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Unfriendly Actions: The Amicus Brief Battle at the WTO

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UNFRIENDLY ACTIONS: THE AMICUS BRIEF BATTLE AT THE WTO

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The implications of law-making in the World Trade Organization (WTO)[1] continue to grow in importance. In 1994, participants hoped that the WTO would judicialize the trade regime. Over the last seven years, we have seen that hope realized. The WTO has registered over 200 complaints.[2] Over 40 Appellate Body or Panel reports have been adopted.[3] The examination of the WTO has progressed from one of speculation as to how things will work to one where we can now speculate where things will go.

The judicialization of the WTO and the growing importance of the dispute resolution mechanism mirror the worldwide trend toward a more binding international dispute resolution. Europeans have long been accustomed to binding rulings handed down by both the European Court of Justice (ECJ) and the European Court of Human Rights. Other examples of this trend include the growing case load of the International Court of Justice, the push for the creation of the International Criminal Court, the increasing strength of the Inter-American Human Rights Court, the creation of the Law of the Sea Tribunal, and the growing actions of both ad hoc tribunals dealing with human rights violations in Yugoslavia and Rwanda. Yet as these other judicial bodies continue to expand and grow in strength, international observers cannot help but be struck by the number and diversity of cases from the WTO.

The cases concern a wide variety of goods and particular issues and, perhaps even more importantly, involve a large number of countries. Developed countries have brought cases against one another and against developing countries for the enforcement of trade law.[4] Developing countries have also had a few problems in using the WTO against more developed countries, as well as against each other.[5] Yet, it is the breadth and depth of the dispute resolution rulings coming out of the WTO that has now led to a closer examination of the

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1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter WTO Agreement], THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 3 (1999) [hereinafter LEGAL TEXTS].

2. *See* Overview of the State-of-Play of WTO Disputes *at* http://www.wto.org/english/tratop_e/ dispu_e.html (Nov. 21, 2000) [hereinafter WTO State-of-Play].

3. *Id.*

4. Developed countries have brought 123 matters to the WTO. *See* WTO State-of-Play, *supra* note 2, at 71.

5. Developed countries have brought 46 matters to the WTO of which 21 were against other developing countries. *See* WTO State-of-Play, *supra* note 2, at 71, 72.

WTO. After all, if the WTO started slowly with very few cases like many of its international judicial predecessors, this examination would not yet be occurring. The WTO is a victim of its own success.

This article examines a variety of different questions regarding the WTO, not the least of which concerns the legitimacy of the WTO. Another question includes whether the WTO is the right place to handle the issues that it does? Should the WTO be ruling on environmental issues? On labor and social issues? On intellectual property issues? Furthermore, should the WTO be modified so that some of these concerns can be addressed? In answering these questions, this article first looks at the issue of legitimacy from the perspective of how the WTO was originally conceived. Second, this article reviews several proposals for increasing legitimacy in the WTO. Third, I examine the battle over amicus briefs at the WTO and apply theories of judicial decision-making to help shed light on the battle. Finally, this article concludes by demonstrating what the amicus brief battle can tell us and what it cannot.

I. LEGITIMACY OF WTO DISPUTE RESOLUTION

In examining the legitimacy of the WTO, we must determine the answers to three historic questions from the perspective of decision-makers present at the formation of the WTO. Was the expansion into environmental, social, and cultural issues planned by the Member States when drafting the WTO? Second, even if this was not planned, have members since accepted this expansion? And finally, has civil society also accepted the expansion of the WTO?

A. Was Expansion Planned by Members?

This first question looks at what Member States were planning when they sat down to negotiate the WTO. Did the members actually expect that the dispute resolution system would be as binding as it is? Did the Member States expect that the WTO's case load would expand so rapidly into issues beyond trade? The expansion of international organizations is not new per se. One only has to examine the history of the European Union (EU) to see that organizations can expand their coverage areas over time without the express intent of the founders.[6] While it is not surprising that the WTO's coverage of expected issues would expand over time, it is perhaps surprising the speed with which this is occurring.

Clearly there are certain parts of the WTO agreements that specifically set forth the balancing act the WTO is supposed to engage in when ruling on

6. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2437-53 (1991) (explaining how the EU mutated beyond its original jurisdiction through extension, absorption, incorporation and expansion of different areas of the law).

environmental or other social issues.[7] One could also argue that it would be naïve for any Member State to expect that environmental issues, in particular, would not be addressed by the WTO, given the fact that even prior panels arising out of the General Agreement on Tariffs and Trade (GATT) had ruled that certain environmental measures are a violation of the GATT.[8] However, intellectual property is expressly included in the WTO system with the Trade-Related Aspects of Intellectual Property Rights (TRIPS). In the cases to date dealing with these "trade and . . ." issues, the backlash from Member States and commentators has been swift.[9] As one writer notes,

> Whether it is wise to vest such far-reaching power in the WTO and its dispute settlement system in this politically sensitive and problematic area is questionable. It now appears from the developing case law that this sweeping transfer of jurisdiction to the WTO dispute settlement authorities was accomplished with little planning or reflection.[10]

We could conclude that these forays into "trade and . . ." issues were probably anticipated by Member States, both because of express treaty language and some expectation that the case load would expand. Even if they were not, we can ask the next questions to test their legitimacy.

B. Is the Expansion of Issues Accepted by Members?

Even if members did not anticipate that the WTO dispute resolution system would be ruling on these broader issues, members could show the legitimacy of

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7. *See, e.g.*, General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XX, LEGAL TEXTS, *supra* note 1, at 423, 455-56; General Agreement on Trade in Services (GATS), WTO Agreement, Annex 1B, Art. XIV, LEGAL TEXTS, *supra* note 1, at 284, 296-97; Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, Annex 1A, LEGAL TEXTS, *supra* note 1, at 59, 67-68.

8. GATT Dispute Panel Report on United States—Restrictions on Imports of Tuna, GATT B.I.S.D., (39th Supp.) at 155 (unadopted 1991), 30 I.L.M. 1594. *See, e.g.*, Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455 (1993) (reacting to the GATT decision against the United States' law banning the import of tuna caught with non-dolphin friendly nets); Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999) (pointing out where unilateral actions can be helpful).

9. *See generally* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999) (describing the concerns over WTO jurisdiction). *See also* Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 709 (1998) (discussing a number of "trade and . . ." issues).

