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## WHETHER AND HOW *AMICUS CURIAE* CAN PROMOTE DEMOCRACY IN THE DSM

YIFAN LI\*

*To address the “democratic deficit” within the World Trade Organization (WTO) and its Dispute Settlement Mechanism (DSM), the introduction of amicus curiae is proposed as a means for non-state actors to contribute their perspectives to WTO adjudicators. This paper categorises the impact of amicus curiae on democracy within the DSM into “internal” (equal participation of WTO members) and “external” (public participation), asserting that amicus curiae influences both dimensions. Additionally, it outlines the development of amicus curiae in the DSM and clarifies that the amicus curiae discussed here refers to a mechanism in which the acceptance of briefs from non-state actors is independent of member states' consent. The second and third sections primarily analyse whether amicus curiae can promote democracy, demonstrating that while it enhances public participation, it simultaneously undermines equal participation among WTO members. Therefore, its impact on democracy in the DSM is multifaceted. The final section highlights the crucial role of member attitudes in addressing this issue and explores various arrangements to mitigate the negative impact on democracy.*

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## I. INTRODUCTION

The multilateral trading system has governed international trade for over 70 years, beginning with the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. From the GATT era to the WTO era, significant progress has been achieved in this domain, largely due to member states consistently bridging their differences and adapting the system to evolving global trends.<sup>1</sup> Today, the WTO stands once again on the brink of reform. Since late 2020, the Appellate Body (AB) has been paralysed,<sup>2</sup> and the ongoing Doha Round negotiations remain stalled<sup>3</sup>. The WTO, along with its Dispute Settlement Mechanism (DSM), faces formidable challenges. Although reform is challenging, there is a strong anticipation for a new system that reflects changes in the international landscape. In addressing what kind of WTO and DSM are needed for the future, the relationship with civil society is an unavoidable issue.<sup>4</sup>

The WTO was established on the premise that “power and authority were considered to rest with states”,<sup>5</sup> with public interests represented by states. However,

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<sup>1</sup> *The History of the Multilateral Trading System*, WORLD TRADE ORGANIZATION, (Aug. 10, 2022), [https://www.wto.org/english/thewto\\_e/history\\_e/history\\_e.htm](https://www.wto.org/english/thewto_e/history_e/history_e.htm).

<sup>2</sup> *Dispute Settlement – Appellate Body Members*, WORLD TRADE ORGANIZATION, (July 25, 2022), at [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm). [hereinafter AB Members].

<sup>3</sup> *The Doha Round*, WORLD TRADE ORGANIZATION, (July 28, 2022), [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm).

<sup>4</sup> Daniel C. Esty has in *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, in J. INTL. ECON. LAW 1, 123, 123-147(1998) stated that “Improved responsiveness and representativeness on the part of the WTO and better understanding of the international trading system on the part of the public would enhance the WTO’s legitimacy and strengthen in its position as a central element of the emerging structure of international economic governance”; “The Civil Society Advisory Group was established in June 2023 as part of a strengthened engagement between the WTO Director-General and civil society.” WORLD TRADE ORGANIZATION, (May 21, 2025), [https://www.wto.org/english/forums\\_e/ngo\\_e/csag\\_e.htm](https://www.wto.org/english/forums_e/ngo_e/csag_e.htm).

<sup>5</sup> Richard A. Higgott et al., *Introduction: Globalisation and Non-State Actors*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 1 (2011).

globalisation has transformed the role of states, and non-state actors have increasingly gained influence in international politics and economics.<sup>6</sup> Due to its failure to adapt to this shift, the WTO and its DSM have long been criticised for a “democratic deficit,” with calls for them to be accountable to the people affected by their activities.<sup>7</sup> *Amicus curiae* has thus been proposed as a mechanism to provide a channel through which the public can bring democratic influence to the DSM and shape dispute settlement outcomes—where decisions are dominated by member states without adequate input from marginalised stakeholders—thereby enhancing transparency and pluralistic representation in trade governance.

Previous studies on this issue have primarily cited the “democratic deficit” as justification for introducing *amicus curiae*.<sup>8</sup> However, subsequent analyses regarding the AB’s interpretation, the feasibility of this mechanism within the DSM, or the challenges it may face in implementation lack a direct and comprehensive response to the democracy question—specifically, in what ways *amicus curiae* impacts democracy in the DSM, whether it can promote democracy in the DSM, and how it can serve as a catalyst for democracy within the DSM.<sup>9</sup> Although these studies address several important aspects of introducing *amicus curiae*, their analysis and conclusions fall short in clearly illustrating the link between *amicus curiae* and democracy. This connection is crucial, as the introduction of *amicus curiae* does not, in itself, guarantee the achievement of democratic objectives. By frequently emphasising democratic goals in discussions on *amicus curiae*, the discourse can remain focused, ensuring that *amicus curiae* neither assumes too light nor too heavy a role within the DSM.

Regarding the introduction of this mechanism into the DSM, Nicholas and other opponents argue that *amicus curiae* are not suitable representatives of public interests, as inherent flaws in non-state actors prevent them from effectively conveying public opinion within the DSM. Moreover, they contend that the WTO has always been, and should remain, an interstate organisation, meaning that the public has no role in

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<sup>6</sup> *Id.*

<sup>7</sup> SARAH JOSEPH, *Democratic Deficit and the WTO*, in *BLAME IT ON THE WTO?* 56-71 (2011) [hereinafter Joseph].

<sup>8</sup> Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 *FORDHAM INT’L L.J.* 173, 214-215 (2000).

<sup>9</sup> See Claude E. Barfield, *Free Trade, Sovereignty, Democracy: Future of the World Trade Organization*, 2(2) *CHI. J. INT’L L.* 403 (2001) [hereinafter Barfield]; Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18(2) *MICH. J. INT’L L.* 183, 183 (1997) [hereinafter Charnovitz I]; Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25(2) *B.C. INT’L & COMP. L. REV.* 235 (2002); Robert F. Housman, *Democratizing International Trade Decision-Making*, 27(3) *CORNELL J. INT’L LAW* 699, 703-715 (1996).

the DSM.<sup>10</sup> However, these critics overlook the role of globalisation in reshaping government functions and the fact that government authority has diminished in certain areas. Supporters of *amicus curiae*, such as Charnovitz, have countered these arguments. Nevertheless, their responses to the concern that *amicus curiae* provide limited perspectives in the DSM appear constrained by a narrow focus on how to gather civil society viewpoints comprehensively.<sup>11</sup> While they propose solutions to partially address this issue, they fall short of analysing *amicus curiae* within the broader context of the DSM, nor do they consider whether achieving democratic goals necessarily requires *amicus curiae* to present comprehensive views.

Beginning with the issue of democracy and ultimately returning to it, this article analyses the relationship between the *amicus curiae* mechanism and democracy within the DSM, the role it plays in supporting democracy, and the adjustments needed to promote democratic principles within the DSM. The first section examines the connection between *amicus curiae* and democracy in the DSM, explaining why this mechanism is considered a potential solution to the “democratic deficit” in the DSM. The second section outlines the current state of *amicus curiae* in the DSM and the rationale for further study. The third section evaluates whether *amicus curiae* can indeed promote democracy within the DSM. Subsequently, the fourth and fifth sections propose methods to ensure that *amicus curiae* contribute meaningfully to democracy in the DSM.

## II. DEMOCRACY AND *AMICUS CURIAE* IN DSM

### A. *Link Between Democracy and Amicus Curiae*

The multilateral trading system administered by the WTO is facing diverse and significant obstacles. The stalled Doha Round negotiations and the paralysis of the AB have sparked discussions about the future of this system. Numerous studies have

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<sup>10</sup> See Saif Al-Islam Alqadhafi, *Reforming the WTO: Toward More Democratic Governance and Decision-Making* 53 (WTO Working Paper No. 57, 2007) [hereinafter Alqadhafi]; Barfield, *supra* note 9; Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L L. 295, 303-314 (1996) [hereinafter Nichols]; Gregory C. Shaffer, *The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25(1) HARVARD ENVIRON. L. REV. 1, 41-74 (2001) [hereinafter Shaffer I].

<sup>11</sup> See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17(1) U. PA. J. INT'L L. 331, 356-357 (1996) [hereinafter Charnovitz II]; Nicola Charwat, *Who Participates As Amicus Curiae in World Trade Organization Dispute Settlement and Why?*, 27 NEW ZEALAND UNIVERSITIES L. REV. 1, 27-29 (2016); Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest*, 35 FORDHAM INT'L L.J. 510, 548-553 (2012).

sought to identify the issues within the WTO and explore potential reforms to help it navigate this crisis.

One criticism of the WTO is its “democratic deficit.”<sup>12</sup> This discussion occurs within the broader context of the democratisation of international organisations. As Zweifel states in his book, traditional international relations theory and traditional democratic theory have long ignored each other, and neither alone can offer solutions to the lack of democracy in international organisations. Thus, new theoretical approaches are needed in this field.<sup>13</sup> Moreover, the question of whether international organisations can be democratic remains open to debate.<sup>14</sup> However, given that there is no clear boundary between undemocratic and democratic, these debates do not impact discussions on how to make international organisations “more democratic.” This expression, however, is imprecise and may lead to confusion, as there is no universally accepted definition of “democracy,” much less of “democracy in international organisations.” To clarify, the distinction between “internal” and “external” democracy, as outlined in Miller’s study, can be applied here. “Internal democracy” requires the WTO to be accountable to its members who “authorise or sustain” it,<sup>15</sup> ensuring equal participation among all members<sup>16</sup>. Beyond the consensus principle, equal participation also demands that additional attention be given to developing members in disadvantaged positions to prevent more powerful members from infringing upon their interests.<sup>17</sup> “External democracy” entails that the WTO should be accountable to people whose lives are affected by its decisions, promoting public participation in its decision-making processes.<sup>18</sup>

Currently, there is no mechanism for non-state actors to participate in WTO negotiations, making the DSM the only channel through which non-state actors can seek a voice.<sup>19</sup> Some have argued that this goal can be achieved through the use of

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<sup>12</sup> Joseph, *supra* note 7, at 56.

