

**Effects and Outcomes of *Amicus Curiae* Briefs at the WTO:
An Assessment of NGO Experiences**

Leah Butler

Abstract The World Trade Organization (WTO) operates on a strictly government-to-government level. Despite this, nongovernmental organizations (NGOs) attempt to influence the decisions of the WTO by using *amicus curiae* briefs. This study examines the ways in which NGOs use *amicus curiae* briefs to influence WTO decisions regarding international trade policy, presenting the motivations behind NGOs' decisions to use *amicus curiae* briefs, the strategies used to submit the briefs, the relative merits of these strategies, and the outcomes and effects of brief submittal. A survey of 15 NGOs that submitted *amicus curiae* briefs to WTO dispute bodies from 1996 – 2006 reveals that NGOs were able to achieve a variety of procedural/participatory and substantive goals and found utility in submitting *amicus curiae* briefs despite procedural barriers. Although submitting *amicus curiae* briefs directly to the WTO offers NGOs the most autonomy and is the preferred method, funneling such briefs through WTO Member States resulted in increased brief acceptance and consideration. Moreover, gaining Member State support, attracting media attention, networking among NGOs, and working directly with the WTO had further advantageous effects. Until formal procedures are instated to guide the use of *amicus curiae* briefs at the WTO, NGOs can strategize brief submittal to achieve desired outcomes.

Introduction

The World Trade Organization (WTO), established in 1995 by the Uruguay Round negotiations¹, is an exclusively government-to-government institution that administers WTO trade agreements, handles trade disputes, monitors national trade policies, provides technical assistance and training for developing countries, and is a forum for trade negotiations (WTO 2006b). The WTO aims to encourage trade liberalization and facilitate free and fluid trade worldwide among its 149 Member States. While the WTO's exclusive membership can be considered an indispensable characteristic that ensures the efficient and equitable regulation of trade, this exclusion can simultaneously be seen as undemocratic and un conducive to promoting trade laws that address the diverse concerns of other global constituents.

The growing influence of WTO has motivated many non-state actors with strong policy agendas to seek access to the WTO decision-making process in an effort to affect WTO policies. Notwithstanding formidable procedural and ideological barriers to public participation in WTO dispute settlement proceedings, nongovernmental organizations (NGOs) have submitted *amicus curiae* briefs to the WTO during dispute cases to influence dispute outcomes and promote more transparent and informed decisions. The use of *amicus curiae* briefs during WTO dispute settlement is a contentious topic among WTO Member States, academia, professionals, and civil society alike. As WTO procedural law currently stands, the conditions under which such briefs are accepted are not clearly delineated nor does case history indicate that brief acceptance is based on precedent. This lack of clarity provides an interesting basis for studying the actions of non-state actors at the WTO and the democratic nature of the WTO as an institution.

It is clear that *amicus curiae* brief submittal, as an avenue through which NGOs can voice their concerns in the international trade arena results in mixed outcomes. How has this reality shaped NGOs' approaches to submitting *amicus curiae* briefs? What are NGOs' underlying motivations to submit *amicus curiae* briefs to the WTO? How has the *amicus curiae* brief, as a communicative tool, aided NGOs' pursuit to influence trade decisions? This study addresses these questions by examining the strategies NGOs used to submit *amicus curiae* briefs to WTO dispute panels and appellate bodies since the WTO's inception and draws on the specific case of the *United States–Import Prohibition of Certain Shrimp and Shrimp Products* (“US–Shrimp”)

¹ Since 1948, the General Agreements on Tariffs and Trade (GATT) provided the rules for the global trading system. These rules have been refined over time through negotiations. The Uruguay Round was the last round of these negotiations.

dispute to examine NGOs' motivations to submit *amicus curiae* briefs and the effects of *amicus curiae* submissions.

Dispute Settlement As Member States strive for economic prosperity and increased welfare through trade, many issues arise as diverse sets of national and international laws come together in one arena. A dispute arises “when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations” (WTO 2005). The Dispute Settlement Body (DSB), consisting of WTO Members, is responsible for resolving trade disputes between Member States. Other Member States not directly involved in the dispute or “third parties”, can declare interest in the dispute and provide input to panelists. The DSB assembles panels to hear cases and ultimately decides whether to accept or reject a panel’s decision.² Once the panel’s decision has been accepted, the decision becomes a ruling. If the ruling is later contested by WTO Members, an appeals process begins. The appeal can only be heard if it is based on points of law and does not reexamine new issues. The appeal is heard by an Appellate body that makes a subsequent decision to “uphold, modify, or reverse a panel’s legal findings.”³ This decision must also be accepted by the DSB to become a ruling. To date the DSB has handled over 300 such disputes (WTO 2006a).

The process of dispute settlement within the WTO provides a political space for the resolution and discussion of pressing topics embedded in global trade but not necessarily imperative to national economic interests, such as human health, labor rights, environmental protection, and consumer rights. Scholars and civil society have raised the issue of whether the WTO is the appropriate avenue through which to determine the optimal balance between trade and “non-trade” concerns, particularly because these issues may not be adequately represented by national governments. The WTO is often criticized as an exclusive and undemocratic institution as it is only constitutionally committed to consulting with and responding to its Member States, while it makes decisions for the rest of society. In parallel with this discourse is

² Panels are chosen separately for each case and consist of 3-5 experts from a list of well-qualified individuals from various countries.

