Amicus curiae in the WTO Dispute Settlement Procedure: A Developing Country’s Foe?

Claudia Franziska Brühwiler
Universität St. Gallen

The admittance of amicus curiae briefs in the US-Shell/Turtle dispute in 1998 stirred a debate among WTO Member States whether the dispute settlement procedure should be accessible for private individuals and entities. Developing countries firmly opposed the inclusion of amici curiae into the Dispute Settlement Understanding (DSU) and repeated their arguments frequently in cases leading to amicus submissions, fearing a further shift of power in favour of developed countries and changes in the nature of the dispute settlement system. The present article examines these concerns in light of the experience made with amicus submissions in 21 disputes. It will be argued that most of the fears expressed by developing countries are ungrounded and often base on wrong assumptions. However, it will likewise be shown that concerns regarding the compatibility of the dispute settlement’s confidential nature and the admittance of amicus briefs were legitimate and need to be addressed by the Dispute Settlement Body (DSB).

Key words: WTO, dispute settlement, amicus curiae, DSU review
Jel Codes: K33, O19

1 Introduction

"Imagine how you’d feel if your organization managed to convince your ... state legislature ... to enact a decent law. Then a foreign government or corporation challenged the law as illegal under international trade rules. The next thing you know, a special trade court closed to the public could decide that the law should be eliminated or weakened.
It can happen. It has happened.
It is called the World Trade Organization."

(FRIENDS OF THE EARTH 2005, p. 4)

The problem, here presented in a dramatic manner by the global environmental organization FRIENDS OF THE EARTH, is as old as the World Trade Organization’s (WTO) dispute settlement procedure: representatives of the civil society challenge it as secretive and unresponsive to social concerns. As multilateral trading standards increasingly collide with different countries’ legislation, nongovernmental organizations (NGOs) demand the possibility to defend a State’s public choices before the panels and the
An amicus curiae submission can be a powerful tool for individuals and groups who are not directly involved in a dispute to present their views. The term "amicus curiae" is Latin for "friend of the court" and refers to a party who is allowed to present their case to the court, even if they are not involved in the case. This practice is common in many legal systems, including the United States Supreme Court, where amici curiae briefs are often filed to provide additional context or argument on a case.

In the World Trade Organization (WTO), amici curiae briefs have become more common in recent years. The WTO's Dispute Settlement Understanding (DSU) and its Working Procedures do not explicitly mention amici curiae briefs, but panels have the discretion to accept unsolicited information and advice if it is relevant to the case. This discretion is informed by Art. 11 of the DSU, which gives panels the authority to seek information in light of the matters before it.

The use of amici curiae briefs in WTO cases is a recent development, and their impact and efficacy are still being debated. Some argue that amici curiae can provide valuable perspectives and insights, while others are concerned that they may represent an attempt to sidestep the traditional adversarial process.

Despite these concerns, amici curiae submissions have been used in a number of WTO cases to provide additional perspectives on complex issues. The WTO's acceptance of amici curiae submissions is a reflection of the organization's openness to include a wider range of perspectives in its decision-making process.

In conclusion, amici curiae submissions can be a powerful tool for individuals and groups to present their views on complex issues before the WTO. Their use is still developing, and their impact on the decision-making process is yet to be fully assessed. However, the WTO's acceptance of amici curiae submissions is a positive step towards greater inclusivity in its decision-making process.
2.3 Amicus curiae Briefs in the Appellate Procedure

The last point is also valid for amicus briefs reaching the AB: in US-Lead and Bismuth II the AB held that entities filing a brief had no right to its consideration, while briefs included in a party’s submission would be regarded as an integral part thereof. The judges saw their own authority to accept briefs not established in Art. 13 DSU as this provision is only applicable for the panel proceedings, but in Art. 17.9 DSU. Deriving from this provision a ‘broad authority to adopt procedural rules’, the AB assumed its legal authority to accept and consider helpful briefs. Meanwhile, it has extended this competence to briefs originating from private individuals as well as Member States which do not participate as third parties in a dispute.

Anticipating considerable interest of external parties, the AB deviated from the abovementioned ruling in EC-Asbestos by establishing a so-called Additional Procedure which set formal requirements for amicus briefs (Weiss 2004). Adopted solely for the purpose of that appeal, these complementary rules were, according to the AB, legally grounded in paragraph 16 of the Working Procedures (Appellate Review), which authorises the WTO’s higher instance to fill procedural lacunae.

2.4 Legal Questions Unanswered

Already the AB’s interpretation of Art. 13 DSU has not withstood the scrutiny of legal scholars, who termed it as ‘artistic’ (Mavroidis 2002) and contradictory to the DSU: the AB admonished panels to consult the parties concerning a possible admittance of briefs, although Art. 13 allows panels to seek information independently, as long as they do not contact experts or entities under a party’s jurisdiction (Stoiber 2004). Likewise, the AB’s assumption of a ‘broad procedural authority’ and the establishment of an Additional Procedure have been criticised as not pertaining to such a substantial question as participatory rights (Weiss 2001). The denomination of the AB’s rulings on amicus briefs as an overstretch of its mandate and illegitimate judicial activism has become even louder with its acceptance of a brief filed by a Member State: the alleged misconstruction of the relevant provisions resulted according to critics in a circumvention of third party obligations.

In sum, the legal debate boils down to the question on whether the construction of the mentioned provisions has been justified or whether amici could only be admitted after an amendment to the DSU by the Member States. However, as long as the problem cannot be resolved in negotiations, amicus briefs have to be accepted as part of the WTO’s procedural reality: as the two judicial bodies’ practice has shown, they de facto follow a stare decisis (Steinberg 2004), thus rendering amicus briefs a customarily accepted procedural means.

3 Friends and Foes: The amicus curiae Debate

3.1 Proponents: Towards Transparency and Inclusiveness

Amici curiae are mainly seen as ‘friends’ by developed countries, like the European Communities which actively try to promote the admittance of external submissions: taking into account the need for a DSU reform as established at the end of the Doha conference in 2001, the EC proposed an amendment to the Dispute Settlement Body (DSB) memorandum. Therein it claimed that it was no longer necessary to debate whether amicus curiae briefs may be accepted by the DSU courts, but how to effectively discipline them as an established instrument of law (DiStefano 2003). Art. 13 was crafted as a broad interpretation of Art. 13 DSU and it was intended to institutionalise the Additional Procedure, adopted by the AB solely for EC-Asbestos. Similarly, the first advocate of amicus curiae at the WTO, the United States (Baroncini, 2003), also forwarded a proposal to enhance transparency by allowing external entities to voice their concerns (Zimmermann 2004).

Although both dampened their support for amicus briefs during the reform discussions, they proved their general endorsement in the disputes to come. Their positive attitude was partly due to the pressure exercised...
by national NGOs, but, more importantly, rooted in their experience with amici at *inter alia* the European Court of Human Rights or the U.S. Supreme Court which made them aware of potentially positive effects amici interventions.\(^{14}\)

Above all, they would grant representatives of civil society access to the dispute settlement, which would partly fulfill often voiced demands for responsiveness to social and environmental concerns: amici can confront the Court with the broader dimension of its decisions and thus, as MAVRODIS (2002) put it:

"constitute an opportunity for any given court ... to see, through the submitted briefs, its role in the society within which it operates."

At the international level, this becomes all the more relevant as the gap is wider between possible participants to a dispute and those affected by it (HERNÁNDEZ-LÓPEZ 2001; UMBRICH 2005). In the WTO context this is even aggravated by the fact that only Member States enjoy *locus standi*: these might not be interested in representing the opinion of minorities or social interests (UMBRICTION 2005), and in some cases could even refuse to enter a dispute in order to avoid economic disadvantages.

### 3.2 Opponents: Questions of Power and Beyond

In spite of these potential advantages linked to amicus briefs, the response of developing countries to the EC proposal proved to be very scant: all of them manifestly refused external submissions.\(^{15}\) This reaction was hardly surprising, since major developing countries like India had already during and in the aftermath of the US-Shrimp/Turtle dispute opined that the WTO’s judicial bodies were incompetent to consider or even accept amicus briefs.\(^ {16}\) Accordingly, reform proposals launched by coalitions of developing countries like the African Group aimed at restricting the rights of panels and AB in their handling of briefs (ZIMMERMANN 2004).

