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Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience

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Padideh Ala'i

Abstract

This Essay first reviews the controversy surrounding the issuance of procedures for amicus curiae submissions by the Appellate Body in *E.C.—Asbestos*. Second, it looks at the history and practice of amicus curiae briefs at the WTO. Third, the Essay looks at how in the United States an amicus curiae has changed from being a “friend of the court” to a “judicial lobbyist,” and specifically, focusing on the procedural approach taken by the U.S. Supreme Court in addressing the negative impact of such judicial lobbying. Finally, the Essay draws certain lessons from the U.S. experience and concludes that the Appellate Body in *E.C.—Asbestos* adopted the U.S. Supreme Court approach in dealing with the “problem” of unsolicited amicus curiae briefs.

JUDICIAL LOBBYING AT THE WTO: THE DEBATE OVER THE USE OF AMICUS CURIAE BRIEFS AND THE U.S. EXPERIENCE

*Padideh Ala'i**

INTRODUCTION

The continuing debate over the use of amicus curiae briefs at the World Trade Organization¹ ("WTO") raises interesting questions about the influence of the U.S. legal system on the WTO dispute settlement process. Specifically, it brings to the surface differences between legal cultures and the fact that the U.S. legal culture with its emphasis on procedure is not readily transferable to the WTO. Comparing the controversy regarding the use of amicus curiae briefs before WTO Panels and the Appellate Body with the history and evolution of the institution of amicus curiae before the U.S. Supreme Court may help explain the solitary support of the United States for the Appellate Body's decision to issue additional procedures for the filing of amicus curiae briefs in *European Communities—Measures Affecting Asbestos and Asbestos containing Products* ("E.C.—Asbestos").² This Essay first reviews the controversy surrounding the issuance of procedures for amicus curiae submissions by the Appellate Body in *E.C.—Asbestos*. Second, it looks at the history and practice of amicus curiae briefs at the WTO.³ Third, the Essay looks at how

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1. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

2. *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135/R (Sept. 18, 2000) [hereinafter *E.C.—Asbestos Panel Report*].

3. It also must be mentioned that other inter-governmental institutions allow for amicus curiae briefs including, the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal of Rwanda, European Court of Human Rights, Inter-American Court of Human Rights, and International Court of Justice. See generally Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (arguing that national and re-

in the United States an *amicus curiae* has changed from being a “friend of the court” to a “judicial lobbyist,” and specifically, focusing on the procedural approach taken by the U.S. Supreme Court in addressing the negative impact of such judicial lobbying. Finally, the Essay draws certain lessons from the U.S. experience and concludes that the Appellate Body in *E.C.—Asbestos* adopted the U.S. Supreme Court approach in dealing with the “problem” of unsolicited *amicus curiae* briefs.⁴

I. *E.C.—ASBESTOS: THE APPELLATE BODY’S ADDITIONAL PROCEDURES FOR AMICUS CURIAE SUBMISSIONS*

In *E.C.—Asbestos*, Canada notified the Dispute Settlement Body (“DSB”) of the WTO that it would file an appeal with the WTO Appellate Body regarding the Panel ruling issued on October 23, 2000.⁵ By November 8, 2000, the Appellate Body had received thirteen⁶ unsolicited *amicus curiae* briefs regarding the appeal. The Appellate Body rejected and returned all thirteen unsolicited briefs and issued a letter informing the applicants of new procedures the Appellate Body had adopted for such submissions.⁷ These Additional Procedures were issued under Rule 16(1) of the Working Procedures for Appellate Review and

gional human rights tribunals have shown the usefulness of *amicus curiae* briefs in reaching well reasoned and accurate opinions). For a comparison between the WTO/GATT and the ICJ, see Nick Covelli, *Public International Law and Third Party Participation in WTO Panel Proceedings*, 33 J. OF WORLD TRADE, 125 (1999).

4. It is acknowledged that the issue of *amicus curiae* briefs and NGO participation are fundamentally linked and interrelated, but this Essay maintains that there is merit in looking at the issue of *amicus curiae* briefs as separate and distinct from the broader question of NGO participation.

5. The Panel ruling in *E.C.—Asbestos* has broken new ground by upholding for the first time a trade restrictive measure under the General Exceptions of GATT 1994 and specifically under Article XX (b) of GATT, as necessary for human health. See *E.C.—Asbestos Panel Report* para. 9.1; see also Padideh Ala’i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body’s Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT’L L. REV. 1129 (1999) (providing historical review of Article XX cases prior to *E.C.—Asbestos*). Although the result of the decision in *E.C.—Asbestos* may have been pro-environment, the Panel’s failure to take into account the varying health risks posed by the products in its analysis of “like products” under Article III(4) of GATT 1994 has raised concerns about the potential negative impact of this decision on health and safety regulations. See *E.C.—Asbestos Panel Report* para. 8.130; see also Part II of this Essay for further discussion.

6. See *Amicus Brief Storm Highlights WTO’s Unease with External Transparency*, 4 BRIDGES 1, 4 (2000); see also Laurie Kazan-Allen, *The WTO: Who Needs Friends?*, at http://www.ibas.binternet.co.uk/WTO_Amicus.htm.

7. See BRIDGES, *supra* note 6, at 1.

stated that they were issued in the “interest of fairness and orderly procedure.”⁸ The Additional Procedures, most importantly, provided that all those who intended to submit amicus curiae briefs would first be required to submit an application for leave to file such a submission with the Appellate Body.⁹ The deadline set for the filing of the applications was noon, November 16, 2000.¹⁰

Shortly after the Additional Procedures were communicated and posted on the WTO web site, the members of the WTO¹¹ accused the Appellate Body of acting beyond the scope of its mandate. The Egyptian Ambassador, acting on behalf of the Informal Group of Developing Countries (“IGDC”), asked for a Special Session of the WTO General Council regarding the Additional Procedures adopted by the Appellate Body.¹² The Special Session on the Additional Procedures took place on November 22, 2000 (“Special Session”). The consensus among these members, with the notable exception of the United States, was that the issue of amicus curiae briefs was not procedural, but a substantive one that only members could decide.¹³ A statement

8. In a communication sent from the Chairman of the Appellate Body to the Chairman of the Dispute Settlement Board (“DSB”) dated November 8, 2000, informing the DSB of the Additional Procedures adopted by the Division hearing the appeal in *E.C.—Asbestos*, the Appellate Body Chairman stated that:

This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the Working Procedures for Appellate Review, and is not a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

European Communities—Measures Affecting Asbestos and Asbestos Containing Products, Communication from the Appellate Body, WT/DS135/9 (Nov. 8, 2000) [hereinafter *Additional Procedures*].

9. *See id.*

10. *See id.*

11. The WTO is an inter-governmental organization and membership, is limited to governments.

The permanent seven-member Appellate Body is set up by the Dispute Settlement Body and broadly represents the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

World Trade Organization, *Dispute Settlement*, at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

12. *See* Gustavo Capdevila, *Trade: Civil Society Groups Spark Power Battle within WTO*, INTER PRESS SERVICE, Nov. 24, 2000.

13. *See* Chakravarthi Raghavan, *Will WTO-AB Listen to ‘Strong Signal’ from Members?*,

issued by the IGDC in connection with the Special Session stated that "while the Appellate Body was entitled to adopt its own working procedures, this decision of theirs went beyond an outreach activity, seeking information from individuals . . . not mandated by the DSU."¹⁴ The WTO representative from Pakistan even went so far as to call for the resignation of the Appellate Body Chairman.¹⁵

At the Special Session, the WTO members accused the Appellate Body of taking actions that were beyond its mandate under the Dispute Settlement Understanding¹⁶ ("DSU"). For many WTO members, the issuance of the Additional Procedures was only the latest example of a series of disturbing developments including the Appellate Body decision to allow acceptance of an unsolicited amicus brief in *United States Import Prohibition of Certain Shrimp and Shrimp Products* ("U.S.—Shrimp")¹⁷ and acceptance of amicus curiae briefs in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("U.S.—British Steel").¹⁸ The following remarks by the Egyptian Ambassador convey this sentiment:

It was 'crystal clear' there was no agreement among members on the issue of amicus curiae briefs—demonstrated during the DSU over the reports on the Shrimp—Turtle and U.S. British Steel cases. The WTO is a member driven intergovernmental organization and this basic and fundamental nature of the organization should and will remain as such.¹⁹

Similarly, Ambassador S. Narayanan expressed the concern of

4790 S. N. DEV. MONITOR, (2000); see also BRIDGES, *supra* note 6. It is noteworthy that although there are some differences amongst members of the WTO with regards to the issue of NGO participation, there was consensus on the issue of Appellate Body's lack of authority in adopting the Additional Procedures.

14. Raghavan, *supra* note 13.

15. See Kazan-Allen, *supra* note 6.

16. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) (emphasis added) [hereinafter DSU].

