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TURNING THE PROTESTER INTO A PARTNER FOR DEVELOPMENT: THE NEED FOR EFFECTIVE CONSULTATION BETWEEN THE WTO & NGOs

*Maura Blue Jeffords**

If the WTO expects to have public support grow for our endeavors, the public must see and hear and in a very real sense actually join in the deliberations.¹

I. INTRODUCTION

Former United States (“U.S.”) President Bill Clinton’s words in response to the thousands of protesters that converged on Seattle during the World Trade Organization’s (“WTO’s”)² 1999 Ministerial Meeting highlighted an evolving

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¹ See *The New Trade War*, ECONOMIST, Dec. 2, 1999, available at http://www.economist.com/displayStory.cfm?Story_ID=264372 (describing U.S. President Bill Clinton’s comments regarding the protestors during the World Trade Organization’s Seattle Ministerial Meeting in 1999).

2. See World Trade Organization, *What is the WTO?*, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 1, 2003) (describing the history of the WTO as a successor to the General Agreement on Tariffs and Trade (“GATT”). The results of the Uruguay Round included the modified GATT, as well as two new agreements, the General Agreement on Trade in Services (“GATS”) and an Understanding on Dispute Settlement (“DSU”). *Id.* Four principles characterize the cornerstone of the WTO: implementation of tariffs through a concession mechanism, elimination of quantitative restrictions, the most favored nation (“MFN”) principle and the national treatment of foreign and domestic suppliers. *Id.* The WTO is headed by a ministerial meeting of its 145 members (as of February 1, 2003) that meets at least once every two years. *Id.* A General Council oversees the

systemic issue facing the WTO as well as a shift in the relationship between international institutions, member states, and private stakeholders. This issue is whether and how the WTO should consult with non-governmental organizations ("NGOs") and what role these entities should have in the WTO's function as the arbiter of the world trading system. Resolution of this issue will affect the WTO's efficacy and legitimacy as a global institution. The WTO's consultation with NGOs also has ramifications on the relationship between international institutions and individuals. This issue reflects the shift from the classic diplomatic model in which nation states alone have a role in the operation of international institutions to a modern model in which these institutions consult NGOs to address and to resolve issues affecting individuals.

This shift presents a challenge for the WTO: how can it incorporate the viewpoints and interests of non-state actors into the institution's operations? The presence of the protesters in Seattle had a disastrous effect on the outcome of the Seattle Ministerial Meeting, effectively shutting down the negotiations. Many of the protesters had purposely gone to Seattle to obstruct the negotiation of new trade rules. Other protesters went to Seattle to voice their concerns and opposition to globalization. A third group, under the confederation of various NGOs traveled to Seattle in hopes of playing a more important role in the trade talks than that of mere observers. In the end, their presence challenged the classic legal and diplomatic model of international relations.

In the traditional model of international relations, memberships of international institutions like the WTO were comprised of nation states. Under this model, governments would attempt to bring the varied interests of its citizenry into harmony and represented those interests in the international forum. Non-state actors such as individuals and NGOs could influence their governments' trade priorities only through domestic processes, such as lobbying or petitioning the executive.

ministerial decisions and operates the Dispute Settlement Body and a Trade Policy Review Body. *Id.* Reporting to the General Council are the Goods Council, the Services Council and the Intellectual Property Council. *Id.* The WTO is headquartered in Geneva, Switzerland and is headed by a Secretariat with a 500 person staff. *Id.*

However, this model is changing. While the Agreement Establishing the WTO provides that only states may be members, it also states that the organization may consult with non-state actors. This provision reflects the modern model in which NGOs make greater contributions to international institutions. To be true to its founding principles, the WTO as an institution needs to adopt the modern model by modifying its structure to facilitate effective consultation with NGOs.

This Article argues that the present WTO structure for consultation with NGOs lacks a commitment to utilize NGOs in the construction and application of global trade rules that will achieve the WTO's goals. As compared to other international institutions, the WTO does not recognize the increasing importance of civil society in the functioning of international institutions in the modern era.

The modern era is one in which individuals are aware of the influence of the multilateral trading system. Since World War II, advances in communications and transportation have brought the world's people closer and made them more economically interdependent. The end of World War II brought the creation of the General Agreement on Tariffs and Trade ("GATT")³ and its successor, the WTO,⁴ which continues to affect the lives of individuals in all states. The WTO's rules are binding on all its member states and often impute obligations on non-state actors as well. Moreover, given the impossibility of any state representing all of its domestic interests, non-state actors like NGOs arguably should have a stake in the WTO to give voice to those unrepresented interests.

