Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty

Duncan B. Hollis
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DUNCAN B. HOLLIS*

Abstract: Recent debates regarding the impact of globalization on state sovereignty have led some to conclude that globalization is eroding such sovereignty. This Article challenges that conclusion. It argues that neither the current frenzy of private actor participation in international fora nor the law-making functions of international organizations at which such activity is directed supplants state sovereignty in some zero-sum game paradigm. Examining the emergence of amicus curiae in international dispute settlement—specifically the controversy over amici participation in the WTO Asbestos case—the Article concludes that both private actor participation in international law and the exercise of law-making authorities by international organizations has occurred, and can only continue to occur, with the consent of states.

INTRODUCTION

As the title of this Symposium—Globalization and the Erosion of Sovereignty—suggests, scholars are devoting increasing attention to the relationship between globalization and the sovereignty of states.¹ Specifically, scholars debate whether globalization, in the sense of increasing transnational movement of capital, goods, people, pollution, diseases, and ideas, is eroding the sovereignty of states, which has served as the central tenet of the international legal order since the

* Attorney-Adviser for Treaty Affairs, Office of the Legal Adviser, U.S. Department of State. J.D., Boston College Law School, 1996; M.A.L.D., Fletcher School of Law & Diplomacy, 1996; A.B., Bowdoin College, 1992. The views expressed in this Article are those of the author and not those of the Department of State. The author would like to thank Professor Cynthia Lichtenstein, in whose honor the Symposium was held, for the inspiration to pursue a career in international law, and Jo Brooks, Melanie Khanna, and Bart Legum for their helpful comments on an earlier draft of this article.

¹ See, e.g., STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999) ("[A]nalysts have argued that sovereignty is being eroded by one aspect of the contemporary international system, globalization, and others that it is being sustained . . . ").
Peace of Westphalia in 1648. Proponents of this viewpoint generally cite two developments in making their case. First, they claim that sovereign states, originally defined as entities subject to no external authority or control, now increasingly find themselves subject to international regulation that has radically diminished the areas where they are free from external influence. Second, they posit that states no longer dominate the international landscape, as international organizations and private actors (e.g., multinational corporations, nongovernmental organizations (NGOs), and even individuals) exercise increasing influence in the creation, implementation, and enforcement of international norms.

Discussing the expanding role of private actors in public international law, therefore, necessarily involves a discussion of sovereignty.


3 Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law: Sovereignty: Organized Hypocrisy*, 52 Stan. L. Rev. 959, 959 (2000) (noting conventional wisdom that sovereignty in the sense of a nation’s exclusive and absolute power within its territory “appears to have diminished significantly in the past half century as a result of economic globalization, transportation and communications advances, the rise of nongovernmental organizations (NGOs), and the spread of international human rights law"); Kal Raustiala, *Sovereignty and Multilateralism*, 1 Chi. J. Int’l L. 401, 418–19 (2000) ("[W]e are increasingly choosing to regulate at the international level. . . . Sovereignty traditionally conceived will necessarily be compromised . . ."); Trimble, *supra* note 2, at 1948 ("The creation of activist international institutions necessarily entails more loss of national sovereignty . . .").

4 Steve Charnovitz, *Opening the WTO to NonGovernmental Interests*, 24 Fordham Int’l L. J. 173, 210–11 (2000) [hereinafter Charnovitz I] (noting developing country fears that NGO participation in the WTO may diminish their sovereignty, and discussing how sovereignty can be challenged by NGOs); Trimble, *supra* note 2, at 1946 ("In the past, international law concerned itself mostly with states and official intergovernmental relations. Now it increasingly concerns itself with private personae, including multinational corporations, as well as governments, and it deals with subjects that traditionally were treated as purely domestic matters."); see also Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 Am. J. Int’l L. 489, 491 (2001) (noting the proliferation of NGOs in the last decade).
The controversy surrounding the amicus curiae is no exception. In various contexts, international dispute settlement bodies are now wrestling with what role, if any, to give to private actors such as NGOs that petition to have their views on a particular case heard. To some, allowing the voices of these private interests to be heard in disputes in which they would otherwise have no standing constitutes another wave of evidence that the sovereignty of states is being eroded; that state actors are being weakened by the presence and participation of non-state actors in public international law.

By examining the case of the amicus curiae more closely, however, it becomes clear that it need not serve as further evidence of the erosion of sovereignty; to the contrary, one can view these developments as confirming sovereignty’s continuing vitality. Indeed, taking a broader view, it is not accurate to say that either the current frenzy of private actor participation in international fora or the law-making functions of international organizations at which such activity is directed supplants or erodes state sovereignty in some zero-sum game paradigm. As the case of the amicus illustrates, both private actor participation and the law-making authorities of international organizations have occurred, and can only continue to occur, with the consent of states. States remain at the epicenter of international law—their activities continue to dictate not only what the law is today, but also who determines what the law is tomorrow.

To understand this perspective, this Article first briefly examines the context in which international tribunals are permitting amicus curiae filings, including not only the amicus cases themselves, but also the broader context of private actor participation in public international law generally. This Article then explores some of the various meanings that can be attributed to the concept of sovereignty, and, relying on an international conception of the term, demonstrates how, looking at the World Trade Organization (WTO) Asbestos controversy as a case-study, states do not need to view the role of private

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5 See infra notes 71–82 and accompanying text.

