Effectiveness and legitimacy of Amicus Curiae submission before WTO judiciary organs

Prof. Assoc. Rezana Konomi, PhD
Faculty of Law, Tirana University, Albania

Dorina Gjipali, PhD
Faculty of Political and Legal Studies,
Aleksandër Moisiu University, Durrës, Albania

MSc. Ntastin Perola
Erasmus University Rotterdam, Netherlands

Abstract

'Amicus curiae' is a latin term that means a 'friend of the court'. In essence, this term encapsulates "[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''. This presents a non-party with the opportunity to submit its views regarding the outcome of a particular dispute regarding a broad range of issues (e.g. the appraisal of the merits in light of contemporary developments, the submission of factual elements etc.). These submissions have been present also during the predecessor of the current institutionalized WTO, namely the GATT system, albeit never being considered by those panels. However, there was gradual a shift in the panels' position regarding the engagement with amicus curiae submissions. In this regard, the first amicus curiae submission in the US - Gasoline case was rejected by the WTO panel of that case. It was only the US - Shrimp case that paved the way for amicus curiae to find their way into the WTO adjudicative system. This was followed by a great polarization regarding the legitimacy of engaging with submission of non-state actors in an inherently inter-governmental system. This paper, therefore, sustains that the amicus curiae submissions facilitate effectiveness if exercised within the constraints of legitimacy (as conceptualized within the ambit of the WTO), by framing the analysis through doctrinal discussions as well as empirical evidence that is derived from other research that is appropriately referenced.

Keywords: amicus curiae; GATT system; WTO judiciary organs.

Introduction

The WTO establishment entailed the institutionalization of the expansions from the GATT system to further include services (GATS), dumping measures, subsidies (e.g., the SCM Agreement), technical barriers to trade (TBT Agreement) etc. This can be seen as an organic growth in a spill-over effect whereby the removal of trade barriers on one level has gradually developed into an attempt of ensuring an effective system of

international trade operating in many different areas. The successful operational effect of the ambitions and aims procured by the WTO required a comprehensive system for managing and settling the disputes arising in the context of the covered agreements. Such a system was developed by building on the previous system of GATT in resolution of trade disputes. The DSU therefore established the contemporary dispute settlement mechanism reflecting the institutionalized character of the WTO. Accordingly, Article 13 DSU enshrines the right of the panel body (tasked with adjudicating a certain dispute) to seek information that it deems necessary for the resolvent of the dispute in hand. Subsequently, this article was interpreted in the context of the *Shrimps-Turtles* litigation whereby the Appellate Body rendered that the wording 'to seek' entailed in itself a discretion for the panel to decide on whether to accept 'non-requested information'.[1] In light of this judgment, non-state actors have had access to submit amicus curiae briefs (in a factual, legal, or socio-political context) to the WTO DSM for the past 24 years.[2] This has, in turn, led to discussion regarding the appropriateness and the legality of such submissions.

As such, the following sections will seek to determine the extent to which amicus curiae submissions enhance the effectiveness while maintaining the legitimacy of the WTO. To this end, Section A elaborates on some empirical data regarding submission of amicus curiae which provide a basis for analyzing the effectiveness of such briefs. This is further framed in a doctrinal discussion of the role of the panel (and AB) in seeking a just outcome. Section B, in turn, discusses the legitimacy considerations in the context of accountability and participatory rights. Section C summarizes and concludes that amicus curiae should remain as a tool for dispute settlement bodies to fulfill their tasks effectively and efficiently.

Enhancing effectiveness - the goal of justice

- *Empirical perspective: the submission of Amicus Curiae*[3]

Building on the decision reached by the AB in the *US-Shrimp* case, the AB further elaborated that Article 17.9 of the DSU accorded the AB with the authority to draw up its own working procedures, essentially entrenching a legal practice of authority to accept amicus curiae submissions.[4] Throughout this time there have been 98 amicus submissions representing 148 actors whereby NGOs represent the largest

[1] *United States — Import prohibition of certain shrimp and shrimp products* (WT/DS58/AB/R) 12 October 1998, at §107.

