MEMBERSHIP AND ITS PRIVELEGES: THE WTO, CIVIL SOCIETY, AND THE AMICUS BRIEF CONTROVERSY

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<u>OUTLINE/INCOMPLETE DRAFT</u>

Introduction

Among international organizations, the WTO is rightly regarded as among the most closed to stakeholder participation in its activities. What Keohane and Nye have identified as the "Club" approach to multilateral trade negotiations reflects an essentially hostile attitude of the official guardians of the regime to direct stakeholder involvement of any kind. In the case of the WTO, this hostility is so extreme that it extends beyond civil society, or non-governmental actors, and includes other intergovernmental international organizations, which are often prohibited even from participating as *observers* in WTO proceedings that concern their mandate. The situation has reached new heights of absurdity with the Doha agenda—while one item on this agenda is the relationship between multilateral environmental regimes and the WTO, the relevant intergovernmental environmental organizations haven't managed to obtain access to the discussions of their own treaties at the WTO Committee on Trade and Environment!

At the WTO Ministerials, a practice has developed of providing NGOs that make an application to the WTO and meet certain criteria (not very clearly articulated) a kind of "accreditation". This accreditation earns these NGOs the dubious privilege of attending several "plenary sessions" where delegations read set speeches, repeating generalities about their negotiating positions that could less tediously be gleaned from a regular reading of the *Financial Times*. Similarly, the WTO has organized several symposia for civil society actors in Geneva—a commendable innovation, but one that has

not brought civil society any closer to routine, systematic participation in the real workings of the WTO.

One exception to the exclusion of NGOs from formal participatory roles in the WTO relates to the dispute settlement process. The Appellate Body of the WTO has held that both panels (the tribunals of first instance in WTO dispute settlement) and the AB itself have the discretion to accept *amicus curiae* briefs from non-governmental actors. a*micus curiae* briefs hardly constitute a major role for NGOs as such. But because this is the first step towards formal and direct participation for NGOs in the *real* workings of the WTO, the a*micus curiae* development is well worth studying: the hostility of the WTO "club" members (as represented most obviously by the delegates of governments in Geneva) to the decision would in many respects be puzzling, but for the possibility that with the Appellate Body ruling a formal line has been crossed, beyond which the stability and exclusivity of club privileges will be subject to repeated challenge and question.

In this paper I will examine the legal basis of the decision of the AB to admit amicus briefs (Part I) including the objections to that legal basis from the "Club", consider the move by the AB in *Asbestos* to try and address the controversy by formalizing the *amicus* process in that case and the resultant further backlash from the "Club" (Part II), and finally draw some broader implications and conclusions from the resulting impasse between the "Club" and the Appellate Body (Part III).

The Appellate Body Acceptance of a Role for NGOs: The Legal Basis i

In the *Turtles* case, the Appellate Body reversed a finding of the panel below that it did not have the authority to accept *amicus* submissions from non-governmental entities. The panel had considered that, since it had a right to "seek" information from any person pursuant to Art. 13 of the WTO Dispute Settlement Understanding (DSU), it was thereby prohibited from considering non-requested information. The AB held that the reading of the word "seek" as a prohibition of this kind ignored the context, which was a very broad grant of fact finding authority to the panel, in order that the panel may discharge its Art. 11 obligation to make an "objective assessment of the facts."(paras. 107, 108). As well, the AB noted the semantic difficulties that would arise, were the term "seek" to be interpreted in the manner suggested by the panel. Since the panel is only legally *required* to consider information submitted by parties and third parties, the consideration of information from any other source entails a positive decision on the part of the panel to so exercise its discretionary authority, i.e., arguably to *seek* the information.

