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**Amicus Curiae Briefs Before The WTO:
Much Ado About Nothing***

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ACT ONE: TAMING OF THE SHREW

Amicus curiae briefs recently monopolised the discussion with respect to WTO dispute settlement proceedings. WTO members, with the exception of very few, showed in rather explicit terms their disagreement with the way the Appellate Body handled this issue. It all started when the Appellate Body in the context of a recent litigation officially invited *amicus curiae* briefs. Some WTO Members requested that an extraordinary Council meeting be convened. Heated exchanges during the Council meeting probably had an effect and the Appellate Body decided to back-track from what it originally stood for. What happened in the Council though was the culmination of a more general dissatisfaction.

In this Paper, I first provide an account of the legal interpretation that the Appellate Body privileged when dealing with the status of *amicus curiae* briefs in WTO law (Act Two). I then move to a brief Act Three, where I examine under what conditions parties would be interested in filing such briefs to the WTO. I note in this respect that the most obvious candidates (consumers’ organisations) have yet to use this possibility and that the main users are non-governmental organisations (NGOs) with an interest in health and environmental issues. This picture however, might be changing in the future. In the same Section I refer to a study conducted on the issue of *amicus curiae* briefs submitted to the US Supreme Court and which puts into question the efficiency of (at least some) of the briefs filed. In the Final Act I conclude, in the Shakespearean manner, that probably the whole discussion amounts to “Much Ado About Nothing”: WTO law already contains in-built disciplines that, if properly applied on the *amicus curiae* issue, provide an adequate response to the issue which is in line with the distribution of powers between

legislative and judiciary as expressed in the WTO Dispute Settlement Understanding (DSU). In the same Section however, I sketch the attitude of the Appellate Body to “test the waters” and its institutional consequences. To my view, the story of *amicus curiae* briefs is a perfect illustration of the limits that WTO institutions face: contrary to the popular belief, the WTO remains an essentially Members-driven organisation.

ACT TWO: THE COMEDY OF ERRORS

The Appellate Body decisions concerning participation of NGOs are not a monument of clarity. First, the Appellate Body dealt with the issue in the context of the *Shrimps-Turtles*¹ litigation. The story runs as follows: NGOs had submitted briefs to the Panel which refused to accept them because it never requested them. The Panel was taking Art. 13 DSU at face value. This Article, it is reminded reads:

"Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate".

In the Panel's view, the verb “to seek” which figures in the body of Art. 13 DSU reflects the idea that panels and panels only have the initiative to request information. Hence, in the panel's view, unsolicited information is *ipso facto* (that is, precisely because it is not solicited) to be disregarded.

The Appellate Body disagreed. In a rather convoluted passage, it reasoned as follows:

“That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested.

If, in the exercise of sound discretion in a particular case, a panel concludes *inter alia* that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes” (§ 107 of the report, op. cit., italics in the original).

This is as close as you can get to artistic legal expression: according to the Appellate Body, the Panel's interpretation of the term “seek” is wrong because, had a party sought (past of the verb 'to seek') to submit unsolicited information and had the Panel agreed to accept such unsolicited information, the Panel would have examined such unsolicited information. True. The problem though is what in case when a Panel does not accept such unsolicited information and not what in case when it accepts it. To make things worse, the Appellate Body in a typical statement the legal value of which cannot be ascertained (in light of the fact that at the end, the Appellate Body typically concludes 'for all the reasons discussed above' and we are often left in the dark as to the particular importance of each and every reason provided for in the report) draws a parallel between two antitheses: to seek and not to seek on the one hand, and to accept and to reject on the other (§ 104 of the report, op. cit.). But of course, no parallel can be drawn: the issue is precisely whether any unsought information should *ipso facto* (i.e., because it is unsought) be rejected?

The fact of the matter is that through a rather “acrobatic” interpretation of the term “to seek”, the Appellate Body managed to introduce the *amicus curiae* briefs issue to the WTO.

Crucially, it did so by reference to Art. 13 DSU which is, as I will try to show later, not the most appropriate way to deal with this issue.

¹ United States — Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R, 12 October 1998.