³ 3 of 7 permanent Appellate body members, chosen by the DSB, hear each case. Members of the Appellate body must be “individuals with recognized standing in the field of law and international trade, not affiliated with any government.”

a substantial call from civil society to increase the transparency⁴ of WTO processes by granting outside parties more opportunities to actively contribute to WTO decision-making.⁵ While an “opening-up” of the WTO to outside parties is a controversial issue, some feel this would bring new credibility and much needed accountability to such a powerful intergovernmental organization.⁶

Many NGOs, as part of civil society, have actively pursued recognition from the WTO as valid contributors to the dispute resolution process. NGOs are organizations independent of governments such as international NGOs, environmental NGOs, transnational advocacy networks, grassroots organizations, community-based organizations, epistemic communities, or any social or legal advocacy groups. NGOs have the potential to exert substantial influence on dispute settlement decisions by providing a range of services and expertise that could drastically improve the knowledge base from which decisions are made. This rationale is based on the assertion that NGOs more accurately represent the multi-faceted concerns of the public than do states.⁷ As NGOs are by definition external to governments, they often represent a different set of concerns and thus have the potential to broaden the WTO dialogue to include a diverse set of key issues that are often skirted or overlooked by Member States – for example, issues that may not translate well into simple economic terms. In an effort to increase transparency of WTO decisions and question the privileged status of Member States during dispute settlement, some NGOs have pushed for the formal recognition of civil society in an effort to encourage the inclusion of ideas and information from entities other than a party or third party to a dispute.

The options available for NGO input during dispute settlement are extremely limited. NGO symposia on Trade and Environment, NGO briefings on WTO Council and Committee work, and Ministerial Conference access are the three broad arenas, created by the WTO, to which NGOs have been granted access. The participation of NGOs in dispute settlement proceedings has emerged as a largely informal activity (Albin 1999). As “non-party” actors in WTO

⁴ “‘Transparency’ in the context of the WTO is understood to mean both ‘openness’ and ‘participation’. ‘Openness’ refers to the information flow within the WTO membership (internal transparency) and to the information flow from the WTO to the public at large (external transparency). ‘Participation’ refers to more specific demands of civil society to be able to actively contribute to the decision-making processes of the WTO” (Umbricht 2001).

⁵ Civil society is generally defined as a ‘third system’ of agents including privately organized citizens outside of government or profit-seeking actors (Price 2003).

⁶ For perspective on this debate see Charnovitz 2000, Esty 1997, Schneider 2001, Scholte et.al. 1998, and Zhengling 2004.

⁷ See Peel 2001 for an assessment of NGO capacity to represent the public interest in global environmental protection.

processes, these organizations are not granted voting authority and usually cannot participate in formal negotiations. The only direct, yet tenuous, avenue through which NGOs can submit information to WTO dispute settlement bodies is through the *amicus curiae* (“friend of the court”) brief. *Amicus curiae* briefs are submitted by groups not recognized as parties to the dispute and contain legal or technical information that may be useful in deciding dispute rulings.

Amicus Curiae Brief Submittal *Amicus curiae* brief submission and acceptance involves a series of steps. NGOs can submit *amicus curiae* briefs to the WTO via three different strategies. Briefs can be submitted directly to either a panel or to an appellate body. If this occurs, the panel or appellate body reviews the brief and then makes a procedural decision either to accept or reject the brief based on an assessment of the panel or appellate body’s legal authority and the positions of the involved parties. If accepted, the panel or appellate body then decides whether to officially consider or disregard the brief. The panel or appellate body will indicate in its decision whether it will *consider* the brief while making a decision. If the brief is not considered, the panel or appellate body will state this decision explicitly in its report. If the brief is rejected, the NGO may try to re-submit it by appealing to a Member State.

As a second strategy, an NGO may submit a brief by attaching it to a Member State’s submission upon the Member State’s approval. If the brief is appended to a Member’s submission, it will be reviewed and considered as if it were synonymous with the views and arguments of the Member State.⁸ However, the panel or appellate body will only consider the brief to the extent its content is supported by the Member State. That is, if the Member State partially or conditionally supports the brief, the panel or appellate body will review the brief keeping this in mind, i.e. in a less rigorous fashion.⁹

As a third strategy, the NGO can submit the brief directly to the WTO in addition to attaching it to a Member State’s submission. In effect, this strategy is a “dual submittal” as the brief is sent via two separate paths. In this case, the briefs are handled in the same manner as outlined above as determined by the method of submittal.

Case History Although NGOs have tried to submit *amicus curiae* briefs to the WTO since 1996¹⁰ it wasn’t until the Appellate Body ruled in the 1998 *US–Shrimp* dispute that panels were

⁸ For example, see *US – Shrimp I AB*, para 89.

⁹ For example, see *US – Shrimp I AB*, para 91.

¹⁰ Several environmental groups tried to submit *amicus curiae* briefs in *US–Standards for Reformulated and Conventional Gasoline* (1996) and *EC–Measures Affecting Meat and Meat Products* (1997).

allowed to accept unsolicited *amicus curiae* briefs.¹¹ Since then, many NGOs have submitted *amicus curiae* briefs to both panels and appellate bodies either as attachments to Member State submissions or as stand-alone briefs, i.e. submitted directly to the WTO (See Table 1). The WTO Dispute Settlement Understanding (DSU)¹² does not mention *amicus curiae* briefs; thus there is no legal process explicitly governing their use. However, NGOs and others assert that panels and appellate bodies have the authority to accept *amicus curiae* briefs under Article 13.1 of the DSU, which allows panels to “seek information and technical advice from any individual or body which it deems appropriate” and Article 13.2 which empowers panels to “seek information from any relevant source and may consult experts to obtain their opinion.”¹³

In the 2001 *European Communities–Measures Affecting Asbestos and Products Containing Asbestos* dispute, the Appellate Body created the “Additional Procedure” to address submissions from groups other than a party or third party to the dispute using Rule 16(1) of the *Working Procedures*.¹⁴ The Appellate Body put forward the Additional Procedure after recognizing the possibility of receiving such submissions during the appeal and was of the view that “the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures.”¹⁵ The NGO community saw this development as an important step in enacting a formal process to handle *amicus curiae* submissions at the WTO, and thus created a surge of interest within the NGO community.¹⁶ However, while making the decision to allow panels and appellate bodies to accept and consider *amicus curiae* briefs, panels have emphasized that they have no obligation to take these unsolicited briefs into account when rendering their decisions. In essence, groups not a party or third party to a dispute may submit briefs to the WTO but the discretion to accept and consider these briefs lies exclusively with the panel or appellate body receiving the brief.

