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Article

2004

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How to cite

BOISSON DE CHAZOURNES, Laurence. Transparency and 'Amicus Curiae' briefs. In: The journal of world investment & trade, 2004, vol. 5, n° 2, p. 333–336. doi: 10.1163/221190004x00506

This publication URL: <https://archive-ouverte.unige.ch/unige:6156>

Publication DOI: [10.1163/221190004x00506](https://doi.org/10.1163/221190004x00506)

Transparency and *Amicus Curiae* Briefs

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What do we mean by *amicus curiae*? In the literal sense, we mean “friends of the court”. It is an institution well known to many of you because it is known in many domestic legal systems—the Roman system in ancient times but also in the common-law system—and now more and more in continental legal systems such as the French one the *amicus curiae* matter is arising.

What is also interesting is that it is an issue which is also important for international courts and tribunals. When I use the term international courts and tribunals, it is in a generic sense, and I am not going to enter into the debate about whether or not the World Trade Organization’s Appellate Body is a court. I consider it as a court for the sake of this presentation.

Speaking of these numerous international courts and tribunals, it should be emphasized that some of them, such as the European Court of Human Rights or the Inter-American Court of Human Rights, have statutory provisions allowing for the submissions of *amicus curiae* briefs. Others do not have such statutory provisions, a good example being the International Court of Justice, which has been very reluctant so far to admit any *amicus curiae*. Then we have the economic dispute settlement fora such as the WTO, the North American Free Trade Association (NAFTA) and the International Centre for Settlement of Investment Disputes. In this case, one can note that the WTO has been so far very much the target of the submissions of *amicus curiae* briefs, but there is also an emerging practice with NAFTA Chapter 11 procedures, and I shall come back to that later on.

I will focus my remarks on the WTO system, knowing that it is an inter-State system, which is also important, and that it has specific rules in terms of dispute settlement procedures which are contained in the Understanding on Dispute Settlement (DSU). When you look at the DSU, however, you see that there is no specific provision on *amicus curiae*; the only thing which exists is that the panel can seek information. This is in Article 13 of the DSU.

Then, for the WTO Appellate Body, there is nothing about *amicus curiae*. The only thing that we have is that there are working procedures which can be elaborated by the Appellate Body. There is no specific mention of *amicus curiae* but, in fact, there have

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been a lot of submissions of *amicus curiae* briefs, and they have been admitted within the realms of the WTO. This is interesting because it has been a judge-driven process where the judge has accepted the submissions of *amici curiae*.

Now, a few points about *amicus curiae*. There is an issue of accountability and legitimacy, that is for sure. There is also an issue of knowing what contribution is made by *amici curiae*. Should we admit *amici curiae*? There is then an issue of the positions of certain groups and the non-governmental organizations (NGOs). What do the NGOs think about *amicus curiae*, and what do the developing countries think about *amicus curiae*?

Let us take the matter of accountability first. Very often when people are discussing *amicus curiae*, what they are going to ask is: "Who are these people who are making submissions as *amicus curiae*? These people are not elected; they do not have any political mandate; but they think that they are able to enter into the realms of dispute settlement procedures and that they have a right to provide information." That is what we will call the argument based on political legitimacy, and there might be a point about that.

However, there are other grounds for establishing legitimacy, such as expertise legitimacy. A matter which is important for us when we look at the case-law of the WTO is that *amici curiae* have been brought in there very often to face situations where there were disputes which were "cross-cutting" disputes—those involving trade and the environment or involving trade and other matters. In this context, the *amicus curiae* was there to try to fill in the gaps. So there was an aspect of legitimacy: it was to represent the unrepresented at the WTO. That might be contested, of course.

Then another parameter is that when we speak about the environment we are speaking of global interests and global concerns, and States' territorial approach might not be the most adequate approach for representing the interests concerned in such global issues.

One other point also to be mentioned about the legitimacy aspect of NGOs or other actors submitting *amicus curiae* briefs is that when you look at definitions of *amicus curiae*, for example in *Black's Law Dictionary*, you are going to see that it is linked to public-interest issues. So should the notion of *amicus curiae* at the WTO be linked to a public-interest issue? When you look at the practice of the WTO, of the Appellate Body, in fact many of the *amicus curiae* briefs which have been accepted were not directly linked to public-interest matters as such, and that might be a question.

Then a last question is: should we not be speaking of legal legitimacy? I ask that because when looking at other fora, you see that more and more *amicus curiae* briefs are admitted, so maybe there is an emergence of a customary international rule which allows for the submissions of *amicus curiae* briefs. For example, when you look at the Chapter 11 NAFTA context, you see that there have been two cases—the *Methanex* case¹

¹ *Methanex Corporation and the United States of America*; documents available at: www.naftalaw.org.

and the *Ups* case²—where *amicus curiae* submissions have been accepted. And when you look at the reasoning of the Arbitration Tribunal in *Methanex*, it is quite interesting, because the Tribunal followed very carefully the reasoning of the Appellate Body in the WTO case. So is there an emerging customary rule?