17. *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (May 15, 1998) [hereinafter *Shrimp-Turtle Panel Report*].

18. *United States—Imposition of Countervailing Duties on Certain Hot-Rolled lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R (May 10, 2000) [hereinafter *U.S.—British Steel Appellate Report*].

19. Raghavan, *supra* note 13.

many WTO members with the past performance of the “powerful Appellate Body”:

My friends know that I consider the Appellate Body of the WTO to be the most powerful institution in the world, more powerful than the G-8. What the Appellate Body decides has commercial, economic and social implications for 139 countries around the world. The power of the Appellate Body should be frightening to everybody, including the Appellate Body themselves. The membership has created this powerful institution in good faith, in the expectation of common good for all. The membership has always shown well-merited deference to the Appellate Body. Is it too much to expect from the powerful Appellate Body to show deference to the feelings of almost the entire membership that in accepting unsolicited amicus curiae briefs and seeking amicus curiae briefs, the Appellate Body is acting without mandate.²⁰

At the Special Session, only the United States “whole-heartedly backed” the Appellate Body’s decision to adopt the Additional Procedures.²¹ According to the U.S. Representative to the WTO, the Appellate Body “‘did the only thing it could do’ given the number of persons that either had already filed or expressed their intent to file friend of the court briefs.”²² The United States also stated that the Appellate Body had “merely managed a situation that already existed in the specific context of the asbestos dispute.”²³ At the conclusion of the Special Session, the Chairman of the General Council, Ambassador Kare Bryn of Norway, stated that he would convey to the Appellate Body “the sentiments from the meeting that the Appellate Body has to exercise extreme caution on this issue.”²⁴

The controversy surrounding amicus curiae submissions in the *E.C.—Asbestos* dispute raises three important and interrelated issues. *First*, it highlights the increasing power of the Ap-

20. *Id.* Other commentators, particularly from the developing world, seem to agree with this view. For example, Mr. Raghavan, editor of the “SUNS,” a publication of the Third World Network, has stated that “the General Council and the WTO member states should take action to curb the absolute power of the Appellate Body.” Capdevila, *supra* note 12.

21. See BRIDGES, *supra* note 6, at 4.

22. *Id.*

23. See BRIDGES, *supra* note 6, at 4 (stating that “New Zealand and Switzerland were the only other members to express ‘cautious support’ for the Appellate Body’s initiative”).

24. Raghavan, *supra* note 13.

pellate Body that was unforeseen and possibly unintended when the WTO was established at the conclusion of the Uruguay Round. During the short life span of the WTO, the success of the Appellate Body has been in sharp contrast to the lack of success at the inter-governmental level. While the WTO membership has been unable to reach consensus on a variety of issues including the selection of the WTO Director-General,²⁵ an agenda for further trade rounds,²⁶ the linkage of trade to environment or labor,²⁷ and participation of non-governmental organizations,²⁸ those very same issues have been raised in the context of specific disputes before the Appellate Body. As a result, in controversial areas such as trade and environment, the Appellate Body has taken a more assertive role than the General Council or the WTO Committee on Trade and Environment.²⁹ *Second*, the *E.C.—Asbestos* dispute demonstrates the continuing opposition of many governments to NGO participation at the WTO and the increasing power of international civil society.³⁰ *Finally*, the solitary voice of the United States in support of the Appellate Body can be attributed, at least partly, to the U.S. legal system's historical familiarity with the institution of *amicus curiae* and its evolution from "friend of the court" to "judicial lobbyist." This Essay addresses only this third and final issue.

II. AMICUS CURIAE BRIEFS AT THE WTO

Under the GATT system unsolicited briefs from non-members were not accepted. It was argued that the dispute was strictly between governments and that panelists could only address the claims and arguments that were submitted by the parties to the dispute.

25. See John H. Jackson, *The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights*, 94 AM. SOC'Y INT'L L. PROC. 222, 223 (2000).

26. See David A. Gantz, *Failed Efforts to Initiate the 'Millennium Round' in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349, 352 (2000) (stating that "[i]t is very difficult to move forward when . . . the so called 'Quad' countries (United States, European Union, Canada, and Japan) disagree even on basic objectives of a new negotiating round"). See generally *id.* at 352-57.

27. See *id.* at 352-53, 364.

28. See *id.* at 363; see also Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 FORDHAM L. REV. 345, 350 (2000).

29. See Gantz, *supra* note 26, at 363.

30. Many articles have been written on the issue of NGO participation at the WTO. See, e.g., Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 223-24 (1997).

The WTO dispute settlement system has not followed the GATT view on unsolicited submissions by non-members. First, the Appellate Body has held that although the Panels may still consider only the *claims* raised by the parties, they can consider any *arguments*, including those not raised by the parties, if they are relevant to the Panel's analysis of a case.³¹ Second, Article 13 of the DSU which authorizes WTO panels to "seek information from any relevant source and . . . consult experts to obtain their opinion,"³² has been interpreted by the Appellate Body to allow the submission of non-requested or unsolicited briefs.³³

A. *Amicus Curiae* Briefs Filed in WTO Panel Proceedings

Amicus curiae briefs were first filed in the WTO dispute settlement system in two visible and highly controversial cases: *United States—Standards for Reformulated and Conventional Gasoline*³⁴ ("*Reformulated Gasoline*") and *European Communities—Measures Concerning Meat and Meat Products (Hormones)*³⁵ ("*E.C.—Hormones*").

31. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (Sept. 9, 1997); see also *European Communities—Measures Concerning Meat and Meat Products*, Report of the Appellate Body, WT/DS48/AB/R (Feb. 13, 1998) [hereinafter *E.C.—Hormones Appellate Report*].

32. Article 13 (*Right to Seek Information*) states in full:

- (1) Each panel shall have the right to *seek* information and technical advice from any individual or body which it deems appropriate. However, before a panel *seeks* such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization for the individual, body, or authorities of the Member providing the information.
- (2) Panels may *seek* information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.

DSU art. 13 (emphasis added).

33. See generally *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S.—Shrimp Appellate Report*].

34. See Panel Report, WT/DS2/R (Jan. 29, 1996) [hereinafter *Reformulated Gasoline Panel Report*] and Report of the Appellate Body, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *Reformulated Gasoline Appellate Report*].

35. See *E.C.—Hormones Appellate Report*; see also Public Citizen, Institute for Agriculture and Trade Policy, Cancer Prevention Coalition, Community Nutrition Institute, and Earth Justice Legal Defense Fund, *Comments to the Appellate Body of the World Trade*

mones"). Both cases raised issues about the right of the WTO members to promulgate and enforce domestic environmental or health and safety regulations that conflict with their WTO obligations.³⁶ In both cases, however, the dispute settlement bodies ignored the NGO submissions.

The question of unsolicited amicus curiae briefs was first³⁷ discussed by the Dispute Settlement Panel in *United States—Shrimp*.³⁸ In *United States—Shrimp*, unsolicited amicus curiae briefs were submitted by NGOs both to the Panel³⁹ and to the Appellate Body.⁴⁰ The Panel rejected all of the unsolicited NGO submissions, stating that "accepting non-requested information from non-governmental sources, would be, in our opinion, incompatible with the provisions of the DSU as currently applied."⁴¹ The Panel interpreted the word "seek" in Article 13 to mean only those submissions that were explicitly solicited, i.e., requested.⁴² The Panel also followed GATT philosophy, holding

Organization concerning European Communities—Measures Concerning Meat and Meat Products (Hormones) (Oct. 31, 1997), available at <http://www.citizen.org/pctrade/gattwto/Testimonies%20&%20Comments/meat.htm>.

36. In *Reformulated Gasoline*, the Gasoline Act of the Clean Air Act ("CAA") of the United States was found to be inconsistent with U.S. obligations under GATT 1994 and not justified under the General Exception provisions of Article XX. Although the Appellate Body reversed the panel ruling that the gasoline rule did not fall within the terms of Article XX(g) of the GATT 1994 (i.e., "relating to conservation of an exhaustible natural resource"), it did state that it was not justified under the chapeau of Article XX. See also Ala'i, *supra* note 5, 1145-1149. In *E.C.—Hormones*, the Panel and Appellate Body held that the EU regulations that ban meat or meat products derived from cattle who have been administered either natural or synthetic hormones were inconsistent with the EU obligations under the GATT and Uruguay Round agreements. See *E.C.—Hormones Appellate Report*, at 29-30.

37. It must be noted that in *E.C.—Hormones*, the Appellate Body had already recognized the right of panels to "seek information and advice as they deem appropriate in a particular case." *E.C.—Hormones Appellate Report* para. 147.

