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Notes, Comments and Developments

AN 'AMICUS CURIAE BRIEF' ON AMICUS CURIAE BRIEFS AT THE WTO

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ABSTRACT

This article first analyses the nature of the institution of amicus curiae. Next, the article outlines different options for tackling the amicus question by the WTO dispute settlement bodies and highlights the complexities thereby entailed, drawing a distinction between policy arguments and legal arguments. If it is not through a package deal at a ministerial conference, it is less likely that actions by the political bodies of the WTO will succeed. Finally, the author concludes that amicus curiae briefs, for systemic reasons, should in the future only be allowed at the panel level, and not at the appellate level. The article further suggests that, ideally, the initial submissions of the parties should be made public *ab initio* in order to allow the best possible exchange with non-governmental experts and views.

INTRODUCTION: THE QUESTION OF AMICUS CURIAE BRIEFS AT THE WTO

The question of the admissibility of amicus curiae briefs at the WTO is essentially a problem of transparency entailing a high degree of constitutional significance.

'Transparency' in the context of the ongoing debate at the WTO is understood to mean both 'openness' and 'participation'. 'Openness' refers to the information flow within the WTO membership (internal transparency[1]) and to the information flow from the WTO to the public at large (external transparency).[2] 'Participation' refers to more specific demands of civil society to be able to actively contribute to the decision-making processes of the

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64 For the current official WTO position, cf 'Internal Transparency and the Effective Participation of Members', WTO News, 2000 News Item, 21 December 2000, available at http://www.wto.org/english/news_e/news00_e/gcinternaltrans_e.htm, last visited 20 September 2001.

2 For the current official WTO position, cf 'External Transparency', WTO News, 2000 News Item, 22 November, December 2000, available at http://www.wto.org/english/news_e/news00_e/gcexternaltrans_nov00_e.htm, last visited 20 September 2001.

WTO. In order to allow this participation to be meaningful and timely, information must be made available at a certain point, preferably at an early stage of a decision-making process. Since only members have standing at the WTO, the direct participation of civil society in the WTO dispute settlement process has taken the form of the institution known as 'amicus curiae' briefs, i.e. submissions from bystanders. Because the *Understanding on Rules and Procedures Governing the Settlement of Disputes*[3] (DSU) does not mention this institution, a heated discussion has arisen regarding the question of whether such non-governmental briefs should be, or even must be, accepted by the WTO dispute settlement bodies.

As in any decision-making process, the greater the amount of information and views considered, the greater the chances for a good outcome.[4] On one hand, the quality of the final decision would be increased by adopting an inclusive approach allowing as many persons and entities as possible whose legitimate interests are affected by the decision to explain their perspective.[5] On the other hand the greater the number of participants, the more cumbersome the process of reaching a decision, and an effective process is crucial to a judicial system whose aim is to resolve the dispute at hand as quickly as possible.[6] As in the case of any problem of transparency, the underlying difficulty lies in the correct balance between efficiency and inclusiveness.

Transparency in the area of WTO dispute settlement, however – transparency in the adjudicative process – must be treated with special care due to the fact that such dispute settlement is different in nature and function from negotiations, for instance at a ministerial conference. Due process, standing and control of the matter in dispute, as well as specific rights of parties to a dispute, are concepts that can and should be handled only with velvet gloves.

The great constitutional significance of the amicus question results from the fact that, as long as the political bodies of the WTO are practically paralyzed, and therefore unable to amend the DSU or interpret it authoritatively, the dispute settlement bodies must work independently even if they realize

[3] Annex 2 of the Agreement Establishing the World Trade Organization (the 'WTO Agreement').

[4] In this sense, the International Trade Law Committee of the International Law Association (ILA), pursuant to its *Declaration on the Rule of Law in International Trade,* in *ILA's Resolution No. 2/2000 on International Trade Law*, available at www.ila-hq.org, last visited 20 September 2001, recommends the following steps: '(b) Opening the WTO dispute settlement system for observers representing legitimate interests in the respective procedures, and promoting full transparency of WTO dispute settlement proceedings. (c) Allowing individual parties, both natural and corporate, an advisory locus standi in those dispute settlement procedures where their own rights and interests are affected.' For the context of trade and human rights, see Ernst-Ulrich Petersmann, 'Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships', 4(1) JIEL 1, 35 (2001).

[5] Thomas Cottier, 'The WTO and Environmental Law: Three Points for Discussion' in Agata Fijolkowski and James Cameron (eds), *Trade and the Environment: Bridging the Gap* (1998), 56, 59,: '. . . amicus briefs from nongovernmental organizations could further enhance the legitimacy, and acceptance, of the WTO dispute settlement process'.

[6] Where they become part of the record.

that a majority of WTO Members are against allowing amicus curiae briefs. Until now, the dispute settlement bodies, especially the Appellate Body, have stood firm and asserted their duty to judge without interference, something which has been particularly difficult since the DSU is silent about amici and the public discussion of this issue has been vehement.[7] This represents a crucial step for these bodies, an effort that has opened the eyes of many to the full meaning and extent of judicial independence at the WTO.

A. History of the amicus curiae question before the WTO adjudicative bodies

The question of how to handle amicus curiae briefs in general has been before the Appellate Body for almost four years.[8] Early on, the question concerning amici was asked not only at the panel level, but also at the appellate level.[9] In the *US – Shrimp/Turtle* decision, the Appellate Body offered a broad reading of Article 13 DSU allowing panels to consider amicus curiae briefs. At the appellate level,[10] the Appellate Body argued in *US – Lead Bars* that, in light of Article 17.9 DSU, it had an 'extensive authority' to adopt procedural rules which do not conflict with the DSU or the covered agreements. It also pointed out that, pursuant to Rule 16(1) of the *Working Procedures for the Appellate Review* (hereinafter the Working Procedures),[11] a division that hears a specific case is allowed to develop an appropriate procedure should a procedural question arise that is not covered by the DSU; this additional procedure, however, is valid only for the purpose of that particular appeal.[12] The Appellate Body decided that it had the legal authority to accept and consider unsolicited information as long as the input of the non-state actor is pertinent and useful.

Before and after each of these decisions, the Appellate Body came under

[7] See for instance: Daniel Pruzin, 'WTO Members Make Unfriendly Noises on "Friends of the Court" Dispute Briefs', BNA Daily Report for Executives, 9 August 2000, at C1.

