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# The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments

JOSEPH KELLER\*

## Introduction

In today's increasingly interdependent global society, international institutions formerly committed to operating as insular systems recognizing only states as legitimate participants have come under pressure to open their processes to public view and participation. The World Trade Organization (WTO) in particular has been widely criticized for its lack of transparency and democratic participation.<sup>1</sup> Nowhere has this criticism been more prevalent than in the arena of dispute settlement.<sup>2</sup> The controversy over the acceptance of amicus briefs at the WTO reflects the tensions among WTO members and non-members concerning greater public access to dispute settlement

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<sup>1</sup> Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. Int'l L. & Pol. 299 at 348 (2002); Robert Howse, *Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, Outline/Incomplete Draft; John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live up to the Moniker "World Trade Court"?*, 31 Law & Pol'y Int'l Bus. 739, 756 (2000); Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?*.

<sup>2</sup> *Id.*; See also Andrea Kupfer Schneider, *Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy be Made?: Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 Wid. L. Symp. J. 87 at 91 (2001).

proceedings.<sup>3</sup> This battle has been fought primarily through the Appellate Body and its important series of decisions on amicus briefs.<sup>4</sup>

Panels and the Appellate Body govern dispute settlement at the WTO.<sup>5</sup> Panels are established by the Dispute Settlement Body, which consists of all WTO members. Panels are essentially tribunals, and consist of three or sometimes five experts from different countries who render decisions in a given trade dispute between member states. Members of a panel are chosen in consultation with the countries that are parties to a dispute (if the parties cannot agree, the WTO director-general appoints them). Panelists serve in their individual capacities and cannot receive instructions from any government. A party may appeal the ruling of a panel to the Appellate Body. There are seven members of the Appellate Body, and each member serves a four-year term. These individuals are experts in the area of trade law and must not be affiliated with any government. Three members of the Appellate Body hear each appeal of a panel ruling.

This article argues in favor of increased amicus participation in WTO dispute settlement and is divided into four parts. Part I briefly examines the history of Appellate Body decisions concerning amicus briefs. Part II examines the significant new developments in the *Sardines* case, including the acceptance of amicus briefs from governments that are non-parties to a dispute.<sup>6</sup> Part III explains why amicus practice is desirable at the WTO and analyzes some important procedural suggestions for handling the submission of amicus briefs. Part IV proposes and evaluates new possibilities for amicus participation in WTO dispute settlement. These new possibilities include participation by government agencies and international organizations, and the emergence of a category of briefs relied upon by the panels and Appellate Body.

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<sup>3</sup> See Donald McRae, *Trade and the Environment: Competition, Cooperation or Confusion?*, 41 Alberta L. Rev. 745; Kim Van der Borgh, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 Am. U. Int'l L. Rev. 1223; Duncan B. Hollis, *GLOBALIZATION & THE EROSION OF SOVEREIGNTY IN HONOR OF PROFESSOR LICHTENSTEIN: Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. Int'l & Comp. L. Rev. 235.

<sup>4</sup> Appellate Body Report, *United States-Import Prohibitions of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")*, WT/DS58/AB/R, adopted 12 October 1998; Appellate Body Report, *European Communities-Trade Description of Sardines ("Sardines")*, WT/DS231/AB/R, adopted 26 September 2002.

<sup>5</sup> See [www.wto.org](http://www.wto.org) for a complete summary of the dispute settlement system at the WTO as described in the introduction of this article.

<sup>6</sup> Appellate Body Report, *European Communities-Trade Description of Sardines ("Sardines")*, WT/DS231/AB/R, adopted 26 September 2002.

## I. The Evolution of Appellate Body Decisions on Amicus Briefs.

The Appellate Body rendered its first important decision on amicus briefs in the *Shrimp-Turtle* case<sup>7</sup>. In *Shrimp-Turtle* the governments of India, Pakistan, Thailand and Malaysia protested a United States embargo on shrimp harvested by a method that harmed sea turtles. The United States attached three non-governmental organization (NGO) briefs to its appellant's submission. The Appellate Body admitted these three amicus briefs as part of the U.S. submission.<sup>8</sup> More importantly, the Appellate Body overruled the panel's finding that it did not have authority to accept unattached amicus briefs. The Appellate Body criticized as too narrow and technical the panel's interpretation of the grant in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of a right to seek information.<sup>9</sup> Instead the Appellate Body declared that the "authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel."<sup>10</sup> Therefore panels do have a right under Articles 11, 12 and 13 of the DSU to accept amicus briefs, whether or not attached to a member's submission.<sup>11</sup>

The next important Appellate Body ruling addressing amicus briefs made clear that the Appellate Body itself could also consider unsolicited amicus briefs.<sup>12</sup> In *Carbon Steel* the Appellate Body found power to consider amicus briefs in Article 17.9 of the DSU and its grant of broad authority to adopt procedural rules, provided that such rules do not conflict with the DSU or any covered agreements.<sup>13</sup> The Appellate Body explained the nature and limitations of its power: "Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO."<sup>14</sup> In this manner the Appellate Body emphasized the discretionary character of amicus participation.

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<sup>7</sup> Appellate Body Report, *United States-Import Prohibitions of Certain Shrimp and Shrimp Products* ("*Shrimp-Turtle*"), WT/DS58/AB/R, adopted 12 October 1998.

<sup>8</sup> *Id.* at ¶89.

<sup>9</sup> Art. 13.

<sup>10</sup> *Shrimp-Turtle* at ¶108.

<sup>11</sup> For a critique of this decision and its method of interpretation, See Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead/Asbestos Doctrine*, 44 Harv. Int'l L.J. 317 (2003).

<sup>12</sup> Appellate Body Report, *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*Carbon Steel*"), WT/DS138/AB/R, adopted 10 May 2000.

<sup>13</sup> *Id.* at ¶39.

<sup>14</sup> *Id.* at ¶9.