In light of some commentary on the decision, it is important to note that the AB did *not* base the authority to accept *amicus* briefs on the right to "seek" information from any individual or body in Art. 13—it reversed an interpretation of the panel that the word "seek" in Art. 13 implies a *prohibition* on the acceptance of such briefs.[ii] Instead, the AB held that the breadth of Arts. 12 (which allows a panel to create its own procedures, deviating from the default procedures in Annex 3 of the DSU) and Art. 13, enable in particular ways the panel to discharge its DSU Art. XI duty "to make an objective assessment of the matter before it, including an *objective assessment of the facts of the case and conformity with the relevant covered agreements* . . ."(para. 106 emphasis

added by AB). In other words, subject to any explicitly limiting or prohibitive provisions in the DSU, the real scope of the panel's authority is defined by what is "indispensably necessary" to perform its functions under Art. XI. This is good sense, for—even taken together with the working procedures in Annex 3—the provisions of the DSU hardly amount to a comprehensive *code* of civil procedure or evidence.[iii]

It is by appreciating the exact nature of the ruling in *Turtles* concerning the powers of *panels* to consider unsolicited *amicus* submissions, that we can understand its approach to the AB's own authority to consider such submissions. In *Turtles,* in preliminary rulings not reproduced in full in the AB final report, the AB accepted at least one *amicus* submission that was made directly to the Appellate Body, and not attached to a Member's submissions. Three other submissions were accepted as attachments to the US brief—the appellees had challenged the right of the US to attach material that was not an integral part of its brief. The AB admitted these submissions with the caveat that "considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main US appellant's submission."(para. 91)

According to Dr. Appleton, the fact that the AB, in *Turtles,* did not give any basis for accepting the brief unattached to any Member's submission, suggests that it somehow retreated, given the challenge to its authority by the appellees, from its preliminary ruling accepting the unsolicited brief. Dr. Appleton opines: "Other than Article 16.1 of the Working Procedures, there would not appear to be a legal basis in either the Working Procedures or the DSU that would support the direct acceptance of such submissions. Unlike Panels which are specifically granted the power to 'seek' information. In fact, its

authority would seem to be constrained by DSU Article 17.6 which limit it, perhaps unrealistically, 'to issues covered in the panel report and legal interpretations developed by the panel."[iv]

More recently, in the *Carbon Steel* case, the AB affirmed explicitly its authority to consider unsolicited *amicus* briefs, thus seemingly disproving Dr. Appleton's theory of a retreat. The AB held: "[i]n considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in the appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs. However, Article 17.9 of the DSU provides[that working procedures are to be drawn up by the Appellate Body]. This provision makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements [footnote omitted]."(para. 39) In the footnote, the AB referred to 16(1) of the *Working Procedures,* which allow a division to develop an appropriate procedure where a procedural question is not covered by existing rules of procedure. I cannot see any flaw in this reasoning. However, it is useful to respond to a number of objections.

One kind of objection is there is no explicit grant of discretion in the text of the DSU that would allow the AB to accept amicus briefs. If it were true that the AB could do nothing for which it did not have an explicit authorization in the DSU, then it would be paralyzed in the exercise of normal functions of appellate review—the DSU does not even provide explicitly the AB with the power to hear the states parties to the dispute

(although it does set out Third Party rights, that is intervenor rights of states Members of the WTO to intervene in an appellate proceeding). A second objection—actually argued by the EU in this case in opposing the AB's authority to accept *amicus* submissions—is that since in the case of panels, the authority to receive *amicus* briefs is grounded in an explicit right to seek information from any individual or body, this is the kind of authority that would have been granted explicitly by the DSU, if the AB were supposed to have it. This objection reposes in a misreading of the decision in *Turtles* with respect to the source of the panel's authority to consider *amicus* submissions—as we have noted above, while correcting the panel's view that Art. 13 did not prohibit a panel from considering unsolicited information, the AB found the authority to accept such information to be based on Arts. 12 and 13 of the DSU taken together, and read in light of the panel's duty to make an objective assessment of the matter, and the scope of authority implicit in that duty. This disposes of a further, and very closely related objection raised by the EU in *Steel* and adumbrated in Dr. Appleton's interpretation of *Turtles:* the panel's authority to receive *amicus* submissions reposes on its authority with respect to fact finding; the AB is prohibited from fact finding, therefore it cannot possibly have the authority to accept *amicus* briefs. The first premise of this pseudo-syllogism is incorrect, because the AB stated the scope of the authority of the panel in terms of *both* aspects of making an objective assessment of the matter—the duty to make an objective assessment of the facts *and* the applicability and conformity with the relevant agreements. Indeed, it would seem that the AB wanted to forestall the mistake in the first premise of the Appleton syllogism, for in the relevant passage, as cited above, the AB actually put both aspects of the duty of objective assessment of the matter—fact and law—in italics. As for the second premise