The arguments forwarded against amici are partly of legal and systemic nature, starting by the simple fact that the term ‘amicus curiae’ is nowhere mentioned in the DSU, which signifies that the now advocated openness had historically never been intended by the Member States (UMBRICTION 2005). That conclusion seems to opponents all the more compelling when one considers the imbalance between Members and external parties, as it was created by the jurisprudence: while NGOs could file their briefs without meeting further requirements, Member States could do so only if they had first acted as third parties before the corresponding panel and fulfilled the obligations hereof (MAVRoDIS; UMBRICH 2005). Ultimately, it has been argued, external interference would disturb the intergovernmental character of the WTO (DSB 2003a).\(^ {17}\)

Moreover, developing countries not only feared an asymmetry of rights, but also of resources and power: most affluent NGOs, think tanks and business associations are located in Western countries, which, assuming congruent interests between an entity and its home State, already puts Members at a disadvantage which do not dispose of these social resources (ZIMMERMANN 2004). Similarly it was argued that a developing and especially a least developed country’s (LDC) limited resources would never allow it to respond properly to the deployment of briefs, communications and other actions carried out by a counterpart’s friends of the court — an allusion to the so-called ‘floodgate argument’.\(^ {18}\)

### 3.3 A Crumbling Coalition: The Cases of Jordan and Morocco

During sessions of the Dispute Settlement Body, developing countries repeatedly defended these arguments, thereby signalling that a compromise could hardly be reached on the *amicus curiae* issue.\(^ {19}\) Yet the developing countries’ opposing coalition early started to crumble, as the example of the Kingdoms of Jordan and Morocco proves: although the former also feared amicus briefs to be a financial burden for participating developing countries and LDCs (DSB 2003b), the Kingdom took – and still takes – a more open stance towards external parties. Stressing that it would counter developing countries’ interests to leave the issue unresolved and to block any compromise (DSB 2003b, 2003c), it launched its own proposal

---

\(^{14}\) For an overview of the amicus practice at international Courts, including references to the U.S. experience (MERCEAU 2003 and SHELTUN 1994).

\(^{15}\) TN/DS/1136

\(^{16}\) See below Chpt. 4.

\(^{17}\) An argument often raised in a special session of the DSB 2003a (TN/DS/15).

\(^{18}\) Quoting from the Minutes WTO Doc. WT/IG/MS/60 of 23 January 2001 (MAVRODIS 2002; UMBRICH 2003).

\(^{19}\) In the 1972 Namibia proceedings, the registrar refused an external application, stating that the court would be “unwilling to open the floodgates to what might be a vast amount of proffered assistance” (1972 ICJ Proceedings (2 Legal Consequences), para 639 (SHELTUN 1996)).

\(^{20}\) This was confirmed at, inter alia, the special session of the DSB on 13 November 2003 (TN/DS/M/11).
that should meet the demands for more openness and at the same time accommodate the most pressing concerns: it not only foresaw the admittance of amici curiae submissions, but also the set-up of a fund,

"with the aim of remitting any costs or expenses that may be incurred by a developing or a least-developed country Member in reviewing, analyzing and/or responding to issues raised in an unsolicited amicus curiae brief."\(^1\)

Jordan further underlined its open attitude by implementing a Free Trade Agreement with the United States, whereby it signed a complementary Memorandum of Understanding: the latter includes a clause stating that amici curiae briefs shall be accepted and considered by the panel ruling on disputes concerning their Agreement.\(^2\) In a Joint Statement on WTO Issues they even agreed that in bilateral disputes before a WTO panel amicus submissions should also be admitted.\(^3\)

A second developing country demonstrated its positive opinion on amici curiae submissions in a more spectacular way — namely by becoming an amicus curiae itself: as it could not contribute to the appeal in EC-Sardines as a third party, Morocco filed a brief to the AB.\(^4\) While the decision of the AB to accept the submission rendered the argument of unequal rights between external parties and Member States void, it nonetheless caused a controversial debate among the other Members.\(^5\) Only Morocco supported the AB's ruling, declaring that it had merely helped the Kingdom to protect its interests (Covelli 2003).

4 Amici curiae vs Developing Countries? — The Case Law

4.1 Overview 1998-2005: amici in Twenty-One Disputes

"Much Ado About Nothing" termed (Mavroidis 2002) the concerns expressed by the Member States against the admittance of amici curiae briefs. Considering the experience gathered in the meantime, one is tempted to agree at least regarding the matter's quantitative dimension: since the first time a panel accepted amicus briefs incorporated in a party's submission \textit{prima facie} as an integral part thereof, only twenty-one amici cases have reached the WTO's judicial bodies. These disputes led in total forty-five amici to file a brief either with a panel or the AB. However, only eight of them have been taken into account as part of a regular party's submission, while only an additional two contributed to the panel's consideration independently. Unsolicited briefs directed at the AB, on the other hand, have so far not been regarded as helpful.\(^6\)

As nearly all of these cases involved developing countries as either parties to the dispute or as third parties, they will in the following serve to examine whether the opposition of less affluent Member States against amici has also in substance been "much ado about nothing" — or: whether amici curiae are in fact amici of developing countries. The only amicus dispute not to be taken into account concerned Australia's import prohibition on certain sardines, which constituted one of two cases where the panel accepted independent amicus briefs:\(^7\) although they did not quote them directly, the panelists regarded explanations forwarded by Concerned Fishermen and Fish Producers on why Australia treated imports of sardines differently from imports of pilchards (Mareau 2001) as helpful in rendering their decision.

The following section will deal with the remaining cases by dividing them into different categories which refer to the kind of interests represented by the amici. Having determined the latter with the aid of the actual briefs or the goals and motives stated by the respective organization, 'environmental', 'public health' and 'business or industrial' cases as well as one touching 'rights of indigenous people' will be examined. A last category has not been established according to the type of concerns voiced externally, but is set apart since it unites cases unveiling systemic problems related to amici curiae. An overview of the disputes pertaining to a particular category is provided at the beginning of every subsection, whereby the regular parties as well as the amici will also be named. In addition, a comprehensive list of all relevant cases is provided in Annex A.

\(^1\) TN/DS/W/53.
\(^2\) Memorandum Art. 2(b).
\(^3\) Joint Statement Art. 2(b).
\(^4\) AB Report EC-Sardines, para. 133.
\(^5\) See below Chpt. IV.6.
\(^6\) WTO, \textsc{Handbook 2004}. It is claimed that the AB accepted in preliminary ruling on US-Shrimp/Turtles at least one amicus submission that was not attached to a Member's submissions (Howitt 2003b). However, this brief has not been mentioned in the AB's report nor quoted in the literature as the AB's first acceptance of an independent brief. Moreover, it is not known what kind of organization should have filed it.
\(^7\) For a brief review of the case for instance: (Sandoz 2003).
4.2 Environmental Stakes: The Shrimp/Turtle Cases

Table 1: Amici curiae in the environmental cases

<table>
<thead>
<tr>
<th>Cases</th>
<th>Parties to the Dispute</th>
<th>Amici curiae</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Shrimp/Turtle WT/DS58/R, 15 May 1998</td>
<td>India, Malaysia, Pakistan and Thailand vs. the U.S.</td>
<td>In favour of the respondent: • WWF • Coalition led by CMC and CIEL</td>
</tr>
<tr>
<td>US-Shrimp/Turtle WT/DS58/AB/R, 12 October 1998</td>
<td>U.S. as appellant; India, Malaysia, Pakistan and Thailand as joint appellants</td>
<td>In favour of the appellant: • the Humane brief • Coalition led by CMC and CIEL • WWF and FIELD</td>
</tr>
<tr>
<td>US-Shrimp (Art. 21.5 — Malaysia) WT/DS58/RW, 15 June 2001</td>
<td>Malaysia vs. the U.S.</td>
<td>In favour of the respondent: • Coalition led by the Earth Justice Legal Defense Fund • Coalition led by the National Wildlife Federation</td>
</tr>
<tr>
<td>US-Shrimp (Art. 21.5 — Malaysia) WT/DS58/AB/RW, 22 October 2001</td>
<td>Malaysia as appellant; the U.S. as appellee</td>
<td>In favour of the appellant: • American Humane Society and Humane Society International • Position unknown: • Prof. ROBERT HOWSE</td>
</tr>
</tbody>
</table>

At the beginning of the first amicus case stood, ironically, an organization that would also be part of one of the first amicus coalitions (SHAFFER 1999): Had not the Earth Island Institute compelled the U.S. administration to apply section 609 of Public Law 101–162, a law regulating the harvest of shrimp in U.S. American waters, to all shrimp exporting countries, the WTO’s judicial bodies would not have rendered their second decision in an environmental case that early after Dolphin/Tuna (SANDS 2003). While the law itself obliged shrimp trawl vessels to use turtle excluder devices (TEDs), section 609 extended its scope by prescribing an import ban on shrimp harvested by means that might harm sea turtles. In order to prevent such a ban, exporting countries had to obtain in negotiations a certification declaring that they disposed of a regulatory programme comparable to the U.S. in order to protect sea turtles. As the U.S. did not even contact them for negotiations, India, Malaysia, Pakistan and Thailand were adversely affected by the United States’ turtle protection regime and thus felt forced to challenge it before a panel.

