and Appellate Body, the *U.S.-Gasoline* case. The Panel, however, decided to follow the practice of the old GATT and did not consider these briefs.[21] It was the U.S.-Shrimp case that opened the WTO door to *amicus curiae*. The following section summarizes U.S.-Shrimp and some of the other most important cases on the admissibility of *amicus curiae* briefs in the WTO.

Panel has the right to accept *amicus curiae* briefs: U.S.-Shrimp[22]

In this case the Panel received two *amicus* briefs, one submitted by the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL),[23] and the other by the World Wide Fund for Nature (WWF).[24] Both *amicus* briefs provided scientific and technical facts relevant to the conservation of sea turtles in defense of the U.S. trade ban on foreign shrimp caught without using turtle excluder devices (TEDs) to protect threatened and endangered sea turtles. Although the panel acknowledged receipt of the two *amicus* briefs, it decided that it would be inconsistent with the Dispute Settlement Understanding (DSU)—the main WTO agreement on settling disputes—to accept and consider them, because the panel had not requested them.[25] At the same time, the Panel observed that any of the parties in the dispute could include the *amicus* briefs as part of their own submissions if they wished to do so.

On appeal, the United States argued that there is nothing in the DSU that prohibits panels from considering unsolicited information. Rather, Article 13.2 of the DSU provides a panel with wide discretion in choosing its sources of information.

The appellees, i.e., India, Pakistan and Thailand, offered the following counter-arguments:

1) Article 13 does not require panels to consider unsolicited information, and the United States was wrong to argue that it did.[26]
2) Panels must follow three steps in seeking information: a decision to seek technical advice; the notification to a Member that such advice is being sought within its jurisdiction; and the consideration of the requested advice. The interpretation offered by the United States would eliminate the first two of these three steps, thereby depriving a panel of its right to decide whether it needed supplemental information, and what type of information it should seek, as well as depriving Members of their right to know that information was being sought within their jurisdiction.
3) Appendix 3 of the DSU, which sets out Working Procedures for panels, allows only those WTO Members who are parties or third parties to present written submissions to panels. It would therefore be unreasonable to interpret the DSU as granting a non-Member the right to submit an unsolicited written submission, when not all Members enjoy a similar right.
4) The U.S. argument would increase the workload of the already overburdened Secretariat by requiring it to deal with a multitude of unsolicited briefs, most of which would be too biased to be of value.
5) Parties would also find their burdens increased by feeling obliged to respond to unsolicited submissions that might attract the attention of a panel member.

In its ruling, the AB started by affirming that access to the dispute settlement process of the WTO is limited to Members of the WTO. Thus, only Members who are parties or third parties in a dispute have a *legal right* to make submissions and have them considered by a panel. Likewise, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and third parties in a panel proceeding. The admissibility of *amicus* briefs, however, is not one that concerns the obligation of panels. Instead, the key issue here is what a panel is *authorized* to do under the DSU.

The AB ruled that a panel's right to "seek information" under Article 13 includes the power to *accept or reject* any information or advice it may have sought and received, or to *make some other appropriate disposition* of this information or advice. The AB also noted that Article 12.1 of the DSU authorizes panels to depart from or add to the Working Procedures set forth in Appendix 3 of the DSU after consultation with the parties to the dispute in order to "provide *sufficient flexibility* so as to *ensure high-quality panel reports* while *not unduly delaying the panel process*." Against this context, the AB ruled that the Panel's reading of the word "seek" was unnecessarily formal and technical. The authority to *seek* information is not a *prohibition* against accepting unrequested information, but rather grants a panel the discretion either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.

AB has the right to accept *amicus curiae* briefs: U.S –Lead Bismuth II[27]

In this case, two *amicus* briefs were submitted to the AB. The appellee European Communities filed a letter arguing that the briefs were "inadmissible" for the following reasons:

1) Although *U.S.–Shrimp* cited Article 13 as the basis for allowing *amicus curiae* briefs in *panel* proceedings, the article does not apply to the Appellate Body; moreover, that provision is limited to *factual information and technical advice*, and does not include *legal arguments or legal interpretations* received from non-Members.