of Dr. Appleton's syllogism, we have disposed of it at length in the previous section of the paper on the fact/law distinction.

A different objection, also made by the EU, is that the *discretion* to receive *amicus* submissions is inconsistent with the limitation of participatory *rights* to parties and third parties (i.e., to WTO Members). At one level, this objection is a non-sequitur. It in no way follows that because x does not have a right to something, I do not have the authority to grant x that thing. At another level, much more sophisticated, the claim is that acceptance of unsolicited information by non-WTO Members is systemically incompatible with a mechanism that limits rights of participation to parties and third parties. Expressed in these latter terms this objection is a serious one; for even if the AB has discretion or authority not limited to what is explicitly set out in the DSU, it is obvious that the AB is still bound to exercise any such discretion or authority reasonably and in a manner consistent with the objectives of dispute settlement in the WTO.

In the *S. 301* case (no aspect of which did the EU chose to appeal), the panel made the important observation that, even if the WTO system does not provide direct rights to non-Members but only to Member states, the fact that the rights and obligations in the WTO treaties, in many instances, affect the interests of non-state actors, may still be relevant to the interpretation of those rights and obligations: "the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals. However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. . . The very first preamble to the WTO Agreement states that Members recognize 'that their relations in the field of trade and economic endeavor should be conducted with a view to raising

standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services.'"(paras 7.73-7.75). Given the context of the *301* case, the panel necessarily focused on the indirect protection of the rights of traders afforded by the system, but many other interests of individuals are protected as well—for example, by the exceptions in Art. XX that permit otherwise GATT-inconsistent action that is necessary to protect various environmental or health interests of citizens.

Indirect access to dispute settlement proceedings through *amicus* submissions recognizes these realities, without thereby changing the nature of the system as one that grants or recognizes rights only among states parties to the treaties.

It should also be borne in mind that, while one basic purpose of dispute settlement is to settle disputes to the satisfaction of parties and perhaps of third parties with legal interests in the particular dispute, the DSU confers on the dispute settlement organs the broader role of clarifying the law (DSU 3.2). The dispute settlement organs, including the AB, must take into account both the objective of satisfactory settlement of disputes *inter partes* and the objective of clarification of the law. One might dare say that this latter objective is of particular importance in appellate review. Parties to a dispute may have many strategic reasons for making legal arguments in a particular way or avoiding other legal arguments altogether—complete party control over the scope of appellate legal interpretation may not serve the interests of clarification of the law. One response has been for the AB to take a very broad view of who may be a party or third party to a proceeding (see *Bananas*). Another response, articulated in *Hormones,* has been to balance party control of the legal claims to be considered by panels, and ultimately the

AB, with the ability to consider legal *arguments* other than those raised by the parties (*Hormones,* para. 156). Likewise, the discretion to accept *amicus* briefs is related to the AB's broader institutional role in clarifying the law.[v]