On the opposing side, they saw themselves not solely confronted with the U.S., but also with coalitions of NGOs that had filed briefs highlighting the environmental dimension of the case. In the panel proceedings, the United States incorporated the briefs both by the Worldwide Fund for Nature (WWF) and by a coalition led by the U.S.-based Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL), a university-based legal group. Before filing its actual brief, the latter had already stressed the need for the WTO to admit amici curiae in a motion (CIEL, 2005). It was the same coalition that also lobbied by a letter to President Clinton to appeal the panel’s decision, which declared the U.S. policy inconsistent with the WTO regime. In its appeal as well as in the second phase of the Shrimp/Turtle dispute in 2001, when Malaysia unsuccessfully challenged the revised guidelines (DE LA FAYETTE, 2003), the United States again integrated the factual and legal information provided by amici into its own submission.²⁸

However, deducing from this approach that the amici were in essence mere advocates of U.S. interests would be wrong: although, e.g., the first briefs by the WWF and the CIEL coalition expressed similar opinions regarding the procedural questions, meaning the admittance of amicus briefs, and the legal interpretation of the disputed Art. XX GATT (CIEL 1999),²⁹ the United States repeatedly stated that it did not wholly endorse the position stated in the briefs.³⁰ Accordingly, the dispute settling bodies only took those parts of the briefs into account which were identical with the defendant’s position, thereby reducing them to a repetitior of U.S. arguments. Retrospectively, the complainants’, later the appellee’s as well as several third parties’ opposition to the briefs appeared only justified from a systemic point of view.

None of the complainants or appellees was confronted with the opposition of an amicus operating under its own jurisdiction. The only exception was India as a third party and proponent of Malaysia’s position in its recourse to Art. 21.5 DSU: four Indian based NGOs³¹ had joined the Na-

³¹ Marine Turtle Preservation Group of India, National Wildlife Federation, Operation Kachitapa, Project Swarajya and the Visakha Society for Prevention of Cruelty to Animals. With the exception of the first group, the location of these groups has been found out on their respective websites.
4.3 A Public Health Case: The EC and NGOs v. Asbestos Imports

Table 2: The amici in the Asbestos cases

<table>
<thead>
<tr>
<th>Cases</th>
<th>Parties to the Dispute</th>
<th>Amici curiae</th>
</tr>
</thead>
<tbody>
<tr>
<td>EC-Asbestos</td>
<td>Canada vs. the EC Relevant third parties: Brazil and Zimbabwe</td>
<td>In favour of the applicant:</td>
</tr>
<tr>
<td>WT/DS135/R,</td>
<td></td>
<td>• the Instituto Mexicano de Fibro-Industrias A.C.</td>
</tr>
<tr>
<td>18 September 2000</td>
<td></td>
<td>In favour of the respondent:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Collegium Ramazzini</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• the American Federation of Labor and Congress of Industrial Organizations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• both incorporated into the EC's submission</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Ban Asbestos Network</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• ONE (Only Nature Endures)</td>
</tr>
<tr>
<td>Appeal both by Canada and the EC Relevant third party: Brazil</td>
<td>(11 submissions – cf. Annex A)</td>
<td></td>
</tr>
</tbody>
</table>

While Shrimp/Turtle had only drawn the interest of environmental protection or advocacy organizations, groups representing a myriad of interests, ranging from the already acquainted NGOs to public health associations, church groups and chemical trade associations attempted to contribute to the proceedings launched by Canada against a French import ban of asbestos and products containing all forms of this supposedly carcinogenic substance (Wirth 2002). Already the panel was confronted with five amicus submission, whereof one originating from an Indian environmental NGO, Only Nature Endures (ONE), was rejected as untimely. While the defendant, the EC, found the briefs filed by a group of experts and a labour interest organization as reflecting its own arguments and therefore incorporated them into its submission, another brief in support of its position was not taken into consideration. Likewise, the scientific and legal opinion of the Instituto Mexicano de Fibro-Industrias

While Shrimp/Turtle had only drawn the interest of environmental protection or advocacy organizations, groups representing a myriad of interests, ranging from the already acquainted NGOs to public health associations, church groups and chemical trade associations attempted to contribute to the proceedings launched by Canada against a French import ban of asbestos and products containing all forms of this supposedly carcinogenic substance (Wirth 2002). Already the panel was confronted with five amicus submission, whereof one originating from an Indian environmental NGO, Only Nature Endures (ONE), was rejected as untimely. While the defendant, the EC, found the briefs filed by a group of experts and a labour interest organization as reflecting its own arguments and therefore incorporated them into its submission, another brief in support of its position was not taken into consideration. Likewise, the scientific and legal opinion of the Instituto Mexicano de Fibro-Industrias...
of the Court doubted that any amicus could have contributed arguments going beyond the party submissions (HOWSE 2003). Still the way the AB dealt with the briefs, i.e. the publication of an Additional Procedure, was subject to harsh criticism by developing countries, which considered that as an overstretch of the judges’ mandate.40

4.4 Rights of Indigenous People: The Softwood Lumber Dispute

Table 3: The amici in the Softwood cases

<table>
<thead>
<tr>
<th>Cases</th>
<th>Parties to the Dispute</th>
<th>Amici curiae</th>
</tr>
</thead>
</table>

Other than in Asbestos or Shrimp/Turtle, the nexus between the more than twenty years lasting Softwood Lumber disputes (DFAIT 2005b; MINISTRY OF FOREST, GOVERNMENT OF BRITISH COLUMBIA 2002) and the interests voiced by external parties is anything but obvious: between the United States and its Northern neighbour evolved a dispute about the Canada’s provincial and federal forest management regimes. With the expiration of the 1996 Lumber Trade Agreement in 2001, a five year long interlude free of conflict likewise ceased and the dispute reached the WTO. Considering Canada’s export restriction and some province’s particularly low stumpage fees (ALI, SACCOCIA, THOMPSON 2005)41 as countervailable subsidies, the U.S. reacted to a petition launched by the Coalition for Fair Lumber Imports by imposing countervailing and anti-dumping duties on Canadian softwood lumber (DFAIT 2005b). Canada challenged these measures before the WTO and thereby saw the American lumber industry supported by two unexpected amici: in two of five Softwood Lumber cases the Indigenous Network on Economies and Trade submitted its opinion and in the second dispute the Interior Alliance.42

As the name of the former suggests, the aides were associations defending the rights of indigenous people. Their intervention in a case that at first glance seems to be a solely economic matter becomes comprehensible by the Interior Alliance’s submission, which has been taken into consideration by the panel without ts being incorporated in a party’s submission. The Interior Alliance claimed that harvesting companies were only able to beat the market price because of British Columbia’s refusal to redistribute a share of the revenue gathered from them to indigenous people. Thus the Canadian lumber industry not only profited from low stumpage rates, but already the non-recognition of aboriginal land rights had the effect of a subsidy under international trade law. As a consequence they called on the panel to:

“Maintain the present trade remedies necessary to restore fair competition and ensure that fundamental conditions for fair trade such as environmental protection and the recognition of indigenous rights, especially Aboriginal Title, be respected and met by the Canadian government and Canadian forest companies in the future.” (ICTDS 2002)

Albeit its supporter, the United States rejected the Interior Alliance’s interpretation, since it considered the question of traditional land rights better to be addressed domestically (GASTLE 2002). The panel itself did not quote or refer to the brief in its decision, but explained that harvesting companies were taking on a number of obligations in addition to paying43 the actual fee under provincial stumpage contracts, which has been interpreted as a reference to Aboriginal rights (MANUEL 2002).

