

# ***Amicus Curiae* Brief**

## **Should the WTO Remain Friendless?**

### **Executive Summary**

The issue of the *amicus* brief has become a contentious one in the context of the WTO dispute settlement process ever since the Shrimp-Turtle case. This was the first time in its history when the WTO Appellate Body (AB) of dispute settlement considered such briefs from non governmental organisations. The issue gave rise to a cluster of questions – both legal and political. The legal questions are attributable to the lack of clarity in the regulating provisions with respect to the rights of Panel vested by the WTO's Dispute Settlement Understanding. At political level, developing countries strongly opposed the admittance of *amicus* brief from NGOs. They argued that it would put them at a disadvantage as the civil society organisations in the South are much weaker compared to their Northern counterparts.

Questions have also been raised in relation to the procedures and practices followed in receiving *amicus* briefs. It is understandable that there may be a set format or set procedure for the filing of an *amicus* brief. The AB tried to establish such a procedure in the Asbestos Case. The 'Additional Procedure' was established with retrospective effect and applicable to this particular case only. However, subsequently the AB rejected the briefs referring to the same 'Procedure'. The entire episode has been criticised severely and termed arbitrary by many. The case created so much of controversy that a special session of the General Council had to be called to discuss the issue. However, no consensus could be reached and the issue remains unresolved even today.

### ***Amicus Curiae: The Term Defined***

'*Amicus Curiae*' is a Latin term meaning 'friend of the court' and represents a legal principle. It refers to a party that is allowed to provide information to the court voluntarily, in the form of a legal brief, even though the party is not directly involved in the case at hand. The person or the body appointed (either by the court or by application to the court) is known as the *amicus curiae*, and the brief submitted is known as *amicus* brief.

### ***Role in the Settlement of Dispute***

The *amicus* brief is one of the ways in which interest groups can participate in the adjudication process. It not only gives an entry to interest groups into the adjudication process, but also provides an opportunity to the courts to understand, the complexities of the matter, especially when public interest issues are involved.

### ***Amicus Brief at the WTO: The Legal Provision***

The WTO does not have a formal procedure for non-party submission in its dispute settlement procedure. However, the possibility of submitting *amicus* briefs in the adjudication process, if required, has been kept open.

### ***Admissibility of Briefs: The Harmonic Requirements***

A good law and its proper administration need to satisfy the harmonic requirements of law, viz., clarity, continuity, certainty, consistency, properly laid down procedures, properly defined institutions, etc. Failure to meet any of these creates a need for further interpretation (misinterpretation). Clarity of procedural rules is the very basis of the rule of law. Due regard to legal principles as well as the principles of justice further provides an impetus to further the desired achievement of equity in justice.

### ***NGO Participation: Is it Required?***

NGO participation in the dispute settlement process by way of *amicus* brief is of course a good solution to address multidisciplinary questions in the light of a number of inter-playing factors. The affected groups shall have an approach and a proper say in the dispute under consideration. As long as the avenue for their participation is kept open and the concerned disputant Members support the participation of NGOs as the provider of a wider base to the adjudicating body, a more balanced approach can be achieved, which ultimately would be reflected in the report of the Panel or the AB.

## ***Amicus Curiae: The Term Defined***

*Amicus Curiae* refers to a party that is allowed to provide information to the court voluntarily, in the form of a legal brief. The *amicus* brief may also be submitted on invitation by the court, if the court desires it in any matter under its consideration. In general practice the *amicus curiae* only submits the brief. As it does not represent any party, its role is to show the pros and cons of the issue and it is not normally allowed to appear before the court.

*Amicus* briefs are a general practice of legal discourse and are accepted in all types of legal systems, be they civil or common law systems, all over the world. In some systems, there are no formal rules and the matter is left exclusively to the discretion of the court.

The practice of appointing an *amicus curiae* is carried out in three ways.

### *By consent of the parties*

This type of practice is found in the courts of the United States, where a prospective *amicus* can ask for the consent of the parties to the dispute. Both parties have to give their consent. If any of the parties does not give its consent, the prospective *amicus* may then apply to the court for permission (see *infra*). In some countries (e.g. South Africa) the court may refuse the appointment even if both parties give their consent.