[8] Amicus curiae briefs were already introduced for the first time in the procedure leading to the Appellate Body Report in *EC – Measures Affecting Meat and Meat Products* (hereinafter *EC – Hormones*), WT/DS26&48/AB/R, adopted 13 February 1998.

[9] Contrary to general perception, amicus curiae briefs were filed at both stages of the proceedings in the procedure leading to the Appellate Body Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*hereinafter US – Shrimp/Turtle*), WT/DS58/ABR, adopted 6 November 1998, paras 99–110.

[10] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (hereinafter *US – Lead Bars*, otherwise known as *Carbon Steel*) WT/DS138/AB/R, adopted 7 June 2000, para 39–42.

[11] WT/AB/WP/3,

[12] Rule 16(1) Working Procedure for the Appellate Body: 'In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure *for the purposes of that appeal only*, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body'.

pressure from energetic public reaction.[13] With its most controversial decision,[14] referred to hereinafter as the 'EC – Asbestos' decision, the Appellate Body placed itself in a 'catch 22' situation: The course of events in *EC – Asbestos*[15] angered Nongovernmental Organizations (NGOs), on the one hand, because they construed the 'additional procedure'[16] that the Appellate Body published on the WTO website as an invitation to submit amicus briefs, but none of the briefs they then submitted were subsequently accepted in the final decision. On the other hand, however, most WTO Members were also displeased with the *EC – Asbestos* decision due to their opposition to the admission of such briefs in general. The posting of the 'additional procedure' on the WTO website provoked not only strong reactions among Non-Governmental Organizations (NGOs), but also prompted a special General Council meeting on 22 November 2000, at which certain members aired their outrage.[17] A great majority of the members clearly indicated their opposition to the admission of amicus curiae briefs at any level of the WTO procedure. Only the United States[18] stood firm in its official position of welcoming all input from NGOs at any level of the contentious procedure. The final report of the Appellate Body was awaited with much agitation, but disappointed many because it failed to offer any discussion or principled decision on how the Appellate Body will handle amicus curiae briefs in the future. The report merely outlined the events leading to the posting of the additional procedure, and stated, without explanation, that out of the seventeen amicus curiae briefs submitted, none had been accepted, nor *a fortiori* taken into account in deciding the case. The individual NGOs had already been summarily informed that their request for leave to file had been refused.[19]

[13] 'Complainants in WTO Shrimp Case Slam Appellate Report at DSB', *Inside US Trade* (13 November 1998) and 'WTO Members Fight Appellate Body on British Steel over NGO Briefs', *Inside US Trade* (9 June 2000).

[14] *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (hereinafter *EC – Asbestos*) WT/DS 135/AB/R, adopted 5 April 2001, para 50–57.

[15] *EC – Asbestos*, see footnote above.

[16] WT/DS135/9, see also *EC – Asbestos*, para 52, and Geert A. Zonnekeyn, 'The Appellate Body's Communication on Amicus Curiae Briefs in the Asbestos Case. An Echternach Procession?', 35(3) JWT 553–63 (2000). This 'additional procedure' was removed from the WTO website in December 2000 and can be found at the WTO's Database 'Documents Online'.

[17] WT/GC/M/60, 23 January 2001, cited in Petros Mavroidis, 'Amicus Curiae Briefs Before The WTO: Much Ado About Nothing', Harvard Jean Monnet Working Paper 02/01, http://www.jeanmonnet-program.org/papers/01/010201.html, last visited 20 September 2001.

[18] United States Statement at the 22 November 2000 General Council Special Meeting, para 2: 'Given that the Appellate Body has the authority to accept and consider amicus submissions, and given that a number of persons had either already filed, or expressed an interest in filing, amicus submissions, the Appellate Body did the only thing it could do. It adopted procedures to manage this issue in a fair, legal, and orderly manner, taking into account the interests of members of civil society in having their views considered, the interests of the parties and third parties in being able to review and respond to any amicus submissions, and the interests of all in resolving the dispute.'

[19] For details and a sample letter refusing the request for leave, see the collection pertaining to *EC – Asbestos* at http://www.law.georgetown.edu/iiel/amicuscuriae5.html, last visited 20 September 2001.

In light of the background of these tumultuous events, which some described as a 'constitutional crisis' and others call 'much ado about nothing',[20] it is important to recall that, despite the mantra that the WTO is a 'member driven organization', it is the mission of the Appellate Body – as that of any judicial branch – to interpret the covered agreements independently.[21]

In the following discussion, I would like to take a step back from this heated debate and analyze what the covered agreements permit concerning this matter and attempt to discern what would be best for the WTO. In retrospect, the arguments advanced in this heated debate seemed to be strongly driven by one of two desired results which are diametrically opposed: the general allowance of amicus curiae briefs in the system on the one hand, or the general prohibition of such briefs on the other hand.

B. An amicus curiae brief on amicus curiae briefs

The aim of this article – through an analysis of all arguments pro and con regarding the admission of amicus curiae briefs at the WTO – is to approximate as closely as possible the position of an impartial friend of the WTO concerned with the healthy development of its legal system. In this sense, this article can be looked upon as the brief of a friend of the court submitted directly to the Appellate Body, treating the question of amicus curiae briefs submitted to the dispute settlement system of the WTO. In so doing, I will try to provide an analysis that is as objective as possible of the current situation and the various options for the WTO. The question of non-member submissions and an assessment of viable solutions are at issue. One such solution would be to accept amicus curiae briefs at the panel level, but not at the appellate level, based on the rationale arising from a systemic interpretation of the covered agreements. If this solution were implemented, this article might represent, so to speak, the final unsolicited amicus curiae brief directly submitted and (hopefully) accepted by the Appellate Body.

C. Delimitation of the subject matter

Before analyzing the nature of amicus curiae briefs in general, the subject matter must be delimited in one respect, that is, this article will concentrate exclusively on the question of the admission of *independently submitted* amicus curiae briefs. If a country chooses to attach a non-member-brief to its own submission, the situation is less problematic. It is up to each party or participant to assess whether the extra submission might upset a panel or might, instead, help insofar as it demonstrates the support of a specialized NGO and

[20] Petros Mavroidis, see above, n 17.