40 See above Chpt. 3.2.

41 Stumpage fees are charged “to logging companies for the right to harvest lumber form public land.”


India, as the only developing country involved as a third party, did not issue any opinion on it, but focused on the legal questions raised by the two parties, whereby it backed the Canadian standpoint.\textsuperscript{44} In the remaining Softwood Lumber cases involving unsuccessful \textit{amicus} submissions in support of the U.S. claim,\textsuperscript{45} however, it raised its voice against the acceptance of briefs in general.\textsuperscript{46}

### 4.5 Business Interests: Defending Barriers to Trade

#### Table 4: Amici involved in business cases

<table>
<thead>
<tr>
<th>Cases</th>
<th>Parties to the Dispute</th>
<th>Amici curiae</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Lead and Bismuth II</td>
<td>The EC vs. the U.S. Relevant third parties: Brazil and Mexico</td>
<td>In favour of the respondent: • American Iron and Steel Institute (AISI)</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 23 December 1999</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US-Lead and Bismuth II</td>
<td>The U.S. as appellant; the EC as appellee Relevant third parties: Brazil and Mexico</td>
<td>In favour of the appellant: • AISI • Specialty Steel Industry North America</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 7 June 2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US-Countervailing Measures on Certain EC Products</td>
<td>The U.S. as appellant; the EC as appellee Relevant third parties: Brazil and India</td>
<td>In favour of the appellant: • AISI</td>
</tr>
<tr>
<td>WT/DS212/AB/R, 9 December 2002</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US-Definitive Safeguard Measures on Steel</td>
<td>The U.S. as appellant; Inter alia Brazil and Korea as appellees</td>
<td>In favour of the appellant: • AISI</td>
</tr>
<tr>
<td>WT/DS249-259/AB/R, 10 November 2003</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US-Section 110(5) Copyright Act</td>
<td>The EC vs. the U.S. Relevant third party: Brazil</td>
<td>In favour of the respondent: • Association of Singers, Composers, Authors and Publishers (ASCAP),</td>
</tr>
<tr>
<td>WT/DS160/RI, 15 June 2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EC-Bed Linen</td>
<td>India vs. the EC</td>
<td>In favour of the applicant: • Foreign Trade Association (FTA)</td>
</tr>
<tr>
<td>WT/DS141/FL, 30 October 2000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{44} Panel Report US-Preliminary Determinations Softwood Lumber, paras. 5.46-5.55

\textsuperscript{45} The briefs themselves have not been published, but their general tendency is clear given the nature and activities of the NGOs involved: all of them are part of the "Transborder Conservation Project" (Transborder Conservation Project 2005) and have signed a letter directed to U.S. Special Ambassador Marc Racicot, wherein they stated their opinion (IBC Coalition 2002; NRDC 2002).


Besides spokesmen of environmental, public health or aboriginal concerns, also representatives of industry and business tried to reach the WTO's judicial bodies as \textit{amicus curiae}: the American Iron and Steel Institute (AISI), which comprises 31 member companies and 116 affiliate and affiliate members linked to the steel industry, tried to act as the 'voice of the Northern American steel industry'\textsuperscript{47} in four cases concerning the U.S. steel regime (AISI 2005). In addition, the Brussels based Foreign Trade Association (FTA) tried to intervene in the Bed Linen dispute between the EC and India, while the American Society of Composers, Authors and Publishers (ASCAP) submitted a brief in the US-Section 110(5) Copyright Act case.

ASCAP's submission was unsuccessful: the EC had claimed that a section of the U.S. Copyright Act, which exempted certain retail and restaurant establishments from paying royalties for radio or TV music, violated the TRIPS Agreement (USTR 2005). On certain questions raised by the panel thereto, the United States Trade Representative (USTR) asked ASCAP's legal advisors for their opinion, which was then considered as useless to the dispute by the defendant as well as by the complainant.\textsuperscript{48}

The AISI's first attempt to reach the panel in US-Lead and Bismuth II failed due to untimeliness,\textsuperscript{49} but in the appeal its brief as well as the one filed by the Specialty Steel Industry North America\textsuperscript{50} were discussed by the parties and third parties. Both briefs argued in favour of U.S. countervailing duties on steel exports, which had been imposed on British company due to the terms applied for its privatisation (Prevost 2001). Hardly surprising was the outright rejection of these \textit{amicus} opinions by the third parties Mexico and Brazil,\textsuperscript{51} firstly, the two countries were and still are generally opposed to \textit{amicus} submissions, and, secondly, they supported the EC's complaint both before the panel and the AB, referring to the detrimental effect of the U.S. practice on their own privatisation programmes. Although the A3 once more stressed its competence to consider \textit{amicus} contributions deemed helpful, it again renounced to do so.\textsuperscript{52}

Of the other two relevant cases pertaining to U.S. steel policy, a nearly identical picture can be drawn: in the appeal on US-Countervailing...
Measures on Certain EC Products, the U.S. declared that it did not intend to incorporate the AISI's brief into its own submission, but that it nonetheless agreed with it in most its aspects, whereas India and Brazil as third parties probably agreed neither with its contents nor its admission. Similarly, in US-Definitive Safeguard Measures on Steel the appellee Brazil was supported by Latin American third parties in its opposition against the AISI brief, which was finally not taken into consideration.

While AISI and ASCAP both defended the interests of their 'home country', the United States, the EC-Bed Linen case shows that this does not always have to be that way in cases pertaining to industrial interests (STERN 2003). Naturally, comparing the amicus in this panel procedure to the two interest organizations is not admissible, since the Foreign Trade Association (FTA) engages not for specific interests, but for a free world trade and the liberal development and strengthening of the multilateral trading system within the framework of the WTO (FTA 2001).

Bearing that in mind, it is less surprising that a European NGO should support a developing country like India in a judicial conflict with the EC: the latter had applied anti-dumping measures against importations of textile products made in India, which were challenged as inconsistent with the Anti-Dumping Agreement. However, the FTA's supporting brief was not taken into consideration by the panel, not even the parties commented on it, although one could speculate on India's traditionally outright rejection of the submission.

Although a categorization of Thailand-H-Beam, EC-Sugar and EC-Sardines could also follow the previous pattern, these three cases are set apart for revealing problems connected to amicus submissions that go beyond legal questions regarding the AB's mandate or the resistance of Member States: the first two cases showed the risks of the dispute settlement's desired 'openness', whereas the third highlighted possible conflicts of rights and duties between third parties and amici.

In Thailand-H-Beams and EC-Sugar, Thailand as appellant and Brazil as one of two complainants found confidential information disclosed to external parties: when asked to express its opinion on the brief of a U.S. association, Thailand not only pointed out the AB's lacking authority to consider such a submission, but also a 'potentially more serious issue' linked to it. Specifically, the Consuming Industries Trade Action Coalition's (CITAC) brief contained references to arguments made by Thailand in its submission, indicating that this organization had obtained access to these confidential information. Thailand alleged that Poland or a third party must have 'failed to treat Thailand's submission as confiden-

---

54 The AB states in its report that the third parties could not agree on a common position regarding the amicus brief (para. 76 fn. 177). However, as India and Brazil sided with the EC in this dispute and in general firmly oppose submissions of external parties, it is permissible to assume their rejection of the brief in this case.
56 Panel Report EC-Bed Linen, para. 6.1 fn. 10.
Moreover, Thailand observed that the law firm representing the appellee Poland also maintained a close connection with CITAC, suggesting that it might have passed on the contents of Thailand's submission to CITAC.59

Reacting to the AB’s inquiries, neither the third parties60 nor Poland could explain the leak of information: the latter replied that while there was a connection between the law firm acting as its legal counsel and CITAC, that firm had not assisted CITAC in preparing its amicus submission and that neither the Polish government nor members of the law firm could explain how CITAC came to refer so specifically to Thailand’s brief.61 Consequently, the AB emphasized in its preliminary ruling the importance of Art. 17.10 and 18.2 and officially rejected CITAC’s amicus brief, but declined the appellant’s request to issue a direct inquiry to CITAC, as it was not a party to the case.62

Three years later, Brazil detected in a brief filed in support of the EC’s export subsidies on sugar ‘that there was evidence that a breach of confidentiality had occurred’63 with respect to certain information provided in the amicus submission. Supported by the other complainants, Thailand and Australia, Brazil urged the panel to investigate how the breach could occur. Not able to discern the source of the Wirtschaftliche Vereinigung Zucker (WVZ),64 the panel decided not to take the submission into account since it regarded it as ‘evidence of a breach of confidentiality which disqualifie[d] the credibility of the authors’.65

On appeal, an amicus brief filed in favour of the appellees caused less disturbances: the Association of Central American Sugar Industries’ brief was found unnecessary to be taken into account.66

While the external intervention in the above cited cases would have been to the detriment of the participating developing countries, the standpoint taken by the amicius in EC-Sardines has not been accessible. Although the European Communities as appellant were eager to accept the brief filed by Morocco, it is not clear whether the EC did so to gather helpful information or simply to further promote amicius briefs as a procedural means (STERN 2003). As has already been discussed above,67 the submission of the Kingdom of Morocco stirred a debate less due to its potential contents than for the mere fact of its acceptance by the AB.68 Peru, the appellee in the case, argued that the appearance of a Member as amicus constituted a circumvention of the DSU’s third party rules. This view was shared by a majority of developing countries, most prominently by the Latin American Members, since they had witnessed Colombia being denied third party status (COVELLI 2003; Dispute Settlement Body 2002; ZIMMERMANN 2004).