<sup>13</sup> THOMAS D. ZWEIFEL, *INTERNATIONAL ORGANIZATIONS AND DEMOCRACY: ACCOUNTABILITY, POLITICS, AND POWER*, Introduction, 1–3 (2006).

<sup>14</sup> See Dawisson Belém Lopes & Guilherme Casarões, *Can International Organisations Be Democratic? A Reassessment*, 41(3) *CONTEXTO INT.* 481, 495–496 (2019) [hereinafter Lopes & Casarões]; Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic’s View*, in *THE COSMOPOLITANISM READER*, 424 (W. Brown & David Held eds., 2010) [hereinafter Dahl].

<sup>15</sup> David Miller, *Against Global Democracy*, in *AFTER THE NATION? CRITICAL REFLECTIONS ON NATIONALISM AND POSTNATIONALISM* 141–160, 153 (Keith Breen & Shane O’Neill eds., 2010) [hereinafter Miller].

<sup>16</sup> Joseph, *supra* note 7, at 62–65.

<sup>17</sup> Miller, *supra* note 15, at 143–146.

<sup>18</sup> Dahl, *supra* note 14.

<sup>19</sup> Nichols, *supra* note 10, at 308–309.

*amicus curiae*. However, no consensus has been reached on whether *amicus curiae* can indeed promote democracy within the WTO. Before examining the acceptance of *amicus curiae*, it is important to note that although *amicus curiae* directly support public participation, it also has implications for the equal participation of WTO members. Therefore, both its role in enhancing public participation and its impact on member equality should be analysed.

#### B. *Amicus Curiae in the DSM*

*Amicus curiae*, meaning “friend of the court,” lacks a uniform definition. In the WTO context, it refers to any individual or entity not party to a dispute that can file a submission concerning specific disputes to provide information or advice to panels or the AB during dispute settlement proceedings.<sup>20</sup> While not addressed by any WTO provision, *amicus curiae* has been established through the legal interpretations of the AB in various cases. The AB confirmed that both the panels and itself have the authority to decide whether to accept *amicus curiae* briefs in the *US—Shrimp* and *US—Lead and Bismuth II* cases.<sup>21</sup> It also formulated a special procedure for *amicus curiae* in the *EC—Asbestos* case.<sup>22</sup> However, the AB has implemented this mechanism with caution.

A review of *amicus curiae*-related disputes following the establishment of the special proceedings in the *EC—Asbestos* case reveals that *amicus curiae* in the DSM have not been implemented as intended, and WTO adjudicators have generally adopted a compromise approach. In most cases, WTO adjudicators have declined to consider *amicus curiae* briefs in their rulings, citing that they were “unnecessary” or “of no assistance” without providing detailed reasons. For instance, in cases such as DS 141, DS 257, DS 269, DS 291, DS 339, and DS 406, adjudicators rejected *amicus curiae* briefs on the grounds of “unnecessary.” Similarly, in DS 231, DS 212, and DS 259, they declined to consider these briefs, stating that they were “of no assistance.” In numerous disputes, participants’ and third parties’ opinions on the admissibility and

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<sup>20</sup> *Disputes - Dispute Settlement CBT - Participation in Dispute Settlement Proceedings - Amicus Curiae Submissions* - Page 1, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c9s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm).

<sup>21</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (US—Shrimp), WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter U.S.—Shrimp]; Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (US—Lead and Bismuth II), WTO Doc. WT/DS138/AB/R (adopted June 7, 2000) [hereinafter Lead and Bismuth II].

<sup>22</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (EC—Asbestos), WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter EC—Asbestos].



relevance of *amicus curiae* submissions were solicited before adjudicators made their decisions. For example, in DS 294, DS 367, DS 379, DS 400, DS 435, and DS 529, WTO adjudicators invited parties and third parties to offer their views on the acceptability of *amicus curiae* briefs before deciding whether to consider these submissions.

It should also be noted that in several disputes, WTO adjudicators have specified that only briefs accepted and attached by the parties or third parties to the dispute would be considered. In cases like DS 337, DS 371, and DS 412, adjudicators informed the parties that they would only consider briefs to the extent that these were included in their submissions. Additionally, in DS 277, the panel refused to consider unsolicited submissions due to “the absence of consensus among WTO Members on the question of how to treat *amicus* submissions.”<sup>23</sup> Thus, divergent views among WTO members on this issue have significantly influenced judicial decisions, leading adjudicators to adopt a cautious stance toward accepting *amicus curiae* briefs. As a result, they often either declined most *amicus curiae* briefs or accepted only those that were not opposed by the parties and third parties. In some instances, non-state actors were limited to presenting their views through the participants and third parties involved in the disputes.

The debate between supporters and opponents of *amicus curiae* centres on what type of channel within the DSM should enable non-state actors to directly influence decision-making, and, in addition to members’ consent, on whether the consideration of such submissions can also depend on the permission of panels or the AB. In this sense, *amicus curiae* lies at the core of the debate.

The debates over *amicus curiae* can be divided into two main issues: the appropriateness of the legal interpretation made by the AB and the impact of its implementation. Regarding the former, some articles criticise that the acceptance of *amicus curiae* briefs exceeds the competence of WTO adjudicators, arguing that such interpretations do not conform to relevant WTO rules.<sup>24</sup> It cannot be denied that whether WTO rules have been correctly interpreted relates to one dimension of democracy, the rule of law, which holds that the activities of all governments and institutions, including judicial interpretations by international courts, must be bound

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<sup>23</sup> Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada* (US—Softwood Lumber VI), WTO Doc. WT/DS277/R (adopted Apr. 26, 2004).

<sup>24</sup> See Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead/Asbestos Doctrine*, 44(1) HARV. INT’L L.J. 317, 329 (2003); Petros C. Mavroidis et al., *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, 13-17 (Jean Monnet Working Paper No. 2/01, 2002); Georg C. Umbricht, *An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO*, 4(4) J. INT’L ECON. L. 773, 793-794 (2001).

by laws.<sup>25</sup> However, the appropriateness of these relevant rules will not be discussed further. Many legal authorities have shown that treaty interpretation is a highly complex task and cannot be separated from its political context, especially when relevant rules are ambiguous and open to multiple interpretations.<sup>26</sup> It is undeniable that interpretations both for and against the acceptance of unsolicited submissions from non-state actors can be viable from certain perspectives. Therefore, how to interpret WTO rules is not the most decisive factor in this issue. Furthermore, even though the AB has authorised panels and itself to accept *amicus curiae* briefs through legal interpretation, their practices have been strongly influenced by members' attitudes toward this issue, demonstrating the limited role of legal interpretation.

Experience from other international courts also shows that the acceptance of *amicus curiae* does not solely depend on a specific rule or legal interpretation. For example, the International Court of Justice (ICJ) has accepted submissions from non-state actors in several cases based not on a specific article of its statute or Rules of the Court, but rather on relatively pragmatic considerations.<sup>27</sup> Thus, it makes more sense to focus on the latter issue—whether *amicus curiae* can promote democracy in the DSM—particularly its impact on public participation and equal participation within the DSM.

As mentioned in the first section, proponents of *amicus curiae* argue that introducing *amicus curiae* aims to enhance public participation in the DSM, and it can also affect the equal participation of WTO members. The debates on this issue can largely be divided into these two categories. Therefore, to evaluate the role *amicus curiae* plays in promoting democracy within the DSM, its relationship to public participation must be analysed, while its impact on equal participation should not be overlooked.

### III. *AMICUS CURIAE'S* IMPACT ON PUBLIC PARTICIPATION IN THE DSM

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<sup>25</sup> See Peter Tomka, The Rule of Law and the Role of the International Court of Justice in World Affairs, Inaugural Hilding Eek Memorial Lecture, Stockholm Centre for International Law and Justice, 1-4 (Dec. 2, 2013); Guillermo O'Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15(4) J. DEMOCR. 32, 42-45 (2004); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, Cardozo Law School, Jacob Burns Institute for Advanced Legal Studies, Working Paper Series No. 36, 65-70 (March 2001).

<sup>26</sup> Emilie M. Hafner-Burton et. al., *Political Science Research on International Law: The State of the Field*, 106(1) AM. J. INT'L L. 47, 82-88 (2012); Alexander Orakhelashvili, *Political Life of Treaties: Indeterminacy, Interpretation, and Political Consequences*, 20(3) CHI. J. INT'L L. 545, 560 (2021).

<sup>27</sup> Eric De Brabandere, *NGOs and the Public Interest: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12(1) CHI. J. INT'L L. 85, 91 (2011).