¹¹ See Appellate body Report on United States–Import Prohibition of Certain Shrimp and Shrimp Products (hereinafter “US–Shrimp I AB”), WT/DS58/AB/R, adopted 12 Oct 1998, para 83 – 187.

¹² The DSU is the legal text that details the rules and procedures for dispute settlement. Full title: Understanding on the Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2 Dispute Settlement Understanding.

¹³ *Id.* Art. 13.1, 13.2

¹⁴ See Appellate body Report on European Communities–Measures Affecting Asbestos and Asbestos Containing Products (hereinafter “EC–Asbestos”), WT/DS135/AB/R, adopted on 12 March 2001, para 52 and Appellate Body–Working Procedures for Appellate Review, WT/AB/WP/4, adopted on 1 May 2003.

¹⁵ See EC – Asbestos, para 50-52.

¹⁶ The Appellate body received 17 *amicus curiae* submissions from 23 different entities after the adoption of the Additional Procedure, more than were submitted in all previous dispute cases combined.

Table 1. *Amicus curiae* submissions in WTO trade disputes

YEAR	CASE NAME	BRIEFS SUBMITTED	BRIEFS ACCEPTED
Jan 1996	US – Gasoline	n/a**	0
Feb 1998	EC – Hormones	1**	0
May 1998	US – Shrimp PANEL	2	1A
Oct 1998	US – Shrimp APPELLATE BODY	4	3A 1D
Feb 2000	Australia – Salmon Recourse PANEL	1	1D
May 2000	US – Lead Bismuth II APPELLATE BODY	2	2D*
June 2000	US – Copyright	1	1D*
Sept 2000	EC – Asbestos PANEL	4	2A 2D*
Oct 2000	EC – Bed Linens PANEL	1	1D*
March 2001	EC – Asbestos APPELLATE BODY	11	0
June 2001	US – Shrimp Recourse PANEL	2	1A
Oct 2001	US – Shrimp Recourse APPELLATE BODY	2	1A
Feb 2006	EC – Biotech	3	3D*

A = attached, D = direct, * = not considered

** = Precise data could not be found on the exact number of briefs submitted for these cases

Occasionally, unsolicited submissions from NGOs are allowed in WTO dispute settlement proceedings; however, many such submissions continue to be rejected or not considered. Briefs may be rejected or not considered due to pressure from Member States opposed to *amicus curiae* brief admission in settlement proceedings or because they are found to be unnecessary to render a decision.¹⁷ As Table 1 indicates, there is no clear trend in brief acceptance rate over time. This lack of clear pattern suggests that panels and appellate bodies accept briefs on a case-by-case basis. Likewise, the United States Trade Representative has no set protocol for attaching *amicus curiae* briefs to its own submissions and thus the determination is made on a “case-by-case basis” (Stubbs, pers. comm.). As of 2004, only two unsolicited, stand-alone briefs have been accepted and explicitly considered by dispute decision-makers.¹⁸ Additionally, the *EC–Asbestos* case reveals uncertainty and misconceptions about the procedural rules and expectations for outside parties. Each of the 11 timely applications for permission to file written briefs in this

¹⁷ It should be noted that acceptance of *amicus* briefs during dispute resolution is highly opposed by many Member States who feel that the WTO is a “closed” institution and should only consider concerns of its Members. For examples, see US–Shrimp I Panel, para 3.130 – 3.133 and Panel Report on United States–Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 by Malaysia, WT/DS58/RW, 15 June 2001, para III.A.2.7-15.

¹⁸ A brief submitted by the Center for International Environmental Law (CIEL) *et al.* during US–Shrimp, see US–Shrimp I AB, para 83, and a letter from “Concerned Fishermen and Processors” in South Australia in Australia–Salmon, see Panel Report on Australia–Measures Affecting Importation of Salmon Recourse to Article 21.5 by Canada, WT/DS18/RW, para 7.8-7.9.

appeal were denied for “failure to comply sufficiently with all the requirements” set forth in the Additional Procedure. A form letter was sent to each group informing them of this decision.¹⁹ This blanket reaction reveals institutional hesitation towards accepting these briefs and reflects the insufficient guidance to Member States and NGOs as to when unsolicited briefs will be accepted, let alone when they will be considered pertinent and useful.

The lack of clear process for accepting *amicus curiae* briefs is precisely the institutional ambiguity that this research has been developed to investigate. By examining NGOs’ submission strategies and the effects and outcomes of these strategies, this project considers both the behavior of non-state actors and the nature of the interface between non-state actors and the WTO. Through analyzing WTO dispute case history, I will examine the specific strategies by which NGOs have submitted *amicus curiae* briefs and the resulting outcomes of brief submission. Using the *US–Shrimp* dispute as a pivotal case study, I will also explore NGOs’ goals for submitting *amicus curiae* briefs in conjunction with the overarching effects of brief submittal. From this data I will develop a framework that outlines the relationship between NGOs’ brief submittal strategies and brief outcome. Additionally, I will analyze the different submission strategies and compare and contrast the benefits and drawbacks of each.

Methods

Research for this study draws on data from all WTO dispute cases in which *amicus curiae* briefs were submitted to provide a comprehensive account of brief submittal at the WTO. In an effort to bring detail to this comprehensive account, I supplemented my broad empirical data with specific accounts and information from the *US–Shrimp* dispute case. The case study component of this research provides a more in-depth narrative of *amicus curiae* brief submittal. I chose this particular case due to its lengthy time-span (1996-2001), its relevance to the ongoing debate on environmental impacts of global trade, and because it triggered an impressive amount of interest from the public and from NGOs around the world.