5 Whose Friend, Whose Foe? – Concerns Analysed

5.1 Power Issues and Systemic Concerns in the Past Cases

In light of the twenty-one cases taken into consideration, one is again compelled to ask: have the concerns of developing countries against amicius briefs indeed been, using once more MAVROIDIS’ (2002) reference to Shakespeare, ‘much ado about nothing.’ Have developing countries only cried wolf or have they taken the role of Cassandra, foreseeing adversary consequences for the dispute settlement procedure as a whole? The following sections shall, on the one hand, seek responses to concerns related to ‘power issues’, namely fears connected to the kinds of organization that tried to intervene and their motives to do so. Thereby it will be inquired whether amici have turned out less to be friends of the Court than friends of the West and Western business interests. On the other hand, it shall be focused on systemic issues, i.e. questions regarding changes in the character of the WTO’s dispute settlement procedure and a potential imbalance of rights between Member States and external parties. But, initially, it will be dealt with ‘fear number one’: the floodgate argument.

References:

67 See above Chpt. 3.3.
5.2 Primary Fear: The Floodgate Opened?

An ‘unmanageable number of requests’ (MAVRODIS 2002), a flood of amicus briefs had been expected by Mexico if the gates were opened for external parties to express their opinion on certain aspects of a dispute. But already at a special session of the DSB in November 2003, Chairman Péter Balás noted a discrepancy between expectations and fact: at that time, amicus curiae briefs had been submitted in just nine per cent of all cases, respectively fifteen times, whereby in thirteen of these cases Members had raised the issue of amicus briefs at DSB meetings (DSB 2003c). During the past two years, the relevant caseload augmented by only six disputes, thus to 45 amicus briefs. As has already been explained, of these ten that had been taken into account by panels or the AB, only two had not been incorporated into a party’s submission. Thus the parties were forced to answer to the points raised by these amici, but that did not necessarily increase the workload of the developing countries participating in those disputes: the successful submission of ‘Concerned Fishermen and Producers of Southern Australia’ in Australia-Salmon did not concern any developing country, whereas the opinion of the Interior Alliance in US-Preliminary Determinations Softwood Lumber was not even commented on by India, a third party in that dispute. Even in cases where one party included a brief into its own submission, the remaining participants had not to give further consideration to it, as the former often declared only those points of a brief as relevant that coincided with its own views.

The gap between expectations of a flood of briefs and the reality of their rare appearance and little influence can partly be explained by the deterring practice of the AB: the way it handled the submissions to EC-Asbestos had not only irritated Member States, but also those entities that had filed a brief in accordance with the Additional Procedure. Its rejection of all amicus contributions has been preceded by a convention of the General Council which ended with the Chairman admonishing the judges to deal cautiously with the issue (UMBRICH 2005, Wirth 2002; ZIMMERMANN 2004). Thus potential friends of the Court finally knew neither under what circumstances their voice would be heard nor to what extent the AB bended to external pressure. Obviously, procedural questions concerning external submissions which remain unanswered pose a problem to both Member States and amici curiae: the lack of transparency and of defined rules can deter an entity to file a brief, as it cannot evaluate its chances for success and therefore might prefer to avoid a financial and procedural risk.

But, more importantly, the defenders of the floodgate argument also base their expectations on false assumptions: as Hovse (2003a) explains:

“This fear was largely a product of ignorance of amicus practice before other courts and how it evolved – which is that in practice courts, whether municipal or international, end up accepting only a few briefs, with most submissions rejected on grounds of lack of relevance.” (S. 504)

This observation, however, does not hold for the Latin American coalition: even though they share a civil law culture, and neither the Arbitral Tribunal of the Mercosur admits external submissions (MARCEAU 2001) nor mentions the Statue of the Tribunal of the Andean Community amici curiae briefs, they are well acquainted with amici curiae – at the Inter-American Court of Human Rights. Without disposing of an unambiguous legal basis nor further commenting on the admissibility of amicus briefs, the Court has developed what Shelton termed ‘the most extensive amicus practice’ (SHELTON 1994; MARCEAU 2001) at the international level, in contentious jurisdiction as well as in advisory proceedings. Thereby it was never confronted with the resistance marked by Latin American countries against the acceptance of briefs at the WTO (BUERGENTHAL 1985). In sum, this coalition of opponents was and is well aware of the amicus practice of an international court, but with a practice that runs counter to the experiences referred to by Hovse.

Transposing this experience to the WTO level entails a misperception of the nature of disputes drawing the attention of potential amici: the International Tribunal of the Andean Community has not been covered in the comparative analyses of MARCEAU and SHELTON. The “Estatuto del Tribunal de Justicia de la Comunidad Andina” does not mention amicus briefs and searching the online-database of judgements did not produce any hits for amicus curiae.

---

69 Quoting from the Minutes WTO Doc. WT/GC/M/100 of 23 January 2001.
70 See above Chpt. 4.1.
71 See above Chpts. 4.2 and 4.5

72 Hovse (2003a) has not referred to the example of the Inter-American Court of Human Rights in context of the floodgate argument, but to disprove the often heard opinion that the main resistance of developing countries against amici roots in a “clash of legal cultures” (UMBRICH 2005). Developing countries themselves did not forward this argument, but Mexico spoke of an illegitimate preference for common law practice when commenting on the Methanex and UPS decisions, the two NAFTA cases in which the tribunals admitted amicus briefs (BIESKLAND 2002).
73 The Tribunal of the Andean Community has not been covered in the comparative analyses of MARCEAU and SHELTON. The “Estatuto del Tribunal de Justicia de la Comunidad Andina” does not mention amicus briefs and searching the online-database of judgements did not produce any hits for amicus curiae.
74 Above ten years after Buergenthal’s publication, Shelton does not report any protests against the Court’s acceptance of external briefs.
American Court of Human Rights deals with questions pertaining to essential societal issues; the domestic court with the most extensive amicus practice, the U.S. Supreme Court, receives briefs in more than half of all non-commercial cases amicus briefs, most prominently in environmental cases (Shelton 1994). In contrast, the WTO’s dispute settling bodies do not regularly deal with issues of social or environmental concern (Howse 2003a), such as genetically modified organisms (GMO) or asbestos. Accordingly, the panel’s and the AB’s decisions rarely draw major public attention and thus will not very likely be confronted with a comparable development.

5.3 Power Issues: amici curiae as Friends of the West?

Setting aside that the WTO Members have been spared a flood of briefs, the question remains whether those entities that submitted their opinion were mainly located in Western countries, as suspected by most developing countries. A first glance at the overview of amici curiae provided in Table 6 confirms this expectation: hardly a third of all amici were based in a developing country, whereof none did not even file their brief independently, but relied in US-Shrimp/Turtle and EC-Asbestos on coalitions of NGOs under Western leadership. However, this record would be bended in favour of entities located in developing countries, had the many asbestos producers – ranging from firms in Swaziland to Korea – not filed their briefs at a stage where the Additional Procedure had not yet been published. Accordingly, their submissions did not comply with the AB’s requirements and had to be disregarded by the judges.