Public participation in the WTO refers to the openness of the WTO's "internal decision-making processes to greater public participation and scrutiny."<sup>28</sup> WTO's acceptance of public participation has evolved through several key stages. WTO's engagement with NGOs in context beyond the DSM began with Article V.2 of the Marrakesh Agreement,<sup>29</sup> allowing the General Council to consult and cooperate with relevant NGOs. External transparency was formally addressed in 1996 with Decision WT/L/160/Rev.1<sup>30</sup> on document circulation. Since 2001, the WTO has hosted the Public Forum—its largest outreach event—to facilitate dialogue among global stakeholders on trade and the multilateral system.<sup>31</sup> The concept of public participation is based on the idea that, with the growth of globalisation, international trade impacts all aspects of people's lives. As an international organisation regulating global trade, the WTO should be accountable to the people whose lives are affected by its activities. Furthermore, certain values and concerns from civil society have not been fully represented or considered in negotiation and dispute settlement processes.<sup>32</sup> Consequently, a new "stakeholder model" has been proposed to address the deficits caused by the current monopoly of states in the DSM. This model advocates that all groups with a stake in trade decisions should have access to decision-making processes and that decisions should involve both states and all trade stakeholders.<sup>33</sup>

This model has gained significant attention, and various comprehensive public participation approaches covering all three major functions of the WTO—trade negotiation, trade policy review, and dispute settlement—have been proposed.<sup>34</sup> Regarding public participation in the DSM, some argue that civil society's involvement in dispute settlement proceedings offers several benefits to the DSM:

1. It provides factual and legal information useful to WTO adjudicators.
2. It allows stakeholders to express their concerns and opinions on relevant trade issues, the WTO, and the DSM, ensuring their voices are heard directly by adjudicators.

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<sup>28</sup> Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4(1) TRADE L. & DEV., 19, 19 (2012).

<sup>29</sup> Art. V.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Marrakesh Agreement].

<sup>30</sup> WT/L/160/Rev.1(1996)

<sup>31</sup> Public Forum, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/forums\\_e/public\\_forum\\_e/public\\_forum\\_e.htm](https://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm).

<sup>32</sup> Joseph, *supra* note 7, at 57–59.

<sup>33</sup> G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44(5) DUKE L.J. 829, 913–14 (1995) [hereinafter Shell].

<sup>34</sup> Charnovitz I, *supra* note 9; Ilan Kapoor, *Deliberative Democracy and the WTO*, 11(3) REV. INT'L POLIT. ECON. 522, 536–538 (2004) [hereinafter Kapoor]; Jan Aart Scholte et al., *The WTO and Civil Society* 23–25 (CSGR Working Paper No. 14/98, 1999) [hereinafter Scholte I]; Shell, *supra* note 33, at 913–914; Lopes & Casarões, *supra* note 14, at 495–496.

3. It stimulates debates on relevant trade issues and WTO policies, encouraging members and adjudicators to reconsider their positions and enabling WTO adjudicators to clarify and interpret WTO rules in a manner more accountable to the public.
4. It inspires civil society to understand and engage with the WTO, acting as a bridge of communication between the WTO and civil society.
5. It allows voices denied by national governments to be heard through an international channel, thereby promoting broader democratisation.<sup>35</sup>

*Amicus curiae*, as a channel for civil society to participate and express concerns in the DSM, is regarded by some as an effective means of promoting public participation in this process. However, debates continue over whether this mechanism is a suitable channel for public participation and what role it should play in this regard.

#### A. Proper Channels for Public Participation

The argument that *amicus curiae* serves as an effective way for civil society to express its concerns in the DSM has been challenged on several fronts. One primary objection is that national governments should be the sole representatives of public interests in the DSM, making it unnecessary for non-state actors to participate as *amicus curiae*.<sup>36</sup> The rationale behind this argument is the theory of absolute sovereignty, which emphasises the supreme and indivisible power of the state. According to this view, a state's government is the only legitimate representative of the country in international organisations, and no other entity, whether individual or non-governmental organisation, should represent the country's interests. This theory reflects the belief that the state's independence and autonomy are paramount, and its government holds exclusive authority to make decisions and conduct foreign relations on behalf of the entire nation. The state's sovereignty cannot be compromised, and its government acts as the sole representative in international affairs.<sup>37</sup>

Therefore, this point of view argues that balancing different interests and values is the responsibility of state governments, not any non-state group,<sup>38</sup> and that such balancing should occur at the domestic level. According to this perspective, the domestic decision-making process can be seen as a competition among different

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<sup>35</sup> Alqadhafi, *supra* note 10, at 29.

<sup>36</sup> Nichols, *supra* note 10; Barfield, *supra* note 9; Shaffer I, *supra* note 10.

<sup>37</sup> THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL*, CH. 17-18 (1651); HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE*, CH. 1&3 (1625).

<sup>38</sup> Barfield, *supra* note 9, at 411.

values, where issues are addressed through comparative analysis rather than by a single leader in a specific field. Furthermore, these proceedings require the capacity to consider all interests comprehensively from a broad and long-term perspective.<sup>39</sup> The most appropriate representatives of society as a whole are elected governments, which, compared to private entities, likely have a broader and more enduring perspective.

Before a claim is brought to the DSM, the government of the disputing party has the discretion to decide which arguments will best serve its society. The competition among different values occurs at this stage, which explains why certain interests are not included in the submissions filed by states at the litigation stage.<sup>40</sup> According to this view, non-state actors have no role to play in this context. Additionally, the recent emphasis on public participation in international organisations does not imply a diversification of public representatives but is perceived as a strategy by governments to divert conflicts. A former WTO Secretariat representative also criticised direct public participation, arguing that it simply brings issues that cannot be resolved at the national level into the WTO.<sup>41</sup>

In his article, Nichols emphasised that, historically, the WTO has always been an intergovernmental organisation, with both negotiations and decision-making processes monopolised by states. Comments from civil society have traditionally been solicited by states during these processes. For example, U.S. government agencies have solicited public opinions on environmental issues during trade negotiations, and several Canadian departments have held public hearings on trade matters.<sup>42</sup> Additionally, states have attached briefs from civil society to their submissions in dispute settlement proceedings.<sup>43</sup> These examples demonstrate that the public can participate in the WTO and DSM indirectly through their member states.

However, the theory that national sovereignty is the sole basis for membership and representation at the international level has been questioned by the theory of pluralism of national interests. This theory argues that a state's interests are diverse and multifaceted, and the government alone cannot fully represent all segments of

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<sup>39</sup> J.P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44(1) HARV. INT'L L.J. 221, 239 (2003).

<sup>40</sup> S. Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26(S2) J. LEGAL STUD. 575, 611-612 (1997).

<sup>41</sup> Shaffer I, *supra* note 10, at 42.

<sup>42</sup> Nichols, *supra* note 10, at 305-306.

<sup>43</sup> In DS 337, DS 381, DS 384, DS 400, DS 412, DS 435, members attached *amicus curiae* briefs in their submission to WTO adjudicators, so in these disputes, civil society participated in DSM through WTO members.

society. In this view, various social groups, individuals, and minority communities within a state may have differing interests that should be taken into account in international representations. It recognises that the state's government may not always reflect the concerns of all its citizens, and therefore, other actors, such as non-governmental organisations or expert representatives, can play a role in expressing certain interests in international organisations. This theory emphasises the need for a broader representation of interests in global governance.<sup>44</sup> The WTO, as an organisation whose activities impact many aspects of society, has been urged to reconsider the feasibility of greater public participation.<sup>45</sup> First, by nature, certain interests and values may not be adequately represented by specific member states in the DSM. The WTO dispute settlement system is only accessible to its members, leaving non-member states without access to the DSM.<sup>46</sup> While these non-member countries may still be affected by international trade regulated by the WTO, their voices remain unheard. Although political channels outside the WTO may offer them an avenue to express their views on specific trade issues, this approach does not guarantee that their interests will be considered in the DSM. Thus, *amicus curiae* become their only means of participation in the dispute settlement system, providing a channel to submit their concerns. Its role in enabling non-member countries to participate in the DSM is irreplaceable.

Additionally, due to globalisation, certain interests have acquired an international character and are better suited to representation at the global level.<sup>47</sup> For example, the International Chamber of Commerce (ICC) plays a vital role in formulating voluntary rules for international business, such as the Incoterms® rules, the UCP 600 Uniform Customs, and Practice for Documentary Credit.<sup>48</sup> Similarly, the International Committee of the Red Cross (ICRC) is a “neutral organisation ensuring humanitarian protection and assistance for victims of war and armed violence”,<sup>49</sup> regardless of nationality. These organisations operate on an international level and do not represent the interests of any single state. While they may pursue their international objectives by lobbying national governments and submitting their briefs through WTO members, this approach can be indirect and ineffective. Even

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<sup>44</sup> ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY, CH. 12 (2007).

<sup>45</sup> Kapoor, *supra* note 34, at 537.

<sup>46</sup> *About Us*, UNITED NATIONS, <https://www.un.org/en/about-us> (United Nations has 193 member states, most of them (over 160) are members of WTO).

<sup>47</sup> Globalisation has made it no longer feasible to divide benefits exclusively through geography and sovereignty. See Jan Aart Scholte, *Civil Society and Democracy in Global Governance*, 8(3) GLOB. GOV. 281, 285–88 (2002) [hereinafter Scholte II].

<sup>48</sup> *About Us*, INTERNATIONAL CHAMBER OF COMMERCE, <https://iccwbo.org/about-icc-2/>.

<sup>49</sup> *Who We Are*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://www.icrc.org/en/about-international-committee-red-cross-icrc>.

when members attach these documents to their submissions in the DSM, they do not necessarily serve as proper representatives of these international interests.<sup>50</sup>

Second, even when non-state actors represent only domestic interests, their national governments may choose not to represent their views in the DSM for various reasons. The most obvious reason is that members may reject briefs containing content that opposes their stance in the DSM. It could be argued that briefs unfavourable to one party might benefit the opposing party in the dispute, allowing non-state actors to lobby the latter. If both parties are unwilling to accept them, members who stand to benefit from these briefs can participate in the dispute settlement proceedings as third parties and present these perspectives to WTO adjudicators. In theory, non-state actors could always act through one of the disputing parties or third parties. However, political considerations complicate this process. Governments may have numerous reasons to reject submissions, even those that align with their position.