38. See *Shrimp—Turtle Panel Report*. The measure at issue was a U.S. law that prohibited importation of shrimp or shrimp products into the United States that had been caught without the use of Turtle Excluder Devices ("TEDs"). *Id.*

39. The following NGOs filed submissions in *Shrimp—Turtle Panel Report*: Center for International Environmental Law, Center for Marine Conservation, Environmental Foundation Ltd., Mangrove Action Project, Philippine Ecological Network, and Nacional de Accion Ecologia. See *Shrimp—Turtle Panel Report* para. 155.

40. The following NGOs filed submissions in *U.S.—Shrimp Appellate Report*: Center for International Environmental Law, Center for Marine Conservation, The Environmental Foundation Ltd., The Philippine Ecological Network, the Nacional de Accion Ecologia, the World Wildlife Fund, International, and the Foundation for International Environmental Law and Development. See *U.S.—Shrimp Appellate Report* paras. 79, 99.

41. *Id.* para. 96.

42. See *Shrimp—Turtle Panel Report* para. 7.8.

that the dispute system is inter-governmental and that "it is usual practice for the parties to put forward whatever documents they considered relevant to support their case."⁴³ The Panel further stated that if any of the parties wanted to use or rely on the arguments made by the NGOs they should be included as part of their own submissions.⁴⁴

On appeal, the United States argued that the Panel in *United States—Shrimp* had erred in finding that it could not accept non-requested submissions from NGOs.⁴⁵ The United States argued that the Panel erred in its interpretation of Article 13 of the DSU⁴⁶ by concluding that it only applied to requested or solicited submissions. The Appellate Body agreed with the United States and reversed the Panel's decision on this issue.⁴⁷ The Appellate Body stated that although under the DSU, "access to the dispute settlement process of the WTO is limited to the Members of the WTO"⁴⁸ and non-members do not have a "legal right" to participate,⁴⁹ the Panel's interpretation of the word "seek" in Article 13 of the DSU was "unnecessarily formal and technical."⁵⁰ According to the Appellate Body, under Article 13 a Panel has the discretion to look at or ignore any information, including submissions by NGOs, irrespective of whether such information was requested.⁵¹

43. *Id.* para. 7.8.

44. *See id.* The Panel stated that "if any party in the present dispute wanted to put forward these documents [NGO amicus curiae briefs], or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties, would have two weeks to respond to the additional materials." *Id.* para. 7.8.

45. *See U.S.—Shrimp Appellate Report* para. 9.

46. *See id.*

47. *See id.* paras. 108, 110; *see also* para. 107.

48. *Id.* para. 101 (stating that "[t]his access is not available, under the *WTO agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental").

49. *See id.* It states in full:

[U]nder the DSU, only Members who are parties to the dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right*, to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.

Id. (emphasis added).

50. *Id.* para. 107.

51. The Appellate Body specifically stated:

[A]uthority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been re-

In addition, the Appellate Body set certain standards for consideration of amicus curiae briefs by Panels, including “the relevancy” and “acceptability” of the information and advice received in each submission.⁵² Based on such criteria, a Panel would determine what weight, if any, should be given to the submission.⁵³ Should a panel decide to accept a submission, the Panel is not obliged to consider the submission in rendering its decision. Specifically, the Appellate Body found that it is appropriate that some submissions should ultimately be given no weight.⁵⁴

In *United States—Shrimp*, the Appellate Body did not explicitly address the issue of whether the Appellate Body itself has authority to accept the amicus curiae briefs because the United States had attached the three amicus curiae briefs as exhibits to its main submission. The United States stated that the amicus curiae briefs were incorporated into the main U.S. submission only to the extent that they were consistent with the arguments made by the U.S. submission.⁵⁵ As a result of this disclaimer, the Appellate Body looked only at the main U.S. submission. The Appellate Body further stated that when an amicus curiae brief is attached to a party submission it becomes “an integral part of the participant’s submission.”⁵⁶

On appeal, India, Pakistan, and Thailand objected to the U.S. position on unsolicited NGO submissions, arguing that allowing unsolicited briefs to be filed deprives the Panel of its right to decide whether it needs supplemental information and of what type. Perhaps more importantly, it “deprives [WTO] Members of their right to know that information is being sought from within their jurisdiction.”⁵⁷ The Appellees further stated that to allow unsolicited amicus curiae to be filed would “deluge” the Panel with information that “might be strongly biased if nationals from Members involved in a dispute could provide unso-

requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.

Id. para 108.

52. *See id.* para. 106.

53. *See id.* para. 104.

54. *See id.*

55. *See id.* para. 86. (citing to U.S. letter to the Appellate Body).

56. *Id.* para. 89.

57. *U.S.—Shrimp Appellate Report* para. 109.

licited information.”⁵⁸ In other words, India, Thailand, and Pakistan were concerned that the acceptance of unsolicited submissions from NGOs would become a form of judicial lobbying.

As a third party participant, the E.C. also disagreed with the U.S. interpretation of Article 13 by stating that although Article 13 gives panels the “pro-active discretion”⁵⁹ to “seek” information from other sources, it “wonders whether the text of the DSU could be interpreted so widely as to give non-governmental organizations the right to file submissions directly to a Panel.”⁶⁰

Although the Appellate Body ultimately ruled against the United States in *United States—Shrimp*, the Appellate Body’s agreement with the U.S. position on unsolicited submissions by NGOs has been widely criticized by many developing countries’ governments.⁶¹ In connection with the Appellate Body ruling in *United States—Shrimp*, an Indian representative stated that India will not tolerate “eco-imperialism” through the WTO.⁶² Furthermore, many developing countries believe that NGO participation through amicus curiae briefs is only part of the push by the West to broaden the trade mandate to include labor and environmental concerns.

In 1998, in *Australia—Import Prohibition on Salmon from Canada* (“*Australia-Salmon*”), the Panel sought expert advice under Article 13 of the DSU and Article 11 of the SPS Agreement.⁶³ In *Australia-Salmon* the use of solicited amicus curiae briefs was not controversial as it was clearly authorized by even a restricted interpretation of Article 13. The Panel noted that:

58. *Id.* para. 32.

59. *Id.* para. 65.

60. *Id.*

61. See Sukumar Muralidharan, *In Search of Consensus*, FRONTLINE, JUNE 6-19, 1998, at <http://www.fguardians.org/flmain.html> (stating that “[t]he developing countries rightly view the Western effort to inscribe intrusive labor and environmental standards into the rule-book as an effort to neutralize their comparative advantage in world trade”).

62. Ala’i, *supra* note 5, at 1171 n.185 (citing to Cato Center for Trade Policy Studies Real Audio and Video Archives, *The WTO’s Shrimp-Turtle Decision: Free Trade v. the Environment?* at <http://www.freetrade.org/realmedia/realmedia.html>).

63. See *Australia—Measures Affecting Importation of Salmon*, Report of the Panel, WT/DS18/R (June 12, 1998) [hereinafter *Australia-Salmon Panel Report*]. In this case, Canada objected to the Australian prohibition on the importation of fresh, chilled or frozen salmon from Canada under Quarantine Proclamation 86A (“QP86A”). QP86A prohibited importation unless the fish or parts of the fish have been subject to treatment. Under this rule importation of heat treated salmon products was permitted. *Id.* para 2.14.

In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult with the relevant international organizations, at the request of either party to the dispute or on its own initiative . . . both parties indicated that they had *no objection* to the Panel seeking advice.⁶⁴

Therefore, the Panel invited the parties to submit names of individual experts in the subject matter before the Panel. In addition, the Panel sought names of individuals from the Office International des Epizooties ("OIE").⁶⁵ Subsequently, the Parties were given an opportunity to comment on the list of experts and to state "any compelling objections" they may have to a particular individual listed.⁶⁶ Finally, the Panel selected four individuals from the list "taking into account the comments of the parties"⁶⁷ and requested them to advise the Panel in their individual personal capacities.⁶⁸ Once the experts were selected, the Panel, "in consultation with the parties,"⁶⁹ prepared questions that were submitted to each expert along with a request that responses be provided in writing. The parties also agreed to supply the experts with the written submissions of the parties. The parties were then given an opportunity to comment on the experts' written responses.⁷⁰ Finally, the experts were "invited to meet with the Panel and the parties to discuss their written responses to the questions and to provide further information."⁷¹

In sum, *Australia-Salmon's* use of amici is acceptable to the WTO membership. WTO members are in agreement that Arti-

64. *Id.* para. 6.1 (emphasis added).

65. *See id.* para. 6.2.

66. *Id.* para. 6.3.

67. *Id.* para. 6.3.

68. The individuals selected were Dr. David E. Burmaster, Alceon Corporation, United States; Dr. Christopher Rodgers, fish disease consultant, Spain; Dr. James Winton, National Fisheries and Research Center, U.S. Fish and Wildlife Service, United States; and Dr. Marion Wooldridge, Department of Risk Research, Central Veterinary Laboratory, United Kingdom.