10. Theofanis Christoforou, *Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty*, 8 N.Y.U. ENVTL. L.J. 622, 622 (2000). *See also* Jeffery Atik, *Science and International Regulatory Convergence*, 17 NW. J. INT'L L. & BUS. 736 (1996-97) (arguing that consistent scientific standards are needed).

the WTO's actions by accepting such rulings in practice later on. Continuing the earlier analogy to the EU, as the EU expanded into social, human rights, and environmental areas, the Member States demonstrated their acceptance of this path in two ways. First, these areas are drafted expressly into EU law in later amendments to the Treaty of Rome[11] and separate treaties.[12] Second, the Member States themselves demonstrated their acceptance through their compliance with such rulings. Member States of the EU followed rulings of the ECJ in these expanded areas and continued to respect the supremacy of ECJ law. In fact, the high courts of several Member States only fully accepted the supremacy of the ECJ *after* the ECJ had incorporated human rights into its case law.[13]

The same pattern can be found in the WTO. At this point, the use of the WTO remains high. Not only have Member States used the dispute resolution system, they have also generally complied with even unfavorable rulings. Member States of the WTO have as an agenda for discussion in various panels little concerning the subject matter of the WTO.[14] Indeed, proposed reforms to the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[15] have focused on the process thus far and not the scope of

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11. Treaty Establishing the European Economic Community, Mar. 25, 1997 *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (ESC, EEC, EAEC)—SINGLE EUROPEAN ACT—OTHER BASIC INSTRUMENTS 115, *compiled by* Commission of the European Communities (Abridged Ed. 1987) [hereinafter EUROPE].

12. For example, the Single European Act added the environment to the purview of the European Community. Single European Act, signed at Luxembourg on Feb. 17, 1986 and at The Hague on Feb. 28, 1986, *in* EUROPE, *supra* note 11, at 523. The Treaty on European Union (the Maastrict Treaty) added politics and foreign policy, among other new areas. Treaty on European Union (Treaty of Maastricht), Feb. 1, 1992, *in* Richard Corbett, THE TREATY OF MAASTRICHT 382 (1993).

13. *See, e.g.*, Internationale Handelsgesellschaft mbH v. Einfuhr-Und Vorratsstelle fur Getreide und Futtermittel (Solange I) [German Federal Constitution Court] (Case 2 BvL 52/71) May 29, 1974 [1974] 2 CMLR 540, (holding that as long as (solange) the EC did not provide for fundamental rights, the German Constitutional Court would retain the right to review ECJ decisions to see if these decisions also upheld the basic human rights provided for in the German Basic Law); Re the Application of Wunsche Handelsgesellschaft (Solange II) [German Federal Constitution Court] (Case 2 BvR 197/83), October 22, 1986 [1987] 3 CMLR 225, (holding that since the ECJ has now established a standard of fundamental rights, the German Constitutional Court will no longer review the validity of EU legislation). For an overview, see Andrew Clapham, *European Union—The Human Rights Challenge* in 1 HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW 114 (1991).

14. Trade and Environment Material on the WTO Website, *at* http://www.wto.org/english/tratop_e/envir_e/envir_e.html. (last visited Jan. 22, 2001).

15. Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, LEGAL TEXTS, *supra* note 1, at 354, *reprinted in* 33 I.L.M. 1226 [hereinafter DSU].

the case load.[16] Therefore, it is evident that this expansion into new areas has been accepted by WTO Member States.

C. Has the Expanded Case Load been Accepted by Civil Society?

This leaves the last question of whether other actors in Member States feel the same way about the WTO's expanded case load. Unfortunately, while Member States seem to have either planned or acquiesced in the WTO's handling of non-trade issues, many private actors feel quite differently. The protests in Seattle were only the quite public culmination of the concern that the WTO places trade values above other (more legitimate) values.

Regarding the private actor's concerns about the WTO, there are three issues: (1) the WTO is the wrong forum for many of these issues; (2) the WTO's whole process is opaque and difficult to understand; and (3) state actors might not adequately represent the peoples' interests. First, many argue that the trade panels of the WTO are not equipped and do not have the expertise to be able to rule on complex environmental or intellectual property issues.[17] More compellingly, critics argue that trade panels, by their very designation, place trade values above other more important social issues. While domestic governments can be expected to balance trade with other values, critics worry that an international body will have supremacy without the broader world view in mind.

Second, private actors complain that the WTO dispute resolution process is not sufficiently transparent. Briefs and other submissions to the dispute resolution process are not made public. Oral arguments are closed. Reports are leaked, but not released. The lack of information about each case makes the process more suspect. Private actors are even less likely to trust a decision made by the WTO when they have no idea how that decision was reached. Finally, private actors complain about their inability to participate in the process. While certain Member States provide indirect ways for their respective civil society to lodge complaints that may proceed to the WTO,[18] this applies to only certain

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16. *See, e.g.*, Chad Bowman, *Experts Complain WTO Dispute Settlement is Slow, Ill-Defined, and Often Unsuccessful*, 15 Int'l Trade Rep. (BNA), No. 43 at 1840 (Nov. 4, 1998); Daniel Pruzin, *North-South Stalemate Continues in Talks on Reform of WTO Dispute Process Rules*, 16 Int'l Trade Rep. (BNA), No. 40 at 1647 (Oct. 13, 1999).

17. Kevin C. Kennedy, Why Multilateralism Matters in Resolving Trade-Environment Disputes, Address at the Symposium on the World Trade Organization and the Structure of Global Governance (Oct. 6-7, 2000) *in* 7 WIDENER L. SYMP. J. 31 (2001). *See also* Albert Mumma, Address at the Symposium on the World Trade Organization and the Structure of Global Governance (Oct. 6-7, 2000) (on file with *The Widener Law Symposium Journal*).

18. Section 301 allows an individual to petition the United States government to initiate trade dispute resolutions. Under section 302 a party can petition the United States Trade Representative (USTR) to investigate a foreign government's policies or practices that are suspected to be hindering trade. *See* 19 U.S.C. § 2412. The EU also has a procedure whereby private actors can request the EU take action against those governments violating free trade agreements. *See* Council Regulation

states and still relies on a Member State to bring the complaint. The Member State could, of course, choose not to bring the complaint to the WTO.

