The amici curiae and the WTO dispute settlement system: the doors are open

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THE AMICI CURIAE AND THE WTO DISPUTE SETTLEMENT SYSTEM: THE DOORS ARE OPEN

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I. INTRODUCTION

"WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the ‘security and predictability’ sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system."

This ontological vision of the Dispute Settlement Body allows for interpreting the WTO rules in a perspective of constant adjustment to ever-emerging social aspirations, which the interests of the Member States of the WTO are meant to represent. The technique of the amici curiae corresponds to the desire to participate in the process of resolution of interstate disputes, be it the desire of the civil international society lato sensu, or of the individual stricto sensu. It is an expression of the private or non-State physical and legal persons’ will to participate in the production of the juridical norm and its enforcement, at any level. As a matter of fact, the operation of resolving disputes through a jurisdictional or arbitration body is seen more and more as one of the essential steps of the international normative production process. In their task of enforcing and interpreting the norms of international law, be it general, customary, or conventional, international judges necessarily exercise de facto and de jure

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– maybe unconsciously – a normative function, even if the WTO dispute mechanisms are reluctant to acknowledge it.\(^2\)

Norms of international law have addressees. These include States but also individuals, physical or moral persons. It is the right of the latter to know and estimate the impact of international norms on their daily life.\(^3\)

The international judge being a major actor in the production of international norms, rules and standards, it is therefore normal that non-State actors should have an interest in international dispute settlement, particularly in the international trade sphere.\(^4\) As was recalled by the panel in the case United States – Sections 301–310 of the Trade Act of 1974,

“it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish […] Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the marketplace and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it […] The security and predictability in question are of ‘the multilateral trading system’.


Amici Curiae and WTO Dispute Settlement

The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators. Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it. One of the principal triggers for US action to vindicate US rights under covered agreements is the impact alleged breaches have had on, and the complaint emanating from, individual economic operators”.

II. THE NOTION OF AMICUS CURIAE

A. Searching for a Definition of the Notion of Amicus Curiae

In Black’s Law Dictionary, amicus curiae means “literally, friend of the Court. A person with a strong interest in or views on the subject-matter of an action, but not a party to the action, may petition the Court for permission to file a brief. Such amicus curiae briefs are commonly filed in appeals concerning matters of broad public interest”.

The Dictionnaire de droit international public defines amicus curiae as a notion of British-American domestic law, designating the faculty attributed to a person or a body non-party to a judicial procedure to transmit information that can enlighten the court on matters of fact or law.

The Rules of Procedure of the United States Supreme Court go in the same direction. They provide a definition of the amicus curiae according to which: “an amicus curiae brief that brings to the attention of the Court a relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored […] An amicus is, by definition, a person or institution not personally involved in the particular lawsuit. The amicus may be interested because the Court’s

7 Dictionnaire de Droit international public (under the direction of J. Salmon) (Bruylant/AUF, Brussels, 2001), pp. 62–63.
resolution of the legal issue in a case may some day have an effect on him or it. [...] Or an amicus may be an organization with a worthy social aim to push, or the Federal Government, that provides a degree of expertise and responsibility in advocacy that few private counsel can match".\(^8\)

Some legal systems authorise persons who are not parties to a dispute to bring information on legal details, and even factual elements in the course of a dispute settlement process. The *amicus curiae* have a long history in some legal systems, while they are either almost absent in others, or have been introduced recently. They have evolved in the Roman law, they have developed with the *Common Law*, and they have been integrated into the American legal system, where they have known a blooming expansion. Thus, they are to be found mainly within the American legal order, and to a lesser level of development within *Common Law* systems, while they have recently appeared within continental legal orders, as in France.

The idea is to allow organisations or persons having an interest in a dispute to intervene and give their point of view. There are several advantages to this mechanism, related to the information that can be brought into a dispute settlement, be it factual or juridical, or from other legal sources, or on the consequences deriving from a decision. Other advantages consist in the relatively inexpensive cost of information and in a greater legitimacy in the dispute settlement process, since all interests can be taken into account.

The notion of *amicus curiae* does not appear in the Dispute Settlement Understanding (hereinafter, DSU).\(^9\) The latter only refers to the “advice”, “information”, a panel can ask at any time to any person or body deemed relevant, or to any source deemed relevant. Moreover, the DSU mentions “consultations”, “advice” and “consultation reports” from experts on certain technical and scientific aspects. The notion of *amicus curiae* in the WTO lies at the cross-section of all these techniques: that of information, that of counsel, that of expertise, that of consultation. The *amicus curiae* must then be considered as a generic notion, one that is difficult to pinpoint definitely.

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9 See Article 13 of the DSU.
B. The Role of Amici Curiae and International Dispute Settlement in an Era of Globalisation

Globalisation summons the complexity of law. The latter conjures up the idea of recurring and interweaving relations from one legal order to another. An international judge (i.e., a third party in a dispute deciding on the basis of law), within the context of globalisation, has to proceed, upstream as well as downstream, to an epistemological disruption of his perception of the dispute.

What law should be enforced is the question at stake upstream. The judge should not be satisfied with a corpus of specific rules, whether fragmentarily or singly, in other words, with a monolithic law, to settle certain quarrels. The gist of the arguments exposed before the WTO Dispute Settlement Body (DSB) points to the transversal quality of the juridical questions that can be asked. For instance, WTO bodies cannot ignore the multilateral environmental agreements concerning environmental protection. Thus, the panels and the Appellate Body must proceed to a combined, or at least compatible, reading of these two sets of norms, in order to warrant the efficiency of their decisions. Moreover, increased complexity is not only due to the de jure multiplication of State norms in the international sphere. It also derives de facto from the privatisation of international law, which cannot be shunned by the judge. Thus, for instance, international economic law cannot ignore lex mercatoria, lex sportiva and progress in Internet regulation with lex electronica.

The influence of the international judge’s decisions is the issue downstream. Res judicata must be expanded to a new dimension. The judge’s task is no longer to hang on to the “case-law economy” dogma. Globalisation demands anticipation, and not only curative, res judicata. The judge must be capable of singling out certain juridical problems, and of identifying resolution parameters, in order to restrain quarrels concerning these matters, in the medium and long term. Within such a context, amici curiae can contribute to clarifying the single or plural

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enforceable laws and to determining the legal interests at stake in a given dispute.

Globalisation also demands that dispute settlement procedures be rethought. The entirety and complexity of stakes linked to a specific dispute require an open approach to society. Individuals and non-State actors call more and more for recognition at an international level. Two methods could then be applied.

The first method that comes to mind could be one that favours the acceptance of the disclosure of information from individuals, NGOs or private enterprises, as elements of evidence within the settlement of an inter-State dispute. The path of amici curiae could be opened to them more widely. In addition, international civil society will have to be increasingly associated with conflict resolution in order that decisions warrant legitimacy. A greater transparency in the very procedures of dispute settlement becomes immediately necessary.

Amici curiae reveal the necessity to introduce other legal dynamics in dispute settlement within the international legal order: that of an “inter-normative” international law, and that of “systemic” or “holistic” dispute settlement. Inter-normative law refers to a weaving of norms from diverse legal orders, as well as to social, economic, ecological and political norms. Its use by the judge will be the challenge of a normative balance in dispute settlement procedures and, consequently, of a more systemic law, based on the integration of diverse norms, not exclusively of rules resulting from inter-State juridical production.

As Hervé Asencio explains:

“If truth be told, it is not so much international jurisdictions that wished to receive numerous friendly advisers; it is rather that a swarm of concerned persons suddenly knocked at their door. International law is no longer a closed world, suspended above individuals and enterprises in the purity of relations between sovereign powers. The still incomplete movement of opening international jurisdictions has corresponded to the irruption of private persons within inter-State litigation, and to the

development of non-exclusively inter-State international litigation. The amicus curiae is the procedural breach through which individuals, societies and associations can rush in when the quality of party belongs to the states only".14

C. Amici Curiae in Other International Dispute Settlement Fora: The Case of NAFTA Investment Disputes

The issue of amici curiae is not exclusive to the WTO. Other international dispute settlement bodies have also been confronted with this issue, particularly the European Court of Human Rights,15 the Inter-American Court of Human Rights,16 the International Court of Justice,17 and international criminal courts and tribunals.18

In this context it is interesting to note that the way the WTO has dealt with amici curiae has been used as a model for disputes raised in the context of NAFTA. Thus, within the context of NAFTA, a recent arbitration in the Methanex Corporation v. United States case19 has accepted amicus curiae briefs, relying partly on the acceptance of disinterested interventions as part of the WTO dispute settlement system.20

20 P. Dumberry, "The Admissibility of Amicus Curiae Briefs by NGOs in Investors-States Arbitration: The Precedent set by the Methanex Case in the context of NAFTA Chapter 11 Proceedings", Non-State Actors and International
In this case, the arbitration tribunal decided to receive *amicus curiae* briefs, while referring almost religiously at every step to the positions of the WTO Appellate Body. The arbitration tribunal first acknowledged that nothing in the procedural rules, whether the UNCTITRAL Arbitration Rules or the NAFTA rules in Chapter 11, "either expressly confers upon the Tribunal the power to accept *amicus* submissions or expressly provides that the Tribunal shall have no such power". The tribunal then referred to Article 15 of the UNCTITRAL Arbitration Rules, which confers to the arbitral tribunal’s vast powers in leading the arbitration proceedings. It pointed out that "in the Tribunal’s view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration", which they cannot do, adding, as if to maintain their reasoning, that in the WTO United States – Bismuth Steel case, "the distinction between Parties to an arbitration and their right to make submissions and a third party person having no such right was adopted by the WTO Appellate Body [...]." For present purposes, this WTO practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-Parties third persons.