### *By the court's own appointment*

Derived from the inherent power of the court to regulate its own procedure, the court may appoint an *amicus curiae* only if it deems that it is useful in the proper administration of justice and/or is likely to provide special expertise or new material, or if the case involves a complex point of law which is unlikely to be argued adequately by the parties.

### *By application to the court*

A non-party to the case may also apply to the court in order to be appointed as *amicus curiae*. The court may on the basis of their application appoint them *amicus curiae*. In such cases, an applicant is generally required to identify his/her interest in the matter and to state why his/her brief would be useful.

## **Role in the Settlement of Dispute**

There is a growing trend towards the participation of non-parties to a dispute through the use of *amicus* briefs in national and sub-national courts in different parts of the world. Although, among all jurisdictions, *amicus* briefs are most frequently used in the US, at both the federal and state levels, it is now a very common practice in countries like Canada, Australia, South Africa, the United Kingdom and India.

For example, in India, the National Consumer Dispute Redressal Commission wanted the help of an *amicus curiae* while deciding on the case, *Consumer Unity & Trust Society v. State of Rajasthan and Others*. The Commission, before reaching its conclusion, widely discussed the issues raised in the brief submitted by the *amicus curiae* (Box. 1). There are many cases where the issues raised in *amicus* briefs have been widely discussed by the adjudicating body.

Besides these national cases, several regional tribunals dealing with human rights cases, have accepted applications for the appointment of an *amicus curiae*. The Inter-American Court of Human Rights has appointed *amicus curiae* in almost half of its cases and it has never rejected an application to submit an *amicus* brief. Similarly,

the European Court for Human Rights, has accepted *amicus* briefs in a large number of cases. The following are the principal reasons for the growth of this practice all over the world:

- Third party intervention, and particularly the appointment of *amicus*, is allowed in cases where the parties to the case may not be represented or adequately represented; the purpose here is to ensure that all relevant issues are debated.
- Parties to the case may not intend to take up an issue which the court considers important, or which troubles the court.
- The parties may be in collusion.
- The *amicus* may have specialised knowledge of the field; including factual knowledge or knowledge of the operation of a law or policy. A well known example of this is the famous 'Brandeis brief' in which sociological

### **Box 1: Consumer Unity & Trust Society vs. State of Rajasthan and Others**

Consumer Unity & Trust Society (CUTS) filed a complaint on behalf of Ms. Sushila Devi, who underwent an abdominal tubectomy in a government facility and developed serious complications after the surgery. It was alleged that these complications were due to negligence which constituted deficiency in service.

The issue was raised as to whether services offered in a government facility should be considered as 'service' and a person receiving such services as 'consumer' for the purpose of the Consumer Protection Act, as the government argued that there was no 'consideration' involved.

The National Consumer Dispute Redressal Commission, New Delhi appointed Mr. C. S. Vaidyanathan, an advocate, as the *Amicus Curiae* for the case. He appeared before the Commission and pleaded that the direct and indirect taxes paid to the State constitute 'consideration' for the services and facilities provided to the citizen by the state and such services would fall under the definition of the Consumer Protection Act.

The issue raised by the *amicus curiae* was widely discussed at the Commission. However, the commission did not agree with the views expressed by the *Amicus Curiae*. CUTS appealed before the Supreme Court. Reversing the decision, the Supreme Court withheld the views of the *Amicus Curiae* and gave judgement in favour of CUTS.

data are used to support or attack a proposition of law. It started in the US and has now been widely adopted.

- The use of third party intervention and *amicus* is desirable where wider public interests need to be canvassed. It helps to inform the court of interests other than those represented by the parties, and to focus the court's attention on the broader implications of various possible rulings.
- It is a device to involve people or special groups in judicial decision-making and thus increase the legitimacy of judgements, especially when policy is involved. Legitimate interest groups, who may otherwise have no legal or financial means to raise an issue in courts, can be given a voice in this way.