This does not exhaust the range of legal sources that suggest the appropriateness of an implicit authority to accept unsolicited *amicus* submissions. Art. 17.3 requires that AB Members "stay abreast" of dispute settlement activities of the WTO. The writings of leading publicists is a source of international law, recognized in the ICJ Statute as such, and potentially to be drawn upon in WTO dispute settlement.[vi] Appellate Body members have on at least one occasion been addressed by an independent academic on general legal issues (not albeit on a specific case under judicial consideration), according to some sources. They can be presumed to read law review articles, and perhaps in some cases draft manuscripts by publicists. And, of course, they are also briefed by their clerks. In all these respects, AB members receive advice about the law that is not controlled by the parties, or third parties to the proceeding, and of which parties and third parties may not even be aware.[vii] The sources of information and advice may be broadened out by unsolicited briefs, and indeed *amicus* submissions may counter the danger that a court develops unconscious biases and blinkers with respect to who its reads, or seeks its legal ideas from.[viii]

Another source of law (as provided in the ICJ statute) is judicial decisions. At the international level this includes not only the ICJ but also tribunals established to deal with specific kinds of disputes as well as the ECJ, the European Court of Human Rights, and the Inter-American Court of Human Rights. "Governments and tribunals refer to such decisions as persuasive evidence of law."[ix] Moreover, the decisions of municipal courts

and tribunals may also be relevant: "[d]ecisions of the United States Supreme Court have been relied on by arbitral bodies and have been cited by states in support of their claims."[x] These sources of law support the AB's interpretation of its scope of authority under the DSU. The European Court of Human Rights, pursuant to Article 55 of the European Convention on Human Rights, which, like 17.9 of the DSU, empowers the court to make its own rules and determine its own procedure, has permitted by its own rules the granting of an invitation or leave to "any person concerned" to "submit written comments within a time-limit and on issues which he shall specify."(Revised Rule 37.1) Even prior to these rules, the Court had exercised on occasion its general discretion to accept such submissions.[xi] This, even though only Contracting States and the Commission could be Parties to such proceedings. In the case of the Inter-American Court of Human Rights, the Court has apparently received, and indeed formally noted receipt of *amicus* submissions in numerous cases, while the Convention, the Statute of the Court and its Rules of Procedure are all apparently silent on the matter.[xii] The Inter-American court practice may be of particular significance, since one of the frequently objections to accepting amicus briefs is that this practice reflects a common law bias or common law imperialism, is contrary to the legal culture of civilian and especially developing country Members. The amicus practice of the Inter-American Court was, to the contrary, developed by a bench that is entirely composed of judges from civilian jurisdictions, with Latin legal cultures, which are essentially all developing countries.

Yet another objection raised by the EU in the *Carbon Steel* case is that the DSU provides for confidentiality of AB proceedings, and that this is somehow incompatible with discretionary acceptance of *amicus* submissions. Confidentiality as a general rule of

course differs from normal judicial process in liberal democracies throughout the world. The irony in the EU's objection is that the confidentiality constraint suggests that where the DSU wishes to place restrictions on the AB's authority that are inconsistent with normal judicial practice, it does so explicitly. But, in any case, there is no logical or structural incompatibility with the acceptance of written briefs from *amici* and confidential proceedings.

Finally, because of the ad hoc manner in which the AB decided in *Turtles* and *Carbon Steel* it had the discretion to accept amicus briefs, there was a legitimate concern about transparency and due process. The time frame for appellate review is extremely short; the AB has normally 60-90 days from the filing of the appeal to render its decision. Given this timetable, one can understand that parties would worry that, unless properly structured by procedures, the discretion to accept amicus briefs could undermine due process. At a minimum, due process would seem to require a guarantee that the parties and third parties have adequate time to respond to any such brief that the AB decides to accept. Further, unless the nature of the entity responsible for the amicus submission is transparent, there is a risk of a serious abuse of due process—parties and third parties should not be able to use purportedly independent organizations over which they have influence through funding or other means to advance arguments that they are not prepared to make directly.

In its initial rulings on amicus in *Turtles* and *Carbon Steel*, the AB did not address such issues. One should not be too critical of the AB in that regard, since courts often develop practices such as this in a case-by-case manner, in response to concerns that are raised by the parties in each particular case. However, the legitimacy of the amicus

practice would, in the long run, necessarily depend upon the development of satisfactory safeguards for due process.