In the end, private actors could argue that had they known about the process problems in the WTO, coupled with the expansion into non-trade areas, they would have fought harder in the drafting and ratification process of the agreement establishing the WTO. Either they could have tried to block the agreement or they could have tried to modify it to include reforms dealing with panel expertise, balancing values, transparency, and participation.

II. PROPOSALS FOR INCREASING LEGITIMACY AND DEMOCRACY

Given the critiques of the WTO system, there have been numerous suggestions for how to reform the dispute resolution process. This section outlines some of the more prominent suggestions and the status of that proposed reform.

A. Stop

Those critics most concerned with the increasing breadth of the WTO subject matter argue that the WTO should basically stop hearing those cases that deal with non-trade values. During the recent Symposium on the WTO held in October 2000, many presented arguments for why the WTO should not be hearing environmental,[19] intellectual property[20] or other types of cases that require the WTO to balance trade values with broader social values. Commentators argue that a separate World Environmental Organization is necessary or that the World Intellectual Property Organization (WIPO) should be playing more of a role in intellectual property disputes.[21]

3286/94, 1994 O.J. (L 349) 71 [on Trade Barriers Regulation] (laying down EU procedures in the field of common commercial policy). *See also* Petros C. Mavroidis & Werner Zdouc, *Legal Means to Protect Private Parties' Interests in the WTO: The Case of the EC New Trade Barriers Regulation*, 1 J. INT'L ECON. L., 407-32 (1998).

19. Richard W. Parker, The Case for Environmental Trade Sanctions, Address at the Symposium on the World Trade Organization and the Structure of Global Governance (Oct. 6-7, 2000) *in* 7 WIDENER L. SYMP. J. 21 (2001) (arguing for better WTO criteria in environmental cases). *But see* Andrew L. Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769 (1998) (arguing that the WTO has some clear advantages for adjudicating environmental issues).

20. Samuel Murumba, Address at the Symposium on the World Trade Organization and the Structure of Global Governance (Oct. 6-7, 2000) (on file with *The Widener Law Symposium Journal*); John Mugabe, Address at the Symposium on the World Trade Organization and the Structure of Global Governance (Oct. 6-7, 2000) (on file with *The Widener Law Symposium Journal*).

21. *See, e.g.*, DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 73-98 (1994) (proposing a Global Environmental Organization).

At this point, it is unlikely that the WTO will take a step back from these controversial cases. It is more likely that the Appellate Body will increasingly use language demonstrating its ability to properly balance these issues, as in the Shrimp-Turtle decision,[22] and to attempt to persuade detractors in this way. While the WTO will probably not be adding issues to its plate in the future (as in the failed talks on services negotiations),[23] there is little political will to cut back on the WTO's purview.

B. Increase Participation in Rule-Making

Another proposal is to increase the private actor's, and in particular Non-Governmental Organizations (NGOs), participation in the rule-making from the outset. As the GATT Agreement establishing the WTO is amended, interpreted, and enforced, NGOs should be part of the process. In this way, when guidelines and rules are established regarding the balancing of trade with other values, the NGOs can ensure that the rules will reflect their concerns.[24] From this perspective, if the WTO is going to be dealing with these issues, it might as well have better guidance from the outset.

On the other hand, the proponents of increased NGO involvement assume that NGOs will provide different and varying perspectives from their respective national governments, thereby ensuring that a broader set of values will be included in the WTO balancing act. However, is this in fact the case? One recent study of NGO involvement in rule-making found that the NGOs were far more likely to reflect their respective government's position, rather than form alliances with other NGOs in order to pressure governments.[25] In other words, the idea that NGOs will actually counterbalance their governments is not true and, therefore, we might conclude that the presence of NGOs really does not add anything of substance to decision-making in the WTO.

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22. Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129 (1999); Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017 (1999).

23. Gary G. Yerkey, *Launch of WTO Services Talks Next Year Could be Threatened, Industry Sources Say*, 17 Int'l Trade Rep. (BNA), No. 44 at 1698 (Nov. 9, 2000).

24. Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 709 (1998).

25. 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 HARV. ENVTL. L. REV. (forthcoming 2001).

C. Improve Transparency of the Dispute Resolution Process

The call for increased transparency of the WTO process has been sounded from its critics from the very beginning. Increased transparency leads to increased legitimacy of international organizations based on the following three ideas: publicity, precedent, and predictability.[26] First, publicity of rules and their application ensure that participants and observers will understand how the system actually operates. Second, publication of decisions provides the reasoning of the tribunal in this case and can also provide persuasive authority. Finally, creating a body of well-known case law helps create predictability in this system.

In the WTO, all three of these issues are important. While the WTO's rules are well publicized, there continues to be complaints about the lack of publicity for its decisions and arguments.[27] The current United States position regarding the DSU focuses on increasing the transparency. In the end, both Member States and the private actors within them have an interest in the predictability of the WTO system. Because the WTO is designed to encourage private actors to take actions, like investing, trading, importing, and exporting, these private actors must have faith in the law to protect them consistently.

In this reform, the WTO has already started to move.[28] Decisions are now coming down faster and proposals exist to streamline that process further. It is likely that access to oral arguments and written briefs will also expand. In this area, the WTO is moving relatively quickly to satisfy concerns over legitimacy.

D. Expanded Standing to Private Actors

Several years ago, the academic literature was filled with articles calling for expanding the standing requirements at the WTO to include private actors or NGOs.[29] The support for increased standing is based on several ideas. First,

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26. Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L. ECON. L. 587, 613-14 (1998).

27. *See, e.g.*, Daniel Pruzin, *U.S., EU Reject Compromise Proposal by Japan on Reform of WTO Dispute Rules*, 17 Int'l Trade Rep. (BNA), No. 40 at 1542 (Oct. 12, 2000); Toby J. McIntosh, *Language on WTO Transparency Disappoints: Draft Outcome Evidences Deep Divide*, 16 Int'l Trade Rep. (BNA), No. 48 at 2001 (Dec. 9, 1999).

28. Report on External Transparency (Nov. 22, 2000), *at* http://www.wto.org/wto/english/news_e/news00_e/gcexternaltrans_nov00_e.html.

29. Schneider, *supra* note 26, at 589, 609; Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L. ECON. L. 123 (1998); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 374 (1996). *But see* Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996) (arguing that NGO involvement would not work logistically); Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1998)

private actors serve as effective private attorney-generals.[30] Because private actors are more likely to bring cases when they are directly harmed than a government that must make a selection among cases, more cases for violations will be brought. Furthermore, the decision to bring a case is not colored by political needs. A government can choose not to bring a case for a number of reasons. One reason would be concern over the relations with the target of the case. For example, many believe that the EU withdrawal of the Helms-Burton case from the WTO was clearly a political rather than legal decision.

