

***AMICUS CURIAE SUBMISSIONS***  
**FROM NON-GOVERNMENTAL ORGANIZATION:**  
***THE APPELLATE BODY, IN TOTAL DEADLOCK***

By

Jung-Hee Park

**THESIS**

Submitted to  
School of Public Policy and Management, KDI  
in partial fulfillment of the requirements  
for the degree of

**Master of Business Administration**

2001

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## **ABSTRACT**

### *AMICUS CURIAE* SUBMISSIONS FROM NON-GOVERNMENTAL ORGANIZATION: *THE APPELLATE BODY, IN TOTAL DEADLOCK*

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Recently, there have been a number of controversies concerning Non-governmental organizations' participation in the World Trade Organization. Considering the close relationship between Non-governmental organizations and other international organizations, especially the United Nations, the strong arguments for excluding NGOs from the WTO is anomalous. Since there are no contestable arguments presented by the pro side, which claims that NGOs' participation in the WTO can provide more information, and that the NGOs' role is essential, especially in regards to environmental matters, the countering opinions are mainly focused on the potential practical procedural problems, rather than addressing any legitimate opposition to the pro argument. Although this issue seemed to be brought to a close through the *Shrimp/Turtle* case, in which the Appellate Body's finding permitted NGOs' submission to the panel stage, the practical problems exposed in latter cases clearly showed that the con side's concerns were not groundless. Furthermore, by

excluding all 17 *amicus* submissions in the most recent case, the *Asbestos* case, the Appellate Body plainly demonstrated its current situation of being at a total deadlock. This paper examines the process through which the Appellate Body permitted NGOs to submit their briefs to the DSB, and the DSU Agreements on which the Appellate Body was based. This examination will be conducted by review of the WTO cases in which the issue of the *amicus curiae* briefs were addressed. The exposed practical procedural problems thereof, and the Appellate Body's efforts to overcome these are also presented. In addition, in spite of the Appellate Body's efforts, the remaining complications in establishing a comprehensive agenda for the future are examined, with particular attention on the fundamental conflict which inhibited the Appellate Body's efforts in creating such a firm resolution.

## **ACKNOWLEDGEMENTS**

The completion of this thesis would not have been possible without the invaluable support of many people, whom it is a pleasure for me to acknowledge at this time.

First and foremost, I would like to thank my thesis supervisor, Professor Dukgeun Ahn, who has served as a perpetual source of knowledge and guidance. I would also like to express gratitude to Dean Gill-Chin Lim, Associate Dean Jong-Il You, Professor Woochan Kim, and all of the other Professors of the School of Public Policy and Management, Korean Development Institute – I am sincerely appreciative for their precious time and insightful advice. Finally, I would like to send a special thanks to all my friends and family who have encouraged me in my studies at KDI School, and particularly throughout the writing of my thesis.

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## **LIST OF ABBREVIATIONS**

CONGO	Conference of NGOs (in Consultative Relationship with UN)
DESA	Department of Economic and Social Affairs
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ECOSOC	Economic and Social Council
GATT	General Agreement on Tariffs and Trade
ILO	International Labour Organization
NGO	Non-governmental Organization
SCM	Subsidies and Countervailing Measures
UN	United Nations
UNESCO	UN Education, Scientific and Cultural Organization
UNHCR	Office of the UN High Commissioner for Refugees
WTO	World Trade Organization

## I. INTRODUCTION

The Appellate Body's report on the *Asbestos* case<sup>1</sup>, which was published on March 12<sup>th</sup>, 2001, repelled Non-Governmental Organizations in its decision to reject all *amicus curiae* briefs submitted from 17 NGOs. Now, the Dispute Settlement Body, which is regarded as the most successful outcome of Uruguay Round, is confronted with serious trial. This challenge started with the issue of whether NGOs have access to the World Trade Organization or not. The issue, which originated from whether or not NGO participation in matters of the WTO is desirable, turned to whether NGOs participation could be justified under the WTO Agreements. In the *Shrimp/Turtle* case<sup>2</sup> and in the *Carbon Steel* case<sup>3</sup>, the Appellate Body decided that NGO's submission to the panel and to the Appellate Body, respectively is not incompatible with the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>4</sup>. Based on this Appellate Body's decision, NGOs have tried to submit their briefs to the DSB in several cases, and it is during this process that a lot

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<sup>1</sup> *European Communities – Measures Affecting Asbestos and Asbestos-containing Products* (hereinafter '*Asbestos*'), WT/DS135/AB/R (12 March 2001).

<sup>2</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter '*Shrimp/Turtle*'), WT/DS58/AB/R (12 October 1998).

<sup>3</sup> *United States – Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (hereinafter '*Carbon Steel*'), WT/DS138/AB/R (10 May 2000).

<sup>4</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter '*DSU*'); *Shrimp/Turtle*, above note 2, at paras 102-107; *Carbon Steel*, above note 3, at para 39.

of problems have been exposed.

In this paper, I examine the WTO cases in which the issue of the *amicus curiae* briefs were addressed, and present the kinds of problems that were disclosed in the cases. More specifically, in the Introduction, I present when and how NGOs show their head in the global arena. In addition, what types of intrinsic attributes the WTO keeps as an international trade organization, and an argument concerning NGO's participation in the WTO is also provided in the Introduction. In Section II and III, the *Shrimp/Turtle* case and the *Carbon Steel* cases are reviewed respectively, and in this process, I present the DSU Agreements in which the Appellate Body based justifying its authority to receive *amicus curiae* briefs from NGOs. Additionally, the implications of these decisions are also discussed. In Section IV, I examine the practical problems exposed in the *Carbon Steel* case. In Section V, I present what kind of efforts was made by the Appellate Body in order to resolve problems exposed in the *Carbon Steel* case through examining the *Asbestos* case. Section VI provides recommendations for a future agenda. The conclusion is given in Section VII.

## 1. The Rise of NGOs in the Global Arena

The term “Global citizen society” is not new anymore. Indeed, since the 1970’ s, the activities of international NGOs have dramatically increased in quantity. However, these activities are not an unprecedented phenomenon that was only appeared in recent years. These NGOs have already played a significant role on the international stage since the 19<sup>th</sup> century. According to one survey, there were more than one hundred international NGOs before the 20<sup>th</sup> century, and 61, 131 and 112 international NGOs were created during 1900-1904, 1905-1909 and 1910-1914, respectively. As showed in the survey, the establishment of international NGOs has remarkably increased since the 20<sup>th</sup> century, and this increase in quantity resulted in more than 2000 international NGOs in the middle of the 1970’ s, reaching almost 6000 in 1996<sup>5</sup>.

The rise of international NGOs is not confined to merely a quantitative increase. These NGOs have extended their range of activities in the global arena, and their cooperation with the United Nations is particularly notable. Actually, it is these

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<sup>5</sup> Sungsoo, Joo, and Youngjin, Seo. *United Nations, NGOs, and Global Civil Society*. Seoul: University of Hanyang Press, 2000, at pages 10-11.

