

PARTICIPATION OF NONGOVERNMENTAL ORGANIZATIONS IN THE WORLD TRADE ORGANIZATION

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1. INTRODUCTION

Nongovernmental organizations (“NGO”s)¹ should be given opportunities to participate in the work of the World Trade Organization (“WTO”).² Such opportunities need not be unbounded; they can be structured carefully to maximize the benefits of NGO participation and to minimize any ensuing costs.³ But it is important that the WTO abandon the insularity and secrecy that characterized its predecessor, the General Agreement on Tariffs and Trade (“GATT”).⁴ Eliminating the most resilient and restrictive barriers to trade will require popular approval. Thus, it is vital for the public to understand the aims of the WTO and to develop trust in that organization.

The issue of public participation in the GATT did not

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¹ As used here, the term “NGO” includes all nongovernment organizations, including business groups.

² According to the Marrakesh Agreement Establishing the World Trade Organization, the General Council of the WTO “may make appropriate arrangements for consultation and cooperation with non-governmental organizations” GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, art. V(2), Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125, 1146 (1994) [hereinafter Final Act].

³ See JAMES CAMERON & ROSS RAMSAY, PARTICIPATION BY NON-GOVERNMENTAL ORGANISATIONS IN THE WORLD TRADE ORGANISATION 29-37 (Global Environment and Trade Study No. 1, 1995) (on file with author) (recommending measures that should be introduced to enhance participation by NGOs in the activities of the WTO).

⁴ For the most current version of the GATT Agreement, see GATT, TEXT OF THE GENERAL AGREEMENT (1986). For the original version of the GATT Agreement, see The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

originate in the "trade and environment" debate.⁵ In fact, a primary U.S. objective in the Tokyo Round⁶ was "the adoption of international fair labor standards and of public petition and confrontation procedures in the GATT."⁷ That objective was never achieved. Fifteen years later, when the issue of public participation arose again, some environmental NGOs cleverly borrowed the term "transparency," a word which at that time in GATT circles referred to the trade laws and practices of each country. The NGOs reasoned that if transparency was an appropriate norm at the national level, it was also appropriate at the international level.⁸ In calling for more transparency, the NGOs challenged the GATT to live up to its own principles by increasing the flow of information to and from the public.⁹

These efforts towards transparency, initiated by NGOs, stimulated governmental pressure within the GATT and resulted in several advances toward openness. For instance, the GATT,

⁵ For background on the "trade and environment" debate, and a specific discussion of public participation in the GATT, see DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 211-15 (1994).

⁶ The "Tokyo Round" refers to the 7th round of multilateral trade negotiations under the auspices of the GATT. Ninety-nine countries participated in the Tokyo Round, which began in 1973 and ended in 1979. See JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 324-25 (2d ed. 1986). For a detailed discussion on the results of the Tokyo Round, see GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* (1986).

⁷ Trade Act of 1974, Pub. L. No. 93-618, § 121(a)(4), 88 Stat. 1986, 1986 (1974) (repealed 1988). The United States remains committed to openness in trade policy actions under the GATT. See Uruguay Round Agreements Act, 19 U.S.C. § 3536 (1994) ("The Trade Representative shall seek the adoption . . . of procedures that will ensure broader application of the principle of transparency . . .").

⁸ See Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1285-86, 1296-98 (1992) (discussing the secrecy surrounding the GATT dispute settlement procedure and identifying the need for a neutral forum to resolve trade disputes with participation by both government officials and NGOs).

⁹ See TRADE AND ENVIRONMENT COMMITTEE, NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, *THE GREENING OF WORLD TRADE* 18 (1993) (suggesting ways by which the U.S. Government can provide greater transparency of and participation in GATT policymaking and dispute settlement).

and now the WTO, release Secretariat-drafted studies sooner;¹⁰ the Secretariat staff holds informal consultations with NGOs;¹¹ the new WTO dispute settlement rules permit governments to publicly disclose a statement of the positions it is taking in a pending dispute;¹² and the WTO recently joined the World Wide Web.¹³

Yet in many other ways, the WTO remains as distant from the public as the GATT was. Dispute settlement panels continue to hold closed sessions;¹⁴ the WTO will not release basic biographical information about panelists that would be useful in assessing qualifications or potential conflicts of interest;¹⁵ panel reports are not released to the public until after a report is

¹⁰ See Trade and Environment: Group on Environmental Measures and International Trade Progress report, Dec. 17, 1993, GATT BISD 40th Supp. 75, 98 (noting the Council's agreement that an accompanying list of documents be derestricted).

¹¹ See Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, in 5 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1, 14 (1994) ("Very recently the GATT/WTO system has gingerly begun consultations with environmental groups . . .").

¹² See Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act, *supra* note 2, pt.2, Annex 2, art. 18(2), *reprinted in* 33 I.L.M. 1226, 1237 (1994) ("Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public.") [hereinafter Understanding].

¹³ Announcing that "the WTO must make itself well understood and truly accessible," WTO Director-General Renato Ruggiero launched a WTO World Wide Web information service on September 26, 1995. *WTO Information Service on the Internet*, FOCUS: WTO NEWSLETTER, Aug.-Sept. 1995, at 12. The WTO's World Wide Web server address is <http://www.unicc.org/wto> and internet enquiries can be sent to webmaster@wto.org. See *id.* The WTO server "will be updated regularly and its information base progressively expanded." *Id.*

¹⁴ See Understanding, *supra* note 12, art. 14, 33 I.L.M. at 1235. It is interesting to note that in March 1993, the USTR — following a previous court order — publicly released a copy of the legal brief it had submitted to the Second GATT tuna-dolphin panel. The Netherlands, one of the co-plaintiffs in that case, complained to the panel that the USTR action was a breach of GATT rules. See Letter from J.F. Boddens Hosang, Ambassador of the Kingdom of the Netherlands, to George Maciel, Chairman of the Panel on United States Restrictions on Imports of Tuna (May 11, 1993) (on file with author).

¹⁵ See Letter from Chloe Chapman, Information Division of the World Trade Organization, to Steve Charnovitz (Jan. 30, 1996) (on file with author) ("Unfortunately, the biographies of trade dispute panelists . . . are unavailable.").

adopted;¹⁶ NGOs may not observe regular meetings of the WTO General Council and, indeed, minutes of these meetings remain secret for two years;¹⁷ and finally all WTO committees, including the Committee on Trade and Environment, convene in closed sessions that NGO representatives may not attend.

The criticism of the GATT/WTO by NGOs is broad based. Environmental NGOs have been at the forefront of the criticism, but have been joined by NGOs from labor, development, consumer, public interest, and farm groups.¹⁸ Their arguments can be capsulized by stating that the *World Trade Organization* must look at the interests of the entire world. This globalized perspective cannot be achieved effectively with input only from those governmental trade officials who routinely attend WTO meetings.¹⁹

NGOs are on solid legal ground in seeking greater transparen-

¹⁶ See *Lang Cites Corruption, Labor as Key Issues for First WTO Ministerial*, INSIDE U.S. TRADE, Dec. 15, 1995, at 3 (“[A] number of WTO members again blocked U.S. demands for the early release of dispute settlement panel reports . . . decisions on the derestriction of documents and relations with NGOs remained stalled”); see also Letter from the Information Office of the World Trade Organization to Ms. Hari Osofsky (Feb. 2, 1996) (on file with author) (stating that the new WTO panel report on U.S.-Venezuela-Brazil dispute is a restricted document releasable to governments only); Letter from Tessa Bridgman, World Trade Organization, to Steve Charnovitz (Feb. 2, 1996) (on file with author) (stating that no public information will be available on the Gasoline case until after the panel report is adopted). The January 29, 1996 WTO panel ruling on the “United States - Standards for Reformulated and Conventional Gasoline” case can be found at <http://www.gets.org/gets>.