2) Neither the DSU nor the Working Procedures allow *amicus curiae* briefs to be admitted in Appellate Body proceedings, given that Article 17.4 of the DSU and Rules 21, 22 and 28.1 of the Working Procedures confine participation to participants and third participants, and that Article 17.10 of the DSU provides for the confidentiality of Appellate Body proceedings.

The United States took a contrary view and recalled the statement of the Appellate Body in *U.S.–Shrimp* that the DSU grants a panel authority to accept unsolicited submissions by virtue of its "*ample and extensive authority to undertake and to control the process* by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts." The United States argued that the AB itself has such authority under Article 17.9 of the DSU, which authorizes the Appellate Body to draw up its own working procedures, and Rule 16(1) of the Working Procedures, which authorizes a division to create an appropriate procedure when a question arises that is not covered by the Working Procedures. The United States did not agree that accepting unsolicited *amicus curiae* briefs would compromise the confidentiality of the Appellate Body proceedings or give greater rights to a non-WTO Member than to WTO Members that are not participants or third participants in an appeal.

In its ruling, the AB first noted that the DSU and the Working Procedures neither specifically provide nor explicitly prohibit the acceptance or consideration of *amicus* briefs. However, the AB agreed with the United States regarding the broad authority granted to the AB by Article 17.9 of the DSU and Rule 16(1) of the Working Procedures. At the same time, the AB confirmed that only Members of the WTO have the legal *right* to participate or make submissions in a particular dispute, and the AB has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by non-Member individuals or organizations.

The legal basis for the authority of the AB to accept and consider *amicus* briefs: EC-Asbestos[28]

In this case, which like the U.S.-Shrimp case involved an environmental issue, the Panel received five *amicus curiae* briefs. The briefs by Collegium Ramazzini and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) were incorporated by the EC into its own submission, as they supported the EC's scientific and legal arguments. The EC also proposed to the Panel that it reject the submissions from the Ban Asbestos Network and the Insituto Mexicano de Fibro-Industrias A.C., as those documents contained no information of relevance to the dispute. The Panel accepted the EC suggestion. The fifth brief, submitted by ONE ("Only Nature Endures") after the interim report had been issued, was rejected by the Panel on the grounds that it had been submitted at too late a stage in the proceedings to be taken into account.

On appeal, the AB adopted, pursuant to Rule 16(1) of the Working Procedures, an additional procedure to deal with *amicus* submissions for *the purposes of this appeal only*. According to this procedure, any potential *amicus curiae* were required to apply in advance for leave to file a written brief. Paragraph 3 set out seven detailed requirements for the application for leave, the most important calling for the applicant to "state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute."

The AB subsequently received 17 applications requesting leave. Six of them were denied on the grounds that they were filed late. The remaining applications were filed on time, but all were eventually denied because the AB found none of them sufficiently compliant with the requirements set forth in the Additional Procedure.

Amicus briefs not supported by any party will not be considered: U.S.–Shrimp (Article 21.5—Malaysia)[29]

In this case, which referred back to the original U.S.-Shrimp case, the Panel received two *amicus* briefs from NGOs, one from Earthjustice Legal Defense Fund[30] and the other from the National Wildlife Federation. Both briefs argued that implementation of the U.S. law consistent with the WTO decision would satisfy the requirements of Article XX of the GATT. The panel communicated these two briefs to the parties and asked them to comment on the admissibility and relevance of the submissions.

Malaysia argued that the Panel did not have the right to accept or consider any unsolicited briefs for the following reasons:

1) According to the finding of the Original Panel, DSU Article 13 did not confer any right on a panel to accept unsolicited briefs.
2) Articles 10 and 12 and Appendix 3 of the DSU provide that only Members who are parties or third parties to a dispute have the legal right to make submissions to a panel, and the Appellate Body's interpretation effectively provided greater rights to those who were not WTO Members.
3) The controversial decision of the AB to adopt additional procedures in "U.S.–Lead Bismuth II" resulted in a special meeting of the General Council on November 22, 2000, at which the overwhelming view of WTO Members was that panels and the Appellate Body did not have the authority to receive or consider unsolicited briefs. This view was conveyed to and noted by the Chairperson of the Appellate Body.

