The WTO Dispute Settlement Mechanism

Trade, Environment and the Role of the NGOs

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Reinhard Quick and I have something in common that relates to the just-mentioned episode around *Asbestos*: we both had our applications for leave to submit an *amicus* brief rejected and so I think it is kind of appropriate to focus on that. It reminds me of a song by one of my favourite singer/song writers, Dar Williams, where she invents the category of "the most justified angry ex-girlfriends"; our Panel today could be called the Panel of the most justified angry *amicus* rejectees.

What is an *amicus* brief and what is its role in litigation, municipal and international? Very quickly, it is essentially a written submission by a party to a proceeding in which that party either addresses issues of fact and/or, more especially, issues of law involved in the case. The kind of procedure pre-supposes that some entity or person or even government, let us say a non-party to litigation, can have something useful to say to the adjudicator—and we can explore some of the reasons for that—but I would like to focus on one particular feature of the role of dispute settlement in the World Trade Organization.

As you know, there is only contentious jurisdiction in WTO cases. No one can refer an abstract issue of law to a WTO panel or, as may be more appropriate, to the Appellate Body. Nevertheless, even though all the proceedings are in some sense inter-party, the Dispute Settlement Understanding (DSU) gives the dispute settlement organs not only the role of finding a satisfactory resolution of the individual dispute between the parties but also the role of "clarifying" the law. And as all of us know, parties, when they make submissions in a contentious proceeding, advance legal arguments, and advance interpretations of the facts that have a lot to do with litigation strategy. These choices can relate to politics, and they relate to positions that they are taking in other matters, whether those are other legal proceedings or political disputes. And so it may well be that the kinds of arguments that parties to a proceeding may make and the kinds of facts they may be willing to put into play may not necessarily be of an adequate or sufficient nature to provide an objective determination and resolution of the matter.

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And so in these circumstances, where there is a role of clarifying the law and where in the case of panels there is a duty to make an objective assessment, an objective determination, i.e. not simply to produce a settlement acceptable to the parties, one can well see that an outsider with a different interest or maybe not the same constraints on the kinds of legal arguments and facts that they might bring to the attention of the adjudicator, might have a good and important role to play.

Well, very briefly in two minutes, there is a legal basis for both panels and the Appellate Body to have the discretion to accept *amicus* briefs. In light of much of the heated discussion of this issue it has to be stressed, as the Appellate Body itself has emphasized on two occasions, that we are not talking about the rights non-governmental actors and non-WTO Members to have such submissions considered. The legal issue in the first instance before the WTO and before the Appellate Body is whether panels or the Appellate Body have the discretion to accept such briefs, and that is a very different issue. You can have the discretion, but that does not mean that anyone has the right to submit because States have rights under the WTO system. It would really be quite a radical departure to suggest that any non-State appellant would have a right to intervene in the proceedings and I think a lot of the people who have gone ballistic over the idea that *amicus* briefs should be accepted have done so just based upon this misunderstanding. We are not talking about the right to anyone to have their brief considered, we are only talking about a discretion of the adjudicator to take it into account if it is appropriate.

The first proceeding where there was an Appellate Body ruling on this issue, the *Shrimp/Turtle* case,[1] the Panel below had come to the conclusion that it did not have the discretion to take into account a brief on the basis of a perverse reading of Article 13 of the DSU and the Panel suggested something along the following lines: Article 13 gives us a right to seek information from non-governmental appellants, *ergo* if we are not seeking the information we don't have a right to receive it. We don't have a right to get it.

Well, imagine the following: an immigration statute that gives a person with a certain visa a right to seek employment in the United States. And supposing that they can get an unsolicited job offer, should a reasonable interpretation of that statute be that because somebody phoned you up and offered you the job and you are not seeking it, you can't take it? It is simply a *non-sequitur* to suggest that a *right* to seek information implies a *prohibition* on taking information that isn't solicited. That is an absurd interpretation and the Appellate Body threw it out quite rightly and said that here, in the role of making an objective assessment,[2] an objective determination of the matter

[1] *United States—Import Prohibition on Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 6 November 1998.