69. *Australia-Salmon Panel Report* para. 6.4.

70. *See id.* para. 6.4.

71. *Id.* paras. 6.4-6.5. The summary of the expert written submission was included in the Panel Report as was the transcript of the meeting with the experts that was attached as Annex 2 to the Panel Report.

cle 13 authorizes solicited expert advice. It is even less objectionable when such advice is sought with the advice and consent of the parties. For most of the WTO membership this is the only context in which Article 13 authorizes the submission of amicus curiae briefs before the Panel. Proponents of this narrow view argue that such use of solicited expert advice on factual issues does not interfere with the inter-governmental nature of the WTO.⁷²

Following *Australia-Salmon*, amicus curiae briefs were filed before WTO panels in *United States—Section 110(5) of the U.S. Copyright Act*⁷³ (“U.S.—Copyright”), *E.C.—Asbestos*,⁷⁴ and *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*⁷⁵ (“E.C.—Bed Linen”). In *U.S.—Copyright* the Panel received a copy of a letter sent to the U.S. Trademark Register from a law firm representing the American Society for Composers Authors and Publishers (“ASCAP”). The U.S. Trade Representative had asked for information from ASCAP in relation to certain questions that had been asked of the United States by the Panel. Upon receipt of the letter, the Panel sent copies to both parties and asked them to comment on it if they wished.⁷⁶ Subsequently, the United States distanced itself from the “positions expressed in the letter by that law firm and emphasized that in its view the letter was of little probative value for the Panel, because it provided essentially no factual data not already provided by either party.”⁷⁷ Although disagreeing with the position of the ASCAP, the United States “supported in general the right of private parties to make their views known to the WTO dispute settlement panels.”⁷⁸

72. See DSU. In addition, the experts were limited in their written submissions to questions asked by the Panel. Both parties agreeing to expert participation were allowed to respond to submissions made by the experts.

73. *United States—Section 110(5) of the U.S. Copyright Act*, Report of the Panel, WT/DS160/R (Jun. 15, 2000) [hereinafter *U.S.—Copyright Panel Report*]. E.C. complained that the “home style receiver exemption” to the U.S. Copyright Act, which provided that licenses were not necessary for public performances in restaurants, bars, stores etc., was in violation of certain WTO TRIPS obligations. *Id.*

74. See *E.C.—Asbestos Panel Report*.

75. *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Panel, WT/DS141/R (Oct. 30, 2000) [hereinafter *E.C.—Bed Linen Panel Report*].

76. See *U.S.—Copyright Panel Report* paras. 6.3-6.4.

77. *Id.* para. 6.5.

78. *Id.*

The E.C. stated that it had no substantive comments on the letter and agreed with the United States that “the letter did not add any new element to what was already submitted by the parties.”⁷⁹ The E.C., however, did reiterate that the scope of Article 13 of the DSU was limited solely to issues of fact and not law, stating:

[T]he authority of the Panels is limited to the consideration of factual information and technical advice by individuals or bodies alien to the dispute and thus did not include the possibility for a panel to accept any legal argument or legal interpretation from such individuals or bodies.⁸⁰

In response, the Panel decided to “not reject outright the information contained in the letter from the law firm representing ASCAP,” but agreed that the “letter essentially duplicates information already submitted by the parties” and stated that “we have not relied on it for our reasoning or our findings.”⁸¹

In *E.C.—Bed Linens*, the Panel accepted an amicus curiae submission by Dr. Konrad Neundörfer on behalf of Foreign Trade Association but refused, once again, to “take the submission into account” in reaching its decision.⁸² The Panel did not explain its decision noting only that copies of the submission were made available to the parties for comment and that no party made any substantive comment regarding the submission. Recognizing the past positions of E.C. and India with regard to non-solicited amicus curiae submissions,⁸³ it is logical to assume that both parties would have objected to considering the submission on technical grounds.

In *E.C.—Asbestos*, the Panel initially received four amicus curiae briefs from the following non-governmental organizations in the months of May and July, 1999: Collegium Ramazzini, Ban Asbestos Network, Instituto Mexicano de Fibro-Industrias A.C., and the American Federation of Labor and Congress of Indus-

79. *Id.* para. 6.6.

80. *Id.*

81. *Id.* para. 6.8. The Panel also made a point of emphasizing that the “letter was not addressed to the Panel but only copied to it.” *Id.*

82. See *E.C.—Bed Linen Panel Report* para. 6.1, n.10 (stating that the panel did not find it necessary to take the submission into account in reaching decision in this dispute).

83. See *U.S.—Shrimp Appellate Report*.

trial Organizations (“AFL-CIO”).⁸⁴ Almost one year later, on June 27, 2000, the Panel received a fifth amicus curiae brief from Only Nature Endures (“ONE”), an NGO situated in Mumbai, India.⁸⁵ The submission by ONE was rejected by the Panel for having been submitted too late in the proceedings.⁸⁶ The Panel stated that in view of the provisions of the DSU, “[t]his brief had been submitted at a stage in the proceedings when it could no longer be taken into account.”⁸⁷ It, therefore, decided not to accept the request of ONE and informed the organization accordingly.

The E.C. incorporated by reference in its rebuttal the submission of the Collegium Ramazzini and subsequently stated that it was incorporating by reference the amicus brief submitted by the AFL-CIO, stating that that body supported the E.C.’s scientific *and* legal arguments” in that dispute.⁸⁸ The E.C. proposed that the Panel reject the submissions from the Ban Asbestos Network and the Instituto Mexicano de Fibro-Industrias A.C. as having no relevance to the dispute. Canada argued that all four amicus curiae briefs should be rejected for being submitted too late.⁸⁹

The Panel decided “not to take into account the amicus curiae briefs submitted respectively by the Ban Asbestos Network and by the Instituto Mexicano de Fibro-Industrias A.C.”⁹⁰ The Panel decided to take into account only those submissions that the E.C. had decided to include in their own submission, i.e., submissions by Collegium Ramazzain and the American Federation of Labor and Congress for Industrial Organizations.⁹¹ Canada was given an opportunity to respond in writing and orally to the arguments raised in those two amicus curiae briefs. In the

84. See *E.C.—Asbestos Panel Report* para. 6.1.

85. See Kazan-Allen, *supra* note 6 (stating that ONE is an “unknown group” whose director “travels the world spreading disinformation about asbestos”).

86. See *E.C.—Asbestos Panel Report* paras. 6.4, 8.14.

87. *Id.* para. 8.14. The Panel nevertheless provided the parties with copies of the submission while informing them of its decision and also “informed the parties that the same decision would apply to any briefs received from non-governmental organizations between that point and the end of the procedure.” *Id.*

88. *Id.* para. 6.2 (emphasis added).

89. See *id.* All the submissions were received in the months of May and July 1999, while the Panel was established on November 25, 1998. See *id.* para. 6.1 (giving dates of submissions); see also para. 1.3 (giving date of establishment of Panel).

90. *Id.* para. 8.13.

91. See *id.* para. 8.12.

end, the Panel accepted four out of the five amicus curiae submissions, and of the four accepted, took into account only those two that had been incorporated by reference into the submissions of a party.⁹²

It is noteworthy that the E.C. decided to forego its argument that Article 13 is limited to issues of fact by incorporating in its main submission not only the factual arguments but also the legal arguments contained in two amicus curiae briefs. Similarly, the fact/law distinction was not raised by Canada, who requested that it be given an opportunity to respond to both the factual and legal issues raised by the amicus curiae briefs should the Panel decide to accept those briefs.

In sum, following *U.S.-Shrimp*, Panels do not reject unsolicited amicus submissions on the basis that they are not authorized under Article 13 of the DSU. Many Panels have chosen, however, to use their discretion by ignoring such submissions. The United States has consistently supported the use of amicus curiae briefs before Panels arguing that such briefs can address both factual and legal issues. In *U.S.-Copyright*, the United States supported the right of a U.S. based organization to file an amicus even though the positions expressed by the amici were inconsistent with the positions of the United States government.

B. *Amicus Curiae Briefs filed in Appellate Body Proceedings*

In *United States—British Steel*,⁹³ an industrial NGO, American Iron and Steel Institute, submitted an amicus curiae brief to the Panel. The Panel rejected the submission as untimely because it had been submitted after the Panel's second meeting with the parties.⁹⁴ On appeal, however, the Appellate Body accepted the amicus curiae briefs from the same business NGO, as well as another from the Specialty Steel Industry of North America.⁹⁵ The

92. See *id.* paras. 8.12, 8.13.

93. *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Panel, WT/DS138/R (Dec. 23, 2000) [hereinafter *U.S.—British Steel Panel Report*]. The Panel was established to consider a complaint by the E.C. with respect to countervailing duties imposed by the United States on certain hot-rolled lead and bismuth carbon steel products (lead bars) originating in U.K. The subsidies countervailed relate principally to equity infusions granted by the British Government to a state-owned company, British Steel Corporation. *Id.* para. 2.5.