Law, Vol. 1, No. 3, 2001, pp. 201–214; B. Stern, “L’entrée de la société civile dans l’arbitrage entre Etat et investisseur”, Revue de l’Arbitrage, 2002, No. 2, pp. 329–345. In the above-mentioned case, NGOs have asked to present disinterested briefs: the International Institute for Sustainable Development (ISSD), Communities for a Better Environment and Earth Island Institute. The company Methanex claimed a billion dollars from the United States, since Californian authorities had forbidden, in order to protect the environment from pollution, the use of an additive to gas called MTBE, produced by this company, which would then diminish its benefits. The arbitration tribunal was seized with a requirement of authorising the submission of *amicus curiae* briefs. NGOs required total access to the proceedings, which implied four different requests: the possibility of submitting written communications, of attending hearings, of presenting oral pleadings, of accessing all documents exchanged between the parties to the dispute, including briefs, counter-briefs, appendices, etc. Such a request was unprecedented in a ruling concerning investment between a State and a private investor. NGOs had numerous arguments but they insisted particularly on the case’s importance in terms of general interest ("the immense public importance of the case"). The commercial society was obviously reluctant to accept the intervention of other private parties in the dispute, since it complained of environmental protection measures diminishing its benefits, when environmental NGOs wished on the contrary to defend them. It is no wonder that the United States favoured the admission of the disinterested briefs, since it is their usual policy, while Mexico, following the usual positions of developing countries, opposed it.

21 B. Stern, op. cit., p. 338.
Expanding the parallel even further, the arbitration tribunal compared the
two relevant articles: Article 15 in the UNCITRAL Arbitration Rules and
Article 17.6 in the WTO’s DSU. According to the tribunal, “[…] the
Appellate Body there found that it had power to accept amicus
submissions under Article 17.9 of the Dispute Settlement Understanding to
draw up working procedures. That procedural power is significantly less
broad than the power accorded to this Tribunal under Article 15 (1) to
carry out the arbitration in such manner as it considers appropriate”. 22

The question of amici curiae at the WTO having led to followers in
other fora, it is then necessary to investigate the status of amici curiae
within this organisation, both currently and in the past.

III. THE SAGA OF THE ADMISSIBILITY OF AMICI CURIAE WITHIN THE WTO
AND ITS MANY DEVELOPMENTS

A. First Step: The Reluctance of the WTO Panels

In conformity with the practice derived from the 1947 GATT, the
amici curiae presented during the United States – Standards for
Reformulated and Conventional Gasoline and EC Measures Concerning
Meat and Meat Products (Hormones) cases were not taken into
consideration by their panels. 23

22 B. Stern, op. cit., p. 339. This case-law was confirmed in the case UPS
(United Parcel Service of America Inc.) v. Government of Canada. This case is
also an arbitral in the context of ALENA’s Chapter 11, on application of the
UNCITRAL Arbitration Rules of CNUDCI. This dispute involved the company of
fast mail delivery, UPS, and Canada, since, according to the company, there was a
State monopoly for the Canadian Post. UPS considered that this situation violated
the rules of national treatment set by the ALENA. Workers associations of the
Canadian Post wished to intervene as amici curiae in the case, namely the
Canadian Union of Postal Workers (the Union) and the Council of Canadians (the
Council). The possibility to intervene as amici curiae was actually a subsidiary
request, introduced upon the hypothesis of the rejection of their principal request:
that these two organizations become parties to the case. For a presentation of this
case, see also B. Stern, op. cit., pp. 340–345. See Decision of the Tribunal on
Petitions for Intervention and Participation as Amici Curiae, 17 October 2001,
23 United States – Standards for Reformulated and Conventional Gasoline
(hereinafter referred to as US - Gasoline case), Report of the Panel, 29 January
1996, Doc. WT/DS2/R; EC Measures Concerning Meat and Meat Products
(Hormones) (hereinafter referred to as Hormones case), Report of the Panel,
18 August 1997, Doc. WT/DS26/R/USA, WT/DS48/R/CAN. Under the GATT,
third-parties’ communications were admitted only if they had been previously
In the United States – Import Prohibition of Certain Shrimp and Shrimp Products case, the panel considered that it could not accept unsolicited information, unless they were included within the briefs of one of the parties. In this particular case, the panel had received an intervention application from the Centre for Marine Conservation (CMC) and from the Centre for International Environmental Law (CIEL). Both are non-governmental organisations. The panel had also received another intervention application from the World Wildlife Fund. The plaintiff parties – India, Malaysia, Pakistan and Thailand – required that the panel should not take into account the communication’s content in its investigation of the dispute. On the contrary, the United States incited the panel to make use of any relevant information included in both interventions, as in any other similar communication. In the end, the panel ruled on the issue in the following manner:

“We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, 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 material. We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for Marine Conservation and the Center for International


25 Ibid., para. 3.129.
Environmental Law as an annex to its second submission to the Panel” 26

The panel’s interpretation of Article 13 of the DSU (which we will refer to again later) in this case does not facilitate the intervention of amicus curiae, and creates an uncertainty on the latter’s independence and objectivity. Indeed, if a condition of acceptability of a non-governmental organisation’s communication is that it should be introduced by a party (therefore a State) to the dispute, as an element of its own communication, then amici curiae find themselves reduced to the role of instruments in the WTO dispute settlement process. Thus, the WTO Appellate Body attempted to put into perspective the panel’s interpretation of the DSU.

B. Second Step: The WTO Appellate Body Strikes Back

1. The first part of the episode: the accessibility of amici curiae in the panel’s proceedings

The panel’s position in the Shrimp-Turtles case provoked a very interesting reaction from the Appellate Body concerning amici curiae. 27 According to the Appellate Body, the interpretation of Article 13 of the DSU that confers panels “the right to seek information and technical advice from any individual or body which it deems appropriate” (Article 13.1) and to “seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter” (Article 13.2) was too restrictive. The Appellate Body had already established in the Hormones case 28 and in the Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items case, that a panel was endowed with a large discretionary capacity concerning the requirement of information and technical advice. 29 Consequently, following the reasoning

26 Ibid., para. 7.8.
29 See Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items, Report of the Appellate Body, 27 March 1998, Doc. WT/DS56/AB/R, paras. 84-86: “Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in EC
of the Appellate Body in the *Shrimp-Turtles* case, it was improper to interpret the term “seek” in a too narrow manner, notably by assimilating it to an interdiction of acceptance. The Appellate Body specified that:

“The comprehensive nature of the authority of a panel to ‘seek’ information and technical advice from ‘any individual or body’ it may consider appropriate, or from ‘any relevant source’, should be underscored. This authority embraces more than merely the choice and evaluation of the source of the information or advice which it may seek. A panel’s authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability and relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received”.