A government could also choose not to bring a case because the matter is not sufficiently important nationally. Smaller violations or violations that have impacted less powerful sectors of a nation's society may never be brought by a government. Granting private actors standing eliminates this concern with political capture.

Finally, private actors have the ability to bring a case against their own government. Without this standing, violations of international law that primarily hurt domestic interests (for example, favoring one exporting industry over an importing industry) would never be addressed.[31]

It is, however, unlikely that standing in the WTO will be expanded any time soon. The current type of standing—state standing with private actors behind the scenes—is clearly the type favored by Member States. Member States want to protect their political prerogatives to select cases.

Without direct standing, private actors have turned to other methods of participation. One of the methods, the amicus brief, has turned into the latest flash point for issues of legitimacy in the WTO dispute resolution process.

III. THE AMICUS BRIEF BATTLE

The battle over the use of amicus briefs is a signpost of many of the issues that continue to divide the WTO. First, there appears to be some divisions between developed and developing countries as to the support for amicus briefs. This section will discuss where those concerns come from and how legitimate they are. Second, the acceptance of amicus briefs by the Appellate Body, and then the political response to that acceptance, demonstrates the importance of coordination between the branches of international organizations. As we have seen and probably will continue to see with the EU, there are times where the ECJ moved faster along a path than the political will in particular Member States

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(arguing that private actors are already involved significantly).

30. *See* Weiler, *supra* note 6, at 2421 (noting the importance of citizens to the EU judicial system); P.P. Craig, *Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEG. STUD. 453 (1992) (arguing that private actors are critical to the enforcement of EU law).

31. Robert O. Keohane, et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 472-74 (2000).

was ready to go. This may well be a similar situation concerning the WTO and amicus briefs. While the law or judiciary may find that amicus briefs are appropriate, the Member States are not yet politically ready to accept such a reform.

A. The Evolution of Amicus Briefs

In 1996, two different disputes faced the possible use of amicus briefs. In the Reformulated Gas Dispute between the United States, Brazil and Venezuela,[32] several environmental groups tried to submit amicus briefs to the WTO panel. These briefs were sent back by the WTO stating that the groups' arguments should be addressed directly to the organizations' member government. Similarly, in the Beef Hormone dispute between the United States and the EU,[33] amicus briefs submitted by environmental groups were returned with the admonition that these briefs were neither welcome nor acceptable.

This practice started to changed in 1998 with the Shrimp-Turtle dispute. In this case, the governments of India, Malaysia, Pakistan and Thailand were protesting a U.S. embargo on shrimp harvested by a particular method that harmed rare sea turtles. There were two briefs filed in 1997. The first brief was filed jointly by the Center for Marine Conservation and the Center for International Environmental Law.[34] Three other NGOs also joined in the brief: the Red Nacional de Accion Ecologica from Chile, the Environmental Foundation from Sri Lanka, and the Philippine Ecological Network. This brief made the argument as to why amicus briefs should be accepted. Amicus briefs, these amici argued, will enhance public participation and improve the dispute settlement process. The brief then made the substantive argument that the U.S. regulations were appropriate. The second amicus brief also supported the U.S. law and was filed by the World Wide Fund for Nature along with the Foundation for International Environmental Law and Development.

The four Asian countries protested the amicus briefs arguing that such submissions were neither contemplated nor authorized by the WTO's DSU. The United States, on the other hand, argued that the panel should be able to seek information from any relevant source. The Panel determined that the U.S. could attach the briefs to their own submissions and that the four other countries

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32. WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/9 (Jan. 29, 1996), *at* http://www.wto.org/english/tratop_e/dispu_e/ distab_e.htm [hereinafter WTO Website].

33. WTO Panel Report on U.S. Complaint—E.C. Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R/USA (Aug. 18, 1997), *at* WTO Website, *supra* note 32.

34. WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R ¶ 3.129 (Oct. 12, 1998) [hereinafter Shrimp/Turtle], *at* WTO Website, *supra* note 32.

would have the opportunity to respond.[35] On appeal, the Appellate Body determined that, based on Article 13 of the DSU,[36] the Panel "has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not.*"[37]

The next opportunity to review amicus briefs arose in February 2000 in the Australian Salmon Case arising between Canada and Australia.[38] In it, the panel accepted briefs from two Australian fishermen outlining the approach of the Australian sanitary authorities. The panel noted that the information from the fisherman was relevant and accepted as part of the record. Just a few months later, the Appellate Body also had the opportunity to revisit the amicus brief issue. In the British Steel Case between the U.S. and the EU, two amicus briefs were filed by U.S. industry groups defending the U.S. procedures. The American Iron and Steel Institute and the Specialty Steel Industry of North America filed their briefs separate from the U.S. governmental submission. In response, the EU argued that the briefs were inadmissable because Article 13 does not apply to the Appellate Body. Instead, the Appellate Body found authority under Article 17.9 of the DSU,[39] which gives the Appellate Body broad procedural authority. While the Appellate Body noted that it had "no legal duty to accept or consider unsolicited amicus briefs," the Appellate Body also stated that it does have authority "to accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so."[40] In the end, however, the Appellate Body concluded that it was not necessary to take these two briefs into account in rendering their decision.[41]

In three more cases, the right to file amicus submissions continued to be defined. In the Music Licensing Panel between the U.S. and the EU,[42] the panel accepted a letter written by a law firm on behalf of the American Society of Composers, Authors and Publishers (ASCAP). The panel noted that it would not outright reject the information provided by the group. A WTO panel also accepted an amicus brief in a case between the EU and India regarding linen.[43]

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35. *See* Shrimp/Turtle, *supra* note 34, ¶ 78.

36. *See* DSU, *supra* note 15, art. 13.

37. Shrimp/Turtle, *supra* note 34, ¶ 108.

38. *See* WTO Panel Report on Australia—Measures Affecting Importation of Salmon, WT/DS18/R (June 12, 1998), *at* WTO Website, *supra* note 32.

39. *See* DSU, *supra* note 15, art. 17.9.

40. WTO Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (May 10, 2000), *at* WTO Website, *supra* note 32.

41. *See also* Arthur E. Appleton, *Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?*, 3 J. INT'L ECON. L. 691 (2000).