[21] John H. Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited', 4(1) JIEL 67–78 (2001).

adds additional credibility to a certain set of arguments. In the case of a non-governmental submission that is attached to a country's submission, the Appellate Body has already decided that the attached brief becomes an integral part of the country's submission.[22]

I. THE ESSENCE OF THE INSTITUTION OF AMICI CURIAE

A. Amici curiae: friends or foes of the court?

The concept of amicus curiae briefs, as it is understood today, is that a private person or entity[23] who has no direct legal interest at stake in the dispute at hand may submit an unsolicited report to the court in which such person or entity may articulate its own view on legal questions and inform the court about factual circumstances in order to facilitate the court's ability to decide the case. These uninvited and (ostensibly) uninterested bystanders are called 'amici curiae', which is Latin and means 'friends of the court'. The idea of amici goes back to Roman times, when lawyers did not have the convenience of online databases, when books were rare, and oral history was the principal way to transmit jurisprudence and wisdom. In these circumstances, amici were crucial for informed decision-making and were – at least in theory[24] – considered aids, offering assistance to the court in cases in which the court would have serious doubts or be about to commit a mistake.[25] This idealized view has changed over the centuries: what was once a gesture of friendship has become a deliberate act of advocacy.[26] In Rome, the role of amici was to draw to the Court's attention a precedent or crucial fact that had been overlooked. Today, most amici are guided by their own interests and try to influence the judges into taking the position that is the most favorable to their interests, either by pointing out new factual aspects or by trying to fortify a specific line of argumentation that seems most beneficial to their position. What was once an idealistic service to the court has now become an instrument to influence judicial decision-making.

B. A concept touching upon due process

The fact that amici no longer act in an uninterested manner is crucial to the present analysis because this means that the information they offer is different

[22] *US – Shrimp/Turtle*, above n 9, paras 79–91 and 99–110.

[23] Until now, most of the briefs have been filed by NGOs, some have been filed by industry associations and three have been filed by professors working in this field of law, see http://www.law.georgetown.edu/iiel/amicuscuriae.html, last visited 20 September 2001.

[24] This is a somewhat romantic view of the institution in ancient Rome that might only partly correspond to the reality at that time and has therefore to be taken cum grano salis, but this view helps to understand the difference between the amicus curiae institution and advocacy.

[25] Cf 'corpus iuris secundum': 3A C J S Amicus Curae, para 2.

[26] Krislov, 'The Amicus Curiae Brief: from Friendship to Advocacy', 72 Yale L J 694 (1963).

from that derived from a well-written newspaper or from academic literature. It must also be noted that, if amici are allowed to file documents, at least one party to the case at hand must then react to defend its viewpoint against this additional argument, which entails the devotion of additional time, effort, and resources to the case at hand. Thus, at least one party must respond to arguments stemming from a private person or entity which does not have the rights and obligations of a WTO Member and therefore has no standing before the WTO. In other words, the acceptance of a submission from a non-state actor affects the balance between the parties to the dispute settlement and becomes a question of due process.[27] The fact that the workload triggered by amici submissions can be significant has implicitly been confirmed by the action of the Appellate Body Secretariat in adopting the 'additional procedure' in *EC – Asbestos*,[28] because the aim of requiring an application for leave to be limited to three typewritten[29] pages was clearly to reduce the workload and to further 'the interest of fairness and orderly procedure in the conduct of this appeal' – or, in other words, due process.

C. Content of an amicus curiae brief: fact or law?

Amicus curiae briefs can offer new factual details or new legal arguments which can, under ordinary circumstances, be both interesting and helpful to the court. However, it is important to bear in mind that these briefs might contain facts, new facts and arguments not specifically pertaining to questions of law and that, at a certain level of jurisdiction, a court may be restricted in its review to questions of law. This may cause problems at the appellate level in the WTO dispute settlement system under Article 17.6 DSU, which limits the jurisdictional competence to questions of law. On the other hand, the Appellate Body has broadly interpreted Article 13 DSU to allow amicus curiae briefs at the panel level.[30] It is interesting to note that Article 13 DSU, applicable only at the panel level, was drafted for purposes of facilitating fact-finding by the panels *and not to introduce new legal arguments*. It allows for an inquisitorial element in an otherwise adversarial procedure that is intended to exhaustively list the ways of introducing legal arguments and factual information in Article 12 DSU for parties and in Article 10 DSU for third parties. Article 13 DSU, however, uses the phrase 'to seek information', which permits the Appellate Body to state that *information* can be both factual and legal

[27] In this view, there is clearly an 'inherent difference in nature between academic writings and other relevant documents (such as decisions of the ICJ), on the one hand, and amicus curiae briefs'. 'Issues of Amicus Curiae Submissions: Note by the Editors', 4(3) JIEL 701–06 (2000).

[28] WT/DS135/9, additional procedure in *EC – Asbestos*.

[29] WT/DS135/9, additional procedure in *EC – Asbestos*, Article 3 letter b.

[30] *US – Shrimp/Turtle*, above n 9, para 108.

in nature, and to conclude that, if the panel can *seek* information, it should *a fortiori* be allowed to *accept* information – he who can do more, can do less.[31]

D. Differences in different settings

The question of how amicus curiae briefs could draw the WTO into the tumult it has experienced concerning the *EC – Asbestos* decisions can be understood fully only if one appreciates the fact that different countries and different international organizations have very different institutions and different ideas of delimitation and sensibilities to deal with arguments or facts offered by entities which are not the original parties to a dispute.

1. Amicus curiae is a common law concept

Today, quite frequently, common law countries allow amici curiae,[32] whereas civil law countries have almost never heard of the concept.[33] Under the procedures governing civil law countries, the closest institution to amici is the 'intervention'. An intervener, however, must show a legal interest and becomes a (third) party to the procedure once he is admitted, with the result that he must, in the majority of cases, bear the consequences of the final judgment. On the other hand, an amicus curiae, by definition, does not have standing, does not therefore have the rights and obligations of a party and must never bear the direct legal consequences of the outcome.[34] In my opinion, the fact that one legal tradition tends to allow the concept of amicus curiae, whereas the other legal tradition restricts the access to a particular process to a more narrowly defined set of persons or entities, reflects a more subtle and fundamental difference between the two different approaches to

[31] An analysis of the content of the amicus curiae briefs submitted to the WTO thus far is difficult since only a limited, non-representative selection has been made publicly available. One can see, however, that many of these briefs are very thoughtful contributions and have, in some cases, been written by well-respected WTO-law specialists, either on behalf of an NGO or even on their own behalf. Almost all such submissions, however contain both facts and law.