I conducted original research for this project through a document review of primary and secondary sources. I compiled a database of WTO documents including panel reports, appellate body reports, legal texts, and press releases from the WTO document library on the official WTO website. These sources provided factual and legal information about the dispute cases. I located

¹⁹ See EC–Asbestos, para 56.

copies of *amicus curiae* briefs, media publications, and lobbying materials related to the dispute cases by requesting the documents directly from the NGOs or by using their online resources. Additionally, I compiled information about the *US – Shrimp* case and the use of *amicus curiae* briefs at the WTO from scholarly journals (law reviews, law journals, trade journals, and environmental policy journals). In combination, these sources provided enough information to piece together a narrative of dispute settlement events, submissions, and decisions.

In conjunction with document review, I gathered information directly through interviews with official NGO representatives from NGOs that submitted *amicus curiae* briefs to the WTO over the past 10 years.²⁰ I used phone interviews, email correspondence, and NGOs' websites to gather this information. I collected data on each of the 26 NGOs that submitted *amicus curiae* briefs in the *US–Shrimp* dispute. I communicated directly with 15 of these NGOs and was able to conduct 7 extensive interviews. I also communicated with NGOs involved in other dispute cases to provide a more comprehensive knowledge base from which to investigate strategies and draw conclusions. (The Appendix contains a complete list of *amicus curiae* brief submissions to the WTO from NGOs with an indication of those that actively participated in this study).

After establishing initial communication with an NGO, I was directed to a representative within or associated with the organization who either was involved with drafting the *amicus curiae* brief, corresponding with the WTO, or had the most knowledge about this topic. I was able to speak with the authors of the briefs in some instances but often had to speak with more peripherally involved NGO representatives, as some of these disputes occurred years ago. I was not able to contact each NGO involved in these disputes due to time constraints and problems establishing communication as some are very small and reside in foreign countries. When phone interviews were not possible, communication occurred via email.

My questions to NGO representatives were designed to elicit primary accounts of the NGO's reasons for submitting an *amicus curiae* brief, the strategies used to submit the brief, their thoughts on the effects of brief submittal, and the utility of *amicus curiae* briefs as a communicative tool. I attempted to extract as much information as possible to answer these questions and collected anecdotal accounts of the NGO's experience with brief submission. I

²⁰ I completed the CITI Course in the Protection of Human Research Subjects on 26 Oct 2005 to conduct the interview component of this study.

posed similar questions to each NGO representative and for simplification, treated all responses as equally valid and as representative of the NGO.

I categorized data on NGOs' goals for submitting *amicus curiae* briefs by detecting trends and commonalities between information from each NGO. I grouped NGO responses into categories based on the most prominent goals including goals that were often cited, as they were the most important overall, and I included particularly unique goals to show variance. Looking beyond the final outcome of brief submittal (whether the briefs were officially accepted or rejected), I collected accounts from NGOs of both the concrete and more overarching effects of brief submittal. These data were similarly categorically separated using often cited and particularly unique effects.

I used empirical evidence from WTO reports and facts relayed through NGO interviews to numerically assess *amicus curiae* submittal strategies and outcomes in all WTO trade disputes. After gathering information on *amicus curiae* brief submittal strategies, I separated the strategies into three groups that indicate the different strategic spheres: leverage strategy – inside, leverage strategy – outside, and submittal strategy.

“Leverage strategy – inside” includes strategies that involve transmitting *amicus curiae* briefs through established official entities, in this case, through a Member State or directly to a WTO panel or appellate body. This type of strategy works within the existing legal and procedural policies of the WTO and if submitted through a Member State, within the Member State's domestic policies governing such submissions. Through utilizing this type of strategy, the NGO is participating “inside” formal legal and procedural structures. In the case of the *US–Shrimp* dispute, the United States Trade Representative was the administrative body that decided which briefs to attach.

“Leverage strategy – outside” includes strategies that capitalize on the effects of attracting media attention and building strength through numbers or networking. Media includes press releases, publicity events, posting of newspaper and magazine ads, protests, public mailings, and televised press. Networking can involve adding signatories to a brief, reaching out to international NGOs, collaborating with multiple NGOs on brief content, and any cooperation between NGOs that utilizes combined talent and expertise to facilitate a joint endeavor.

The “submittal strategy” is the final method by which the *amicus* brief is submitted. As previously stated, NGOs have three options available to them. To reiterate, these options are to

submit the brief directly to a WTO panel or appellate body, to submit the brief as an attachment to a Member State's submission, or to submit directly to the WTO and also as an attachment.

After combining the empirical data with the organizational grouping, I developed a framework based on the relationship between these strategies and brief outcomes. The purpose of this framework is to display the dynamics between these different variables and to provide a means in which to conceptualize the primary factors that influence brief submittal. Without official procedural guidelines to systematize *amicus curiae* brief submittal, this framework can be seen as a representation of the current de facto process of *amicus curiae* brief submittal at the WTO.

Results

From my interviews, I found that NGOs have many goals they aim to achieve by submitting *amicus curiae* briefs. As summarized in Table 2, I have categorized these goals as “participatory/procedural goals” and “substantive goals” and then further separated into more descriptive categories. Participatory/procedural goals include goals that address issues of transparency, the relationship between civil society (i.e. NGOs) and the WTO, the process for *amicus curiae* brief submittal, and the information flow between civil society and the WTO. In contrast, substantive goals are content related and can address specific case issues, technical information, legal arguments, Member State positions, and general WTO topics geared towards content and not process.

The goals listed in Table 2 are reflective of goals specifically pertinent to NGOs involved in the *US–Shrimp* dispute. Nevertheless, due to the developing nature of NGO activity in WTO disputes and the shared intention of these NGOs to promote transparent decision-making and increased accountability, many of these goals can be generalized as pertinent to other WTO dispute cases. The list of goals in Table 2 is a synthesis and condensation of all goals and is not a comprehensive list of all goals expressed by NGOs involved with the *US–Shrimp* dispute. It is distilled from the unique combination of goals that each NGO expressed. On average each NGO mentioned 8 of the 18 goals included in Table 2.²¹ In general NGOs found all participatory/procedural goals important. Overlap in substantive goals was less common as each

²¹ All NGOs shared the specific Participatory/Procedural goal of “*Amicus curiae* brief acceptance and consideration in final ruling” as would be expected given the specific focus of this project.