6 John R. Bolton, Should We Take Global Governance Seriously, 1 CHI. J. INT’L L. 205, 217 (2000) (decrying the loss of sovereignty that can occur through the mobilization of “civil society” in international decision-making); see Charnovitz I, supra note 4, at 199–200, 210–11 (describing statists’ views that nongovernmental interests have no place in intergovernmental organization and that giving non-state actors a role in international decision making is undemocratic and a challenge to state sovereignty).
actors in public international law as a necessary devolution of their sovereignty.\(^7\)

I. AMICUS CURIAE BRIEFS

How does the concept of amicus curiae arise in international law? Basically, it becomes an issue whenever an international tribunal decides to permit one or more private actors to present to the tribunal their views on a case.\(^8\) These views are expressed in written briefs and labeled amicus curiae, literally, "friend of the court," following the Anglo-American tradition.\(^9\) Private actors, such as NGOs, industry representatives, or even individuals, seek to submit such briefs because they generally have no right to initiate an international case or intervene as a party, and the case's outcome may affect non-parties.\(^10\) Amicus briefs have been filed and accepted in disputes between states, e.g., within the WTO Dispute Settlement system, and have been considered acceptable in disputes between a state and a private actor, e.g., in NAFTA Chapter 11 Investor-State Arbitrations, as well.\(^11\)

Where does an international tribunal derive its power to permit amicus participation? One could posit, based on the practice of municipal legal systems, that such authority is afforded to all tribunals as a general principle of international law, much like the principle that

\(^7\) See infra notes 71–82 and accompanying text.

\(^8\) See Dinah Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 Am. J. Int’l L. 611, 616 (1994). Amicus briefs suggest to the tribunal matters of fact and law within the amici's knowledge, and international tribunals may take them into consideration notwithstanding the fact the amici are not able to participate in the proceedings and are not bound by its outcome. Id. at 611.


\(^10\) Shelton, supra note 8, at 612. At the same time, courts may accept amicus briefs because they can contain detailed factual or legal analysis not found in the parties’ arguments. Id. at 618.

\(^11\) See, e.g., GATT Appellate Body Report on U.S.—Imp. Prohibition of Certain Shrimp and Shrimp Prods., WT/DS58/AB/R ¶ 108 (Oct. 12, 1998), available at 1998 WL 720123 [hereinafter Shrimp Turtle Appellate Report] (finding that WTO panels have authority under the WTO Agreement to accept amicus participation at their discretion); Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae, United Parcel Serv. of Am. Inc. v. Canada, ¶ 73 (NAFTA Chap. 11 Trib., Oct. 17, 2001) [hereinafter UPS]. In the case of NAFTA, it should be noted that although two NAFTA tribunals have found authority to accept amicus briefs, to date, no actual amicus briefs have been filed and accepted by a NAFTA tribunal.
tribunals have the authority to establish their own jurisdiction.12 Indeed, amicus curiae date back to Roman law and remain a highly visible component of common law systems, most notably, in the United States.13 Even in some civil law systems where amicus participation is not explicitly recognized, one finds the functional equivalent of such a role through the broad rights of intervention made available to interested persons by courts.14

International tribunals have not, however, based their authority to permit amicus participation on a general principle of international law. Instead, they generally make a consensual justification—relying on their constituent treaty as evidence that the states creating that instrument gave them sufficient powers, either explicitly or tacitly, to permit private parties to be heard where it was deemed appropriate.

For example, at the WTO, the Appellate Body has found that both dispute panels and the Appellate Body itself have tacit authority under the WTO Dispute Settlement Understanding (DSU) to admit amicus participation.15 In the Shrimp Turtle case, the Appellate Body overruled a panel’s rejection of amicus briefs by reasoning that DSU Article 13 gives panels the discretion to accept amicus participation.16

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12 See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute]; see also Peter Malanczuk, Akehurst’s Modern Introduction to International Law 49 (7th ed. 1997) (noting how the principle that a tribunal is competent to decide whether or not it has jurisdiction in cases of doubt was borrowed from national law principles).

13 Ala‘l, supra note 9, at 84; Shelton, supra note 8, at 616.

14 See Shelton, supra note 8, at 616 ("[T]he position in France and other civil law countries is to grant broad rights of intervention. Associations and organizations concerned with the environment or human rights participate in cases as intervenors, serving the same purpose as amici in common law countries.").

15 Shrimp Turtle Appellate Report, supra note 11, ¶ 110; GATT Appellate Body Report on U.S.—Imposition of Countervailing Duties on Certain Hot Rolled Lead and Bismuth Carbon Steel Prods. Originating in the U.K., WT/DS138/AB/R ¶ 39 (May 10, 2000), available at 2000 WL 569563 [hereinafter British Steel Appellate Report]. There is no provision in the DSU for the submission of amicus curiae briefs. Understanding on Rules and Procedures Governing Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU]. The Appellate Body’s finding of tacit authority to permit amicus participation has already been subject to extensive scholarship. Ala‘l, supra note 9, at 67–84; Charnovitz 1, supra note 4, at 183–90; Andrea Kupfer Schneider, Unfriendly Actions: The Amicus Brief Battle at the WTO, 7 Widener L. Symp. J. 87, 95–101 (2001). The current analysis, therefore, is limited to discussing how the WTO’s dispute settlement system has handled the question of its authority to address amicus participation. For a discussion of WTO member states’ reactions to the dispute settlement system’s handling of the issue, see infra notes 76–82 and accompanying text.