94. See *id.* para. 6.3.

95. See *U.S.—British Steel Appellate Report* para. 4.2.

Appellate Body rejected the European Communities argument that amicus curiae briefs are “inadmissible” in appellate review proceedings.⁹⁶ The E.C. argued, as it had in *U.S.—Shrimp*, that the basis for amicus curiae briefs in Panel proceedings is Article 13 of the DSU and Article 13 is only applicable to Panel proceedings and not Appellate Body proceedings. Therefore, the E.C. argued, the Appellate Body has no authority to accept such submissions.⁹⁷ The E.C. noted that Article 13 of the DSU applied to “*factual information and technical advice*” and did not include “*legal arguments or legal interpretations* received from non-members.”⁹⁸ Furthermore, the E.C. argued:

[N]either the DSU nor the [Appellate Body] *Working Procedures* allow amicus curiae briefs to be admitted in Appellate Body proceedings, given that Article 17.4 of the DSU . . . confine(s) participation in an appeal to participants and third participants, and that Article 17.10 of the DSU provides for the confidentiality of Appellate Body proceedings.⁹⁹

Brazil and Mexico, as third party participants, agreed with the E.C. Brazil and Mexico distinguished between issues of fact and law and stated that Article 13 of the DSU contemplates the Panel receiving only factual information from other non-member sources and that there is nothing in either the DSU or the Working Procedures of the Appellate Body that would authorize receipt of briefs from private entities “containing legal arguments on the issues under appeal.”¹⁰⁰ Mexico further argued that the Working Procedures and the DSU limit participation in the appellate proceedings, excluding countries who were not parties or third parties during the Panel proceeding from joining at the appeals level, and that this limitation is another reason why amicus curiae briefs may not be accepted on the Appellate level.¹⁰¹ Brazil further argued that the “[m]embers of the WTO and, in particular, parties and third parties, are uniquely qualified to make legal arguments regarding Panel reports and the

96. *See id.* para. 36 (stating that “[o]n 15 February 2000, the European Communities filed a letter arguing that the amicus curiae briefs are ‘inadmissible’ in appellate review proceedings, and stating that it did not intend to respond to the content of the briefs” by the two U.S. industrial NGOs).

97. *See id.*

98. *Id.* (emphasis added).

99. *Id.* (emphasis added).

100. *Id.* para. 37.

101. *See id.*

parameters of the WTO obligations."¹⁰² The argument was that member governments have a unique understanding of their WTO obligations because they had negotiated the Uruguay Round agreements. Furthermore, it was argued, only members were intimately involved in the Panel proceedings from which the appeal was taken and, as a result, were most aware of the contents of their submissions and the issues on appeal.

The United States disagreed with the positions of the E.C., Brazil, and Mexico and argued that the Appellate Body *had* the authority to accept amicus curiae submissions by the steel industry associations.¹⁰³ The United States argued that, as the Appellate Body had stated in *U.S.—Shrimp*, Article 13 provided the Panels with “*ample and extensive authority to undertake and to control the process* by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.”¹⁰⁴ According to the United States Article 13 permits Panels to receive expert information on issues of law *and* fact. The United States further argued that the Appellate Body’s authority to accept amicus curiae submissions is authorized under Article 17.9 of the DSU,¹⁰⁵ which allows the Appellate Body to draw upon its own working procedures, and Rule 16(1) of the Working Procedures,¹⁰⁶ which authorizes the Appellate Body to “create appropriate procedures when a question arises that is not covered by the Working Procedures.”¹⁰⁷ Finally, the United States disagreed with the E.C., Brazil, and Mexico that acceptance of unsolicited amicus curiae briefs would “compromise the confidentiality of the Appellate Body proceedings, or give greater right to a non-WTO member than to WTO members who are not participants or third participants in an appeal.”¹⁰⁸

The Appellate Body in *U.S.—British Steel* once again agreed

102. *Id.* para. 37.

103. *See id.* para. 38.

104. *Id.* para. 38 (citing *U.S.—Shrimp Appellate Report* para. 106) (emphasis added by the United States).

105. DSU art. 17.9 (stating that “[w]orking Procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information”).

106. WTO, *Working Procedures for Appellate Review*, WT/AB/WP/3 (Feb. 28, 1997), available at http://www.wto.org/english/tratop-e/dispu-e/ab3_e.htm [hereinafter *Working Procedures*].

107. *U.S.—British Steel Appellate Report* para. 38.

108. *Id.*

with the United States on the issue of amicus curiae briefs. First, the Appellate Body stated that although nothing in the DSU specifically authorizes it to accept or consider amicus curiae briefs from outside sources, “neither the DSU nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs.”¹⁰⁹ The Appellate Body went on to state that Article 17.9 of the DSU provides the Appellate Body with “broad authority to adopt procedural rules which do not conflict with any rules and procedures of the DSU or the covered agreements”¹¹⁰ and, in addition, Rule 16(1) of the Working Procedures “authorizes a division to create an appropriate procedure when a question arises that is not covered by the Working Procedures.”¹¹¹ The Appellate Body concluded that it does not have a “legal duty” to accept submissions from non-WTO members¹¹² but it has “the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.”¹¹³ Finally, however, the Appellate Body concluded that in *U.S.—British Steel* it was not necessary to take the two amicus curiae briefs into account in rendering its decision.¹¹⁴

Following *U.S.—British Steel*, the role of amicus curiae briefs at the Appellate Body came up again in *E.C.—Asbestos*. As mentioned earlier, consistent with its position on amicus curiae submissions in *U.S.—British Steel*, the Appellate Body in *E.C.—Asbestos* relied on Rule 16(1) of the Working Procedures to promulgate Additional Procedures for the acceptance of amicus curiae briefs. These Additional Procedures were communicated to all participants and third participants as well as the Chairman of the Dispute Settlement Body on November 8, 2000.¹¹⁵ The three members of the Appellate Body who established the rules made it clear that the rules were adopted “for the purposes of this appeal only,” and that the rules were *not* additions to the working procedures of the Appellate Body.¹¹⁶ The Additional Procedures provided that “[a]ny person, whether natural or legal,

109. *Id.* para. 39.

110. *Id.*

111. *Id.* para. 38.

112. *Id.* para. 41.

113. *Id.* para. 39.

114. *See id.* para. 42.

115. *See* Additional Procedures.

116. *Id.*

other than a party or a third party to this dispute . . . must apply for leave to file such a brief from the Appellate Body by noon on Thursday, November 16, 2000."¹¹⁷ The Additional Procedures made it clear that no one would be permitted to file an *amicus curiae* brief who had failed to file an application for leave and such leave had been granted.

Section 3 of the Additional Procedures further stated what information an application for leave should include.¹¹⁸ Among the information requested was detailed information about the applicant, its activities, membership and sources of funding, interest of the applicant in the proceedings, disclosure of all information about any relationship the applicant may have to any of the parties or third parties and any financial assistance or contribution made to the applicant in preparation of this application or the brief by a party or any third party, and identification of the specific legal issues that are the subject of this appeal that the applicant intends to address in its brief.¹¹⁹ Perhaps the most difficult information requested from an applicant was contained in part 3(f) of the Additional Procedures, which "indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of

¹¹⁷ *Id.* para. 2.

¹¹⁸ Article 3 of the Additional Procedure provides:

An application for leave to file such a written brief shall:

- (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
- (b) be in no case longer than three typed pages;
- (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
- (d) specify the nature of the interest the applicant has in this appeal;
- (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal . . . which the applicant intends to address in its written brief;
- (f) indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
- (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in preparation of its application for leave or its written brief.

Id.

¹¹⁹ See Additional Procedures.

what is already submitted by a party or third party to this dispute.”¹²⁰ The Additional Procedures further provided that application for leave could not exceed three pages.¹²¹ They also set forth procedural rules that must be followed by those whose application for leave is granted, i.e., page limit, deadline for submission, form of such submissions, etc. The Additional Procedures also state that “[t]he grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.”¹²²

It is estimated that seventeen groups and one individual submitted applications for leave to file an amicus curiae brief by the deadline.¹²³ However, almost immediately after the deadline the Appellate Body shocked the NGO community by rejecting all applications and stating only the following:

Please be advised that we have reviewed and considered your application, in accordance with the Additional Procedure adopted by this Division . . . and that your application for leave to file a written brief in this appeal has been denied for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.¹²⁴

Many of the applicants requested an explanation from the Appellate Body, asking the Body to “specify which of the requirements set forth in the individual sub-paragraphs of paragraph three of the Additional Procedure” they had failed to comply with and the Appellate Body’s reasoning in reaching that conclu-

120. *See id.*

121. *See id.* para. 3(b).