The more recent *Asbestos* case brought new procedural developments to amicus participation.<sup>15</sup> Faced with a number of amicus submissions, and cognizant of the health and public interest issues inherent in the case, the Appellate Body adopted, pursuant to Rule 16(1) of the Working Procedures for Appellate Review, for purposes of the *Asbestos* appeal only, an additional procedure to deal with amicus submissions.<sup>16</sup> The Appellate Body then denied all applications for leave to file a written brief, claiming that each applicant failed to comply sufficiently with the requirements set forth in paragraph 3 of the Additional Procedure.<sup>17</sup>

The actions of the Appellate Body caused a great deal of consternation among both WTO members and those who had requested leave to file an amicus brief. Applicants denied by the Appellate Body felt insulted by the statement that none among them had correctly followed a set of simple procedures.<sup>18</sup> Several WTO members felt a similar sense of disgust after the *Asbestos* decision, although for entirely different reasons--they disdained the notion of amicus practice under any circumstances.<sup>19</sup> Member governments objected to amicus participation with more hostility than ever before, and Egypt called a meeting of the WTO General Council to address the situation. At that meeting, twenty-four governments criticized the Appellate Body, four did not criticize the Appellate Body, and only one (the United States) endorsed the Appellate Body's action.<sup>20</sup> This widespread discontent with the Appellate Body's amicus jurisprudence led some to believe that the Appellate Body was retreating from its policy of accepting amicus briefs. However, such notions were proven wrong by another Appellate Body ruling expanding amicus participation in dispute settlement.

## II. Expansion of Amicus Practice: Benefits and Dangers of The *Sardines* Decision.

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<sup>15</sup> Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos Containing Products* ("*Asbestos*"), WT/DS135/AB/R, adopted 12 March 2001.

<sup>16</sup> *Id.* at ¶52.

<sup>17</sup> *Id.* at ¶56.

<sup>18</sup> See Howse, *supra* note 1 at 15.

<sup>19</sup> See Dispute Settlement Body, *Minutes of the Meeting*, WTO Doc. WT/DSB/M/83 (June 7, 2000). See also Decision by the Appellate Body Concerning Amicus Briefs, Statement by Uruguay at the General Council, WTO Doc. WT/GC/38, at 3 (Nov. 22, 2000).

<sup>20</sup> Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. Int'l L. & Pol. 299 at 348 (2002).

(Citing WTO General Council, Minutes of Meeting Held in the Centre William Rappard on 22 November 2000, WT/GC/M/60, para. 1 (Jan. 23, 2001).

Part II of this article (a) explains the *Sardines* decision; (b) analyzes the benefits of the *Sardines* decision; and (c) analyzes problems that might result from expansion of amicus practice under *Sardines*.

*a. Sardines developments*

Recent developments in amicus practice include the Appellate Body's decision to accept amicus briefs from governments that have not exercised their third party rights.<sup>21</sup> This development signals an increasingly liberalized approach to amicus participation in WTO dispute settlement.

The *Sardines* case involved the submission by WTO member Morocco of an amicus brief in a dispute between Peru and the European Communities. Peru's letter dated 26 July 2002 contended that accepting such a brief would allow a WTO member to "impermissibly circumvent the DSU" which "establishes the conditions under which WTO members can participate as third parties in dispute settlement proceedings."<sup>22</sup> Peru hinged its argument on Articles 10.2 and 17.4 of the DSU, which govern participation and written submissions by third parties.<sup>23</sup> The Appellate Body responded by reasserting its discretion to accept amicus briefs and broadening that discretion to include the acceptance of amicus briefs by WTO members.<sup>24</sup> The Appellate Body reasoned that the existence of an explicit right of WTO members to participate as third parties in dispute settlement proceedings did not justify treating members differently from non-members regarding amicus submissions.<sup>25</sup> Addressing the concern that it should not treat non-members more favorably than members with regard to amicus participation, the Appellate Body noted: "As we have already determined that we have the authority to receive an *amicus curiae* brief from a private individual or an organization, *a fortiori* we are entitled to accept such a brief from a WTO Member, provided there is no prohibition on doing so in the DSU. We find no such prohibition."<sup>26</sup>

The Appellate Body continued its sensible approach, articulated previously in *US-Lead and Bismuth II*, of not permitting broad negative inferences to be drawn from narrowly constructed DSU rules.<sup>27</sup> Clearly just because the Appellate Body has the legal duty to accept submissions from

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<sup>21</sup> *Sardines*, *supra* note 1.

<sup>22</sup> *Id.* at ¶154.

<sup>23</sup> *Id.* at ¶161.

<sup>24</sup> *Id.* at ¶157; ¶164.

<sup>25</sup> *Id.* at ¶163.

<sup>26</sup> *Id.* at ¶164.

<sup>27</sup> *US Lead and Bismuth II*, WT/DS138/AB/R, adopted 7 June 2000.

parties and third parties does not thereby mean that it does not possess the legal discretion to accept *amicus curiae* submissions from WTO members.<sup>28</sup>

The Appellate Body thus determined that acceptance of *amicus curiae* briefs filed by members is a matter of discretion, to be determined on a case-by-case basis.<sup>29</sup> The Appellate Body reaffirmed its finding in *Carbon Steel* that Article 17.9 of the DSU provides broad legal authority for the Appellate Body to regulate its own procedures.<sup>30</sup> It seems appropriate for the Appellate Body to consider the underlying purposes of WTO law and dispute settlement in making decisions of this manner. If the Appellate Body finds any *amicus* brief objectionable or simply not useful in deciding the dispute, it can choose not to consider that brief. This discretion will create a balance of interests by allowing access for *amicus* submissions while at the same time appropriately limiting the influence of such submissions.