42. WTO Panel Report on United States—Section 110(5) of the U.S. Copyright Act, WT/DS160/R ¶ 6.3 (June 15, 2000), *at* WTO Website, *supra* note 32.

43. WTO Panel Report on European Communities—Antidumping Measures on Imports of Cotton-Type Bed Linen from India, WT/DS141/R (Oct. 30, 2000), *at* WTO Website, *supra* note

In the Measures Concerning Asbestos between Canada and the EU,[44] the panel received four briefs last year and forwarded all four to the parties. Interestingly, the EU adopted two of these briefs into its own submissions. The panel then accepted these two submissions and gave Canada the opportunity to respond. The panel did not take into account the other two submissions. An amicus brief filed in June 2000 was refused on the basis that the proceedings had progressed to a stage where the material was too late. The Appellate Body, now hearing the appeal from the Asbestos Case between Canada and the EU, recently outlined guidelines for submitting amicus briefs regarding the appeal, including deadlines and page limits, all in a case in which thirteen amicus briefs have been filed so far.[45]

It is now clear that both WTO panels and the Appellate Body have the right to accept amicus briefs. Furthermore, it appears that when these briefs are attached to a party's submission, the information is treated as part of the government's materials for purposes of accepting the information and having the opportunity to respond to it. On the other hand, amicus briefs need not automatically be accepted by the WTO. Moreover, while the amicus briefs have been permitted, panels and the Appellate Body have yet to actually cite them or rely on them in their holdings.

B. Protests over the use of Amicus Briefs

Many Member States of the WTO are concerned that the WTO dispute resolution process is becoming too open. These Members States object to allowing all of the various amicus filers to participate. Furthermore, members are concerned that NGOs now possess more rights than Member States.

These concerns have arisen after the occurrence of two recent events. First, the United States refused requests from other Member States, including Australia and Japan, to sit in on consultations between the U.S. and the EU regarding the U.S. "carrousel" approach to trade retaliation. (The EU contends that the carrousel approach violates the WTO.) Second, in the British Steel Case discussed above, the WTO allowed amicus briefs not attached to a Member State's filing. Moreover, these amicus briefs came from industry groups rather than the more traditional NGOs, such as environmental groups. The

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44. WTO Panel Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000), *at* WTO Website, *supra* note 32.

45. Daniel Pruzin, *WTO Appellate Body Sets Out Procedures for NGOs' Amicus Briefs in Asbestos Case*, 17 Int'l Trade Rep. (BNA), No. 45 at 1751 (Nov. 16, 2000) [hereinafter Pruzin I]. Interestingly, the WTO has also rejected at least five of the requests to submit an amicus brief filed under their new rules provoking outrage on the part of several well-known environmental groups. *See* Daniel Pruzin, *WTO Appellate Body Under Fire for Move to Accept Amicus Curiae Briefs from NGOs*, 17 Int'l Trade Rep. (BNA), No. 47 at 1805 (Nov. 30, 2000) [hereinafter Pruzin II].

combination of restrictions on Member States at the same time that private actors are being granted even more access raises red flags for many, including those countries such as Australia and the EU, who have long promoted more transparency.

The concerns come in four types: (1) new policy is being made concerning amicus briefs by WTO Panels and the members should be deciding that rather than the panels; (2) NGOs will have more rights to participate than Member States; (3) the identity of these non-members is troublesome; and (4) any move away from the state-to-state interaction in the WTO is a bad one.

The first concern deals with the actual text of the DSU. Nowhere in the text of the DSU is amicus brief actually mentioned. Article 13.1 permits the WTO panel to "seek information and technical advice" from wherever it wishes.[46] Article 13.2 further adds that panels "may consult experts to obtain their opinion."[47] The Appellate Body determined, in the *Shrimp/Turtle Case* discussed above, that panels could accept amicus briefs under this language. Critics argue that since the DSU is silent on amicus briefs, any amendment to the procedures needs to be approved in advance by the Member States.[48] Canada noted that the Appellate Body's decision in British Steel " 'highlights the importance of members deciding and clarifying, in the DSU rules, whether amicus briefs should be permitted and, if so, under what conditions.' "[49] As Japan stated, it " 'is highly regrettable if the Appellate Body repeatedly makes findings on this controversial issue without taking into consideration the numerous opposite opinions expressed by members.' "[50] More recently, the Appellate Body was criticized for outlining the rules of submission for amicus briefs regarding the Asbestos Case.[51] The chairman of the WTO's General Council, Ambassador Kare Bryn of Norway, said that he would ask the Appellate Body to proceed with extreme caution regarding the issue of amicus briefs.[52]

The second argument is that non-members are being given more rights than Member States to participate in dispute resolution proceedings. While members need to reserve third-party rights within 10 days of a panel's establishment, amicus briefs seem to have no set time limit. Furthermore, a member state cannot submit material to the Appellate Body unless the member state participated at the panel level. Amicus briefs also have no such requirements.

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46. DSU, *supra* note 15, art. 13.1.

47. *Id.* art. 13.2.

48. Daniel Pruzin, *Key WTO Members Score Appellate Body for its Decision to Accept Amicus Briefs*, 17 Int'l Trade Rep. (BNA), No. 24 at 924 (June 15, 2000).

49. *Id.*; *see also* Gary G. Yerkey, *Canadian Official Opposes Allowing NGOs to File Amicus Briefs in WTO Dispute Cases*, 15 Int'l Trade Rep. (BNA), No. 26 at 1141 (July 1, 1998).

50. Daniel Pruzin, *WTO Members Make Unfriendly Noises on Friends of the Court Dispute Briefs*, 17 Int'l Trade Rep.(BNA), No. 33 at 1283-84 (Aug. 17, 2000).

51. *See* Pruzin II, *supra* note 45, at 1805.

52. *Id.*

As India's WTO Ambassador noted, the WTO was giving more opportunities to outside organizations than to Member States. " '[A] situation is developing in which Members have to demand, in such proceedings, treatment no less favorable to the treatment being accorded the NGOs!' "[53]

Moreover, the shift in amicus filers from traditional NGOs to law firms and business groups clearly has some Member States worried.[54] It is one thing to imagine that an environmental group might participate, it is another thing to see well-funded industry groups and law firms participating in the WTO dispute resolution process.