16 Shrimp Turtle Appellate Report, supra note 11, ¶ 110. The Shrimp Turtle Panel had rejected briefs submitted by two environmental NGOs on the grounds that it lacked the
Neither Article 13 nor any other article of the DSU includes an explicit provision for the submission of amicus briefs. Nevertheless, Article 13 does provide that, "[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. . . . Panels may seek information from any relevant source and may consult experts to obtain their opinion in certain aspects of the matter."\footnote{DSU, supra note 15, art. 13.} According to the Appellate Body, Article 13 gave the Shrimp Turtle panel the authority to review or ignore any information, including NGO submissions, regardless of whether the panel had explicitly sought the information in the first place.\footnote{See Shrimp Turtle Appellate Report, supra note 11, ¶ 108 ("[A] Panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.").} A number of governments criticized the Appellate Body's decision on the grounds that it was not supported by the DSU, an outcry that crested with the Asbestos case discussed below.\footnote{Charnovitz I, supra note 4, at 185; Pruzin, supra note 16, at 1805; see also infra notes 76–82 and accompanying text.}

In the British Steel Appellate Report, the Appellate Body found that it also had discretionary authority to accept and consider amicus submissions during the appellate review process.\footnote{British Steel Appellate Report, supra note 15, ¶ 39.} Although it concluded that it would not take the particular briefs it had received into account, the Appellate Body reasoned that Article 17.9 of the DSU gave it broad discretionary authority that allowed it to accept such briefs.\footnote{Id. ¶¶ 39–42.} DSU Article 17.9 provides the Appellate Body with authority to adopt procedural rules that do not conflict with rules and proce-
dures of the DSU or the covered WTO agreements. The Appellate Body also relied on the fact that, pursuant to Article 17.9, it had established Working Procedures, including Rule 16(1), which authorized the creation of appropriate procedures when a question arises that is not covered by the Working Procedures. Thus, the Appellate Body, as it did in the Shrimp Turtle Appellate Report with respect to panel action, made a textual analysis of its constitutive document, the DSU, to find implied authority to permit amicus participation.

Such a textual analysis of the amicus question by tribunals is not limited to the WTO. NAFTA Chapter 11 investor-state arbitral tribunals have engaged in similar reasoning. In an October 17, 2001, arbitral decision, United Parcel Services of America, Inc. v. Canada, a NAFTA Tribunal confirmed its power to permit amicus briefs on the grounds that NAFTA's dispute settlement provisions, NAFTA Article 1120, authorized the Tribunal to proceed on the basis of the UNCITRAL Arbitration Rules. The Tribunal found that Article 15(1) of UNCITRAL's rules, in turn, tacitly gave it authority to accept amicus briefs since it authorized the Tribunal to "conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting his case." The Tribunal concluded that its authority to accept amicus briefs was appropriate so long as such participation did not affect the rights of the disputing parties.

The UPS decision reached the same conclusions as an earlier NAFTA Chapter 11 decision, Methanex Corp. v. United States, which also invoked UNCITRAL Article 15(1) as the implied basis for amici participation. In both cases, the tribunals supported their reliance on

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22 DSU, supra note 15, art. 17.9.
26 UPS, supra note 11, ¶ 61. In so ruling, the Tribunal noted that amicus participation was consistent with NAFTA itself as nothing in allowing amicus briefs contravened the right of NAFTA parties to intervene in a case, or the ability of the Tribunal to seek independent expert advice on specialized factual matters, both of which were authorities explicitly provided by NAFTA Articles 1128 and 1133. Id. ¶ 62.
27 Methanex Corp. v. United States, 16 MEALEY's INT'L ARB. REP. D-1, ¶ 5 (NAFTA Ch. 11 Trib., Jan. 15, 2001) [hereinafter Methanex]. The Tribunal saw its ability to accept ami-
Article 15(1) by noting that the U.S.-Iran Claims Tribunal had rendered the same result in Case A/15. They contrasted such findings with the practice of the International Court of Justice (ICJ) of not accepting participation by anyone other than states, and in certain cases, public international organizations, because the ICJ Statute itself so limited the court's authority. Finally, both tribunals declined to consider as decisive the existence of amicus rules in the domestic laws of two of the NAFTA parties in favor of a tacit textual analysis of UN-CITRAL Article 15(1).

The approach by international tribunals to private participation in these cases—i.e., looking to their own authorities to find an explicit, or in most cases, a tacit grant of authority to allow amici participation—is not limited to the trade context. As Professor Shelton detailed in 1994, other tribunals, notably the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights are all examples where, with explicit or tacit authorization, international tribunals have permitted private actors to serve an amicus function. To this list, one might soon add the International Criminal Court (ICC); Rule 103 of the draft ICC Rules of Procedure provides that the ICC may, if it deems it desirable, "[a]t any stage of the proceedings . . . invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."

See {id. ¶ 32; UPS, supra note 11, ¶ 64 (citing Iran v. United States, Case A/15, 2 Iran-U.S. Cl. Trib. Rep. 40, 43, where foreign banks were able to submit their own memoranda to the Tribunal). Moreover, the NAFTA Tribunals noted that Article 15(1) was worded more broadly than the language on which the British Steel Appellate Repart had relied in finding a discretionary authority to accept WTO amici participation. See Methanex, supra note 27, ¶ 33.

Methanex, supra note 27, ¶ 34 (citing ICJ Statute, supra note 12, arts. 34, 35, 61–64); UPS, supra note 11, ¶ 64. But see Shelton, supra note 8, at 623–24 (noting that the ICJ did accept one amicus brief from an NGO in the 1950 South-West Africa advisory proceeding, but rejected the same NGO's request to submit a brief in the contentious 1950 Asylum case).

Methanex, supra note 27, ¶ 47; UPS, supra note 11, ¶ 65.

Shelton, supra note 8, at 629, 631–32, 638.