Moreover, while Western amici do in fact dominate the current picture, they cannot be regarded as a developing country’s adversaries and their home country’s natural allies. In cases touching upon environmental or public health issues, amici curiae can indeed be termed as foes of developing countries – meaning their governments – as NGOs operating in these fields have defended conservative policies they consider necessary, but which violate WTO agreements. At the domestic level, however, the same entities regularly represent interests that conflict with their government’s programme: these NGOs engage for global issues and are not mere advocates of any government. Congruence between their goals occurs only at

<table>
<thead>
<tr>
<th>Type of amicus</th>
<th>Number of amicus briefs filed:</th>
<th>Therof Located in a Developing Country:</th>
<th>Number taken into consideration:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member State</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Individual</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Group of Experts</td>
<td>4</td>
<td>1 (independently); 6 (incorporated)</td>
<td>6 (incorporated)</td>
</tr>
<tr>
<td>Environment</td>
<td>14</td>
<td>2 independently; 9 as part of a joint brief</td>
<td>6 (incorporated)</td>
</tr>
<tr>
<td>Public Health</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Industrial/Trade Interests</td>
<td>14</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Labour Interests</td>
<td>1</td>
<td>0</td>
<td>1 (incorporated)</td>
</tr>
<tr>
<td>Indigenous People</td>
<td>3</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>In Total:</td>
<td>45</td>
<td>16</td>
<td>10</td>
</tr>
</tbody>
</table>

At the WTO level, examples for amici that have not appeared as friends of their State constituted the European FTA and the Canadian Interior Alliance. More interestingly, though, the same could be witnessed in the case of NGOs operating solely in developing countries: as has already been observed, in US-Shrimp/Turtle Indian environmental organizations supported the U.S. standpoint and thereby underlined that a government’s opinion does not necessarily coincide with the one held by civil society. Depending on the accessibility of a country’s political system, amici curiae could provide a means for representatives of specific interests to voice their opinion which otherwise might remain unheard.

75 With regard to US-Shrimp/Turtle this has also been observed by Stazes 2003.
76 See above Chpt. 4.3.
77 See above Chpt. 4.2.
5.4 Power Issues: amici curiae as Friends of Business?

Affluent and influential as they already are at domestic level, business associations were feared to exercise additional pressure in the WTO dispute settlement procedures as amici curiae. Prévost (2001) even asserted that parties to a dispute would mainly include briefs filed by business associations and thus further strengthen these organizations. Contrary to these concerns, Table 6 shows that business interests were not predominant, as becomes even more poignant if one considers that of these fourteen briefs nearly a third had been filed by the American Iron and Steel Institute alone.

Like in the case of the faulty floodgate argument, this counterintuitive result can only be explained by the fact that amicus opponents again based their argument on a wrong, though not disclosed assumption: that business associations or corporations have no other possibility to defend their interests than by amicus submissions. Yet in the United States as well as in the EC, they are granted a more efficient means by law (Stoiber 2004): the 1974 U.S. Trade Act allows private entities to complain against alleged breaches of trade agreements, which might lead to WTO procedures. Similarly, pursuant to the EC's Trade Barriers Regulation of 1994, a petition can be filed with the Commission to investigate the admissibility of barriers to trade. If obligations under the WTO have indeed been violated by a State and if it lies in the interest of the European Communities to set an end to this situation, the Commission will ask for consultations according to the DSU. Thus it is far more effective for a European or U.S. defender of corporate interests to file a complaint with the Commission, respectively with domestic authorities, whose consideration is granted by law, rather than submit an amicus brief that can easily be disregarded. However, sometimes the domestic petitioning efforts involuntarily lead to a dispute before the WTO: the U.S. Coalition for Fair Lumber Imports, as has been told before, had successfully lobbied for countervailing duties against Canadian softwood lumber – which ultimately led to a complaint against the U.S. In the series of cases pertaining to that conflict, the named organization never appeared as an amicus.

In addition to these legal means, corporations and business associations also know more discreet ways to reach dispute settlement circles, most prominently by lobbying efforts. Given their experience and resources to access the WTO dispute settlement world without the risk of being openly turned down like most amici, Howse (2003a) remarked that:

"The idea that the amicus procedure would be captured by these kinds of interests, or would largely benefit them is close to absurd. Why walk through the front door, when you can go through a key-hole?" (S. 509)

5.5 Systemic Issues: Imbalance of Rights and Obligations?

Less obvious are the answers to concerns relating to changes in the dispute settlement system due to amicus contributions. Member States feared that, by admitting external briefs, the inter-governmental character of the WTO would be threatened and private entities would be granted participatory rights without corresponding obligations. However, this perception is to be refuted by reference to the AB's rulings: although external parties have the possibility to file briefs to both instances, there is no right to having them considered by the judges. In contrast, third parties are bound to certain procedural obligations, but in exchange, their opinion must be heard and considered by either panel or AB. Moreover, only Member States enjoy locus standi before the dispute settling organs of the WTO.

The admittance of amicus briefs filed by Member States in EC-Sardines should, theoretically, further weaken, if not nullify the argument that external entities received more rights than regular Members. In that particular dispute, however, a Member State was indeed put at a disadvantage as the status of amici was commonly regarded as reserved to private entities; while Colombia tried to reach the AB on the habitual path, i.e. as a third party, but was refused this status, Morocco circumvented these regulations and appeared as an amicus. Thus Colombia was deprived of the possibility to make its position known, whereas a private individual's opinion was taken notice of. The fact that the two briefs accepted were not taken into consideration does not compensate Colombia's foregone opportunity to forward its arguments.

For the future, however, the situation has been clarified and States like Colombia now dispose of another means to make their standpoint known.

78 See above Chpt. 4.4.
79 See above Chpt. 2.2.
80 See above Chpt. 3.3 & 4.6.
It has even been suggested that *amicus* participation might provide a cost-effective way for less affluent States to participate in the proceedings (Howse 2003a). But before we could speak of *amicus* briefs as 'cost-effective', the conditions under which a brief is successful, i.e. effective, should be laid down by either the DSB or the AB. In the meantime, States, and particularly States with few resources at their disposal, will probably avoid the risk of filing their arguments like other potential *amicus*.

Regarding further categories of potential *amicus*, only one question remains to be raised: whether non-Member States likewise have a right to submit their arguments. Particularly States that are already trying to acquire membership might have an interest to state their opinion in disputes potentially affecting their future position. In view of the AB's and the panel's current case law, nothing speaks against a non-Member's *amicus* intervention. Politically, however, it seems not advisable for a State involved in accession talks to express its opinion on a case and thereby possibly offend its negotiating partners – an argument which might counterbalance the non-Members' interest in intervening and thus render the overall likelihood of such a brief very small.

Equally pertaining to the question of an imbalance of rights between external parties and Members are confidentiality issues: such an asymmetry could indeed be observed if private entities were able to access confidential submissions or information about the substantial meetings between judges and parties to a dispute. Both party submissions and meetings remain, however, inaccessible for external parties. Up to this point, one could agree with Howse (2003b) that the admittance of *amicus* briefs is structurally not incompatible with confidential proceedings. However, experience has shown that there indeed exists a link between questions of confidentiality and *amicus*, since the latter have already undermined confidentiality rules in two cases: the Thailand-H-Beams as well as the EC-Sugar cases will not render it easier for panels to establish 'equality of arms' (Ehlermann 2002) between disputing parties by motivating them to make available all information used in their defence. Why should one disclose confidential information to an opponent, if the latter might pass it on to external parties?

---

81 See above Chpt. 4.2.
82 This question has, to my knowledge, not been posed in the literature.
83 He reiterated this opinion in Howse (2003a).
84 Additional Procedure para. 3(g).
85 Panel Report EC-Sugar (Australia), para. 7.83.
86 Quoting from the Minutes WTO Doc. WT/GC/M/60 of 23 January 2001.
conflict with political institutions (Davey 2003). In contrast, the International Court of Justice (ICJ) never declined to decide a case considered by critics as purely political conflicts. (Mavroidis 2002), while it did frequently declare itself only concerned with legal questions of a dispute which are to be abstracted from the surrounding political aspects (Davey 2005; Shav 2003), the Court did not provide any guidance on how to distinguish between political or legal questions.

Similarly, the WTO's adjudicating bodies have been accused of interfering in political issues in two cases: in India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Goods and in Turkey—Restriction on Imports of Textile and Clothing Products they were confronted with questions that should have been settled by political organs of the WTO, but were stuck in a political impasse (Davey 2003; Ehlermann 2002, Hovse 2003b). Even though, according to Ehlermann, panel and AB regarded these respective disputes to be addressed more suitably by the competent Committees, they could not decline to render a decision as this would have been contrary to Art. 3.2 DSU.