NGO pursued varying facets of the *US–Shrimp* dispute. Some were more concerned with WTO jurisprudence while others were primarily concerned with scientific and policy-oriented issues. Very few NGOs explicitly mentioned their goals were to “Expose the negative effects of the WTO on domestic environmental policy” or to “Criticize the WTO as a legitimate venue to determine environmental conflicts” but I have included these goals because they stand out and help to convey the wide range of NGOs’ intentions.

Table 2. NGO’s goals for submitting *amicus curiae* briefs during *US–Shrimp* dispute (Bold font indicates a widely held goal.)

PARTICIPATORY/PROCEDURAL GOALS
Broad
✍ Bolster the quantity and quality of communication between NGOs and the WTO
✍ Maintain presence of civil society at the WTO
✍ Communicate interests and concerns of the public
✍ Increase transparency of WTO decisions
✍ Reform the WTO’s dispute settlement procedures on <i>amicus curiae</i> briefs
✍ Expose the undemocratic process of WTO
Specific Outcome
✍ <i>Amicus curiae</i> brief acceptance and consideration in final ruling
SUBSTANTIVE GOALS
Broad
✍ Expose the negative effects of the WTO on domestic environmental policy
✍ Criticize the WTO as a legitimate venue to determine environmental conflicts
✍ Encourage consideration of environmental effects of trade during disputes
Member Related
✍ Represent interests not well represented by Member States
✍ Defend a Member State’s position
✍ Pressure a Member State to adopt the NGO’s views
Technical
✍ Emphasize specific and relevant decisions in earlier disputes
✍ Promote a specific policy
✍ Provide expertise on technical and/or scientific information
Legal
✍ Change WTO jurisprudence in the dispute
✍ Provide relevant information on international and national law and policy

The strategies utilized by NGOs to encourage *amicus curiae* brief acceptance are displayed in Table 3. NGOs indicated that using the leverage strategies of gaining media attention and networking affected both their ability to gain a Member State’s support and to influence the likelihood of a brief’s acceptance. Out of the 15 NGOs I established communication with, 9 indicated that media played an important role in encouraging brief acceptance and ensuring the public and press were aware the issues and events related to the disputes. Some NGOs indicated

that publicity and media pressure are “just as important” as submitting an *amicus curiae* brief in influencing the course of a dispute and that law can be more powerful when coupled with the media. At times, media was used as a tool to “embarrass” the WTO by exposing *amicus curiae* brief rejections. Media was also used to rally public support and apply pressure on the WTO. While neither gaining media attention nor networking had strong observable effects on the outcome, which is more a factor of the submittal strategy, both of these strategies were integral parts of many NGO’s efforts.

Table 3. Strategies used by NGOS to encourage *amicus curiae* brief acceptance in WTO dispute cases

Leverage Strategy - Inside	
✍	Gain Member State support
✍	Work directly with the WTO
Leverage Strategy - Outside	
✍	Use media to promote goals
✍	Network with other NGOs
Submittal Strategy	
✍	Submit brief directly to WTO
✍	Attach brief to Member State’s submission
✍	Submit directly and attach

In conjunction with using media, 11 out of 15 NGOs indicated that networking with other NGOs was important in adding credibility and showing support for the *amicus curiae* brief. In the case of the *US–Shrimp* dispute, the *amicus curiae* briefs often combined legal expertise with scientific facts to bolster brief validity and content: for example, some NGOs pair environmental law capacity with scientific research and advocacy capacity. NGOs were able to show national and international support for a brief by networking with other NGOs thus expanding the number of signatories on a brief. The number of NGO signatories on *amicus curiae* briefs submitted during the *US–Shrimp* dispute ranges from 1 to 10 with an average of 4. The largest number of signatories on any *amicus curiae* brief submitted to the WTO during a dispute to date is 15; this occurred in the 2006 *EC–Biotech* dispute.

A few NGOs also mentioned the leverage strategy of working directly with the WTO. This strategy requires direct interaction between NGO actors and WTO panelists, law clerks, or appellate body members. NGOs that were able to employ this strategy established communication with a specific person on the “inside” of the WTO who was able to bring attention to the brief, encourage brief acceptance, or utilize key arguments from the brief on their own, perhaps without official brief acceptance or consideration.

Table 4 reveals numerical data on submittal strategies of the 33 *amicus curiae* briefs submitted to the WTO over the past 10 years, including the 11 timely applications to file an *amicus curiae* brief submitted in the *EC–Asbestos* case. The table also indicates, within each submittal strategy, the number of briefs officially accepted and the number of briefs officially considered by the panel or appellate body while rendering a decision. Briefs were only included in the last column if the panel or appellate body report explicitly stated the consideration or inclusion of the brief in rendering a decision or mentioned the brief’s association with a Member State’s submission.²²

Table 4. *Amicus curiae* submittal strategies and outcomes in all WTO trade disputes

Submittal Strategy	Number Submitted	Number Accepted	Number Considered
Submit direct to WTO	25	11	2
Submit directly and attach	5	5	5
Attach to a Member State submission	3	3	3

As Table 4 indicates, 25 out of a total of 33 briefs were submitted directly to the WTO and not through a Member State; this is much more than were submitted via the other two submittal strategies combined. However, compared to the proportion of accepted briefs submitted as attachments to a Member State’s submission (100%) or submitted directly and attached (100%), the proportion of accepted briefs submitted directly to the WTO is much lower (44%). Similarly, 100% of the briefs submitted as attachments to a Member State’s submission or submitted directly and attached were officially considered, while only 18% of the accepted briefs submitted directly to the WTO were officially considered. It is interesting to note that there is no variance in acceptance proportions between those briefs submitted directly to the WTO and attached to a

²² There are complexities to the issue of official consideration vs. a more informal consideration. These issues will be taken up in the discussion.