Thus, the so-called case of the amicus, which, as discussed below, has recently been so controversial at the WTO, is, with the notable exception of the ICJ, a relatively widespread phenomenon in modern international dispute settlements. It is, however, a phenomenon that has emerged with the consent of states, not in spite of them. Even where the participation is limited to an amicus role, international tribunals have looked to their constitutive instruments to determine whether the states that created those instruments either expressly or tacitly authorized them to involve private actors in the proceedings.

II. PRIVATE ACTORS AND THE INTERNATIONAL LEGAL ORDER

The limited participation by private actors as amici in international dispute settlement is consistent with the practice of private actor participation in international law generally, most notably NGOs. Although states and, to a lesser extent, public international organizations create, implement, and enforce international law, private actors play some role in that process.\textsuperscript{35} Looking at the activities of individuals, and more specifically NGOs, one finds evidence of an influence both in the formation and the application of international law, albeit one that is qualitatively and quantitatively less than that of states and international organizations.\textsuperscript{34}

Private actors engage in the formation of international law in various ways. They can, at the request of a government, serve on national delegations to conferences that negotiate and adopt treaties. For example, the U.S. delegation to the conference that negotiated

\textsuperscript{35} Whether individuals, and thus NGOs, are formally considered subjects of international law is a debate this Article does not address. See Ian Brownlie, 	extit{Principles of Public International Law} 605 (5th ed. 1998) ("[C]ontroversy as to whether the individual is a subject of law is not always very fruitful in practical terms, and the issue is always viewed with the idea of proving that he is a subject \textit{vel non}. He probably is \textit{in particular contexts} . . . ."); L. Oppenheim, \textit{I International Law} 639 (H. Lauterpacht ed., 8th ed. 1955) ("[F]act that individuals are normally the object of International Law does not mean that they are not, in certain cases, the direct subjects thereof"); Alexander Orakhelashvili, \textit{The Position of the Individual in International Law}, 31 \textit{Cal. W. Int'l L.J.} 241, 252 (2001) ("[T]he distinction between the nature of legal capacity of State and international organizations on the one hand, and individuals on the other, is apparent. The individual does not have any legal capacity under general international law."). Without prejudice to that debate, the current study examines the role individuals and NGOs have in the formation and application of international law, not with a view to establishing their own place in the international legal order, but rather examining the impact such activities have on the principal actor in that order—the sovereign state.

the 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean included representatives not only from the U.S. Department of State and other federal agencies, but representatives from environmental NGOs and the U.S. fishing industry as well.⁵⁵ Although such participation is controlled by the national government, in the case of the International Labor Organization (ILO) national delegations include private representatives who are able to act independently of their governments.⁶⁶

Where states have agreed to open negotiations, NGOs and other private actors have also come to play a significant independent role as observers in conferences to negotiate various multilateral treaties. Although they generally do not have a role in the formal negotiations or the treaty's final adoption, as observers, NGOs and other private actors may speak before the conference, make proposals, and substantially influence the negotiation's outcome.⁵⁷ For example, NGOs played a significant role in drafting the U.N. Convention on the Rights of the Child.⁶⁸ More recently, 236 NGOs participated in the conference that negotiated the Rome Treaty, playing a widely acknowledged role in bringing the states to agreement.⁶⁹ Similar NGO involvement has also been recorded in climate change negotiations.⁷⁰ Thus, although it may not always be formal, and is certainly not uni-

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⁵⁵ NGOs represented on the U.S. delegation included the World Wildlife Fund and the Audubon Society, while the U.S. fishing industry was represented by the U.S. Tuna Foundation, the American Fishermen's Research Foundation, and the Western Fishboat Owner's Association.

⁶⁶ The Constitution of the ILO provides that each member state has four delegates to the organization—two from the state's government, one representing the employers in the state, and one representing workers in the state—each of whom votes individually. See INT'L LABOUR ORG. CONST., as amended, arts. 3.1, 4.1, available at http://www.ilo.org/public/english/about/iloconst.htm (last visited Mar. 8, 2002).

⁵⁷ See, e.g., Charnovitz II, supra note 34, at 281. Although the general rule is that NGOs have no negotiating role, in some rare cases NGOs have participated and signed the final act at an official conference to draft a treaty, as was the case with the International Chamber of Commerce at the League of Nation's Conference on Customs Formalities. Id.


⁷⁰ See, e.g., Edith Brown Weiss, The Rise or the Fall of International Law?, 69 FORDHAM L. REV. 345, 350 (2000) (recalling that at the negotiations for the Framework Convention on Climate Change and the Kyoto Protocol NGOs distributed information, prepared agreed positions on issues, and developed a draft text of the Convention as an advocate to governments).
versal, the role of NGOs and other private actors in influencing the norms adopted in various multilateral negotiations is undeniable.

Limited private actor participation in the formation of international law is replicated in its application. Just as they act as observers at treaty negotiations, NGOs may be permitted to occupy a more permanent role as observers to various public international organizations.\textsuperscript{41} Thus, the U.N. Economic and Social Council (ECOSOC) currently maintains a registry of 2091 NGOs that are eligible to engage in certain limited and defined actions before the ECOSOC.\textsuperscript{42} NGOs can also act as advocates, making presentations to states favoring the adoption of a particular interpretation of international law. Although recognized as a \textit{sui generis} NGO given its status under the four 1949 Geneva Conventions and the 1977 Additional Protocols, the International Committee of the Red Cross (ICRC) has a long history of playing a role in monitoring how states apply international humanitarian