Charnovitz provides convincing examples to illustrate this complexity. He notes, “[a] government might not want to repeat an NGO point if doing so could undermine the government in another WTO case or domestic litigation”.<sup>51</sup> For instance, the U.S. and the EEC implemented similar trade measures in two separate disputes. In the fur-trapping case, a U.S. official publicly condemned the EEC’s measure and pressured the EEC to repeal it.<sup>52</sup> However, prior to this case, in the *U.S.—Tuna (EEC)* case, the U.S. government defended a similar measure before the DSM. This contradiction raises questions about whether the U.S., in the *U.S.—Tuna (EEC)* case, withheld arguments in defence of its own Act, which was later found to violate GATT, to avoid inviting similar arguments against itself in future disputes.<sup>53</sup>

Another reason governments may withhold certain views is if they wish to use the DSM as a tool to pressure changes to domestic measures they oppose. In such cases, a government might present a weak defence or refrain from advancing certain favourable claims before WTO adjudicators.<sup>54</sup> Thus, member states cannot always be relied upon to represent specific views in the DSM. *Amicus curiae* provide an alternative approach, allowing voices disregarded by national governments to be heard in the DSM.

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<sup>50</sup> Charnovitz I, *supra* note 9, at 276–277.

<sup>51</sup> Charnovitz II, *supra* note 11, 353.

<sup>52</sup> Sebastian Princen, *EC Compliance with WTO Law: The Interplay of Law and Politics*, 15(3) EUR. J. INT’L L. 555, 559–61 (2004).

<sup>53</sup> Charnovitz II, *supra* note 11, at 353.

<sup>54</sup> *Id.*

B. *The Limitation of the Role of Amicus Curiae*

This section examines the role that *amicus curiae* play in the DSM. In other words, as “friends of the court,” what kind of assistance should they provide to WTO adjudicators? This paper argues that excessive expectations placed on *amicus curiae* could create obstacles to public participation. We must acknowledge the limited function of *amicus curiae*, and recognise that other arrangements within the DSM can complement their role.

Many NGOs face structural limitations that hinder their meaningful participation in legal processes such as WTO dispute settlement. International trade law is a highly technical and specialised field that demands considerable legal expertise<sup>55</sup> — something that many NGOs, particularly smaller or regional ones, do not possess. As a result, their contributions are often confined to factual submissions rather than substantive legal arguments. This limitation is further amplified at the appellate level of the WTO, where the AB is mandated to address only issues of law.<sup>56</sup> Consequently, even well-intentioned NGO input may be excluded from consideration.<sup>57</sup>

Another argument against the role of *amicus curiae* in promoting public participation is that non-state actors are not qualified representatives of civil society, which undermines the democratic legitimacy of their participation as *amicus curiae*.<sup>58</sup> Specifically, it is argued that, for *amicus curiae* to serve as an effective channel for public participation, the DSM must ensure a comprehensive view of civil society, including voices from diverse genders, races, geographic regions, and more. This paper, however, takes an opposing view. First, it is unrealistic for most non-state actors to meet such criteria. For example, NGOs are not elected by all individuals within their fields; rather, they are composed of like-minded individuals who choose to engage in specific activities. In terms of scope, NGOs may be local (e.g., American Heart Association), regional (e.g., Pacific Disability Forum), or international (e.g., Greenpeace). They may also be organised around specific religions (e.g.,

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<sup>55</sup> Gregory C. Shaffer, *How to make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Countries Strategies*, ICTSD Resource Paper No. 5, 9-10 (March 2003).

<sup>56</sup> Petros C. Mavroidis et al., *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, 1, 10-11 (Jean Monnet Working Paper No. 2/01, 2002).

<sup>57</sup> Gabrielle Marceau & Matthew Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4 TRADE L. & DEV. 19, 30-34 (2012).

<sup>58</sup> Alqadhafi, *supra* note 10; Scholte I, *supra* note 34; Nichols, *supra* note 10; Shaffer I, *supra* note 10; Thomas A. Zimmermann, *The Future of the WTO - Addressing Institutional Challenges in the New Millennium*, 60(2) AUSSENWIRTSCHAFT. ZEITSCHRIFT FÜR INTERNATIONALE WIRTSCHAFTSBEZIEHUNGEN 241, 241-44 (2005).



International Federation of Catholic Parochial Youth Movements) or focus on particular demographics, such as gender (e.g., Association for Women's Rights in Development). Given their nature and objectives, these groups often cannot individuals affected by the issues they address.

Second, differences among non-state actors result in varying capacities to participate in international organisations. It is challenging to obtain comprehensive views, even when briefs are gathered from diverse non-state actors. However, this does not impact their participation as *amicus curiae*.

Some NGOs are well-funded and have numerous experts. Their ample financial and professional support makes it easier for them to be heard at the international level. Meanwhile, smaller groups lacking these resources are often excluded from international organisations. This phenomenon has occurred in other international organisations, such as the United Nations. A regional representative at the International Council of Voluntary Agencies pointed out that international counterparts of small NGOs in developing countries are often unwilling to support these smaller NGOs due to concerns about being outperformed. This dynamic hinders cooperation between well-funded organisations and smaller NGOs. For example, an application by small NGOs for a UN food distribution project was blocked by a large international organisation, which subsequently won the project and subcontracted it to smaller organisations. In this case, there was no partnership—only abuse and exploitation.<sup>59</sup>

In addition to the disparity between large and small NGOs, significant differences exist between NGOs from the Global North and the Global South in their capacity to participate in international organisations. Due to variations in development levels and social conditions, NGOs from these regions sometimes hold divergent views on issues, such as climate change. However, Northern and Southern NGOs are unevenly represented in international climate-related negotiations. Specifically, NGOs from the Global North are overrepresented, while those from the Global South are underrepresented. As of 2015, most NGOs participating in international climate change negotiations were from the Global North, with only one-quarter of accredited organisations from the Global South.<sup>60</sup> Despite limited disclosure of *amicus curiae* identities in WTO reports, Charwat's comprehensive statistical analysis reveals a clear geopolitical imbalance in engagement patterns. Examination

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<sup>59</sup> *Improving Partnerships Between National and International NGOs in Africa*, UNITED NATIONS, <https://www.un.org/en/chronicle/article/improving-partnerships-between-national-and-international-ngos-africa>.

<sup>60</sup> Marika Gereke & Tanja Brühl, *Unpacking the Unequal Representation of Northern and Southern NGOs in International Climate Change Politics*, 40(5) THIRD WORLD Q. 870, 871 (2019) [hereinafter Gereke & Brühl].

of country-income classifications demonstrates that civil society actors from high-income nations dominate this mechanism, accounting for approximately seventy-six percent of documented submissions. Notably, North American and European organisations alone contribute nearly sixty-five percent of total participation, far exceeding input from the global South.<sup>61</sup>

The impact of trade on climate change and the environment has long been a central issue within the WTO, where trade is recognised as playing a crucial role in this field. It is likely that this uneven participation of NGOs in climate change negotiations will also be reflected in the DSM.<sup>62</sup> Furthermore, the DSM lacks arrangements to address these imbalances.<sup>63</sup> As a result, it is argued that this inequality favours well-funded and Global North non-state actors, ultimately diminishing the role of *amicus curiae* briefs as representatives of civil society.

It is undeniable that considering the diverse perspectives of civil society can enhance democracy within the DSM. However, *amicus curiae*'s consideration inevitably extends proceedings and increases costs. And no unsolicited *amicus curiae* submissions have been taken into consideration at the Panel or Appealing proceedings in practice. Before exploring how to balance these different views, one question must be addressed: Is such a requirement essential for the acceptance of *amicus curiae*? In other words, does the *amicus curiae* mechanism bear the responsibility of providing comprehensive information? This paper argues that it does not.

For *amicus curiae* whose interests might be affected by a ruling, it is unreasonable to expect them to provide comprehensive or universally accepted views. The concept of *amicus curiae* has expanded to most common law systems and is widely accepted by U.S. courts. The *amicus curiae* mechanism under debate in the WTO is similar to that of the United States,<sup>64</sup> particularly considering that the additional procedural arrangement for *amicus curiae* formulated by the AB in the *EC—Asbestos* case closely resembles U.S. Supreme Court rulings on the matter.<sup>65</sup> Thus, the U.S. *amicus curiae* system can offer insights into the characteristics of the WTO's approach.

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<sup>61</sup> Nicola Charwat, *Who Participates as Amicus Curiae in World Trade Organization Dispute Settlement and Why?*, 27 NEW ZEALAND UNIVERSITIES L. REV. 1, 20-21 (2016) [hereinafter Chawat].

<sup>62</sup> Alqadhafi, *supra* note 10; Shaffer I, *supra* note 10.

<sup>63</sup> Nichols, *supra* note 8; Scholte II, *supra* note 47.

<sup>64</sup> For example, the *amicus curiae* in the UK has a different function. In the UK, *amicus curiae* can make decisions for an adult who lacks mental capacity or a child. See *Litigation Friends*, <https://www.gov.uk/litigation-friend>.

<sup>65</sup> Padideh Ala'i, *Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience*, 24(1) FORDHAM INT'L L.J. 62, 62-67 (2000).

*C. Amicus Curiae in the US Legal System and Its Impact on the DSM*

In the U.S. legal system, NGOs often use *amicus curiae* briefs to educate the courts. For issues not raised by the parties and overlooked by the courts, NGOs with specific perspectives or those whose objectives may be impacted by a ruling can submit *amicus curiae* briefs.<sup>66</sup> Although their “particular worldview” may differ from others, as long as their interests are potentially affected by the ruling, they have the right to present their concerns. It is not the responsibility of these NGOs to balance differing perspectives in their *amicus curiae* submissions.