The Appellate Body's opinion did not go down well. Although the Appellate Body did not accept any of the briefs filed, some WTO Members started protesting. The reason was that they felt that non-institutional players, like NGOs, could end up having more rights than WTO Members. The asymmetry in their eyes resulted from the fact that whereas NGOs could file to the Appellate Body their brief anyway, WTO Members could do so only if they had first acted as third parties before the corresponding panel. This was however a wrong argument. The issue was not whether there should be symmetry or asymmetry between institutional and non-institutional players. The issue was whether the Panel's interpretation of the term “to seek” was sustainable or not.

As presented in terms of asymmetry however, it gave the Appellate Body the opportunity to clarify its position on this issue in the *US – CVDs on Steel*² case-law. Referring to the argument on asymmetry, the Appellate Body observed:

“Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or 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 of the report, *op. cit.*, italics in the original).

So much for the duty. And what about the right?

² See Appellate Body report on *United States - Imposition Of Countervailing Duties On Certain Hot-Rolled Lead And Bismouth Carbon Steel Products Originating In The United Kingdom*, WTO Doc. WT/DS138/AB/R of 10 May 2000.

“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” (§ 42 of the report, *op. cit.*, italics in the original).

In principle, this statement takes away a lot of the criticism previously advanced. Still, it is less than satisfactory. The crucial issue remains by reference to which provision in the WTO Agreement did the Appellate Body conclude that it indeed had the legal authority under the DSU to accept *amicus curiae* briefs? Implicitly, the answer should be searched in Art. 13 DSU. But if it is indeed the case that Art. 13 DSU confers such authority to WTO adjudicating bodies, why did the Appellate Body add in its *Shrimps-Turtles* decision that the Panel should consult with the parties to the dispute before accepting unsolicited information? The legal authority of panels to request information from any source under Art. 13 DSU is not subjected to any such prior duty to consult the parties to the dispute. More importantly, Art. 13 DSU talks of the right of panels and panels only to seek information from outside sources. Unless one extends the term "a panel" to cover all WTO adjudicating bodies -- an exercise which anyway could hardly find support in the Vienna Convention on the Law of Treaties (VCLT) -- Art. 13 DSU cannot be of much help.

Recently however, the Appellate Body had the opportunity to further clarify its position. The issue arose in the context of the *Asbestos* litigation³. Following the panel proceedings, the Appellate Body decided, for the first time, to publicly invite briefs from all interested sources. In the Appellate Body's view, its legal authority to do so stemmed from Art. 16(1) of the Working Procedures for Appellate Review. Art. 16(1) states:

³ European Communities — Measures affecting asbestos and products containing asbestos (DS135/R) and (DS135/R/Add.1). Document inviting briefs: DS135/9.

“In the interest of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a Division may adopt an appropriate procedure for the purpose of that appeal only provided that it is not inconsistent with the DSU, the other covered agreements and these Rules”.

Now this is the appropriate moment to take stock of what the Appellate Body has ruled on the *amicus curiae* issue: Panels, under Art. 13 DSU, can accept unsolicited briefs. However, they are –according to the current state of affairs, at least—under no legal duty to either respond to the sender or to reflect the content of the briefs received in their findings. They should (the Appellate Body was expressing a wish and was not reflecting an obligation) consult with the parties whether they should accept briefs and nothing more. Practice shows that panels will ask the parties to a dispute whether they would like to incorporate what has already been stated in a brief. But panels do not have to ask this question under the DSU. In a nutshell, they can throw to the bin *amicus curiae* briefs sent to them and they will be behaving perfectly along the wishes of the Appellate Body as long as they do just that (that is, throw the brief to the bin) and not, when throwing *amicus curiae* briefs to the bin, they also issue a decision whereby they reject the (thrown to the bin) unsolicited briefs because they were not solicited.

The Appellate Body on the other hand, has the legal authority under Art. 16(1) of its Working Procedures to accept briefs. Such briefs can be solicited, if the Appellate Body decides to exercise its prerogative under Art. 16(1) and formally invite briefs. The words “for that appeal only” in the body of Art. 16(1) make it clear that the Appellate Body will solicit briefs on an *ad hoc* basis.