[2] Van den Bossche, P. (2008),'NGO Involvement in the WTO:'A Comparative Perspective',Journal ofInternational Economic Law,11(4): 739.

[3] Theresa Squatrito, 'Amicus Curiae Briefs in the WTO DSM: Goodor Bad News for Non-State ActorInvolvement?' World Trade Review (2018), 17: 1, 65–89.

[4] *US–Lead and Bismuth* II, WTO/DS138/AB/R, 10 May2000, para. 39.

share, followed by business organizations and institutes.[5] It should be noted, however, that non-state parties have merely exercised their right to submit their views as deriving from the AB's case law. This does not mean that all the submissions have been accepted or considered by the dispute settlement bodies. In effect, panels have considered amicus submissions in a very limited share of cases (18.5% of submissions for the period between 1998-2014).

In turn, these submissions have been discarded by the panels (or ABs) in 81.5% of the cases. The more striking fact is that it is exceptionally rare for an AB to consider, let alone engage with the merits of an amicus submission. In practice, there has been only one case (in the period between, 1998-2014) where the AB has considered that a non-party submission merited consideration. Ultimately, this shows that the ongoing debate regarding the submission and acceptance of amicus curiae is mostly done in a theoretical dimension, as opposed to a case-by-case analysis which would warrant a somewhat conclusive remark with respect to their effectiveness.

- *A dogmatic construction: reaching a 'just' decision upon 'jurisdictional truth.'*

Considering the brief empirical data, it appears that the effectiveness of amicus submissions will render itself to dogmatic constructions of the duty and role of the adjudicators (panel or AB). Consequently, it is important to firstly ask; what is the duty of the dispute settlement body tasked with adjudicating a dispute between two Members? This question requires a determination of the role of the panels when being tasked to resolve a certain dispute.

The starting point is to examine the 'dispute settlement understanding' (DSU) of the WTO. The Uruguay Round established the Appellate Body as a standing body and, pursuant to Article 17.6 of the DSU, vested it with the authority to review "issues of law covered in the panel report and legal interpretations developed by the Panel". As such, the AB stated in the *US - Certan EC Products* report that ''pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" (emphasis added)''.[6] In addition, article 3.2 DSU stipulates that the dispute settlement mechanism of the WTO aims at providing security and predictability to the multilateral trading system. One can therefore distinguish the judicatory character of the panels (and the ABs). This is further enhanced through the 'case law' of the AB. In this context, it was stated in the *US - Stainless Steel (Mexico)* that subsequent panels are not free to depart

[5] See in this regard: Shaffer, G. C. (2001),'The World Trade Organization under Challenge: Democracy and the Law andPolitics of the WTO's Treatment of Trade and Environment Matters',Harvard EnvironmentalLaw Review,25(1): 1–93.

[6] *US — Certain EC Products* (WT/DS165/AB/R) para. 92.

from the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.[7] This entails that, 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'.[8] Such interpretation is unsurprising when considering the duty of the dispute settlement mechanisms to ensure predictability in the environment of international trade. Nevertheless, it is akin to the stare decisis system of the common law courts, but as well as the doctrine of legal certainty in civil law courts (according to the latter, a lower court should follow the reasoning of the higher (Supreme) court(s) in a case containing the same legal issue and relevant facts).[9] If the AB (as well as the panels) are to be construed as systems adopting judiciary character, the question then arises - is 'justice' (or 'just' decision-making) the objective of the AB (and the panels)? Justice in this context is framed within the system of the WTO agreements.

In any case, it is rather undeniable that whatever construction of justice one employs, the first starting point to seeking it is the determination of the facts. As such, any adjudicatory body will try to get as near as reasonably possible to an understanding of what happened, and how the pertinent legal norms apply to the controverted events.[10] The importance of understanding the facts should not be overlooked. After all, the AB was not able to render a conclusive examination in the *Korea - Dairy* case precisely due to a lack of the relevant (undisputed) factual context.[11] This element is often referred to as a 'jurisdictional truth' which relates to the adequacy of a description of facts, limited to the facts that can be proved. Therefore, for the AB (or panels) to pursue a jurisdictional truth, they must be aware of the existence of certain (relevant) facts and must, in turn, find them admissible when offered. Conclusively, where an amicus submission provides for factual evidence that can help the adjudicatory body in painting a better picture, then such submissions should be welcomed as they further enhance effectiveness in pursuit of the jurisdictional truth.