At this point, the way was open for *amici curiae*, well beyond the sole hypothesis of an invitation from a panel. Moreover, the Appellate Body seized this occasion to clarify the extent of potential interpretations of the DSU by the WTO dispute settlement bodies. This is a very illustrative instance of the way the WTO dispute settlement bodies tend sometimes to emancipate themselves from State and political supervision. The Appellate Body did not hesitate to stress the necessity of interpreting the DSU flexibly (in order to secure the objectivity in dispute settlement demanded in Article 11 of the DSU), by a combined reading of Articles 12 and 13 of the DSU. In the Appellate Body’s logic, “It is pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties

*Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves “to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate”. Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all”.

to the dispute. Article 12.2 goes on to direct that ‘[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process’’.31 And the Appellate Body specified that:

“The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, 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. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to ‘make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements’’.32

It can definitely be said that the Appellate Body struck back on the clear-cut positions of panels, especially under the GATT (1947). Besides, the Appellate Body did not hesitate to claim it, by declaring that “the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU”.33 At the same time, the Appellate Body considered that the panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organisations, or any portion thereof, to its own submissions.34

As a result, the Appellate Body drew a distinction: “amicus curiae not attached to the communication of a party to the dispute” and “amicus curiae attached to the communication of a party to the dispute”. After an in-depth analysis of the Shrimp-Turtles case and of the Appellate Body’s reasoning, it appears that the two types of amicus curiae do not seem to benefit from the same juridical status. In other words, the Appellate Body does not confer the same weight on them. This is what stems from the idea the Appellate Body formulated that “under the DSU, only Members who are parties to a 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

31 Ibid., para. 105.
32 Ibid., para. 106.
33 Ibid., para. 110.
34 Ibid.
considered by a panel.\textsuperscript{35} Correlatively, a panel is \textit{obliged} in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions [...]”.\textsuperscript{36} Does this mean \textit{a contrario} that non-governmental organisations have no “legal right” to submit communications? This would be quite paradoxical, given the overall interpretation and reasoning the Appellate Body gave on Article 13 in the DSU.

This being said, the panels have respected the Appellate Body’s call to order in a subtle and strange way after the \textit{Shrimp-Turtles} case. Indeed, panels have limited the impact of \textit{amici curiae} on dispute settlements, while not rejecting the possible interventions from \textit{amicus curiae} not attached to the communication of a party to the dispute. As an example in the \textit{United States – Section 110(5) of US Copyright Act} case, the panel considered that “in this dispute, we do not reject outright the information contained in the letter from the law firm representing ASCAP to the USTR that was copied to the Panel [...] the Appellate Body has recognized the authority of panels to accept non-requested information. However, we share the view expressed by the parties that this letter essentially duplicates information already submitted by the parties. We also emphasize that the letter was not addressed to the Panel but only copied to it. Therefore, while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings”.\textsuperscript{37}

2. Second part of the episode: the accessibility of \textit{amici curiae} in the Appellate Body proceedings

Does the theoretical open-mindedness prevailing for panels apply to the Appellate Body itself? The question is all the more important since this phase of the proceedings would surely be more attractive to \textit{amicus curiae}. It has been resolved in the \textit{United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom} case, where the Appellate Body deemed that they disposed of capacities comparable to those granted to dispute panels by Article 13 of the DSU. According to the Appellate Body,

\textsuperscript{35} Articles 10 and 12 and Appendix 3 of the DSU. Article 17.4 of the DSU limits the right to appeal a panel report to parties to a dispute, and permits third parties which have notified the DSB of their substantial interest in the matter to make written submissions to, and be given an opportunity to be heard by, the Appellate Body.
\textsuperscript{36} Op. cit., para. 102.
"We are of the opinion that we have the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so".38

The Appellate Body had relied on Article 17, paragraph 9 of the DSU, holding that "working 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". The Appellate Body deduced therefrom that it disposed of large capacities and had the legal ability to decide the opportunity of accepting and examining or not the information deemed relevant in the context of appellate proceedings. This constitutes a prolongation of the Shrimp-Turtles case, where the Appellate Body had already accepted that NGO briefs be joined to the communication of a State party to the appeal.39

This interpretation of the DSU raised a number of criticisms and controversies within the WTO.40 It is true that here again, the Appellate

40 During the meeting on the adoption of the Appellate Body and the panel reports in United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Doc. WT/DSB/M/83, para. 12), Canada’s representative questioned “whether the general authority under Article 17.9 of the DSU to draw up working procedures provided a sufficient legal basis for the Appellate Body to accept and consider amicus curiae briefs [...] the Appellate Body had provided no guidance as to when, in future cases, it would be prepared to accept and consider amicus curiae briefs [...] by explicitly recognizing that it had to act consistently with the DSU provisions, the Appellate Body seemed to have precluded its consideration of amicus curiae briefs that contained new facts, or that sought to re-argue issues of facts already decided by the Panel. To do otherwise would contravene Article 17.6 of the DSU, which limited the jurisdiction of the Appellate Body to issues of law [...] the Appellate Body’s reasons did not specifically address whether it could consider factual information contained in an amicus curiae submission. The Appellate Body’s decision on this critical issue was more than a matter of procedure. It highlighted the need for Members to decide and clarify, in the DSU rules, whether amicus curiae briefs should be permitted and, if so, under what conditions [...] the issue of amicus curiae briefs raised many complex and controversial issues which could not be resolved at the present meeting. Those issues were of systemic concern and, as such, should only be addressed by Members".
Body’s legal reasoning is rather difficult to follow. Indeed, the Appellate Body itself admits that “Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO Members which are parties or third parties in a particular dispute.”41 This acceptance would be more of a “right” than of an “obligation”, according to the Appellate Body. Does that mean that accepting amici curiae depends largely on its discretionary power? Then, the issue lies in the question of knowing whether the WTO Member States had intended, when the DSU was being elaborated, to grant such power to panels and to the Appellate Body.

This situation could lead to considering that the Appellate Body has ignored Articles 3.2 and 19.2 of the DSU, in virtue of which dispute settlement bodies will not diminish or increase the rights and obligations of the WTO Members, included in the WTO Agreements. It is true that Article 13 in the Understanding confers on dispute panels the right to require advice or information, yet no disposition in the DSU confers a similar right on the Appellate Body. Thus, it is difficult to prove that the fact that the Appellate Body considers itself competent to examine amici curiae does not diminish nor increase the rights and obligations of the WTO Members.42

42 During the DSB meeting on 19 June 2000 (Doc. WT/DSB/W/137), the Chairman of the DSB made the following statement: “The Appellate Body did not consult with me or with the Director-General. This was because the Appellate Body was not drawing up new Working Procedures for Appellate Review. The Appellate Body had merely been asked in this specific case by the European Communities as appellee in the case to rule on whether it could accept and consider two unsolicited briefs which had been presented by two US steel industry associations to the division hearing this appeal. I would like to point out that paragraph 39 of the Appellate Body report merely notes that nothing in the DSU or in the Working Procedures for Appellate Review provides for acceptance of amicus curiae briefs or for prohibition thereof […] To recapitulate, the Appellate Body was merely ruling on a specific procedural objection made by one of the parties to the dispute concerning these two unsolicited briefs. It was not and I emphasize that it was not drawing up new Working Procedures and therefore was not under an obligation to consult me, as Chairman of the DSB, or the Director-General. Indeed, I have to say that in the context of deciding issues raised in a particular appeal, in fact, it would seem to me to be highly inappropriate for the
The Appellate Body’s subtle shift provoked anxieties from the numerous Member States of the WTO concerning the opening of the dispute settlement proceedings to non-State entities, seeing there a pronounced interventionism and activism from the dispute settlement bodies. The representative of Hong Kong, China, did not fail to point it out. According to him, “The unilateral expansion by the Appellate Body of its legal authority, which went beyond the DSU, was not only an act of judicial activism but also a violation of the amendment provisions under Article X:8 of the WTO Agreement. Furthermore, the acceptance of a brief which contained factual information was contrary to the letter and spirit of Article 17.6 of the DSU [...] The Appellate Body had refused to bind its discretion, which it should not have, ex ante, in this respect”.

However, although the Appellate Body has been daring, it has not made much use of the amici curiae. In the Bismuth case, it has considered that “In this appeal, we have not found it necessary to take the two amicus Appellate Body to consult either with the Chairman of the DSB or with the Director-General in that specific context”.

43 See the Account of the meeting on the adoption of the Appellate Body and the panel reports in the Bismuth case (op. cit., para. 15), as well as the position taken by Argentina during this meeting (ibid., para. 14). According to this country’s representative, “The Appellate Body had recognized that the authority to accept and consider amicus curiae briefs was not specifically provided for in the DSU nor in the Working Procedures for Appellate Review. However, the Appellate Body had concluded that its authority was covered by the authority to adopt rules granted to it under Article 17.9 of the DSU [...] The dispute settlement system established intergovernmental procedures and the authority to accept and consider unsolicited briefs submitted by individuals or organizations, not Members of the WTO, could distort the character of dispute settlement procedures. Access to the WTO dispute settlement procedure was restricted to WTO Members and panels, and the Appellate Body only had a duty to consider submissions from parties or third parties in a given dispute. The authority to accept and consider amicus curiae briefs appeared less justified if one took into account the fact that an appeal had to be limited to issues of law covered in panel reports and to legal interpretations developed by panels. Furthermore, recognition of the authority to accept amicus curiae briefs raised a number of doubts over the rights of Members that were neither parties nor third parties in a dispute. The question was whether those Members had the right to make voluntary submissions that might be accepted and considered by panels or the Appellate Body. If not, this would entail that they would have less rights than individuals or organizations that were not Members of the WTO [...] recognition of the authority to accept and consider amicus curiae briefs raised many complex problems [...] the interpretation made by the Appellate Body exceeded its authority to establish working procedures for Appellate Review”.
curiae briefs filed into account in rendering our decision"). This is quite similar to the attitude of panels.