### **Amicus Brief at the WTO: The Legal Provision**

The WTO does not have a formal procedure for non-party submission in its dispute settlement procedure. However, the possibility of submitting *amicus* briefs in the adjudication process, if required, has been kept open. This is provided in Art. 13.1 of the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), which states, *inter alia*, that the Panel has the right to seek information from any individual or body on the issues under its consideration.

### **Cases of Submission**

#### *Shrimp-Turtle Case*

In the famous Shrimp-Turtle case, the US government, by virtue of its enabling legislation (Sec. 609 of US Endangered Species Act) imposed a ban on the import of shrimps that were harvested without using Turtle Excluder Devices (TED) because this way of trawling killed endangered species of sea turtles unnecessarily. The affected parties regarded the action as a unilateral measure restricting the entry of their products into the domestic market of the USA, contrary to the GATT rules.

Because of the importance of the case to global environmental management, *amicus* briefs were submitted by three coalitions of NGOs who were concerned about environmental issues. The Panel in this case declined to accept the unsolicited briefs. However, the AB, reversing the stand of the Panel, decided that *the submissions, though unsolicited, were part of government submissions, which are admissible*.

Thus, strictly speaking, it cannot be said that the AB accepted any *amicus* brief in the Shrimp-Turtle case, as the information provided by the NGOs was received only as part of government submissions and not as *amicus* briefs as such.

#### *Salmon Dispute*

In a case instituted against Australia for its ban of imports of salmon from Canada, the Panel considered information contained in an unsolicited letter from Concerned Fishermen and Processors of South Australia as relevant to its procedures and accepted the information as part of

the records. This was the first instance in which a Panel accepted an *amicus* brief.

#### *Bed Linen Case*

In an anti-dumping case over bed linen (India *v.* European Union) brought before the Panel for settlement, an *amicus* brief was submitted. The Panel accepted the brief but it was not taken into account.

#### *British Steel Case*

In a case against the United States, regarding the imposition of countervailing duties on certain hot-rolled carbon steel products originating in the United Kingdom, the Panel received an unsolicited brief from the American Iron and Steel Institute. The Panel declined to accept the brief, stating that it came too late in the Panel's process. At the appellate level, the AB received the brief from the American Iron and Steel Institute on the same day that the US government filed the case. Later, another unsolicited brief came from a trade association called Specialty Steel Industry of North America.

The AB stated that it had the authority to decide whether to accept unsolicited briefs because Art. 17.9 of the DSU enables it to draw up its working procedures. It further stated that a private person has no 'legal right' to have its brief considered by the AB. Instead, there is a legal authority to accept private briefs when it is found pertinent and useful to do so. Later the AB concluded that it was not necessary to take the two briefs into account.

#### *Asbestos Case*

The Asbestos case was the first case where the AB had taken initiatives in order to open the avenue for *amicus* briefs, in their true sense, to be submitted at the adjudication process under the DSU. In this case the Panel received five written submissions from asbestos victim groups and industry. Two of these were appended to the European Communities' submission and considered by the Panel as defending party's arguments. The Panel rejected the remaining three. Two of them were rejected without explanation and one was rejected because it was submitted late.

The AB laid down an 'Additional Procedure', applicable only to this particular case, to file an *amicus* brief stating that the decision to publish the criteria was made in the interests of fairness and orderly procedure in the conduct of the said appeal.

The AB had already received 13 written submissions from NGOs. After the adoption of the 'Additional Procedure', each of these 13 submissions was returned to its sender, along with a letter informing them of the procedure adopted by the Division hearing the appeal. Only one of these organisations, the Korea Asbestos Association subsequently submitted a request for leave in accordance with the Additional Procedure (Box. 2).

Pursuant to the Additional Procedure, the AB received 17 applications requesting leave to file a written brief. Six of those 17 applications were received after the specified dead line and for this reason, leave to file a written brief

was denied. Each of the applicants was informed of the denial of their application.