Regarding the content of *amicus curiae* briefs, the only required sections are the interests of the *amicus*, a summary of the argument, the argument itself, and a conclusion.<sup>67</sup> A balance of differing views is not mandated. This understanding of *amicus curiae* should also apply to the DSM. While the WTO lacks formal “interest demonstration” requirements — a key distinction between the two systems — the fundamental purpose of amicus briefs remains the same in both contexts: to highlight overlooked facts or perspectives rather than balance all competing interests. When this shared purpose is considered alongside the DSM’s absence of content requirements and adjudicators’ discretionary power to reject submissions, it becomes clear that the WTO’s standards for *amicus curiae* are no more demanding than those in the U.S. legal system. For instance, when an environmental NGO submits concerns to WTO adjudicators about the environmental impact of a particular trade measure, drawing attention to the connection between this measure and environmental protection, the purpose of *amicus curiae* is fulfilled — regardless of whether the court ultimately adopts its perspective. Therefore, the objective of *amicus curiae* in the DSM is to bring certain issues to the attention of WTO adjudicators, and whether these views represent all affected individuals or are adopted in rulings does not affect their right to participate as *amicus curiae*.

While a comprehensive view of all affected individuals is not required in *amicus curiae* proceedings, it is essential for sound decision-making. Non-state actors submitting *amicus curiae* briefs to panels or the AB may represent only a small portion of the affected individuals. Due to disparities in capacity, voices from developed countries and well-funded groups are more likely to be heard than those from developing countries and smaller groups, leading to incomplete information gathering. However, dispute settlement decisions should be accountable to all affected parties. Therefore,

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<sup>66</sup> Leah Ward Sears, *Why and When to File an Amicus Brief*, Smith Gambrell Russell Law, (Jul. 15, 2022), <https://www.sgrlaw.com/ttl-articles/why-and-when-to-file-an-amicus-brief/>; Sunny Kumar, *Comparative Study of Amicus Curiae*, Indian National Bar Association, (Jul. 14, 2022), <https://www.indianbarassociation.org/comparative-study-of-amicus-curiae/>.

<sup>67</sup> *Supreme Court of the United States Office of the Clerk Washington, D.C. 20543–0001*, March 31 2017, [https://www.fec.gov/resources/legal-resources/litigation/indinst\\_sc\\_judgment.pdf](https://www.fec.gov/resources/legal-resources/litigation/indinst_sc_judgment.pdf).

the tension between the limited role of *amicus curiae* and the need for comprehensive information in decision-making should be recognised. It is unreasonable for *amicus curiae* briefs to serve as the sole source of information for WTO adjudicators.

If the analysis of *amicus curiae*'s role in promoting public participation ends here, the potential imbalance in public participation could pose a serious threat to the democratisation of the WTO. The WTO still lacks the capacity to fully account for the interests of civil society, whose lives may be impacted by its actions. Additionally, concerns about this imbalance will remain unaddressed, potentially weakening civil society's support for *amicus curiae*. Therefore, *amicus curiae*—or raising certain issues to the attention of WTO adjudicators—is only the first step in public participation. To thoroughly consider the interests of affected individuals, make well-reasoned decisions, and minimise errors in rulings, WTO adjudicators need access to a comprehensive range of views on particular issues. Consequently, potential imbalances in *amicus curiae* participation must be addressed, though not necessarily within the *amicus curiae* process itself.

Until better solutions are developed, this paper acknowledges and argues that the existing system can provide some means of adjustment.

The role of *amicus curiae* in the DSM should be considered alongside other dispute settlement arrangements. The expectation that *amicus curiae* should represent the full spectrum of civil society's opinions overlooks the information-gathering capabilities of other DSM proceedings. For issues that remain contentious and where limited viewpoints have been received by WTO adjudicators, there are at least two ways to address this imbalance. The first method involves comments from the disputing parties and third parties. After WTO adjudicators receive *amicus curiae* briefs, the disputing parties and third parties may be invited to comment on relevant issues. If the views expressed by *amicus curiae* are inapplicable to certain situations or if participating members hold differing opinions, the comment process can provide a platform for the exchange of perspectives. Although not explicitly required by any provision, this comment procedure has been conducted in some disputes involving

*amicus curiae*. For example, panels in DS367,<sup>68</sup> DS381,<sup>69</sup> DS384,<sup>70</sup> and DS529<sup>71</sup> all invited parties to provide comments on the content of the *amicus curiae* submissions.

The second method is the panels' and AB's right to seek information. According to Article 13 of the DSU, panels have the authority to "seek information and technical advice from any individual or body which it deems appropriate."<sup>72</sup> While no provision explicitly grants the AB the same right, it possesses a degree of discretion over appellate proceedings under Article 17.9 of the DSU and Rule 16(1) of its working procedures. In several disputes, the AB has interpreted this discretion to include the right to accept *amicus curiae* briefs and could similarly authorise itself to seek information as needed.<sup>73</sup> Through this power, WTO adjudicators can supplement the *amicus curiae* mechanism by actively seeking specific information and viewpoints. For instance, if an environmental organisation from the Global North submits an *amicus curiae* brief on a trade-related environmental issue affecting a developing country, and WTO adjudicators find this submission lacks perspectives from the Global South or the country concerned, they can seek additional information to make the viewpoints more comprehensive.

By considering comments from disputing parties and third parties and seeking information when necessary, WTO adjudicators can help mitigate imbalances between large and small NGOs and counter any bias against developing members. Consequently, *amicus curiae* should not be viewed as a panacea for all public participation issues; setting excessively high expectations could hinder civil society from expressing their concerns within the DSM.

Although some arrangements can help balance diverse views from civil society, it remains impossible to consider the perspectives of every non-state actor. Consequently, the opinions received by WTO adjudicators can only be relatively

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<sup>68</sup> Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand* (Australia — Apples), ¶ 1.17, WTO Doc. WT/DS367/R (adopted Dec. 17, 2010).

<sup>69</sup> Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (US — Tuna II (Mexico)), ¶¶ 7.1–7.9, WTO Doc. WT/DS381/R (adopted June 13, 2012).

<sup>70</sup> Panel Report, *United States — Certain Country of Origin Labelling (COOL) Requirements* (US — COOL), ¶¶ 2.9–2.10, WTO Doc. WT/DS384/R (adopted July 23, 2012); Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements* (US — COOL), WTO Doc. WT/DS386/R, (adopted July, 23, 2012).

<sup>71</sup> Panel Report, *Australia — Anti-Dumping Measures on A4 Copy Paper* (Australia — Anti-Dumping Measures on Paper), ¶ 1.12., WTO Doc. WT/DS529/R, (adopted Jan. 27, 2020).

<sup>72</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>73</sup> Lead and Bismuth II, *supra* note 21; EC—Asbestos, *supra* note 22.

comprehensive. NGOs vary widely in their views on the appropriate level of public participation. Whether these views are balanced at the *amicus curiae* stage or in other proceedings, there will always be individuals whose voices go unheard. However, this does not signify a failure of *amicus curiae* to introduce public perspectives into the DSM. Public participation can be achieved in various ways. For international organisations like the WTO, direct participation is impractical; therefore, civil society's interests are represented indirectly through its representatives. In this context, individual rights are limited, but the inevitable exclusion of some individual claims does not undermine the legitimacy or democratic nature of the entire system.<sup>74</sup>

No government or international organisation has successfully resolved this issue, and we cannot expect non-state actors to accomplish this task. Such a responsibility is too burdensome for them and could be used as a pretext to exclude civil society from the dispute settlement system. The purpose of *amicus curiae* is to foster public participation within the DSM and make such a mechanism viable at the international level, not to provide a flawless solution. Introducing this imperfect mechanism can partially address the deficiencies of the existing one, and its role in this respect should not be overlooked.

In summary, the model in which member states act as the sole representatives of their citizens in the DSM has faced criticism. International trade increasingly impacts the lives of people around the world, and certain concerns from civil society — those that cannot or should not be represented by national governments — deserve to be heard in the WTO decision-making process. The *amicus curiae* mechanism has thus been proposed as a channel for public participation. Its role in this context is to bring specific issues to the attention of WTO adjudicators, meaning that comprehensive opinions are not required from *amicus curiae* submissions. Regarding the varied capacity of non-state actors to submit briefs and the potential imbalance of public views, which may negatively influence dispute settlement outcomes, the current system can provide some adjustments until better solutions are found. Therefore, *amicus curiae* can effectively promote public participation within the DSM.

#### IV. *AMICUS CURIAE'S* IMPACT ON MEMBERS' EQUAL PARTICIPATION IN THE DSM

As previously mentioned, the introduction of *amicus curiae* also pertains to another aspect of democracy in the DSM: the equal participation of WTO members. One cannot conclude that *amicus curiae* enhance democracy in the DSM solely by

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<sup>74</sup> NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 2–3 (2006).

demonstrating its role in promoting public participation. Whether the introduction of *amicus curiae* can foster democracy in the DSM also depends on its relationship with members' equal participation.

*A. Equal Participation and Democracy*

To assess how this system affects equal participation and, consequently, impacts democracy in the DSM, one must first understand the current status of members' participation in the DSM and the relationship between equal participation and democracy.