Member State's submission and those briefs only attached to a Member State's submission. Both were accepted 100% of the time.

Table 5 lists the various effects of submitting *amicus curiae* briefs as indicated by NGOs participating in the *US-Shrimp* dispute. Most NGOs mentioned brief submittal as leading to a combination of participatory/procedural effects and substantive effects and, on average, each NGO mentioned 7 of the 18 effects included in Table 5. Similar to Table 2, these responses are separated into "participatory/procedural effects" and "substantive effects" and then further separated into more descriptive categories. This list is also a synthesis and condensation of all the effects mentioned by NGOs, not a comprehensive list of all effects expressed by NGOs. Furthermore, this table only reflects the effects expressed by NGOs and does not include other general or specific effects that may have occurred but were not mentioned by NGOs during interviews or other correspondence. The effects listed are responses to questions regarding the NGOs' perception of the immediate and lasting effects of brief submittal and questions regarding goal achievement.

Table 5. Effects of submitting *amicus curiae* briefs during the *US-Shrimp* dispute (Bold font indicates a widely held effect.)

PARTICIPATORY/PROCEDURAL EFFECTS
Broad
✍ Built upon practice of brief submittal
✍ Maintained presence of civil society at the WTO
✍ Gained more transparency in WTO decisions
✍ Established camaraderie with other NGOs
✍ Exposed undemocratic process of WTO
Specific Outcome
✍ <i>Amicus curiae</i> brief accepted and considered
SUBSTANTIVE EFFECTS
Broad
✍ Gave constructive critique of multilateral trading system
✍ Highlighted the overlap of trade and environment issues at the WTO
✍ Brought NGO's concerns to a global audience
✍ Presented the WTO decision-makers with an environmental perspective
Member Related
✍ Reinforced a Member State's position
✍ Impacted a Member State's argument
✍ Represented interests not reflected by Member States
✍ Fostered better relations with Member States
Technical
✍ Restated and supported a previous WTO ruling
✍ Promoted an environmentally-conscious policy
✍ Provided needed expertise on scientific facts and technical information
Legal
✍ Attained better jurisprudence

To indicate how NGOs' strategies for submitting *amicus curiae* briefs interact to lead to a specific outcome, I developed a schematic representation, or framework, that shows the relationship between these different components (Figure 1). The purpose of this framework is to suggest that the ways in which an NGO uses leverage strategies may directly affect the submittal strategy and thus directly affect brief outcome. I also suggest that leverage strategies can affect brief outcome, although perhaps in less direct ways. As previously mentioned, leverage strategies and the submittal strategy can have effects that go beyond the outcome of an *amicus curiae* brief's submission; these more overarching effects are listed in Table 5 and include procedural/participatory and substantive effects. For simplicity, these effects are not included in this framework even though their occurrence and scope is influenced by NGOs' submittal strategies, leverage strategies, and the outcomes of submitted briefs.

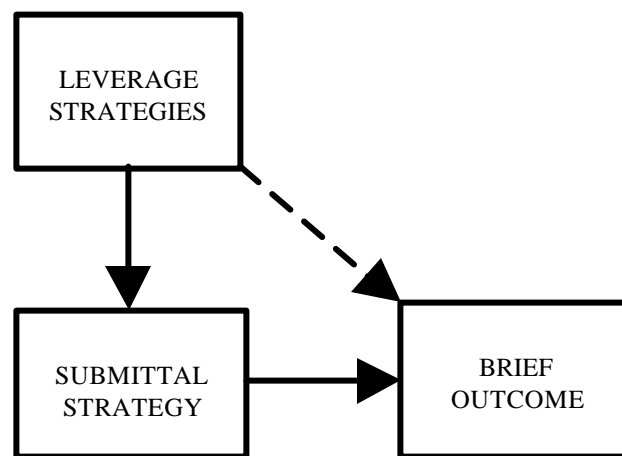


Figure 1. Interaction of strategies and their influence on brief outcome (Solid lines indicate a strong, direct influence. Dashed lines indicate a less direct influence.)

Through gaining a Member State's support, NGO's are able to attach their briefs to the Member State's submission thus greatly increasing the chances the brief would be read and considered by WTO decision-makers (see Table 4). Some NGOs saw brief attachment as a "guarantee" the brief would be read and used in the final decision. By submitting briefs as attachments, NGOs were able to first influence their national government before progressing to the international front. Some NGOs attached briefs to Member State submissions "out of

necessity” and “as a way in” while others prioritized impacting the Member State’s argument before progressing to the international arena and found that through collaborating with the Member State, the Member State’s argument could be refined. However, many NGOs voiced frustration over the fact that some attached *amicus curiae* briefs were de-emphasized and only conditionally supported by the Member State using the brief. This conditional support had a direct effect on the weight given to the brief by the panels and appellate bodies. Furthermore, some NGOs felt that by attaching their briefs they were providing filtered input that did not fully represent the organization’s argument. Thus, instead of remaining impartial to their national governments, NGOs in this situation were compelled to align their arguments with those of the national government’s in order for their brief to be submitted.

Submitting *amicus curiae* briefs directly to the WTO was the most preferred submittal strategy. NGOs valued this approach because they saw it as a way to remain autonomous from Member States and offer input that is representative of the organizations’ constituency and purpose. This strategy was also used when Member State’s refused to attach NGO briefs, typically a result of a conflict in argument, content, or purpose. NGOs used directly submitted briefs to cover new ground, arguments, and perspectives that were not addressed or amply emphasized by Member States. However, because briefs submitted directly are the most likely to be rejected, some NGOs chose to sacrifice a loss of autonomy for increased chances of brief acceptance via a Member State.