The Asbestos Fiasco

In the *Asbestos* case, Canada challenged a French ban on the sale and use of asbestos, whether domestic and imported, based on the established grave health effects of exposure to asbestos fibres. Clearly this was a case that raised basic issues concerning the relationship between WTO rules for trade liberalization and the protection of human life and health; the broad public interest in this case was thus obvious from the start. The panel, while finding the French ban to be a justified exception to WTO rules, nevertheless had ruled that there was a prima facie violation of the GATT, based on the notion that imports of asbestos were "like" products to legal substitutes available in France, and thus that the ban represented discrimination against the Canadian imports, i.e. a violation of the GATT National Treatment obligation. The jurisprudential basis for such a finding is a story for another paper, but it is fairly obvious that, from the ethical perspective of protection of human life and health, the suggestion that products proven to have killed thousands of victims are "like" those with no such track record is outrageous. It was thus obvious as well that this was a case where the Appellate Body could expect to receive a number of amicus submissions from non-governmental organizations concerned with health and environmental issues.

Here the AB took the opportunity to address the due process issues left often by its rulings in *Turtles* and *Asbestos*. It set out a Special Procedure according to which entities would apply for leave to submit a brief to the Appellate Body. This Procedure set

out a strict time frame both for submission of the application, as well as for submission of a brief itself, in the circumstance where the AB decided to grant leave.

According to the Special Procedure an application must, *inter alia*, disclose the nature of the entity applying for leave, its interest in the case, and whether it is being financed or supported by the parties. Also, the applicant would have to explain, briefly, how its submission would help the AB decide the case, going beyond the arguments the parties themselves could be expected to make.

All of this was very sensible as a way of addressing the due process and transparency issues surrounding the acceptance of amicus briefs. In addition, by pre-screening, as it were, the AB was acting to address a related fear—that, if there was discretion to accept amicus briefs, the system would be overwhelmed by submissions, thereby taxing the already limited resources for dispute settlement. This fear was largely a product of ignorance of amicus practice before other courts and how it evolved—in practice courts, whether municipal or international, end up accepting only a few briefs, with most submissions rejected on grounds of lack of relevance. It also was based upon a rather bizarre assumption that WTO dispute cases routinely deal with the kinds of issues that engage large numbers of stakeholders. However, a formal screening process makes clear what many in the trade "Club" did not understand or pretended not to understand—that the amicus practice developed by the Appellate Body in *Turtles* and *Carbon Steel* does not create a right to have a brief considered but merely represents a discretion of the judiciary to accept such briefs as may be helpful in deciding the case.

Far from assuaging due process and related concerns, however, the Special Procedure in *Asbestos* provoked the most virulent backlash yet seen against the WTO.

Delegations from many countries lashed out against the AB, in public and private, for pre-empting the rights of the Membership itself to establish procedures for dispute settlement, for compromising the nature of the WTO as a "Member-driven" organization, and for pandering to developed-country NGOs. It is in this context that the AB decided to reject all of the applications for leave submitted to it. The applicants were sent a form letter stating that they had not complied sufficiently with the formal requirements for an application for leave.

This was very clumsily handled—for me at least, it was an insult to be told that I couldn't follow a set of simple instructions; but I assume that this was not the fault of the judges but of some inept junior law clerk , who was unable to find the words that were appropriate, namely a simple statement that based on the application the AB did not believe that the brief would be of assistance in deciding the appeal. Indeed, I cannot say whether any of the briefs, including my own, would have really been necessary for the Appellate Body to provide an adequate resolution of the appeal. Did any of us have legal arguments or insights into the relationship between law and policy that the AB could not glean from the Parties' submissions or from its own wide reading in WTO scholarship? But Petros Mavroidis[1] has a point that the AB had good institutional reasons in this case for accepting at least one of the briefs; by doing otherwise, it appeared to be caving to political pressure, thereby risking the appearance of judicial independence, and making effective an attack on its institutional legitimacy.