The remaining 11 applications were considered in accordance with the Additional Procedure, and in each case, the AB decided to deny leave to file a written brief. As it was deemed by the AB that these failed to meet the requirements set forth in Additional Procedure, it did not allow a single brief to be entertained in the dispute settlement process. The AB did not properly specify which of the requirements of the Additional Procedure the briefs did not meet in any of the cases. The experts believe that they were rejected primarily because of strong criticism of the AB's actions in this regard by the General Council of the WTO.

In practice, only one independently submitted NGO brief has been taken into consideration so far by a dispute settlement panel of the WTO. This was the brief from the Concerned Fishermen and Processors of South Australia

in the Australian-Salmon case. Another brief was accepted in the anti-dumping dispute over bed linen, won by India against the EU, but it was not taken into account. All other *amicus* briefs accepted were part of government submissions. Independently submitted briefs in the British Steel appeal (filed by industry associations) and the Asbestos dispute were turned down. In none of the cases did the Panels specify why they accepted or rejected independent submissions.

### **Amicus Brief at the WTO: The Debate**

When, for the first time, *amicus* briefs of NGOs were submitted and also considered by the AB in the course of the settlement of the *Shrimp-Turtle* dispute, it gave rise to a mixed picture of support and protest. A deep division was induced between WTO Members over non-state participation in the trade dispute settlement process.

The idea of allowing *amicus* briefs was supported on the following grounds:

<b>Box 2: Additional Procedure for Amicus Brief Submission in the Asbestos Case</b>
<p>It stated as follows:</p> <p>“...This Additional Procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the <i>Working Procedures for Appellate Review</i>, and is <i>not</i> a new working procedure drawn up by the AB pursuant to paragraph 9 of 17 of the <i>Understanding on Rules and Procedure Governing the Settlement of Disputes</i>.”</p> <p>It further stated - “any person whether natural or legal, other than a party or a third party to this dispute had until November 16<sup>th</sup> 2000 to file a three page request to submit an <i>amicus</i> brief.” This application had to, <i>inter alia</i>:</p> <ol style="list-style-type: none"> <li>(1) specify the nature of the interest the applicant had in the appeal,</li> <li>(2) Identify the specific issues of law covered in the Panel report that the applicant intended to address in the brief,</li> <li>(3) Indicate in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has already been submitted by a party or the third party.</li> </ol> <p>Those granted leave to file were to submit their briefs by November 27<sup>th</sup> 2000. The criteria included, <i>inter alia</i> the following:</p> <ol style="list-style-type: none"> <li>(1) Maximum length of 20 pages,</li> <li>(2) Substantive requirement to set out a precise statement,</li> <li>(3) Strictly limited to legal arguments, supporting the applicant's legal position on the issue of law or legal interpretations in the Panel report.</li> </ol> <p>Moreover, it was also specified that the grant of leave to file a written brief did not imply that the submission's legal arguments would be addressed in the report.</p>

- That it was a positive step and was a sign of growing judicial independence and openness of the dispute settlement system.
- That NGOs, having more freedom than a government body are more vocal in addressing the specific issue of interest and therefore could give more positive input in the settlement of a dispute.
- That, the step taken by the dispute settlement body was a progressive step towards the anticipation of increased input from the NGOs in dispute settlement, which has been otherwise exclusively reserved for Member governments.
- That the step was a positive step in the direction of making the WTO a more open organisation and enhancing public confidence in the WTO dispute settlement process.

On the other hand, the parties protesting against the idea of allowing *amicus* briefs pleaded:

- That although the Panel has a right to seek the information granted by Art. 13.1 of the DSU, the Panel, while seeking the information from any body or individual within a Member's jurisdiction, has an obligation to inform the authorities of that Member.
- That if a Panel requires the information in the course of the settlement of the dispute, it can request it, and the brief may be allowed for submission in accordance thereto. But Members that are not parties or third parties cannot avail the right to present written briefs.
- That if any information is provided on the own will of the third party, it should be treated as

an unsolicited brief. Therefore, such unsolicited briefs should not be entertained, as they might deluge the Panel with unsolicited information.