NGOs that made it possible for the formation of several present international organizations, such as ILO, UNESCO and UNHCR. These NGOs not only played an important role on establishing special organizations controlled by the United Nations, but have also broadened the scope of their activities based on a close relationship with the UN. For instance, the number of NGOs having consultative status with the Economic and Social Council (ECOSOC) was only 41 in 1948, but in 1999, it increased to 1701<sup>6</sup>. Without doubt, this would not have been possible without cooperation between the U.N and the various NGOs. Indeed, the Non-Governmental Organizations Section of the United Nations Department of Economic and Social Affairs (DESA) handles matters related to NGO consultative status with the ECOSOC through the ECOSOC Committee on NGOs. The Section also assists and supports the conference of NGOs in consultative status (CONGO), and facilitates CONGO Members' participation at UN meetings and conferences<sup>7</sup>.

In case of the UN, NGOs involvement in international organizations is accepted without serious resistance, and does not expose practical problems.

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<sup>6</sup> Ibid at pages 11-13.

<sup>7</sup> The United Nations, *NGOS and the Economic and Social Council (ECOSOC): The United Nations Department of Economic and Social Affairs – DESA*, online, Internet, 3 May. 2001. [http://www.un.org/partners/civil\\_society/ngo/n-ecosoc.htm](http://www.un.org/partners/civil_society/ngo/n-ecosoc.htm)

Considering this, it is unique that there are still acute arguments concerning NGO participation in the WTO. However, in examining the internal characteristics of the WTO, some of the possible reasons for controversy become apparent.

## **2. The WTO as an Inter-governmental Trade Organization & the Dispute concerning NGO's Participation in the WTO**

Recently, there have been a number of controversies concerning NGOs' effort to participate in international trade policy-making activities. The supporting arguments were based on the expected benefit from providing NGOs with the opportunity to observe meetings, and to submit their own documents to the WTO. Daniel C. Esty, one of the supporters of NGO involvement, maintained that NGOs can help the WTO to be more authoritative, fair, responsive, representative, and effective, by facilitating a flow of information to and from decentralized citizens, thereby diffusing concerns about its democratic deficit. Moreover, by competing with governments in the WTO's analytic realm, NGOs could broaden the base of information and thinking upon which decisions are made, and thus improve the quality, authoritativeness, and perceived fairness of the policy choices and judgments

emanating from the WTO<sup>8</sup>. There is no doubt that NGO's access to the WTO can provide it with more information, and thus, can broaden the base of analysis on which decisions rest.

NGOs also can provide an additional oversight and audit mechanism. Daniel Esty indicated that:

Well-informed citizen groups can act as watchdogs of national governments and report on whether they are fulfilling their obligations under international economic law. With better access to documents and meetings, NGOs also would be in a position to review and critique WTO performance. While this may not seem intuitively attractive to those in Geneva, the value of peer review is now widely appreciated<sup>9</sup>.

As noted above, NGOs can play at least two significant roles: as a service provider and as a watchdog. Furthermore, given that the world economy is becoming more and more globalized, there is an urgent need for solving worldwide issues, such as environmental concerns, which require collective action. For instance, in order to protect certain animal species, insofar as we do not want them to be extinct, there

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<sup>8</sup> Esty, Daniel C. "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion," *Journal of International Economic Law*, Volume 1, Issue 1 (1998): 123-147.

<sup>9</sup> *Ibid* at pages 134-135.

should exist regulation governed not by individual governments, but by an international trading organization, such as the WTO. However, if the WTO continues to only focus on legal disputes based on each country's own interest, there might be no possibility of those peripheral – but not unimportant – matters to be taken into consideration, and thus, it will fail to make the regulation. This unfortunate result can be avoided by environmental NGOs' participation in the WTO decision-making process. Indeed, it was mainly the environmental concern, although not the only factor, that caused NGO's participation in the WTO to be supported by a glowing body of literature

Despite these benefits, many people continue to resist NGO participation in the WTO. Based on a number of concerns, they try to exclude NGOs from a formal role in the WTO<sup>10</sup>. The cons' point could be classified into three categories. First, they maintain that the WTO was established as an inter-governmental trade organization, and that the trade policy process works best when governments can speak clearly to each other without the disruption of other voices.

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<sup>10</sup> For the best arguments against participation, see Philip M. Nichols. "Realism, Liberalism, Values, and the World Trade Organization," 17 *University of Pennsylvania Journal of International Economic Law* 851 (1996); William M. Reichert. "Note, Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations," 2 *Minnesota Journal of Global Trade* 219 (1996).

The original membership and accession is clearly confined under the Article XI and XII.

#### Article XI

##### *Original Membership*

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.
2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

#### Article XII

##### *Accession*

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

....

A second set of concerns about the role of NGOs in the WTO relates to the matter of representation. It is argued that it will be difficult to ascertain how many and which people a particular group represents. The final concern is about

practicalities of NGO participation. This concern is based on potential practical procedural problems. Indeed, these raise a number of questions, such as, *Who would be responsible for allocating to groups the title of “NGOs”?* *How would the extent of participation be delegated?* *Should there be a supreme voice among international bodies?* *Would the current problems of time limitations faced by governments in open meetings only be exacerbated?*

As shown above, there are still acute controversies concerning NGOs access to the WTO. But, interestingly, compared with the pros, there is little academic literature arguing against a broader role for NGOs within the WTO. Indeed, there are no wrong arguments presented by the pro side, which says that NGOs participation in the WTO can provide more information, that NGOs can also act as watchdogs, and that the NGOs’ role is essential, especially for environmental matters. Such strong arguments may be the reason little academic literature representing the cons’ side exists. However, in recent years, there has been an increasing concern about potential practical problems - shown above as the final concern – and it was widely believed that there would be implementing problems in spite of large benefit from NGO’ s access to the WTO. In fact, these worries have been realized in actual cases, as it will

be presented below, particularly, in Section IV and V.

## **II. *SHRIMP/TURTLE* CASE**

### **1. The Origin of an Affair**

It is during the *Shrimp/Turtle* case that the long argument regarding NGO's *amicus curiae* submission to the DSB firstly arose in actual case. This case started with appeals from India, Pakistan, Thailand and Malaysia to dispute the import prohibition of certain shrimp and shrimp products imposed by the United States; the act restricting imports was based on the U.S claim that the above countries exterminated turtles in the process of shrimp fishing. In this case, both the Panel and the Appellate Body supported the appealing countries, and thus, it came to an end with the defeat of the U.S. However, the briefs submitted by the NGOs in the Panel's deliberation process diverted discussion to another issue. This was initiated by two unexpected *amicus curiae* briefs submitted to the Panel.

### **2. The Panel Stage**

#### **A. The Panel's Decision**

In the *Shrimp/Turtle* case, the Panel received two documents submitted by NGOs and rejected to take these documents into consideration. It was Article 13 of

the DSU on which the Panel based its ruling.

Article 13 of the DSU

*Right to Seek Information*

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
2. Panel may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

This article clearly describes that the panel has the authority to select the source and content of information, and based on this article, the Panel grants itself discretionary authority<sup>11</sup>. Based on the same article, the Panel also notes that accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU currently applied<sup>12</sup>. In sum, the Panel made a ruling that its

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<sup>11</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (15 May 1998), at paras 7.7-7.8.

<sup>12</sup> *Ibid* at para 7.8.

discretionary authority worked only upon its request, and that it did not have any authority to accept non-requested information from NGOs. Indeed, in this case, the Panel had not requested those two documents, which served as the reason for their rejection.

However, the Panel did not try to block all non-requested information. By providing each party with a right to attach these documents as part of their own submissions to a panel, the Panel made one exception in allowing for non-requested information<sup>13</sup>.