Lastly, an amicus curiae brief can also contain information on how the dispute relates to a broader political and social context.[12] In this regard, it is important to also point out that *law* functions as pertaining and reflecting legal norms, which in themselves are shaped through development of social norms. That is why, the law is often construed as a living organism that adapts through an organic growth in economic and socio-political contexts. Therefore, it is rather unequivocal that amicus submissions

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[7] *US - Stainless Steel (Mexico)* (WT/DS344/AB/R) 20 May 2008 para. 160.

[8] *Ibid* para. 162.

[9] Perola Ntastin, Submission of Amicus Curiae before WTO Judiciary Organs: An Evaluation of a Contested Practice - Effectiveness and Legitimacy, Erasmus University Rotterdam p. 2-4.

[10] William W. Park, "The Four Musketeers of Arbitral Duty" inArbitration of International Business Disputes,Studies in Law and Practice, Oxford (2nd ed., 2012), 545.

[11] Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, available at: https://www.wto.org/english/res_e/booksp_e/dispu_settlement_e.pdf, p. 33, accessed on 8 April, 2022.

[12] *Supra* n(2), 739.

that place a certain legal issue in a greater socio-political framework can help the dispute settlement bodies' duty of applying the applicable law in a manner which is appropriate to contemporary developments. This can be exemplified through the *US - Tuna* case (and the backlash resulting therefrom) where the AB refused to consider PPMs as affecting consumer perceptions and behaviors. Van de Bossche has clarified that nowadays the question of whether PPMs may be of relevance requires a more nuanced approach.[13] This is because the consumers are more diligent and conscious of their decisions' impacts on greater issues (e.g. climate change). Consequently, where the submission of amicus curiae briefs can help in providing a clearer understanding of the legal issue in the context of contemporary social (as well as political) practice, then such submissions should not only be permitted, but also encouraged.[14] Following the foregoing analysis, it is rather clear that amicus curiae submissions can aid the dispute settlement bodies in reaching a jurisdictional truth, which in turn enhances effectiveness of the reports through 'just' decision-making. Such submissions can, moreover, help in maintaining a coherent legal practice that reflects contemporary socio-political (but also socio-economic) norms. Nevertheless, the issue of legitimacy also warrants careful consideration.

Legitimacy considerations

On the outset, it should be pointed out that the issue of legitimacy is often framed in the context of transparency.[15] However, the present paper sustains that transparency in itself revolves around the idea of openness in the process of decision-making (which is inherently linked with the duty to give reasons), as well as availability of open forum for viewing for interested parties. On the contrary, the issue of amicus curiae briefs is more akin to the legitimacy of having non-Members participate (or at least have the chance to have a say) in matters which concern agreements between governmental bodies (state-to-state agreements). Such legitimacy presents a two-tier issue:

a) On a theoretical level, it is appropriate to construct the issue of legitimacy in the context of accountability. After all, the governmental (member-confined) system of the WTO is inherently linked to the legal theories of representation, which is done through the institutionalization of such representation in the form of governments. In turn, these governments are intended to act in response to, as well as in accordance with, the interests of its people. Ultimately, this representation through democratic election provides for the foundational link legitimizing the decision-making in the international

[13] Van den Bossche, Werner Zdouc, The Law and Policy of the World Trade Organization, Cambridge University Press (5th ed) 715

[14] Perola Ntastin, Submission of Amicus Curiae before WTO Judiciary Organs: An Evaluation of a Contested Practice - Effectiveness and Legitimacy, Erasmus University Rotterdam p. 4.

[15] See Jose´E. Alvarez, Foreword, and Robert Howse, 'From Politics to Technocracy and Back Again: The Fate ofthe Multilateral Trading Regime', 96 AJIL (2002), 1 and 94; Laurence Boisson de Chazournes 'Transparency and Amicus Curiae Briefs' The Journal of World Investment & Trade, 333.

sphere. In this sense, one can question the issue of legitimacy (on account of lack of accountability) when amicus curiae briefs are submitted by non-governmental bodies. While this conventional approach (rested on foundational legal theories) is in itself well-founded, it would appear that a contemporary view warrants a more nuanced examination.