*b. Benefits of the Sardines decision*

One benefit of this new development in *amicus* participation is that it will allow WTO members to access the Appellate Body in disputes which may have an impact on them which was not foreseen at the time appropriate for intervention as a third party. Allowing access at this later time will ensure that all members with an interest in the dispute have the opportunity to present their views, subject always to the discretion of the Appellate Body. If the Appellate Body determines that a member submitting an *amicus curiae* brief has an interest that is merely ancillary to the dispute, or not legally cognizable for whatever reason, it can choose to ignore the submission.

It is also important to note that the significance of Appellate Body decisions extends beyond the impact nations realize economically through implementation of particular rulings. Perhaps equally important is the role the Appellate Body's decisions play in clarifying the law.<sup>31</sup> One scholar has noted: "complete party control over the scope of appellate legal interpretation may not serve the interests of clarification of the law. One response has been for the AB to take a very broad view of who may be a party or third party to a proceeding (see *Bananas*)."<sup>32</sup> The Appellate Body has now further supplemented this broad view by allowing members to access a dispute to which they have not become a third party. Thus the Appellate Body may exercise discretion to address a new category of legal arguments that may not

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<sup>28</sup> For an opposing view, see Robbins, *supra* note 9.

<sup>29</sup> *Sardines*, *supra* note 1 at ¶167.

<sup>30</sup> *Sardines* at ¶ 166.

<sup>31</sup> DSU 3.2.

<sup>32</sup> Robert Howse, *Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, Outline/Incomplete Draft.

otherwise have been addressed in arguments by the parties, third parties, or other amicus participants. In this respect the Appellate Body's acceptance of WTO member amicus briefs is consistent with its role under DSU 3.2

*c. Potential problems with expansion of amicus practice under Sardines*

One objection to this new development in amicus participation suggests that allowing greater access for WTO members in this fashion will facilitate ambush style tactics, with substantively significant legal arguments strategically held until late in the proceeding. This problem may be adequately addressed by adopting a set of formal procedures for amicus participation. One interesting model is the recent proposal of the European Communities for a new Article to be inserted into the DSU after Article 13.<sup>33</sup> This proposal suggests that any person wishing to make an amicus submission must apply for leave to file within 15 days from the date of the composition of the panel or within five days from the date of the notice of appeal.<sup>34</sup> Additionally the Communication provides that parties and third parties to the dispute be given ten days from the date of receipt of any amicus curiae submission to comment on that submission. This ten-day period would protect the parties and third parties from ambush style tactics. However, while the 15-day and five-day limits will also serve this function, they seem too brief for a prospective amicus participant to apply for leave to file a submission. The interests of the parties and third parties can be protected, and due process respected, while maintaining a longer window of opportunity for amicus to decide whether to participate.

Another complaint related to protecting the parties and third parties to a dispute suggests that amicus participation of any sort tends to favor developed countries.<sup>35</sup> This argument insists that NGOs tend to be located in wealthier countries and therefore will be sympathetic to the views of those nations. While this notion is far from a proven point, it is worth examining the effect participation as amicus by WTO members might have on this debate.<sup>36</sup> Will this new member amicus participation alleviate that perceived problem; or is it an unfair burden on developing countries?

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<sup>33</sup> *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding: Communication from the European Communities*, TN/DS/W/1, 13 March 2002.

<sup>34</sup> *Id.* at ¶2.

<sup>35</sup> See McRae, *supra* note 3.

<sup>36</sup> See John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live up to the Moniker “World Trade Court?”*, 31 LAW & POL’Y INT’L BUS. 739, 756 (2000).

Developing countries may view member amicus participation as another weapon that developed countries may use to impose undue costs on and tax the minimal resources of lesser developed countries (LDCs). On the other hand, LDCs may in some cases not see opportunities to intervene as third parties as a result of their lack of resources. When this occurs, opening the door for participation at a later date as amicus may be an advantage to LDCs. In any case, participation by members as amicus should lead to better information, both factually and legally, for use by panels or the Appellate Body in deciding disputes.

Another angle ties amicus participation to questions and concerns about lobbying. Viewed positively, member amicus participation generally allows those members without political connections or lobbying money greater access to the dispute settlement process. This fairness argument makes sense, but can be countered by another view that suggests that expanding amicus participation could lead to more burdensome lobbying by private organizations. For example, a private organization might feel the panel or Appellate Body would take its arguments more seriously if they appeared in a brief submitted by a WTO member.<sup>37</sup> This type of lobbying could lead to an unfair advantage gained by those with powerful lobbying efforts, such as large corporations with an economic interest in a dispute. In turn this advantage could act to skew the legal inquiry substantively away from broader policy concerns and towards the specific economic interests at stake.

### III. The Case for Amicus Participation in WTO Dispute Settlement.

Before moving on to discuss possible future developments in amicus participation, it is important to make the case for the benefits of amicus participation as it currently exists. Part III of this article addresses the pro-amicus arguments most frequently mentioned by scholars, including (a) the need to address the democracy deficit at the WTO (meaningfulness of access for groups or individuals whose rights and interests are at stake) and (b) the concern over transparency.<sup>38</sup> Section (c) of Part III addresses procedural mechanisms for handling amicus submissions and analyzes objections to

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<sup>37</sup> See Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?*, 12 *Transnational Law* 427, 443 (1999). Laidhold discusses the negative effects of private parties lobbying WTO members to join in disputes as a third party.