C. Third Step: Between Openness and Impenetrability or the WTO Appellate Body’s Policy of Shying Away

1. The uncertain effect of amicus curiae briefs

The amicus curiae can be of help by performing in-depth analyses of national legislation and case-laws, or of the practice in other international jurisdictions. Some amici curiae really support an international jurisdiction by attracting their attention to international general law or to a branch of international law other than the one applied by the jurisdiction. It is a way of countering de-partitioning in litigation, and the risk that international law be fragmented. Thus, the World Wildlife Fund Brief that was presented unsolicited to the panel, then to the Appellate Body in the Shrimp-Turtles case, underlined the importance of environmental law and the need to integrate it within the WTO’s law.

The influence of amici curiae on dispute settlement is very limited within the WTO, as said earlier. If we go back to the second episode of the case-law saga, we have to admit that the Appellate Body clearly favoured this orientation. According to the Appellate Body, “The fact that a panel may motu proprio have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged”.

2. Integrating the submission of amicus curiae briefs in the proceedings

The Appellate Body does not wish for the dispute settlement sphere to become an out-law zone. This is why it considered that, sensing that a panel risked being “submerged” with amicus curiae briefs, at least a minimal legal framing was needed to determine the conditions of validity of these briefs.

46 Shrimp-Turtles case, op. cit., para. 108.
In the *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* case\(^{57}\) (hereinafter referred to as *Asbestos case*), the Appellate Body considered that in order to be accepted, an *amicus curiae* brief had to comply with certain content and presentation conditions. It therefore set those and publicized them on its website:

1. "In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November 2000.

3. An application for leave to file such a 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;\(^{48}\)

(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, as set forth in the


\(^{48}\) About the point of acting, see H. Ascencio, op. cit., pp. 911–914.
Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;

(f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and 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 the preparation of its application for leave or its written brief.

4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

5. The 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.

6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat by noon on Monday, 27 November 2000.

7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the brief;

(b) be concise and in no case longer than 20 typed pages, including any appendices; and
(c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute by noon on Monday, 27 November 2000”.

A certain rigidity characterises the procedure set by the Appellate Body, even if it is understandable that the will to control *amicus curiae* is a sensible one, aiming at reassuring a large number of the WTO members. Nevertheless, is this procedure capable of facilitating the acceptance of *amicus curiae* by dispute settlement bodies, especially by the Appellate Body? That is not so certain. For instance, how will the interests of non-governmental organisations to act in a specific dispute be legally defined? Would an organisation, whose interest sphere is very wide and thus has little specificity, risk seeing its briefs often rejected by the Appellate Body? It must be confessed that uncertainty remains, since the established criteria remain very general, and there is no practice in that field as yet.

A number of Member States at the WTO have reacted negatively to the procedure elaborated by the Appellate Body. An extraordinary meeting of the General Council was summoned at Egypt’s demand, in order to present their point of view. Uruguay’s position is very much representative of this extraordinary reunion’s atmosphere:

“The General Council was the proper forum to discuss this issue, since it was the highest WTO body when the Ministerial Conference was not in session, and the only body authorized to interpret the agreements. The WTO dispute settlement system had been described as the ‘jewel’ of the results of the Uruguay Round and Members should not allow this jewel to lose its brilliance or value. If Members ceased to have confidence in the dispute settlement system, which was unique at the international level, they would lose a fundamental tool for the defence of their interests and would find themselves worse off than before […] The WTO was an agreement of a contractual nature that was qualitatively different from other international agreements in the sense that the obligations that stemmed from this contract included the strict fulfilment of the decisions of the DSB to the extent of
diminishing the decision-making capacity of Members. Insofar as Members were mainly states, the political effect of this situation was of no little consequence. It was for this reason that any decision taken by the bodies that made up the system could not be taken lightly, but had to be firmly based on the provisions of the agreements, duly signed and ratified by the respective governments and parliaments. In this context, Uruguay viewed with great concern the appearance and mass circulation outside the WTO of the Appellate Body communication establishing the additional procedure for the submission of written briefs from persons or institutions that were neither parties nor third parties in a particular dispute at the appeal stage. Uruguay's concern was based on the fact that notwithstanding the positive intention that inspired this document, its form, its substance and the way it had been handled affected the rights and obligations of WTO Members and altered the relationship between the bodies within the system [...] As for substance, Uruguay believed that the practical effect had been to grant individuals and institutions outside of the WTO a right that Members themselves did not possess. This procedure allowed such individuals or institutions to present their point of view and possibly even influence a purely legal and interpretative decision on the rules in a specific case, while that right was reserved solely to the parties and third parties to a dispute, and was even refused to other WTO Members. This was highly inappropriate, as it altered an agreement negotiated and adopted multilaterally, and in particular since this subject was discussed during the negotiations of the Uruguay Round but was not incorporated in the DSU. Furthermore, this procedure limited the rights of parties and third parties. The last paragraph of section 1 of the factual background note stated that the decision gave the parties and third parties a full and adequate opportunity to comment on and respond to submissions. However, this was not possible within the short and mandatory time-limits which the Appellate Body had to meet in its work. Moreover, the members of the Appellate Body had the capacity, knowledge and experience necessary to take the legal decisions incumbent upon them without any outside help.⁴⁹

⁴⁹ General Council Meeting, 22 November 2000, Doc. WT/GC/M/60, paras. 4–9.
3. The Appellate Body’s backtrack from *amicus curiae*

Establishing conditions for the presentation of *amicus curiae* was the first step of a backtrack that could be foretold, because of the sharp reactions from States towards the evolution of case-law concerning *amicus curiae*. This evolution has raised many concerns to Member States as well as in the doctrine. Panels risked being overwhelmed with information, and the very informal quality of *amicus curiae* could cause criteria in evidence law to loosen. As a consequence, the Appellate Body adopted an extremely restrictive approach. In this context, the *Asbestos* case appears to be a turning point. In this case, the Appellate Body promptly refused to examine the eleven applications in view to submit a written brief, presented in conformity with the established procedure for presenting *amicus curiae*.

The argumentation of the Appellate Body to justify the rejection of these applications was rather laconic. According to the Appellate Body:

> "The Appellate Body received 11 applications for leave to file a written brief in this appeal within the time limits specified in paragraph 2 of the Additional Procedure.\(^{50}\) We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently...

\(^{50}\) Applications from the following persons were received by the Division within the deadline specified in the Additional Procedure for receipt of such applications: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland) and Lutheran World Federation (Switzerland).
with all the requirements set forth in paragraph 3 of the Additional Procedure [...] We received a written brief from the Foundation for International Environmental Law and Development, on its behalf and on behalf of Ban Asbestos (International and Virtual) Network, Greenpeace International, International Ban Asbestos Secretariat, and World Wide Fund for Nature, International, dated 6 February 2001. As we had already denied, in accordance with the Additional Procedure, an application from these organizations for leave to file a written brief in this appeal, we did not accept this brief”.

Has the Appellate Body felt political pressures from members of the WTO? At any rate, the Asbestos case is evidence of the limits of the dispute settlement system within the WTO on the level of the relationship between political organs and dispute settlement bodies.