The United States referred back to the findings of the Appellate Body that the Panel had the discretion to consider either or both of the NGO submissions. The U.S. noted that the submission from the National Wildlife Federation raised issues directly relevant to the matter before the Panel and attached it

as an exhibit to its own submissions "to ensure that a relevant and informative document [would be] before the Panel, regardless of whether the Panel decid[ed] to exercise its discretion to accept [that submission] directly from the submitters." The U.S. did not deem the submission from Earthjustice similarly relevant, as it addressed a hypothetical issue that was not before the Panel, but noted that the Panel did have the discretion to accept the submission directly from Earthjustice according to the AB's ruling.

The United States also pointed out several problems with Malaysia's arguments, mainly that the DSU does not authorize panels to overrule a finding of the Appellate Body; and that the AB finding provides panels with the discretion, rather than the obligation, to consider unsolicited submissions.

The panel decided not to include the Earthjustice submission in the record. The National Wildlife Federation submission, on the other hand, was considered as part of the United States submission.

Amicus curiae brief duplicating information submitted by parties will not be considered: U.S.–Section 110(5) Copyright Act[31]

In this case, the U.S. Trade Representative wrote a letter to a law firm representing the American Society of Composers, Authors and Publishers (ASCAP), requesting information in response to questions the Panel had submitted to the United States. The law firm responded to the Trade Representative by letter, and also forwarded a copy of this letter to the Panel. The Panel subsequently transmitted the letter to both parties for their comment.

In its reply, the United States emphasized that the letter provided no factual data not already provided by one or the other party. At the same time, however, the U.S. affirmed its support in principle for the right of private parties to make their views known to WTO dispute settlement panels.

The EU similarly noted that the letter did not add any new information, and argued that according to the interpretation of the Appellate Body in U.S.-Shrimp, panels could only consider factual information and technical advice by *amici curiae*, and could not accept legal arguments or interpretations from them.

In its ruling, the panel agreed with the parties that the letter essentially duplicated information already submitted by the parties, and did not take the letter into account in its findings.

WTO Members can also submit briefs as *amici curiae:* EC-Sardines[32]

In this case, the AB received two *amicus* briefs, one filed by Professor Robert Howse[33] and the other by Morocco, a WTO Member that did not exercise third party rights at the panel stage of the proceedings. While there was little resistance to the AB accepting the first brief, the admissibility of the second brief was more controversial. Peru argued that accepting Morocco's brief would allow Morocco to effectively become a third party while circumventing the procedures set out in Articles 10.2 and 17.4 of the DSU. The EC, on the other hand, argued that it would be bizarre to allow private individuals to participate as *amicus curiae* while prohibiting WTO Members from doing so.

In its ruling, the AB affirmed that the legal authority to regulate its own procedures set out in Article 17.9 of the DSU entitled the AB accept and consider the *amicus curiae* brief submitted by Morocco. At the same time, the AB reiterated that only parties to WTO disputes have the *right* to submit briefs, and that in exercising its discretion, the AB is not bound to accept *amicus* briefs in every case, especially if the brief is submitted at a very late stage and would interfere with the "fair, prompt and effective resolution of trade disputes."

Given the substantive issues raised in the Morocco submission, the AB decided that, with one exception, Morocco's *amicus curiae* brief did not assist the AB and thus would not be taken into consideration.

Summary

Through a series of cases, the Panel and AB have established a rich body of jurisprudence on the admissibility of *amicus* briefs, which includes the following rules:

1) DSU Article 13 grants the Panel the authority to accept and consider *amicus* briefs;
2) The AB also has authority to accept and consider *amicus* briefs. The legal basis for this authority, however, is somewhat unclear, relying in some cases on Article 17.9 of the DSU and in other cases on Article 16.1 of the Working Procedures. These two provisions, moreover, each have their own problems:

   Article 17.9 of the DSU requires the AB to consult with the Chairman of the DSB and the Director-General before drawing up working procedures, and to communicate these new procedures to the Members, but in U.S.-Lead and Bismuth II, the AB did not fulfill either requirement.

