

Case Notes

WORLD TRADE ORGANIZATION, EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS, PANEL REPORT

Editor's Note: The Appellate Body issued its report on European Communities – Measures Affecting Asbestos and Asbestos-Containing Products on 12 March 2001. A note on the Appellate Body's report in this case will be produced in a subsequent issue of RECIEL.

INTRODUCTION

Environmental and health groups have been closely tracking developments in a dispute in the World Trade Organization (WTO) between the European Communities (EC) and Canada over a French ban on the import of asbestos and asbestos-containing products. Given the straightforward nature of the French measure, and the widely recognized carcinogenic character of asbestos, analysis under the 1994 General Agreement on Tariffs and Trade (GATT) was expected to be uncontroversial. Interest in the dispute arose primarily from what appeared to be a WTO panel's first opportunity to apply the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Instead, in what may prove to be one of the most widely criticized panel reports to date, the Panel delivered a bizarre interpretation of GATT law and practice. If left to stand, the Panel's reasoning would allow trade rules to challenge even the most basic of regulatory judgments. Although the Panel upheld the ban, it did so only after initially finding that the French trade restrictions violated the GATT's basic rules that require all 'like' imported products to be treated in a non-discriminatory manner.¹ France was then required to justify its 'violation' through an exception to the WTO rules, based on the protection of public health. Canada appealed the Panel's ruling, and the

final report of the Appellate Body is expected in March 2001.²

A second unexpected development from this dispute was the issuance by the Appellate Body of an 'Additional Procedure' to deal with submissions from 'non-parties'.³ Non-government organizations, academics and industry groups had expressed a keen interest in the dispute at the Panel level and five *amicus curiae* submissions were made to the Panel. Given civil society interest in the appeal, the Appellate Body invited applications for leave to file written submissions, and constructed a series of criteria to test the admissibility of these applications. The Additional Procedure elicited a mixed response. While non-governmental organizations welcomed a new level of transparency and a formal recognition of their interests, some WTO members felt that the Appellate Body had overstepped its mandate. However, all the applications for leave to file written submissions were rejected. The Appellate Body is expected to provide written explanations for its actions with its final report.

In light of the imminence of the Appellate Body's report in this dispute at the time of going to print, this brief case note focuses on a number of basic conceptual issues raised by the Panel's substantive analysis of the GATT and the TBT Agreement. It then turns to assess the Appellate Body's use of the Additional Procedure to invite and screen *amicus curiae* submissions.

BACKGROUND

The dispute arose over French decree No. 96–1133 of 24 December 1996 (the decree), banning

the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres... regardless of whether these substances have been incorporated into materials, products or devices. (Article 1)

The ban provides an exception, on a temporary basis, for certain existing materials, products or devices con-

¹ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, 18 September 2000, WT/DS135/R ('Panel Report').

² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Notification of An Appeal by Canada, 23 October 2000, WT/DS135/8; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Communication from the Appellate Body, 20 December 2000, WT/DS135/10.

³ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review AB-2000-11, 8 November 2000, WT/DS135/9 (the 'Additional Procedure').

taining chrysotile asbestos fibre when, to perform an equivalent function, no substitute for that fibre is available which poses a lower health and safety risk than posed by asbestos (Article 2).

On 28 May 1998, Canada initiated WTO dispute settlement procedures against the European Communities challenging the French decree. Brazil, the United States and Zimbabwe joined as third parties to the dispute.

Canada challenged the decree as a violation of the GATT, Article XI (prohibiting quantitative restrictions) and Article III:4 (requiring national treatment of imported 'like products'). It claimed that the EC was not entitled to a defence under the GATT's general exception for measures necessary to protect human health (Article XX (b)). Canada also asserted that the decree was incompatible with the TBT Article 2.2 (as an unnecessary obstacle to international trade), Article 2.4 (as not being based on or in compliance with international standards) and Article 2.1 (in violation of national treatment disciplines and the most-favoured-nation clause). Finally, Canada argued that, in the event that the Panel was unable to find a violation of the GATT, the Panel should nonetheless find that benefits accruing to Canada under the GATT had been nullified or impaired by the decree (asserting a so-called 'non-violation' complaint), and that Canada should, as a result, be compensated. The EC rejected each of these arguments.