Yet to justify the refusal of a political questions doctrine at the WTO, reference to the DSU is not essential: the observations made for and by the ICJ are also valid for disputes before WTO panels or the AB – political issues are often, if not always entwined with the legal question at disposition. In international law in general as well as in international trade law, the legal kernel of a dispute can be discerned, but that cannot change the perception of a dispute as inherently political. Thus a dispute is not politicized due to amicus submissions, it is rather its inherent political nature that leads NGOs and other entities to engage as amici. Cases leading to many amicus submissions are already subject to a political debate before NGOs try to make themselves heard; public awareness of cases like the pending GMO dispute is high, as they pertain to problems unresolved at domestic level.

In the judicial proceedings, parties might try to highlight the political sensitivity of an issue, by adding political or ethical rather than unambiguously legal arguments. But their impact is marginal, as has already been indicated above: a dispute settling body does not see its role in settling political, but legal disputes and thus filters submissions for their legal ar-

Cf. for instance the ICJ’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, which was often criticized for dealing with a purely political question [Advisory Opinion of 8 July 1996, ICJ Reports 1996, pp. 220] at-

6 Summary and Conclusion

“Much ado about nothing?”—this question has guided the analysis of the WTO’s amicus cases. In the course of this examination, it has been argued that

- the judicial bodies and the parties to a dispute have not been exposed to a flood of amicus briefs, because WTO disputes do not always concern issues that rank high in the public awareness and thus stir the interest of NGOs.
- business associations have not dominated the amicus submissions, since they dispose of more discreet and effective ways to reach dispute settling circles.
- although it were mostly Western organizations which filed briefs, they did not necessarily defend the interests of their home country: NGOs engaging for social and environmental issues stand for global concerns and thus often pursue their interests in opposition to their respective governments.
- an imbalance of rights between external parties and regular Members does not exist at the latter’s disadvantage, since both are entitled to file briefs amicus curiae and only Members enjoy locus standi as well as access to confidential meetings and information.
- disputes are not politicized by amicus briefs, since it is their inherent political nature and domestic importance that leads NGOs to submit their arguments. Cause and effect have obviously been reversed by those holding this concern.

Thus an unambiguous yes or no cannot be given as an answer, instead it has to be opted for a “yes, but”: yes, many concerns have proven ungrounded. Neither have we witnessed an unmanageable flood of submissions filed by entities defending the affluent Western business world, nor saw we Member States put at a disadvantage in comparison to potential amici. Likewise, we cannot speak of a major influence exercised by external parties; disputes before the WTO’s judicial bodies are as political or non-political as they have always been in cases drawing public interest. Hence amicus briefs cannot be regarded as a main deterrent for the participation arguments. As a consequence, NGOs filing a brief do often use their appearance as a forum to ‘sell their message’ (Mavroidis 2002) and to nourish a public debate, but it lies not in their force to prevent the judges to filter their arguments and thus deprive proceedings of their legal nature.
of LDCs, and certainly not for the participation of developing countries that are comparatively affluent like India.

But: we indeed saw problems caused by *amicus* submissions. Parties leaking confidential information to external entities do imperil the character of the WTO’s dispute settlement system which still does not equal a purely judicial procedure, but includes a strong diplomatic element depending on mutual trust between the parties. These breaches of confidentiality as well as the legal uncertainty on the side of both *amicus* and Member States can only be addressed by adopting clearly defined rules as the AB did in EC-Asbestos. However, the latter need to be agreed upon by the Dispute Settlement Body and thus by all Member States. This has so far not been possible, as the *amicus* debate is also a reflection of the divide between affluent developed countries eager to make the dispute settlement more accessible and developing countries that have even in the light of the *amicus* record not recoiled from their position.

**References**


Center for International Environmental Law (CIEL) (1999), *Amicus Brief to the Appellate Body on United States – Import Prohibition of Certain Shrimp and Shrimp Products*, In cooperation with the Center for Marine Conservation (CMC); on behalf of Environmental Foundation Lt. (EFL), Mangrove Action Project (MAP), Philippine Ecological Network (PEN), Red Nacional de Accion Ecologia (RÉNACE) and Sobrevivencia, Internet: http://ciel.org/Publications/shrimpturtlebrief.pdf (as of 16 May 2005).

Center for International Environmental Law (CIEL) (2005), *Notice to Submit Amicus Brief to the Panel on United States – Import Prohibition of Certain Shrimp and Shrimp Products*, In cooperation with the Center for Marine Conservation (CMC), the Environmental Foundation Ltd. (EFL), the Philippine Ecological Network (PEN) and Red Nacional de Accion Ecologia (RÉNACE), Internet: http://ciel.org/tae/second.html (as of 16 May 2005).


SIERRA CLUB (1998), Letter to President Clinton on WTO Sea Turtle Protection, In cooperation with the Center for International Environmental Law (CIEL), the Center for Marine Conservation (CMC), the Community Nutrition Institute, the Defenders of Wildlife, the Earth Island Institute, the Earthjustice Legal Defense Fund (ELDF), Friends of the Earth, the Humane Society of the United States, the National Audubon Society, the National Wildlife Federation and the Natural Resources Defense Counsel, Washington, Internet: http://www.sierraclub.org/trade/environment/turtles.asp (as of 19 May 2005).

[as cited as: Letter to President Clinton]


STOIBER, Benedikt (2004), Das Streitschlichtungsverfahren der Welthandelsorganisation, Diss. Universität Regensburg. Frankfurt am Main: Peter Lang GmbH.


[as cited as: Transborder Conservation Project]


UNITED STATES TRADE REPRESENTATIVE (USTR) (2005), Overview of WTO and NAFTA Dispute Settlement Involving the United States, Internet: http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file881_5697.pdf (as of 27 May 2005).


---

**List of Cases**

All decisions have been retrieved on 29 April 2005 at http://www.wto.org.


[cited as: Panel Report Australia-Salmon]


[cited as: Panel Report EC-Bed Linen]


[cited as: Panel Report EC-Sugar (Australia)]


[cited as: Panel Report EC-Sugar (Brazil)]


[cited as: Panel Report EC-Sugar (Thailand)]


[cited as: AB Report EC-Sugar]


[cited as: Panel Report EC-Asbestos]
[cited as: AB Report EC-Asbestos]

[cited as: AB Report EC-Sardines]

[cited as: AB Report US-Countervailing Measures on Certain EC Products]

[cited as: AB Report US-Definitive Safeguard Measures on Steel]


[cited as: AB Report US-Final CVD Softwood Lumber]

[cited as: Panel Report US-Shrimp/Turtle]

[cited as: AB Report US-Shrimp/Turtle]
## Annex A: Overview of Relevant Cases

The following table provides an overview of all relevant cases ordered chronologically according to the date of the decision, thereby showing
- which developing countries had participated in the dispute.
- what entities had filed a brief *amicus curiae*.
- and whether these briefs had been taken into consideration by either panel or AB.

The overview has been made with the aid of
- Worldtradelaw.net
- WTO.org

<table>
<thead>
<tr>
<th>Case</th>
<th>Developing countries involved</th>
<th>Number of amicus briefs</th>
<th>Themselves taken into consideration</th>
<th>Amicus curiae</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Lead and Bismuth</td>
<td>Brazil and Mexico as third parties</td>
<td>0 (untimely)</td>
<td>0 (untimely)</td>
<td>American Iron and Steel Institute (AISI)</td>
</tr>
<tr>
<td>EC-Asbestos</td>
<td>Brazil and Zimbabwe as third parties</td>
<td>2</td>
<td>0</td>
<td>American Iron and Steel Institute (AISI)</td>
</tr>
<tr>
<td>EC-Asbestos</td>
<td>Brazil and Zimbabwe as third parties</td>
<td>5 (timely)</td>
<td>0</td>
<td>American Iron and Steel Institute (AISI)</td>
</tr>
<tr>
<td>EC-Asbestos</td>
<td>Brazil and Zimbabwe as third parties</td>
<td>1</td>
<td>0</td>
<td>Foreign Trade Association</td>
</tr>
</tbody>
</table>

**Notes:**
- EC-Asbestos cases are included in the EC's submission.
- The Instituto Mexicano de Fibro-Industrias A.C. is a civil society organization based in Mexico.
- The A.C. is a non-governmental organization based in India.
- The foreign trade association is based in the USA.
<table>
<thead>
<tr>
<th>Dispute</th>
<th>Parties</th>
<th>Panel</th>
<th>Appellate Body</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Shrimp</td>
<td>Malaysia is complainant; Ecuador, India, Mexico, Pakistan, Thailand, and Hong Kong China are third parties.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US-Preliminary Determinations</td>
<td>India is a third party.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US-Investigation</td>
<td>Korea is a third party.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EC-Sugar</td>
<td>Brazil and Thailand as third parties.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EC-EG</td>
<td>Argentina is a complainant; 3 expanding dispute parties.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>US-Shrimp, Pakistan and Thailand</td>
<td>Ecuador Island Institute; the Humane Society of the United States; and the Sierra Club are appellants.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Developing Countries Involved**

<table>
<thead>
<tr>
<th>Number of Developing Countries Involved</th>
<th>Number taken Amici Curiae</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>
### Amici Curiae in the WTO Dispute Settlement Procedure: A Developing Country's FoE?