¹⁷ Interview with William Davey, Director of the WTO Legal Affairs Division, (Nov. 3, 1995).

¹⁸ U.S. NGOs joining the criticism of the WTO system include: the Animal Welfare Institute, the Center for Science in the Public Interest, Citizen Action, National Consumers League, the AFL-CIO, Public Citizen, Institute for Agriculture and Trade Policy, Government Accountability Project, Consumer Federation of America, and Development Gap. See Charles E. Hayes, *Asia-Europe Summit Draws NGOs*, EARTH TIMES, Mar. 15, 1996, at 5 (stating that Asian and European NGOs “called for a rejection of the World Trade Organization paradigm of development”).

¹⁹ Meetings of the WTO Trade and Environment Committee have included environmental officials from a handful of countries, not just trade officials. See David Runnalls, *Let's Have More Transparency at WTO*, EARTH TIMES, Mar. 15, 1996, at 21 (“Even the meetings of the Committee on Trade and Environment are closed to all but member states and some intergovernmental organizations.”).

cy and participation in the WTO.²⁰ Drawing on the expertise of NGOs is a hallmark of other intergovernmental organizations and institutions. For example, Agenda 21, a program of action implemented by the United Nations Conference on Environment and Development ("UNCED"), states that:

all intergovernmental organizations and forums should, in consultation with non-governmental organizations, take measures to: . . . enhance existing or, where they do not exist, establish, mechanisms and procedures within each agency to draw on the expertise and views of non-governmental organizations in policy and programme design, implementation and evaluation; [and]. . . [p]rovide access for non-governmental organizations to accurate and timely data and information to promote the effectiveness of their programmes and activities²¹

In fact, most other international organizations have done far more than the WTO to involve NGOs in their work.²² For example, the Organization for Economic Cooperation and Development ("OECD") has active advisory groups drawn from business and trade unions.²³ The International Labour Organization ("ILO")

²⁰ See Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 93 (1992) (describing many global environmental laws, such as the Bergen Declaration and the Bangkok Declaration, which speak of the importance of public participation of NGOs relating to the environment).

²¹ Agenda 21, art. 27(9), U.N. DOC. A/CONF.151/26 (1993).

²² See *General Review of Current Arrangements for Consultations with Non-Governmental Organizations: Report of the Secretary General*, U.N. ESCOR, 1st Sess., Agenda Item 3, at 2, U.N. DOC. E/AC.70/1994 (1994) (noting how international organizations involve NGOs in their work); PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION, SUB-COMMITTEE ON TRADE AND ENVIRONMENT, *Arrangements for Relations with Non-Governmental Organizations in the United Nations, Its Related Bodies and Selected Other Inter-Governmental Organizations* (1994). Note that this WTO document from the preparatory committee was classified as restricted, unlike the UN document from which it was drawn.

²³ The OECD's foundational document provides the authority for these active advisory groups. See *Convention on the Organisation for Economic Co-operation and Development*, Dec. 14, 1960, art. 12, T.I.A.S. No. 4891, 888 U.N.T.S. 179, 187 [hereinafter OECD Convention]. A new NGO advisory committee to the OECD is being created for the environment. See Barbara

includes workers and employers as *delegates* to that organization.²⁴ Especially in recent years, NGOs have become important players in many international conferences and organizations.²⁵

Casassus, *OECD Environment Ministers Fail To Reach Accord On Lead, Chemical Data*, Daily Rep. Executives (BNA) No. 34, at A-24, A-25 (Feb. 21, 1996).

²⁴ See Instrument for the Amendment of the Constitution of the International Labour Organisation, Oct. 9, 1946, art. 3, T.I.A.S. No. 1868, 15 U.N.T.S. 35, 38 [hereinafter ILO Constitution].

²⁵ See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 250, 251 (1995) ("Nongovernmental organizations perform parallel and supplementary functions at almost every step of the strategy for regime management we have begun to identify."); HARLAN CLEVELAND, *BIRTH OF A NEW WORLD: AN OPEN MOMENT FOR INTERNATIONAL LEADERSHIP* 74 (1993) (stating that the history of the United Nations is "replete with evidence that nongovernments have often taken the lead in making and carrying out international policies"); COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBORHOOD* 32-35 (1995) (stating that the UN Conference on Environment and Development accredited more than 1400 NGOs in 1992 for the Rio conference on human rights); YOLANDA KAKABADSE N. & SARAH BURNS, *MOVERS AND SHAPERS: NGOS IN INTERNATIONAL AFFAIRS* 1 (World Resources Institute ed., 1994) (stating that UNCED "legitimized NGOs as a vital players in the environmental and development dialogue"); MARINE MAMMAL COMMISSION, *ANNUAL REPORT TO CONGRESS* 107 (1996) (discussing a recent episode where five environmental groups negotiated directly with the government of Mexico toward the development of a new regional intergovernmental agreement on dolphin protection) [hereinafter MARINE MAMMAL COMMISSION]; Barbara J. Bramble & Gareth Porter, *Non-Governmental Organizations and the Making of US International Environmental Policy*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 311-13 (Andrew Hurrell & Benedict Kingsbury eds., 1992) (exploring the contribution of NGOs to the formulation of international environmental policy); Betty Ferber et al., *Building an Environmental Protection Framework for North America: The Role of the Non-Governmental Community*, in *GREEN GLOBE YEARBOOK* 1995 83-92 (1995) (discussing the role of NGOs in protecting the environment); Hilary F. French, *Forging a New Global Partnership*, in *STATE OF THE WORLD* 1995 185-88 (Linda Starke ed., 1995) (discussing NGO participation in the Rio conference on human rights); Benedict Kingsbury, *Whose International Law? Sovereignty and Non-State Groups*, 68 AM. L. SOC'Y INT'L L. PROC. 1 (1994) (discussing the relationship between NGOs and indigenous peoples); Thomas Princen et al., *Nongovernmental Organizations in World Environmental Politics*, 7 INT'L ENVTL. AFF. 42 (1995) (discussing NGO participation in the African Elephant case and the Great Lakes basinwide pollution problem); David Reed, *The Global Environment Facility and Non-Governmental Organizations*, 9 AM. U. J. INT'L L. & POL'Y 191 (1993) (explaining NGO involvement in the establishment of environmental standards); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 WASH. Q., Winter 1995, at 45 (indicating that "NGO's have emerged as prime movers on a broad range of global issues"); Patricia Waak,

Indeed, the World Bank is searching for a new kind of employee it calls an "NGO Specialist."²⁶ Of course it should be noted that NGOs remain largely shut out of the International Monetary Fund, as well as international military, nuclear, and law enforcement organizations.