So we know the legal provision that allows panels to accept *amicus curiae* briefs (Art. 13 DSU). We also know the legal provision that allows the Appellate Body to request submission of *amicus curiae* briefs (Art. 16(1) of the Appellate Body’s Working Procedures). But we still do not know the provision that allows the Appellate Body to accept unsolicited *amicus curiae* briefs. It cannot be Art. 13 DSU, since

this provision refers to panels only.⁴ Can it be Art. 16(1)? Most likely, not. Art. 16(1) is about *ad hoc* solutions and does not reflect a general right. On the other hand, if we interpret Art. 16(1) along the lines of the Appellate Body's interpretation of Art. 13 DSU, then yes, the Appellate Body under Art. 16(1) has the legal authority to accept unsolicited briefs which must be an implied authority in view of the explicit authority vested upon the Appellate Body to request *amicus curiae* briefs. The Appellate Body however so far has not advanced this interpretation. Hence, it is still unclear whether Art. 16(1) will be interpreted along the lines of Art. 13 DSU.

The legal authority to accept unsolicited briefs could also lie somewhere in Art. 17 DSU, since it is Art. 17 DSU that describes how the Appellate Review will take place. And, as the Appellate Body in the *Asbestos* case noted, it cannot lie in Art. 17.9 DSU which regulates new working procedures (which is not the case, as the Appellate Body maintains, when we talk of *amicus curiae* briefs). Why however should we be searching for the answer? Is it not the Appellate Body's task to explain itself on the issue? Well, the Appellate Body did not. Hence, the search.

What followed added to and did not detract at all from the story. The Appellate Body, in its request for submission of *amicus curiae* briefs, laid down seven (7) easy-to-meet procedural conditions (having mostly to do with the size of the submission) that petitioners requesting leave should meet. It further promised to respond whether petitioners requesting leave will be heard. Any notion of due process would lead to the inescapable conclusion that, if somebody requesting leave could fulfil the seven (7) easy-to-meet procedural conditions, he/she would be heard by the Appellate Body. A number of hopefuls⁵ submitted. None was admitted. All seventeen failed, obviously, to meet the seven (7) easy-to-meet procedural requirements that the Appellate Body itself had imposed. All seventeen?

⁴ Unless of course, the Appellate Body can show that the term "panels" also encompasses the term "Appellate Body", an approach that would not necessarily go down easily with all members of the Appellate Body.

Meanwhile, some WTO Members saw the request of the Appellate Body which was circulated on November 8, 2000. They were not entirely in agreement with the initiative of the Appellate Body and requested an extraordinary meeting of the WTO General Council. On November 22, 2000, the meeting took place. And there, with very very few exceptions, WTO Members showed what they thought of the Appellate Body's initiative. I quote from the Minutes⁶:

“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” (§ 7 of the Minutes).

Egypt, speaking on behalf of the Informal Group of Developing Countries (IGDC) stated that the Appellate Body's decision “went far beyond the Appellate Body's mandate and powers” (§ 12 of the Minutes).

India, adding a dramatic tone, first noted that “the disquiet and anxiety generated among the Membership by the Appellate Body's communication was so great that convening this special meeting of the General Council on short notice was more than justified” (§ 29 of the Minutes). It reproduced what had been stated before and added that “when an overwhelming number of the Members were clearly of the view that even accepting unsolicited *amicus curiae* briefs was a substantive issue that could not be dealt with under Rule 16(1), it was totally unjustified by the Appellate Body to proceed on the basis that soliciting *amicus curiae* briefs was not a substantive matter and that they could deal with it under Rule 16(1)” (§ 32 of the Minutes, italics in the original).

Brazil, “was also concerned with the notion that panels and the Appellate Body would be deciding who had a right to file written briefs on the basis of the applicant's membership, legal status, objectives,

⁵ We come back to this point in a moment.

⁶ See WTO Doc. WT/GC/M/60 of 23 January 2001.

interests, nature of activities, sources of financing, or relationship with parties or third-parties to the dispute. If jurisprudence advanced in this direction, the dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO, much less to its dispute settlement mechanism” (§ 46 of the Minutes).

Mexico noted that the Appellate Body’s *démarche* would lead to an “unmanageable number of requests”, and would add to the delay (§ 51 of the Minutes).

Switzerland noted that the issue “should be solved through negotiations” and that “failing to do this, the division between the legislative and the judicial functions would remain blurry” (§ 64 of the Minutes).