BANNING TOXIC PRODUCTS

A threshold question confronting the Panel was whether to analyse the French decree under Article XI (as argued by Canada) or Article III (as argued by the EC). At first glance, the French decree is a trade ban that would appear to fall squarely within the GATT's direct prohibition on quantitative restrictions under Article XI. However, the EC favoured the application of Article III, and invoked the Interpretive Note to Article III. Interpretive guidance in Ad Article III provides that, where a regulation applies to both imported and 'like' domestic products and is enforced against the imported product at the time or point of importation, it is to be regarded as an internal regulation (rather than a quantitative restriction) which is subject to the provisions of Article III. The EC noted that the decree combined an import ban with a ban on domestic production or sale of asbestos, and thus was directly within the scope of Ad Article III. If the Panel found otherwise, the EC argued, Article XI's prohibition on import bans could prevent WTO Members from using such bans as an obvious means of enforcing otherwise GATT-compatible bans on domestic sales.

The choice of which Article to apply was central to the analysis that followed. If the Panel had viewed the

decree as a prohibited quantitative restriction under Article XI, the burden would immediately shift to the EC to show that France was entitled to an exception under Article XX. Instead, the Panel agreed with the EC and, taking into account Ad Article III, tested the decree under Article III:4. This channelled the Panel's analysis towards Article III's national treatment standard, which tests whether Canadian asbestos is being treated less favourably than 'like products' produced in France.

According to GATT practice, under Article III, Canada bears the burden of proving that the competitive relation between its asbestos and a 'like' French domestic product is being undermined by the French measure.⁴ If a 'like product' is identified and the imported product is being treated less favourably in a manner that 'affords protection' to the domestic product, a *prima facie* violation is shown. The analysis begins with a search for a 'like product', and possible candidates are tested against the WTO's emerging definition of likeness. The Appellate Body's most authoritative clarification to date of the definition of a 'like product' directs a panel to compare the products' physical characteristics, their perception through consumers' tastes and habits, their end uses and other objectively observable criteria.⁵ The assessment of likeness will vary, in the manner of 'an accordion', depending on the WTO provision at issue and the prevailing circumstances of the dispute.⁶

Somewhat surprisingly, in a case involving an evenhandedly applied trade ban on a product internationally recognized as carcinogenic, the Panel stretched the 'accordion of likeness' to an absurd length. The Panel found, for example, that innocuous

⁴ See *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel adopted on 23 July 1998, WT/DS54/R; WT/DS55/R; WT/DS59/R; WT/DS64/R, para. 14.169; *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, Report of the Appellate Body adopted on 23 May 1997, WT/DS33/AB/R, 10.

⁵ See *Report of the Working Party on Border Tax Adjustments*, adopted on 2 December 1970, BISD 18S/97; *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Report of the Panel adopted on 10 November 1987, BISD 34S/83, 85, para. 5.6; *United States – Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June 1992, BISD 93S/206, para. 5.24; *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R ('*Japan – Alcoholic Beverages*'), 12–13; *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Panel adopted 20 May 1996, WT/DS2/R ('*US – Gasoline Panel*'), paras 6.8–6.9; *Canada – Certain Measures Concerning Periodicals*, Report of the Appellate Body adopted on 30 July 1997, WT/DS31/AB/R, 15.

⁶ In its guiding interpretation of 'like product', the Appellate Body has stated that: 'The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied'. (*Japan – Alcoholic Beverages*, at 13).

building materials, containing polyvinyl alcohol (PVA) and cellulose were 'like' asbestos-containing building materials. In the process of this analysis, the Panel specifically found the acknowledged toxicity of asbestos to be an inappropriate basis for distinguishing between products. In sum, as toxic building materials (chrysotile asbestos) were found to be 'like' non-toxic building materials (PVA and cellulose), the French trade ban amounted to unfavourable treatment between these like products, and Canada's *prima facie* case was established.

The Panel's reasoning appears to be based on the assumption that taking into account toxicity as part of a 'like product' analysis would render the health-based exception in Article XX redundant. In a curious twist of logic and in an effort to 'preserve' the effectiveness of an exception, the Panel felt compelled to find a violation by distorting the plain meaning of the rule in Article III. If this reasoning were to stand, it would, in effect, place on any regulator wishing to distinguish between hazardous and non-hazardous (but otherwise 'like') products, the burden of meeting the GATT's narrowly drawn exceptions under Article XX.