Finally, members are concerned that the WTO is moving away from being a state-to-state organization. Countries such as Mexico and Malaysia have long opposed changing the state-to-state interactions of the WTO.[55] More recently, other Asian members have also voiced concern over losing this particular part of the WTO. After the adoption of the British Steel Case (discussed above), India stated that the amicus findings are " 'resulting in a situation where not only nongovernmental voluntary organizations but also powerful business associations . . . are able to intervene in the dispute settlement process.' "[56] India also stated, " 'We do not consider this to be a good development from the point of view of the long-term health of the dispute settlement system, which is meant to be a mechanism for resolution of disputes between members.' "[57] For these members, the advantage of the WTO is that diplomacy has more of an opportunity to work when disputes are not open to the public.

C. Precedents of Procedural Expansion

Although the WTO panels and Appellate Body have not yet made any substantive use of the amicus briefs, protesters are rightly worried that amicus briefs could be relied upon in the future. We can examine both the U.S. Supreme Court and the ECJ for precedent on how emerging court systems enact expansion of their rules. In *Marbury v. Madison,* while the U.S. Supreme Court held that the Court had no jurisdiction and could not provide a remedy for Mr. Marbury, it reached that result only by holding a federal statute (giving the Court additional jurisdiction) unconstitutional.[58] In other words, the first time that the Court overtly declared and exercised its ability to overturn federal legislation, the Court did so in a way that placated those most likely and able to criticize the decision.[59]

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53. Pruzin, *supra* note 50, at 1285. *See also*, Pruzin II, *supra* note 45, at 1805.
54. *See* Pruzin, *supra* note 50, at 1285.
55. *Id.* at 1283.
56. *Id.* at 1284.
57. *Id.*
58. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
59. As Robert McCloskey so eloquently described Marbury v. Madison, ("The decision is a

Similarly, the ECJ has on several important cases expanded the scope of EU law while holding substantively for the member state. In *van Duyn v. Home Office*, the ECJ held on the substance that the UK had the right to block Miss van Duyn's entry into the UK.[60] The UK had recently joined the EC, and the ECJ, it was speculated, wanted to make sure that the first case from the UK went in their favor. On the procedural side, however, *van Duyn* establishes the law that directives have direct effect. Similarly, the ECJ in the case of *Defrenne v. Sabena* made sure that their ruling against Sabena was not retroactive and, therefore, would not cost the government of Belgium millions of dollars.[61] At the same time, the Court established that directives have horizontal direct effect giving individuals in the future the ability to sue other private entities for violating EU law.

Arguably, the WTO could be seen as effecting the same type of procedural expansion. While the amicus briefs have not yet been important on the substance, the WTO has clearly established that they can be submitted. We could logically assume that it is only a matter of time before one of these amicus briefs is relied on by the WTO. Furthermore, the WTO's acceptance of amicus briefs has already been cited by a NAFTA panel in its acceptance of amicus briefs. The WTO's procedure expansion could have ripple affects.[62]

IV. THEORIES OF JUDICIAL DECISIONMAKING AND AMICUS BRIEFS

The battles over amicus briefs only make sense if we assume that amicus briefs *do* have influence on the judicial body. To examine whether that is in fact the case, we can look at three theories of judicial decision-making and see what each of these theories say about the impact of amicus briefs.

A. Legal Model

The legal model of judicial decision-making assumes that judges decide cases based on their understanding of the legal requirements for that set of facts.[63] In

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masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.") ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960).

60. Case 41/74, van Duyn v. Home Office, 1974 E.C.R. 1337 (establishing direct effect of directives).

61. Case 43/75, Defrenne v. Societe anonyme belge de navigation aerienne Sabena, 1976 E.C.R. 455 (recognizing horizontal direct effect [direct effect vis-à-vis private actors] from the Treaty of Rome).

62. Peter Menyasz, *NAFTA Panel Says NGOs Can Intervene in Cases Brought for Arbitration Purposes*, 18 Int'l Trade Rep. (BNA) No. 5 at 211 (Feb. 1, 2001).

63. *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U.L. REV. 251, 255-64 (1997) (explaining the history of the legal

a seminal study on the use of amicus briefs at the United States Supreme Court, Professors Joseph Kearney and Thomas Merrill note that the legal model is clearly the "official" conception of how courts operate.[64] The procedures used at the Supreme Court—the back and forth of written arguments, oral argument, and draft opinions, are all designed to ensure that the Court reaches a decision consistent with the law.

The Supreme Court's treatment of amicus briefs reflects this model. Supreme Court Rule 37.1 states,

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.[65]

As Kearney and Merrill note, the rule seems to imply that amicus briefs can influence the Court when the brief addresses the legal merits of the case and provides new information.

If we apply the legal model to the use of amicus briefs at the WTO, we would see that amicus briefs could influence the WTO. However, this influence would be appropriate given that the information provided in the amicus briefs would help decision-makers better apply the law. In other words, we might assume that the Sierra Club or the ASCAP spend more time and money researching their particular area of interest than does the U.S. government. Therefore, in a case concerning the environment or music licensing, these NGOs could provide helpful information to the WTO decision-makers.

If one believes in the legal model of judicial decision-making, amicus briefs are an appropriate and legitimate way of assisting the court in reaching the correct decision.[66] The support of the United States for the use of amicus briefs at the WTO seems to support this conclusion. The United States has argued that amicus briefs will increase the participation in and the transparency of the WTO

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model); Nathan Hakman, *Lobbying the Supreme Court—An Appraisal of "Political Science Folklore,"* 35 FORDHAM L. REV. 15, 47-50 (1967) (defending the legal model as appropriate for the study of amicus briefs).

64. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PENN. L. REV. 743, 776 (2000).

65. Sup. Ct. R. 37.1.

66. *See generally* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (calling for greater acceptance of amicus briefs on behalf of NGOs in international courts).

dispute resolution system.[67] In the end, the United States argues, that the use of amicus briefs will increase the legitimacy of the WTO.

B. The Attitudinal Model

Political scientists, however, have long attacked the legal model as a poor explanatory tool for the outcome of cases.[68] Instead, political scientists have overwhelmingly adopted the attitudinal model for studying the Supreme Court.[69] The attitudinal model argues that judges decide cases based on their political preferences. The model assumes that judges have liberal to conservative tendencies, fixed by the time they are appointed to the Court, and then apply those tendencies to facts in cases as they arise.[70]

Under the attitudinal model, amicus briefs should have minimal impact.[71] Since judges' preferences are already fixed, information from the amicus briefs would rarely impact the judge who would already have applied his political beliefs to the set of facts.