III. After *Asbestos*

The situation after *Asbestos* can best be characterized as a kind of stand off between the Appellate Body and the trade "Club". In subsequent cases, the AB has not

attempted to reproduce the Special Procedure in *Asbestos*. It has become rather subtle in dealing with amicus submissions. In the dispute concerning implementation of the original ruling in *Turtles*, I submitted an amicus brief to the AB. In its judgment the AB noted that it was not necessary to consider the brief in order to decide the appeal. The wording in question clearly indicates that the AB has not backed off from its view that it has discretion to accept amicus briefs. A decision not to accept a brief because it is not necessary for the disposition of the appeal is an *affirmation* of the discretion to accept or reject such briefs, as it appears appropriate to the AB.

Further, in focusing its wrath on the AB's move in *Asbestos* the trade "Club" abandoned for all intensive purposes the effort to suppress amicus practice at the panel (first instance) level. Any amicus brief submitted in panel proceedings becomes, presumably, part of the record of the panel, which can (and indeed arguably must) be considered by the AB in disposing of an appeal. Thus, there is a kind of emptiness in the effort to draw the line at submission of amicus briefs to the AB directly (as Mavroidis has also pointed out). At the same time, the concerns about the ability to respond adequately to such briefs within the extremely short time frame of the appellate process could lead one to make a principled choice to be more liberal in the approach to amicus submissions at the panel level than at the AB level.

Third, in two investor-state disputes under the NAFTA, *Methanex* and *UPS*, arbitral panels have found they have discretion to accept amicus briefs, despite a lack of explicit reference to such discretion or authority in the governing conventions. The panels cited with approval the reasoning of the AB in *Turtles* and *Carbon Steel*. In the

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[1] Cite Jean Monnet working paper.

UPS case, the AB Special Procedure in Asbestos was proposed as a model for an approach to amicus under NAFTA (in that case, by the investor, in fact).

Fourth, in its proposals for DSU reform in the Doha round, the European Communities—which as noted above opposed the amicus practice vigorously in the *Carbon Steel* case—has accepted that it is now established law that the dispute settlement organs have discretion to receive and consider such briefs, and has suggested a set of formal procedures, entrenched in the DSU, which would govern amicus practice (THE COMPLETED VERSION OF THIS PAPER WILL CONTAIN A DETAILED ANALYSIS OF THESE PROPOSALS).

Fifth, the notion that the amicus practice is systematically biased in favor of developed countries is increasingly difficult to sustain. While developing country *governments*, or more precisely still, their trade officials, remain the most strident enemies of amicus practice, developing country NGOs are actually taking advantage of the practice. For example, in the *Turtles* implementation dispute, an amicus brief submitted at the panel level was the collaboration of both developed an developing country NGOs. In the intellectual property area, developed and developing country NGOs and indeed developing country governments in some cases have been working together, particular on the access to medicines issue. If cases go to dispute settlement that relate to the Doha Declaration on access to medicines, one can be sure that there will be no dearth of amicus submissions from developing country NGOs. One should be skeptical of the view that developing countries are the true "enemies" of amicus practice; it is really the trade "Club" that is the enemy, and the Club has made developing countries the cannon fodder of the amicus fight. The distaste for NGOs among

developed country Club members is just as great; but how else to justify one's opposition to this form of NGO participation back home in Canada or Australia, for instance, but to pretend that one is standing up for one's "weaker" brothers in the South?