## **B. Implications of the Panel's Ruling**

The Panel's finding in the *Shrimp/Turtle* case can be simply summarized. Firstly, the Panel ruled that it has an authority, "discretionary authority", to select information and the source of information, but that it does not have any authority to receive non-requested information from NGOs. Secondly, if any party wishes to put forward non-requested information, the party shall submit it as part of their own submissions in order for such information to be accepted by the panel.

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<sup>13</sup> Ibid.

The Panel's decision has three implications. First of all, the Panel's decision shows its intention to keep its position as a judicial organization among sovereign states. As it was mentioned above, the Panel did not completely prohibit non-requested information from NGOs. Rather, it offered any party a right to submit these documents as part of their own submission. This indicates the Panel's intention to change the actual provider of this submission from the NGO to the filing government, which has such capacity as a Member of the DSB. In other words, the Panel's main concern on this ruling was not excluding any non-requested information from NGOs, but retaining its characteristics as a judicial organization for Member countries only. Secondly, in order to keep its position, the Panel interpreted Article 13 based on a conservative viewpoint. Since the WTO was established as an inter-governmental organization, the articles also automatically show such color. The clause found in the second paragraph of Article 13 of the DSU stating, "With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group", illustrates this tendency particularly well. The sentence indicates that the purpose of Article 13 is to inform that the panel may request an experts' view when it is confronted with a scientific or technical matter, and thus, when it needs an experts' view in order to

clearly understand a factual issue raised by a party. This is in line with the purposes of the panel's establishment. Given that "each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate" and that "a panel may request an advisory report in writing from an expert review group", the Panel ruled that it may request, but may not accept non-requested information<sup>14</sup>. This ruling shows that the Panel used a narrow approach which is literal in nature, in the process of interpreting Article 13 of the DSU. This narrow approach can be understood considering that the Panel interpreted article 13 based on a conservative viewpoint. Finally, it seems that the Panel wanted to use each party as a filter in brief selection. By passing over the burden of brief selection to each party, the panel can avoid the risk of being deluged with a number of non-requested briefs.

The Panel's ruling was indeed in line with the aim of the DSB's establishment, and thus, it does not request a huge change from the DSB. Therefore, if this original ruling had been accepted by the Appellate Body, the *amicus curiae* submission issue would have been terminated in this case.

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<sup>14</sup> Ibid at paras 7.7-7.8.

### 3. The Appellate Body's Decision

Since the Appellate Body did not reverse the Panel's ruling, which said the import prohibition by the U.S cannot be justified under Article XX of GATT 1994, the U.S finally lost the case. However, by reversing the Panel's ruling on the *amicus curiae* submissions, this dispute demonstrated various aspects of the case. In the Appellate Body's stage, it did not annul the panel's discretionary authority itself, but it reversed the Panel's second finding, which said accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU currently applied<sup>15</sup>.

In this case, the Appellate Body fixed the panel's discretionary authority, based on Article 13, in which the Panel also depended in granting itself its own discretionary authority. Based on this article, the Appellate Body noted that 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<sup>16</sup>. This ruling specified the panel's

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<sup>15</sup> *Shrimp/Turtle*, above note 2, at paras 102-110.

<sup>16</sup> *Ibid* at para 104.

discretionary authority and emphasized that the panel does not have legal obligation to accept or give due consideration to *amicus* submissions made by NGOs. Concerning this, there is no difference between the two bodies' findings on *amicus curiae* submissions. However, as mentioned above, the Appellate Body reversed the Panel's ruling, prohibiting itself from receiving *amicus* submission from NGOs directly<sup>17</sup>. The based articles for this ruling were article 11 and 12 of the DSU.

Article 11.

*Function of Panels*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12.

*Panel Procedures*

1. Panels shall follow the Working Procedures in Appendix 3 *unless the panel decides otherwise after consulting the parties to the dispute.*
2. *Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process*

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<sup>17</sup> Ibid at paras 106-110.

Appendix 3

*Working Procedures*

12. Proposed timetable for panel work:

. ...

(c) Receipt of written rebuttals of the parties: ----- 2-3 weeks

(d) Date, time and place of second substantive meeting with the parties:

----- 1-2 weeks

. ...

*The above calendar may be changed in the light of unforeseen developments.*

Additional meetings with the parties shall be scheduled if required.

In its report, the Appellate Body noted 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...*”<sup>18</sup>

As shown above, the Appellate Body, in its legal interpretation, not only focused on Article 13 of the DSU, which is most highly related to the panel’s discretionary authority, but also in Article 11 and 12 of the DSU, which provide for the panel’s

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<sup>18</sup> Ibid at para 106.

function and procedures. Based on Article 12, the Appellate Body found that the DSU accords to a panel ample and extensive authority to undertake and control the process, with which the panel can accomplish its function as described in Article 11 of the DSU.

The Appellate Body also noted that;

Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word "seek" must necessarily be read, as apparently the Panel read it, in too literal a manner. 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<sup>19</sup>.

The Appellate Body's ruling can be summarized that the panel has ample and extensive authority to undertake and control the process which is essential for performing its function, and considering this, the word "seek" should be interpreted in a different way. Hereby, the Appellate Body drew article 11 and 12 of the DSU in the process of interpreting the word "seek", and finally it eliminated the distinction between "requested" and "non-requested" information.

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<sup>19</sup> Ibid at para 107.

#### **4. Implications of the Appellate Body's Ruling: Who is the Beneficiary?**

The Appellate Body's ruling in the *Shrimp/Turtle* case resulted in a fundamental change regarding the issue of *amicus curiae* submissions. As presented above, the Panel's ruling which prohibits itself from accepting non-requested briefs directly from NGOs was coincident with its purpose of existence, and thus, it does not require huge alteration; it could terminate controversy concerning *amicus curiae* submissions here. However, by reversing this Panel's ruling, the Appellate Body changed the whole situation.

The Appellate Body's finding that vanished the distinction between "requested" and "non-requested" has three implications. At first, this ruling seems to grant the panel more authority. As a matter of fact, the Appellate Body granted the panel the authority to accept even non-requested *amicus* briefs. However, considering that the Appellate Body already authorized the panel's discretionary authority, this ruling does not provide additional advantage. On the contrary, it in fact, indicates that an NGO can submit its brief regardless of whether or not it was requested. Therefore, the real beneficiary from this finding is not the panel but the NGOs. Secondly, the

Appellate Body's finding is not fit for the panel's purpose of existence. There is a clear distinction between the methods used by the two bodies' in approaching the interpretation of the word "seek" in article 13 of the DSU. Whereas the Panel's ruling was mainly based on article 13 of the DSU and only focused on finding out the intended purposes of that article, the Appellate Body used a "broad approach" in its legal interpretation. The different approaches used by the two bodies resulted in completely opposite conclusions. Finally, the Appellate Body's ruling was made without preparing for actual procedures, either for the DSB or the NGOs, and this lack of procedure for receiving *amicus* submissions posed a variety of potential practical problems. The potential practical problems, indeed, were clearly exposed in the *Carbon Steel* case

### III. CARBON STEEL CASE

#### 1. The Origin of an Affair

The *Carbon Steel* case started with the appeal from European Communities to a panel against the imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom acted by the United States. This case ended in the Panel stage with the defeat of the U.S., based on a ruling that the U.S violated Article 10 of the SCM Agreement<sup>20</sup>. The Appellate Body did not reverse this finding, and thus, the case was finally terminated<sup>21</sup>. In spite of no such distinct feature on the finding of these two bodies, the fact that NGOs submitted their briefs to the DSB again was enough to attract attention. In this Section, I review how the issue of *amicus curiae* submissions developed in the *Carbon Steel* case of which the Panel's report was published 14 months after the Appellate Body eliminated the distinction between "request" and "non-request" information in the *Shrimp/Turtle* case. In the *Carbon Steel* case, this issue was brought up to the surface by a NGO, the *American Iron and Steel Institute*, which submitted its non-requested

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<sup>20</sup> *United States – Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Panel, WT/DS138/R (23 December 1999), at para 7.1.