SCIENCE, RISK ASSESSMENT AND GATT ARTICLE XX(b)

Under the Panel's reasoning, the relevance of asbestos' toxicity was shifted forward to the discussion on the applicability of the GATT's exception in Article XX(b) which governs measures 'necessary to protect human . . . life or health'. The relationship between protective measures and risk has been developed in some detail under the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and under the TBT Agreement. The SPS Agreement, in particular, lays down international standards for the conduct of risk assessment. But neither the GATT text, nor past GATT practice, provides much guidance as to how a Panel should use scientific evidence to balance the trade effects of a measure against the risks posed by a product. The Panel struggled to construct its own standard, which would appear to introduce a significant new evidentiary burden on a member seeking to defend a health measure under Article XX. The imposition of a higher evidentiary standard, applied in a context where the carcinogenic nature of the product was not in dispute, might also be corrected by the Appellate Body.

Under past GATT practice, a panel asked to analyse Article XX(b) must first decide a threshold question of whether the measure falls within the category of measures designed to protect human, animal or plant life or health. If a panel finds that a measure does fall within that category, it must then turn to a second step, and consider whether the measure is 'necessary' to protect

human, animal or plant life or health.⁷ Should a measure clear these two tests, the measure is 'provisionally justified' and a panel then turns to the tests in the 'chapeau' of Article XX.

The Panel, instead, sought to introduce a series of tests that would require a regulator to demonstrate it had 'sufficient scientific evidence' to 'reasonably conclude' that it had met each step of an Article XX analysis.⁸ In doing so, the Panel transformed a simple threshold test concerning the measure's policy objective into a scientific risk assessment for which there is no basis in the text of Article XX. The Panel's recurring inquiry into the sufficiency of scientific evidence, in the context of a dispute where the hazardous nature of the product is undisputed, would impose a considerable new burden on the regulator. It would also appear to undermine the Appellate Body's cautious approach to the role of scientific 'objectivity' as a check on the discretion of national regulators. The Appellate Body has, for example, instructed panels to

bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.⁹

With regard to the second step, the so-called 'necessary' test, the Panel appeared to draw upon recent practice from the application of the SPS Agreement. The Panel noted that it is up to each WTO member to decide the level of protection it wishes to provide its citizens.¹⁰ A determination that France could 'reasonably be expected' to employ alternative measures would have to have been made on the basis that the desired objective is, as determined by France, absolute protection as represented by a trade ban. To find for Canada, the Panel would have then been required to find that there

⁷ In analysing other subparagraphs, the Appellate Body has found that provisional justification under subparagraph (b) of Article XX requires a determination as to whether the relevant measure (i) concerns the protection of human, animal or plant life or health and (ii) is 'necessary' to protect human, animal or plant life or health. See *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body adopted on 10 January 2001, WT/DS161/AB/R; WT/DS169/AB/R (*Korea – Beef*), para. 157. See also *United States – Import Prohibition of Shrimp and Shrimp Products*, Report of the Appellate Body adopted 6 November 1998, WT/DS58/AB/R (*US – Shrimp*), at paras 125ff.

⁸ Panel Report, para 8.182.

⁹ The Appellate Body, in *European Communities Measures Affecting Meat And Meat Products (Hormones)*, Report of the Appellate Body adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, found that 'a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned,' para. 124.

¹⁰ Panel Report, para. 8.171. See also para. 8.179.

are alternative measures that provide the same level of protection as a ban. In this case, Canada failed to show that controlled use provides absolute protection from exposure to chrysotile asbestos¹¹ leading the Panel to conclude that the decree was necessary to protect human health and life within the meaning of subparagraph (b) of Article XX.

Canada had argued that as long as the risks associated with substitute products were unknown, France should not be permitted to legislate with respect to chrysotile asbestos.¹² The Panel observed that

to make the adoption of health measures concerning a definite risk depend upon establishing with certainty a risk already assessed as being lower than that created by chrysotile would have the effect of preventing any possibility of legislating in the field of public health.¹³

Accordingly, the Panel rightly confirmed that, where a product has the potential to do harm to human, animal or plant life or health, measures may be implemented with respect to that product without requiring a WTO member to show that alternative products cause less harm.

THE GATT AND TBT: JURISDICTIONAL CONTOURS

As has frequently been the case in post-Uruguay Round disputes, the complaining party argued a violation of the GATT and, in the alternative, one of the more detailed WTO agreements. The TBT Agreement has yet to be applied by a WTO Panel. The TBT was adopted to 'further the objectives'¹⁴ of the GATT, and can be seen as a systematic elaboration of the GATT practice that developed under Articles III:4, XI and XX. Although the TBT Agreement essentially reiterates GATT standards on most-favoured nation and national treatment, it provides the complaining party with more causes of action upon which to challenge a measure, and thus may be viewed as the agreement of choice for complainants.