122. *Id.* para. 5.

123. *See BRIDGES, supra* note 6, at 1 (stating that 13 were submitted before the new rule was promulgated). A complete list is not available, particularly a listing of industrial or business NGOs, however the following NGOs and individual publicly stated that they had filed applications with the Appellate Body and have had their applications rejected (1) The American Public Health Association, (2) The Society of Occupational and Environmental Health (“SOEH”), (3) The Occupational and Environmental Diseases Association, (4) The International Confederation of Free Trade Unions (“ICFTU”), (5) The European Trade Union Confederation (“ETUC”), (6) The Australian Centre for Environmental Law, (7) The International Ban Asbestos Secretariat, (8) the Ban Asbestos Virtual Network, (9) Greenpeace International, (10) Worldwide Fund, (11) Foundation for International Environmental Law and Development, (12) The Center for International Environmental Law, and (13) Robert L. Howse, Professor of International Law at the University of Michigan Law School. *See id.*

124. *Letter from Appellate Body Members Florention Fleiciano, James Bacchus, and Claus Dieter Ehlermann*, (Nov. 16, 2000), at http://www.ibas.btinternet.co.uk/WTO_Rejection.htm.

sion.¹²⁵ The Secretariat of the Appellate Body, Ms. Debra Steger, responded to these requests for more information by stating that “we are unable at this time to provide you with the additional information you request . . . This information will be provided in full in the Report of the Appellate Body which will be available at the completion of this appeal.”¹²⁶ This letter was written after the Special Session that had been held specifically to condemn the Appellate Body’s issuance of the Additional Procedures.¹²⁷

At the time of the writing of this Essay, the Appellate Body has not yet issued its decision in *E.C.—Asbestos*. It is clear, however, that the rejection of these briefs has so far been premised on noncompliance with the Additional Procedures, i.e., Section 3 of the Additional Procedures.¹²⁸

C. Conclusion

The use of amicus curiae briefs at the WTO is a recent and controversial phenomenon. There is emerging consensus on the issue of amicus curiae submissions before WTO Panels. Article 13 of the DSU explicitly authorizes Panels to “seek” expert advice from outside sources. The Appellate Body has interpreted this to mean that Panels have discretion to accept and take into account solicited or unsolicited NGO submissions. By the same token, the Appellate Body has held that NGOs can submit unsolicited briefs to Panels but that Panels are under no obligation to take such submissions into account in rendering their decisions. To date, unsolicited amicus curiae submissions have only been taken into account to the extent that they have been made part of a party’s submission.

In contrast, there is no consensus on the issue of amicus

125. See, e.g., *Letter from Jacob Weksman on behalf of the Foundation for International Environmental Law & Development (SOAS) and Matthew Stilwell on behalf of the Center for International Environmental Law* (Nov. 21, 2000), at http://www.ibas.btinternet.co.uk/WTO_Question.htm.

126. See, e.g., *Letter from Debra Steger to Ms. Tait* (Nov. 28, 2000), at http://www.ibas.btinternet.co.uk/WTO_Enq_Response_1.htm.

127. Capdevila, *supra* note 12.

128. We know that the Appellate Body has rejected all amicus curiae briefs. It was, however, at no time under any legal obligation to take into account those amicus curiae briefs even if it had accepted the application for leave to file such petitions. Certain non-governmental organizations involved in the process have indicated to the author that they plan to nevertheless file amicus curiae briefs.

curiae briefs at the Appellate level. The Appellate Body has ruled that it is authorized to accept amicus curiae submissions and has determined that it has authority to issue procedural rules with regards to such submissions. To date, however, the Appellate Body has not taken into account any amicus submission that had not already been attached to a party's submission. For the Appellate Body, the submission of amicus curiae briefs is a procedural question that deserves a procedural answer. For the rest of the WTO membership, amicus curiae submissions at the Appellate Body level is a substantive question that can only be decided at the General Council or inter-governmental level on a substantive level.

III. AMICUS CURIAE BRIEFS IN THE UNITED STATES

This section examines the U.S. Supreme Court experience with amicus curiae submissions and how the court has chosen to deal with such submissions. The hope is that such an examination will enable us to better understand the "procedural" solution to the amicus curiae question that was adopted by the Appellate Body in *E.C.—Asbestos* and also shed some light on the institution of amicus curiae from a U.S. perspective.

A. Amicus Curiae at Common Law

The use of amicus curiae briefs dates back to Roman law.¹²⁹ "The function of the amicus curiae at common law was one of oral 'shepardizing'" or "the bringing up of cases not known to the judge."¹³⁰ Amicus curiae also included testimony by those who had been involved in the legislative process and in cases where the meaning of a statute was at issue.¹³¹ Any bystander, including non-lawyers, was allowed to appear as amicus curiae if

129. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1962).

130. *Id.* at 695. Also evidenced by the Holthouse's Law Dictionary definition cited by Krislov: "When a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as amicus curiae. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen or does not at the moment remember." *Id.*

131. For example, in *Horton & Ruesby, Comb.*, Sir George Treby, a member of the British Parliament, informed the court that he had been present at the passage of a statute and wished to inform the court of the intent of the Parliament in passing the legislation as an amicus curiae. In that case the meaning of the statute was at issue and the amicus curiae was allowed. See 90 Eng. Rep. 326 (K.B. 1686).

they possessed either a knowledge of the fact or the law that was deemed by the court to be relevant in achieving a just result.¹³² Historically an *amicus curiae* “did not even have to be an attorney to intervene, and the general attitude of the courts was to welcome such aid, since ‘it is for the honor of a court of justice to avoid error.’”¹³³

Historically, *amicus curiae* briefs dealt primarily with issues of law rather than fact. A 1921 Harvard Law Review Note, *Amicus Curiae*, explains:

Upon any question of law an *amicus curiae* may inform the court in any manner open to a party. The court’s knowledge of domestic law is less uncertain now than when the custom of *amici curiae* originated. But greater certainty is more than counterbalanced by increased complexity. Briefs of *amici curiae* are often submitted where the court feels that the case is of exceptional moment and demands unusually careful consideration. In such a brief, cases are cited and points of law presented . . . It would even seem that if a statute is ambiguous an *amicus curiae* might introduce proper evidence of the intention of the legislators.

Many of the orthodox definitions of the *amicus curiae* would draw the line here, for they confine the suggestions which he [the *amicus curiae*] may make to “matters of law.”¹³⁴

It further provides:

The essential purpose of the *amicus curiae*, as his name implies, is not to represent the interests of any person, but to assist the Court. Whatever a court may know or do on its own initiative an *amicus curiae* may suggest, and it is usually immaterial who prompts him to appear.¹³⁵

The permission to participate as an *amicus curiae* has always been a privilege or “grace” and has never been a “right.”¹³⁶ The historical reason for the need at common law for *amicus curiae* briefs has been attributed to the reluctance of common law judges to allow third parties to intervene in proceedings.¹³⁷

132. See Krislov, *supra* note 129, at 695.

133. *Id.*

134. Note, *Amicus Curiae*, 34 HARV. L. REV. 773, 774 (1921).

135. *Id.* at 775-76.

136. Krislov, *supra* note 129, at 695.

137. See *id.* at 696.

B. *The U.S. Experience with Amicus Curiae*

Early U.S. cases continued the common law tradition of not allowing third party interventions in suits between parties. Therefore, the number of amicus curiae appearances in cases continued to grow.¹³⁸ The amicus curiae first appeared on the U.S. scene in 1821 in *Green v. Biddle*,¹³⁹ a case involving land holdings in Kentucky where the court suspected collusion. Henry Clay was the amicus curiae. By 1905, the U.S. Supreme Court had stated the following regarding the criteria used by the Court in granting applications for leave to file an amicus curiae:

Leave to file briefs in a pending case as amicus curiae will be denied where it does not appear that the applicant is interested in any other case which will be effected by the decision, and the parties are represented by competent counsel, whose consent has not been secured.¹⁴⁰

The next major development occurred in 1933 in *Florida v. Georgia*¹⁴¹ where the U.S. government was allowed to participate as amicus curiae.¹⁴²

By 1938, increased interest in amicus curiae participation forced the U.S. Supreme Court to formulate written rules governing amicus curiae participation. In 1939, the U.S. Supreme Court promulgated its rules on submission of amicus curiae briefs, which provided:

A brief of an amicus curiae may be filed when accompanied by written consent of all parties to the case, except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such briefs must bear the name of a member of

138. It is also argued that the growth was due to the fact that the common law restriction on third party intervention was "exacerbated by the American system" where the "creation of a complex federal system meant . . . an even greater number of conflicting public interests were potentially unrepresented in the course of private suits." Krislov, *supra* note 129, at 697.