<sup>21</sup> *Carbon Steel*, above note 3, at para 75.

brief to the Panel.

## 2. The Panel Stage

In the *Carbon Steel* case, the Panel received a brief from the *American Iron and Steel Institute* (“AISI”), and refused to accept the AISI brief as a result of the late submission of the brief<sup>22</sup>. Indeed, the AISI’s brief was submitted after the deadline for the parties’ rebuttal submissions, and after the second substantive meeting of the Panel with the parties. The Panel noted that this late submission did not enable parties to have adequate opportunity to present their comments on the AISI brief to the Panel. In addition, since the Panel decided not to exercise the authority to delay its proceedings granted under the Article 12.1 of the DSU, the AISI’s brief was not taken into consideration in the Panel stage in this case<sup>23</sup>.

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<sup>22</sup> *Carbon Steel*, above note 20, at para 6.3.

<sup>23</sup> *Ibid.*

### **3. The Appellate Body Stage**

#### **A. The Appellate Body and Discretionary Authority**

On February 7<sup>th</sup>, 2000, the Appellate Body received two *amicus curiae* briefs from the *American Iron and Steel Institute* (AISI) and the *Specialty Steel Industry of North America*. The Appellate Body, which recognized a panel's discretionary authority in the *Shrimp/Turtle* case, encountered the same challenge in the very next case – among the cases in which the issue of the *amicus curiae* briefs were addressed - as a result of its own ruling that vanished the distinction between “requested” and “non-requested” information. In this case, since the Appellate Body primarily needed to establish its clear-cut line of authority under the DSU, the process of the Appellate Body stage was not as simple as that of the Panel. In the *Carbon Steel* case, the question of whether or not the Appellate Body had the authority to receive *amicus curiae* submissions from NGOs was initially discussed. It was not easy for the Appellate Body to grant itself the discretionary authority, since, without doubt, Article 13 of the DSU, on which the panel's discretionary authority was based, only applied to the panel. Indeed, European Communities maintained that the basis for allowing *amicus curiae* briefs in panel proceedings is Article 13 of the DSU, as explained in the *Shrimp/Turtle* case, and that this article does not apply to the

Appellate Body<sup>24</sup>. However, The United States noted that, in the *Shrimp/Turtle* case, the Appellate Body explained that the authority to accept unsolicited submissions is found in the DSU's grant to a panel of “*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.” According to the United States, it is clear that the Appellate Body also has such authority, given that Article 17.9 of the DSU authorizes the Appellate Body to draw up its own working procedures, and Rule 16(1) of the *Working Procedures* authorizes a division to create an appropriate procedure when a question arises that is not covered by the *Working Procedures*<sup>25</sup>. The Appellate Body adopted the approach advocated by the United States.

Article 17.9 of the DSU provides:

Procedures for Appellate Review

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

Rule 16(1) of the *Working Procedures for Appellate Review* provides:

General Provisions

In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a

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<sup>24</sup> *Carbon Steel*, above note 3, at para 36.

<sup>25</sup> *Ibid* at para 38.

division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body.

The Appellate Body noted that even though neither the DSU nor the Working Procedures specifically provide for, or prohibit its acceptance of *amicus* briefs, Article 17.9 of the DSU grants the Appellate Body broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements<sup>26</sup>. Hereby, the Appellate Body granted itself discretionary authority which it had granted to the panel in the *Shrimp/Turtle* case. Furthermore, the Appellate Body also specified its discretionary authority; in other words, the Appellate Body accentuated that its discretionary authority does not involve any legal duty to receive *amicus curiae* briefs from NGOs, as it had emphasized in the *Shrimp/Turtle* case for the panel. In this case, the Appellate Body accented this by re-referring to the finding that it had made in the *Shrimp/Turtle* case for the panel.

In the *Shrimp/Turtle* case, the Appellate Body emphasized that the panel does not have legal obligation to receive *amicus* submissions by noting that:

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<sup>26</sup> Ibid at para 39.

.... 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 considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding<sup>27</sup>.

In this case, the Appellate Body accentuated that the Appellate Body also does not have legal liability to receive NGOs' submissions by re-noting this finding.

### **B. The Appellate Body's Decision**

In this case, the Appellate Body finally granted itself discretionary authority. However, the Appellate Body did not exercise this newly granted authority by simply stating that they have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering their decision<sup>28</sup>. As a result, both *amicus curiae* submissions were not accepted by the Appellate Body.

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<sup>27</sup> *Shrimp/Turtle*, above note 2, at para 101.

<sup>28</sup> *Carbon Steel*, above note 3, at para 42.

#### **IV. PRACTICAL PROBLEMS EXPOSED IN THE *CARBON STEEL* CASE**

Since the *Shrimp/Turtle* case had been closed, the *Carbon Steel* case was the first one among the cases in which the issue of the *amicus curiae* briefs were addressed. In this case, the Appellate Body granted itself discretionary authority which is exactly the same as what it had granted the panel in the *Shrimp/Turtle* case, and therefore, both the Panel and the Appellate Body were able to receive non-requested briefs in this case. In other words, from this case, any NGO was granted to submit its brief regardless of whether or not it was requested. Actually, in this case, the Panel and the Appellate Body received one and two *amicus* submissions respectively. In the process of receiving these *amicus* submissions, various practical problems were exposed.

##### **1. Lack of Timetable and Format**

The NGOs' documents rejected in the Panel stage clearly showed that there was no practical procedure on which the NGOs could depend as a guideline. In the *Shrimp/Turtle* case, the Appellate Body permitted NGOs to submit their briefs to the

panel, requested or not. However, it had not fixed the timetable for non-requested NGOs, and thus, they did not have any guideline in submitting their briefs in the *Carbon Steel* case. It was for this reason that the document from the AISI was rejected by the Panel as a result of late submission. This clearly showed the urgent necessity to fix the practicalities of the procedure.

## **2. Discretionary Authority: Unclear Criterion in Brief Selection**

The decision of the Appellate Body in the *Carbon Steel* case definitely exposed what an ambiguous criterion discretionary authority is in selecting *amicus curiae* briefs. In the *Carbon Steel* case, the Appellate Body received two non-requested briefs, with the reason of rejection being simple; In this case, the Appellate Body had a hard time granting itself discretionary authority, and it tried to specify the characteristics of this authority. Compared to this, the Appellate Body's decision in the *Carbon Steel* case was relatively short. The Appellate Body rejected all *amicus curiae* briefs by simply stating that they have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering their decision. Actually, this ruling can be justified by the characteristics of discretionary authority emphasized by the Appellate Body, which says the Appellate Body is obliged by law to accept and

give due consideration, only to submissions made by the parties and the third parties. However, from the NGOs' point of view, this kind of unclear reason of rejection cannot be easily accepted. Unlikely rejection caused by a "late submission", since the decision based on simply exercising discretionary authority cannot provide an explicit reason for being rejected, it is not easy for NGOs to accept.