NGOs are playing increasingly important roles in direct negotiations with governments. For example, in September 1995, several environmental groups undertook discussions with the Government of Mexico to explore the possibility of a new convention to protect dolphins during tuna fishing.²⁷ This compromise led to a declaration by twelve nations, including the United States, calling for a binding international agreement to be signed by 1996.²⁸ In January 1996, the Worldwide Fund for Nature reached an agreement with the Government of Finland and a major forestry company in Finland to permit a commencement of logging operations in Russia's Karelian forest.²⁹

It is sometimes suggested that NGO involvement in the GATT/WTO would contradict the principles upon which the global organization was established. This argument, however, ignores the early attempts by the postwar multilateral trading

Shaping a Sustainable Planet: The Role of Non-Governmental Organizations, 6 COLO. J. INT'L ENVTL. L. & POL'Y 345, 361 (1995) (stating that the "leadership and relative success of the NGOs in Cairo is a foundation that must be built upon to further strengthen the voice of the global citizen"); David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 1, 4 (1996) (discussing whether the disparity in nonstate participation at the national and international policymaking levels is warranted in the areas of public health and the environment); Daniel J. Shepard, *Nongovernmental Organizations Move From Grassroots to Corridors of Diplomacy*, EARTH TIMES, Mar. 15-31, at 16 (stating that "NGOs have seen their role at international conferences transformed from mere observer status at best to the point where they are now inextricably intertwined in the process of setting global policy"); *Policy Notes: World Bank and NGOs*, EARTH TIMES, Mar. 15, 1996, at 4 (announcing that the World Bank will allow various sectors of civil society, including NGOs, to participate in the Bank's decisionmaking processes).

²⁶ See *Appointments*, ECONOMIST, Jan. 6, 1996, at 85 (advertising for "NGO Specialists," positions that "involve developing and managing training programs, organizing workshops for resident missions in developing countries, and developing the series of studies on State-NGOs relations").

²⁷ See MARINE MAMMAL COMMISSION, *supra* note 25, at 107.

²⁸ See *id.*

²⁹ See *Logging Resumes in Karelian Under Pact Between WWF, Finland, Finnish Forestry Firm*, Int'l Env'tl. Rep. (BNA), at 180 (Mar. 6, 1996).

system to involve NGOs.³⁰ The original plan of the Bretton Woods system provided for an International Trade Organization (“ITO”) to be flanked by the World Bank and the International Monetary Fund.³¹ The United Nations initiated negotiations for the ITO in 1946 and concluded in 1948 with the Charter for the International Trade Organization.³² Article 87(2) of the ITO Charter provided that “[t]he Organization may make suitable arrangements for consultation and co-operation with nongovernmental organizations concerned with matters within the scope of this Charter.”³³

For various political reasons, the ITO never came into existence.³⁴ Instead, the GATT — which was originally intended to be superseded by the ITO — replaced the ITO as a *de facto* treaty and organization. It is instructive, however, to look at how the Interim Commission for the ITO intended to implement ITO Article 87(2). In May 1949, the Interim Commission Secretariat — which later became the GATT Secretariat — prepared a report for the first ITO Conference which, among other topics, proposed

³⁰ For further discussion of NGO involvement in the post-war multilateral trading system, see Steve Charnovitz & John Wickham, *Non-Governmental Organizations and the Original International Trade Regime*, 29 J. WORLD TRADE 111, 113 (1995) (discussing efforts by the United Nation Conference on Trade and Employment and the Interim Commission for the ITO to involve NGOs).

³¹ See Frederick M. Abbott, *Trade and Democratic Values*, 1 MINN. J. GLOBAL TRADE 9, 14 (1992) (“The International Monetary Fund and International Bank for Reconstruction and Development were established to provide stability and liquidity in world financial markets as well as to provide funds for development. The third in the triumvirate of international institutions planned for the post-war era was to be the International Trade Organization.”). See also THE BRETTON WOODS-GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS (Orin Kirshner ed., 1996) (detailing the history and adaptations of the Bretton Woods economic system).

³² The same conference also wrote the GATT agreement. See KENNETH DAM, THE GATT 10-11 (1970); ALSO PRESENT AT THE CREATION: DANA WILGRESS AND THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT AT HAVANA (Michael Hart ed., 1995) (discussing the origin of the ITO and providing full text of the Charter).

³³ I.T.O. CHARTER, art. 87(2), reprinted in U.S. DEPARTMENT OF STATE, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 110 (1948).

³⁴ See William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U.L. REV. 335 (1994) (citing lack of business and government support as well as uncertainty about the potential effectiveness of certain provisions as primary reasons why the ITO failed).

procedures for NGO involvement in the ITO.³⁵ This proposal suggested that: (1) appropriate NGOs be listed as consultative organizations;³⁶ (2) these listed organizations be invited to ITO Conference sessions;³⁷ (3) NGO representatives be able to make statements on items on which they had submitted reports, and on other items at the discretion of the chairperson;³⁸ and (4) these organizations receive ITO documents as necessary for effective consultation.³⁹ Member governments extensively discussed these procedures and would have likely adopted them if the ITO came into existence.⁴⁰

The fact that the negotiators of the ITO treaty provided for NGO participation, combined with evidence that the Interim ITO was prepared to implement this provision, together demonstrate that NGO participation is consistent with the design and aspirations of the multilateral trading system. That the GATT behaved in a more introverted way does not detract from the intention of the founders of the trading system.⁴¹

The WTO Agreement provides that “[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.”⁴² So far, the WTO

³⁵ For the text of this ITO proposal, see Charnovitz & Wickham, *supra* note 30, at 120-21.

³⁶ See *Proposed Report of the Interim Commission to the First Conference of the International Trade Organization* 59 (1949) (on file at the U.S. National Archives, Box 153, Lot File 57D-284).

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.* at 60.

⁴⁰ See Charnovitz & Wickham, *supra* note 30, at 121 (“Had opposition to the ITO not developed, there is every indication that the recommendations . . . concerning NGOs would have been approved by the First Conference of the ITO.”).

⁴¹ See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties*, 17 U. PA. J. INT’L ECON. L. 295, 307 n.57 (1996) (noting participation by International Chamber of Commerce in the early years of the GATT).

⁴² Final Act, *supra* note 2, art. V(2), 33 I.L.M. 1125, 1146. The WTO Agreement on the Rules of Origin provides that the chairman of the Technical Committee may invite representatives of “international governmental and trade organizations” to attend meetings as observers. GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS Annex 1A (1994) [hereinafter LEGAL TEXTS].

General Council has not begun to implement this provision. There is a wide range of opinion on what is "appropriate" for NGOs to see, hear, and do. Nevertheless, the straightforward nature of this provision, and its similarity to the original provision in the ITO, make it difficult for WTO members to argue convincingly that the WTO is different from other international organizations in its ability to institutionalize NGO participation.

In his thoughtful contribution to this symposium, Professor Philip Nichols raises a number of important concerns about granting standing to NGOs in the WTO dispute resolution mechanism.⁴³ He responds to a notable article by Professor G. Richard Shell which proposes a new model for trade governance called the "Trade Stakeholders Model."⁴⁴ This essay comments on some points raised by Nichols.

There are two major issues relating to NGO participation in the WTO. The first is NGO participation in the policy work of the WTO as carried out in various committees, such as the Committee on Technical Barriers to Trade. The second is NGO participation in the WTO dispute resolution process as plaintiffs, *amici curiae*, witnesses, or observers. These general issues are separable. The WTO could involve NGOs in the policy committees but not in dispute resolution on the grounds that public disclosure would harden positions, chill negotiations, and hinder settlements. Likewise, the WTO could open up dispute resolution but not the policy committees on the grounds that fact collection and adjudication should be insulated from interest group pressure. These two major issues regarding NGO participation in the WTO, followed by some conclusions, are discussed in turn.