Costa Rica noted that “such a measure represented a risk for developing countries as it would put them in a situation where they would be sort of possibilities of defence” (§ 70 of the Minutes).

On the other side, the United States “believed that the Appellate Body had acted appropriately” (§ 74 of the Minutes), whereas the EC stated that there was a need for rule-making on this issue, and that “if the legislative fell short in legislating, the judiciary arm had the tendency to fill the gap” (§ 96 of the Minutes).

The Appellate Body was hence accused of: giving non-institutional players more rights than it is prepared to acknowledge to WTO members; going against the popular perception with respect to the status of *amicus curiae* in WTO law; opening up WTO dispute settlement to intense politicking; disproportionately increasing the workload for panels and itself; prejudicing developing countries’ interests; and finally, trespassing its own mandate and becoming a legislator.

Of all the charges voiced during the meeting only the last is meritorious. For if the Appellate Body acted within its mandate, all of the other charges automatically fall.

The comedy of errors however does not stop here. Following this meeting and having now clearly established that the majority of WTO Members are hostile to its initiative, the Appellate Body went ahead and issued an un-motivated communication whereby it rejected all *amicus curiae* submitted to it. The world learned from journalists⁷, that the motivation for rejections would come with the final report. It is never too late. Or is it sometimes?

By opening up the process for submission briefs and immediately closing it following the November WTO Council meeting, the Appellate Body managed to alienate all of the WTO constituency: the WTO Members, the NGOs⁸ and some of us who continue to write on WTO issues.

Before I respond to the question whether the Appellate Body was legitimized to behave the way it did, I ask the question why would a non-institutional player participate as *amicus curiae*.

ACT THREE: TO SUBMIT OR NOT TO SUBMIT; THIS IS THE QUESTION

Now, why would someone submit as *amicus curiae* to the WTO? The incentive to submit is severely reduced by the fact that an *amicus curiae* brief (as explained in the Final Act) which contains factual information, if submitted to the Appellate Body, will be rejected. The factual record has to be established by the parties to the dispute and no one else at the panel level. This stems directly from the de-centralized character of enforcement of WTO obligations and the way Art. 17 DSU reads. A party to a dispute can

⁷ See, *The Economist*, December 10, 2000: according to Debra Steger, Director of the Legal Affairs Division of the Appellate Body, full motivation for every rejection will be provided when the final report comes out in April 2001.

decide though to incorporate in its submissions an *amicus curiae* brief. If the brief at hand contains factual elements, it must be incorporated at the panel level and it must be clear that the issue at hand had been previously discussed at the consultations stage. Otherwise, maybe even incorporation will not work. But if this were to be the case, why not send the information to the interested party right away instead of sending it to the WTO?

On the other hand, one would expect that a properly functioning democracy would anyway try to incorporate such views in its own brief. Hence only those briefs that somehow did not make it to a national submission and which do not extend to factual aspects of the case (as explained above) if presented as *amicus curiae* to the WTO have a chance to be reviewed.

These caveats notwithstanding, why would anyone send an *amicus curiae* brief to the WTO? Essentially for two reasons: to provide some information (an opinion how to interpret facts established by others) on the one hand, and to sensitise a court about the interest that a particular case might have for the wider public on the other. This second grounds is in fact the bridge between a court and the society.

Amicus curiae briefs hence represent an opportunity for any given court: to be exposed to an opinion and to see, through the submitted briefs, its role in the society within which it operates.

At the same though, *amicus curiae* briefs confer an advantage to the party to a dispute with which they side. Due process considerations can help ensure that there will be no undue advantage conferred to any party. After all, a court's role is to look for the truth (its truth, of course). The pleadings by the parties to a dispute circumscribe the dispute; they should not be understood as the frontiers of truth.

⁸ On an anecdotal basis, we should mention that Robert Howse, Professor of Law at the Un. of Michigan, expressed his wonder at a conference held in Geneva (December 2000) as to the wisdom of students to spend substantial

This is precisely why Art. 13 DSU exists: its function is to guarantee that panels will have the authority to look for answers beyond what has been pleaded. Such answers will of course be used to address a complaint as presented by the complaining party. In other words, one should not over-emphasize the decentralized character of enforcement at the WTO. WTO Members are indeed the masters of their disputes only as far as their representation is concerned. From there onwards and all the way to the end result, there is only one master: the adjudicating body.