The TBT Agreement covers all products traded between WTO members. However, it applies to only particular kinds of trade-related measures. TBT-covered measures include technical regulations, voluntary standards and conformity assessment procedures. A 'technical regulation' is defined as a '[d]ocument which lays down product characteristics... with which compliance is mandatory'.¹⁵ In determining whether the French decree fell within this definition, the Panel elaborated

a three-part test that would assess whether the measure (i) affected one or more given products, (ii) specified the technical characteristics of the product that allow them to be marketed in the country taking the measure and (iii) required mandatory compliance.¹⁶

The Panel distinguished the trade ban in Article 1 of the decree from the exceptions in Article 2 of the decree. It found that the decree's trade ban in Article 1 did not satisfy these three criteria, and that the fact that the EC had notified the decree to the WTO Committee on Technical Barriers to Trade had no legal effect on the applicability of the Agreement to the decree. The Panel, however, concluded that the decree's exceptions to the ban did satisfy the three criteria. They affected one or more given products, the provisions concerning exposure levels and labelling constituted specification of the technical characteristics of the product that allowed them to be marketed in France, and penalties applied to a failure to comply. The Panel was not deterred in its analysis by the fact that the exceptions were transitional nor did it consider them to be ancillary to the ban.¹⁷ However, it found that Canada had not made any specific claims concerning the exceptions in the terms of reference provided to the Panel. On that basis, the Panel declined to reach any conclusion concerning the application of the TBT to the exceptions.¹⁸

ARTICLE XXIII: COMPENSATION IN THE ABSENCE OF BREACH?

Historically, Article XXIII:1(b) – the so-called non-violation clause – has been used to prevent tariff concessions under Article II of the GATT from being undermined by the use of trade-related measures that were not themselves breaches of WTO rules, e.g. subsidies.¹⁹ However, with the introduction of a raft of WTO agreements covering subsidies and other measures that might threaten the integrity of market access commitments, commentators have agreed that the scope of Article XXIII:1(b) has been greatly reduced.²⁰ WTO members and past panels have thus considered that 'the non-violation remedy should be approached with caution and should remain an exceptional remedy'.²¹

¹¹ Panel Report, para. 8.211.

¹² Panel Report, para. 8.220.

¹³ Panel Report, para. 8.221.

¹⁴ TBT Agreement, Preamble, 2nd tiret.

¹⁵ TBT Agreement, Annex 1.

¹⁶ Panel Report, para. 8.57.

¹⁷ Panel Report, paras 8.65 and 8.66.

¹⁸ Panel Report, para. 8.72.

¹⁹ See *Japan – Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel adopted 22 April 1998, WT/DS44/R ('*Japan – Film Products*'), para. 10.35–6; *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Report of the Panel adopted on 25 January 1990, BISD 37S/86, para. 148.

²⁰ See P.J. Kuyper, 'The Law of GATT as a Special Field of International Law: Ignorance, further refinement or self-contained system of international law?' in *GATT Law* (1994), 247.

²¹ See *Japan – Film Products*, paras 10.36–7.

Given that the scope of Article XXIII:1(b) should be confined, the EC objected to the Panel proceeding to scrutinize the decree under the non-violation clause when it had already been found to have been justified under Article XX.²² If Article XX is to be read in accordance with the principle that all terms in a treaty shall be read to have meaning and effect,²³ it must be done on the basis that a determination under Article XX precludes a claim under XXIII:1(b). It could be argued that WTO members should not be 'tried twice' under the GATT with respect to the same measure.