\textsuperscript{41} See Henry G. Schermers \& Niels M. Blokker, \textit{International Institutional Law} 126–28 (3d ed. 1995). The Council of Europe currently recognizes 423 NGOs as having consultative status, who not only meet independently but also select twenty-five NGOs to act as liaisons with the Council itself. \textit{See id.} at 133; Liaison Committee of the Non-Governmental Organizations Enjoying Consultative Status with the Council of Europe, \textit{Report of 2001 Plenary Conference of NGOs} (Jan. 23, 2001), available at http://www.ngo.coe.int/English%20Site/Plenary_Conference/reports.htm (last visited Mar. 8, 2002). In the case of the World Tourist Organization, there is a category of affiliate membership, open to NGOs, commercial bodies, and associations, from which three are selected as observers to the Organization’s Congress and one selected as an observer to its Board. \textit{See Schermers \& Blokker, supra,} at 118-19; World Tourism Organization, \textit{About WTO,} at http://www.world-tourism.org//aboutwto/aboutwto.html (last visited Mar. 4, 2002). Such participation is not limited to NGOs; several private companies serve as members of the Consultative Committees of the International Telecommunications Union, enjoying all the privileges of membership except the right to vote in plenary meetings when their state is also represented. \textit{Schermers \& Blokker, supra,} at 133–34.

\textsuperscript{42} For a list of the registry, see U.N. Economic \& Social Council Non-Governmental Organizations Section, \textit{Economic and Social Council Non-Governmental Organizations,} at http://www.un.org/esa/coordination/ngo (last visited Mar. 8, 2002) (listing 2091 NGOs in consultative status with ECOSOC). Article 71 of the U.N. Charter provides that ECOSOC may “make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” U.N. Charter art. 71. These NGOs are subdivided into three categories—those concerned with most of the activities of the ECOSOC (Category I), those concerned with only a few fields of activities covered by ECOSOC (Category II), and those not closely related to the work of ECOSOC but of sufficient importance to be related in some way to the U.N. (Organizations on the Roster). \textit{See Schermers \& Blokker, supra note 41,} at 130. ECOSOC consults with all these organizations through a Committee on Non-Governmental Organizations made up of nineteen government representatives. Although the results have been very limited in practice, Category I \& II organizations are permitted to submit limited written statements, and in a few circumstances, speak in the ECOSOC, while Organizations on the Roster may only submit written statements at the request of the Secretary General. \textit{See id.} at 131.
NGOs also publish reports analyzing how states are meeting their international legal obligations, most often in the human rights context. In certain situations, private actors may petition states or international organizations directly about whether particular acts conform to international law. For example, in a side agreement to NAFTA—the North American Agreement on Environmental Cooperation—Canada, Mexico, and the United States authorized private parties to submit allegations that any one of the three states had failed to enforce its environmental laws effectively. At the World Bank, NGOs or groups of individuals may request an Inspection Panel to investigate claims of injury arising out of an act or omission of the Bank resulting from its failure to follow operational policies and procedures with respect to the design, appraisal, and/or implementation of a Bank project.

Private parties may even participate directly with states in reviewing the implementation of an international agreement. The 1998 Agreement on the International Dolphin Conservation Program provides for an International Review Panel (IRP), made up not only of representatives of the parties, but also three representatives from ex-
experienced environmental NGOs and three representatives from the affected tuna industry. IRP responsibilities include, *inter alia*, analysis of reports submitted to the IRP regarding fishing by vessels covered by the Agreement, identification of possible infractions of the Agreement, and coordination with the party whose flag the vessel flies of possible infractions and any enforcement actions taken with respect to that vessel.

Moreover, it is a mistake to assume that these examples of private actor participation in the international legal order reflect an entirely new phenomenon. As Steve Charnovitz's enlightening article, *Two Centuries of NGO Participation in International Governance*, articulates, NGO participation in international affairs is a well-established practice that has at various periods in the past exercised an influence on international law. For example, numerous peace societies at the Hague Peace Conferences in 1899 and 1907 engaged in lobbying and mass publicity much like modern-day NGO activities at multilateral treaty negotiations. Thus, although one can consider the current level of private actor activity in the international legal order to be at a high-water mark, it is not without precedent. As with amici, moreover, such participation has occurred because states have consented to NGOs and others playing a role in particular fora or processes engaged in the formation and implementation of international law.

### III. Sovereignty Reconsidered

Thus, looking at the scope of existing private actor participation in international law from both the perspective of the amicus curiae and the more general practice of NGOs, the debate is not whether private actors should participate in international law at all, but the extent to which they should participate. It is the increased participation of private actors in the international legal order, together with a more vigorous role for international organizations, that has, in turn, led to claims that the role of the state in that order is eroding; i.e., that private actor participation diminishes the sovereignty of states.

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48 *Id.* Annex VII(1).

49 Charnovitz II, *supra* note 34, at 185.

50 *Id.* at 196–97.
Such claims do not, however, withstand scrutiny if one examines the concept of sovereignty more closely.

The term sovereignty has always been susceptible to various meanings. As originally expressed in the works of Machiavelli, Bodin, and Hobbes, it served as an attempt to localize a single supreme legislative and political authority within the internal structure of a polity. As a corollary to this theory, the term sovereignty came to describe not only the relationship between a supreme authority and its subjects within a state, but also the relationship of that authority with other states. Simply put, sovereignty could be considered a form of absolute domestic jurisdiction—the exclusion of external actors from domestic authority structures within a given territory.

It is this domestic jurisdiction concept of sovereignty that many argue is subject to erosion at the hands of globalization, the increasing power of international organizations, and the expanding role of private actors in international law. That perspective has an obvious appeal. There is no doubt that international law recognizes fewer topics today as within the reserved domain of states' respective domestic jurisdictions. Topics such as monetary policy, human rights, and environmental protection, which were all previously considered within the sole purview of individual state actors to address as they sought fit within their borders, are now all recognized as appropriate subjects for international regulation by agreement among states.