#### Table: Developing Countries' Amicus Curiae

<table>
<thead>
<tr>
<th>Case</th>
<th>Developing countries involved</th>
<th>Amicus curiae</th>
<th>Amicus briefs</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Lead and Bismuth</td>
<td>Brazil and Mexico as third parties</td>
<td><strong>American Institute for International Steel</strong></td>
<td>2</td>
</tr>
<tr>
<td>2 June 2000</td>
<td></td>
<td><strong>Specialty Steel Industry Trade Action Coalition</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 7 June 2000</td>
<td>Brazil as applicant, 1</td>
<td><strong>Consuming Industries Trade Action Coalition</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 9 March 2001</td>
<td>Brazil as a third party</td>
<td><strong>Brazzilian Foreign Ministry</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 5 Dec. 2002</td>
<td>Brazil as a third party</td>
<td><strong>Brazzilian Foreign Ministry</strong></td>
<td>1</td>
</tr>
<tr>
<td>Thailand-H-Beams</td>
<td>Thailand as applicant, 1</td>
<td><strong>American Iron and Steel Institute</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/DS51/AB/R, 12 March 2001</td>
<td>China as third party</td>
<td><strong>Canadian Institute of Trade and Policy</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS212/AB/R, 9 Dec. 2002</td>
<td>China as third party</td>
<td><strong>Thai Institute for Environmental and Social Studies</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/D51/AB/R, 4 April 2001</td>
<td>China as a third party</td>
<td><strong>Thai Institute for Environmental and Social Studies</strong></td>
<td>1</td>
</tr>
<tr>
<td>EC-Asbestos</td>
<td>Brazil as a third party</td>
<td><strong>American Public Health Association (United States)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS212/AB/R, 9 Dec. 2002</td>
<td>Brazil as a third party</td>
<td><strong>Bahia Institute of Tuberculosis and Leprosy (Brazil)</strong></td>
<td>1</td>
</tr>
<tr>
<td>US-Counterfeiting</td>
<td>Malaysia as applicant, 1</td>
<td><strong>American Human Rights and Humanitarian Action</strong></td>
<td>2</td>
</tr>
<tr>
<td>US-Shrimp</td>
<td>Malaysia as applicant, 1</td>
<td><strong>American Legion</strong></td>
<td>2</td>
</tr>
<tr>
<td>WT/DS247/AB/R, 26 Sept. 2002</td>
<td>Malaysia as a third party</td>
<td><strong>American Legion</strong></td>
<td>2</td>
</tr>
<tr>
<td>EC-Safety</td>
<td>Peru as applicant, 2</td>
<td><strong>American Human Rights and Humanitarian Action</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/DS263/AB/R, 29 Sept. 2003</td>
<td>Peru as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>US-Neonate</td>
<td>Mexico as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS5/AB/R, 22 Dec. 2001</td>
<td>Mexico as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>1</td>
</tr>
<tr>
<td>US-Virgin Islands</td>
<td>Puerto Rico as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS263/AB/R, 29 Sept. 2003</td>
<td>Puerto Rico as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>US-Neonate</td>
<td>Puerto Rico as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>2</td>
</tr>
<tr>
<td>WT/DS5/AB/R, 22 Dec. 2001</td>
<td>Puerto Rico as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>US-Virgin Islands</td>
<td>United States as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS263/AB/R, 29 Sept. 2003</td>
<td>United States as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
</tbody>
</table>

#### Table: Developing Countries' Amicus Curiae

<table>
<thead>
<tr>
<th>Case</th>
<th>Developing countries involved</th>
<th>Amicus curiae</th>
<th>Amicus briefs</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Lead and Bismuth</td>
<td>Brazil and Mexico as third parties</td>
<td><strong>American Institute for International Steel</strong></td>
<td>2</td>
</tr>
<tr>
<td>2 June 2000</td>
<td></td>
<td><strong>Specialty Steel Industry Trade Action Coalition</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 7 June 2000</td>
<td>Brazil as applicant, 1</td>
<td><strong>Consuming Industries Trade Action Coalition</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 9 March 2001</td>
<td>Brazil as a third party</td>
<td><strong>Brazzilian Foreign Ministry</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS138/AB/R, 5 Dec. 2002</td>
<td>Brazil as a third party</td>
<td><strong>Brazzilian Foreign Ministry</strong></td>
<td>1</td>
</tr>
<tr>
<td>Thailand-H-Beams</td>
<td>Thailand as applicant, 1</td>
<td><strong>American Iron and Steel Institute</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/DS51/AB/R, 12 March 2001</td>
<td>China as third party</td>
<td><strong>Canadian Institute of Trade and Policy</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS212/AB/R, 9 Dec. 2002</td>
<td>China as third party</td>
<td><strong>Thai Institute for Environmental and Social Studies</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/D51/AB/R, 4 April 2001</td>
<td>China as a third party</td>
<td><strong>Thai Institute for Environmental and Social Studies</strong></td>
<td>1</td>
</tr>
<tr>
<td>EC-Asbestos</td>
<td>Brazil as a third party</td>
<td><strong>American Public Health Association (United States)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS212/AB/R, 9 Dec. 2002</td>
<td>Brazil as a third party</td>
<td><strong>Bahia Institute of Tuberculosis and Leprosy (Brazil)</strong></td>
<td>1</td>
</tr>
<tr>
<td>US-Counterfeiting</td>
<td>Malaysia as applicant, 1</td>
<td><strong>American Human Rights and Humanitarian Action</strong></td>
<td>2</td>
</tr>
<tr>
<td>WT/DS212/AB/R, 9 Dec. 2002</td>
<td>Malaysia as a third party</td>
<td><strong>Thai Institute for Environmental and Social Studies</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/D51/AB/R, 4 April 2001</td>
<td>Malaysia as a third party</td>
<td><strong>Thai Institute for Environmental and Social Studies</strong></td>
<td>1</td>
</tr>
<tr>
<td>EC-Safety</td>
<td>Peru as applicant, 2</td>
<td><strong>American Human Rights and Humanitarian Action</strong></td>
<td>1</td>
</tr>
<tr>
<td>WT/DS263/AB/R, 29 Sept. 2003</td>
<td>Peru as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>US-Neonate</td>
<td>Mexico as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS5/AB/R, 22 Dec. 2001</td>
<td>Mexico as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>1</td>
</tr>
<tr>
<td>US-Virgin Islands</td>
<td>Puerto Rico as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS263/AB/R, 29 Sept. 2003</td>
<td>Puerto Rico as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>US-Neonate</td>
<td>Puerto Rico as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>2</td>
</tr>
<tr>
<td>WT/DS5/AB/R, 22 Dec. 2001</td>
<td>Puerto Rico as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>US-Virgin Islands</td>
<td>United States as applicant, 1</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
<tr>
<td>WT/DS263/AB/R, 29 Sept. 2003</td>
<td>United States as a third party</td>
<td><strong>Asociación Interamericana de Abogados (Argentina)</strong></td>
<td>0</td>
</tr>
</tbody>
</table>
Annex B: Additional Procedure

Adopted by the Appellate Body for EC-Asbestos (WT/DS135/9, 8 November 2000).

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the Working Procedures for Appellate Review, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November 2000.

3. An application for leave to file such a written brief shall:
   (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
   (b) be in no case longer than three typed pages;
   (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
   (d) specify the nature of the interest the applicant has in this appeal;
   (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
   (f) 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; and
   (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this
dispute in the preparation of its application for leave or its written brief.

4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat by noon on Monday, 27 November 2000.

7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:
   (a) be dated and signed by the person filing the brief;
   (b) be concise and in no case longer than 20 typed pages, including any appendices; and
   (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the
   (d) Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute by noon on Monday, 27 November 2000.

9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (original emphasis)