The case confirms the Appellate Body’s somewhat lack of enthusiasm to take the content of amicus curiae into consideration. During these proceedings, the Appellate Body adopted a reasoning that showed great subtlety in its reluctance for amici curiae:

“On 13 August 2001, we received a brief from the American Humane Society and Humane Society International. This brief was also attached as an exhibit to the appellee's submission filed by the United States in this appeal. As we have previously stated in our Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products, attaching a brief or other material to the submission of either an appellant or an appellee, no matter how or where such material may have originated, renders that material at least prima facie an integral part of that participant's submission. In that Report, we stated further that it is for a participant in an

51 Asbestos case, op. cit., paras. 56–57.
appeal to determine for itself what to include in its submission. At the oral hearing in this appeal, held on 4 September 2001, we asked the United States to clarify the extent to which it adopted the arguments set out in the Humane Society brief. The United States stated: ‘[t]hose are the independent views of that organization. We adopt them to the extent they are the same as ours but otherwise they are their independent views. We submit them for your consideration but not like our arguments where, for example, the panel is expected to address each one’. Accordingly, we focus our attention on the legal arguments in the appellee’s submission of the United States. On 20 August 2001, we received a brief from Professor Robert Howse, a professor of international trade law at the University of Michigan Law School in Ann Arbor, Michigan, in the United States. In rendering our decision in this appeal, we have not found it necessary to take into account the brief submitted by Professor Howse.”\textsuperscript{54}

Finally, the European Communities – Trade Description of Sardines case (hereinafter referred to as Sardines)\textsuperscript{55} proves that even if the Appellate Body wishes to maintain its right, and that of panels, to require and accept amici curiae, it remains quite reluctant to take them into consideration in a dispute settlement. One of the briefs was presented by an individual. Peru was against the Appellate Body’s consideration of unsolicited disclosures of information. Peru underlined that, although disclosures from non-Members were welcome when they were joined to those of a Member of the WTO party to a dispute settlement procedure, the DSU indicated clearly that only the Members of the WTO could present disclosures independent from panels and the Appellate Body. The European Community has notified that amici curiae briefs were relevant, and that the Appellate Body had a discretionary ability to accept them. Among the third parties, Canada emphasised that there was no clear agreement between the WTO Members concerning the role of amicus curiae briefs in dispute settlements. Chile and Ecuador also required that amicus curiae briefs be rejected, alleging that the Dispute Settlement Understanding does not authorise the participation of amici curiae. The Appellate Body recalled its ability to accept amici curiae briefs, as it was enunciated for the first time in the report on the Bismuth case. Peru conceded at the hearing before the Appellate Body that its position was not

\textsuperscript{54} Ibid., paras. 75–78.

exactly supported by the Appellate Body case-law. Therefore, the Appellate Body considered that the objections from Peru concerning the *amicus curiae* brief presented by an individual were not founded, thus declaring that “We find that we have the authority to accept the brief filed by a private individual, and to consider it. *We also find that the brief submitted by a private individual does not assist us in this appeal*.56

D. The Epilogue of the Saga: The Contribution of the WTO Dispute Settlement System to the Definition Ratione Personae of Amici Curiae

1. Expected actors

NGOs: It is no wonder that NGOs have cut the lion’s share in the debate on the opening of the international system, especially of international jurisdictions to the international civil society. The WTO dispute settlement system has been characterised by a strong intrusion of *amicus curiae* briefs’ registration requirements by NGOs, and this in the major part of the disputes (*US – Gasoline, Hormones, Shrimp-Turtles, Asbestos*). Due to the current exponential growth of NGOs, the Appellate Body should establish procedural rules prior to the acceptance of their briefs. Transparency is not anarchy. Dispute panels must put forward their efficiency in dispute solving. Precisely, if clear and objective criteria on the *amicus curiae* registration proceedings by NGOs are not established, the efficiency of the dispute settlement system at the WTO can be hindered.

**Scientific experts:** The potentiality of multiple disputes on scientific questions, notably concerning the Agreement on Sanitary and Phytosanitary measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), or even Article XX b) in the 1994 GATT, demand that the WTO dispute panels be more prompt in asking for notices or information from scientific experts, or that they accept *amicus curiae* briefs aiming at clarifying certain scientific questions in a given dispute. The *Hormones* case has emphasised this demand. On this occasion, the Appellate Body was very satisfied with the attitude of panels in their research for scientific information. The Appellate Body declared that it agreed “[...] with the Panel. Both Article 11.2 of the *SPS Agreement*57 and Article 13 of the DSU enable panels to seek information and advice as they

56 Ibid., para. 160.
57 Article 11.2 of the SPS Agreement states: “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”.
deem appropriate in a particular case [...] therefore, in its selection and use of experts, the Panel has not acted inconsistently with Articles 11, 13.2 and Appendix 4 of the DSU and Article 11.2 of the SPS Agreement.58

2. Unexpected actors

Individuals: The exclusively inter-State nature of dispute settlement at the WTO was not a sufficient sign that individuals would want to present amici curiae on private grounds. Yet, in Asbestos and other cases, individuals applied for the registration of a brief. The sequel given by the Appellate Body to these applications shows that the status of individuals acting as amicus curiae remains uncertain. At this level, rules are needed to avoid abuse in the registration of briefs from individuals.

Companies, entrepreneurs associations and trade unions: The WTO’s commercial mandate brings to companies (i.e., employers and employees) a greater feeling of being involved in the many disputes between Member States of the WTO. Companies’ interests (notably multinational companies’ interests) are chiefly represented in the rules of the GATT/WTO. Workers also have a say on certain questions of potential concern. This is why trade unions (i.e., the International Confederation of Free Trade Unions) have wished to register briefs in the Asbestos case. Similarly, companies (i.e., Roofit Industries Ltd. (India)) have wished to do so. It is known that the Appellate Body has rejected those applications. Still, the status of amici curiae submitted by companies and workers’ unions demands to be clarified. The displacement of the field of social debate within the WTO should be avoided. The International Labour Organisation (ILO) remains the competent organisation in that matter; becoming the field of controversy between employers and workers, via the amici curiae, is not the mandate of the WTO dispute settlement system.

About private lawyers: Private lawyers should not be considered as amici curiae. They intervene during dispute settlement proceedings as legal advisers or representatives of one of the States party to the dispute. The admission of private lawyers in the WTO system of dispute settlement has not always been the rule. Private lawyers were admitted before the Appellate Body for the first time during the European Communities – Regime for the Importation, Sale and Distribution of Bananas case.59

In this particular case, the government of Saint Lucia wanted two legal advisers, who were not full-time government employees of Saint

58 Hormones case, op. cit., paras. 147–149.
Lucia, to participate in the Appellate Body hearing. Saint Lucia argued there were two distinct issues about the rights of representation in WTO dispute settlement proceedings. The first issue was to know whether a State might advocate its arguments before a panel, or the Appellate Body, by resorting to private counsel. The second issue concerned a State’s sovereign right to decide who are its official representatives, or its delegation. Saint Lucia considered that, under customary international law, no international organisation had the right to undermine a government’s sovereign right to decide who it wants to accredit as official representative and member of its delegation. Moreover, Saint Lucia pointed out that neither the DSU nor the Appellate Body Working Procedures dealt with the issue of the right of a sovereign State to designate its delegation or to credit persons as full representatives of its government. Saint Lucia maintained that if those bodies did, then they would exceed the abilities of a panel, of the Appellate Body or of the WTO, by virtue of customary international law. In addition, Saint Lucia underlined that no disposition, neither in the DSU, nor in the Working Procedures, obliged governments to designate civil servants only as advisers in the proceedings of one of the WTO panel or of the Appellate Body.

The Canadian and Jamaican governments supported Saint Lucia’s claim in this case. Canada subscribed to what Saint Lucia argued, namely, that the composition of the delegation of a State Member of the WTO, in the absence of rules prescribing the contrary, was an internal matter, one that concerned this State exclusively. Canada maintained that a State Member of the WTO has the right to authorise persons deemed necessary or appropriate to represent its interests. Canada deemed that a specialised committee, or the Appellate Body, did not have to check the capacity of the persons a State authorised to be part of its delegation. Jamaica asserted that a government has a right to determine the composition of its own delegation, in view of the law and international practice.60

60 Ibid., para. 10. Yet, the plaintiffs declared they opposed Saint Lucia’s registered claim aimed at allowing non-governmental representatives to participate in the Appellate Body hearing. The plaintiffs pointed out that the specialised committee had decided, during a meeting with the parties, that private advisers wishing to represent Saint Lucia in this case were not allowed to participate in the specialised committee meetings. Concerning Saint Lucia’s claim, requiring that its legal advisers take part in the Appellate Body hearing, the plaintiffs advocated that the WTO was not meant to change its established practice in this matter, and that such a change would radically modify the basis of the WTO dispute settlement system. The plaintiffs maintained that the rules of international law governing diplomatic relations, especially those codified in the Vienna Convention on
Finally, the Appellate Body decided to accede to Saint Lucia’s requirement. The Appellate Body underlined that:

"[...] we can find nothing in the Marrakesh Agreement Establishing the World Trade Organization (the ‘WTO Agreement’), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings [...] it is well-known that in WTO dispute settlement proceedings, many governments seek and obtain extensive assistance from private counsel, who are not employees of the governments concerned, in advising on legal issues; preparing written submissions to panels as well as to the Appellate Body; preparing written responses to questions from panels and from other parties as well as from the Appellate Body; and other preparatory work relating to panel and Appellate Body proceedings. These practices are not at issue before us. The sole