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51 See Raustiala, supra note 3, at 401.
52 Malanczuk, supra note 12, at 17; Krasner, supra note 1, at 11. It is worth noting that theorists such as Locke, Mill, and Marx have all challenged this approach as not necessarily reflecting the divisions of authority that exist within most states. Krasner, supra note 1, at 11.
53 Malanczuk, supra note 12, at 17.
54 See Krasner, supra note 1, at 3–4; see also Goldsmith, supra note 3, at 967 (noting that the traditional conception of sovereignty reflected the right of a state to determine its own Constitution, its own commercial policies, and to treat its subjects according to its discretion). Krasner notes that this concept of sovereignty is often called Westphalian sovereignty, although the principle that it reflects “had virtually nothing to do with the Peace of Westphalia.” Krasner, supra note 1, at 20. Accordingly, that term is not used herein.
55 See supra notes 2–4 and accompanying text.
56 Jayasuriya, supra note 2, at 428 (“[E]xtensive international effort to regulate environmental, health, weapons and even human rights standards bears witness to this trend toward international regulation . . . .”); Trimble, supra note 2, at 1946 (providing that international law now “deals with subjects that traditionally were treated as purely domestic matters”).
57 Schermers & Blokker, supra note 41, at 4 (“The present substance of international law includes a number of issues that previously belonged to the exclusive jurisdiction of states. Trade and monetary policy, social policy, human rights, environment protection are some striking examples.”).
Ultimately, however, as Stephen Kramer argues in *Sovereignty: Organized Hypocrisy*, it is a fallacy to say that there ever was such a system of sovereign states, each having absolute domestic jurisdiction over its territory to the exclusion of all other states.\(^5\) To the contrary, states have always been subject to external normative influences. The Peace of Westphalia, most often cited as the source of the notion of sovereign states operating within their domestic jurisdictions free from the influence of outside actors, itself included derogations from this principle.\(^5\) The Treaty of Osnabrück contained conditions by which the parties agreed to allow religious minorities under their respective jurisdictions freedom of religion.\(^6\) The reality of state interaction further belies the notion that states have ever been free from external interference. The Gunboat Diplomacy of the 19th century serves as a stark example of how the domestic jurisdiction theory of sovereignty reflected a theoretical construct more than a practical reality.\(^6\)

Such difficulties in lining up the absolute domestic jurisdiction theory of sovereignty with actual state practice make it worthwhile to examine alternative conceptions of sovereignty. Among these, one stands out—international sovereignty—as more accurately reflecting the reality of state behavior on the international plane.\(^6\) International sovereignty conceives of sovereignty not in terms of domestic jurisdiction, but in terms of status in the international community.\(^6\) It is most often characterized in terms of membership in a community of equally sovereign states, but it perhaps can be better understood

\(^{58}\) Krasner, *supra* note 1, at 24–25; see also Schermers & Blokker, *supra* note 41, at 2 (noting the tension between formal independence, or sovereignty, of states and their actual interdependence).

\(^{59}\) See Krasner, *supra* note 1, at 73, 75.

\(^{60}\) Gross, *supra* note 2, at 5. Similar protections for both religious and ethnic rights can be found in treaties throughout the 17th, 18th, and 19th centuries. *Id.* at 5–7; Goldsmith, *supra* note 3, at 968.

\(^{61}\) See Krasner, *supra* note 1, at 128.

\(^{62}\) See *id.* at 14–20 (distinguishing international legal sovereignty from three other types of sovereignty—Westphalian, domestic, and interdependent); Chayes & Chayes, *The New Sovereignty* 27 (1995) ("Sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life."). Krasner also critiques international sovereignty, finding that it too has been subject to breach, i.e., states recognizing non-state actors as states or refusing to recognize entities that otherwise qualify as states, but later notes that the tension between the rule and actual practice is less severe than the case of the absolute domestic jurisdiction theory of sovereignty. See Krasner, *supra* note 1, at 25.

through association with the concept of international legal personality—the capacity to exercise rights and duties in the international legal order. Specifically, states having international sovereignty have the general capacity to operate internationally. They can, *inter alia*, make international claims, participate in international adjudications, and engage in both the formation and application of international law through treaties and/or custom.

It is this concept of international sovereignty—the notion of states having international legal personality—that is reinforced rather than eroded by recent examples of private actor participation and international institutional law-making. As Schermers and Blokker emphasize in their classic treatise, *International Institutional Law*, "[t]he fact that during the twentieth century public international law has imposed substantial limitations upon the freedom of states does not take away their legal status as sovereign entities as long as the essence of state functions are retained."

Indeed, if private actor participation or international institutional law-making were eroding a state's international sovereignty, then presumably their views and their consent would matter less. One would no longer be able to say that the general consent of states creates rules of general application. One would no longer need to see if states accept the legitimacy of international organization activities or the participation of private actors in the formation or application of international law.

The truth, however, is that no such state of affairs exists. The general consent of states creating rules of general application remains the operating principle of the international legal order. By treaty or by practice, it is states whose conduct determines the rules of international law. What has changed is that states have opened the door to allow others some limited level of international sovereignty. Modern states recognize the ability of other actors to have rights and duties on the international plane, a status that, while certainly not equal to states, is sufficient for those actors to participate in the formation, implementation, and even the enforcement of international law. Public international organizations have had such a status for some time

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64 Brownlie, *supra* note 33, at 57–58 (defining a legal person as “an entity of a type recognized by customary international law as capable of possessing rights and duties and of bringing international claims, and having these capacities conferred upon it”).

65 See id. at 57.


67 See Brownlie, *supra* note 33, at 2.
now.68 Private actors are now seeking to gain, or in some cases reestablish,69 recognition of their own limited international sovereignty.