   Article 16.1 in the Working Procedures does not require similar consultation, but places a series of conditions on creating new rules: i) The issue should be procedural rather than substantive – a definition subject to substantial disagreements among the WTO Members (see below); ii) The rules drafted by the AB must not be "inconsistent with the DSU, the other covered agreements and these Rules." Again there are doubts among WTO Members as to whether the AB's rules on *amicus* briefs are consistent with the DSU; iii) The AB shall "immediately notify the parties to the dispute, participants, third parties and third participants" after adopting such procedures; iv) Any procedure adopted pursuant to Article 16.1 in the Working Procedures is applicable to that particular appeal only.

   In summation, it appears that the AB needs to provide further clarification on the legal basis for accepting *amicus* briefs.
3) Both individuals and organizations may submit *amicus* briefs, but it is unclear which organizations are covered. According to existing panel and AB decisions, the organizations include NGOs, law firms and WTO Members. Based on the line of reasoning of the panel and AB in their reports, inter-governmental organizations and countries that are not WTO Members should also be allowed to participate as *amici curiae*. The Agreement between the Interna-

tional Monetary Fund and the World Trade Organization, however, seems to largely prohibit the IMF from communicating its views in writing to WTO dispute settlement panels.[34] If the IMF, an international organization that works close with the WTO, is not allowed to participate as *amicus* in WTO dispute settlement proceedings, other inter-governmental organizations should probably be similarly prohibited. Further clarification from the AB on this point might be necessary.

4) During the panel stage, briefs can provide only factual information;[35] during the appellate stage, briefs should address only questions of law;[36]
5) *Amici curiae* may submit briefs, but do not have a *right* to have their briefs accepted and considered by the panel and AB. This right is limited to WTO Members that are parties or third parties to a dispute. The Panel and AB have the discretion to decide whether to accept *amicus* briefs, and whether to consider the briefs after accepting them.
6) The AB has the authority to adopt procedures to regulate how *amicus* briefs should be submitted, but it is unclear at this point whether the panel has such authority. Since the AB has been very open on this issue, however, it is probably just a matter of time before the AB allows panels to adopt similar procedures.
7) *Amicus* briefs should not repeat the factual information or legal arguments already covered by the briefs of parties to the dispute.[37]
8) If one of the parties to the dispute attaches an *amicus* brief to its submissions, the *amicus* brief becomes part of that submission, and the Panel or AB cannot reject it.
9) *Amicus curiae* may submit briefs, but may not participate in the proceedings of the Panel or AB.

Interestingly, even though the Panel and AB consistently claim the right to accept and consider *amicus* briefs, they rarely exercise this right. The cases above indicate that unless one of the parties attaches an *amicus* brief to its own submission, the Panel and AB frequently reject *amicus* briefs for procedural reasons, or because the information in them is irrelevant or duplicates the submissions of parties to the case. An exception is the *amicus* submission from Morocco in the EC-Sardines case, which was considered by the AB without being attached to the submissions of any of the parties in the case. Of course, Morocco was the only *amicus curia* that was also a WTO Member.

One explanation for this apparent inconsistency between theory and practice is that the panel and AB are more interested in asserting this right than in exercising it. Indeed, as demonstrated below, the mere assertion of this authority has caused great controversy within the WTO, and exercising it in practice would certainly entail even greater political cost.

The views of WTO members on *amicus* briefs.