- That instead of improving the dispute settlement mechanism, it only increases the administrative task of the already over burdened secretariat.
- That both industry advocates and public interest groups would use the procedure to further press their interests.
- That the NGOs of the North would have proper access in the adjudication process and would have a proper say there due to their good resources and research facilities whereas the Southern NGOs, due to lack of resources and proper research facilities, would not have access to the adjudication process.
- That the Dispute Settlement Body has created an implied right to the submission of the amicus briefs, which is contrary to the aspirations of Art. 3.2. It specifies follows:

“...Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

The controversy deepened with the AB's assertion in the British Steel case that the AB itself has the discretion to accept *amicus* brief. It reached a paroxysm after the AB issued a procedure on November 8, 2000 for submitting such briefs in the Asbestos case. The issuance of the procedure prompted Egypt and other developing countries to call for a special session of the General Council to discuss what they saw as the AB's encroachment upon the members' rights. Many members, both developed and developing, thought that the AB's various rulings on the admissibility of NGO briefs amounted to illegal rule-making rather than the legitimate interpretation of the Dispute Settlement Understanding (DSU).

At the special meeting of the General Council held on November 22, 2000, only the United States wholeheartedly backed the AB's decision. New Zealand and Switzerland were the only other Members to express cautious support for the AB initiatives. Most other countries, led by India, blasted the decision to issue the procedure as a dismissal of the 'overwhelming sentiment of the Members against the acceptance of unsolicited *amicus* brief'. It was then left to the General Council Chair, Kare Bryn, to try to forge a consensus on what is acceptable with regard to *amicus* briefs, including whether they should be accepted at all. He also forwarded a stern note to the AB, urging it to exercise 'extreme caution' on the issue.

## **Admissibility of Briefs: The Harmonic Requirements**

The rule of law, being a spur in the multifarious development, always generates confidence among the user groups. However, experience shows that the DSU lacks the harmonic requirements of a good law; due to which the Panel and AB were found to be wandering

around with inconsistent practices and unpredictable outcomes. The conduct of the Panel and the AB in accepting *amicus* briefs in certain cases and rejecting them in others has made the admissibility of briefs a controversial issue.

In none of the cases where the *amicus* briefs were rejected or accepted, did the AB state the justifications for its actions. A basic question on admissibility can always be raised due to the non-compliance of the DSU to the harmonic requirements of a good law as described below.

### *Lack of clarity in the rules*

The rules expressed in Art 13.1 of the DSU were misinterpreted due to being quite unclear in the light of universally practiced legal principles. Therefore, the admissibility of the *amicus* briefs remained under the discretionary rights of the Panel. It is the discretionary right of the Panel enabled by the said Art. 13.1, to seek information from any individual or body that it deems appropriate.

### *Absence of due process*

Procedural fairness consists of an explicitly laid down procedure applicable to all the cases in hand. In the absence of the same, the rule shall have the same flaw in it. This may ultimately lead to injustice. The remarkable incidence of drawing up a working procedure can be found in the Asbestos Case where the AB arbitrarily imposed the 'Additional Procedure' for the submission of briefs. The protestors against NGO participation termed this a lack of 'procedural fairness'.

### *Inconsistent approach*

The dispute settlement process should be directed to the settlement of disputes not towards the creation of further disputes. Inconsistency in the practice of the AB is clearly visible in the instances of acceptance and rejection of briefs in various cases. The very ambiguous nature of the AB is reflected here.

### *Uncertainty of the outcome*

Art. 3.2 of the DSU provides that "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system..." The case specific approach of the AB has given birth to suspicion in the minds of disputing parties. This approach along with the lack of proper procedure leads to unpredictable outcomes, contrary to the aspirations expressed in Art. 3.2 of the DSU.

## **NGO Participation: Is it Required?**

In trade disputes, human and consumer aspects of the dispute very often get marginalised. The matter of dispute, if purely perceived in economic terms by marginalisation of human or consumer aspects, leaves grey areas that remain to be addressed. These grey areas can be brought into light by the participation of NGOs as *amicus* briefs. If we look at the Shrimp-Turtle case, we can find that the briefs submitted were only from the environmental NGOs, therefore environmental issues got over-

emphasised in the AB's report. The economic rights of the shrimp trawlers, who had been in the profession from generations, remained in the grey area. Had there been any participation of NGOs concerned with the human rights of the concerned people, a more balanced approach could have been achieved. The issue in the grey area would have been brought into light and addressed properly.