In essence, it is rather undisputable that a state government is better positioned to address issues that concern internal matters and to further advocate such domestic interest in the international dimension. However, modern problems have highlighted the deficiencies of such a territorial approach. Various issues ranging from environmental perspectives (e.g. climate change), all the way to financial regulations (one can think of the world-wide scope of money-laundering activities) can hardly be tackled by being confined to the domestic realm. As such, non-governmental organizations provide for a helpful medium that can promote a construction of legitimate interests that adopts a more 'internationalist' approach, as opposed to the conventional territorial thinking. That is not to say that NGOs will not advocate for industry-interests, since non-governmental organizations are by no means confined to the framework of public interest. However, they do provide for a prospect of counterbalancing state representations which can themselves be heavily influenced by lobbyist activities. In this sense, amicus curiae briefs can enhance legitimacy by providing a voice for interests that cannot be addressed through a conventional territorial approach. This, however, requires a system that is well-equipped to facilitate the admission of amicus curiae, which is linked with the second tier of legitimacy.

b) The second tier can be constructed in terms of a procedural legitimacy since amicus curiae briefs concern participatory rights. In this regard, the DSU is completely silent on the issue of amicus curiae. While the AB has 'resolved' this legitimacy gap through its interpretation of 'to seek' as encompassing a discretion to accept (or not) an amicus brief, the question remains whether this poses a threat to the Member-based system of the WTO. The answer to this question ultimately requires an empirical evaluation.

As previously pointed out, the degree to which panels (or ABs) engage with an amicus submission is low, which in turn hints at a conditional nature of acceptance. This is unsurprising when considering the political and legal constraints within which the WTO DSM operates.[16] Therefore, their decisions reflect incentives to ensure their judgments are complied with (political appraisal), while aiming to maintain the

[16] See in that regard, Steinberg, R. H. (2004),'Judicial Lawmaking at the WTO: Discursive, Constitutional, and PoliticalConstraints',American Journal of International Law,98(2): 247–275; and McCall Smith, J. (2003),'WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings',World Trade Review,2(1): 65–100.

tribunal's institutional integrity and legitimacy (legal pressures).[17] In this regard, Squatrito has pointed out how such pressures unfold in practice:[18]

- Endorsement by one of the parties (such endorsement can be in the form of alignment between the amicus and a party's preferences as made known to the adjudicator, or through adjudicators' assessment of public statements from one party): research has shown that panels are reluctant to consider an amicus which does not, at least to some degree, pertain to the views of one of the parties to the dispute.[19]
- Coherence of WTO DSM: this means that rules ought to be applied in a consistent manner, which is particularly important for maintaining (and boosting) a tribunal's legal legitimacy.[20] Consequently, one can expect that the AB (or panels) will treat the acceptance of amicus curiae through a consistent approach (much in the same way that they have sought consistency in their reports).

A combination of these two elements means that dispute settlement bodies of the WTO would apply a consistent approach of accepting/considering amicus briefs only if they align with the views/preferences of one of the parties. In effect, this means that Members retain their power through the political constraints that they exert on the tribunals. Such an application diminishes the issue of participation rights insofar as the AB exercises caution in its treatment of amicus curiae submissions.

Conclusive remarks

The issue concerning amicus curia submissions from non-governmental bodies has gained continuous prominence ever since the US-Shrimp report. Against this backdrop, the authors have argued that these submissions can facilitate effectiveness if exercised within the constraints of legitimacy (in the context of the WTO). In return, one can expect a more just decision due to the ability of amicus curiae briefs to help adjudicators in reaching a more complete view of the issue. These submissions can further help in placing a certain dispute within the relevant socio-political context, therefore enhancing the effectiveness of the decision-making through alignment of law with contemporary practices.