### **3. The *Amicus Curiae* Brief which was Already Rejected by the Panel**

The *American Iron and Steel Institute* (AISI), which made the issue of *amicus curiae* briefs arise again in the *Carbon Steel* case by submitting its document to the Panel, also added one more point of controversy by submitting its document to the Appellate Body again. In the *Carbon Steel* case, this did not become the main issue since the Appellate Body expressed the reason of rejection by simply stating that they have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering their decision. However, the fact that the AISI's brief submitted to the Appellate Body was what had already been rejected by the Panel would result in new problem, a capacity problem. So far, the appeal to the Appellate Body was confined within what was decided by the Panel. In other words, the brief that was excluded from the Panel's consideration had no effect on the Panel's decision at all, and thus, to

receive this kind of brief results in exceeding the range of the Appellate Body. In this case, it seemed there was a necessity for the Appellate Body to make a clear ruling on this capacity problem, instead of simply noting its newly granted discretionary authority as a reason of rejection, although that is the easiest way to reject any *amicus* brief.

## V. *ASBESTOS* CASE

### 1. The Origin of an Affair

The *Asbestos* case started with the appeal from Canada to a panel against import prohibition of asbestos containing products imposed by France. In this case, although the claim of France was not supported by the Panel, Canada also failed to provide proper provisions to support its claim, ultimately preventing Canada from winning the case<sup>29</sup>. The Appellate Body reversed some of the Panel's findings, however, it also concluded that France was not in violation, at least, concerning the issues Canada raised in this case, and thus, this case was terminated with the defeat of Canada<sup>30</sup>. The factor that makes this case significant is several NGOs' *amicus curiae* submissions to the DSB. The Appellate Body's efforts to resolve practical problems exposed in the *Carbon Steel* case resulted in new developments concerning this issue. In this Section, I present the process of dealing with NGOs' briefs submitted to the Panel and the Appellate Body in the *Asbestos* case.

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<sup>29</sup> *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, Report of the Panel, WT/DS135/R (18 September 2000), at para 9.1.

<sup>30</sup> *Asbestos*, above note 1, at paras 192-193.

## 2. The Panel's Decision: Sticking to its Original Position

In the *Asbestos* case, the Panel received four *amicus curiae* briefs. The NGOs that submitted to the Panel are the following: *Collegium Ramazzini*, dated 7 May 1999; *Ban Asbestos Network*, dated 22 July 1999; *Instituto Mexicano de Fibras Industriales A.C.*, dated 26 July 1999; and *American Federation of Labor and Congress of Industrial Organizations*, dated 28 July 1999. Canada, the appellant, notified the Panel that, bearing in mind the general nature of the opinions expressed by the non-governmental organizations in those submissions, they would not be useful to the Panel at this advanced stage of the proceedings<sup>31</sup>. EC informed the Panel that it incorporated into its own submissions the *amicus* briefs submitted by the *Collegium Ramazzini* and the *American Federation of Labor and Congress of Industrial Organizations*, as those bodies supported the EC's scientific and legal arguments in this dispute<sup>32</sup>.

The Panel decided that it would consider these two briefs that were submitted as a part of the EC's document and that it would not include the others<sup>33</sup>. The Panel

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<sup>31</sup> *Asbestos*, above note 29, at para 6.2.

<sup>32</sup> *Ibid* at paras 6.2-6.3.

<sup>33</sup> *Ibid* at para 6.3.

received one more *amicus* brief from the ONE (“*Only Nature Endures*”) on June 27<sup>th</sup>, 2000, but refused to accept it due to its tardy submission<sup>34</sup>. Reviewing the Panel’s decision, one fact becomes clear. The Panel concurred with and reinforced its original position expressed in the *Shrimp/Turtle* case. In that case, the Panel stressed its discretionary authority and noted that *amicus curiae* briefs could be accepted only when it was submitted as a part of a party’s document. The decision that it would accept only the two *amicus* briefs incorporated into EC’s document clearly showed the Panel’s adherence to its original position. The additional *amicus* brief, submitted by the ONE, was rejected by the reason of late submission, which indicated that the practical problems that had been exposed in the *Carbon Steel* case were not resolved yet.

### **3. The Appellate Body’s Efforts: ‘Additional Procedure’ in the *Asbestos* Dispute**

Since Canada did not accede to the Panel’s ruling, it appealed to the Appellate Body.

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<sup>34</sup> Ibid at para 6.4.

In this case, the Appellate Body made an effort to solve practical problems exposed in the *Carbon Steel* case by clarifying the procedure rule. This effort was realized with the documents called ‘Additional Procedure’<sup>35</sup> in the *Asbestos* dispute. The document was sent to the Chairman of the DSB by the Chairman of the Appellate Body on November 8<sup>th</sup>, 2000. It informed the Chairman of the DSB of the additional procedure adopted by the Division hearing the appeal in the *Asbestos* dispute. The Appellate Body had depended more on DSU Article 17.9 than Rule 16(1) of the *Working Procedures* in the process of granting itself the authority to receive *amicus curiae* briefs, and in this document, the Appellate Body emphasized that this communication was only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review* by noting as such three separate times: in the preface, sub-title and first paragraph of this document. This seemed to result from a lack of consultation with the Chairman of the DSB, which is enforced under DSU Article 17.9. Indeed, this document was simply presented to the Chairman of the DSB, and his/her input was not incorporated in its formation.

The Appellate Body tried to solve practical procedural problems through this

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<sup>35</sup> *European Communities – Measures Affecting Asbestos and Asbestos-containing Products: Communication from the Appellate Body* (hereinafter ‘Additional Procedure’), WT/DS135/9 (8 November 2000).

document. Therefore, it presented several requirements concerning a timetable and structured format. In other words, it showed NGOs the deadline of their submissions and assigned a maximum page limit. In addition, the Appellate Body required that each NGO specify the nature of its interest in this appeal and that it indicate any relationship, if any, with any party or any third party to this dispute. This is of importance since it offered NGOs guidelines for their submission, and thus, left no room for rejection due to procedural or formal elements, but only a failure to meet them. Hereby, the possibility of acceptance increased, and the issue turned to how the Appellate Body would deal with *amicus curiae* briefs which satisfied these conditions.

#### **4. The Appellate Body's Decision**

As mentioned above, the Additional Procedure was set in order to prepare for expected *amicus curiae* submissions in the Appellate Body stage. Actually, in this case, the Appellate Body received 17 *amicus* briefs. Six of them were rejected as they were submitted later than the due date regulated in paragraph 2 of the Additional Procedure<sup>36</sup>. The main issue became what decision the Appellate Body would make on the remaining 11 *amicus* briefs that were submitted before the deadline. The

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<sup>36</sup> *Asbestos*, above note 1, at para 55.

Appellate Body finally rejected all these submissions with the reason being their failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure<sup>37</sup>.

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<sup>37</sup> Ibid at para 56.