The approach of the AB with respect to the admissibility of *amicus* briefs has shown its selective nature, though a shift in perception has been observed. If the practice in cases from the Shrimp-Turtle to the Asbestos case is looked into, we may find that the AB has liberalised its views towards the admissibility of the briefs. In the first instance the AB only entertained briefs that were submitted as part of a government submission, and declared such submissions to be an integral part of the government submission. A more liberalised approach was taken in the course of the Asbestos case, whereby the AB, though it did not entertain any of the independently submitted briefs, proceeded a little forward by setting up the Additional Procedure.

By looking at the trend, it is quite obvious that a liberal approach was in the making with respect to the entry of *amicus* briefs. Though the AB has taken a leap towards progress, the subsequent reprimand by the General Council on the issue, has halted process. The decision of the AB to formulate the Additional Procedure was not binding on any other submissions in future cases. However, it would have had a strong persuasive effect on the formation of guidelines for *amicus* brief submissions in the future.

The apprehension of developing countries that the admittance of *amicus* briefs in the WTO dispute settlement process would put them at a disadvantage seems to have emanated from the memory of their past follies. It is true that Northern NGOs, to some extent, enjoy better opportunities than their counterparts in the South. However, it would be naïve to say that only the Northern NGOs have the means to take part in the WTO dispute settlement process.

Many Southern NGOs have already made their presence known in Geneva, either directly or through their networks. Even in the Shrimp-Turtle case the *amicus* briefs submitted were from three NGO coalitions from both industrial and developing countries. For example, the brief submitted by the Centre for International Environmental Law (CIEL) was a joint brief by CIEL, the Centre for Marine Conservation (CMC) from the US, Red Nacional de Accion Ecologia (RENACE) from Chile, the Environmental Foundation Ltd. from Sri Lanka, and the Philippine Ecological Network. Even in the Asbestos case, one of the briefs submitted was from an Indian NGO, although it was not considered due to late submission.

Moreover, it can also be argued that the governments of the North are much more resourceful than the governments of the South. In fact many of the poor countries do not have permanent missions in Geneva. It is also well recognised that many Northern NGOs are very much concerned with Southern interests. But can this be said for the Northern governments? In such a scenario, contrary to the apprehension of many developing countries, the participation of NGOs in the WTO dispute settlement process has the potential to achieve better representation of developing countries' interests.

The suggestion that NGOs should take part in the process through their national governments, seems to be ludicrous and will not serve any purpose. This will work only when NGOs have views that are similar to those of their national governments. For example, in the 1997 WTO case involving the EU ban of meat grown with artificial hormones, Public Citizen, a US NGO, submitted a brief supporting the EU position. The WTO dispute panel returned the brief with a note admonishing the group for submitting unsolicited information. Obviously, the US Government would not have included Public Citizen's brief in its own submission.

## Conclusion

The WTO process contrasts sharply with the rule in national court systems, in which any interested group can submit an *amicus* brief. This is the case in many nations including those who are opposing such a provision in the WTO. The courts get useful information from such briefs. There is no reason why the WTO process should not be allowed to avail this channel of getting information. But unfortunately, the WTO members have refused to look at the issue from a broader perspective.

Their position on the issue has been driven mostly by narrow and immediate interests. For example, Canada, which is usually open to greater external transparency of the WTO, opposed NGO participation in the WTO dispute settlement process, primarily because in the Asbestos Case, the *amicus* briefs highlighted some issues which were not in its interests.

The WTO members should look beyond the cases in hand and must realise that greater transparency would ensure equity and fairness in the system and would be good for the global community as a whole in the long run. The WTO should encourage NGOs to participate in its dispute settlement process to have a broader base of information in the dispute concerned, which is required for the proper administration of justice. It should prescribe the procedure for such submissions, which should be applied in all future cases. This would certainly induce greater clarity in the rules vis-à-vis the procedural fairness in its dispute settlement process.

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