[32] See Rule 37 of the US Supreme Court, Rule 18 of the Supreme Court of Canada, Order IV para 1 of the Rules of the Supreme Court of India. The concept is also known in New Zealand (High Court Rule 81) and Australia (*Lange* v *ABC* (S108/116)), but I found no rule or case for Great Britain.

[33] The ECJ is not familiar with the instrument of amicus curiae briefs. Because the ECJ provides for interventions, it therefore follows mainstream continental European procedures on this question. Germany, France, Switzerland, but also Japan and Mexico, for example, are not familiar with the institution of amicus curiae. Mexico for instance stated in the Methanex Case 'that there was no power under Mexican law for its domestic courts to receive amicus curiae briefs'.

[34] In my view, it is important to emphasize that the main difference between the two institutions lies in the fact that an intervener is granted standing and can participate in the procedure, whereas an amicus merely offers certain information. It is a logical consequence that the amicus must never assume the legal consequences of the judgment, whereas the intervener must usually do so, but this is not the main difference. Therefore, intervention at the ECJ *is* an intervention, and not an amicus curiae brief, since the intervening person must prove a legal interest.

deciding legal questions in general. Thus, the vehement debate on this question at the WTO represents, in part, a clash of legal cultures.

2. Do the practices of other international institutions matter?

Many articles have been written on the submission and acceptance (or rejection) of amicus curiae briefs in dispute settlement procedures of different international organizations.[35] Inasmuch as these articles show that many of the analyzed international fora allow non-state actor submissions, these findings tend to be cited in order to lend added legitimacy to the relatively new tendency under GATT/WTO law to allow such briefs. Such conclusions often overemphasize the prevalence of the institution of amici.[36] In general, it can be said that in international courts where individuals have standing,[37] amicus curiae are allowed[38] in certain specific circumstances, whereas the dispute settlement procedures of strictly inter-state institutions generally prohibit the concept.[39] These analyses are appealing and politically interesting, but not extremely relevant to the question of whether amici should be allowed at the WTO. The latter question can only be decided through an analysis and interpretation of the text of the covered agreements and the results of the Uruguay Round, especially the DSU, pursuant to the rules of interpretation

[35] Dina Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings', 88 (4) AJIL 611–42 (1994), and Gabrielle Marceau and Matthew Stilwell, 'Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies', 4(1) JIEL 155–87 (2001).

[36] For example: Robert Howse, 'The Early Years of WTO Jurisprudence' in *The EU, the WTO and the NAFTA, Towards a Common Law of International Trade* (London: Oxford University Press 2000), 49: 'In the case of *amicus* briefs, by contrast, there is a wide range of domestic and international practice that suggest, in contemporary circumstances, that the discretion to consider such briefs has become widely (if not universally) assumed as an appropriate judicial right, implicit in the function of the tribunal to make a judgment having heard all the relevant facts and arguments.'

[37] Human rights courts and the few international criminal courts, see next footnote.

[38] For example: Inter-American Court of Human Rights, see Thomas Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', 79(1) AJIL 1–27 (1985), or Rule 61(3) of the European Court of Human Rights:

> In accordance with Article 36 §2 of the Convention, the President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not a party to the proceedings, or *any person concerned who is not the applicant*, to submit written comments or, in exceptional cases, to take part in a hearing. Requests for leave for this purpose must be duly reasoned and submitted in one of the official languages, within a reasonable time after the fixing of the written procedure,' or Rule 103 of the Rules of Evidence and Procedure of the International Criminal Court, entitled Amicus Curiae and Other Forms of Submissions: ' . . . at any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.'

[39] The ICJ Registrar refused to officially receive amicus curiae briefs (Namibia Case, 1970 ICJ Pleadings (2 Legal Consequences), 636, 638, answer to Professor Michael Reisman). There is only one instance in which the ICJ received such a brief unofficially (Case Concerning the Gabcikovo-Nagymaros Project (Danube dam project by the Slovakian Government on the basis of a 1977 bilateral treaty), ICJ Reports, 1997). Mercosur is also not familiar with this institution.

of the general public international law, codified in the Vienna Convention on the Law of Treaties.

3. Substantive question or procedural question?

Apart from the discussion of which other institutions accept amici, there is another recurring but less relevant theme in the discussion concerning amici submissions: whether the question is substantive or procedural in nature.[40] This discussion was started by people who favor admitting amici, who claim that the amicus question is a purely procedural matter and should therefore be left up to the decision of the dispute settlement bodies, since it is within their inherent power to organize the procedure. Persons who oppose the concept of amici, on the other hand, claim that the question is a substantive one, which must therefore be negotiated by the Member States and cannot be decided by the quasi-judicial bodies of the WTO. This discussion obscures the most relevant question, i.e. whether amici are allowed under the covered agreements. Both the substantive law and the procedures were negotiated at the Uruguay Round. The real question is whether or not the negotiators wished to delegate such broad powers to dispute settlement bodies in order to allow them to introduce the concept of amicus curiae briefs into their procedures. It is irrelevant whether such an admission of non-state actors is considered a question of substantive or procedural law.[41]

4. Differences between the justification of domestic and international amici

Politically speaking, the justification for the concept of non-state actor briefs is even more significant at the international level than at a national level. At the national level, the concerned parties can generally show a legal interest and obtain standing before a court dealing with a case that affects their interests. In international law, individuals are in general still very much an object of law, rather than a subject of law. Most of the time, individuals do not have standing and must therefore rely on the idea that their government represents them fairly, based on the classic view of state-centered international law, which represents the thesis that governments in democratic countries represent all of their constituencies. For numerous reasons, there is a risk that this is not always true.

5. Policy and legal arguments

Generally, it is wise to allow non-state actors to bring their expertise and views to the court. The concept of amicus curiae briefs is obviously an

[40] JOB (01)183, 20 June 2001.

[41] For an interesting parallel debate on standing as a reflection of substantive law, cf *United States Department of Labor* v *Triplett*, 494 US 715 (1990), and the discussion on standing and substantive rights in Laurence H. Tribe, *American Constitutional Law*, 3rd ed, vol 1 (New York: Foundation Press 2000), 443.

interesting tool to allow greater public participation in the quasi-judicial function of the WTO dispute settlement bodies. This broader participation can not only provide the panelists a more complete picture in order to make the right decisions, but can also educate a larger public, which in turn might help to foster a general understanding of the world trade system. This political justification, however, is not enough to justify giving amici *carte blanche*. The question remains whether or not amicus submissions have been legally foreseen under the covered agreements or whether a careful interpretation leads to allowing the practice. In the following sections, policy arguments and legal arguments are distinguished.