139. See *Green v. Biddle*, 21 U.S. 1 (1823) at 17.

140. HANNIS TAYLOR, JURISDICTION AND PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES, (1905) (citing to *Northern Securities Co. v. United States*, 191 U.S. 555 (1903)).

141. 58 U.S. 478 (1854).

142. See *id.* at 495.

the bar of this court.¹⁴³

The 1939 Rule departed from the common law practice that had allowed non-lawyers to also appear as an *amicus curiae*.¹⁴⁴ In addition, it acknowledged the unique role that the government had played in safeguarding the public interest by allowing only the federal or state governments to file without consent of the parties.¹⁴⁵ During the first half of the 20th century *amicus curiae* briefs were filed in 10% of U.S. Supreme Court cases.¹⁴⁶

By the late 1940s, an *amicus curiae* had evolved from being a disinterested bystander acting as a “friend of the court” to an advocate acting on behalf of a client whose interest may or may not be the same as one of the parties. This change was noted in 1946 in *Universal Oil Products v. Root Refrigerating Co.* when the Supreme Court explicitly recognized that an *amicus curiae* serves “two masters, the court and the client.”¹⁴⁷ This was the point in U.S. history when “the institution of the *amicus curiae* brief moved from “neutrality to partisanship, from friendship to advocacy.”¹⁴⁸

Shortly after the evolution of *amicus curiae* from “friend of the court” to “advocate,” the U.S. Supreme Court issued new and

143. *Revised Rules of the Supreme Court of the United States*, Rule 27.9., 306 U.S. 685, 708-09 (1939).

144. See Krislov, *supra* note 129, at 703.

145. See *Revised Rules of The Supreme Court of the United States*, *supra* note 143.

146. See generally Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000); see also *id.* at 788.

147. See *Universal Oil Prod. Co. v. Root Ref. Co.*, 328 U.S. 575, 581 (1946) (noting that “[w]hile the amici formally served the court, they were in fact in the pay of private clients”).

148. This transition from “friendship to advocacy” is evident from the evolving definition of *amicus curiae* in legal dictionaries. The older definition of *amicus curiae* found in Abbott’s Dictionary of Terms and Phrases was “[a] friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge.” Krislov, *supra* note 129, at 694-95 (citing Abbott’s Dictionary of Terms and Phrases). Today, Black’s Law Dictionary defines *amicus curiae* as “a person with a strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, *ostensibly on behalf of a party* but actually to suggest a rationale consistent with its own views.” BLACK’S LAW DICTIONARY 43 (5th ed. 1983) (emphasis added).

A comparison of these two definition shows that an *amicus curiae* is no longer by definition an uninterested party interested in assisting the Judge. However, the Black’s Law Dictionary definition seems to indicate also that the *amicus* may not be on the side of either party and may be representing other interested parties not otherwise party to the suit.

detailed rules on filing of amicus curiae briefs as part of an effort to restrict the use of such submissions. The 1949 amendments to the rule¹⁴⁹ distinguished between amicus curiae briefs filed before the Court on the merits, i.e., after the writ for certiorari had been granted, and those filed prior to grant of the writ of certiorari.¹⁵⁰ The Supreme Court discouraged the filing of amicus curiae briefs without consent of the parties, particularly if filed before the writ of certiorari had been granted.¹⁵¹ In addition, the new amendments emphasized the need for the consent of all parties,¹⁵² a requirement that had been frequently disregarded in the past.¹⁵³ The 1949 Amendments also required parties wishing to participate as amicus curiae and who were denied permission by either party to file a "motion for leave" with the Supreme Court.¹⁵⁴ In such motions the applicant had to justify the need for the amicus curiae brief. Specifically, these motions for leave were required to state why the questions of law or fact addressed in the amici have not been adequately presented by

149. SUP. CT. R. 27(9), 338 U.S. 959 (1949) [hereinafter 1949 Amendment].

150. *See id.*

151. *See id.* 27(9)(b) states in part:

Brief of an amicus curiae prior to consideration of jurisdictional statement or petition for writ of certiorari:—A brief of an amicus curiae filed with consent of the parties, or motion, independent of the brief, for leave to file when consent is refused may be filed only if submitted a reasonable time prior to the consideration of a jurisdictional statement or a petition for writ of certiorari. Such motions are not favored.

Id.

152. Rule 27(9) of the 1949 Amendment provides that:

Brief of an amicus curiae in cases before the Court on the merits:—A brief of an amicus curiae may be filed only after order of the Court or when accompanied by written consent of all parties to the case and presented promptly after announcement postponing or noting probable jurisdiction . . . [or] granting certiorari. . . .

Id.

153. *See* Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUSTICE SYSTEM J. 35, 37-38 (1983).

154. 1949 Amendment, *supra* note 149. Sup. Ct. Rule 27 (c) provides:

Motion for Leave to File: When consent to a filing of the brief of an amicus curiae is refused by a party to the case, a motion independent of the brief, for leave to file may timely be presented to the Court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case. A party served with such motion may seasonably file in this Court an objection concisely stating the reasons for withholding consent.

Id.

any party and the relevancy of such additional information to the outcome of the case.¹⁵⁵

As a result of the 1949 Amendment, amicus curiae participation decreased from 31.6% of the ninety-eight cases in 1949 to 13.6% of the ninety-five cases in 1951.¹⁵⁶ Others have estimated that during this time period the Court rejected 76% of the motions for leave to file amicus curiae briefs.¹⁵⁷ It is reported that at approximately the same time the 1949 Amendments were implemented, the Supreme Court sent "a signal" to the Solicitor General of the United States that the government should refrain from giving consent in cases where the United States was a party.¹⁵⁸ In fact, until 1957 the U.S. government would refuse to consent to filings of amicus curiae briefs in cases in which it was a party.¹⁵⁹

It has been argued that the 1949 Amendments were made because some Supreme Court Justices were "put off" by the "propagandistic" tone of certain amicus curiae filings in high profile cases such as those involving the Hollywood Ten¹⁶⁰ and the espionage cases against the Rosenbergs.¹⁶¹ In both cases, the filings were made at the certiorari level, i.e., before the Supreme Court decided to look at the merits of the case.¹⁶² It is important to note that the Court's response to excessively partisan or propagandistic amicus curiae briefs was to require prior filing of motions for leave and which were then consistently rejected. In other words, the response of the Supreme Court to a substantive problem was to issue procedures and then apply them in a restrictive manner throughout the 1950s.

Additional amendments were made to the Supreme Court Rules on amicus curiae in 1954.¹⁶³ The 1954 Amendments clari-

155. See *id.*

156. See O'Connor & Epstein, *supra* note 153, at 37.

157. See *id.* at 38.

158. See Krislov, *supra* note 129, at 715.

159. See O'Connor & Epstein, *supra* note 153, at 38.

160. See *Lawson v. United States*, 176 F.2d 49 (1949), *cert. denied*, 339 U.S. 934 (1950).

161. *United States v. Rosenberg*, 108 F.Supp. 798 (S.D.N.Y. 1952), *aff'd*, 200 F.2d 666 (2d. Cir. 1952) *cert. denied*, 345 U.S. 965 (1953).

162. See O'Connor & Epstein, *supra* note 153, at 37.

163. See Rules of the Supreme Court, THE SUPREME COURT PRACTICE, Vol. 1, Pt.1, Order 104, Rule 42 (1954) [hereinafter RSC].

fied issues such as the form for filing motions and briefs,¹⁶⁴ the time table for filing of amicus curiae briefs,¹⁶⁵ and set page limits for motions for leave.¹⁶⁶

In the late 1950s, there was a change in attitude towards amicus curiae briefs. Justices Black and Frankfurter in particular were critical of the Solicitor General practice of denying consent. As early as 1952 Justice Frankfurter had written that:

If all litigants were to take the position of the Solicitor General, either no amicus curiae briefs . . . would be allowed, or a fair sifting process for dealing with such applications would be nullified and undue burden cast upon the Court. Neither alternate is conducive to the wise disposition of the Court's business.¹⁶⁷

Similarly, two years later Justice Black also wrote:

I have never found the almost insuperable obstacle of rules put in the way of briefs sought to be filed by persons other than litigants. Most of the cases before the Court involve matters that affect far more than the immediate record parties. I think public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs.¹⁶⁸

In response to criticism, the Solicitor General changed its policy and began to give consent to amicus curiae filings in cases involving the government.¹⁶⁹ This marked the beginning of the "laissez faire" attitude of the court towards amicus curiae briefs¹⁷⁰ that continues today.¹⁷¹ For example, in the case of *Webster v. Reproductive Health Services*, a total of seventy-five amicus curiae briefs were filed.¹⁷² It is estimated that over the last fifty years the incidence of amicus curiae participation has increased

164. *See id.* Rule 42(3) (clarifying that the motion for leave did not need to be separate from the brief itself).