The interesting thing in the WTO battle over the amicus briefs is that no one has been arguing that amicus briefs are irrelevant. Perhaps these voices are silent. After all, if one does not think that amicus briefs matter, one is unlikely to engage in the battle. Clearly, the loudest voices in the amicus brief battle including the WTO, do not implicitly adhere to this particular theory.

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67. U.S. Ambassador to the WTO, Rita Hayes, stated after the British Steel Case when the Appellate Body outlined its right to receive amicus briefs that the Appellate Body, (" 'has taken a positive step in the direction of making the WTO a more open organization and enhancing public confidence in the WTO dispute settlement process.' ") Pruzin, *supra* note 48, at 924. The U.S. has also defended the Appellate Body's guidelines in the Asbestos Case to the General Council, but was only joined by New Zealand and Switzerland. *See* Pruzin II, *supra* note 45, at 1806.

68. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 62-65 (1993) (attacking the legal model as meaningless).

69. *See* Cross, *supra* note 63, at 252 n.4; Melinda Gann Hall & Paul Brace, *Justices' Responses to Case Facts: An Interactive Model*, 24 AM. POL. Q. 237, 237-38 (1996). ("Without question, the attitudinal model has dominated the study of judicial choice and stands unchallenged as the best representation of voting on the merits in the nation's highest court.") *Id.*

70. SEGAL & SPAETH, *supra* note 68, at 65; SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992 109 (1995); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561-63 (1989). *But see* Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235 (1999) (disagreeing with the attitudinal model); J. Randolph Block, *Book Review*, 1980 AM. B. FOUND. RES. J. 617, 624 (reviewing HAROLD J. SPAETH, SUPREME COURT POLICY MAKING: EVALUATION AND PREDICTION (1979) (calling the attitudinal model an intellectual toy)).

71. As Segal and Spaeth note, ("[I]nterest groups have little tangible to offer the justices, apart from some information—occasionally not otherwise available—that may marginally ease their reaching a decision.") SEGAL & SPAETH, *supra* note 68, at 241.

C. The Interest Group Model

A third potential model to explain the use of amicus briefs is the interest group model.[72] Under this model, interest groups use amicus briefs to lobby the court in the same way they would lobby the legislature.[73] Judges decide cases based on what they perceive as the popular will, which is reflected by what these interest groups convey to the court. This theory, which is similar to the public choice theory used by some legal scholars to explain legislative choices, is now being applied to judicial choices as well.[74]

This model contrasts sharply with the two previous models. Judges neither decide cases based on the legal requirements nor on their policy preferences. Instead, they decide cases in order to satisfy the interest group's political demands. Judges do not have fixed political or ideological preferences other than to gain approval from the respective group.

The interest group model of judging is similar to the interest group model of legislative behavior.[75] In both, the desire to make interest groups happy comes from the goal of maximizing personal benefit. While legislators focus on reelection, judges too could focus on personal benefits to be gained by ruling one way or another. Lower level judges might be concerned with reappointment or even their career after stepping down. Even the prestigious life-appointed Supreme Court Justices could worry about their reputation. As Kearney & Merrill posit, "This concern with enhancing their reputation, the self-interest argument suggests, drives the Justices to adopt the preferred positions of the most influential interest groups, because these groups have the capacity to affect the Justice's reputation with key audiences."[76] Supreme Court Justices could also be concerned with the reputation of the Court as a whole and could, therefore, want to ensure that the Court is generally following public opinion in order to ensure public respect and deference.

Under the interest group model, the potential influence of amicus briefs is great. Because judges want to know what the public thinks, and particularly what

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72. *See* NEAL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 53-97, 123-50 (1994) (arguing that the interest group theory of politics should also be applied to the judiciary); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-48 (1991).

73. ("[A]mici's view of their own efforts is akin to that of groups lobbying before Congress.") Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823, 829 (1999).

74. Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259, 278-79 (1999); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 220 (1997).

75. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991). For more general information on public choice theory, see Symposium, *Theory of Public Choice*, 74 VA. L. REV. 167-518 (1988).

76. Kearney & Merrill, *supra* note 64, at 784.

influential groups think, the amicus briefs provide a bellwether of that opinion. Furthermore, the identity of the amicus brief filer and the number of briefs filed would have far more weight with judges than any legal argument actually put forth in the brief. In other words, while under the legal model, amicus briefs might provide helpful legal arguments or information; under the interest group model, the most helpful information in the brief is who filed it.

If one believes in the interest group model, one could be legitimately suspicious of amicus briefs.[77] Amicus briefs would unduly persuade the court in an inappropriate manner, not at all based on law. This suspicion of amicus briefs does seem to be the basis of the arguments put forth by countries in the WTO that do not want amicus briefs admitted. If decision-makers in the WTO become concerned about public opinion, as demonstrated through NGO briefs, then decision-makers might allow these groups more or equal influence than the states actually participating in the dispute. India, among other countries, argues that in a process that should be limited to states, permitting amicus briefs inappropriately shifts the balance of power between states and civil society. Furthermore, because many of the NGOs who have the resources to file amicus briefs will be from developed countries, developing countries worry that these NGOs will be engaging in a different type of "ecoimperialism." It is bad enough, a developing country might argue, that it has to defend itself against developed countries without permitting additional, and perhaps persuasive, parties to also join the fight.

V. LESSONS FROM THE SUPREME COURT

A. Empirical Results on the Legal Models

Kearney and Merrill studied all of the argued merits decisions from the 1946 Term through the 1995 Term of the Supreme Court and examined the impact of amicus briefs on the Court.[78] They found a number of interesting patterns, some of which we can translate into the WTO. Amicus briefs supporting respondents were more successful than briefs supporting petitioners. Small disparities of one or two briefs for one side with none for the other may impact the success of that side but larger disparities do not appear to have an impact. Amicus briefs cited by the Court are not any more likely to be on the winning side than briefs not cited. Amicus briefs filed by experienced lawyers appear to be more successful than those filed by inexperienced lawyers. Finally, institutional litigants,

77. *See, e.g.*, Jaffe v. Redmond, 518 U.S. 1, 35-36 (1996) (Scalia, J., dissenting) (noting that all of the 14 amicus briefs filed with the court support a psychotherapist's privilege in federal court). ("Not a single *amicus* brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts.") *Id.*

78. *See* Kearney & Merrill, *supra* note 64, at 751-61.

particularly the Solicitor-General, have had greater success when filing amicus briefs than non-institutional litigants.