II. REGULATING AMICUS CURIAE THROUGH JUDICIAL INTERPRETATION

While only two possibilities have been discussed publicly so far – to allow amicus curiae briefs at the WTO, or to forbid them completely – there are other options, like the one allowing amici at the panel level but not at the appellate level. This intermediate option will be explored in greater detail at the end of this section, after the arguments advanced in favor of the two more prevalent proposals have been revisited.

A. Arguments in favor of amicus curiae briefs

1. Policy arguments

The following policy arguments can be advanced in favor of the admission of amicus curiae briefs at any level of WTO quasi-jurisdiction:

(a) *All available information helps.* Information from every source should always be welcome in order to facilitate the decision-making process. Members of panels and the Appellate Body should not be limited to material submitted to them by the parties to a dispute. They should be free to accept anything they feel could help them in their decision-making process.

(b) *The more complex the case, the more information is needed.* This is especially true in fields with highly complex implications, such as those under WTO law. For the same reason, expert opinions must be allowed, because it is impossible for governments or panels or appellate body members to be experts in all of the fields involved in a trade dispute, especially now that more varied issues (such as environmental law, competition law, labor law, etc.) are involved.

(c) *The fair representation by governments of every minority forming part of their constituency is a fiction.* It is important to lend a voice to all communities, groups, and entities that are directly or indirectly touched by the results of a dispute. This is especially true because these minorities have no standing and there is therefore no guarantee that their legitimate interests will be represented fairly by their governments.

(d) *The gap between individuals who are allowed to participate in procedures and individuals who are affected by the relevant decision is wider at an international level than it is at a national level.* At a domestic level, amicus curiae are allowed in common law countries and, in civil law countries, private individuals that have a direct interest in the matter at hand can intervene as third parties. At an international level, individuals and NGOs are mostly precluded from any direct participation in the state-centered perception of international law. The DSU grants standing only to Member States. Therefore, it is even more important to allow non-members to bring forth their views via amicus curiae briefs in the international arena than it is to permit such briefs at a national level.

2. Legal arguments

The legal arguments in favor of admitting amicus curiae briefs within the WTO framework at the panel level are different from those for admitting such briefs at the WTO appellate body level. The arguments for admitting amici at both levels can be summarized as follows:

(a) *Broad interpretation of Article 13 DSU.* As described above, the current state of law interprets Article 13 DSU broadly: The Appellate Body argued in *US – Shrimp/Turtle* that the terms to 'seek information' had to be interpreted to also allow a 'passive seeking', such as when an NGO offered information on an unsolicited basis.[42]

Another interpretation emphasizes a different paragraph of the same Appellate Body decision in *US – Shrimp/Turtle* which leads to the same result, but is more in tune with the interpretation of Articles 17.9 DSU and 16(1) Working Procedures in *EC – Carbon Steel* (inherent/delegated power, see above). The 'breadth of Article 12 (which allows a panel to create its own procedures, deviating from the default procedures in Annex 3 of the DSU) and Article 13 DSU, enable the panel in specific ways, to discharge its duty under DSU Article 11 "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 the Appellate Body)'.[43] Or, in other words, the source of the panel's authority to consider amicus briefs does not stem from the phrase 'to seek' of Article 13 DSU, read to include 'to accept', because the Appellate Body only noted that Article 13 DSU did not *prohibit* panels from considering non-state actor briefs. Rather, this authority stems from 'Articles 12 and 13 DSU together, read in light of the

[42] *US – Shrimp/Turtle*, above n 9, para 108.

[43] Robert Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power', Paper prepared for the World Trade Institute, Berne, 21–22 August 2000.

panel's duty to make an objective assessment of the matter, and the scope of authority implicit in that duty'.[44]

(b) *'Delegated power' to the Appellate Body.* In order to be able to admit amicus curiae briefs at the appellate level, Article 17.9 DSU is invoked, delegating to the Appellate Body broad authority to adopt procedural rules which do not conflict with any rule of the DSU or the covered agreements pursuant to Article 3.4 DSU. In this sense, Article 16(1) of the Working Procedures allows the Appellate Body, on a case-by-case basis, to develop an appropriate *ad hoc* procedure when a procedural question that is not covered by the Working Procedures arises.

(c) *The 'inherent power' of the Appellate Body.* Since the delegation of power under Article 17.9 does not address the possibility of amici, some commentators go a step further and contend that the mission of the Appellate Body itself inherently entails the power to allow amici in order to be able to reach an 'objective assessment'. This argument can stand on its own, or be seen as an explanation of the delegated power under Article 17.9 DSU. A lawyer from the common law tradition would likely argue in the same way as did the US Supreme Court in 1884, when it argued that it was 'the inherent power of a court of law to control its processes'[45] and therefore allowed briefs by non-parties to bar injustice caused by lack of representation.[46]

In response to the many critics of the admission of amicus curiae briefs, advocates of such briefs argue that these briefs cannot change the rights of WTO Members because no standing is granted to non-members.[47] In their opinion, it remains at the complete discretion of the panels or the Appellate Body as to whether or not the briefs are accepted. Therefore, amici supporters argue that no new rights are created through the admission of amici.

B. Arguments against amicus curiae briefs at the WTO

1. Policy arguments

(a) *Allowing NGOs to participate means shifting more power to the industrialized countries.* Critics of the admission of amicus curiae briefs at either level of WTO quasi-jurisdiction argue that if NGOs are allowed to have a voice within

[44] Robert Howse, see footnote above. This view approaches the legal reasoning of why amici should be admitted on the panel level very much to the reasoning at the appellate level: what is an 'implicit in that duty' at the panel level, is the 'implicit authority' at the appellate level. The big question is what is implicit and what is not. While it is obvious that the DSU is not a detailed code of procedure, it is a delicate question if the adjudicator has the power to create rules allowing amicus curiae briefs or not. Common law lawyers might have a natural tendency to allow amicus submissions, claiming that this is an 'inherent power' of any court, whereas civil law lawyers tend to be reluctant to do so.

[45] *Krippendorf* v *Hyde,* 110 US 276, 283 (1884).

[46] At that time, the US Supreme Court rules of procedure did not yet foresee amici submissions.