<sup>38</sup> See Maura Blue Jeffords, *TURNING THE PROTESTER INTO A PARTNER FOR DEVELOPMENT: THE NEED FOR EFFECTIVE CONSULTATION BETWEEN THE WTO & NGOs*, 28 *Brooklyn J. Int'l L.* 937; David J. Bederman, *National Security: Globalization, International Law and United States Foreign Policy*, 50 *Emory L.J.* 717 (2001).

amicus participation, including concerns over confidentiality, due process and fairness to lesser developed countries.<sup>39</sup>

*a. Democracy Deficit*

Many scholars have identified a so-called democracy deficit at the WTO.<sup>40</sup> This notion complains that the WTO fails to give dispute settlement access to those parties whose interests are often at stake in a dispute. As only states have standing, NGOs, corporations, other private groups and individuals have no recognized method for influencing decisions that impact them.<sup>41</sup> This denial of participation has been termed a democracy deficit and is often cited as a problem that can be alleviated in part through amicus participation.<sup>42</sup>

WTO members have often objected to amicus participation on the grounds that it is inappropriate to a system designed to give rights only to state members.<sup>43</sup> This criticism ignores the practical reality of the dispute settlement process: “There can be little doubt that non-state actors have long played very significant—albeit informal and unofficial—roles in both the legislative and dispute resolution processes.”<sup>44</sup> The Kodak-Fuji dispute and the Reformulated Gas dispute are examples of disputes that are only nominally between WTO parties, and “can be more fruitfully understood as components of complex international corporate battles.”<sup>45</sup> Therefore the WTO dispute settlement system can be understood as formally granting rights

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<sup>39</sup> Maki Tanaka, *Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO Under the Rio Principles*, 30 *Ecology L.Q.* 113 (2003).

<sup>40</sup> Andrew T. Guzman, *Global Governance and the WTO*, 45 *Harv. Int'l L.J.* 303 (2004).

<sup>41</sup> Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 *Kan. L. Rev.* 823 (2002).

<sup>42</sup> Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?* 12 *Transnat'l Law* 427 (1999).

<sup>43</sup> See Dispute Settlement Body, Minutes of the Meeting, WTO Doc. WT/DSB/M/83 (June 7, 2000). See also Decision by the Appellate Body Concerning Amicus Briefs, Statement by Uruguay at the General Council, WTO Doc. WT/GC/38, at 3 (Nov. 22, 2000).

<sup>44</sup> Jeffrey L. Dunoff, *International Law Weekend Proceedings: Civil Society at the WTO: The Illusion of Inclusion?*, 7 *ILSA J Int'l & Comp L* 275 at 281 (2001).

<sup>45</sup> *Id.* at 282.

only to states, while informally recognizing the interests of large and powerful corporations.<sup>46</sup>

By contrast, NGOs often face a more difficult battle in getting their views before the panels or Appellate Body. The opponents of amicus participation would have the interests of NGOs channeled exclusively through governments. But NGOs need independent participatory access because governments cannot always represent their interests. The goals of the NGO or other private organization may directly conflict with the government's position, or may contain some legal arguments and policy concerns not adopted by the government. For example, the interests of a consumer group NGO would not be likely to coincide with the government's interest in a case challenging a protectionist measure of that government.<sup>47</sup> NGO access is even more important for NGOs from developing countries that may not have the resources to participate effectively in WTO dispute settlement.<sup>48</sup> Additionally, the situation could be even bleaker for NGOs located in nations not yet admitted as WTO members.<sup>49</sup> These NGOs would find access to WTO dispute settlement obstructed by the status of their home nation.

WTO dispute settlement may also be enhanced by the participation of individuals. WTO legal provisions contain reference to the GATT/WTO purpose of protecting the interests of individuals.<sup>50</sup> The panel in the *S. 301* case considered these individual interests relevant to the interpretation of treaty provisions:

However, it would be completely wrong to consider that the position of individuals is of no relevance to the GATT/WTO matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce

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<sup>46</sup> Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. of Int'l Econ. L. 433 (1998).

<sup>47</sup> Charnovitz, *supra* note 9 at 324.

<sup>48</sup> Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 Fordham Int'l L.J. 173, 205-206 (2000).

<sup>49</sup> *Id.*

<sup>50</sup> See the Preamble to the Agreement Establishing the World Trade Organization, which contains references to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand."

certain market conditions which would allow this individual activity to flourish.<sup>51</sup>

The panel sets forth a teleological interpretation of both the Preamble to the WTO Agreement and Article 3.2 of the DSU.<sup>52</sup> The panel interprets DSU Art. 3.2 as containing a purpose to protect individual economic actors: “The security and predictability in question are of “the multilateral trading system.” The multilateral trading system is, per force, composed not only of States, but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.”<sup>53</sup> Recognizing the salient reality of the individual interests at stake, the panel notes that the complaints of individual economic actors often trigger dispute settlement proceedings, thereby producing what the panel refers to as “indirect effect”.<sup>54</sup> Put another way, violation of a member state’s rights often flows directly from the injury to individual economic actors within that state. By bringing suit to enforce its rights a member state provides an indirect route for individual economic actors to remedy their injuries.

The panel employs a method of interpretation whereby panels and the Appellate Body may recognize the significance of individual interests without compromising the fundamental nature of the WTO as a system granting rights only to state members.<sup>55</sup>

Amicus practice is another means of providing indirect access to individual interests, the protection of which is already well understood as fundamental to the achievement of the underlying purposes and goals of the WTO.<sup>56</sup> Allowing these individuals to influence their fate through amicus participation would help alleviate democracy deficit.

The *Hormones* dispute between the United States and the European Communities is a classic example of a case directly affecting individuals.<sup>57</sup> European consumers of beef, in their individual capacity, will be affected by a decision calling for a removal of the trade barrier against hormone treated beef (if the removal is ever actually effectuated). One could argue that the consumer may choose to boycott any hormone treated beef, but in reality this

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<sup>51</sup> Report of the Panel, *United States—Sections 301-310 of the Trade Act of 1974* (“S. 301”), WT/DS152/R at ¶7.73, 22 December 1999.

<sup>52</sup> *Id.* at ¶7.74-7.75.

<sup>53</sup> *Id.* at ¶7.76, (quoting DSU art. 3.2).

<sup>54</sup> *Id.* at ¶7.77-7.78.

<sup>55</sup> See Howse, *supra* note 16.

<sup>56</sup> See S. 301, *supra* note 28.