To give WTO members two opportunities to seek redress with respect to a single measure creates legal uncertainty for WTO members. Accordingly, the non-violation clause should be considered by panels in only exceptional circumstances where the measure is not otherwise covered by the WTO agreements. Taking the unacceptable consequences of applying Article XXIII:1(b) to a measure that has been justified under the GATT to their extreme, a government could be found liable to pay compensation to the creator of a health hazard or the polluter of the environment in a foreign country. Some would argue that the 'polluter pays principle' should not be turned into a 'pay the polluter principle' through the inappropriate application of the non-violation clause.²⁴ Similarly, a State that has violated its obligation under customary international law not to cause environmental damage in another State should not then be entitled to claim compensation from the damaged State under Article XXIII:1(b).²⁵

AMICUS CURIAE BRIEFS

The evolution of *amicus curiae* – or 'friend of the court' – submissions in WTO dispute settlement practice was advanced by the Appellate Body's adoption of the Additional Procedure. The WTO does not have formal procedures for non-party submissions. In the past, submissions from non-government organizations, along with local community groups and industry, have been accepted and considered only through ad hoc

determinations of the WTO's dispute settlement bodies.²⁶ The Panel's consideration of non-party submissions was based on this past practice.²⁷ The Appellate Body's Additional Procedure in this case marked the WTO's first attempt to create a formal mechanism by which non-party submissions could be received.

The Additional Procedure provided that any person other than a party or third party to the dispute could apply for leave to file a written brief by 16 November 2000. Written submissions from the appellant and non-parties were due on the same day.²⁸ Applicants for leave were required to adhere to a number of requirements, including specification of their interest in the dispute, identification of the issues of law that they proposed to address, explanation of how their submission would contribute to the resolution of the dispute in a manner that was not repetitive of the parties' submissions and confirmation that they had received no financial support from any of the parties in preparing their submission.²⁹ If leave were granted, written briefs had to be submitted 10 days later, before responses had been received from the defending and third party governments.³⁰

Although many public interest organizations agreed with the Panel's finding, they were concerned that certain legal errors in the Panel's reasoning would have broader implications if not corrected on appeal. While this case concerned a health measure and its conclusion is not binding on subsequent WTO panels, the interpretation of these provisions could be used as 'guidance' in other disputes. The findings in this dispute might also influence national regulators' decisions to protect health and the environment in the future.

It is reported that 17 applications for leave to file non-party briefs were submitted and that all were rejected.³¹ Confirmation of the applications received and the reasons for rejecting or, as the case may be, accepting

²² Panel Report, para. 8.264

²³ See *US – Gasoline*, at 14–15; *Japan – Alcoholic Beverages*, at 7.

²⁴ The international legal principle that polluters should bear the cost of their pollution is set out in Principle 16 of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, adopted at Rio de Janeiro, 14 June 1992, 31 *ILM* (1992), 874 (the 'Rio Declaration'). This principle is derived from other Principles in the Rio Declaration (e.g. Principle 7) and other international and regional instruments (e.g. 1972 OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies, C(72)128 (1972) 14 *ILM* (1975), European Communities, First Environmental Action Programme 1973–1976, OJ C 112, 20.12.1973).

²⁵ The customary international legal principle that States have a responsibility not to cause damage to the environment of other States is set out in Principle 21 of the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, 16 June 1972, 11 *ILM* (1972), 1416 and Principle 2 of the Rio Declaration.

²⁶ See e.g. *US-Shrimp* paras 106–107; *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body adopted 7 June 2000, WT/DS138/AB/R ('UK Steel'), para. 39.

²⁷ Five written submissions from asbestos victims groups and industry were received by the Panel, two of which were appended to the European Communities' submission and considered by the Panel as part of the defending party's arguments (Panel Report, para. 8.12). The Panel rejected the remaining three; two without explanation and one because it was submitted too late in the decision-making process (Panel Report, paras 8.13–14).

²⁸ Additional Procedure; Rule 21 of the *Working Procedures for Appellate Review* (WT/AB/WP/3) dated 28 February 1997.

²⁹ Additional Procedure, para. 3.

³⁰ Additional Procedure, para. 6.

³¹ 'Amicus Brief Storm Highlights WTO's Unease with External Transparency', 4 (9) *Bridges Monthly Review* (November–December 2000), 1, <http://www.ictsd.org/html/arct_sd.htm#Bridges>. Applicants for leave included asbestos victim groups, trade unions and international environmental and legal organizations.

them, is expected in the Appellate Body's report in March. Reports indicate that several non-party applicants were rejected for filing their applications after the deadline.³² Others were notified that they had failed to comply with the requirements set out in the Appellate Body's instructions, without indicating which of the requirements had not been satisfied.³³ Diverse applicants were rejected in a standardized manner. Until further explanations are provided, the Appellate Body's approach appears to be inconsistent with the WTO's past demands for due process in its dispute settlement procedures.³⁴ Organizations invited to apply for leave to submit written briefs could legitimately expect that the due process principles applied to WTO members would extend to all persons participating in the dispute settlement process. Relying on the Appellate Body's general authority to accept and take account of 'pertinent and useful' written submissions from non-parties,³⁵ some public interest organizations have challenged the rejection of their request and proceeded with submitting an *amicus curiae* brief to the Appellate Body in this case.³⁶