The unequal participation of WTO members in the DSM has been a persistent issue, particularly between developed and developing members. This disparity has long been one of the WTO's primary concerns. Members' differing attitudes toward enhancing the participation capacity of developing members have also contributed to the stagnation of the Doha Round negotiations.<sup>75</sup> However, a comprehensive solution to this problem has yet to be found. This situation arises from two main factors. First, the increasing time demands and complexity of dispute settlement proceedings place significant demands on members' capacity to participate. For instance, India, Pakistan, Malaysia, and Thailand in the *U.S.—Shrimp* case argued that allowing amicus curiae submissions from NGOs might result in a flood of unsolicited briefs, which would disproportionately burden developing country parties with limited legal capacity, as well as complicate the work of the panels and the AB.<sup>76</sup> Second, there is a disparity in the capacity of developed and developing members to engage in the DSM. Since the establishment of the WTO, the multilateral trading system has introduced numerous measures to facilitate developing countries' participation in the DSM. However, alongside these efforts, the time costs and complexity of dispute settlement have also increased. While rising costs and legal complexities affect all participants, they pose an even greater challenge for developing countries, given their unique circumstances.<sup>77</sup> Due to the forward-looking nature of damage calculations in the DSM, even when respondents' measures are ultimately found WTO-inconsistent, the starting point for calculating

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<sup>75</sup> Christopher Stevens, *The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO*, 24-30 (ISD Working Paper No. 163, 2002); DANI RODRIK, *THE GLOBAL GOVERNANCE OF TRADE AS IF DEVELOPMENT REALLY MATTERED*, 58 (Report submitted to UNDP, 2001); AMIN ALAVI, *LEGALIZATION OF DEVELOPMENT IN THE WTO: BETWEEN LAW AND POLITICS*, 101-102 (2009).

<sup>76</sup> *U.S.—Shrimp*, *supra* note 21, at 10.

<sup>77</sup> M. BUSCH & E. REINHARDT, *DEVELOPING COUNTRIES AND THE GATT/WTO DISPUTE SETTLEMENT*, in *WTO and Developing Countries* at 195–212, 197–99 (George A. Bermann & Petros C. Mavroidis eds., 2007) [hereinafter Busch & Reinhardt]; GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIP IN WTO LITIGATION*, at 15–16 (Brookings Institution Press, 2003) [hereinafter Shaffer II].

damages is the expiration of the reasonable period for implementing the ruling. Consequently, complainants must bear losses until that time. The prolonged dispute settlement process can cause significant harm to industries in developing countries, which is why developing complainants are more inclined toward early settlements.<sup>78</sup> The introduction of *amicus curiae* could further increase time costs, exacerbating this situation.

From a financial perspective, the government of a developed country can generally afford the increased costs of litigation. Even when the government lacks such financial resources, a well-funded domestic private sector with a significant interest in the dispute may be willing to bear the expenses.<sup>79</sup> In contrast, the situation in developing countries is different. These countries often lack strong partnerships between the public and private sectors; initiating a dispute “requires a major commitment” from both the government and the domestic private sector.<sup>80</sup>

From a legal perspective, developing countries often lack sufficient legal experts to represent them before panels or the AB. To secure a favourable ruling, they must frequently hire private law firms from developed countries or seek help from the ACWL.<sup>81</sup> While this can compensate for their shortage of legal experts, it also raises the overall cost of litigation, further increasing the financial burden and hindering their participation.<sup>82</sup> Although the WTO Secretariat and the Advisory Centre on WTO Law can mitigate some of these disadvantages, the assistance they provide is limited, and the challenges developing countries face remain significant.<sup>83</sup>

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<sup>78</sup> Ujal Singh Bhatia, *The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System*, Release of the Appellate Body Annual Report 2016 (Address by Chairman of Appellate Body, June 8, 2017) at 2-3; Busch & Reinhardt, *supra* note 77.

<sup>79</sup> Shaffer II, *supra* note 77.

<sup>80</sup> N. MEAGHER, REPRESENTING DEVELOPING COUNTRIES IN WTO DISPUTE SETTLEMENT PROCEEDINGS, in *WTO Law and Developing Countries*, at 213–26, 218–19 (G. A. Bermann & P. C. Mavroidis eds., 2007).

<sup>81</sup> See, e.g., *Assistance in WTO dispute settlement proceedings since July 2001*, ACWL, <https://www.acwl.ch/wto-disputes/>; *Disputes by member*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm#thai](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#thai); See also, Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177, 181 (2006) (showcasing that since the establishment of the ACWL, Thailand has participated in 11 WTO dispute settlement cases as either a complainant or respondent. In 7 of these cases, it sought legal assistance from the ACWL).

<sup>82</sup> SALEH A. SHRAIDEH, THE PARTICIPATION OF DEVELOPING COUNTRIES IN THE DISPUTE SETTLEMENT SYSTEM OF THE WTO, 102 (2013) [hereinafter Shraideh].

<sup>83</sup> HECTOR A. SMITMANS, UNRESOLVED ISSUES IN THE WTO UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, in *Reform and Development of the WTO Dispute Settlement System* (D. Georgiev & K. V. Broright eds., 2006) 247, 262; Chad



Consequently, compared to developed members, these developing members are more hesitant to protect their interests through the DSM. The introduction of *amicus curiae* also raises the financial and professional demands on developing members.

According to internal democracy theory, the DSM should be accountable to its members who “authorise or sustain” it.<sup>84</sup> If the DSM cannot provide a level playing field for both developed and developing members, leaving behind those who constitute the majority of WTO members,<sup>85</sup> it would be unreasonable to consider it internally democratic. Therefore, to enhance democracy in the DSM, *amicus curiae* should not only promote public participation but also ensure that the equal participation of WTO members is not compromised.

### B. *Amicus Curiae* and Equal Participation of WTO Members

The impact of *amicus curiae* on members’ equal participation in the DSM can be understood through its influence on the costs of dispute settlement proceedings and on members’ capacity to participate. These two factors are closely linked. When the costs of dispute settlement proceedings increase, the participation capacity of developing members — who struggle to bear such costs — tends to decrease proportionally.

The *amicus curiae* mechanism can increase the costs of the DSM in several ways. From a time perspective, WTO adjudicators require more time to review and filter valuable submissions from non-state actors compared to a DSM without this mechanism. When numerous *amicus curiae* briefs are submitted, the screening process can be highly time-consuming. For example, in the *Australia — Tobacco Plain Packaging* case, the Panel received 80 *amicus curiae* briefs from various groups, including business associations, intellectual property organisations, and health organisations.<sup>86</sup> Given the limited duration of panel proceedings, this creates a significant burden for WTO adjudicators. Furthermore, as previously discussed, to ensure the quality of rulings and accountability to affected individuals, adjudicators may need to seek additional input when they find *amicus curiae* briefs to be incomplete. This further extends the

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P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, 19(1) J. INT. TRADE & ECON. DEV. 33, 51–53 (2010).

<sup>84</sup> Miller, *supra* note 15, at 153.

<sup>85</sup> WTO has over 160 members, developing members constitute about three quarters of the total number.

<sup>86</sup> Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, WT/DS441/R (adopted June 29, 2020); WT/DS458/R, WT/DS467/R (adopted Aug. 27, 2018).

time required. In the *Australia — Tobacco Plain Packaging* case, for instance, balancing views from multiple fields can be especially time-intensive.

Additionally, parties and third parties to the dispute need time to comment on the content of these briefs. Consequently, *amicus curiae* can prolong dispute settlement proceedings, raising the time costs of the DSM—a change that poses particular challenges for developing members who generally prefer early settlements.

From a financial and professional resources perspective, the *amicus curiae* mechanism also increases members' expenses in these areas. First, a longer dispute settlement proceeding itself requires a greater investment of resources. Second, as Squatrito notes in her article, the advice or information provided by *amicus curiae* may differ from that in members' submissions, potentially undermining the claims of the parties or third parties to the dispute. For instance, in *U.S.—Shrimp* case, several developing countries warned that NGO amicus briefs could overburden limited legal capacities and complicate proceedings.<sup>87</sup> If these parties wish to secure a favourable ruling, they must respond to the content of *amicus curiae* briefs. Given that some of these briefs are authored by experts in specific fields, responding effectively often necessitates substantial financial and professional support. This additional cost impacts members differently, placing a significant burden on developing members who lack such resources.<sup>88</sup>

It is argued that the imbalance of *amicus curiae* participation between the Global North and Global South undermines the representation of developing members. Given the same conditions of participation, non-state actors from developed members possess a greater capacity to engage and are, therefore, more likely to be heard in the DSM. As a result, it is predictable that groups from the Global North will primarily represent Northern voices.<sup>89</sup> However, as discussed above, concerns about this imbalance can be alleviated through arrangements such as inviting comments from parties and requesting information from more suitable groups. Consequently, this issue of imbalance is unlikely to have a serious impact on the participation of developing members.

In summary, *amicus curiae* increases the time, financial, and professional costs of participating in the DSM. At the same time, the participation capacity of developing members—whose interests are harmed by extended dispute settlement periods and who face shortages of financial and professional resources—will comparatively

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<sup>87</sup> *U.S.—Shrimp*, *supra* note 21.

<sup>88</sup> Theresa Squatrito, *Opening the Doors to the WTO Dispute Settlement: State Preferences on NGO Access as Amici*, 18(2) SWISS POLIT. SCI. REV. 175, 181 (2012) [hereinafter Squatrito].

<sup>89</sup> Gereke and Brühl, *supra* note 60; Alqadhafi, *supra* note 10; Shaffer I, *supra* note 10.

decline. If the introduction of *amicus curiae* renders the DSM unable to be accountable to the majority of its members who authorise or sustain it, then the DSM's internal democracy cannot be achieved. Therefore, *amicus curiae* risks undermining the internal democracy of the DSM.

Squatrito's research supports this point. Regarding the primary reasons shaping states' differing preferences on *amicus curiae*, she proposes four hypotheses: the first is the possibility of adverse rulings states may face in the DSM; the second is whether members are democratic at the national level; the third is whether members have experience with *amicus curiae* in other international organisations; and the fourth is whether members have the capacity to manage costs associated with *amicus curiae*. By empirically examining these hypotheses, she concludes that states' preferences on *amicus curiae* are primarily shaped by the last factor—their capacity to manage these costs. This finding suggests that members opposing the introduction of *amicus curiae* do so mainly because, lacking such capacity, they believe *amicus curiae* would bring them more harm than benefit.<sup>90</sup> Such cost-related opposition is a major obstacle to introducing *amicus curiae* and will be further analysed in Part 4.2 of this paper.