Art. 13 DSU is one avenue for WTO panels to honour their mandate. Due powers (the implicit powers as discussed in the Final Act) is the other. *Amicus curiae* are, as the term denotes, friends of the court. They are in principle committed to help the court in its search for truth. Public choice theory has helped us understand that we should always look at the incentive structure of the actor. And yes, many friends of the court are rather friends of themselves. They do not care about systemic issues, they do not care for the truth. They want to sell a message. But this is not an argument against accepting *amicus curiae* briefs. This is an argument in favour of selecting properly the members of a court.

On the other hand, probably the influence of *amicus curiae* has been grossly exaggerated: in a comprehensive study examining the influence of such briefs to the Supreme Court, Kearney and Merrill (2000) show that briefs by institutional litigants and experienced lawyers are those that have most of the impact. The first are anyway present in the WTO but as third parties whereas the second category has, to our knowledge, only been represented once in the WTO and the brief was rejected without motivation so far.⁹

Finally, the second grounds for submitting briefs cannot be over-emphasized when it comes to discussing *amicus curiae* briefs submitted to the WTO, an organization which has been accused (and continues to

amounts of money to learn WTO law from someone who cannot comply with seven procedural requirements.

be) non-transparent, undemocratic, non-representative of modern concerns. Opening up the door to non-institutional players is probably the best way for the WTO to explain itself against a series of (most of them, completely unwarranted) accusations. But more on this later.

THE FINAL ACT: MUCH ADO ABOUT NOTHING

Was the Appellate Body legitimized to request *amicus curiae* briefs? The Working Procedures, that are adopted in accordance with Art. 17.9 DSU, cannot of course go beyond the mandate of Art. 17 DSU. This approach is dictated by the fact that whereas the DSU is negotiated and agreed upon by the WTO Members (the principals), the Working Procedures will be drafted by the Appellate Body in consultation with the Director-General and the Chairman of the DSB (essentially, the agents). The agents lack the legitimacy needed to go beyond the mandate established and reflected in Art. 3.2 DSU (which obliges WTO adjudicating bodies to respect the balance of rights and obligations as agreed by sovereign states and reflected in the WTO contract). The Appellate Body itself has acknowledged that Art. 3.2 DSU constitutes the boundaries within which it must operate.

Art. 17 DSU, on its face, makes no allowance for *amicus curiae*. Is this however the end of the story? Is the Appellate Body bound only by what is explicitly stated in the DSU? If this were indeed the case, one could end up with rather perverse outcomes: for example, nowhere the DSU mentions that the Appellate Body must make an objective assessment of the matter before it. The matter comprises of course not only the facts, but also the law, as the unambiguous wording of Art. 11 DSU makes it plain. Such an obligation is imposed only on panels (Art. 11 DSU). Does the fact that such an obligation is not explicitly imposed on the Appellate Body mean that, following an *a contrario* interpretation, the Appellate Body

⁹ Robert Howse submitted an *amicus curiae* in the Asbestos case. His brief was rejected, along with the other briefs submitted, without motivation.

should not make an objective assessment of the matter before it? Of course not. The Appellate Body cannot preach objective assessment and practice subjective superficial browsing.

The Appellate Body hence, should be allowed some discretion to conduct business before it. The key is of course that, when exercising such discretion, the Appellate Body does not undo its implicit duty to respect due process. And by the way, nowhere in the DSU is the term due process mentioned. Few would disagree that the Appellate Body has to ensure that due process has been complied with. WTO Members, in their submissions, whenever they raise a procedural concern, almost always refer to due process.

The Appellate Body can, to our mind, respect due process and still invite *amicus curiae* provided that it always ensures that such briefs do not extend to factual issues and parties to a dispute are given adequate opportunity to react to them.

The first requirement is imposed by the DSU itself: Art. 17 DSU makes it plain that only legal issues are properly before the Appellate Body. *Amicus curiae* briefs must cover only legal issues.