2. PARTICIPATION IN WTO POLICYMAKING

Nichols hypothesizes that "[i]t is unlikely that member countries would be willing to entrust negotiations involving sovereignty to any entity other than themselves."⁴⁵ Assuming that Nichols' statement is true, there remain a number of useful NGO activities which fall short of signing — or signing off on —

⁴³ See Nichols, *supra* note 41, at 315-21.

⁴⁴ See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995).

⁴⁵ Nichols, *supra* note 41, at 308-09.

treaties.⁴⁶ For example, NGOs can facilitate negotiations in several ways by providing expert information, serving as a sounding board for possible compromises, injecting new ideas into a substantive debate, securing public support necessary for parliamentary approval, and serving as monitors to enforce governmental commitments.⁴⁷

One concern about NGO involvement is that it would slow down WTO policymaking which would be an undesirable effect. On the other hand, NGO participation in the GATT Uruguay Round, which took over seven years to negotiate, might have expedited the negotiating process.⁴⁸ The NGOs might have catalyzed trade negotiators and encouraged them to look beyond mercantilist interests. Certainly, the involvement of NGOs in the environment regime has *not* caused undue delay in negotiating environmental agreements. In fact, during the seven years of Uruguay Round negotiations, no less than seven global environmental agreements were reached.⁴⁹

One reason why the Uruguay Round took so long to complete was because little occurred during extended periods of time as governments either stewed at each other or awaited national elections in individual countries.⁵⁰ With NGOs at the table, the governments might have been prodded toward more diligent negotiations. NGO involvement also might have stimulated the trade negotiators to obtain more significant results than those that were achieved.⁵¹

⁴⁶ See LAWRENCE E. SUSSKIND, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 130-31 (1994). Susskind prefers the terminology of nongovernmental interests ("NGI's") as opposed to NGOs. See *id.*

⁴⁷ See *id.*

⁴⁸ See generally THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1-6 (Terence P. Stewart ed., 1993) (discussing the laborious years of negotiating the Uruguay Round Agreement) [hereinafter A NEGOTIATING HISTORY].

⁴⁹ See Jessica Mathews, *The Great Greenless GATT*, WASH. POST, Apr. 11, 1994, at A19.

⁵⁰ One issue that delayed the Uruguay Round negotiations was the U.S.-E.U. dispute over agriculture. See A NEGOTIATING HISTORY, *supra* note 48, at 217 ("The EC-U.S. agriculture dispute took center-stage leaving most of the other 106 participants out of subsequent talks.").

⁵¹ For a detailed examination of the strengths and weaknesses of the Uruguay Round results, see JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, THE URUGUAY ROUND: AN ASSESSMENT 8 (1994) (giving the Uruguay Round

Nichols worries that the presence of NGOs would undermine "the apparent authority" of governments, and thus their ability to negotiate trade policies.⁵² While it is true that NGOs could have that effect, NGOs also could stimulate the opposite reaction. A government backed by NGOs might actually find its credibility strengthened in negotiations as other countries perceive an enhanced ability to follow through on its commitments.

Nichols argues that involving NGOs implies that "national governments do not adequately represent the interests of all of their constituencies."⁵³ That proposition is surely true. Indeed, many national governments fail to represent the interests of even a majority of their constituencies as periodically reflected by low approval ratings. Yet, one need not posit a failure in democracy to support greater NGO participation in international organizations. To the contrary, NGO participation should be viewed as an exemplification of the democratic vision.

The case for policymaking participation of national NGOs in international organizations is not premised on the incompetence of national governments to balance domestic interests. It may be that governments do the best possible job of balancing conflicting interests. Instead, the contention is that international organizations will perform more effectively if they have the input of interest groups. The *exact* same argument justifies NGO involvement in domestic rulemaking.⁵⁴ Why should NGOs be involved in the creation of national law, but not international law?⁵⁵

The case for the policymaking involvement of international NGOs in international organizations is a different matter. While

a B+ grade overall).

⁵² Nichols, *supra* note 41, at 316.

⁵³ *Id.* at 310-311.

⁵⁴ See KONRAD VON MOLTKE, INTERNATIONAL ENVIRONMENTAL MANAGEMENT, TRADE REGIMES AND SUSTAINABILITY 28 (International Institute for Sustainable Development ed., 1996) ("[T]he provision of information and public participation are designed to help make public policy choices which are firmly grounded in the articulated needs of citizens. The logic of public participation in environmental policy does not end at national frontiers.").

⁵⁵ See generally Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 561 (1956) (stating that because "the right of individuals to proceed before international bodies is almost non-existent today in international law practice, does not exclude the creation of this right at any moment by agreement of states").

one can argue that the views of national NGOs are represented by national governments, the same argument cannot be made for international NGOs, such as the WWF International, the International Confederation of Free Trade Unions, or the International Chamber of Commerce. International NGOs have no national government to represent them; they only have international organizations.

Nichols opines that "it is difficult to envisage a scheme that could equitably allow for direct participation by all of the citizens of the world."⁵⁶ This view is correct. Nobody, however, calls for such direct participation, but rather NGOs advocate an organized process of NGO involvement. Borrowing from the procedures of the United Nations Economic and Social Council,⁵⁷ the OECD,⁵⁸ the ILO,⁵⁹ and the 1949 ITO Secretariat proposals,⁶⁰ the WTO General Council could easily formulate a workable set of arrangements for NGO participation.

Nichols also worries that NGO participation would be problematic because some groups would have greater resources for participation than others.⁶¹ The issue of disparate resources is a pervasive problem in any organization. In fact, disparate resource allocation is currently a problem for *governmental* representation at the WTO. After all, the U.S. Trade Representative has more staff in the WTO headquarters city of Geneva than does the Geneva delegation of trade ministry of The Congo.

The most serious concern raised by Nichols is that NGO participation "might cause the World Trade Organization to move away from or be unable to pursue the goal of free trade."⁶² According to Nichols, trade scholars believe that the GATT's "low public profile" was "one of the largest contributors to trade

⁵⁶ Nichols, *supra* note 41, at 313.

⁵⁷ UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, RULES OF PROCEDURE OF THE ECOSOC, U.N. Doc. E/5715/Rev.1 (1983); *see* UNITED NATIONS CHARTER art. 71.

⁵⁸ *See* OECD Convention, *supra* note 23.

⁵⁹ *See* ILO Constitution, *supra* note 24, art. 3, T.I.A.S. No. 1868, 15 U.N.T.S. at 38.

⁶⁰ *See supra* notes 31-35 and accompanying text.

⁶¹ *See* Nichols, *supra* note 41, at 318-19. Nichols makes this point with particular reference to dispute panels. *See id.*

⁶² *See* Nichols, *supra* note 41, at 319.

liberalization over the past fifty years.”⁶³ Even if GATT’s low public profile largely contributed to trade liberalization in the past — and it is possible that GATT’s low public profile was the main reason why trade liberalization proceeded *so slowly* over the past 50 years — it seems unlikely to remain so in the future as trade assumes a larger role in U.S. political discourse.