The impact of *amicus curiae* on democracy within the DSM is complex. On one hand, it can promote public participation; on the other hand, it may undermine equal participation among all members. Because its effect on democracy cannot be precisely quantified, it is challenging to determine whether *amicus curiae* will ultimately do more good or harm. Furthermore, it affects different members in various ways. For states with sufficient resources to manage the costs associated with *amicus curiae*, this mechanism can be beneficial. However, for less wealthy members lacking such resources, it may pose significant challenges.

Furthermore, the introduction of the *amicus curiae* system has significant implications for the relationship between trade and development. By adding additional submissions and assessments, it can prolong dispute resolution within the WTO. For developing countries, this delay could be detrimental, as it means prolonged uncertainty and the risk of greater economic losses during the dispute. These countries, which often rely on timely trade relief for development, may suffer more from these delays than wealthier nations, exacerbating their vulnerability.<sup>91</sup> Additionally, the system may introduce biases in favour of developed countries, whose interests are more frequently represented in *amicus* briefs.<sup>92</sup> This can skew

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<sup>90</sup> Squatrito, *supra* note 88, at 181.

<sup>91</sup> See DSU, *supra* note 72, art. 12.10 (provides special and differential treatment for developing country complainants, aiming to facilitate early resolution of disputes and increase the likelihood of reaching a mutually agreed solution before initiating more complex panel proceedings).

<sup>92</sup> Charwat, *supra* note 61, at 20-21.

outcomes in ways that fail to reflect the particular needs of developing countries, undermining key provisions such as special and differential treatment. As a result, developing nations may find it harder to use trade as a tool for economic diversification and sustainable growth, further hindering progress on critical challenges such as poverty reduction, inequality, and climate adaptation.<sup>93</sup>

If not carefully managed, the *amicus curiae* mechanism risks reinforcing structural imbalances in the WTO system, marginalising developing countries and weakening the organisation's role in promoting inclusive development. Instead of narrowing the development gap, it could inadvertently widen the divide between the global North and South.

While there is no simple answer to whether *amicus curiae* can promote democracy in the DSM and how it would further impact the development of developing countries under existing conditions, the discussion should not end here. WTO reform offers opportunities to address many unresolved issues, including those related to *amicus curiae*. As mentioned, with the development of globalisation, there is a growing diversity in public representation. The rise of non-state actors cannot be ignored, nor can the WTO avoid their influence.<sup>94</sup> The role of *amicus curiae* in enhancing civil society participation is irreplaceable within the DSM. Therefore, it is essential to analyse whether the negative impacts associated with *amicus curiae* can be mitigated.

## V. MAKING *AMICUS CURIAE* WORKABLE IN THE DSM

The negative impact of *amicus curiae* on democracy and development pertains to its potential to undermine members' equal participation in the DSM. Given the member-driven nature of the WTO and its DSM, this influence is particularly significant when considering whether *amicus curiae* should be introduced. Therefore, addressing members' concerns about the erosion of equal participation<sup>95</sup> is central to this question.

### A. *The Impact of Members' Attitudes on Decision-Making in the WTO*

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<sup>93</sup> U.S.—Shrimp, *supra* note 21; Squatrito, *supra* note 88, at 181.

<sup>94</sup> Kapoor, *supra* note 34, at 536-538.

<sup>95</sup> Charwat, *supra* note 61, at 2; Through empirical research, Squatrito has also demonstrated that WTO members' opposition to *amicus curiae* primarily stems from their limited capacity to manage the procedural and financial burdens associated with this mechanism. This finding suggests that developing countries - with their more constrained resources and weaker institutional capacity in the DSM - may face disproportionate disadvantages from the introduction of *amicus curiae*, potentially affecting their overall participation in the dispute settlement system. Squatrito, *supra*, note 88.

Since the entry into force of the Marrakesh Agreement and the establishment of the WTO, the dispute settlement system has evolved from being more power-oriented to more rule-oriented. A significant step toward a rule-oriented system was the abolishment of the positive consensus principle and the adoption of the negative consensus principle concerning the establishment of panels, the adoption of rulings, and the authorisation of retaliation. Under the positive consensus principle applied during the GATT period, the establishment of panels, the adoption of panel reports, and the authorisation to suspend concessions or obligations were all subject to the consensus of Contracting Parties.<sup>96</sup> This strongly influenced the effectiveness of the judicial process and pressured members to resolve disputes through political means. In the WTO era, the DSU grants members the right to almost automatic initiation of a panel proceeding upon a complainant's request.<sup>97</sup> Articles 16.4, 17.14, and 22.6 further confirm the adoption of the negative consensus principle in other proceedings,<sup>98</sup> making blocking nearly impossible and thereby reducing political interference in judicial decision-making. Additionally, to enhance the quality of dispute settlement decisions, an appeals process was introduced to review legal and interpretative issues at the panel stage. The two-tier system in the WTO DSM was formally established.

However, these changes have not transformed the DSM into a fully legal system; it still retains a strong political character, which makes the DSM quasi-adjudicative.<sup>99</sup> Due to the lack of a centralised authority at the international level and an overarching authority above the states, the political nature of settling international disputes remains unavoidable. While legal methods have undeniably advanced in recent years, the majority of international disputes are still resolved through political means.<sup>100</sup> This characteristic is evident in the DSM as well. After decades of development, the WTO provides its members with multiple avenues to resolve trade disputes, including consultation, good offices, conciliation, mediation, arbitration, and a quasi-adjudicative DSM.<sup>101</sup> Members are encouraged to find mutually satisfactory solutions at any stage of proceedings, even after panel or AB procedures have begun, indicating a consistent preference for political approaches within the WTO. Furthermore, the positive consensus principle retained during the appointment of AB members highlights the political nature of the DSM. The selection process

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<sup>96</sup> JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 71 (1998).

<sup>97</sup> DSU, *supra* note 72, art. 6.1.

<sup>98</sup> *Id.* arts. 16.4, 17.14 & 22.6.

<sup>99</sup> ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 66–68 (1997).

<sup>100</sup> YOSHIFUMI TANAKA, *THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES* 22–23 (2018).

<sup>101</sup> DSU, *supra* note 72, art. 5.

involves not only an assessment of professionalism but also a political negotiation among member states. In addition to legal expertise, members consider the preferences and dispositions of candidates, which is crucial when disputes involve the varied interests of different member states. This dynamic make achieving consensus even more challenging.<sup>102</sup>

The influence of members' political considerations on the DSM's function is evident in various cases. The complexity of appointing AB members is exemplified by the deadlock over the successor to David Unterhalter in 2014<sup>103</sup> and the current paralysis of the AB, ongoing since the end of 2020, due to the United States' obstruction of new AB appointments.<sup>104</sup> Past rulings have also demonstrated strong political influence from members in the context of *amicus curiae*. Although the AB has granted panels and itself the right to accept or reject *amicus curiae* briefs, as of the end of 2021, panels and the AB have consistently refrained from considering *amicus curiae* briefs whenever one or more parties to a dispute express opposition.<sup>105</sup>

The coexistence and interaction of legal and political elements create a *sui generis* DSM in the WTO. Although the political dimension has often been criticised, it remains integral to the DSM. Consequently, members' attitudes significantly influence the functioning of the WTO and its DSM. Since *amicus curiae* can undermine the equal participation of WTO members in the DSM, member opposition has been provoked, constituting a primary obstacle to introducing this mechanism. Given that this negative impact cannot be overlooked, it is essential to address members' concerns regarding the erosion of equal participation.

*B. Mitigating Negative Impacts of Amicus Curiae on Democracy*

The issue of *amicus curiae*, like other factors that hinder the participation of developing members, is rooted in the complexity of dispute settlement proceedings and the varied capacities of members to address these challenges. This conclusion suggests basic strategies for mitigating members' concerns: enhancing the capacity

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<sup>102</sup> Gregory C. Shaffer et al., *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79(1) LAW AND CONTEMPORARY PROBLEMS 237–273, 271 (2016).

<sup>103</sup> *Id.* at 237–273, 270–272 (There were two African candidates who received support from different powerful camps: the Egyptian candidate was supported by the United States, while the Kenyan candidate was supported by a majority of members, including the European Union. Both sides were not willing to give in).

<sup>104</sup> See Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, 24(3) J. INTL. ECON. LAW 534–550, 534–535 (2021); AB Members, *supra* note 2 (The term of the last AB member expired on 30 November 2020, and now the AB is unable to review disputes due given its ongoing vacancies).

<sup>105</sup> WTO *Analytical Index*, DSU – Article 13/Appendix 4 (Jurisprudence), [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/dsu\\_app4\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_app4_jur.pdf).

of developing members and making *amicus curiae* rules more accommodating to them. This paper proposes several conservative approaches, achievable through minor adjustments to the existing mechanism. Specifically, certain current arrangements can be improved to offer more support, and new special and differential treatment provisions tailored to this issue could also be developed.