IV. EXERCISING SOVEREIGNTY IN THE WTO ASBESTOS CONTROVERSY

It would be a mistake to see this situation as a zero-sum game—the notion that new subjects of international law mean that the old subjects, states, lose their status or have it eroded in some way. They have not. Indeed, the controversy over amicus participation in the Asbestos case serves as a prime example of the continuing vitality of the international sovereignty of states in the very context, i.e., the WTO, that so many allege is leading to sovereignty’s erosion.70

In the Asbestos case, the Appellate Body, relying on the fact that the underlying panel had received five amicus submissions (of which two were taken into account), adopted rules for how it would process amicus submissions, which were subsequently posted on the WTO website.71 This represented a departure from its prior practice of accepting amicus briefs only when they either were attached to the parties’ briefs or were unsolicited.72 The Appellate Body justified the move on the same bases it had previously cited for amicus participation—Article 17.9 of the DSU and Rule 16(1) of its Working Procedures.73 In the procedures themselves, the Appellate Body required NGOs wishing to submit an amicus brief to apply for leave in advance by showing, inter alia, how “the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has already been submitted by a party or third party to this dispute.”74 The Appellate Body received eleven timely applications (and six untimely ones) from environmental NGOs, victims rights groups, the

68 Id. at 57–58, 678–81.
69 Charnovitz II, supra note 34, at 286 (“Before the League of Nations, there were few international organizations built by diplomats without advance work by NGOs and visionary individuals. The League provided for NGO involvement in its early years, but then NGOs were squeezed out in favor of routinized governmental interaction. . . . The decade of the 1990s has provided new opportunities for NGO participation.”).
71 Id. ¶¶ 50–51.
72 See Pruzin, supra note 16, at 1805.
73 Asbestos Appellate Report, supra note 70, ¶¶ 50–51; see supra note 23 and accompanying text.
74 Asbestos Appellate Report, supra note 70, ¶ 52(3)(f).
chemical trade industry, professional health societies, and academics.\textsuperscript{75}

At Egypt's request, the WTO General Council held a special session on November 22, 2000 to discuss the Appellate Body's procedures.\textsuperscript{76} With the exception of the United States, which took the view that the Appellate Body had the authority under the DSU to allow amicus participation and, therefore, the authority to adopt procedures governing such participation, WTO member delegations were highly critical of the Appellate Body's actions.\textsuperscript{77} Two arguments in particular dominated the session. First, the majority of delegations took the view that the Appellate Body's adoption of rules of procedure for amicus participation went beyond its authorities under the DSU.\textsuperscript{78} Second, a large number of delegations made the point that the issue of non-state actor participation in an intergovernmental organization such as the WTO was a matter for the members to settle, not the dispute settlement system.\textsuperscript{79} As one delegation emphasized,

\textsuperscript{75} See id. \textsuperscript{1} 55-57.

\textsuperscript{76} For a detailed account of the WTO Minutes, see WTO General Council, Minutes of WTO General Council Meeting, WT/GC/M/60 (Nov. 22, 2000), available at http://www.wto.org/english/tratop_e/wtocom_e/wtocom_e.htm (last visited Mar. 8, 2002) [hereinafter General Council Minutes].

\textsuperscript{77} See id. \textsuperscript{1} 74-77 (expressing the views of the United States). None of the other twenty-eight member delegations that took the floor at the General Council Meeting endorsed the Appellate Body's approach. Although a number of states appeared willing to concede that amicus participation before dispute settlement panels was less controversial, only three states—the United States, New Zealand, and Japan—indicated support for the Appellate Body's earlier ad hoc acceptance of amicus briefs. See id. \textsuperscript{1} 76, 87, 111; see also id. \textsuperscript{1} 15, 25, 63, 79, 98, 102 (expressing the views of Egypt, Hong Kong, Switzerland, Turkey, Chile, and Panama noting the differing authorities of panels and the appellate body with respect to non-party participation).

\textsuperscript{78} See id. \textsuperscript{1} 6, 10-12, 39, 42, 50, 54, 63, 70, 78, 79, 89, 93, 97, 98, 106, 112 (expressing the views of Uruguay, Egypt, India, Brazil, Mexico, Columbia, Switzerland, Costa Rica, Bolivia, Turkey, Jamaica, Argentina, Cuba, Chile, Tanzania, and Japan that the Appellate Body's procedural rules for amicus participation in the Asbestos case went beyond its mandate). It should be noted that a number of states at the session (e.g., Egypt, Columbia, and Singapore) spoke as representatives of groups of states (e.g., the Informal Group of Developing Countries, ANDEAN, ASEAN, etc.).

\textsuperscript{79} See General Council Minutes, supra note 76, \textsuperscript{1} 9, 15, 22, 38, 52, 55, 58, 61, 64, 69, 73, 81, 83, 87, 96, 105, 107 (views of Uruguay, Egypt, Hong Kong, India, Mexico, Columbia, Zimbabwe, Singapore, Switzerland, Norway, Canada, Turkey, Hungary, New Zealand, European Communities, Australia, and Tanzania that issue of amicus participation was responsibility of WTO members to resolve). Delegations also complained that allowing rules on amicus participation granted procedural rights beyond those available to WTO members who were not parties or third parties to an Appellate Body proceeding. See id. \textsuperscript{1} 7 (expressing the views of Uruguay). Others pointed out that the issue of amicus participation had been raised during the negotiation of the DSU and not adopted. See id. \textsuperscript{1} 50 (expressing the views of Mexico).
the General Council, not the Appellate Body, has authority under Article V(2) of the WTO Agreement to “make arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.” As a result of the meeting, the Chair concluded that “the Appellate Body should exercise extreme caution in future cases until Members had considered what rules were needed.” The Appellate Body subsequently rejected all of the requests for leave to file amicus briefs “for failure to comply sufficiently with all the requirements” set out in the Appellate Body’s procedures.