Kearney and Merrill interpret their results to support the legal model of judicial decisionmaking for several reasons. First, because amicus briefs do appear to influence the Court over time and in a variety of contexts, the attitudinal model does not apply. Second, large disparities in the numbers of amicus briefs filed on one side are not linked to that side's success. This thus counters the interest group model assumption that brief counting should be able to predict outcomes. Finally, it appears that briefs that do provide new information or good legal arguments successfully influence the Court. Institutional litigants and experienced lawyers are exactly the type of filers who know what type of information is most helpful to the court and are more successful than other types of filers. Moreover, Kearney and Merrill argue,

> [t]he greater success associated with amicus briefs supporting respondents can be explained by the supposition that respondents are more likely than petitioners to be represented by inexperienced lawyers in the Supreme Court and hence are more likely to benefit from supporting amcici, which can supply the Court with additional legal arguments and facts overlooked by the respondents' lawyers.[79]

B. Translations to the WTO

There are two questions from this study that have implications for the WTO: (1) how can this translate to the WTO? And (2) can findings from the U.S. Supreme Court be translated into the WTO? If the legal model is the correct model for judicial decision-making everywhere, then NGOs will gain influence over time through the filing of amicus briefs. Those NGOs that become repeat players, gain or hire experienced lawyers and begin to institutionalize themselves into the WTO process should see increased success under the legal model. For example, if the Sierra Club becomes like the AFL-CIO in front of the Supreme Court, it should have a higher success rate than other types of amicus filers. Furthermore, if powerful NGOs come to the aid of less experienced states in front of the WTO, we would expect to see that those NGOs could be helpful.

Those in favor of the legal model argue that reliance on amicus briefs is appropriate. They would argue that the amicus brief is providing helpful information and even corrects an imbalance of power. As a result, the WTO panels and Appellate Body would better apply the law, and the process of dispute resolution is more democratic and more legitimate.

Detractors of amicus briefs at the WTO, on the other hand, do have reason to be concerned. The idea of repeat non-state actors at the WTO being able to influence the outcome of cases is abhorrent to those states who want to protect state prerogatives in international organizations.

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79. Kearney & Merrill, *supra* note 64, at 750.

C. Differences between the Supreme Court and the WTO

The second question may be even more important. It is unclear that the findings at the Supreme Court would translate to the WTO. Although the Appellate Body is appointed for a set term, WTO panels are appointed ad hoc, and neither set of jurists have life tenure. Moreover, Supreme Court Justices have no other employ and are less likely to worry about their career after the Court. Panel members in the WTO are often practicing attorneys, government officials, and others who have ongoing lives outside the WTO. Political scientists could argue that the pressure to be re-appointed and other personal goals may outweigh a strict adherence to the law. These jurists would be more likely to operate under an interest group model. Furthermore, one could argue, jurists in the WTO are basically writing on a clean slate compared to the 200 years of rulings from the Supreme Court. With more room for interpretation, WTO jurists might understandably look to interest groups for clarification. Finally, given the desire to build the respect and reputation of the WTO as a new institution versus the large stature that the Supreme Court already maintains, the WTO decision-makers would arguably be far more deferential to interest groups than the Supreme Court.

If the attitudinal model is the one to apply to the WTO (or even just the panels[80]), the influence of amicus briefs becomes far more problematic. Instead of legitimately helping the WTO to correctly apply the law, interest groups possess undue influence solely based on their identity and resources. Amicus filers could begin to outweigh states in their importance in cases. If states perceive that well-funded groups from developed countries have more influence than developing countries, the WTO will be undermined as a fair and legitimate process.

Another point of analysis for a future article is to use these judicial models to analyze the role of third party states in disputes. While the rights of amicus briefs are still being debated, it is clear that third party states have the right to intervene in WTO disputes. Some of the lessons from the Supreme Court study could also apply to third parties, particularly in terms of experienced lawyers and repeat players. One could imagine a situation in several years where the U.S. had a history of intervening in cases and becoming quite influential at the expense of smaller states who appear less often before the WTO.

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80. The legal service of the WTO provides basically the same support and legal advice at both stages of dispute resolution and, therefore, one might argue the difference between the Appellate Body and the Panels is minimal.

VI. CONCLUSION

There are a number of points to draw from the amicus brief battle. First, in the eyes of NGOs, it clearly makes sense to continue to push for the acceptance and use of amicus briefs. Whether one believes in the legal model or the interest group model of judicial decision-making, amicus briefs can influence those decisions. At the same time, Member States of the WTO who are suspicious about the increased involvement of NGOs at the WTO are also correct to worry about the impact of these briefs.

Second, the question of which model applies to the WTO remains an open one, ripe for further analysis. Given the expertise within the legal service of the WTO and the detailed intricacy of trade agreements, one could clearly argue that the legal model is the most appropriate. Decisions are made by applying the treaties to the particular set of facts at hand. If this model is the correct one, then amicus briefs are appropriate and legitimate ways of democratizing the WTO dispute resolution process and ensuring better decisions for all parties.

On the other hand, WTO panelists and Appellate Body members could be concerned with the overall view of the WTO, with their own careers in and out of the WTO, and other personal concerns resulting in an interest group model. Under this model, amicus briefs are insidious. They inappropriately persuade decision-makers to base their rulings on factors other than the treaty law. Amicus briefs take power away from the Member States and the rules members have agreed upon and, instead, shift this power to well-funded NGOs with narrow interests.

The third model discussed in the article, the attitudinal model, would argue that amicus briefs are irrelevant. If, in fact, the WTO operates along this model, and panelists have already determined opinions on trade law, then the entire battle about amicus briefs is energy wasted. According to the attitudinal model, we should be spending this energy on screening panelists themselves.

Finally, the amicus brief battle can be used as a lens to examine the ongoing stresses in the WTO as the organization evolves. Broader issues over the role of the judiciary, the evolution of jurisdiction, and the role of civil society are all brought to the surface in this particular dilemma. How the WTO resolves these and how the Member States respond gives us insight into the growth and future of the WTO.