A week after the non-party applications for leave had been made and rejected, the WTO's governing General Council called a special meeting to discuss the Additional Procedure.³⁷ According to reports, only the United States, New Zealand and Switzerland expressed their endorsement of the Appellate Body's adoption of the Additional Procedure. Some developing country members voiced their concerns that the acceptance and consideration of submissions from non-WTO members prejudiced the rights of members. In particular, some developing country members suggested that non-party submissions would promote economic and environmental interests of industrialized countries at the expense of those of developing countries lacking resources to make *amicus* submissions.³⁸ The General

Council meeting ended with a decision to conduct consultations on the question of formal procedures for *amicus curiae* briefs and a warning to the Appellate Body to proceed with 'extreme caution' in its consideration of non-party submissions in the future.³⁹

It remains to be seen how the Appellate Body will handle *amicus* submissions in light of the edict from the WTO's governing General Council. The precise line of separation of 'judicial' and 'legislative' powers between the Appellate Body and the General Council has never been clear. The political pressure facing the Appellate Body might subdue legal development of WTO *amicus* practice in the short term and the concerns expressed by developing country members will need to be addressed for WTO *amicus* practice to progress in the future.⁴⁰ Nevertheless, civil society – particularly non-government organizations representing public interests – should be encouraged by the Appellate Body's apparent sympathy towards calls for external transparency and public participation in the WTO. With the contemporaneous deliberations on *amicus* briefs by WTO's North American cousin, NAFTA,⁴¹ there is positive momentum favouring 'friend of the court' submissions to the world's trade institutions. The sympathetic climate for *amicus* submissions has important implications for non-governmental groups promoting health and environmental protection and sustainable development in the context of international trade.

CONCLUSION

At the time of going to print, the Appellate Body's report in this case had not been issued. Although it is expected to endorse the Panel's central conclusion in upholding the French ban on asbestos, it will be interesting to see how the Appellate Body deals with the myriad of complex issues raised by the Panel's analysis. National health regulators await the Appellate Body's report, hoping it will recognize their authority to develop measures to protect their populations in a non-protectionist manner without resort to the limited exceptions under the GATT. 'Friends of the court' are also hopeful that the Appellate Body will have regard for their concerns and interests in its conclusions and recommendations in this case.

Written by: Alice Palmer, Staff Lawyer, FIELD and Jacob Werksman, Senior Lawyer, FIELD

³² Ibid. See also collection of applications and correspondence available on the International Ban Asbestos Secretariat website, <<http://www.ibas.btinternet.co.uk/>>.

³³ Ibid. Applications rejected on the basis of non-compliance with paragraph 3 included Greenpeace International, World Wide Fund for Nature, the Centre for International Environmental Law, the Foundation for International Environmental Law and Development and the Australian Centre for Environmental Law.

³⁴ For example, the Appellate Body has expressly noted that a party to a WTO appeal is 'always entitled to its full measure of due process' (*US – Shrimp*, para. 97) and that WTO members themselves are bound to administer domestic procedures in accordance with standards of basic fairness and due process (*US – Shrimp*, para. 181ff.)

³⁵ *UK Steel*, para. 39.

³⁶ Available at <<http://www.field.org.uk/papers/tepap.htm>>.

³⁷ 'WTO General Council Slaps Appellate Body on Amicus Briefs', 4:25 *Bridges Weekly Trade News Digest* (28 November 2000), available at <<http://www.ictsd.org>>.

³⁸ Ibid. See also World Trade Organization, *Decision by the Appellate Body Concerning Amicus Curiae Briefs: Statement by Uruguay at the General Council* on 22 November 2000, WT/GC/38, 4 December 2000 (Uruguay Statement); collection of applications and correspondence available on International Ban Asbestos Secretariat website, <<http://www.ibas.btinternet.co.uk>>. See also Bridges, n. 31 above.

³⁹ See Bridges, n. 37 above.

⁴⁰ See Uruguay Statement, n. 38 above.

⁴¹ In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amicus Curiae', 15 January 2001, available at <http://www.iisd.org/trade/investment_regime.htm>.