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The Role of Private Parties in WTO Dispute Settlement Proceedings – The Recognition of *Amicus Curiae*

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Introduction

- **The principle: an intergovernmental dispute settlement system**
- **The pivotal role of private parties in the system**
- **The gradual recognition of *amicus curiae***
- **Recommendations regarding the filing of amicus curiae briefs**



The principle: an intergovernmental dispute settlement system

- **A system for the settlement of disputes between WTO Members administered by Members**

“Only members who are parties to a dispute, or who have notified their interest in becoming third parties in such dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by a Panel” Appellate Body – US - Shrimps



The principle: an intergovernmental dispute settlement system

- No reference to *amicus curiae* (“friends of the court”) in the DSU
- Briefs by non-governmental entities initially denied in WTO disputes -- in line with the GATT practice
- Exception, briefs included as part of one of the parties’ submission



The pivotal role of private parties in the initiation of disputes

- **Through institutional procedures**
 - US – Section 301 of the Trade Act of 1971
 - EU – Trade Barriers Regulation
- **Ad-hoc initiations at the request of industries / companies**
- **Support offered by private parties to governments in dispute settlement proceedings**



The gradual recognition of the right to accept *amicus curiae* briefs

- Panels enjoy a wide discretion to seek information and technical advice

“This is a grant of discretionary authority: a panel is not duty bound to seek information in each and every case or to consult particular experts”

“Just as a panel has the authority to determine how to seek expert advice, so also does a panel have discretion to determine whether to seek information or expert advice at all”

Appellate Body – Argentina-Footwear



The gradual recognition of the right to accept *amicus curiae* briefs

- Panels may accept unsolicited information

“We do not believe that the word “seek” must necessarily be read, as apparently the Panel read it, in a too literal manner”

“If, in the exercise of its sound discretion in a particular case, a panel concludes inter alia that it could do so without “unduly delaying the panel process”, it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate” Appellate Body – US - Shrimps



The gradual recognition of the right to accept *amicus curiae* briefs

- **The Appellate Body may also accept unsolicited briefs**

“We are of the opinion that we have the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so” BUT

“Individuals and organizations, which are not Members of the WTO have no legal right to make submissions or be heard by the Appellate Body” Appellate Body – US – Lead and Bismuth II



The gradual recognition of the right to accept *amicus curiae* briefs

- Members may also submit *amicus curiae* briefs

“we have the authority to receive and amicus curiae brief from a private individual or and organization, a fortiori we are entitled to accept such a brief from a WTO Member provided that there is no prohibition on doing so in the DSU. We find no such prohibition” however

“acceptance of any amicus curiae brief is a matter of discretion, which we must exercise on a cases-by case basis”

Appellate Body – EC - Sardines



The gradual recognition of the right to accept *amicus curiae* briefs

- The adoption of a procedure for the admission of *amicus curiae* in EC - Asbestos
 - Application for leave to file
 - Review of the applications by the Appellate Body
 - Deadline for the filing of *amicus* briefs
 - Requirements regarding the form and content of *amicus curiae* briefs



Functions of *amicus curiae* briefs

- Legal analysis / interpretation of provisions considered in a disputes
- Factual support -- at the panel stage
- Contextual information



Recommendations to private parties interested in filing *amicus curiae* briefs

- Address dispute claims so as to assist the panel/Appellate Body with the “fair, prompt and effective resolution of trade disputes”
- Liaise with parties to the dispute
- File *amicus curiae* in a timely manner -- no later than the deadline for the filing of third party submissions



Thank You

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