<sup>57</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, adopted 16 January 1998.

may prove extremely difficult and burdensome. Imagine as a matter of necessity inquiring each time a person enters a supermarket, butcher shop, or perhaps more problematic, a restaurant, and demanding to know the source and character of all beef being sold. A general boycott at the wholesaler level would be inconsistent with the goals of a decision condemning the ban and might raise antitrust issues.

Furthermore, some individuals may be powerless to protect themselves from the effects of a WTO ruling in a case such as *Hormones*. For example, children are known to be particularly susceptible to the effects of food borne illnesses. Although unrelated to hormone treated beef, the E-coli problem experienced in the United States demonstrates this phenomenon. Who will represent the interests of children if their parents fail to recognize a danger? In this scenario the activities of NGOs might interact with the interests of a class of individuals who would otherwise be powerless to represent themselves. It seems sensible to allow NGOs to participate as amicus, rather than leaving such public interest issues solely to the discretion of the governments involved in a dispute. As has been noted by many scholars, one common and prominent critique of the WTO system complains of too much reliance on governments and economic theory to protect the public interest.<sup>58</sup> Such a problematic imbalance is particularly troublesome when health issues are at stake.

This imbalance also reaches the tension between environmental and economic interests. The failure of states to adequately balance these competing concerns makes amicus participation particularly desirable. One WTO critic has noted that “critics argue that trade panels, by their very designation, place trade values above other more important social issues...an international body will have supremacy without the broader world view in mind.”<sup>59</sup> In this view, the potentially narrow focus of a panel is an institutional failure that can be remedied in part by allowing outside experts with divergent opinions access to the process.

More liberal amicus participation will better serve the public interest for disputes involving especially novel or complex industries. An intellectual property dispute might involve complicated issues that NGOs are particularly well suited to explicate. For example, “Sierra Club or the ASCAP spend more time and money researching their particular area of interest than does

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<sup>58</sup> See Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 A.J.I.L. 489 (2001).

<sup>59</sup> Andrea Kupfer Schneider, *Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy be Made?: Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 Wid. L. Symp. J. 87 at 91 (2001).

the U.S. government.”<sup>60</sup> The same could be said for NGOs with any number of special areas of environmental expertise. While these NGO’s undoubtedly may introduce their own prejudices into their arguments, the panels and Appellate Body are sophisticated enough to filter this information for its core usefulness. In these especially difficult cases, more complete information through amicus participation can lead to better dispute settlement and will enhance the efficiency of the WTO.<sup>61</sup>

*b. Transparency*

Another major critique of the WTO focuses on the lack of transparency to the dispute settlement process.<sup>62</sup> Transparency in international law as a concept can be traced as far back as the philosopher Kant’s essay “Perpetual Peace.”<sup>63</sup> Kant writes: “all actions that affect the rights of other men are wrong if their maxim is not consistent with publicity.”<sup>64</sup> Kant’s writing reflects the high value placed on maintaining openness in judicial processes that affect the public interest. His idea implies that men will recognize unfairness or abuse of process if that process is held open to scrutiny. It seems natural to insist that transparency improve at the WTO in order to avoid any such systemic risk of unfairness and to stimulate better policy discussions amongst both members and non-members. One could argue that those outside the WTO system have an inherent right to compete, with full information, in the marketplace of ideas to influence decisions that will inevitably impact them. At the very least, the improvement of transparency will reduce suspicion of and increase public confidence in the WTO system.

Comparing the WTO system to the American dispute resolution system sheds light on why the WTO system’s lack of transparency is particularly problematic. United States courts fit into a constitutional scheme that includes “transparent procedures for staffing them, an active practice of dissent, extensive openness to amicus curiae, and the means to overrule judicial decisions that do not depend, as in the WTO, on achieving political consensus.”<sup>65</sup> The extraordinary power of the Appellate Body is not subject

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<sup>60</sup> *Id.* at 102.

<sup>61</sup> See Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGO’s in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 *Colo. J. Int’l Envtl. L. & Pol’y* 47 (2001).

<sup>62</sup> See Bederman, *supra* note 37.

<sup>63</sup> See Charnovitz, *supra* note 9.

<sup>64</sup> *Id.* at 301, (quoting Kant).

<sup>65</sup> Kal Raustiala, *AEI Conference Trends in Global Governance: Do They Threaten American Sovereignty? Article and Response: Sovereignty and Multilateralism*, 1 *Chi. J. Int’l L.* 401 at 413 (2000).

to the same checks and balances as the courts of the United States. Nor is the Appellate Body under the microscope of public opinion in the same way as the Supreme Court of the United States. Decisions of the Appellate Body, at least in theory, are not subject to the same political or public oversights, and its inaccessibility seems consequently even more dangerous.

One method for addressing the transparency problem at the WTO would call for greater participation of amicus in WTO dispute settlement. Amicus participation is consistent with the ideas of Kant, who points out that governments should consult philosophers in matters of international relations, and that philosophers have a moral obligation to participate where it is not expressly forbidden.<sup>66</sup> In the modern context, the NGOs or other amicus participants may be characterized as the philosophers, who will and should participate where not forbidden.<sup>67</sup> Unlike member states of the WTO, NGOs tend to publicize their legal theories and views regarding disputes with which they are involved. Consequently, engaging NGOs in the WTO dispute settlement process will often create the publicity esteemed by Kant and sought by WTO critics. If an amicus brief, filed by an NGO in a WTO proceeding, is posted by that NGO on its website and circulated among academics and other interested NGOs, transparency will be increased with respect to the legal issues and facts addressed in the brief.

Consider also the reciprocal relationship between greater transparency and amicus participation. Just as participation of amicus would help engender greater transparency, greater transparency of process (such as opening dispute hearings to the public) would create more meaningful access for amicus. Analogizing to Kant's model, participation by philosophers will be facilitated by an opening of the process to public view. This in turn will reduce public concerns about the integrity of the process.