Except for the United States, which has consistently supported the power of the Panel and AB to accept *amicus* briefs, most WTO Members have been rather critical of the jurisprudence of the Panel and AB on this issue. The following is a summary of their major criticisms:

1) *The WTO is an inter-governmental organization. The NGOs that appear as amici curiae do not represent governments and therefore cannot participate in the WTO dispute settlement process. To confer on NGOs the right to participate as amici curiae is an infringement upon the rights of WTO Members. Thus, the admissibility of* amicus *briefs is a substantive rather than procedural issue, and should be decided by WTO Members, not the Panel or AB.*

As this writer stated earlier, this criticism is based on the false premise that *amici curiae* have a *right* to submit briefs to the Panel and AB. The AB has repeatedly stated that only WTO Members that become parties to the disputes pursuant to the proper procedures have the right to submit briefs, and it is up to the Panel and AB to decide whether to accept and consider *amicus* briefs. Thus, the admissibility of *amicus* briefs should be an issue of procedure within the jurisdiction of the Panel and AB.

As Weiler has pointed out, this criticism also reflects the tension between the diplomatic and judicial natures of the WTO.[38] Diplomats cherish the intergovernmental nature of the WTO and resist any attempt by the WTO "to pierce the State veil and question in any way the legitimacy of formal governmental positions."[39] Lawyers and judges, on the other hand, are tasked with preserving and guaranteeing the integrity of a legal process, and regard the exclusion of voices affected by a decision as infringing on not only the ethic of open and public process, but the very principles of natural justice.[40]

Even assuming that the *amicus curiae* issue *should* be decided by Members, judging from the slow progress of WTO negotiations ever since the launch of the Doha Round, it is unrealistic to expect that the issue *could* be decided in the foreseeable future. Tension between the decision-making and dispute-settlement mechanisms of the WTO is inevitable. Given the unfeasibility of drawing up new rules through negotiations, it is inevitable that the Panel and Appellate Body will apply creative interpretation of the relevant agreement provisions to problems that Members have been unable to resolve in the Ministerial Conference or the General Council.[41]

WTO Members are not even in agreement on whether the *amicus curiae* issue should be decided by the General Council or by the Dispute Settlement Body, which follow different procedures. The General Council would have to follow the procedures set out in Articles IX.2 and X of the Agreement Establishing the WTO, as well as the requirements under Article V.2 of the same Agreement. The DSB, on the other hand, would have to follow Articles 2 and 3 of the DSU, and any amendment of DSU provisions would have to follow the rules under the 1994 Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, as well as paragraph 30 of the Doha Declarations.

2) *The GATT Contracting Parties discussed the issue of* amicus *briefs, and rejected the U.S. proposal to allow* amicus *briefs. Thus, neither the Panel nor the AB should be allowed to accept or consider* amicus *briefs.*

There are several problems with this argument. First, should the Panel and AB rely on negotiating history? DSU

Article 3.2 requires WTO agreements to be interpreted "in accordance with customary rules of interpretation of public international law." According to the AB, this includes, *inter alia*, Article 32 of the Vienna Convention on the Law of Treaties, which allows preparatory work of the treaty and the circumstances of its conclusion to be taken into consideration in treaty interpretation. The same article, however, also states that such records, known as *travaux preparatoires*, can only be used as interpretive tools to confirm or clarify the meaning resulting from the application of Article 31, and cannot in their own right provide sufficient basis for treaty interpretations.

Second, *travaux preparatoires* can only be used to the extent that there is an official record of them. Unfortunately, during the Uruguay Round[42] the issue was discussed at an Informal Group on Institutional Issues, and there is no official record that could be used in formal dispute settlement proceedings.

Third, even if an official record were available, the fact that a proposal was not incorporated into the final agreement could be interpreted to mean either that the proposal was defeated, or that it was so obvious that there was no need to make explicit reference to it. Indeed, the latter interpretation is exactly the view taken by the U.S.

3) *The acceptance of* amicus *briefs lacks legal basis, because the authority of the Panel to "seek" information under DSU Article 13 does not encompass the authority to "accept" information.*

This argument is based on a rather mechanical interpretation of the word "seek." As the power to seek is a broader authorization of the power to accept, it should include *a fortiori* the power to accept. Even assuming that "seek" does not include "accept," the Panel could get around this by initially refusing to accept the *amicus* brief, then seeking the same brief from the *amicus curiae*.