[17] Carrubba, C. J., Matthew, G., and C. Hankla (2008),'Judicial Behavior under Political Constraints:Evidence from the European Court of Justice',American Political Science Review,102(4): 435–452.

[18] *Supra* n(3), 75.

[19] Theresa Squatrito, 'Amicus Curiae Briefs in the WTO DSM: Goodor Bad News for Non-State ActorInvolvement?' World Trade Review (2018) 80-81. See also Dunoff, J. L. (1998),'The Misguided Debate over NGO Participation at the WTO',Journal ofInternational Economic Law,1(3) 660.

[20] Kelemen, D. (2001),'The Limits of Judicial Power: Trade–Environment Disputes in the GATT/WTO and the EU',Comparative Political Studies,34(6): 625.

However, amicus curiae briefs have faced legitimacy challenges, particularly in terms of accountability and the participation rights of non-governmental entities in dispute settlement procedures. The authors recognize that the arguments regarding (lack of) accountability are well-founded, nevertheless such arguments are hinged on a territorial construction of representation in a way that oversimplifies the contemporary issues of a globalized world. As such, amicus curiae can facilitate a medium of representation for those interests that are otherwise overshadowed in light of over-reliance on purely domestically-driven interests of State parties. These interests also relate to the issue of participatory rights, which is the second aspect of legitimacy. However, empirical data shows that amicus curiae briefs have been rejected in the majority of cases, therefore revealing a pattern of behavior intended to uphold the Members interests, since an amicus brief will only be considered if it aligns with a party's views). This may be seen as a proportional reaction by the WTO DSM, since it has seemed to optimize the effectiveness of its decision-making, while ensuring to the greatest extent possible that the Members' interests are represented. Ultimately, proponent critics should rest assured that, for the time being, the system remains in effect a Member-driven international organization, albeit with some provision for non-member participation.

- *The contemporary and broader picture*

The Appellate Body has, to date, retained the right to accept/dismiss submissions of unsolicited amicus curiae submissions from 3rd parties' non-party to a dispute. One can however deduct from examining the jurisprudence of the AB that the panels operating as the first instance, together with the AB, are under no obligation to accept, nor even inquire into the merits of a submission. This therefore translates into no right to legal standing for non-members. Yet, the right that the AB has reserved to the DSM bodies with regard to amicus curiae submissions has sparked much reaction from Member States, which have also retained the position that the WTO disputes are procedures purely between Members and there is therefore no role whatsoever for non-parties.

In retrospect, this friction between the AB and the Members that have empowered it with the powers to adjudicate the disputes arising within the WTO system appears to have been an instigating spark that would foreshadow the subsequent stagnation and ''overshadowing'' of the WTO. The conflict between the Members and the AB grew beyond the amicus curia issues with economic powers exerting their influence, often as a byproduct of a matrix of political and economic interests that would ultimately halt the effective operability of the DSM by rendering the AB wholly ineffective. The multilateral nature of agreement that aims to balance the interests of 164 states has proven to be unsuccessful as a path of action.

This may be attributed to the rather outdated rules that pre-date extensive 21st century developments, such as the extensive application of the internet into international trade and investment, or the rise of People's Republic of China into a competing economic and trading power. However, the organic response of international trade to the stagnation of a centralized trading system has been reliance on Free Trade Agreements, with recent prominent examples being the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPPTP'), or the Canada-EU Free Trade Agreement ('CETA'). These fragmented and yet structured economic partnerships offer viable options, through long term solutions, that may soon render the institutionalized WTO obsolete. International Investment Courts, which can draw, learn and develop from the ICSID system can offer more specialized legal certainty through defined systems that fit the idiosyncrasies of Free Trade Agreements as they may be tailored by States themselves. This would ultimately allow room for defining the role of amicus curiae accordingly, albeit there being a growing practice of acceptance in international adjudication. Unless the WTO would successfully undergo surgical changes needed to facilitate and reintegrate trust into the system, which would paradoxically entail changes to the very rules that have provided the legal basis for the AB to reserve the right to accept/dismiss unsolicited amicus curiae submissions, we might very well see the practice of amicus curiae taking prominence in areas such as investment law in conjunction with human rights.

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