165. *See id.* Rule 42(2) (amending to provide that an amicus curiae brief must be filed at the same time as the party whose position is being supported by the amicus curiae brief).

166. *See id.* Rule 42(2) (providing a five printed page limit for a motion for leave).

167. *Lee v. United States*, 343 U.S. 924 (1952) (emphasis added).

168. *See* RSC at 947.

169. Kearney & Merrill, *supra* note 146, at 764.

170. *Id.*

171. *Id.* (stating that it is Supreme Court practice to "allow essentially unlimited amicus participation").

172. *See id.*

by more than 800%.¹⁷³

In 1990, the Supreme Court amended its rules ("1990 Amendment") in response to the dramatic increase in the number of amicus curiae filings.¹⁷⁴ The 1990 Amendment discouraged filing of repetitious or irrelevant amicus briefs and provided that "[a]n amicus curiae brief that brings to the attention of the Court *relevant* matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus brief that does not serve this purpose burdens the Court, and its filing is *not favored*."¹⁷⁵ The 1990 Amendment is a substantive amendment to the extent that it addresses the substance of an amicus curiae submission rather than the filing procedure. The impact of the 1990 Amendment in improving the quality of amicus curiae briefs filed with the Supreme Court has not been assessed. Studies, however, have shown that poorly reasoned and excessively partisan briefs written by inexperienced lawyers are significantly less effective than well reasoned filings by experienced lawyers.¹⁷⁶ Therefore, in many ways, the 1990 Amendment is an acknowledgment on the part of the Supreme Court of the drawbacks of an "open door policy" towards amicus curiae submissions, and the burden such a policy imposes on the Supreme Court.¹⁷⁷

The most significant amendment to the Supreme Court rules was made in 1997 ("1997 Amendment") when a new subsection was added. Subsection 6 states:

173. *See id.* at 749.

174. The Supreme Court Rules on amicus curiae briefs were also amended prior to this in 1980 in only two respects. First, instead of requiring the amicus to be filed "a reasonable time" prior to the consideration of the petition by the Court, which was very indefinite and unhelpful, it fixes the time as the same as for the brief in opposition to the petition, thirty days after the petition is received. Second, it provides that an amicus curiae brief cannot exceed twenty pages in length. *See RSC, supra* note 163, at Order 104, rule 36 (1989).

175. SUP. CT. R. 37(1) (emphasis added).

176. *See* Kearney & Merrill, *supra* note 146, at 813-14.

177. Justice Posner has expressed clear opposition to an open door policy towards amicus curiae briefs. *See Ryan v. Commodity Future's Trading Commission*, 125 F.3d 1062 (7th Cir. 1997) (stating that vast majority of amicus filings should not be allowed as they are unhelpful and filed by allies of litigants and "abuse" the institution of amicus curiae which means "friend of the court, not friend of the party"); *see also National Organization for Women, Inc., v. Scheidler*, 223 F.3d 615, 616 (7th Cir. Ill. 2000) (stating that the "policy of this court is . . . never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties").

A brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.¹⁷⁸

By adopting the 1997 Amendment the Supreme Court has acknowledged that an amicus curiae is no longer a "friend of the court" or a disinterested bystander.¹⁷⁹ In fact, in *Jafee v. Redmond*¹⁸⁰ Justice Scalia lamented the partisan reality of amicus curiae filings and their potentially distortive effect on the outcome of a case when he wrote:

[A]micus briefs supporting respondents, most of which came from such organizations as the American Psychiatric Association, the American Psychoanalytic Association, the American Association of State Social Work Boards, Not a single amicus brief was filed in support of the petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of truth in the federal courts.¹⁸¹

Through the 1997 Amendment the Supreme Court has addressed the reality of judicial lobbying through amicus curiae submissions. The response has been to require full disclosure by an amicus curiae of its affiliations so that the lobbying may take place in an open and transparent manner. A transparent procedure presumably limits the negative effects of amicus curiae filings. In the United States, full disclosure and transparency makes judicial lobbying acceptable. Once affiliations and biases are registered on the first page of an amicus brief the position of the brief can be inferred without much attention being given to the contents of such briefs. Today, the usefulness of the rule

178. SUP. CT. R. 37(6) (1997). The exception to this requirement is the Solicitor General of the United States.

179. The only exception to this is the Office of the Solicitor General, which has developed a special relationship with the Supreme Court and is expected to have as part of its duty to protect the high court in discharging its functions and sometimes reviewing the Court's docket to relieve the Court from unmeritorious claims. See, e.g., Janene M. Marasciullo, *Removability and the Rule of Law: The Independence of the Solicitor General*, 57 GEO. WASH. L. REV. 750 (1989).

180. 518 U.S. 1923 (1996) (holding that federal law recognizes psychotherapist-patient privilege).

181. *Id.* at 1940

may be shown by the fact that most amicus briefs filed with the Supreme Court, with the notable exception of those filed by the Solicitor General have little impact on the decisions of the Supreme Court.

C. *Lessons Learned from the American Amicus Curiae Experience*

The U.S. experience with amicus curiae teaches us a number of things. First, use of an amicus curiae is embedded in the common law tradition. At common law it was acceptable for a Judge to not know all the cases that may be relevant law in a particular case or controversy and for an amici to appear to assist the Judge in clarifying issues of law. From the perspective of a common law lawyer, therefore, the argument that amicus curiae briefs should be limited to issues of fact and not law fails to recognize the essence of an amicus curiae.¹⁸²

Second, the evolution of an amicus curiae from “friend of the court” to “lobbyist” has been explicitly acknowledged by the Supreme Court of the United States for the past fifty years. The Supreme Court has dealt with this evolution and its inherent drawbacks by issuing detailed procedures for submissions of such briefs. These procedures were applied restrictively, throughout the 1950s, thereby allowing the Supreme Court to reject the vast majority of the motions for leave to file an amicus. From late 1950s to the present, these same procedures have been applied liberally as the U.S. Supreme Court adopted an open door policy towards amicus curiae submissions. The practical result of an open door policy has been that many amicus curiae submissions are ignored and have little impact on the Supreme Court’s decision making. Finally, in 1997, the Supreme Court by issuing the 1997 amendments explicitly acknowledged that amicus curiae briefs are a form of “judicial lobbying,” and announced its decision to tackle the problem by insisting that such lobbying take place in an open and transparent manner.

IV. *JUDICIAL LOBBYING ON THE GLOBAL STAGE*

In the American context, judicial lobbying is accepted so

182. *But see* Raghavan, *supra* note 13 (citing statement made by Indian official that “[i]t is ironic that the Appellate Body which comprises persons of recognized authority, with demonstrated expertise in law should look for outside guidance in the form of amicus briefs”).

long as it is acknowledged as such. This comfort level with the concept of amicus curiae briefs as “judicial lobbying” helps explain why the United States has been supportive of the use of such briefs at the WTO. The Additional Procedures issued by the Appellate Body in the *E.C.—Asbestos* case are very close if not identical to the Supreme Court rules on amicus curiae briefs. In *E.C.—Asbestos* the Appellate Body was trying to do the same thing the U.S. Supreme Court has done. Like the Supreme Court rules, the Additional Procedures require groups to identify their membership, affiliation, and funding.¹⁸³ The Additional Procedures also require disclosure of information as to who was funding the very activity of filing an amicus curiae.¹⁸⁴ Much like the U.S. Supreme Court did in 1949, the Appellate Body in *E.C.—Asbestos* issued neutral procedures that seem to invite participation. Like the U.S. Supreme Court did in the 1950s, the Appellate Body applied those procedures in an unnecessarily restrictive manner and rejected all applicants. The WTO members may be justified in their concern, however, since, as the U.S. experience has shown, the same procedural rules can in the future be used by the Appellate Body to pursue an “open door” policy towards amicus curiae briefs.

It is likely that all the Appellate Body hoped to do was, as the United States has argued, “manage” the lobbying that was already taking place. The Appellate Body failed to realize, however, that its procedural solution to the amicus curiae “problem” may be unacceptable. The WTO Appellate Body has neither the legal tradition nor the legitimacy of the U.S. Supreme Court and, therefore, cannot use the procedural tactics of the Court.

POSTSCRIPT

On March 12, 2001 the Appellate Body issued its ruling in *EC-Asbestos*. The Body provided no additional explanation as to why it had denied applications for leave to file amicus curiae briefs. The Appellate Body merely stated that the applicants had failed to “comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.”¹⁸⁵

183. Additional Procedures para. 3(c).

184. *Id.*; see also *id.* para. 3(g).

185. *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (Mar. 12, 2001).