4) *According to DSU Articles 8 and 17, panelists and AB members should be well-qualified individuals or persons of recognized authority who should not need to seek help from outside.*

The first problem with this argument is that, as history shows, allowing *amicus* briefs does not imply incompetence on the part of the judge. Secondly, it is often hard for panelists to handle all of the highly technical questions relating to intellectual property rights, trade barriers and sanitary and phyto-sanitary standards that were brought into the multilateral trading system with the conclusion of the Uruguay Round. That is why the DSU itself explicitly provides for the Panel to seek information (Article 13) or consult expert review groups (Appendix 4). Clearly, even if the Panel or the AB could easily handle the issues themselves, they are not prohibited from seeking external assistance.

5) *Even if the admissibility of* amicus *briefs is a procedural issue and there is legal basis for the Panel and AB to accept* amicus *briefs, they have not followed the proper procedures in the relevant cases and thus have acted illegally.*

This criticism is largely directed at the AB, which when accepting *amicus* briefs under DSU Article 17.9 should consult with the DSB Chairman and the Director-General, and under Article 16.1 of the Working Procedure for Appellate Review should immediately notify parties to the dispute as well as other Members of the AB. It should be very easy to fulfill these procedural requirements.

Opponents of *amicus* briefs in the WTO further claim that accepting and considering *amicus* briefs can lead to the following undesirable consequences:

1) *In the example of the additional procedure for submitting* amicus *briefs set out in the EC-Asbestos case, the* amicus curiae *is required to indicate "in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute." This requires the* amicus curiae *to gain access to the submissions of the parties, leading to violations of the confidentiality requirement mandated in Article 3 of the Working Procedures (Appendix 3) and DSU Article 10.10.*

Even though the proceedings of the Panel and AB are still mostly confidential, party submissions in WTO disputes are now confidential in name only. The most active participants in the WTO dispute settlement system, such as the U.S., EU, Canada and Australia, have all made their submissions available to the public under the provision in Article 3 of Appendix 3 stating that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public." Even if a party to a WTO dispute keeps its submissions confidential, any WTO Member can request public disclosure of a summary of the submission.

2) *Accepting* amicus *briefs might increase the burden of the panel and AB.*

In practice, the Panel and AB are engaged in collecting all information related to the case under consideration, so allowing *amicus* briefs should not make much difference. Also, *amicus* briefs are quite costly to prepare, and many NGOs have limited resources. Allowing *amicus* briefs should therefore not open a floodgate.

3) *Accepting* amicus *briefs would place an additional burden on parties to the dispute. Also, since NGOs that can afford to submit* amicus *briefs are mostly located in the developed world, this could widen the existing gap between the capacities of developed and developing countries.*

This is a real issue for WTO Members, especially the developing Members.

There are two possible ways to avoid widening the gap between developed and developing countries: first, Members and their NGOs should try to build up connections with NGOs in developing countries and have them work for the interest of developing countries; second, the capacities of domestic NGOs in developing countries need to be built up.

Author's note: This article benefits from the generous support provided by the Seed Funding for Basic Research at The University of Hong Kong.