*c. Objections to Amicus Participation and Proposed Procedural Mechanisms Addressing these Objections.*

While participation of amicus in WTO dispute settlement will help with the problems of democracy deficit and transparency, many critics have noted that due process, confidentiality and fairness to LDCs are legitimate concerns of amicus participation.<sup>68</sup> The best method for addressing these concerns is to create a set of procedures for amicus participation designed to protect the interests of the parties and third parties to the dispute.

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<sup>66</sup> Charnovitz, *supra* note 9 at 303.

<sup>67</sup> That is, they should participate in the WTO dispute settlement process where no express provision exists denying access for prospective amicus participants

<sup>68</sup> See Tanaka, *supra* note 38.

As discussed earlier in connection with the *Sardines* case, the European Communities (EC) suggested a set of procedures to be inserted after Article 13 of the DSU.<sup>69</sup> The first paragraph of the EC Communication provides that unsolicited amicus submissions must be directly relevant to the factual and legal issues under consideration by the panel or Appellate Body.<sup>70</sup> In addition, paragraph 3(d) requires the amicus applicant to demonstrate the direct interest that the applicant has in the dispute and paragraph 3(f) requires the applicant also to show why it would be desirable for the panel or Appellate Body to grant the applicant leave to file a submission.<sup>71</sup> These provisions serve a gate keeping purpose and prevent the feared deluge of amicus submissions from affecting the parties to a dispute. This will be particularly relevant to LDCs that may not have resources to address a multitude of amicus submissions.

A more progressive approach to developing amicus practice might also include a list of criteria especially relevant to the values and goals of amicus participation. For example criteria might be found in “the broader objectives of the WTO as expressed in the preamble to the WTO Agreement, including the reference to sustainable development, and the requirement for positive measures to ensure that developing countries secure a commensurate share in the growth of international trade.”<sup>72</sup> These criteria should be incorporated into the procedures for amicus participation. Procedures could endorse these considerations as being of primary importance in amicus participation, while specifically not closing the door on participation by amicus curiae representing corporate interests. Adoption of such value preferences into procedural rules would encourage participation by NGOs with a public interest motive.

The EC Communication further addresses these types of concerns by requiring an application for leave to file an amicus brief to 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.”<sup>73</sup> The panel or Appellate Body in a dispute can use these criteria to screen applicants and deny the applications of those deemed inappropriate. Prospective amicus participants that are funded indirectly by a party or third party, or by powerful corporations, whose interests are known to coincide

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<sup>69</sup> Communication from the European Communities, *supra* note 17.

<sup>70</sup> *Id.* at ¶1.

<sup>71</sup> *Id.* at ¶3.

<sup>72</sup> Gabriele Marceau & Matthew Stillwell, *Practical Suggestions for “Amicus Curiae” Briefs Before WTO Adjudicating Bodies*, 4 J. Int’l Econ. L. 155 at 179 (2001).

<sup>73</sup> Communication from the European Communities, *supra* note 17 at ¶3(c).

with a party, will at least be compelled to disclose the true nature of their interest in the dispute.

One could make the argument that NGOs from developed countries tend to represent a national or regional interest whether or not they receive any funding or support from their governments. These NGOs are better funded due to their location in a particular wealthy area, and thus their participation may create a bias in favor of their home region. While biases may be created, the EC procedures would allow the Appellate Body or panels the discretion, under a standard of full information and disclosure, to determine whether or not amicus participation would create unfairness in particular situations. This should control the potential abuse of the amicus process by wealthier parties on a case-by-case basis, and provide for greater likelihood of success for amicus participants that are purely public interest NGOs.

Even in the absence of procedural mechanisms for controlling amicus participation, the objection to amicus practice as favoring corporate interests or tipping the balance of power unfairly in any particular direction can be met with the answer that it is up to the members of a panel or Appellate Body to monitor this potential unfairness. As Professor Mavroidis points out: “And yes, many friends of the court are rather friends of themselves. They do not care about systemic issues, they do not care for the truth. They want to sell a message. But this is not an argument against accepting *amicus curiae* briefs. This is an argument in favour of selecting properly the members of a court.”<sup>74</sup> Put another way, the character and motivation of the amicus participants will be less important than the judicial caution exercised by panel or Appellate Body members in attaching weight to particular amicus briefs. Therefore concerns over the effects of amicus practice lend weight to other proposals for reform of the WTO dispute settlement process, including the call for developing a permanent panel.<sup>75</sup> Additionally, Mavroidis points out that Article 13 of the DSU provides the mandate for panels to seek out whatever information they may deem necessary to resolving the dispute, regardless of whether such information has been pleaded by a party.<sup>76</sup>

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<sup>74</sup> Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Working Paper at 12 (Feb. 2001), at <http://www.jeanmonnetprogram.org/papers/01/010201.html>.

<sup>75</sup> See Ernst-Ulrich Petersmann, *Improvements of the WTO Dispute Settlement System, Conference Report*. Petersmann's Report summarizes the main arguments made in the discussions of eight papers presented at the conference on *Improvements and Clarifications of the Dispute Settlement Understanding of the World Trade Organization-WTO Negotiators Meet Academics*, at European University Institute in Florence from 13-14 September 2002.

<sup>76</sup> Mavroidis, *supra* note 39.

Looking at the concerns about prejudice to LDCs from a more pragmatic perspective, the idea that amicus practice benefits the wealthier nations is even more dubious. Notably, these powerful players “have access to politicians, and therefore to the servants of politicians, delegates and ambassadors; they have access as well, or the resources to buy access, to lawyers, consultants and lobbyists who can make their views effectively known in the Geneva community.”<sup>77</sup> With this arsenal of tactics at their disposal, why would the most powerful WTO members even bother with amicus submissions? Because amicus briefs are one of the most effective methods of participation only for members who do not possess the resources mentioned above, and therefore do not enjoy the benefits of lobbying or employing teams of sophisticated attorneys. In any case, the EC procedures would help break down what little remains of the objection to amicus participation on grounds of its prejudice to LDCs.