[47] *US – Lead Bars*, para 41; Steve Charnovitz, 'Opening the WTO to Nongovernmental Interests', 24 (I&2) Fordham International Law Journal 185 (2000), fn 66.

dispute settlement, the developed countries will gain even more power within the system and, more specifically, within the dispute settlement process. It is their contention that most of the NGOs are from developed countries, and the few NGOs from developing countries are financed by their developed country counterparts. In their view, NGOs are therefore more likely to support the viewpoints of developed countries, forcing developing countries to assume the added logistical burden of defending themselves against these amici arguments.[48]

(b) *Fear of a change in the inter-governmental nature of the WTO.*[49] Foes of amici curiae also fear that allowing non-state actors to have a voice within the dispute settlement system on a regular basis might open up a whole new can of worms, insofar as the non-state actors would quickly wish to extend their power by seeking regular standing and would probably wish to have more say during negotiations as well. This argument stresses that the institution of amicus curiae enjoys the popularity that it does because it represents the only way for NGOs to be heard during a dispute settlement process. The admission of amici, as a substitute for real standing, is therefore seen as an important step on a slippery slope towards full participation and recognition of non-members through standing.

2. Legal arguments

(a) *Article 13 DSU must be construed narrowly.* On legal grounds, critics of non-state participation in WTO dispute settlement advance the opinion that the broad interpretation that the Appellate Body gave to Article 13 DSU is erroneous. In their view, this article must be construed strictly for purposes of fact-finding.[50] They argue that the generous interpretation of the Appellate Body should be overturned. This step would not be impossible because the WTO dispute settlement system does not follow a stare decisis doctrine. Thus, it would not be a problem to reach a solution by overturning an older decision, and since NGOs have no standing, it would be easy to cut back any expectations on their part.

(b) *An historical argument, i.e. the assertion that this kind of openness to NGOs was excluded during the Uruguay Round negotiations – has also been added to this side of the debate.*[51]

[48] Tenth point of the Statement of H.E. Ambassador Fayza Aboulnaga, Permanent Representative of Egypt, acting as Chairperson of the Informal Group of Developing Counties (IGDCs) before the Special Meeting of the General Council of 22 November 2000.

[49] Intervention by Canada at the General Council Special Meeting of 22 November 2001, and 'G-15 Communiqué on WTO Ministerial', *Inside US Trade* (10 September 1999), at 9–10, para 19.

[50] *US – Lead Bars* para 36: The EC argued: 'that article is limited to *factual information* and technical advice, and would not include *legal arguments* or *legal interpretations* received from non-Members'. Brazil and Mexico agreed with that position, *US – Lead Bars* para 37.

[51] Statement by India at the General Council special session of 22 November 2000, para (4) referring to a 'major delegation's negotiating proposal' in November 1993 which encountered 'overwhelming opposition'.

(c) *The fact that the words amicus curiae are never mentioned in the text of the DSU strengthen amici opponents in their conviction that amici submissions cannot be introduced through the back door (in the context of a broad interpretation), since the silence of the DSU is qualified and not an inadvertent lacuna that should be filled by the adjudicating body.* This is even more true at the appellate level, to which Article 13 DSU is not applicable.[52]

(d) *There is no delegated or inherent power that allows the dispute settlement bodies to adopt procedures to accept amicus curiae briefs.* Under this view, the issue of whether amici should be allowed is a more fundamental question and should be resolved by the membership, not the adjudicators. It is a more fundamental question than the 'procedural questions' delegated in Article 17.9 because the introduction of amici disturbs a carefully designed balance within the dispute settlement process, a balance that offers both parties a fair, predictable procedure to appear before the panels and the Appellate Body. To allow amicus curiae briefs disturbs that balance, since the consequences thereof cannot be foreseen. Such briefs threaten the system by being one-sided, disruptive and burdensome due to the additional work they entail in connection with a timeframe that is already tight. In one sense, the Appellate Body has acknowledged that amicus curiae briefs can entail a great deal of extra work.

C. Amicus curiae briefs allowed at the panel level, but not at the appellate level

As an alternative to the two opposing positions detailed above, the following section now offers a new interpretation, proposing the admission of amicus briefs at the panel level but not at the appellate level. This intermediate position has never been articulated in academic writing.

1. Policy arguments

(a) *An advantage of the intermediate solution is that the Appellate Body would not be overburdened by a flood of non-member submissions for a specific case.* The seven members of the Appellate Body are already faced with much more work than that which was initially foreseen, and permitting the NGOs to submit briefs to the Appellate Body directly could significantly add to this workload.

(b) *Guarantee of two levels of scrutiny for each legal argument of a case.* This solution would ensure that the appellate body is always the second instance to review a legal interpretation. This is important insofar as it confirms the role of the Appellate Body to reassess the legal argumentation of the panel, which increases the probability that a fair and just decision

[52] *US – Lead Bars* para 36: The EC 'notes that Article 13 does not apply to the Appellate Body'.

will be reached. It is as if the Appellate Body must make a decision based on newly introduced arguments.

(c) *Upon publication of the decision that amicus curiae briefs are allowed only at the panel level, a more predictable system would emerge.* If all of the potential non-state actors turn in their views and factual information at an early stage in the panel proceedings, the parties and the panel receive a more complete picture, allowing the panel to better adjudicate. This would enhance the decision-making process at an early stage, without the risk of unequal scrutiny for certain arguments because they were introduced into the system at a later stage. This would also encourage non-state actors to act early and shield participants from unpleasant surprises at later stages of the procedure.

(d) *This interpretation would also ensure that no intricate questions about the difference between facts and law would have to be resolved, on the one hand, by the non-state actors drafting the briefs and, on the other hand, by the Appellate Body reviewing the briefs, since panels must assess both questions of facts and law.*

2. Legal arguments

(a) *It must be determined whether there is a lacuna, or a qualified silence.* The framers were obviously preoccupied with rules for WTO Members and did not exclude or allow submissions by non-members, such as NGOs, in the Dispute Settlement Understanding. It seems probable, however, that if the framers had addressed the issue and allowed non-members to introduce legal arguments, they would not have allowed non-members to do so at a later stage in the WTO dispute settlement than permitted to WTO Members. WTO Members are allowed to participate and, therefore, submit legal arguments in the appellate proceedings only if they were third parties in the panel proceedings. There is no third participant allowed to the appellate review who has not been a third party at the panel level.[53] Therefore, it would make sense to permit non-state actors to introduce their arguments only up until the point in the proceedings at which WTO Members are prohibited from intervening as third parties or participants. This would exclude amicus curiae briefs in an appellate review.