NOTES

1. Bryan A. Garner, Black's Law Dictionary, West Group, St. Paul, Minn., 1999, 7th edition, p. 83.
2. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products ("U.S.—Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755; Panel Report, United StatesImport Prohibition of Certain Shrimp and Shrimp Products ("U.S.—Shrimp"), WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821. Available from http://www.wto.org.
3. See Michael K. Lowman, The Litigating *Amicus Curiae:* When Does the Party Begin after the Friends Leave? *American University Law Review*, Vol.41, 1992, p. 1243; Georg C. Umbricht, An "*Amicus Curiae* Brief" on *Amicus Curiae* Briefs at the WTO, *Journal of International Economic Law*, 2001, p. 778.
4. Ernest Angell, The *Amicus Curiae:* American Development of English Institutions, *International & Comparative Law Quarterly*, Vol.16, 1967, p. 1017.
5. Dinah Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, *American Journal of International Law*, Vol.88, 1994, p. 616; Samuel Krislov, The *Amicus Curiae:* From Friendship to Advocacy, *Yale Law Journal*, Vol.72, 1962–1963, pp. 694–695.
6. Falmouth v. Strode, 88 Eng. Rep. 949 (Q.B. 1707), cited in Samuel Krislov, *supra* note 5, p. 695.
7. Samuel Krislov, *supra* note 6, p. 695; Padideh Ala'I, Judicial Lobbying at the WTO: The Debate over the Use of *Amicus Curiae* Briefs and the U.S. Experience, 24 *Fordham International Law* Journal, Vol.24, 2000, p. 84.
8. Beard v. Tarvers, 27 Eng. Rep. 1052 (Ch. 1749), cited in Samuel Krislov, *supra* note 6, p. 695.
9. Samuel Krislov, *supra* note 5, p.694, 695; Padideh Ala'I, *supra* note 7, pp. 84–85.
10. Samuel Krislov, *supra* note 5, pp. 696–697.
11. *Id.*, p.695.
12. *Id.*
13. *Id.*
14. Green v. Biddle, 21 U.S. 1 (1823) at 17, cited in *id.*, pp. 700–701; Ernest Angell, *supra* note 4, p.1018; Padideh Ala'I, *supra* note 7, p. 86.
15. Regan W. Simpson, *The* Amicus Brief: *How to Write It and Use It Effectively*, Chicago: American Bar Association, Tort and Insurance Practice Section, 1998.
16. Gabrielle Marceau & Matthew Stilwell, Practical Suggestions for *Amicus Curiae* Briefs before WTO Adjudicating Bodies, *Journal of International Economic Law*, 2001, p. 164.
17. *Id.*, p. 175.
18. Marceau & Stilwell, *supra* note 17, pp. 157–158.
19. *Id.*, p.158; Padideh Ala'I, *supra* note 7, p. 67.
20. Andreas F. Lowenfeld, *International Economic Law*, Oxford, 2002, p. 150. Lowenfeld is professor of international law at New York University.
21. Padideh Ala'I, *supra* note 7, p. 68.
22. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products ("U.S.—Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755; Panel Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products ("U.S.—Shrimp"), WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821.
23. CIEL *Amicus Curiae* Brief to the WTO Dispute Settlement Panel (1997), available at http://www.ciel.org/Publications/shrimpturtlebrief.pdf.
24. WWF *Amicus* Brief to WTO Shrimp-Turtle Dispute (1997), available at http://www.field.org.uk/files/shrimpbrief.pdf.
25. For further information on the Dispute Settlement Understanding, see http://www.wto.org/English/tratop_e/dispu_e/dispu_e.htm.
26. This argument actually mischaracterizes the U.S. argument. The U.S. never claimed that panels have "obligation" to accept or consider *amicus* briefs. Instead, a more accurate description of the U.S. view is that panels have "right" to do so.
27. Appellate Body Report, United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595; Panel Report, United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/R and Corr.2, adopted 7 June 2000, as upheld by the Appellate Body Report, WT/DS138/AB/R, DSR 2000:VI, 2623.
28. Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products ("EC— Asbestos"), WT/DS135/AB/R, adopted 5 April 2001; Panel Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products ("EC—Asbestos"), WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R. Communities—Measures Affecting Asbestos and Asbestos-containing Products, Panel Report, *Review of European Community & International Environmental Law (RECIEL)*, Vol. 10, 2001; Georg C. Umbricht, *supra* note 3, p. 776; Padideh Ala'I, *supra* note 7, pp. 63–67, 75–77, 80–83.
29. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia ("U.S. —Shrimp (Article 21.5—Malaysia)"), WT/DS58/AB/RW, adopted 21 November 2001; Panel Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia ("U.S.—Shrimp (Article 21.5—Malaysia)"), WT/DS58/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS58/AB/RW.
30. Earthjustice, Comments to the World Trade Organization (Recourse to Article 21.5 of the DSU of Malaysia), available at http://www.earthjustice.org/regional/international/trade_documents/WTO%20Shrimp-Turtles%2021-5.pdf.
31. Panel Report, United States—Section 110(5) of the U.S. Copyright Act ("U.S.—Section 110(5) Copyright Act"), WT/DS160/R, adopted 27 July 2000. See Padideh Ala'I, *supra* note 7, pp. 74–75.
32. Appellate Body Report, European Communities—Trade Description of Sardines ("EC—Sardines"), WT/DS231/AB/R, adopted 23 October 2002.
33. Howse is a professor of law at University of Michigan and an internationally recognized authority on international economic law.
34. WT/L/195.
35. U.S.-Copyright. Georg C. Umbricht argues that the panel could accept both factual and legal information. See *supra* note 3, pp. 779–880. If DSU Articles 13 and 27 are read together, however, the legal assistance to the panel should be provided by the Secretariat. Thus, the author believes that the "information" referred to in Article 13 is limited to factual information.
36. EC—Asbestos and EC—Sardine.
37. See the *amicus* brief by Earth Justice, available at http://www.earthjustice.org/regional/international/trade_documents/WTO%20Shrimp-Turtles%2021-5.pdf (last checked Feb. 29, 2004).
38. J. H. H. Weiler, The Rule of Lawyers and the Ethos of Diplomats, Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, *Journal of World Trade*, Vol.35, 2001, p. 204.
39. *Id.*
40. *Id.*
41. See Georg C. Umbricht, *supra* note 3, pp. 774–775.
42. The Uruguay Round of trade negotiations from September 1986 to April 1994 transformed the General Agreement on Tariffs and Trade (GATT) into the World Trade Organization (WTO).