A recent U.S. public opinion poll found strong support among U.S. citizens for protectionism. Over 68% of the U.S. public would support the imposition of “tariffs on products from countries that have a trade imbalance with the United States.”⁶⁴ In recent years, there has been a resurgence in protectionist literature⁶⁵ and in 1995, with the advent of a Republican-controlled Congress, trade liberalization proposals stalled.⁶⁶ By winter 1996, trade became a key issue in the Republican Presidential campaign.⁶⁷

Given the heightened public attention to trade, it is unlikely that the WTO will be able to maintain the anonymity of the GATT.⁶⁸ Nor should it.⁶⁹ The WTO should actively engage in

⁶³ *Id.*

⁶⁴ John Maggs, *Poll Shows Opposition to Clinton’s Trade Policy*, J. COM., Nov. 14, 1995, at 1A. It is unclear whether respondents were told that almost all countries do have an imbalance with the United States.

⁶⁵ See, e.g., SIR JAMES GOLDSMITH, *THE RESPONSE: GATT AND GLOBAL FREE TRADE* (1995) (arguing against the policies of GATT); RAVI BATRA, *THE MYTH OF FREE TRADE: A PLAN FOR AMERICA’S ECONOMIC REVIVAL* (1993) (arguing that free trade will not promote economic revival); SIR JAMES GOLDSMITH, *THE TRAP 23-52* (1993) (concluding that GATT and the WTO hand U.S. autonomy over to international bureaucrats); TIM LANG & COLIN HINES, *THE NEW PROTECTIONISM: PROTECTING THE FUTURE AGAINST FREE TRADE* (1993) (arguing for a “new protectionism”); RALPH NADER ET AL., *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* (1993) (highlighting various arguments against free trade); ROSS PEROT, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED — NOW!* (1993) (arguing that NAFTA gives Mexico distinct competitive advantages over the United States).

⁶⁶ See Steve Charnovitz, *The Trade-Blind Congress of ‘95*, J. COM., Dec. 29, 1995, at 6A. See also William L. Roberts, *Buchanan Wins Support By Knocking Free Trade*, J. COM., Jan. 16, 1996, at 1A (reporting that some of Patrick Buchanan’s political support stems from his opposition to NAFTA and the WTO).

⁶⁷ See Richard L. Berke, *Candidates Clash Over Trade Issues Heading Into Vote*, N.Y. TIMES, Feb. 20, 1996, at A1, A14; David E. Sanger, *A Flare-Up of Passions Over Global Trade*, N.Y. TIMES, Feb. 20, 1996, at A1, A14.

⁶⁸ For example, the recent WTO panel decision declaring that a key section of the Clean Air Act violated international trade rules generated much

educating the public about the dangers of protectionist trade policies, just as the World Health Organization educates the public about communicable disease.

The notion that the international trade regime should be a buffer between the makers of trade policy and the public is an elitist view that should not find refuge in liberal governance. The founders of the international trade regime were well aware of the need to obtain popular support in removing domestic trade barriers.⁷⁰ Indeed, the U.S. reciprocal trade agreements program, begun in 1934, contains institutional procedures for broad public participation.⁷¹ As Francis B. Sayre, an architect of the U.S. reciprocal trade agreements program, explained in 1938:

Never before has consideration of tariff matters been so free from logrolling, politics, and narrow sectional influences. Formerly, professional lobbyists frequently crowded others off the stage. Now there exists an effective means, available to all without cost, whereby everyone is assured of a careful and impartial hearing by trained officials who have no party interest to serve . . . It is a process which is thoroughly democratic and thoroughly

publicity. See David E. Sanger, *Trade Group Orders U.S. To Alter Law For First Time*, N.Y. TIMES, Jan. 17, 1996 at 1. For a critique of this report, see Steve Charnovitz, *The WTO Panel Decision on U.S. Clean Air Act Regulations*, Int'l Envtl. Rep. (BNA), at 191-96 (Mar. 6, 1996).

⁶⁹ See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH & LEE L. REV. 1227, 1255 (1992) ("For purposes of gaining a broader constituency among the various policy interested communities in the world, gaining the trust of those constituencies, enhancing public understanding, as well as avoiding the 'charade' of ineffective attempts to maintain secrecy, the GATT could go much further in providing 'transparency' of its processes.")

⁷⁰ See Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 MINN. J. OF GLOBAL TRADE 195, 215-16 (1994) (discussing the public participation in the making of trade policy under President Franklin Roosevelt's Administration).

⁷¹ See Tariff Act Amendments of 1934, Pub. L. No. 73-316, § 4, 48 Stat. 943, 945 (stating that "any interested person may have an opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe"); Exec. Order No. 6,750 (1934).

American in the best sense of that word.⁷²

Although Nichols seems to support freer trade, one of his statements about the GATT/WTO regime is truly inconsistent with such beliefs. Nichols states: "Having sorted out trade policy issues at the national level, bureaucrats are free to cooperate with other governments to maximize national and global welfare without the intrusion of special interests."⁷³ If Nichols means that governmental trade officials reliably favor trade liberalization policies, he is not correctly describing the 47 years of GATT trade governance. International trade remains saddled with tariffs, quotas, and nontariff restrictions. Indeed, by one estimate, only seven percent of world production crossing national borders is subject to the trade liberalization rules of the GATT.⁷⁴ Furthermore, trade officials have frequently sought to maximize national welfare instead of global welfare, sometimes leading policymakers to pursue protectionist policies that advance neither goal.⁷⁵

Although Nichols focuses on the implications of Shell's "Trade Stakeholders Model" for WTO dispute settlement, Shell actually makes a broader point about the need for NGOs in all WTO decisionmaking.⁷⁶ Shell explains that "ultimately, individuals and NGOs will need to become more deeply involved in the legislative process by which the world trade community creates rules

⁷² FRANCIS B. SAYRE, HOW TRADE AGREEMENTS ARE MADE 16 (U.S. State Dep't Commercial Policy Series No. 47, 1938). For a revisionist perspective, see ALFRED E. ECKES, JR., OPENING AMERICA'S MARKET: U.S. FOREIGN TRADE POLICY SINCE 1776 143 (1995) (explaining that in place of the "relatively transparent and accountable process" pursued when Congress wrote tariff legislation, Cordell Hull delegated tariff making authority to a small group of middle-level officials who were not subject to Congressional confirmation).

⁷³ Nichols, *supra* note 41, at 320.

⁷⁴ See THE UN AND THE BRETTON WOODS INSTITUTIONS: NEW CHALLENGES FOR THE TWENTY-FIRST CENTURY 5 (Mahbub ul Haq et al. eds., 1995).

⁷⁵ See JAGDISH BHAGWATI, PROTECTIONISM 43-59 (1989) (discussing the growth of nontariff barriers); JAMES BOVARD, THE FAIR TRADE FRAUD 321 (1991) (stating that "politicians and bureaucrats [are] constantly changing the definition of fairness to justify new trade barriers"); GARY C. HUFBAUER & KIMBERLY A. ELLIOTT, MEASURING THE COSTS OF PROTECTION IN THE UNITED STATES (1994); DOUGLAS IRWIN, MANAGED TRADE: THE CASE AGAINST IMPORT TARGETS (1994); ANNE O. KRUEGER, AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING (1995).