Diplomatic Relations, do not support the thesis saying that a government can choose whoever it wants as a member of its delegation to represent it in a foreign international organism. The plaintiffs have also put forward that the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations was never enforced nor ratified by any of the main host States, including Switzerland and the United States, and therefore does not apply to the WTO. The plaintiffs considered that the rules governing diplomatic representation did not give States a free hand about the choice of persons sought for delegations. Moreover, concerning international courts and other international organisations, the plaintiffs argued that in situations when the participation of external advisers is allowed, it is submitted to the formal written rules that have been negotiated and approved by the Member States of the organisation or the parties to the treaty. The plaintiffs underlined that from the GATT’s first years, government presentations during dispute settlement proceedings have been given exclusively by government advisers or commercial experts. Concerning developing countries, the plaintiffs put forward that, contrary to the practice of other international courts, the dispositions of Article 27.2 of the DSU provide that developing countries have a right to legal assistance from the WTO Secretariat. The plaintiffs also presented certain reasons of general politics supporting their position: dispute settlement at the WTO occurs between governments, and for this reason, the DSU protects the parties’ confidentiality during their recourse to dispute settlement proceedings. In addition, they asserted that if private advisers were allowed to participate in specialised committees’ meetings, a certain number of issues concerning the advisers’ ethics, conflicts of interests, the representation of multiple governments, and confidentiality, could be resolved.
issue before us is whether Saint Lucia is entitled to be represented by counsel of its own choice in the Appellate Body’s oral hearing [...] there are no provisions in the Marrakesh Agreement Establishing the World Trade Organization (the ‘WTO Agreement’), in the DSU or in the Working Procedures that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government’s own choice may well be a matter of particular significance – especially for developing-country Members – to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body’s mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings”.61

The intervention of private lawyers was officially accepted a while later by a panel, on the occasion of the report on the Indonesia – Certain Measures Affecting the Automobile Industry.62

3. About the intervention of international organisations as *amicus curiae*

The proliferation of international jurisdictions does not eclipse the transversality of disputes. For instance, the Hormones, Shrimp-Turtles and Asbestos cases have put forward the necessity to associate international trade law with health and international environmental law. On the occasion of certain disputes, panels might ask other international organisations to clarify certain legal or factual questions concerning the application, or the interpretation, of international instruments elaborated and adopted within those organisations. This is what the panel for the United States – Section 110 (5) of US Copyright Act case did when it asked for a legal information from the World Intellectual Property Organisation (WIPO), supporting this requirement of Article 13 of the DSU.63

Nevertheless, two uncertainties appear in the submission of *amicus curiae* by international organisations. The first uncertainty lies in the absence of an obligation for the WTO panels to ask for information from

61 Ibid., paras. 10–12.
63 Op. cit., para. 4.1. The WIPO’s answer was more factual than juridical.
international organisations competent in the interpretation and enforcement of given instruments. This is what resulted from the Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items case, in which the Appellate Body asserted that:

“Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all [...] the Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF. While it might perhaps have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF in this case, we believe that the Panel did not abuse its discretion by not seeking information or an opinion from the IMF. For these reasons, we find that the Panel did not violate Article 11 of the DSU by not seeking information from, and consulting with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax imposed by Argentina”.

The second uncertainty concerns the status of amici curiae submitted by international organisations. Do they obey the same rules as those elaborated by the Appellate Body in the Asbestos case? A positive answer might be obvious, since the Appellate Body mentioned rules that can apply to any person, whether natural or legal, other than a party or a third party to a dispute. Nevertheless, the proceedings established during the Asbestos case being ad hoc (that is to say, established for the means of the appellate proceedings in the context of the Asbestos case), it can be hoped that more flexible proceedings will come to be considered for international organisations. An international organisation, or the Secretariat of an international convention, or an international jurisdiction (i.e., the Tribunal of the Law of the Sea) wishing to submit an amicus curiae should not be prevented from doing so. In no circumstance should a brief from an international organisation be rejected. This would warrant a better synergy and a greater co-operation between international organisations and international jurisdictions.

The current practice demonstrates that international organisations have almost never taken part in disputes within the WTO through the submission of reports. Efforts must nevertheless be made in this direction.

64 Op. cit., paras. 84–86.
The recent Sardines case brought out what is almost a necessity for the WTO panels, to ask for, ab initio, or to accept ipso facto the amicus curiae communication that international organisations could present. In this dispute, which opposed the European Community against Peru with regard to an EC Regulation establishing common commercialisation norms for sardine tins, and excluding certain species of fish (Sardinos sagax) in the category of “sardines”, chiefly one norm from the Codex Alimentarius, namely the norm Codex Stan 94 (norm for sardines and tinned products of the sardine type), was questioned. Several questions were placed before the panel and the Appellate Body with respect to the enforceability of this Codex norm in the context of disputes between WTO Member States: is Codex Stan 94 a relevant international norm, given that it was not adopted by consensus? Is Codex Stan 94 a relevant international norm, elaborated according to the Codex Alimentarius proceedings? Is Codex Stan 94 a relevant international norm for the regulation of the tinned species of fish Sardina pilchardus (different from the species Sardinops sagax)?

At no time during the proceedings did the WTO panels consult the Codex Alimentarius to analyse and settle the question of the status of norm Codex Stan 94.


In the Sardines case, the problematic aspect of the acceptability of an amicus curiae brief presented by a Member State of the WTO appeared for the first time at the WTO.

In this situation, it was an amicus curiae brief submitted by the Kingdom of Morocco. The European Communities considered that the Appellate Body should not treat amici curiae briefs presented by private persons differently from the amici curiae briefs from Member States of the WTO. Peru, on the contrary, opposed the Appellate Body’s acceptance of the Moroccan brief, advocating that such an acceptance would bend the rules of the DSU establishing the conditions in which Members of the WTO can participate in dispute settlement proceedings as third parties. Peru specifically referred to Articles 10.2 and 17.4 of the DSU.

Ibid., paras. 161–170.
“Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a ‘third party’) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.”
Moreover, Peru considered that, as Morocco had not informed the DSB that it had an interest in that matter, it could not have the opportunity to be heard by the Appellate Body.

The Appellate Body recalled its consideration in the *Bismuth* case, according to which “nothing in the DSU or the Working Procedures specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal” and that “neither the DSU nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs.”

According to the Appellate Body, settling the matter in this direction does not establish a distinction between, on the one hand, communications from WTO Members who are not parties or third parties to a given appeal, and on the other hand communications from non-WTO Members.

According to the Appellate Body, if

“It is true that, unlike private individuals or organizations, WTO Members are given an explicit right, under Articles 10.2 and 17.4 of the DSU, to participate in dispute settlement proceedings as third parties. Thus, the question arises whether the existence of this explicit right, which is not accorded to non-Members, justifies treating WTO Members differently from non-WTO Members in the exercise of our authority to receive *amicus curiae* briefs. We do not believe that it does [...] We have been urged by the parties

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*68 “Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body”.*


*70 Ecuador and Chile have advocated that if the Appellate Body should accept, and take into consideration, an *amicus curiae* brief presented by a Member of the WTO who did not follow the enforceable proceedings for participation as a third party or third party participant, it would be granting to this Member more important rights than to a Member of the WTO who had followed these proceedings, but who had not presented a written communication in the appellate proceedings as specified in Rule 27.3 of the Appellate Body’s Working Procedures. According to Chile and Ecuador, the Member who had not presented a written communication in the appeal would only have the possibility to participate in the hearing as a passive observer, and would not be authorised to have his views known during this hearing. Chile and Ecuador argued that, on the contrary, the Member who had presented an *amicus curiae* brief would have more important rights since his views would be submitted to the Appellate Body. See *Sardines* case, op. cit., para. 162.*
to this dispute not to treat Members less favourably than non-
Members with regard to participation as amicus curiae. We agree.
We have not. And we will not. As we have already determined that
we have the authority to receive an amicus curiae brief from a
private individual or an organization, a fortiori we are entitled to
accept such a brief from a WTO Member, provided there is no
prohibition on doing so in the DSU. We find no such
prohibition.\textsuperscript{71}