Most people consider the WTO dispute settlement system to be one of the major results of the Uruguay Round. After the entry into force of the WTO Agreement in 1995, the dispute settlement system soon gained practical importance as Members frequently resorted to using this system.Â One might think that such an interpretation cannot occur in (WTO) dispute settlement proceedings because Article IX:2 of the WTO Agreement provides that the Ministerial Conference and the General Council of the WTO have the â€œexclusive authority to adopt interpretationsâ€ of the WTO Agreement.Â In practice, panels and the Appellate Body seem to rely more on the ordinary meaning and on the context than on the object and purpose of the provisions to be interpreted. This updated edition of WTO Dispute Settlement: One-Page Case Summaries has been prepared by the Legal Affairs Division of the WTO with assistance from the Rules Division and the Appellate Body Secretariat. This new edition covers all panel and Appellate Body reports adopted by the WTO Dispute Settlement Body as of 31 December 2012.Â â€¢ Status of prior panel reports: Although reversing the Panel's finding that adopted GATT and WTO panel reports constitute subsequent practice under the VCLT Art. 31(3)(b), the Appellate Body found, however, that such reports create â€œlegitimate expectationsâ€ that should be taken into account where they are relevant to a dispute. amicus curiae practice that, like amicus briefs, served as a means through which advocates.Â 14 Id. 15 Dinah Shelton, supra note 8, at 619. 16 See, e.g., Henry S. Gao, Amicus Curiae in WTO Dispute Settlement: Theory and Practice, 1 CHINA RIGHTS. FORUM 51 (2006) (citing Michael K. Lowman, The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave?, 41 AM. U. L.REV. Global Governance Programme. Dispute Settlement in the WTO. Mind over Matter. Petros C. Mavroidis.Â In practice, it is at best doubtful whether reciprocity has been observed, and yet WTO courts, twenty years following their advent, continue to be the busiest courts litigating state-to-state disputes. This leads me to conclude that what seems to have mattered, and still matters, most to WTO Members was the spirit of cooperation in adjudication, the establishment of a process to curb unilateralism.Â The GATT dispute settlement system functioned surprisingly well, especially if we were to take into account its highly imperfect institutional infrastructure. In fact, only two provisions in GATT dealt with dispute settlement, and none of them discussed the institutional design of dispute. Amicus Curiae Briefs in the WTO Dispute Settlement System: Theory and Practice. (2004). Chinese Journal of International Economic Law [å›½é™…ç»æµŽæ³•å¦Š]. 11, 388-416. Research Collection School Of Law. Available at: https://ink.library.smu.edu.sg/sol_research/732. This document is currently not available here. Find it in your library. DOWNLOADS. Since September 21, 2010.