⁷⁶ See Shell, *supra* note 44, at 910, 913-15, 922-24.

and standards — not just the adjudicative process by which these rules are applied.”⁷⁷ Furthermore, Shell believes that the trading regime must be more inclusive in order to integrate both trade and nontrade values.⁷⁸ Nichols, equally sensitive to the problem of clashing values, takes a different approach than Shell’s model and proposes that “laws that primarily reflect important underlying societal values and only incidentally impede trade should not be subjected to scrutiny by the [WTO].”⁷⁹ While Shell would broaden participation in WTO review, Nichols would exempt certain laws from that review.

If the WTO is going to expand its work into new areas such as investment, competition policy, environment, labor standards, and corrupt practices,⁸⁰ it will need a broader base of participation than just national trade ministers. However, even if the WTO were to focus only upon narrow issues of trade liberalization, the case for Shell’s Trade Stakeholders Model would still be strong — primarily because eradicating protectionism is an enormous task which requires the full involvement of all stakeholders.⁸¹ As the “GATT Wisemen” advised a decade ago:

An essential first step in developing support for better trade policies is public awareness. We recommend that, in each country, governments make a conscious and continuing effort to expand public knowledge of the costs and hazards of protectionism, the benefits of open trading policies, and the functioning of the multilateral trading system. Channels for such an effort could include universities and schools, strengthened national consumer groups, and advisory groups made up of influential and active representatives of the main *stakeholders* in international

⁷⁷ *Id.* at 922.

⁷⁸ *See id.*

⁷⁹ Nichols, *supra* note 41, at 297; *see also* Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 709 (1996).

⁸⁰ For a discussion of some areas of future WTO involvement, see Renato Ruggiero, *The Global Challenge: Opportunities and Choices in the Multilateral Trading System* (WTO Press Release, Oct. 16, 1995) (on file with author).

⁸¹ For a discussion of “anti-protection” interest groups, see I.M. DESTLER & JOHN S. ODELL, *ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS* 30-59 (1987).

trade — business, finance, labour and consumers.⁸²

3. PARTICIPATION IN WTO DISPUTE RESOLUTION

Although Nichols comments on “standing” of NGOs to participate in the WTO dispute resolution process, this issue is far removed from the contemporary political debate. For better or worse, no government or major NGO argues that NGOs ought to have “standing” as a plaintiff to invoke WTO dispute resolution. Instead, the contemporary debate addresses whether an NGO ought to be able to submit an *amicus* brief or testify before a dispute panel in a public hearing.⁸³ NGOs also seek access to government briefs.⁸⁴ At this point, NGOs are not pursuing the right to make oral arguments before a panel, nor the right to cross-examine the plaintiff or defendant governments.

If history is a guide, whether NGOs should have standing as WTO plaintiffs is an interesting legal question that surely will arise in the next century and has been resolved in other contexts. For example, as delegates to the ILO, employer and worker NGOs do have standing to lodge complaints about a government’s conformity with its responsibilities under a ratified ILO convention.⁸⁵ Furthermore, environmental NGOs have standing in U.S. courts to challenge federal actions as “interested” humans, but

⁸² GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION 36-37 (1985) (emphasis added).

⁸³ See Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT’L L.J. 699, 744-46 (1994) (offering proposals for the democratization of trade disputes); Benedict Kingsbury, *Environment and Trade: The GATT/WTO Regime in the International Legal System*, in ENVIRONMENTAL REGULATION AND ECONOMIC GROWTH 225 (A.E. Boyle ed., 1994) (“There is NGO pressure to hold panel hearings in public and to make state submissions and panel reports public at an early stage.”).

⁸⁴ The new WTO Agreement provides that a government which is a party to a dispute must, at the request of a member government, provide a non-confidential summary of the information contained in its submissions to the panel. See Trade Policy Review Mechanism, in LEGAL TEXTS, *supra* note 42, at Annex 3, para. 3.

⁸⁵ See INTERNATIONAL LABOUR OFFICE, CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE, arts. 24-25. NGOs may also submit information to the ILO Committee on Freedom of Association.

not generally as representatives of nature.⁸⁶ In the European Union, individuals who are challenging laws in national courts may seek to refer the case to the European Court of Justice under Article 177 for a determination as to whether a national law is violative of provisions of the Treaty of Rome ensuring the free flow of goods.⁸⁷ The North American Free Trade Agreement ("NAFTA") contains a provision giving a private investor the right to invoke arbitration when it believes that a NAFTA member government has violated NAFTA's rules on investment.⁸⁸ This provision was invoked for the first time in March 1996 by a Mexican drug company who complained about Canadian regulations of generic drugs.⁸⁹

One certainly can imagine a system whereby NGOs or individuals would be able to invoke the WTO dispute process.⁹⁰ For example, the European Union has entered into an agreement with several developing countries to limit imports of bananas.⁹¹ A consumer group in Europe should be able to file a complaint that this Agreement violates GATT Article XI, which requires the

⁸⁶ See Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1-29 (1985) (discussing natural objects' lack of standing in court); CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA* 54, 85-88 (1993) (promoting a "guardianship system" in which cases could effectively be brought on behalf of nature itself). For a recent case where NGOs were given standing before the U.S. Court of International Trade, see *Earth Island Inst. v. Christopher*, Nos. 94-06-00321, 95-208, 1995 WL 782856 (Ct. Int'l Trade Dec. 29, 1995).

⁸⁷ See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 177, 298 U.N.T.S. 11, 76-77, *amended by Treaty of European Union and Final Act*, Feb. 7, 1992, 1992 O.J. C191/1 [hereinafter EU Treaty]. For a comprehensive discussion of the ECJ's ability to hear cases directly affected by the Treaty of Rome, see Ann-Marie Burley & Walter Matli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 42 (1993); Shell, *supra* note 44, at 919; GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 180-92 (1993).

⁸⁸ See North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the Mexican States, Dec. 17, 1992, art. 1116, 32 I.L.M. 605, 642-43 (1993).

⁸⁹ See Aviva Freudmann, *Mexican Firm Sues Canada In First Use Of Nafta Rule*, J. COM., Mar. 18, 1996, at 3A.

⁹⁰ See Shell, *supra* note 44, at 902.

⁹¹ See Costa Rica-Colombia-Dominican Republic-European Community-Nicaragua-Venezuela: Framework Agreement on Banana Imports, Mar. 29, 1994, 34 I.L.M. 1 (1995).

general elimination of quantitative restrictions,⁹² especially if no government is willing to do so.⁹³

For the foreseeable future, however, the WTO seems unlikely to grant that sort of standing. A logical interim step would be to give the WTO Secretariat the right to lodge complaints, in the same way that the European Commission has the right to bring a matter before the European Court of Justice.⁹⁴ In one area, the WTO does require standing for private parties in national tribunals. The Agreement on Trade-Related Aspects of Intellectual Property Rights provides that:

Members shall . . . adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.⁹⁵

Environmental and public interest NGOs are seeking an opportunity to participate in WTO dispute resolution because the WTO has become an important forum for international environ-

⁹² Article XI(1) of the GATT Agreement states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 4, art. XI(1), 61 Stat. at A32-33, 55 U.N.T.S. at 224, 226.

⁹³ The U.S. government is preparing a WTO challenge to the agreement on bananas between the EU, Costa Rica, Colombia, Dominican Republic, Nicaragua, and Venezuela. See Frances Williams, *US Steps Up Banana Fight*, FIN. TIMES, Feb. 7, 1996, at 5.