There are corresponding arrangements in place to address the unequal participation of developing members in the DSM, which can also be utilised to resolve issues related to *amicus curiae*. According to Article 27.2 of the DSU, the WTO Secretariat is required to provide free legal assistance, including the services of “a qualified legal expert,” to developing members upon request.<sup>106</sup> These experts from the Secretariat can theoretically replace the need for private law firms from developed countries, thus conserving financial resources for developing countries during dispute settlement proceedings. In addition to the Secretariat, the ACWL, which operates independently of the Secretariat, offers further support by alleviating both legal and financial constraints on developing members. The ACWL primarily provides free or low-cost legal advice to developing countries upon request and offers subsidised legal support when these countries are involved in disputes as complainants, respondents, or third parties.<sup>107</sup> Beyond legal assistance, the ACWL also helps train domestic legal experts in developing countries by offering internships and regular seminars for their officials.<sup>108</sup>

It is worth noting that the WTO Secretariat’s support to developing members focuses mainly on addressing their financial and legal constraints. However, *amicus curiae* briefs often cover diverse areas of expertise, e.g., the scientific information contained in *amicus curiae* briefs in the *EC—Asbestos* case,<sup>109</sup> which the Secretariat cannot fully support. To assist with *amicus curiae*-related issues, the Secretariat could expand its pool of experts to include fields commonly highlighted in *amicus curiae* briefs, such as environmental and health issues. Nevertheless, this approach would have limitations, as the wide-ranging topics covered by *amicus curiae* submissions make it impractical for the WTO Secretariat to cover all areas comprehensively. In such cases, the Secretariat could also provide financial assistance and guidance to help developing members seek expertise from external sources when *amicus curiae* submissions go beyond the Secretariat’s scope.

The ACWL has further established a Technical Expertise Fund to address the shortage of resources available to developing members in areas outside the realm of

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<sup>106</sup> Shraideh, *supra* note 82.

<sup>107</sup> Bown & McCulloch, *supra* note 83, at 47–48.

<sup>108</sup> Shraideh, *supra* note 82.

<sup>109</sup> Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (EC—Asbestos), WTO Doc. WT/DS135/R, para. 6.1-6.2 (adopted Apr. 5, 2001).

WTO law. However, only Denmark, the Netherlands, and Norway have contributed to this fund so far, which may not be sufficient to meet the extensive litigation needs of developing members. Although direct financial assistance can alleviate some of the challenges faced by developing members, the sustainability of funding remains an issue that needs to be addressed within these arrangements.

The WTO Secretariat and the ACWL can only partially alleviate the difficulties that developing members face regarding *amicus curiae*. Both of them are already limited in their ability to provide financial and legal support to developing countries, and these limitations remain unresolved. For instance, the WTO Secretariat has a very limited number of qualified legal experts relative to the large number of developing countries. The ACWL's services are only available to its 39 developing country members and least-developed country members of the WTO,<sup>110</sup> which leaves about half of the WTO's 120 developing members without access to its support. Additionally, the ACWL has primarily been utilised by frequent users, which has limited its ability to encourage broader participation among developing members in the DSM.<sup>111</sup> Consequently, the extent to which the ACWL and WTO Secretariat can support developing members with *amicus curiae*-related issues is uncertain.

Operationally, the ACWL, as an independent organisation outside the WTO system, does not require member consensus for changes, allowing it greater flexibility. However, the support function of the WTO Secretariat is specified in the DSU, meaning any modification would require consensus among members through negotiation, making such changes more challenging to achieve.

Alleviating members' concerns requires a two-pronged approach: enhancing members' capacity to handle *amicus curiae* issues and simultaneously lowering procedural thresholds for developing members. In addition to promoting current arrangements that aid developing members, procedural modifications to the DSU or related rules could be implemented. For instance, provisions could be introduced to grant developing members extended time to respond to *amicus curiae* submissions, and a minimum percentage of these submissions from developing or local sources could be guaranteed for consideration. However, such changes would require member consensus.

The potential bias towards developed countries in the *amicus curiae* submissions can also be addressed through measures aimed at enhancing diversity and ensuring fairness. One of the ways to achieve this is to promote more inclusive participation from NGOs and other interest groups that focus on the interests of developing

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<sup>110</sup> Home, ACWL, <https://www.acwl.ch/>.

<sup>111</sup> Bown & McCulloch, *supra* note 83, at 36.



countries by introducing SDT provisions. For instance, the WTO could establish specific mechanisms that encourage the involvement of NGOs from diverse regions and at various stages of development, ensuring a broader representation of global interests. Furthermore, the WTO could design rules that ensure a balanced representation in *amicus curiae* submissions, preventing the undue dominance of viewpoints from developed countries. To achieve this, a specialised committee could be tasked with evaluating the submissions, ensuring that they reflect a variety of perspectives, thereby guaranteeing the balance and diversity of contributions.

Another key solution lies in enhancing the transparency and independence of the *amicus curiae* process. Transparency can be reinforced by ensuring that all submissions, along with their sources and backgrounds, are publicly available for review, thus enabling better understanding of the potential impacts of these contributions. Such transparency would help countries, particularly those from the developing world, assess the context and implications of *amicus curiae* opinions. Additionally, an independent review mechanism could be introduced to scrutinise the backgrounds, funding sources, and potential biases of NGOs submitting opinions. This would help mitigate the influence of any single nation or group, ensuring that the participation in the process adheres to the principles of fairness and impartiality. An independent committee could be tasked with this role, further strengthening the integrity and credibility of the WTO dispute settlement system.

While ICSID leaves the acceptance of *amicus curiae* submissions to the discretion of the arbitral tribunal,<sup>112</sup> a similar approach in the WTO would place this authority with panels and, previously, the AB. To support rather than burden these adjudicators, a review committee under the DSB would be more appropriate. This structure ensures procedural legitimacy while preventing adjudicators from being overwhelmed by large volumes of submissions. The committee could perform a preliminary screening role, verifying transparency, relevance, and diversity, without undermining the adjudicators' ultimate authority. The screening process itself could draw on ICSID's approach to evaluating non-disputing party submissions<sup>113</sup>.

Therefore, addressing concerns about *amicus curiae* is feasible. One of the simplest ways to reduce its impact on equal participation is to amend the ACWL. However, these changes would not benefit all developing members universally. Modifications to the WTO Secretariat's assistance function and other provisions in the DSU require consensus among members and can only be achieved through negotiation.

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<sup>112</sup> ICSID Arbitration Rules, ICSID, Rule 67(1), [https://icsid.worldbank.org/sites/default/files/Arbitration\\_Rules.pdf](https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf).

<sup>113</sup> *Id.* Rule 67 (2).

## VI. CONCLUSION

The WTO and its DSM have faced criticism for their “democratic deficit,” with calls for greater inclusion of civil society voices in the DSM’s decision-making process. The *amicus curiae* mechanism is seen as a potential remedy for this issue. However, this perspective addresses only one aspect of democracy in the DSM; the impact of *amicus curiae* on democracy is, in fact, more nuanced and complex.

Democracy in the DSM encompasses both external and internal aspects. External democracy requires that the WTO and DSM be accountable to those who have a stake in dispute settlement outcomes. This suggests that the traditional state-monopoly approach in the DSM is no longer viable; instead, there is a growing trend toward diverse representation of civil society. Certain issues are more appropriately represented by non-state actors, and for voices excluded by state governments, *amicus curiae* is the sole avenue for being heard. From this perspective, introducing *amicus curiae* is both reasonable and meaningful.

However, expectations for the role of *amicus curiae* should be realistic. It is essential not to impose an excessive burden that might hinder public participation. For *amicus curiae* affected by specific trade measures, the primary role is to highlight concerns not addressed in the submissions of parties or third parties, rather than offering a comprehensive representation of civil society’s views. While such broad representation is indeed important for decision-making, it is not the responsibility of *amicus curiae*. Balancing differing perspectives can be achieved through other mechanisms within the DSM, such as comments from disputing parties or the ability of panels and the AB to seek additional information. Thus, introducing *amicus curiae* can enhance public participation and promote democracy in the DSM from this perspective.

The *amicus curiae* mechanism also impacts the internal democracy of the DSM. Internal democracy within the DSM requires it to be accountable to the members who “authorise and sustain” it. Therefore, the DSM should ensure equal participation for all members, with particular attention to the unique challenges faced by developing members. Although WTO rules apply universally, developing members often lack the financial and professional resources necessary to navigate the complexities of dispute settlement proceedings, which places a considerable burden on them. The introduction of *amicus curiae* further exacerbates these challenges, making it even more difficult for developing members to participate fully in the DSM. Consequently, this mechanism undermines equal participation among WTO members and negatively affects democracy within the DSM from this perspective.

Determining whether *amicus curiae* contribute more positively or negatively to democracy within the DSM is challenging. However, its impact on equal participation has generated opposition from some members. Given the member-driven nature of the WTO and its DSM, such opposition is a significant factor contributing to the lack of consensus on its introduction. Therefore, to enable *amicus curiae* to facilitate public participation within the DSM, its adverse effects on equal participation must be addressed. Unequal participation within the DSM arises from procedural complexity and the varying capacities of members. First, since members' capacity to handle costs associated with *amicus curiae* shapes their stance on this issue, it is essential to strengthen their corresponding capacities. Second, making procedural rules concerning *amicus curiae* more accommodating for developing members can help alleviate their burdens. These challenges can be addressed through minor adjustments to the current system, such as expanding the scope of services provided by the WTO Secretariat and the ACWL and developing additional SDT provisions.

The conclusions of this article have several limitations. The discussion focussed exclusively on the WTO dispute settlement system. However, democratising the WTO encompasses reforms in negotiations, trade policy reviews, and other areas. Without considering and coordinating with reforms in these fields, this article can only propose conservative solutions for challenges that *amicus curiae* face in the DSM, such as their limited role in balancing diverse opinions and the varying capacities of members to participate in the DSM. These solutions can bring the DSM incrementally closer to democracy. Furthermore, we might envision a future in which non-state actors participate in WTO negotiations and have voting rights in decision-making. In such a scenario, their roles in the DSM could extend beyond *amicus curiae* to include acting as complainants. Whether such ambitions are feasible within the WTO framework requires broader, in-depth research.