A few NGOs felt that submitting briefs directly while simultaneously submitting them as attachments “made sure the WTO received the brief” and “increased the chances of the brief being read.” By using this submittal strategy, NGOs were able to benefit from the political backing of a Member State while also perhaps alluding to the need for a more direct method of submittal. As Table 4 indicates, there was no difference in the proportions of acceptance and consideration between briefs submitted as attachments and briefs submitted directly and attached.

Discussion

When analyzing NGOs’ potential to influence international trade governance and their methods of doing so it is important to keep in mind the broad range of NGOs and their diverse constituencies, geographic areas, funding levels, institutional structures, ideological concerns,

activities, and size. The ability of an NGO to accurately represent transnational public interest is contingent on an NGO's particular motives and features; there is no inherent NGO quality that assures positive and democratically driven action from NGOs. A major WTO concern regarding increased public participation is the potential for an over-representation of special interest group issues. Furthermore, full-scale participation including all non-state actors would also seem to include corporate, industry, and business entities. Previous WTO trade disputes have incited the interest of many different types of parties: individuals, law firms, academics, and industry interest groups to name a few. Thus, developing a process for including and regulating public input in WTO trade disputes requires a careful assessment of potentially interested parties and an analysis of the key elements of effective, democratic, and transparent global decision-making.²³

The *amicus curiae* brief debate at the WTO is partially rooted in concern over a possible over-representation of Northern NGOs' interests as these NGOs are better funded and more numerous than other civil society groups around the world.²⁴ Consequently, displaying international support for a brief was important for some NGOs in my study. Through the establishment of partnerships with other NGOs and better relations with Member States, NGOs may find that future *amicus curiae* brief efforts can be accomplished with more ease. Other factors that might influence an NGO's ability to gain Member State support, influence the WTO from the outside, and represent public interests include the NGO's funding, expertise, public support, persistent and effective lobbying, overlap of interest with Member States and the WTO, and issue framing.²⁵

The process of *amicus curiae* brief submittal brings up many questions regarding how NGOs strategize brief acceptance and how particular motivations and goals shape these strategies. To date, it is apparent that a submittal strategy that includes brief attachment will lead to an outcome of brief acceptance. Whether this strategy is desirable by an NGO will depend on its intentions and goals. For example, an NGO that wishes to highlight "the undemocratic process of WTO" may expect for their brief to be rejected and thus will opt to submit their brief directly to the WTO to bring attention to the rejection. In contrast, an NGO wishing to defend a Member

²³ For suggestions on regulating public interest in WTO decision-making see Peel 2001, Esty 1997, International Centre for Trade and Sustainable Development 1999, and Albin 1999. For suggestions specific to *amicus curiae* brief protocol at the WTO see Marceau and Stilwell 2001.

²⁴ See Mason 2004, Peel 2001, and Esty 1997.

²⁵ See Albin 1999 and Price 2003.

State's position, provide technical expertise or scientific information, or change WTO jurisprudence might value the choice to attach its brief to a Member State's submission as a way to provide substantive input. NGOs that promote policies or present facts not in agreement with a Member State's position must resort to direct submission as it is their only available avenue.

While the leverage strategy of working directly with the WTO via 'insider connections' was only explicitly mentioned by a few NGOs, many NGOs claimed that their briefs were read and its contents used even if the brief was not officially accepted or considered. Such statements call attention to the ambiguous and flexible meaning of "consideration" in these disputes. As previously mentioned, briefs submitted as attachments, even though they are accepted by virtue of being attached to a Member State's submission, are often sidelined due to the conditional support of the Member State. Thus it could be argued that not every accepted brief is closely considered. On the other hand, many NGOs felt that even when briefs are not officially accepted or considered, they are at least read by a WTO member and thus may have an unacknowledged impact in this way. A determination of the precise impacts of *amicus curiae* briefs on panel and appellate body decisions would require a rigorous comparison of legal arguments between an NGO's brief and the DSB's ruling.

The effects of *amicus curiae* brief submittal, listed in Table 5, show that despite difficulties in the submittal process and achievement of mixed outcomes, NGOs were able to achieve many of their original goals and also catalyzed other positive results. Whether their briefs were accepted or not, every NGO agreed that by submitting a brief, they were actively building upon the practice of brief submittal and thus were paving the way for future NGO efforts to be more directed and influential. Similarly, NGOs were able to raise many of their environmental concerns by submitting *amicus curiae* briefs and, in general, achieved an array of substantive goals. Each NGO cited the *amicus curiae* brief as a useful tool to achieve their goals, and that a successful effort was not merely dependent on brief acceptance. In addition to some NGOs' abilities to have direct, short-term effects on the dispute, other NGOs felt that brief submittal had many long-term and symbolic effects. These are included in the "broad" category under both participatory/procedural effects and substantive effects. The overarching effects of brief submittal are important in encouraging the continued action of NGOs. By persistently submitting *amicus curiae* briefs to the WTO, NGOs are regularizing the process, which is an integral step in opening the window to more transparent and inclusive global trade order.

Despite NGO accomplishments, it is clear that the process for handling *amicus curiae* briefs is vague, flexible and changing. Overwhelmingly, NGOs agreed that the main difficulty in submitting briefs is that there is no clear protocol for handling such briefs and that the little direction that does exist is ambiguous and unrefined. Such lack of protocol could be seen as precluding NGOs from submitting briefs in future dispute cases as they might be “wasting their time.” To the contrary, a lack of impetus for submitting briefs was not mentioned by any of the NGOs in this study. It was a general consensus that NGOs would continue to submit briefs as is done currently. Although it is perhaps an overstatement to say the protocol for *amicus curiae* briefs has evolved, for it is always in a state of trial-and-error, it is certainly true that NGOs created this possibility in place of a complete absence of possibility and the issue’s current momentum can be attributed to pressure from NGOs. As the structure of the WTO stands currently, Member States retain overwhelming proportions of agency and the power to sway trade decisions; this fact is not likely to change in the coming years. Despite the current hesitation to open the WTO to non-state actors, the results of this study point to the possibility for NGO agency and influence to develop in future WTO trade disputes through sustained and strategized *amicus curiae* submissions.