## VI. FUTURE AGENDA

The acute dispute concerning NGOs' submission to the DSB was faced with a turning point in the *Shrimp/Turtle* case. In the *Shrimp/Turtle* case, by reversing the Panel's decision that it does not have any authority to accept non-requested briefs from NGOs, the Appellate Body provided NGOs with a right to submit their briefs to the panel. It diverted the interest from whether NGOs' participation in the WTO is desirable, to whether NGOs' participation could be justified under the WTO Agreements. As a matter of fact, there were plenty of controversies concerning the legal justification under which the panel and the Appellate Body were granted discretionary authority. The Appellate Body's ruling in the *Carbon Steel* case where it finally found that it also has discretionary authority, given that Article 17.9 of the DSU authorizes the Appellate Body to draw up its own working procedures, and Rules 16(1) of the *Working Procedures*, turned the core issue of *amicus curiae* brief submissions to how the panel and Appellate Body would treat NGOs' briefs in actual cases. The Additional Procedure written by the Appellate Body in the *Asbestos* case heightened this concern.

The practical problems that had hindered NGOs from submitting their briefs

to the DSB were removed, and the possibility to be accepted increased. However, the Appellate Body's announcement of its decision to reject all 17 replies aroused huge repulsion from NGOs, since the stated reason of rejection was so ambiguous, especially for the 11 NGOs that submitted their briefs within hours of the deadline set forth in paragraph 2 of the Additional Procedure. Debra Steger, director of the Appellate Body's secretariat noted that all would become clear when the body issued its report in March 2001. However, when the Appellate Body presented its report that the reason of rejection was for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure, most of the rejected NGOs could not understand, since they believed that those applications were written with scrupulous attention to the stated details.

The whole process from the *Shrimp/Turtle* case to the *Asbestos* case leaves the following as a future agenda.

### **1. Inconsistency between the Panel and the Appellate Body**

From the *Shrimp/Turtle* case to the *Asbestos* case, the Panel maintained a different position from the Appellate Body. Whereas the Panel intended to limit NGO

submission by legal interpretation coincident with the establishing purpose of the DSB, the Appellate Body provided access to the DSB for NGOs by reversing the Panel's findings, by doing so, eliminating the distinction between "requested" and "non-requested" information. This sort of inconsistency between the two bodies continued to be manifested in the *Asbestos* case. Whereas the Appellate Body made an effort to solve problems disclosed in former cases by setting up an Additional Procedure, the Panel still adhered to its standpoint that had been presented in the *Shrimp/Turtle* case. It is possible, in future cases, for the panel to change its position as a result of the Appellate Body's try and effort in the *Asbestos* case. However, the inconsistencies that had been exposed until and throughout the *Asbestos* case are enough to warrant concern. Since this is an internal problem within the DSB, it is believed that unifying these different standpoints of the two bodies should be a priority for the DSB, and should be resolved prior to efforts in solving the practical problems presented in Chapter 2, 3 and 4 of this Section.

## **2. A Deluge of Non-requested Briefs**

The first potential problem caused by the ruling of the Appellate Body vanishing the distinction between "requested" and "non-requested" information is the

possibility of being deluged with non-requested *amicus curiae* submissions. The number of *amicus* briefs started from two in the *Shrimp/Turtle* case, and increased to 17 in the *Asbestos* case. More detailed investigation uncovers one more feature: Whereas, in the *Shrimp/Turtle* case, both NGOs were non-profitable organizations, profitable organizations, which intended to protect their own interest, were found among NGOs that submitted *amicus* briefs to the DSB in the *Carbon Steel* case. Furthermore, in the *Asbestos* case, even individuals submitted his or her document as one constituting NGO category. This is a result of the comprehensive term, “NGO”, which includes any person or organization not controlled by governments. Considering this wide coverage of the term “NGO”, any person has the capacity of a NGO, and this shows the possibility for the DSB to be overcrowded with innumerable *amicus curiae* briefs. When the DSB is deluged with non-requested briefs in future cases, the number of briefs will be overwhelming. Although the Appellate Body limited the maximum page of each application in the *Asbestos* case – as it can do again in future cases – if a large number of *amicus* submissions are received, a page limit will fail to serve as a sufficient solution.

In the *Shrimp/Turtle* case, the Appellate Body reversed the Panel’s finding

that it was not granted to accept non-requested information from NGOs under the DSU provisions. This Panel decision was a method that enabled the DSB to use each party as a filter in the process of accepting innumerable *amicus* submissions. By reversing this ruling, the Appellate Body left the possibility of being flooded with non-requested briefs, and reviewing an increasing number and extended range of NGOs submissions in the *Asbestos* case, this is likely to be realized at a close date.

As mentioned above, the Appellate Body's reason of rejection was not enough to provide NGOs with a clear understanding, in even the most recent case, the *Asbestos* case. Without a doubt, there is a necessity to establish clear criterion concerning *amicus curiae* brief selections. However, prior to this, the DSB should take measures to deal with the expected innumerable *amicus* submissions, as it is a prerequisite to making a decision on selection.

### **3. Clear Criterion in Brief Selection**

To establish clear standards in the process of accepting *amicus curiae* briefs is one of the most important tasks. Whereas considering how to cope with a number of *amicus* briefs is the potential problems for future cases, fixing a clear criterion in brief

selection is needed to resolve problems that have already been exposed in former cases. Although the Additional Procedure was made in the *Asbestos* case, there was fierce resistance to the Appellate Body's decision to reject all 17 *amicus* submissions. This mainly resulted from a lack of clear standard in brief selection

The Additional Procedure consists of two parts. The first three paragraphs are procedural regulations for application, and the remaining part is for granted applications of leave to file a brief. In the *Asbestos* case, no application was granted by the Appellate Body, which said all of them either violated the deadline set forth in paragraph 2, or failed to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.

The NGOs that showed furious resistance to this ruling were those who were rejected under the paragraph 3 of the Additional Procedure. Paragraph 3 is composed of 7 sub-paragraphs, which requires the submissions to adhere to the following: to be dated and signed by the applicant; to be no longer than three typed pages; to contain a description of the applicant; to specify the nature of the interest the applicant has in this appeal; and to identify the specific issues of law covered in the Panel Report and

a legal interpretation thereof to be addressed in the applicant's written brief. The last

two sub-paragraphs of paragraph 3 are the following:

(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 application leave to file a written brief in this appeal; and indicate, in particular, in what way the application 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.

(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<sup>38</sup>.

What made those 11 NGOs unable to understand was the Appellate Body's ambiguous announcement, which said they had not complied with *a specific section* of the rules set forth in paragraph 3 of the Additional Procedure. The Appellate Body did not clearly notify each NGO of *which specific section* was not complied by it, and this was the main reason why the Appellate Body failed to make them clearly understood. Robert Howse, the professor from Michigan, who claimed he wrote his application with detailed attention to the stated requirements, represents the

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<sup>38</sup> Additional Procedure, above note 35, page 2.

standpoint of those 11 NGOs.

Without a doubt, the panel and the Appellate Body, as they emphasized in the *Shrimp/Turtle* case and the *Carbon Steel* case, are obliged by law to accept and give due consideration only to submissions made by the parties and the third parties, and thus, rejecting all *amicus curiae* submissions by exercising their discretionary authority can be justified under this ruling, at least from a legal perspective.