The Appellate Body considered that none of the participants to the
appellate proceedings pointed out a disposition in the DSU that could be
interpreted as forbidding the Member States of the WTO to participate in
proceedings of panels or of the Appellate Body as amici curiae. Besides,
how such a participation is contrary to the DSU has not been
demonstrated. For the Appellate Body, Articles 10.2 and 17.4 specify the
conditions in which a Member State can participate in dispute settlement
proceedings as a third party or third participant, without leading inevitably
to the conclusion that the participation of States as amici curiae is
prohibited. The DSU gives Member States of the WTO who are
participants and third participants a “legal right” to participate at the
appeal stage.\textsuperscript{72} In particular, Member States of the WTO who are third
participants have the right to present written and oral communications.
According to the Appellate Body, the corollary is that there exists a “duty”,
in virtue of the DSU, to accept and to take into consideration this
communication originating from WTO Members. Yet, participating as
amicus curiae in the WTO appellate proceedings is not a legal right, and
the Appellate Body has no duty to accept an amicus curiae brief. The
Appellate Body concludes:

“The fact that Morocco, as a sovereign State, has chosen not to
exercise its right to participate in this dispute by availing itself of
its third-party rights at the panel stage does not, in our opinion,
dermine our legal authority under the DSU and our Working
Procedures to accept and consider the amicus curiae brief
submitted by Morocco. Therefore, we find that we are entitled to
accept the amicus curiae brief submitted by Morocco, and to
consider it. We wish to emphasize, however, that, in accepting
the brief filed by Morocco in this appeal, we are not suggesting that
each time a Member files such a brief we are required to accept

\textsuperscript{71} Ibid., para. 166.
\textsuperscript{72} Ibid. This is under the restriction of meeting the prescriptions made in Rule 27.3 in the Working Procedures.
and consider it. To the contrary, acceptance of any amicus curiae brief is a matter of discretion, which we must exercise on a case-by-case basis [...] we could exercise our discretion to reject an amicus curiae brief if, by accepting it, this would interfere with the ‘fair, prompt and effective resolution of trade disputes’. This could arise, for example, if a WTO Member were to seek to submit an amicus curiae brief at a very late stage in the appellate proceedings, with the result that accepting the brief would impose an undue burden on other participants.”

With respect to the Moroccan amicus curiae brief in particular, the Appellate Body considered it gave mainly factual information. The brief referred to the scientific differences between the species Sardina: pilchardus Walbaum and Sardinops sagax sagax, and gave economic information on the Moroccan industries of fishing and tinning. Taking into account the fact that Article 17.6 of the DSU restricts an appeal to questions of law and to the interpretations of the law given by the panel, the factual information given in Morocco’s amicus curiae brief was not relevant to the case. Moreover, in this brief Morocco alleged that the measure being questioned was compatible with the relevant international norms, particularly those in the Commission of Codex Alimentarius. Yet Morocco neither specified this allegation, nor presented any elements supporting this position. As a consequence, the Appellate Body did not consider the brief to be relevant. It is nonetheless interesting to notice that some of the legal arguments Morocco asserted related to Article 2.1 in the OTC Understanding and to the GATT (1994); the Appellate Body decided it would examine these arguments in an ulterior phase of the appellate report.

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73 Ibid., paras. 166–167.
IV. CONCLUSION. THE DOHA DECLARATION AND THE REFORM OF THE
DISPUTE SETTLEMENT BODY: TOWARDS A GREATER RECEPTIVITY OF
AMICI CURIAE?

A. Transparency, Yes, But at What Cost?

The Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of
Iron or Non-Alloy Steel and H-Beams from Poland case\textsuperscript{74} showed how
crucial is the issue of the reform of the WTO dispute settlement body
about \textit{amicus curiae}. Transparency in dispute settlement procedures should
be rationalised as best as possible in this reform perspective. In the above-
mentioned case, the Appellate Body had received a written brief from the
\textit{Consuming Industries Trade Action Coalition} (CITAC), a group of
companies and professional associations in the United States. CITAC dealt
with some of the legal questions raised during the appellate proceedings in
its brief. CITAC sent copies of it to Thailand and Poland, who were parties
to the dispute, as well as to the European Communities, to Japan and the
United States, third participants to the proceedings. Thailand had required
that the Appellate Body reject this brief, as well as any brief of this kind
that might be presented during the appellate phase. Thailand considered
that the Appellate Body was not entitled to examine \textit{amicus curiae} briefs
in this case. Thailand added that, independently from the issue of the
acceptance of such briefs by the Appellate Body, a potentially more
serious question had been raised about the brief that CITAC presented.
According to Thailand, the CITAC brief indicated at first reading that this
organisation had had previous access to the communication the appellate
party presented during the proceedings before the Appellate Body.
Thailand maintained that some references to Thailand’s specific arguments
in the CITAC brief followed the style of presentation used in the latter’s
communication as appellate party. Thailand pointed out especially that in
paragraph 2 in the CITAC brief, there was an explicit reference to one
specific section of its communication. Thailand said there was no plausible
explanation of the fact that CITAC, an association in the private sector of
the United States, knew of the precise style of presentation of Thailand’s
communication as appellate party, other than if Poland or a third
participant to the appellate proceedings had not treated Thailand’s
communication as confidential and disclosed it to CITAC, thus violating

\textsuperscript{74} Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or
Non-Alloy Steel and H-Beams from Poland, Report of the Appellate Body, 12
Articles 17.10 and 18.2 of the DSU. Thailand specified that it had gathered that Hogan & Hartson L.L.P., the law firm that had represented Poland in that case, was also an adviser to the CITAC. According to Thailand, there seemed to be "a very close link among CITAC, Hogan & Hartson L.L.P. and Poland". Thailand asserted this apparent link summoned the thought that Hogan & Hartson L.L.P. had disclosed to CITAC the gist of Thailand’s communication.

The Appellate Body then addressed a letter to Poland concerning Thailand’s allegations. It considered that if Thailand’s factual declarations were well-grounded, then it could be established *prima facie* that the obligations of confidentiality contained in Articles 17.10 and 18.2 of the DSU had been violated. Moreover, the Appellate Body maintained that the Members of the WTO who were participants and third participants to the appeal were fully responsible for all action undertaken by their civil servants as well as by their representatives, advisers or consultants, in virtue of the DSU. The Appellate Body asked Poland to tell whether any of its civil servants or other representatives, advisers or consultants, had provided a copy of Thailand’s communication, or had divulged its contents.

75 Ibid., para. 65.

76 In order to determine whether the obligations of confidentiality established in the DSU had failed to be observed, Thailand required that the Appellate Body seek information to know whether civil servants or other Poland representatives had provided a copy of Thailand’s communication, or had, in another way, divulged or communicated the gist of this communication to the CITAC or to any person who was not a participant or a third participant to the appellate proceedings. Thailand also required that the Appellate Body initiate the action it deemed appropriate if it had been established that a participant or third participant to the appellate proceedings had failed to fulfil its obligations as established by Articles 17.10 and 18.2 of the DSU. Thailand suggested this action could notably consist in rejecting the written brief the CITAC presented, forbidding any lawyer or law firm who had divulged the gist of Thailand’s communication from maintaining its participation in the appellate proceedings, asking these lawyers or cabinets to prove they had destroyed or sent back to the Appellate Body all copies of Thailand’s written communication, or all written documents based on or referring to it, asking CITAC to prove it had destroyed or sent back to the Appellate Body all copies of Thailand’s communication or all written documents based on, or referring to it, and demanding that all of Poland’s and third parties’ lawyers provide the Appellate Body with a written report detailing all they had disclosed to any party not participating in the appellate proceedings, including any memorandum established for clients or potential clients or any discussion held with those clients or potential clients, referring in any way to the gist of Thailand’s communication. Ibid., paras. 66–67.
in any other way, to any person who was not a participant or a third participant to the appellate proceedings, including CITAC. The Appellate Body also addressed a letter to each of the third participants to the appeal. In this letter, it asked them to notify whether any of their civil servants, representatives, advisers or consultants had provided a copy of Thailand’s communication to any person who was not a participant or a third participant to the appellate proceedings, or whether they had divulged or in any other way communicated the gist of Thailand’s communication to such a person.\footnote{In its answer, Poland notified the Appellate Body that a representative of Hogan & Hartson L.L.P. had exercised the function of counsel for Poland during the work of the panel, as well as during the appellate proceedings, and that this representative had received a copy of Thailand’s communication as appellate party. Poland also asserted that another representative from the same law firm “has been a corporate lawyer” for the CITAC. Moreover, Poland maintained that the law firm Hogan & Hartson L.L.P. had produced a written declaration indicating that none of its members, associates or representatives had participated in the elaboration of the brief presented by CITAC. Poland added that the Polish administration had not brought any help to CITAC and that no civil servant or other representative of Poland had given a copy, or divulged any of the elements, or in any other way communicated the gist of Thailand’s communication to any person other than the participants to the appellate proceedings. Poland explained it could not say “who has assisted in the preparation of the written brief submitted to the Appellate Body by CITAC”, and that it could not, and neither could Hogan & Hartson L.L.F., explain how the reference to “Section III.C.5 of the Thailand Submission” could have appeared at paragraph 2 in the written brief presented by CITAC. Besides, Poland indicated that it had established “substantial internal confidentiality procedures” and that access to all documents was restricted to two persons belonging to the relevant Polish department and two persons employed by the Mission of Poland in Geneva. Although there was, in Poland’s opinion, no evidence of misbehaviour from Hogan & Hartson L.L.P., it had decided to accept the law firm’s proposition to stop exercising for Poland the function of counsel during the appeal. Ibid., paras. 71–72.} The European Communities maintained they had no reason to suspect that any of the civil servants who had received the communications registered in the appellate proceedings had failed to observe their obligations of confidentiality. Japan said it had not failed to observe the obligations of confidentiality established in Articles 17.10 and 18.2 of the DSU. The United States asserted that in conformity with their usual practice, they had made their own communication public when they registered it, but that they had not performed any of the actions at stake. They added that this issue illustrated the necessity of reinforcing
transparency in dispute settlement within the WTO. From the United States' point of view, the practice consisting of requiring the confidential treatment of communications that did not contain confidential commercial information compromised public support of the WTO dispute settlement body, and hindered the Member States' capacity to fully represent the interests of their involved parties.