Over the past decade, the WTO’s sphere of influence has grown as it further defines its policies and grows in membership. The rationale behind NGO interest in WTO affairs is grounded in the assertion that the impacts of WTO trade decisions encompass a range of concerns that lie outside of conventionally conceived boundaries. As previously stated, the exclusion of these concerns in the WTO’s discourse can be seen as symptomatic of the exclusive institutional structure of the WTO which prioritizes Member States’ interests over those of other global stakeholders, e.g. civil society. A major impetus for NGOs to submit *amicus curiae* briefs to the WTO is to ensure that inputs that determine global trade policy do not remain subject only to the preferences of Member States, which are seen to be primarily concerned with “protecting their sovereign rights” (Peel 2001). By submitting *amicus curiae* briefs NGOs are, in essence, picking up where national governments drop off. While it may not be ubiquitously true that Member States disregard the many social, ecological, and health-related impacts of global trade, the ability of Member States to accurately and effectively represent and mitigate these impacts is at issue. As NGOs attempt to represent these outside interests at the WTO, they have challenged

the WTO's policies on civil society access and, in doing so, call to question issues of transparency, privilege, and participation.

Results from this study highlight both the symbolic and concrete effects of *amicus curiae* submissions, and bring insight to the complex and elusive process of brief submittal. Among the factors favoring brief acceptance are the ability of an NGO to gain Member State support, work with WTO panelists and appellate body members, network with other NGOs, and use the media to promote their goals. An analysis of past NGO efforts suggests that brief attachment is the most reliable method to secure brief acceptance but may not be possible or desirable for all NGOs. By submitting *amicus curiae* briefs directly, NGOs retain their identity as autonomous groups and can put forward diverse sets of concerns perhaps left out of the trade dispute discourse. Until formal procedures are instated to guide the use of *amicus curiae* briefs at the WTO, NGOs can strategize brief submittal to achieve their goals. As a forward-looking component to this study, I suggest that the information presented here can be used by NGOs to influence their choice of strategy, which may influence their effectiveness and success in future disputes.

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Appendix

Amicus curiae brief submissions from NGOs in WTO trade disputes

CASE	NONGOVERNMENTAL ORGANIZATIONS (separated by brief)
1998 US – Shrimp Turtle Panel	World Wide Fund for Nature (WWF)**
	Foundation for International Environmental Law and Development (FIELD)**
	Center for Marine Conservation (CMC)**
	Center for International Environmental Law (CIEL)**
1998 US – Shrimp Turtle Appellate body	Earth Island Institute
	Humane Society of the US (HSUS)**
	Sierra Club
	Earthjustice**
	CIEL**
2000 Australia – Salmon Recourse to Article 21.5 Appellate body	CMC**
	Environmental Foundation Ltd.
	Mangrove Action Project
	Philippine Ecological Network
2000 US – Carbon Steel Appellate body	Red Nacional de Accion Ecologia
	Sobrevivencia
	WWF**
2000 US – Copyright	FIELD**
	CIEL**
2000 EC – Asbestos Panel	Concerned Fishermen and Processors in South Australia
2000 EC – Bed Linens Panel	American Iron and Steel Institute
	Specialty Steel Industry of North America
	American Society of Composers, Authors, and Publishers**
	Collegium Ramazzini
2001 EC – Asbestos Appellate body	Ban Asbestos Network
	Instituto Mexicano de Fibro-Industrias A.C.
	American Federation of Labor and Congress of Industrial Organizations
	Foreign Trade Association
	Centro de Estudios Comunitarios de la Universidad Nacional de Rosario
	Australian Centre for Environmental Law at the Australian National University
	European Chemical Industry Council
	Korea Asbestos Association
International Council on Metals and the Environment and American Chemistry Council	
Only Nature Endures	
Occupational & Environmental Diseases Association	
American Public Health Association **	

	<p>Foundation for Environmental Law and Development ** Center for International Environmental Law International Ban Asbestos Secretariat ** Ban Asbestos International and Virtual Network Greenpeace International World Wide Fund for Nature, International ** Lutheran World Federation</p>
2001 US – Shrimp Turtle Recourse to Article 21.5 Panel	<p>Earthjustice ** HSUS ** American Society for the Prevention of Cruelty to Animals Defenders of Wildlife ** Turtle Island Restoration Network ** Fiscalia Del Medio Ambiente, Chile</p>
	<p>National Wildlife Federation ** CMC ** Centro Ecoceanos Defenders of Wildlife ** Friends of the Earth ** Kenya Sea Turtle Preservation Group of India Natural Resources Defense Council Operation Kachhapa Project Swarajya Visakha Society for Prevention of Cruelty of Animals</p>
2001 US – Shrimp Turtle Recourse to Article 21.5 Appellate body	<p>American Humane Society Humane Society International **</p>
2006 EC – Biotech Interim Reports of the Panel	<p>CIEL Friends of the Earth – United States Defenders of Wildlife Institute for Agriculture and Trade Policy Organic Consumers Association – United States</p>
	<p>Gene Watch UK FIELD Five Year Freeze Royal Society for the Protection of Birds The Center for Food Safety Council of Canadians Polaris Institute Grupo de Reflexion Rural Argentina Center for Human Rights and the Environment Gene Campaign Forum for Biotechnology and Food Security Fundacion Sociedades Sostenables Greenpeace International Californians for GE – Free Agriculture International Forum on Globalization</p>
	<p>Group submission from a trans-Atlantic group of expert academics</p>

** = Actively contributed to this study through direct correspondence