There are two possible motives that led the Appellate Body to reject all 11 *amicus* briefs that were received before the required deadline. The first possibility is that all these briefs indeed failed to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure as officially announced by the Appellate Body in its report. In this case, the Appellate Body will be able to prevent NGOs' objections before they arise again in future cases, simply by describing in detail which sub-paragraph is not complied to by each NGO. The other possibility is, as insisted by Robert Howse, that there simply was no failure to satisfy all the requirements set forth in paragraph 3 of the Additional Procedure. The fact that all 7 sub-paragraphs of paragraph 3 are either too easy to comply with or too ambiguous

supports this idea. As shown above, the first two sub-paragraphs of paragraph 3 of the Additional Procedure, which respectively required to be dated and signed by the applicant, and to be no longer than three typed pages, are easy enough to comply with. Moreover, the others are so ambiguous that the Appellate Body can make any decision based on this. Sub-paragraph (f) in particular, which requires the applicant to indicate, explicitly, the way in which the application will make a new and different contribution to the resolution of the dispute, is so ambiguous that the Appellate Body can reject any NGO's submission based on this.

No one, as an outsider, can be certain as to which of the above cases actually occurred the process of the Appellate Body's decision. However, even if the Appellate Body's announcement was based on the truth, it is also true that the "Appellate Body" caused serious resistance by making an obscure announcement. Furthermore, if their claims for refusal are not based on the truth, in other words, if there were some *amicus* submissions that succeeded to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure, the Appellate Body should have announced that these were rejected on the basis of its discretionary authority instead of noting that there was failure made on the part of the NGOs.

However, to reject *amicus curiae* submissions based on discretionary authority might make this controversy even more complex. Although this authority was granted to the panel and Appellate Body under the DSU agreements, if the Appellate Body rejected NGOs' briefs by simply stating that it exercised its discretionary authority, there is no reason for NGOs to spend time and effort in making their documents comply with all the requirements set forth in the Additional Procedure. It is this concern that makes the Appellate Body hesitant to mention "discretionary authority" in its actual ruling. Indeed, the term "discretionary authority" is the core in the whole *amicus curiae* submission issue.

As mentioned above, no one, except the Appellate Body itself, knows whether the Appellate Body indeed believed all 11 documents had not complied with a specific section of the rules for making applications. Therefore looking at this from a new angle could be more productive. Hereby, one question can be raised as to whether the Appellate Body cannot accept *amicus curiae* submissions, even if the Appellate Body believed there were some *amicus* briefs satisfying all requirements and thought it to be contributive to the resolution of this dispute. And if not, why? What led it to reject all those *amicus curiae* submissions? The answer can be found

under the more detailed investigation into the contents of the *amicus* briefs and the intrinsic attribute of the DSB as an inter-governmental judicial organization, which is presented in the next Chapter.

#### **4. The DSB as an Inter-governmental Judicial Organization *versus* NGOs' Own Legal Interpretation**

Whereas establishing clear criterion in the process of brief selection is the most important task of the DSB, the fact that the DSB is an inter-governmental judicial organization is what makes it difficult. More precisely speaking, that fact prevents the DSB from receiving any *amicus curiae* brief, at least as a form of an independent legal document. As mentioned above, the Panel's legal interpretation of DSU Article 13 was consistent with the aim of DSB establishment. In the *Shrimp/Turtle* case, the Panel ruled that it could accept non-requested briefs only when the brief was submitted as a part of each party's document.

The purpose of Article 13 is only to inform that a panel may request an experts' view when the panel is faced with a scientific or technical matter, and thus, when it needs an expert's view in order to clearly understand a factual issue raised by

a party. The second paragraph of this article clearly shows this. In the process of panel's request for a factual issue concerning a scientific or other technical matter, there is no possibility of a dispute being infiltrated by NGOs' own legal interpretation. Indeed, DSU article 13 was established in line with the purpose of DSB establishment as an inter-governmental judicial organization. In other words, the DSB was established in order to solve trade disputes among sovereign states, and the provisions of DSB supported it. However, the harmony between the DSB and its provisions was ruptured by the Appellate Body in the *Shrimp/Turtle* case. The Appellate Body's finding permitted NGOs to submit its brief regardless of whether or not it was requested, and this resulted in the possibility of the DSB being infiltrated by NGOs' own legal interpretation.

The Panel's ruling does not only exclude the possibility of the DSB being deluged with innumerable non-requested briefs, but also allows for a limitation of two parties, that of the appellant and the appellee. And limiting the parties to only two sovereign states is indeed coincided with the intrinsic attribute and the purpose of the DSB. Compared to this simple two-sided conflict, the Appellate Body's ruling resulted in increasing the number of parties innumerable.

Furthermore, it is not consistent with its own finding in the *Shrimp/Turtle* case.

The Appellate Body clearly ruled that NGOs cannot be members of the DSB. The

Appellate Body noted that:

It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental<sup>39</sup>.

To directly accept *amicus curiae* submissions including individual legal interpretations made by the NGOs, realistically results in providing essentially the same capacity of the parties to the NGOs. This clearly conflicts with the Appellate Body's own ruling which prohibited NGO's accession to the dispute settlement process. This is the reason why the Appellate Body could not accept any *amicus* submissions in the earlier *Asbestos* case. For this reason, the ruling that NGOs' submissions can be accepted only when submitted as a part of the party's documents, presents two advantages: First, it changes an actual offender of this submission from an NGO to the government, which has the capacity as a Member in the DSB. Secondly, hereby, the *amicus* brief including NGO's own legal interpretation can be

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<sup>39</sup> *Shrimp/Turtle*, above note 2, at para 101.

treated as a legal interpretation of each party. In sum, even though the establishment of a clear criterion regarding brief selection is the most important task for the DSB, it might not be easily solved since the DSB was initially established as an inter-governmental organization with the aim to solve trade disputes. To overcome this conflict is the most significant, and at the same time, the most difficult, task for the DSB.

## **VII. CONCLUSION: NEW POSITION OF THE DSB IN 21<sup>ST</sup> CENTURY**

In recent years, there have been many controversies on the topic of whether or not NGOs' participation in the WTO is desirable. Considering increasing activities of NGOs in the global arena, this argument seems to be unavoidable. The Appellate Body appeased this acute dispute by its ruling which permitted NGOs to submit their *amicus* briefs to the panel in the *Shrimp/Turtle* case. The intention of this finding could be understood from several points of view. First, it could be understood from the perspective of international political pressure. Otherwise, this ruling could be the pure result of the Appellate Body's agreement with the pro's opinion. In this paper, the intention of the Appellate Body was not investigated, rather I focused on presenting what kinds of problems arose following this ruling, which problems have yet to be solved, and factors that may hinder the DSB from resolving these problems. I attempted this through a review of the cases in which the issue of *amicus curiae* briefs were addressed.

Now, the Appellate Body is confronted with a difficult situation, which was, ironically, caused by its own finding in the *Shrimp/Turtle* case. However, it does not

mean the opinion of those who resisted NGO participation in the WTO is completely right, rather what the whole process from the *Shrimp/Turtle* case to the *Asbestos* case indicated, is that this Appellate Body's ruling was hasty and made with a lack of preparation. Before eliminating the distinction between "requested" and "non-requested" information in the *Shrimp/Turtle* case, the Appellate Body should have seriously considered its main role and function with utmost priority. In short, it should have thought about its intrinsic attribute as an inter-governmental judicial organization. Without a doubt, the WTO, and especially the DSB, encompasses different internal characteristics from that of the UN. It seemed that the Appellate Body failed, or at least did not sufficiently, take note of this distinction. If this was clearly noted, the Appellate Body should have not reversed the Panel's ruling in the *Shrimp/Turtle* case. For the DSB, as an inter-governmental organization which was established in order to judge international trade disputes, it is almost impossible to receive *amicus curiae* submissions from NGOs that include their own legal interpretations, and that are submitted with an independent capacity. However, it is also impossible now for the Appellate Body to reverse its own ruling in the *Shrimp/Turtle* case, and thus, reviving the distinction between "requested" and "non-requested" information.