As noted above, amicus cases typically involve dispute settlement organs of an international organization, which themselves possess limited international sovereignty, trying to determine whether they have authority to open the door to the international plane to other non-state actors. In most cases, they find the tacit, and in a few cases explicit, authority to do so in their constitutive instruments. That these organs would exercise independent authority to assess their own powers is not unexpected. After all, the states that established these bodies consented to the bodies making legal rulings that would bind the states themselves. In doing so, however, states were not removing themselves from the equation entirely. State consent is not only an initial prerequisite to a dispute settlement body’s exercise of its authorities, but as the Asbestos controversy demonstrates, an ongoing requirement. States must remain confident in the dispute settlement system’s exercise of the authorities those states granted it for the system to have continued legitimacy.

From the Appellate Body’s perspective, indeed from the perspective of the United States, opening the door to limited private actor participation in WTO dispute settlement through amicus briefs fell well within the Appellate Body’s power. And, if it had such a power, it

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80 See id. ¶ 6 (expressing the views of Uruguay); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].
81 General Council Minutes, supra note 76, ¶ 120.
82 Asbestos Appellate Report, supra note 70, ¶ 56.
83 See supra notes 8–32 and accompanying texts.
84 General Council Minutes, supra note 76, ¶ 65 (providing that Pakistan notes importance of Members retaining confidence in the dispute settlement system); id. ¶ 107 (setting forth Tanzania’s statement that, “The General Council had the authority to interpret the WTO Agreements . . . the will of Members should prevail [on allowing amicus participation] and that no other body, even the Appellate Body could claim what Members had not intended to give it.”).
would follow that it would have the power to lay down rules on how it should exercise that power. The hostile reaction of WTO member states to that last step of laying down rules, however, showed that such an interpretation of the Body's procedural authorities went too far for most WTO members.

Although the WTO General Council recognized that the Appellate Body does have certain procedural powers in conducting proceedings, the prevailing view appears to be that laying down rules for NGO participation in the proceedings is not one of them. According to the WTO General Council, they, not the Appellate Body, would determine the relationship between the WTO and NGOs, and that in the meantime, the Appellate Body should exercise extreme caution. One cannot know definitively if this message motivated the Asbestos Appellate Body to reject all of the amicus briefs submitted to it, but it would not seem to be a far-fetched assumption. Moreover, as its subsequent practice already confirms, the Appellate Body will need to interpret its own procedural authorities in the future by taking into account the interpretations of such authorities by the members that granted them.

This is not to suggest that the Asbestos controversy stands for the rejection of private party participation in the international legal order—far from it. Rather, it stands for the principle that states will continue to determine who may participate in that order. In some cases, states have delegated that determination to international organizations, either tacitly or explicitly, and the amicus practice of many international tribunals reflects part of the outcome of that delegation. At the same time, the Asbestos controversy demonstrates that there will be other situations where states (and other entities possessing interna-

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85 See id. ¶ 73 (expressing Canadian views noting that issues surrounding amicus participation "could not be characterized as exclusively procedural").

86 See id. ¶¶ 119–20 (providing a statement of the General Council Chairman summarizing views expressed during the Special Session).

87 Most recently in a second Shrimp Turtle Appellate Body case, the Appellate Body received two amicus briefs (one of which was sent directly to the Appellate Body and attached to the brief of the United States). In neither case did the Appellate Body take the views expressed into consideration. Indeed, in the case of the brief that the United States attached to its own pleadings, the Appellate Body, upon learning that the United States regarded them as independent views, focused its attention only on the legal arguments in the U.S. submission. GATT Appellate Body Report on U.S.–Imp. Prohibition of Certain Shrimp and Shrimp Prods., WT/DS58/AB/RW ¶¶ 76–78 (Oct. 22, 2001).
tional sovereignty) reserve the right to make that determination on their own.88

CONCLUSION

When debating globalization, it is important to recognize that, although it may be fair to say that it has eroded sovereignty in the sense of absolute domestic jurisdiction vis-à-vis an earlier time, the international sovereignty of states remains fundamentally unchanged. The international legal personality of states is untrammeled. States not only continue to have the authority to create, implement, and enforce international law, they also have the authority to determine who else may participate in that process.

The debate over globalization may make the case that the international legal order needs to hear new voices, and it appears that existing actors in that order, not only international organizations but the states themselves, are seeking to accommodate the views of private actors like NGOs. One way they have done this is through the amicus curiae. Through this practice, international tribunals may listen to the views from NGOs and other private actors without giving them a formal role as parties in international proceedings. As the Asbestos controversy demonstrates, however, in listening to such new voices, international organizations and their tribunals should not, and indeed, cannot drown out the old voices that created them.

International law remains both the subject and master of states. It may be true that the international legal order will have to address questions regarding its legitimacy raised by NGOs and other private actors. At the same time, however, in addressing those concerns, in admitting or expanding roles for private actors in public international law, one cannot lose sight of the need to ensure that the system maintains its legitimacy with respect to its existing actors—states.

88 WTO membership, for example, is not limited to states. A number of non-state actors are WTO members, e.g., Hong Kong and the European Communities, having the same rights and duties under the WTO Agreement as states, although the EC does not have a vote separate from and in addition to its Member states. See WTO Agreement, supra note 80, arts. IX, XII, XIV.