In fact, the powerful interests in developed countries, such as corporate interests, have means of getting their point of view known in dispute settlement circles that don't depend on amicus submissions. They have access to politicians, and therefore to the servants of politicians, delegates and ambassadors; they have access as well, or the resources that buy access, to lawyers, consultants and lobbyists who can make their views effectively known in the Geneva community. The idea that the amicus procedure would be captured by these kinds of interests, or would largely benefit them is close to absurd. Why walk through the front door, when you can go through a keyhole? All the howls of the trade "Club" about amicus practice when NGOs are involved should be interpreted in light of their utter silence about the due process issues raised by the long-standing practice of lawyers, lobbyists etc. talking to delegates or even legal officials of the Secretariat.

What I am *not* suggesting here is that such access extends to the AB itself. However, there is an AB Secretariat consisting of legal clerks who have their pulse on the ideas and arguments circulating in the corridors concerning a particular case (some of whom have previously worked in the legal division serving the panels of first instance). And there are routine third party (government) intervenors in disputes, who will sometimes make systemic arguments that have been suggested by the trade community and have little to do in any case with the specific interests of that country at stake in the dispute (if indeed there are any).

The attack on amicus practice is, then, not an attack on the influence of "non-governmental interests" as such in the WTO, nor even and indeed especially not the influence of powerful developed country interests. What amicus practice does is it provides some access for those interests that are not able, or not as easily able, to share one roof as it were with the trade Club. And that is why it is so threatening to the Club.

How to break through the present standoff in light of the above observations on the situation post-Asbestos? Has the Club lost permanently some of its stranglehold? THIS PART OF THE PAPER TO BE COMPLETED.

One point deserves to be made emphatically. This is no time for NGOs to back off from amicus submissions. In the short term, the AB may not "consider" any of these submissions. But it will be forced in each instance to reaffirm its discretion to accept or reject the submissions. With each reaffirmation, the Members of the WTO are reminded that, despite all the pressure, the AB has not backed off from its basic legal position, and that NGOs are not prepared to back off as well.

In addition, it is far from clear that a submission that has not been "considered" will simply go in the waste basket of the law clerks. There is nothing that prevents the judges from reading any such submissions they chose to read, if only to decide whether or not to "consider" them. If a compelling or moving argument is made in an amicus submission, can a judge really erase that argument from his or her mind, if (for whatever good reason), the judge decides that the brief does not need to be "considered" to decide the appeal. In cases of first impression particularly, and cases where the broader public interest is obvious, it is difficult to believe that the judges will not at least scan the amicus material submitted to them, if it is provided in a timely manner; and then everything will

depend upon the persuasiveness and relevance of the brief, from the perspective of the judge. More generally, even scanning eventually "rejected" material, if there is enough of it and it is good enough, will broaden the perspective of the judges. Such a broadened perspective may be of more significance to the way cases implicating competing human values are decided, than any specific legal argument in any one brief. The discourse about dispute settlement and WTO legal interpretation remains dominated to a significant extent by the legal wing of the trade Club—the judges are fortunately somewhat removed from the Club, but they necessarily are influenced by what counts as the mainstream discourse about the law, as are judges everywhere, and amicus submissions are a counterweight to the parochialism of such discourse.

In consequence, at least in the short to medium term, if NGOs understand and take advantage of these realities, they may in some sense feel a little of what it is like to be a WTO insider—the main effect of the shrill rejection of the AB's amicus practice after *Asbestos* may be to give a chance to NGOs to exert influence in the way that insider-friendly groups always have, non-transparently and in a procedural vacuum.

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i This section of the paper is adapted from an essay on appellate review at the WTO presented at the World Trade Forum in 2001.

ii. See for example Edwin Vermulst, Petros C. Mavroidis, and Paul Waer, The Functioning of the Appellate Body After Four Years—Towards Rule Integrity, (1999) 33 *JWT* 1, p. 3. The authors are wrong in any case about the ordinary language meaning of the word "seek." Consider an example from the bad old days when only the men were supposed to do the asking—Ms. X lets me know that she would be favorably disposed if I were to ask her out. But I still have to ask. There is nothing that stretches the ordinary language meaning of "seek," for me to say that I am "seeking" a date with Ms. X—even thought this possibility has been brought to my attention unsolicited. Or let's say I am offered some kind of official position. I think about it for a couple of weeks and come back to the offeror and say, "I'm now seeking that position you mentioned." Again, this seems a natural and unproblematic use of the word "seek" even if the context discloses that what is being sought has been brought to my attention, or frame of interest and knowledge, without prior effort of my own.