As shown in the Introduction, the pro's opinion concerning NGOs' participation in the WTO deserves to be accepted. However, the problem is that it makes the DSB have difficulty in pursuing its original role as an inter-governmental judicial organization. Now, for the DSB, which already permitted NGOs to submit their *amicus* briefs, it is required to harmonize these two. Since the DSB already permitted *amicus curiae* submissions, without a reinterpretation of its own position, there is no way to harmonize them. But given that the DSB's role becomes more and more important in a globalized world, this repositioning should be done with great caution. Certainly, this reassessment of the DSB is very risky, but it is widely believed that any organization cannot work well permanently without any change. Reviewing the whole process from the *Shrimp/Turtle* to the *Asbestos* case, the DSB has shown itself to currently be at a total deadlock. In order to break this, it is believed that the DSB should reinvent; it should adjust its function in accordance to the evolution of international organizations and their heightened role in the global arena. It is hoped that the present review and discussion can initiate a more in-depth look into the matter.

## **APPENDICES**

## APPENDIX A

### The Number of NGOs in Consultative Status with the ECOSOC

Year	General	Special	Roster	Total
1948	13	26	2	41
1968	17	78	222	317
1992	38	297	533	868
1993	40	334	560	934
1994	40	334	560	934
1995	65	406	563	1034
1996	76	468	646	1190
1997	85	582	666	1333
1998	100	742	669	1511
1999	111	918	672	1701

Source: Sungsoo, Joo, and Youngjin, Seo. *United Nations, NGOs, and Global Civil Society*. Seoul: University of Hanyang Press, 2000.

## APPENDIX B

### Privileges and Obligations of NGOs in Consultative Status with the ECOSOC

Privileges/Obligations	General	Special	Roster
Relevance to the work of ECOSOC	All areas	Some areas	Limited
Are in consultative status with ECOSOC	Yes	Yes	Yes
Designate UN representatives	Yes	Yes	Yes
Invited to UN conferences	Yes	Yes	Yes
Propose items for ECOSOC agenda	Yes	No	No
Attend UN meetings	Yes	Yes	Yes
Can speak at ECOSOC	Yes	No	No
Circulate statements at ECOSOC meetings	2000 words	500 words	No
Circulate statements at ECOSOC subsidiary bodies' meetings	2000 words	1500 words	No
Can speak at ECOSOC subsidiary bodies' meetings	Yes	Yes	No
Must submit quadrennial reports	Yes	Yes	No

Source: <http://www.un.org/esa/coordination/ngo/>

## APPENDIX C

WT/DS135/9, 8 November 2000

### EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

#### Communication from the Appellate Body

The following communication, dated 8 November 2000, was addressed by the Chairman of the Appellate Body to the Chairman of the Dispute Settlement Body, informing him of the additional procedure adopted by the Division hearing the appeal in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*.

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I am writing to inform you that the Division hearing the above appeal has decided, in the interests of fairness and orderly procedure in the conduct of this appeal, to adopt an additional procedure to deal with any written briefs received by the Appellate Body from persons other than a party or a third party to this dispute. This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and is *not* a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

Attached, for your information, is a copy of this additional procedure.

**APPENDIX C (cont' d)**

*European Communities – Measures Affecting Asbestos and  
Asbestos-Containing Products*

AB-2000-11

*Additional Procedure Adopted Under Rule 16(1) of the  
Working Procedures for Appellate Review*

To All Participants and Third Participants:

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 written brief shall:
  - (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
  - (b) be in no case longer than three typed pages;
  - (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
  - (d) specify the nature of the interest the applicant has in this appeal;

## APPENDIX C (cont' d)

- (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 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.*

## **APPENDIX C (cont' d)**

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*.
9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure.

## APPENDIX D

### **1. 11 of 17 *Amicus Curiae* Briefs Submitted within the Time Limit of Noon on Thursday, 16 November 2000**

1. Professor Robert Lloyd Howse (United States)
2. Occupational & Environmental Diseases Association (United Kingdom)
3. American Public Health Association (United States)
4. Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina)
5. Only Nature Endures (India)
6. International Council on Metals and the Environment and American Chemistry Council (United States)
7. Korea Asbestos Association (Korea)
8. European Chemical Industry Council (Belgium)
9. Australian Centre for Environmental Law at the Australian National University (Australia)
10. Associate Professor Jan McDonald and Mr. Don Anton (Australia)
11. Joint application from
  1. Foundation for Environmental Law and Development (United Kingdom)
  2. Center for International Environmental Law (Switzerland)
  3. International Ban Asbestos Secretariat (United Kingdom)
  4. Ban Asbestos International and Virtual Network (France)
  5. Greenpeace International (The Netherlands)

## **APPENDIX D (cont' d)**

6. World Wide Fund for Nature, International (Switzerland)
7. Lutheran World Federation (Switzerland)

### **2. Six of 17 *Amicus Curiae* Briefs Submitted after the Deadline of Noon on Thursday, 16 November 2000**

1. Association of Personal Injury Lawyers (United Kingdom)
2. All India A.C. Pressure Pipe Manufacturer's Association (India)
3. International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium)
4. Maharashtra Asbestos Cement Pipe Manufacturers' Association (India)
5. Roofit Industries Ltd. (India)
6. Society for Occupational and Environmental Health (United States)
7. Dated 6 February 2001, seven NGOs filed a joint *amicus curiae* brief, despite the fact that their application for leave to file a written brief had been denied before. The Appellate Body didn't accept this brief.

## **APPENDIX E**

### **Legal Texts Pertaining to *Amicus Curiae*, NGOs and the WTO**

#### **1. Agreement Establishing the World Trade Organization**

##### Article V

###### *Relations with Other Organizations*

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.
2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

#### **2. Excerpts from the Understanding on Rules and Procedures Governing the Settlement of Disputes**

##### Article 13

###### *Right to Seek Information*

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member

## **APPENDIX E (cont' d)**

providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

### Article 17

#### *Appellate Review*

##### *Standing Appellate Body*

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.
2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute

## **APPENDIX E (cont' d)**

settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. 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.
5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.
6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.
7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.
8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

### *Procedures for Appellate Review*

9. 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.
10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the

## **APPENDIX E (cont' d)**

dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.
12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.
13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

### *Adoption of Appellate Body Reports*

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

## Article 18

### *Communications with the Panel or Appellate Body*

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.
2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

## **APPENDIX E (cont' d)**

### **3. Excerpt from the Working Procedures for Appellate Review**

#### **WT/AB/WP/3**

##### *Part II, Process*

##### *General Provisions*

##### Article 16

- (1) In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body.
- (2) In exceptional circumstances, where strict adherence to a time period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

##### Article 17

- (1) Unless the DSB decides otherwise, in computing any time period stipulated in the DSU or in the special or additional provisions of the covered agreements, or in these Rules, within which a communication must be made or an action taken by a WTO Member to exercise or preserve its rights, the day from which the time period begins to run shall be excluded and, subject to paragraph 2, the

**APPENDIX E (cont' d)**

last day of the time-period shall be included.

- (2) The DSB Decision on "Expiration of Time-Periods in the DSU", WT/DSB/M/7, shall apply to appeals heard by divisions of the Appellate Body.

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