⁹⁴ See EU Treaty, *supra* note 87, art. 169, 298 U.N.T.S. at 75. For the most recent version of article 169, see TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (abridged ed., 1987).

⁹⁵ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Final Act, *supra* note 2, pt. 2, Annex 1C, art. 51, 33 I.L.M. at 1217 (footnotes omitted).

mental adjudication.⁹⁶ As Ernst-Ulrich Petersmann recently pointed out, “[t]he GATT dispute settlement system has been used more frequently for the settlement of ‘*environmental disputes*’ between states than any other international dispute settlement mechanism.”⁹⁷

There are two main justifications for NGO participation in dispute resolution. First, NGO participation will increase the information available to the panel, thereby leading to better informed — and hopefully better quality — panel decisions. Pursuing this line of reasoning, David Wirth points out that “[t]he presence of affected nongovernmental parties would widen perspectives on the underlying dispute, thereby reducing the likelihood of erroneous conclusions.”⁹⁸ Second, a closed dispute resolution process will undermine popular support.⁹⁹ The general public of a country that loses a WTO dispute will be more apt to cooperate with the required legislative change if the WTO dispute resolution process seems fair. As Kevin Stairs and Peter Taylor note, “[l]egitimacy of governmental decision-making is enhanced by NGO participation.”¹⁰⁰

An impetus behind NGOs’ desire to participate in WTO dispute resolution is that GATT panels have not performed well in adjudicating environmental disputes, particularly in the tuna-

⁹⁶ See *The Proposals of the International Organisation of Consumer Unions*, in INTERNATIONAL ORGANISATION OF CONSUMER UNIONS, *THE CASE FOR OPENNESS: CONSULTATION AND TRANSPARENCY IN THE WORLD TRADE ORGANISATION* (1994).

⁹⁷ ERNST-ULRICH PETERSMANN, *INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND 22* (1995) (emphasis added) (footnote omitted). It should be noted that the WTO is a forum for the pursuit of public rights, not private rights. While any adjudication can affect parties not directly engaged in the dispute, adjudication about public rights is more likely to affect third parties.

⁹⁸ David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 790 (1994).

⁹⁹ For example, United States Trade Representative Mickey Kantor referred to GATT adjudication as “star chamber proceedings,” a condemnation unlikely to build American confidence in the trading system. *United States Trade Representative Mickey Kantor Remarks on Trade and the Environment at the Global Legislators Organization for a Balanced Environment*, FED. NEWS SERVICE, Feb. 28, 1994, available in LEXIS, Nexis Library, News File.

¹⁰⁰ Kevin Stairs & Peter Taylor, *Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 110, 134 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

dolphin controversy.¹⁰¹ The tuna panel decisions were neither thorough nor entirely logical.¹⁰² The low quality of these environmental decisions — as compared to typically high quality GATT decisions in the more common commercial disputes — suggests a need to improve the information provided to a WTO panel.¹⁰³ Although it does not provide a mandate for NGO *amicus* briefs, the Uruguay Round Agreement does take steps to improve the adjudication process. Most importantly, the Uruguay Round established an appellate review process that will provide a mechanism for correcting erroneous panel decisions.¹⁰⁴

Those critical of direct access by NGOs to WTO panels usually argue that NGOs should filter comments through their sovereign governments.¹⁰⁵ There are, however, several problems with this argument. First, as noted above, international NGOs do not fit the traditional citizen-government model. Second, NGOs from countries who are not members of the WTO are not represented by governments with WTO participatory rights.¹⁰⁶ Thus, environmental NGOs in large nations like China or Russia might have valuable information for a WTO panel, but are prevented from supplying such input. Third, a government may not want to present a point urged by one of “its” NGOs. There could be a benign reason for this: the point could be incorrect.

¹⁰¹ See *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991); *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 33 I.L.M. 839 (1994). Neither panel decision was adopted by the GATT Council.

¹⁰² For a critique of these decisions, see Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVTL. L. REP. 10567 (1994). See also Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2209 (1995) (stating the panels’ “crude but sweeping rules against trade restrictions . . . make no attempt to distinguish between legitimate environmental concerns and protectionism”).

¹⁰³ In response to NGO criticism of the first tuna-dolphin panel, the GATT, in 1992, placed a well respected expert in international environmental law (Austrian diplomat Winfried Lang) on the panel considering the second tuna-dolphin case. Lang has noted that “[t]he merger of trade law expertise and environmental law expertise would certainly facilitate balanced outcomes” Winfried Lang, *Is the Protection of the Environment a Challenge to the International Trading System?*, 7 GEO. INT’L ENVTL. L. REV. 463, 480-81 (1995).

¹⁰⁴ See Understanding, *supra* note 12, arts. 17-19, 33 I.L.M. at 1236-37.

¹⁰⁵ See Nichols, *supra* note 41, at 314.

¹⁰⁶ See *Knock, Knock*, ECONOMIST, Jan. 13, 1996, at 72 (listing twenty-seven countries, from Albania to Vietnam, that are waiting to join the WTO).

But, there might also be a less benign reason: a government might not want to repeat an NGO point if doing so could undermine the government in another WTO case or in domestic litigation. For example, while the United States Trade Representative (“USTR”) defended the U.S. tuna import ban against the European Commission, the USTR pressed the Commission to repeal a pending ban on the import of furs caught in countries permitting leg-hold traps. Perhaps the USTR withheld arguments in the tuna-dolphin case for fear that the Commission would turn those arguments against the United States in a fur trapping case or in another subsequent panel.¹⁰⁷ Such latent conflicts of interest would provide a compelling reason to allow NGOs to present their best points directly.

Additionally, there is the possibility that defendant governments — particularly the United States with its separation of powers — might prefer to lose a WTO case if the executive branch dislikes the law being contested.¹⁰⁸ Similarly, one group within a government, such as the trade officials who speak before WTO panels, might mount a weak defense.¹⁰⁹ In such scenarios of conflicting governmental interest, Nichols’ assumptions that governments can be depended on to synthesize and balance values is not warranted.¹¹⁰

Even some supposedly proparticipation governments are

¹⁰⁷ For example, the U.S. Ambassador to the EU (Stuart Eizenstat) has complained that the EU regulation is “an application of internal rules on an external basis limiting trade in ways that are unilateral and extraterritorial.” *EU Ministers Vote For Trade Ban on Fur From Leghold Traps If No Pact in 1996*, Daily Exec. Rep. (BNA) No. 44, at A12 (Mar. 6, 1996). Yet in the tuna-dolphin dispute, the USTR defended a similar application of a trade measure against EU complaints that the Marine Mammal Protection Act was unilateral and extraterritorial. It is this obvious contradiction in U.S. government policy that has led some environmentalists to wonder how vigorously USTR attorneys defended the U.S. Marine Mammal Protection Act before the two panels that found the Act to be a GATT violation.

¹⁰⁸ See Kingsbury, *supra* note 11, at 15 (asserting that “[t]he executive has on occasion welcomed — and perhaps even encouraged — adverse GATT rulings as a means to overcome opposing pressures in domestic politics”).

¹⁰⁹ See Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT’L L.J. 631, 692-93 (1994) (noting that because the U.S. Trade Representative may bargain away one matter that is being challenged in return for an unrelated concession, the U.S. Department of Justice should represent the United States before the GATT when U.S. laws are challenged).