The Appellate Body considered that:

"The terms of Article 17.10 of the DSU are clear and unequivocal: '[t]he proceedings of the Appellate Body shall be confidential'. Like all obligations under the DSU, this is an obligation that all Members of the WTO, as well as the Appellate Body and its staff, must respect. WTO Members who are participants and third participants in an appeal are fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants. We emphasized this in Canada – Measures Affecting the Export of Civilian Aircraft, where we stated that the provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant. [...] We note that Poland has made substantial efforts to investigate this matter, and to gather information from its legal counsel, Hogan & Hartson L.L.P. We note as well the responses from the third participants, the European Communities, Japan and the United States. Furthermore, Poland has accepted the proposal made by Hogan & Hartson L.L.P. to withdraw as Poland's legal counsel in this appeal. On the basis of the responses we have received from Poland and from the third participants, and on the basis of our own examination of the facts on the record in this appeal, we believe that there is prima facie evidence that CITAC received, or had access to, Thailand's appellant's submission in this appeal. We see no reason to accept the written brief submitted by CITAC in this appeal. Accordingly, we have returned this brief to CITAC".78

78 Ibid., para. 74. Thailand sent the Appellate Body a letter as an answer to the decision returned. In this letter, Thailand said that Poland had given no explanation concerning the way the breach could have been committed and required that the Appellate Body initiate a complementary action in that regard.
B. The Reform of the Adjudicating System and the Positions Expressed by States

Dealing with *amicus curiae* briefs in a formal way within the WTO can be done in different institutional ways. A first option would be to resort to Article V.2 of the Agreement establishing the WTO. A second option would be resorting to Article IX.2 of the Agreement establishing the WTO, a third, to invoke the amendment on account of Article X of the Agreement establishing the WTO and finally to consider a decision of the DSB. None of these options has been the object of a consensus.

Thailand suggested that the Appellate Body ask the CITAC how it could have come into possession of the information in its brief. Thailand also required that the Appellate Body examine what other dispositions could be taken to deter the Member States of the WTO to breach the rules in future cases. Thailand also demanded that the Appellate Body specify the meaning of Poland’s explanation, according to which the latter had accepted Hogan & Hartson L.L.P.’s proposal to stop exercising the functions of juridical advice for it. Moreover, Thailand required that the reasons why the Appellate Body rejected CITAC’s written brief be specified. Ibid., paras. 76–78.


80 “The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO”.

81 “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex I, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X”.

82 “Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex I by submitting such proposal to the Ministerial Conference [...]”.

83 This option would consist in following the model of the decision of the DSB on *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, establishing certain rules concerning voluntary divulging and the rules to follow in the eventuality of a complaint about a conflict of interest the object of which would be a panel member. See document WTO/DSB/RC/1.
between the Member States of the WTO. This enabled the opening of a discussion within the context of the Doha Declaration.\textsuperscript{84}

According to paragraph 30 of this Declaration, Member States of the WTO “agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter”.

The United States\textsuperscript{85} considers that the DSU should envision that the public might be able to follow all fundamental meetings with the parties within the panel procedure, the Appellate Body procedure and the arbitration procedure,\textsuperscript{86} except parts of meetings where confidential information is examined (for instance, confidential commercial information or the methods for enforcing the laws). The Understanding could establish a set of procedures to that affect, while maintaining for the relevant body a certain flexibility to adjust procedures, with the perspective of the particular circumstances of this or that procedure. For instance, procedures should include a certain number of options to allow the public to follow the meetings, for instance, through the broadcasting of meetings on specific visual installations.

The European Community\textsuperscript{87} has suggested that a new article be inserted after Article 13 of the DSU\textsuperscript{88} which would read as follows:


\textsuperscript{85} Communication from the United States, Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency, 22 August 2002, Doc. TN/DS/W/13, p. 3.

\textsuperscript{86} The Arbitration procedures at the WTO are those of Articles 21.3.c, 22.6 and 25 of the DSU. See on this question, L. Boisson de Chazournes, “L’arbitrage à l’OMC”, Revue de l’Arbitrage, 2003 (to be published).

\textsuperscript{87} Communication from the European Communities, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, 13 March 2002, Doc. TN/DS/W/1, para. 10.

\textsuperscript{88} The European Community’s proposition essentially codified the Appellate Body procedure in the Asbestos case.
Article 13bis
Amicus curiae submissions

1. The panel or the Appellate Body may permit unsolicited amicus curiae submissions, provided that the panel or the Appellate Body have determined that they are directly relevant to the factual and legal issues under consideration by the panel or the Appellate Body and that they comply with the rules of this Article. In such a case, the panel or the Appellate Body shall consider the submissions in question, while not being obliged to address, in its report, the factual or legal arguments made in such briefs.

2. Any person, whether natural or legal, other than a party or third party to the dispute, wishing to make an amicus curiae submission to the panel or the Appellate Body, must apply for leave to file such a submission from the panel or the Appellate Body within 15 days from the date of the composition of the panel or within 5 days from the date of the notice of appeal, respectively.

3. An application for leave to file such a submission 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) demonstrate the direct interest that the applicant has in the factual or legal issues raised in the dispute;

(e) identify the specific issues of facts and law which the applicant intends to address in its submission and, in the case of an application submitted to the Appellate Body, the legal interpretations developed by the panel that are the subject of the notice of appeal;

(f) indicate why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other
covered agreements, for the panel or Appellate Body to grant the applicant leave to file a submission in this appeal; 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 the preparation of its application for leave or its written brief.

4. The panel or the Appellate Body will review and consider each application for leave to file a submission and will, within 7 days from their receipt in the case of a panel, and within 3 days in the case of the Appellate Body, render a decision whether to grant or deny such leave. That decision shall be notified forthwith to the applicant by facsimile or electronic mail.

5. Any person, other than a party or a third party to this dispute, granted leave to file an amicus curiae submission, must make its submission to the panel within 15 days from the date of receipt of the notification, and to the Appellate Body within 3 days from such date.

6. A submission filed with the panel or the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the submission;

(b) be concise and in no case longer than 20 typed pages, including any appendices; and

(c) set out a precise statement, strictly limited to legal arguments in the case of a submission to the Appellate Body, supporting the applicant's position on the issues of facts and law with respect to which the applicant has been granted leave to file a submission.

7. The parties and the third parties to the dispute shall be given 10 days from the date of receipt of any submission filed by an applicant granted leave under this Article to comment on and respond to such submissions.

Opening the dispute settlement system to the international civil society will imply having to face real political obstacles, on top of juridical ones. Furthermore, the risk will be that differences in perspectives between
developed countries and developing countries will be displaced to the field of the "democratisation" of this system. One of the major stakes in the negotiations of Doha could well be to determine the legal policy concerning public participation to the dispute settlement procedures. What will be the gist, and the direction, that should be conferred to this participation? Should a larger opening in that field be the new direction or is the State locus standi going to be maintained? Should the participation of “international civil society” be restricted to the sole submission of communications or should it be granted the right to become a party, or at least a third party, to disputes? These questions show that the WTO should not remain insensitive to the debate on the porosity and permeability of dispute resolution mechanisms in the international legal order, and that legal strategies are needed more than ever to rationalise the space of the international dispute.