These are grounds for establishing legitimacy. I think that an important issue in this debate is the distinction that we should make between public-interest actions through *amicus curiae* and industry interests through *amicus curiae*, and what is important with the WTO is that you do not have these clear-cut rules in terms of distinguishing the interests which are represented there through *amicus curiae* briefs.

Now a few remarks about the possible contribution of *amicus curiae* briefs, and I think these are linked to the discussion that we had yesterday about the efficiency of procedures. First, I think that *amicus curiae* briefs can bring a different, non-economic perspective, which might be important for resolving certain disputes. Then they bring additional specific information and expertise—factual as well as legal—and that is also something to be taken into consideration. They also allow for creative legal thinking, and very often the political positions are very constrained. So maybe *amici curiae* can bring some more creative legal thinking into the debate.

I also consider that *amici curiae* can, in fact, support the idea of competition of ideas. With *amici curiae*, you are going to have other ideas which are going to be brought to the forefront of the dispute settlement mechanism and, in fact, the Appellate Body has mentioned the notion of the added value of *amicus curiae* briefs. Another issue which is interesting is that it is a low-cost strategy in terms of information gathering, and this might be also taken into consideration.

At the institutional level, what is also important is that *amici curiae* might be viewed as a way to increase the legitimacy of the international rules in question. They are supported by different players; that means that they should find application or maybe that it would strengthen the argument in favour of their application. Then I think that there is a very important argument which is related to the “international governance” system of the WTO and to the fact that it is an inter-State system—a very closed inter-State system—and *amicus curiae* briefs are viewed as a way for other actors to enter into the realms of the WTO.

Now, is this a positive development? What is interesting is that when you speak with NGOs—and a representative of an NGO, the Center for International Environmental Law (CIEL), which has submitted *amicus curiae* briefs, is here with us—not all of them are in favour of submitting *amicus curiae* briefs at the WTO. I think that one of their main concerns is the non-distinction which is made between them and the industry sector and the fact that they do not have the same tools for presenting or submitting *amicus curiae* briefs, so that there might be an issue of competition among non-State actors.

² *Ups and Canada*; documents available at: <www.nafta.law.org>.

What is also true and what has to be acknowledged within the WTO is that you have a tension between the political organ, the Council, the organ representing the States, and the judicial system, and so far the political process has been very slow on the matter of *amicus curiae*. So how can we reconcile this discrepancy between the political organ's and the judicial organ's views?

When you look at the case-law of the Appellate Body, they say that they have admitted *amicus curiae* briefs, but in fact we do not really know what they have done with them. So there is also an issue of knowing what is going to be done with the content of *amicus curiae* briefs.

Another interesting point is that some of the developing countries are very vocal at the WTO against *amicus curiae*. I think that there is a strong suspicion about NGOs being agents of the Northern countries and bringing arguments on behalf of those countries. Here is an issue of due process in relation to the equality of parties, and in looking at this matter you might think that admitting *amicus curiae* briefs is going to go against the spirit of the negotiating rules in terms of dispute settlement. This is a matter to be taken into consideration.

Then there is a matter of workload. Should *amicus curiae* briefs be admitted, that means that the workload would increase. That might be true, but I do not think that it is only true for the developing countries. It is true for everybody, but this concern could be resolved with process rules, which could limit the number of pages and the focus of the *amicus curiae* briefs.

Finally, some concluding remarks about *amicus curiae*. There are pros and cons about admitting *amicus curiae* briefs, but it seems to me, looking at the international practice, that things are going in the direction of admitting them, and what is now very much at stake for all tribunals and courts is to establish clear rules on how to deal with them. It seems to me that the rules that were established by the Appellate Body in the *Asbestos* case³ are not sufficient if we really want to be sure that there is going to be a fair treatment of all Parties and non-Parties within the judicial process.

A point that I would also like to highlight is that the discussion of *amicus curiae* should be linked to the issue of transparency in the context of the WTO. We all know that the negotiation meetings are not public; they are confidential and all the meetings with respect to the dispute settlement procedure are non-public. With reference to the Freudian "myth of the dark room", one can associate such dispute settlement procedures with a "dark room", and the non-State actors are really wondering what is going on in it. It seems to me that if the room would be less dark maybe the NGOs and others would feel less of an attraction for entering into it. So the issue of transparency may be a good argument to be looked at if you want to regulate the issue of *amicus curiae*.

³ *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11, Report of the Appellate Body, WT/DS135/AB/R; available at: www.wto.org.