¹¹⁰ See Nichols, *supra* note 41, at 311.

sometimes reluctant to listen to NGOs. For example, in March 1994, the Clinton Administration, with great fanfare, created a trade and environment NGO advisory committee.¹¹¹ Two years later, however, the Administration had not yet held the first meeting of this advisory committee.

Nichols seems to recognize the possibility of such conflicts, but he worries instead about the spectacle of a domestic constituency opposing the position of the government that is supposed to represent that constituency.¹¹² Yet surely we are used to that spectacle by now.¹¹³ Domestic opposition to a governmental position is quite common in domestic public law litigation and is increasingly common in "transnational public law litigation."¹¹⁴ One such spectacle occurred in 1981 when the United States Senate restaurant workers lodged an ILO complaint stating that the Senate management refused to negotiate with them.¹¹⁵ The ILO performed a fair investigation without "irreconcilable dissonance."¹¹⁶

Thus far, I have focused on possible inadequacies in the representations made by governments to WTO panels, yet there is even a more fundamental reason to move to a Stakeholders model: defects within the WTO itself. Fundamentally, the WTO Agreement fails to recognize the global environment. It is a treaty about trade across economic borders. If there were no ocean, no atmosphere, no Antarctica, no cross-border pollution, and no biodiversity, not a single word in the WTO would need to be rewritten. The WTO is replete with constructive rules on the topic of economic interdependence, but it is vacuous on the topic of ecological interdependence.

The absence of attention to ecological interdependence necessi-

¹¹¹ See Exec. Order No. 12,905, 59 Fed. Reg. 14,733 (1994).

¹¹² See Nichols, *supra* note 41, at 317.

¹¹³ In a related context, the U.S. government has recognized that NGOs might pursue objectives in international standard organizations that are inconsistent with official U.S. policy. See 19 U.S.C. § 2543(b)(3) (1994).

¹¹⁴ Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2368 (1991) (discussing suits in which plaintiffs seek affirmative reform of U.S. foreign policy programs).

¹¹⁵ See Elmer W. Lammi, *Senate Restaurant Workers Complain to ILO*, UPI, Nov. 30, 1981, available in LEXIS, Nexis Library, UPI File.

¹¹⁶ The term "irreconcilable dissonance" comes from Nichols *supra* note 41, at 318.

tates fundamental reform of the WTO.¹¹⁷ In the meantime, to fill this gap it would be useful to permit NGOs to make written presentations to WTO panels.¹¹⁸ Each panel might also hold one day of public hearings where NGOs could testify. An appropriate time for such NGO input would be after the panel completes a draft on the factual background of the dispute and summarizes the positions of the parties.¹¹⁹ The WTO should release these interim factual and positional drafts to the public before the hearing so that those testifying can comment on them. Nichols worries that any such hearings would present logistical problems since "a trade dispute panel cannot possibly hear from thousands of groups."¹²⁰ As with any legislative hearing, however, the chairperson can determine who will be allowed to speak. Alternatively, NGOs could act collectively to select their spokespersons.¹²¹

If direct participation by NGOs produces too much incoherence, the WTO might try a more organized approach. For

¹¹⁷ For some proposals regarding fundamental reform of the WTO, see Steve Charnovitz, *Improving Environmental and Trade Governance*, 7 INT'L ENVTL. AFF. 59, 76-81 (1995) (proposing the creation of a new Global Environmental Organization and the expansion of the WTO as potential reforms).

¹¹⁸ See TRADE AND SUSTAINABLE DEVELOPMENT PRINCIPLES 31 (1994) (containing a working group report established by the International Institute for Sustainable Development which advocated that NGOs be allowed to make written presentations to WTO panels). See also Michael Kantor, Remarks to the Environmental Defense Fund 4 (Apr. 21, 1994) (on file with author) ("There should be a right to file and have 'amicus' briefs considered by a Panel . . . and, greater obligation of Panels to rely on technical experts where issues beyond trade rules are relevant."); JAMES CAMERON ET AL., WORLD WIDE FUND FOR NATURE, SUSTAINABLE DEVELOPMENT AND INTEGRATED DISPUTE SETTLEMENT IN GATT 1994 12-14 (1994) (discussing reforms to the WTO dispute settlement procedures which would allow NGO access to information as well as access to the GATT decisionmaking processes).

¹¹⁹ See Understanding, *supra* note 12, arts. 17-19, 33 I.L.M. at 1245-46 (describing the panel working procedure which provides a timeline for panels and an interim review period).

¹²⁰ Nichols, *supra* note 41, at 319.

¹²¹ The World Conservation Union can help in selecting spokespersons and NGOs could follow the model of other organizations. See Martin W. Holdgate, *Pathways to Sustainability: The Evolving Role of Transnational Institutions*, ENVIRONMENT, Nov. 1995, at 16, 39 (discussing how "NGOs working in fields like development, science, or humanitarian aid should consider creating a group that can speak for all of them, as ICSU speaks for science and IUCN was designed to speak for conservation").

example, the WTO could ask an intergovernmental environmental organization, such as the United Nations Environment Programme or the World Conservation Union, to name an "Environmental Advocate" to speak for "the environment" in WTO environmental disputes.¹²² The Environmental Advocate would work with NGOs and scientists to produce a report discussing the significance of the environmental treaty or law challenged in the WTO dispute resolution procedure.

Another model that could assure a just representation of environmental interests before WTO panels existed within the Permanent Court of International Justice. This court provided for a special chamber — for labor issues only — in which the judges appoint "technical assessors" who would be "chosen with a view to ensuring a just representation of the competing interests."¹²³

4. CONCLUSION

The establishment of the WTO should improve international trade governance. The WTO has the authority to consider new trade rules, to review national trade laws, and to adjudicate disputes. The Charter of the ITO, written in 1946-48, recognized the need for involving NGOs. Although that organization never came into existence, the birth of its nephew, the WTO, provides an opportunity to correct the GATT practice of excluding NGOs.¹²⁴

NGOs play constructive roles in numerous international organizations. It seems clear that these roles will increase in the years ahead. If it is appropriate for NGOs to provide input to national governments about trade issues, then it is also appropriate for NGOs to provide input to international organizations about

¹²² The European Court of Justice uses advocates-general who make reasoned submissions on cases before it. See generally K.P.E. LASOK, *THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE* 9, 219 (1984) (setting forth the duties of the advocates-general).

¹²³ MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 150 (1934) (quoting the language of Article 26 of the Statute of the Permanent Court of International Justice). This "technical assessor" provision was never used. See *id.* at 328, 349.

¹²⁴ See generally Martin Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, 29 J. WORLD TRADE, Oct. 1995, at 181-206 (arguing that a private right to initiate the dispute resolution system of the WTO would be consistent with the general principles of the world trading system).

trade issues.

Simply put, there are no good reasons for the WTO to refuse to provide systematic participation rights for NGOs. One hopes that WTO members will see this reality while the WTO still enjoys the goodwill afforded to new international institutions. As U.S. Secretary of State Cordell Hull told the Dumbarton Oaks Conference in 1944, “[n]o institution will endure unless there is behind it considered and complete public support.”¹²⁵

¹²⁵ ERSKINE CHILDERS & BRIAN URQUHART, *RENEWING THE UNITED NATIONS SYSTEM* 171 (1994).