(b) *Considering the rationale behind the institution of the Appellate Body, one must draw the same conclusion: the Appellate Body was created as a trade-off for the reverse consensus.* The idea was clearly to have two levels of adjudication as a quid pro quo for compulsory jurisdiction. The first level would establish the facts and decide the case, whereas the second level, as *garde fou,* would review the legal arguments a second time. It is inherent under all rules of procedure for any dispute settlement system (national court or international arbitration) that the issue at stake must be defined by a certain deadline. This means that the parties will have an opportunity to present facts and legal

[53] And this participation as a third participant is very limited: Article 17.4 DSU.

arguments only until a certain deadline, which varies from judicial system to judicial system. If the petitioner fails to present compelling evidence through certain documents or to allege a certain set of facts, precise motives, or presumptions, he will not be allowed to do so later. After that deadline, the facts and legal arguments that have been introduced will be presumed to have been definitely determined. It is widely accepted that this presumption is somewhat artificial and may result in certain errors, but in the absence of such a deadline, proceedings would take forever and a decision could never be reached. In most judicial dispute settlement procedures, it is possible to re-open a case only if new facts that were not known and could not have been known at the time of the proceedings become available – i.e. an extraordinary appeal. Under the WTO dispute settlement system, no extraordinary appeal exists. The appellate review has all of the characteristics of an ordinary appeal insofar as it does not delve into new facts, allegations, or arguments. It would be unfair to allow new arguments for one of the parties at this level since this would, in effect, deprive the opposing party of one level of jurisdiction. The idea was to have all arguments scrutinized twice, which means that the mass of material which the appellate body must reassess and the new decision will be determined based solely on the submissions to the first panel and the decision of the first panel itself, and nothing else. This logically excludes amicus curiae briefs at the appellate level.

(c) *Article 13 DSU applies only to the panel level.* The Appellate Body's broad reading of this norm in its *US – Shrimp/Turtle* decision made it possible to consider amicus curiae briefs by panels. However, this provision was designed to permit fact-finding at the panel level exclusively. Thus, as there is no similar norm at the appellate level, this broad reading has to be confined to the first level, and amici cannot be allowed at the last level of WTO jurisdiction.

(d) *This would also help that the appellate body limits itself to 'issues of law covered in the panel report and legal interpretations developed by the panel' (Article 17.6 DSU), without having to take into consideration legal interpretation developed by non-participants which could also contain factual assertions.* The scope of the appeal would be strictly determined by the appealing participant within the limits of this provision.

(e) *Predictability of the procedures before WTO dispute settlement bodies.* By introducing the principled decision of not allowing amici at the appellate level, the Appellate Body would also put an end to a situaiton which has the flavor of inconsistency within its own procedural rules and return to a predictable system of procedure. Already following the Appellate Body's adoption of the decision in *US – Lead Bars*, formal criticism was brought.[54] At the time,

[54] Arthur E. Appleton, 'Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit From the Appellate Body's Hat?', 3(4) JIEL 691–99 (2000). Appleton's main critique was that the Appellate Body did not comply with all of the conditions of Rule 16(1) of the Working Procedures of the Appellate Body.

the Appellate Body invoked Rule 16(1) of the working procedures that allow a division of the Appellate Body to adopt an 'appropriate procedure for the purpose of the appeal only'. This implies that such an *ad hoc* solution can be valid only for an individual dispute. Such a provision was not drafted to resolve problems that are clearly of a recurring nature, such as the amicus question. The recurrence of a similar situation is a sign that the question involved is more systemic in nature and must therefore be addressed in a different manner in order to reach a permanent solution.[55] The situation would be clarified through either an amendment to the DSU or a decision not to accept amici at the appellate level, and the restoration of certainty and predictability – which are important aims of the dispute settlement as a whole pursuant to Article 3.2 DSU – would be achieved.

III. OTHER POSSIBILITIES TO ADDRESS THE AMICUS ISSUE

In light of the highly debated decisions of the Appellate Body on the amicus issue, it was natural to begin this article by outlining the possibilities for regulating the amicus question through decisions of the dispute settlement bodies. In the following sections, the scope of this article will be expanded to determine whether such a decision is at all warranted, and if so, whether other bodies of the WTO could make the decision.

A. No principled decision – just do it!

One can ask whether it is warranted to give amici curiae any official legal status within the WTO dispute settlement system. After all, the panels are allowed to 'seek information', and to therefore read articles and books dealing with international economic law, without having to disclose the extent to which their decision-making has been influenced by any particular source of knowledge. Advocates for the admission of amicus curiae briefs argue that amici would not, in any event, be allowed as a matter of right. Therefore, why determine and state in the decision the extent to which a panel 'accepted, refused, or took into account' an amicus curiae brief? A great deal of controversy and questioning of the legitimacy of the WTO procedures could probably have been spared if the panels, and especially the Appellate Body, had refrained from mentioning amicus submissions in the first place. Legally, this would have been possible since such submissions are also not mentioned in the DSU; however, from a public relations point of view, now that the question has been placed on the table, it seems doubtful that the controversy can be resolved by 'avoiding the issue'. In addition, NGOs seek certain recognition at an international level in order to prove the relevance of their work to their own members, constituencies, sponsors, and supporters. For them, it is

[55] Idem.

crucial to have influence and recognition within the system and to be able to prove this in some manner.

B. A principled decision to avoid having to give reasons

Another way of avoiding the issue, while still making a principled decision, might be to follow the strategy adopted by the Inter-American Court of Human Rights (IACHR), which has been praised regularly for its fair treatment of amici. The IACHR, however, merely acknowledges the submission of amicus curiae briefs at the beginning of its decisions and does not take a position on the content of the briefs or whether such briefs have been taken into account or even read.[56] This strategy apparently seemed to work very well in terms of public acceptance of the manner of handling NGOs. The IACHR walks a very fine line between acknowledging the existence of submissions of NGOs and maintaining complete liberty to deal with amicus curiae briefs as it deems fit. To apply this concept at the WTO would mean the taking of a principled decision to list all received amicus curiae briefs at the outset of each panel report, without mentioning their fate.