As noted earlier, some of the time constraints proposed by the EC seem too short. These include Paragraph 5, which provides that an applicant granted leave to file a submission must make its submission to the panel within 15 days from the date of receipt of notification and to the Appellate Body within 3 days of such date.<sup>78</sup> The three-day window for submissions to the Appellate Body seems too short a time for an amicus participant to file a brief. In order to meet such a deadline an amicus participant would probably need to have the brief worked out prior to receipt of permission to file. Expanding the time period to file would not be detrimental to the parties.

The EC Communication might also benefit from a provision concerning confidentiality. It is not clear exactly why confidentiality would be a major concern in amicus practice, but a provision detailing the obligations of amicus participants would help abate criticism. A procedure could be developed whereby any amicus participant would be required to sign a letter indicating that certain specified categories of private information it learns through its participation in the dispute would remain confidential. Penalties for violating the provisions could include denial of any future opportunity to apply for leave to file as amicus.

Additionally, the notice requirement contained in paragraph 7 of the EC Communication could be more detailed.<sup>79</sup> A new procedure could be adopted specifically requiring service on all parties and third parties, and requiring such service to contain the disclosure information mandated in paragraph 3.<sup>80</sup> Beyond that new procedures could require any amicus

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<sup>77</sup> Howse, *supra* note 16.

<sup>78</sup> Communication from the European Communities, *supra* note XYZ at ¶5.

<sup>79</sup> *Id.* at ¶7.

<sup>80</sup> *Id.* at ¶3.

submissions to be made available to all WTO members upon request, as done under Article 18 of the DSU with non-confidential summaries of parties' submissions to WTO dispute settlement.<sup>81</sup> Translations might also be provided to parties in appropriate circumstances.<sup>82</sup>

#### **IV. The Future of Amicus Practice at the WTO: Government Agencies, International Organizations, and Briefs Relied Upon**

After the *Sardines* decision, the question arises as to how far the WTO's expanding amicus practice will extend. Now that the Appellate Body has reasserted its discretion to accept amicus briefs and expanded amicus participation to include acceptance of briefs by WTO members, it is not difficult to envision a variety of other possibilities. Part IV of this article will examine (a) the possibility of acceptance of amicus briefs from government organs; (b) acceptance of amicus briefs from international organizations; and (c) the emergence of a new category of briefs "relied on" by the adjudicating body.

##### **a. Government Agencies**

If WTO member states may submit amicus briefs, perhaps organs of those governments should be allowed to submit amicus briefs as well. To examine this question it may be useful to return to the discussion earlier regarding the special desirability of amicus briefs in disputes with significant public health components. For example the *Hormones* dispute, or imagine instead a dispute involving a protectionist measure employed by the European Union to prevent the shipment of American beef tainted by E-coli. A Canadian government agency might wish to file an amicus brief in such a hypothetical dispute between the United States and the European Union. Suppose that the Canadian government agency that is equivalent to the USDA knew of severely unsafe conditions in American meatpacking plants. These conditions might include unsafe line speeds and other unsanitary slaughtering conditions leading inevitably to fecal contamination in the meat. Through its expertise with monitoring its own similar industry, the Canadian agency might be able to provide useful expert information regarding industry practice and minimal safety standards necessary to prevent outbreaks of food poisoning.

A filing by this agency independent of its government might be necessary in order to get its views before the panel or Appellate Body. The

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<sup>81</sup> Gabriele Marceau & Matthew Stillwell, *Practical Suggestions for "Amicus Curiae" Briefs Before WTO Adjudicating Bodies*, 4 J. Int'l Econ. L. 155 at 182-183 (2001).

<sup>82</sup> *Id.*

Canadian government might choose for political reasons to not endorse the views of this agency. If that were the case, the agency, if led by independent minded individuals, and if permissible under Canadian law, could go forward with its filing as *amicus curiae*. This would be desirable in order to have the fullest and best information available to a panel or Appellate Body, especially in a dispute involving an industry the Canadian government agency is perhaps uniquely qualified to comment on.

Other, more grisly scenarios are imaginable which a different Canadian government agency might be qualified to analyze. Continuing with our hypothetical case, a Canadian government agency responsible for workplace safety standards might have useful information to share with a panel or Appellate Body. Suppose this government agency knows that certain practices, employed by United States slaughterhouses, are inherently unsafe for workers. Statistics maintained by this agency regarding the correlation between line speeds at slaughterhouses and worker injury rates might be useful to a panel. These statistics might show an alarming rate of serious injury resulting in deep flesh wounds to workers, from which human blood may contaminate the meat supply. Upton Sinclair's *The Jungle* tells a truth-based tale wherein a slaughterhouse worker falls into a vat of burning animal fat and is incinerated.<sup>83</sup> The worker's flesh is then incorporated into sausage. While this is an extreme example, it illustrates a relevant point about the relationship between workplace safety in slaughterhouses and meat contamination. Any such information held by a Canadian government agency would be scientifically relevant to the same industry practices in the United States and would involve directly the serious public interest issues in the case.

Other types of government agencies might also become involved in filing *amicus* briefs with the WTO. This could occur in any situation where the government agency wished to express a view not joined in or endorsed by the executive branch of its government. Legislative committees could enter the debate in this manner, subject of course to the internal jurisdictional laws of their nations. The United States Senate Finance Committee is one potential candidate for *amicus* participation. The expertise of a committee and its workforce of attorneys and advisors could prove helpful to panels or the Appellate Body. There is also a plausible argument that a legislative committee would express views more accountable to public opinion than those of the executive branch. The U.S. Trade Representative, for example, has been accused of being used as a tool for corporate interests.<sup>84</sup> Although all elected officials have ties to corporate interests and campaign contributors, involving another branch of government would expand the field of interests represented and might include ideas not otherwise presented.