[2] As required by Article 11 of the Dispute Settlement Understanding.

there is considerable authority to investigate the law and the facts, and it is on that basis that one can understand this discretion.

In the *Carbon Steel*[3] case, the law was clarified with respect to submissions of *amicus* briefs to the Appellate Body itself, and I think the Appellate Body quite rightly said that if we have the right to create our own procedures we certainly have the right to a procedural discretion, including a discretion to receive the brief.

Some people suggested that if you rely for your discretion on provisions that say that you have a right to create certain working procedures for yourself, that the only way you can exercise your discretion is through going out and creating those working procedures. But that is just as much a logical *non sequitur* as the one about seeking information. You may well invoke a clause that gives you the right to create your own procedures as evidence of the amplitude of your procedural discretion, but that does not mean that whenever you exercise discretion, the *only* way you can is through the creation of new working procedures.

It is true that the DSU does not confer any explicit power on the Appellate Body to accept *amicus* briefs. But as just noted, it had considerable procedural discretion. And if you read the DSU carefully you will find that it doesn't explicitly confer on the Appellate Body the power to accept oral and written submissions from the parties (even though, curiously, third parties are mentioned). So if we don't read some implicit powers or authorities into the mandate of the Appellate Body, appellate review won't make sense at all. As already noted, the dispute settlement system exists in part in order to clarify the existing law—the DSU says that. And it is a well-established doctrine of international law that an international body should have implied to it, those powers that are necessary and incidental to the exercise of its functions or responsibilities.[4]

Anyhow, finally to the *Asbestos* episode very briefly.In this case the Appellate Body developed a special procedure dealing with a submission of briefs where you had to file an application for leave, and in your packet you will find a copy of this special procedure and you will also find a copy of my application for leave to file a brief.[5] I was rejected by the Appellate Body on the basis that I did not fulfil the requirements that are listed in paragraph 3 which lists various things that you have to include in your application in order to have a chance of success.

Now as a professor, when I was rejected, I said to myself: "I have got to get out of

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[3] *United States—Imposition of Countervailing Duties of Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000.

[4] See, for example, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174. The practice of accepting *amicus* briefs exists in other international tribunals. For an excellent overview see G. Marceau and M. Stillwell, *Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies*, Journal of International Economic Law, forthcoming. The article just cited went to press before a NAFTA investor-State Arbitral Panel ruled that it had discretion to accept *amicus* briefs. See *Methanex Corporation v. United States of America*, decision of the Tribunal, 15 January 2001.

[5] *EC-Asbestos*, Additional Procedure, WT/DS135/9.

WTO law because how can I possibly face my students as an authority in this area if I cannot follow a simple set of requirements and I get my application thrown out because I failed to follow the requirements?" So I have a task for you, and I will give you all my e-mail address. You go through all these paragraph 3 requirements and tell me which of them I did not fulfil. You have my application and you have the requirements. (As for the students, they couldn't find any instance where I did not meet the paragraph 3 requirements. So after that I did feel better about being a WTO scholar.)

Now I should only say one thing in closing: don't tell me it is because it is longer than three pages. The limit for an application was three pages. When it was reproduced for this Conference it was reproduced in a larger font than I actually used but when it was sent to the Appellate Body it was sent in three pages. Among the defects of this special procedure is that it did not specify anything about a font, or indeed as one practitioner pointed out to me, about page size either. It also does not tell you whom you must serve this application on or through what means. And there is another fundamental problem with the procedure that I just want to sustain in closing; you can refer to 3(f), it says that in your application you have to address only those arguments that are stated in Canada's notification of appeal. You are limited to those arguments, and the problem in this case is that one of the most fundamental issues, the interpretation of Article III of the GATT, is an issue that would only be put in play later by the cross-appeal of the European Community. In my own application I tried to address this difficulty by linking the Article III issue to other interpretations by the Panel that were the subject of Canada's Appeal, and dealing with Article III indirectly through taking issue with those other interpretations.

In any case, there was no way of using this mechanism to address any counterclaims or counter-appeal of the appellee and surely that is less than due process, when you are entertaining *amicus* submissions that address the appellant's claims, but not those of the cross-appellant/appellee.