iii. See also the ICJ decision *Reparation for Injuries Suffered in the Service of the United Nations,* 1949 I.C.J. 174, which held that an international organization should be considered to possess those powers not explicitly granted in its constitutive treaty instrument that are necessary for the performance of its duties.

iv. Appleton,"Untangling the Nets, p. 487. Trebilcock and myself explained the silent acceptance of the fourth, unattached brief in a different way: "Perhaps the AB quite reasonably considered the ability to accept such material as implicit in the very notion of

appellate jurisdiction, which would be consistent with general appellate court practice." Michael J. Trebilcock and Robert Howse, The Regulation of International Trade, second edition, (London and New York: Routledge, 1999), p. 66.

v. In suggesting that the ICJ should actively used the discretion afforded to it to accept submissions from international organizations (including non-governmental organizations, by implication) in its grant of advisory jurisdiction, Shelton notes: "The long-term institutional interests of the Court may be best served by ensuring its opinions are based upon the fullest available information and reflect consideration of the public interest, as well as the desires and concerns of the litigating parties." D. Shelton, The Participation of Non-Governmental Organizations in International Judicial Proceedings 88 *A.J.I.L.* 611, p. 625.

vi. David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Hague, London, and Boston: Kluwer, 1999), pp. 35-36.

vii. See also Petros .C. Mavroidis and D. J. Neven, Amicus Curiae Briefs Before the WTO: Much Ado About Nothing, forthcoming, *festschrift* for Claus Ehlermann. It can be argued of course that these sorts of materials are distinguished from *amicus* submissions in that the latter constitute advocacy in a particular case under adjudication. However, US Supreme Court practice indicates that, to the extent that they constitute mere advocacy or preaching of one party or the other's side of the case, *amicus* submissions are likely to be ignored.

viii. This point is emphasized particularly well by Trocker, in commenting on *amicus* practice at the European Court of Human Rights. Niccolo Trocker, L'"Amicus Curiae" nel giudizio devanti alla Corte Europea dei Diritti Dell'Uomo (1989) 35 *Revista di Diritto Civile* 119, p. 124.

ix. Henkin, Pugh, Schacter, and Smit, International Law Cases and Materials, Third Edition (St. Paul, MN: West, 1993), p. 122.

x. Ibid, p. 12.

xi. The most comprehensive examination of international and transnational practice is in an article by G. Marceau and M. Stilwell, "Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies," forthcoming, *Journal of International Economic Law.* This excellent article went to press, however, too soon to include a consideration of the important ruling of an investor-state arbitral panel under the North American Free Trade Agreement, which held that it had discretion to consider *amicus* briefs and exercised that discretion in favor of consideration in the case at bar, *Methanex Corporation* v. *United States of America, Decision of the Tribunal on Petitions from Third Persons to Interven as "Amici Curiae,"* January 15, 2001. This ruling examines the due process issues surrounding *amicus* practice, including confidentiality, in greater detail than the AB has done so far. See also, A. Lester, Amici Curiae: Third-Party Interventions Before the European Court of Human Rights, in *Protecting Human Rights: The European Dimension, Studies in honour of Gerard J. Wiarda,* ed. F. Matscher (Cologne: Carl Heymann, 1988), 341-51, pp. 341-42. In what follows I have been greatly aided by an excellent research paper by Mr. Yvo DeVries, an LLM student at the University of Michigan Law School, 1998-1999, comparing *amicus* practice at the WTO with that of other international and municipal tribunals. My hope and expectation is that Mr. DeVries will soon publish this research.

xii. Lester, ibid., p. 344.