By covering legal issues only though, *amicus curiae* briefs might in practice tilt the balance in favour of one of the parties to the dispute, the side of which they are taking. Is such tilting an extra burden, for the WTO Member concerned, beyond what has been agreed in the Uruguay round agreements? Is such tilting in other words, always in contravention of Art. 3.2 DSU.

No, is the answer, if the Appellate Body observes its own case-law in this respect and develops in practice a procedural mechanism which will ensure that parties to the dispute will be given adequate opportunity to react. Let us take the substantive point first.

The Appellate Body has already emphasized the de-centralized character of WTO enforcement in this respect. In its *Japan – Varietals*¹⁰ case-law, faced the issue whether an argument provided by an expert witness invited to testify before a panel which had not been raised by the complaining party could still be used by the WTO adjudicating body in its *ratio decidendi*. The Appellate Body answered in the negative and we quote:

“However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party”.

Were the Appellate Body to adopt an approach along these lines, participation of NGOs will be in line with the agreed balance of rights and obligations of WTO Members. All *amicus curiae* briefs will thus be used to evaluate arguments made the parties to the dispute and not to make the case for the complainant or the defendant. With respect to NGOs' participation as *amicus curiae* consequently, the Appellate Body has still the opportunity to “streamline” its case-law along the lines of Art. 3.2 DSU¹¹.

Is the concern a serious one though? Does it deserve the attention it attracted? Should WTO Members request an extraordinary session of the WTO Council for an issue like this and not, for example, for the unprecedented manner in which the Appellate Body interpreted the causality requirement in its *Wheat*

¹⁰ Japan — Measures Affecting Agricultural Products, WT/DS76/AB/R, 22 February 1999.

¹¹ For a critical view of the way the Appellate Body has handled this issue, see Appleton (2000). Howse (2000) and (2001) on the other hand, places the accent on the need to have thoughtful opinions and engages in parallels with the concept of deliberative democracy. In these two papers, Howse makes a persuasive case that not only political but also legal considerations should not cast doubt on the way the Appellate Body initially at least handled the issue of *amicus curiae* briefs.

Gluten jurisprudence?¹² What if, NGOs, instead of submitting their briefs to the Appellate Body, publish it in the Financial Times, the Economist or make it available in the Internet? And what if Appellate Body judges (as hopefully is the case) read the Financial Times, the Economist and keep in track with what is going on on the Internet?

Has the Appellate Body gone too far in the *Asbestos* case? Other courts follow a very comparable pattern: the ICJ, its statutory language notwithstanding, seems to direct its procedures towards increased openness in this respect (Shelton, 1994). In *Methanex Corporation and United States of America*, a recent Chapter 11 NAFTA Arbitration, the Tribunal first offers a careful review of the manner in which various adjudicating bodies address the issue of *amicus curiae* and ends up concluding that, provided that due process is safeguarded, nothing prohibits it from accepting such briefs the silence in the language of the applicable law notwithstanding.¹³

Undeniably, the Appellate Body contributed to this mess by inventing interpretations of Art. 13 DSU which are unsustainable under the Vienna Convention on the Law of Treaties, moving into Art. 16(1) of its Working Procedures and not referring, right from the start, to due process. Its initiative however, did give the WTO a momentary (it seems) new lease of life: some eyebrows were raised and people beyond government circles noted with interest that the WTO does not want to live in clinical isolation from the rest of the world anymore.

All this trouble created following the Appellate Body's initiative in the *Asbestos* case is Much Ado About Nothing. Panels might still get flooded with unsolicited briefs. Appellate Body members will continue

¹² In *Wheat Gluten*, the Appellate Body, against the unambiguous wording of the WTO Safeguards Agreement (Art. 4.2) held for the proposition that it suffices that imports are one and not the exclusive cause of injury. Contingent protection will not look the same from now on, unless this interpretation is corrected.

¹³ Art. 15(1) of the UNCITRAL Arbitration Rules, which was applied in the case at hand requests from adjudicating bodies to conduct judicial review in the manner they deem appropriate respecting due process. There is no explicit reference to *amicus curiae* briefs.

(hopefully) to be exposed to points of view expressed in the modern world. So, why all this fuss?

Probably it reflects the fact that delegations in Geneva are not preoccupied with other more serious business. The new round cannot come soon enough ...

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