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<sup>83</sup> Upton Sinclair, *The Jungle* (1906).

<sup>84</sup> See Kal Raustiala, *supra* note 34 at 415.

### ***b. International Organizations***

The participation of international organizations presents another interesting possibility for amicus practice. A committee of the United Nations might play a useful role in dispute settlement as *amicus curiae*. The multinational character of a U.N. committee would make its participation uniquely desirable. Arguably a group of individuals composing a committee should not represent their individual governments or corporate interests. Instead they could act as independent legal experts with no cognizable interest in the case. For example, U.N. legal experts could file an amicus brief in a case involving principles of treaty interpretation. This could have the beneficial effect of broadening the scope of legal principles and interpretative methods relied upon by panels and the Appellate Body. International organizations could pursue a course often advocated by NGOs, namely pushing the WTO towards a more open regime through amicus participation.

NGO participation tends to focus on non-trade law values such as environmental conservation, as evidenced by NGO celebration of the Appellate Body's review of international environmental instruments in interpreting GATT Article XX in *Shrimp-Turtle*.<sup>85</sup> Participation of prestigious international organizations might increase the weight given by the Appellate Body to arguments relying on soft international legal sources such as those discussed in *Shrimp Turtle*. Further, invoking the values enshrined in the WTO preamble, such as sustainable development, might also seem a more solid argument if advocated by international organizations in addition to NGOs.

Would expanding amicus participation to international organizations create any additional fairness concerns? In some cases, LDCs may have a legitimate complaint about reliance on institutions such as the IMF. Professor Howse expressed concern over the *India* case, and the broader deference to views of the IMF on development and macroeconomic policy.<sup>86</sup> Potentially, the Appellate Body might give more weight to an amicus brief filed by the IMF than to a brief filed by an environmental NGO. While troubling possibilities do exist, due process considerations would be respected in the same manner as with any other amicus participant. Procedures as discussed earlier in this paper, would apply equally to all amicus participants. Judicial caution would of course be exercised in determining the role of amicus participation in any given dispute. Discretion should remain the rule; standing itself should not be granted. Opening the WTO to even more amicus participation should serve the function of reducing democracy deficit and

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<sup>85</sup> See Jeffrey L. Dunoff, *supra* note 21 at 280 for discussion of this development.

<sup>86</sup> Robert Howse, Lecture Comments on 9/26/02. (Accompanied by guest speaker Petros Mavroidis).

increasing transparency. If properly monitored it should not create any dangerous burdens on the WTO dispute settlement process or on parties in their individual capacity.

*c. Briefs Relied On*

Another matter of concern to the future of amicus participation is the extent to which amicus briefs are actually considered in dispute settlement. A long history of difficulty surrounds the attempt to convince the Appellate Body or panels to consider or rely on amicus briefs.<sup>87</sup> As mentioned earlier in this paper, in the *Asbestos* case the Appellate Body rejected all applications for leave to file an amicus brief, on the grounds of failure to follow a set of simple procedures laid out in an Appellate Body Communication. This inexplicable decision was sent out by form letter, without any further explanation.<sup>88</sup>

Fortunately not all amicus briefs have been met with such a dismissive response. In a compliance proceeding, one panel appeared to have relied to some extent on an amicus brief.<sup>89</sup> More recently, the Appellate Body decided to consider some of the arguments of Morocco in *Sardines*. These developments, especially *Sardines*, reflect a change in attitude among the Appellate Body and/or panelists toward the usefulness of amicus briefs. The emergence of a new category of briefs “relied upon” by the Appellate Body would diminish the criticism of amicus practice as an insignificant issue.<sup>90</sup> Acceptance of briefs from governments, government agencies and international organizations should facilitate a stronger and more meaningful role for amicus participants.

## CONCLUSION

The struggle for meaningful access to WTO dispute resolution for non-members will continue. Great strides have been made. The Appellate Body has established that both panels and the Appellate Body have the legal authority to accept and consider amicus submissions.<sup>91</sup> Permissible amicus

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<sup>87</sup> Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos Containing Products (“Asbestos”)*, WT/DS135/AB/R, adopted 12 March 2001.

<sup>88</sup> *Id.*

<sup>89</sup> *Award of Arbitrator, Australia-Measures Affecting Importation of Salmon*, WT/DS18/9, 23 February 1999.

<sup>90</sup> Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Working Papers, available at <http://www.worldtradelaw.net/articles/mavroidisamicus.pdf>.

<sup>91</sup> *Carbon Steel*, *supra* note 11.

participants have expanded to include not only NGOs and individuals but also WTO members.<sup>92</sup> Other possibilities for government agencies and international organizations need to be explored.

This article suggests procedures whereby amicus participation might be regulated (notably by a group originally opposed to amicus practice).<sup>93</sup> Nevertheless, numerous hurdles to meaningful participation remain. Many WTO members will undoubtedly continue to complain about the Appellate Body's expanding acceptance of amicus briefs. Complaints about unfairness to LDCs, due process, confidentiality, and other issues will continue to permeate the debate. Some would claim that the integrity of the process is at stake. They are correct; and that integrity is best served by expanding, not reducing, amicus participation in WTO dispute settlement.

This expansion will insure that the public attains some basic measure of access to an institution that greatly affects the world economy, and therefore individuals everywhere. The principles of democratic participation and transparency will best be served by developing a set of procedural rules to insure that due process is respected and the rights of WTO members are not threatened. Once achieved such a procedural mechanism should eliminate a great majority of the fairness concerns raised by critics of amicus participation. Therefore it seems prudent for WTO Members to meet and negotiate these procedures, using the European Communities' model as a starting point. The Appellate Body may then continue to develop its amicus jurisprudence in a liberal fashion, with a set of procedural rules firmly in place.

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<sup>92</sup> *Sardines*, *supra* note 4.

<sup>93</sup> Communication from the European Communities, *supra* note XYZ.