C. Decision needed for legal certainty

Politically, however, it might be too late to adopt such a strategy, and either the quasi-judicial branch or the quasi-legislative branch of the WTO might now have to go all the way and hand down a principled and reasoned decision on the admission of amicus curiae briefs. The 'real world' wants legal certainty: for members, for the dispute settlement bodies, and for civil society, in particular: NGOs, business associations, industry pressure groups, and the public at large. It will be impossible to leave this question in limbo indefinitely. Legally, the question of amicus curiae briefs, which has thus far prompted the legal debate on the amici and culminated in the 'additional procedure' in *EC – Asbestos,* affects due process within the WTO dispute settlement. The need to regulate this matter, most likely through one of the three options described above by the dispute settlement bodies, has now become politically inevitable.

The following sections will outline the different legal methods to implement a principled approach toward the amicus question in the future by the political bodies.

D. Can political bodies resolve the amicus question?

Perhaps the most important problem of the WTO today is the fact that the quasi-legislative branch, the WTO as a negotiation forum, is not producing

[56] Thomas Buergenthal, cf footnote 38, and decisions available at http://www.corteidh.or.cr (last visited 20 September 2001).

enough new rules to keep up with the fast pace of development in its field. This often puts the quasi-judicial branch into the difficult position of having to clarify, or even create a new rule, in situations in which negotiators either failed to address a problem, or were unable to agree on a solution for the problem, or in which problems arise due to new economic or technical developments. In this section, I will analyze whether there might be a way to clarify the amicus issue through non-judicial means, as opposed to a decision of the appellate body.

It is obvious that the members could amend[57] the DSU, either through regular negotiations or within the framework of the so-called 'built-in agenda'. But independently of a new round and therefore within the scope of a package deal, it seems to be politically impossible to achieve a consensus even with respect to the most uncontroversial issue concerning possible changes in the dispute settlement process, as shown by the 'sequencing problem' (inconsistency between Article 21.5 and Article 22.6 DSU for which a viable solution has been proposed and is backed by Canada, Colombia, Costa Rica, Japan, Korea, New Zealand, Norway, Peru, Venezuela, and Switzerland).[58] Currently, any hope of reaching a compromise appears to be doomed from the outset due to the US's position in favor of allowing amicus curiae briefs in general and the position of most developing countries in favor of prohibiting them altogether.

Are there any other possible ways? What about the main political body of the WTO? The General Council cannot reach a decision on grounds of Article V para 2 of the WTO Agreement since this provision addresses the relationship between the WTO as a negotiation forum and civil society, rather than between civil society and the WTO dispute settlement bodies. How about a decision by the Dispute Settlement Body (DSB), which is composed of the same diplomats in Geneva as the General Council, wearing 'another hat'? This is impossible as well since, under Article 2 DSU, the DSB is only granted the power to *administer* rules and procedures, and not to create new rules or interpret the DSU. This latter prerogative is actually reserved for the Ministerial Conference or the General Council under Article IX para 2 WTO Agreement – the so-called authoritative interpretation, which can be adopted upon a three-quarters majority of the WTO Members. This provision has not yet been applied since the inception of the WTO, which might be explained by the fact that it is even more difficult to obtain a three-quarters' majority of *all* WTO Members than it is to obtain a consensus of only the WTO Members *present*. Nevertheless, theoretically, it would be possible for the General Council to take up the recommendation of this article and to

[57] Article X para. 2 WTO Agreement, see *Preparations for the 1999 Ministerial Conference*, Dispute Settlement Understanding, Communication From Pakistan, WT/GC/W/162 (April 1999).

[58] 'Agreement on Dispute Settlement Changes Unlikely Before Doha', *Inside US Trade* (3 August 2001).

authoritatively implement the interpretation that amicus curiae briefs could henceforth only be submitted at the panel level. This interpretation would presuppose that the Appellate Body's 'inherent' or 'delegated' power pursuant to Article 17.9 does not go so far as to encompass the power to allow amici on its own, whereas it would confirm the Appellate Body's reasoned decision on amici at the panel level to the effect that Article 13 DSU must be broadly construed. The current inertia of the political bodies of the WTO, however, implies that most probably the final word will have to be spoken by the Appellate Body – *nolens volens*.

CONCLUSIONS

If there is not any movement on the quasi-legislative side concerning the admission of amici, the general public will expect a well-reasoned decision by the Appellate Body very soon. After a review of the different options and the policy and legal arguments related thereto, the intermediate solution is clearly the most promising one: to allow amici at the panel level where they become part of the record,[59] but not at the appellate level. This solution would be even more convincing if certain additional minor changes were made in the framework of the DSU. Most importantly, a significant step toward more transparency could increase the quality of amicus curiae briefs allowed at the panel level: If the initial submission of the parties were required to be made public simultaneously upon submission,[60] the non-state actors could read these submissions and decide whether or not they can add something of importance to the process by contributing an amicus curiae brief. If the Secretariat were to publish a deadline for the submission of amicus curiae briefs and a checklist of necessary information to be provided within the first few pages of the brief, along the lines of the 'additional procedure' in *EC – Asbestos*,[61] the panelists could quickly inform themselves as to whether it would be worthwhile for them to read the briefs, or whether they are actually battling with completely different issues. Once an amicus brief was accepted, the parties, too, would further profit from such a summary. But even in the absence of these additional changes, it would help the WTO as a whole if the amicus question were settled in the near future through a leading decision of the highest WTO adjudicators which does more than merely perpetuating an *ad hoc* solution on the weak basis of Rule 16(1) of the Working Procedures.

The reaction of the Member States to such a decision will show the extent

[59] Where they become part of the record.

[60] This is already possible voluntarily (see Appendix 3 para 3 DSU) and it should be possible nevertheless to keep specific information confidential. The least intrusive new rule would be to make it mandatory to disclose on the WTO website the non-confidential summary of the information contained in the submission, that currently has to be requested by a Member.

[61] G. Marceau and M. Stillwell, cf fn. 35, propose a very similar procedure.

to which the WTO membership accepts the fact that, with the inception of the WTO and its rule-based dispute settlement system, the Appellate Body acts as an independent quasi-judiciary. The challenge probably rests with the Appellate Body to come up with a principled, well-reasoned decision that puts an end to the now lengthy discussion of this matter. This would allow the general public and the WTO membership to once again focus on more significant issues, which, after all, constitute the main *raison d'être* for the adjudicative bodies at the WTO.