Part II shows that the source of the tension between the WTO and NGOs lies in the fact that international law has no uniform definition of an NGO. Further, throughout its history, the WTO has been inconsistent in its consideration of the knowledge and opinion of NGOs even though the WTO places obligations on them. Despite this inconsistency, the increasing number of

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

4. Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 1A, 1 LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

NGOs participating at the WTO represents an incredibly arrayed force that could either further or hinder the WTO's goals.

Building on the history of the WTO and the magnitude of NGO interest in influencing the WTO institutionally, Part III of this paper focuses on the NGOs' current attendance at WTO ministerial meetings and symposia, as well as the NGOs' attempts to play a role in dispute resolution at the WTO. Part IV examines the arguments for and against increasing access for NGOs at the WTO's rulemaking and policymaking fora. While these arguments are persuasive, they ignore the number of NGOs that are already attending WTO ministerial meetings and symposia, and submitting position papers. Furthermore, the arguments against NGO consultation lack merit when the WTO's NGO policy is compared to how other international institutions consult NGOs on their policy and rulemaking activities. These institutions also provide models that the WTO might imitate to successfully consult with NGOs on policy and rules without impinging upon member states' rights.

Part V examines the separate but related issue of NGO participation in the WTO's dispute resolution process. This Part analyzes the unique quality of the WTO's dispute settlement process, which is not found in other international institutions. This quality keeps these other institutions from being useful models of how the WTO dispute settlement panels might consult with NGOs. Part VI addresses the sub-issue of whether NGOs should be able to bring disputes before WTO panels. The WTO's structure and procedure for resolving disputes rules out the possibility of NGOs being complainants. However, NGOs do have a role in WTO dispute resolution by way of *amicus curiae* briefs. This part proposes that WTO members create specific and tailored rules to seek and welcome *amicus* briefs to be used by the panels to assist in resolving disputes.

This Article concludes with a summary of recommendations for the WTO and its members to consult NGOs in order to accomplish the WTO's mission of improving the world's living standards through fair trade rules.

II. WHAT IS AN NGO?: A HISTORY

The first step in analyzing the tension between NGOs and the WTO with the goal of proposing a workable solution is to determine the source of the tension. The current tension between

the WTO and NGOs derives from the ambiguous and inconsistent definitions of NGOs used by international institutions and the WTO's reliance on the outdated traditional model of international relations. The failure to properly define these influential non-state actors explains the place NGOs have at the WTO. Historically, the treatment of NGOs in the global trading context has not been uniform. Currently, the WTO limits NGO consultation by characterizing the WTO as a government-to-government institution. However, the WTO's short history shows that the non-state actor is very interested in and committed to furthering the WTO's objectives. This history and background of NGOs is only the foundation of this tension, but is critical to understanding the problem and to proposing a solution. The WTO should adopt a structured consultative procedure to effectuate NGOs' contributions.

What exactly is an NGO? This is not a rhetorical question. The term "non-governmental organization" plainly means an organization that is not a government organization.⁵ More precisely, an NGO is an organization that does not conduct the affairs of a country.⁶ Specific to the debate about NGOs and the WTO, Black's Law Dictionary defines a non-governmental organization as, in international law, "any scientific, professional, business, or public interest organization that is neither affiliated with nor under the direction of a government; an international organization that is not the creation of an agreement among countries, but rather is composed of private individuals or organizations," which are often granted consultative status with the United Nations ("UN").⁷ The UN includes NGOs such as OPEC, Greenpeace, and the Red Cross. These definitions are relevant because although international law does not consistently define "NGO,"⁸ international institutions label entities

5. See THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 671 (1999).

6. See *id.* See also ANTONIO CASSESE, INTERNATIONAL LAW 17 (2001) (arguing that traditional international law posits that States have the exclusive right to conduct the affairs of a nation). See also TERJE TVEDT, ANGELS OF MERCY OR DEVELOPMENT DIPLOMATS: NGOs & FOREIGN AID 41 (1998) (theorizing that NGOs are responses to "market or state failures").

7. BLACK'S LAW DICTIONARY 1076-77 (7th ed. 1999).

8. See Oscar Schachter, *The Erosion of State Authority and Its Implications for Equitable Development in International Economic Law* WITH A HUMAN FACE 37 (Friedl Weiss et al. eds., 1998) (describing how international

as NGOs based on domestic law.⁹ Naturally, different definitions from diverse legal systems and cultures create challenges for international institutions. In response to the challenge, several international institutions and legal scholars have attempted to clarify what type of entity is an NGO, each using different classifications. However, this selection of definitions creates ambiguities and misunderstandings about the nature of NGOs.

A definition proposed by the Secretary-General of the UN characterizes the trans-border nature of NGOs:

An NGO is a non-profit entity whose members are citizens or associations of citizens of one or more countries and whose activities are determined by the collective will of its members in response to the needs of the members or of one or more communities with which the NGO cooperates.¹⁰

The Secretary-General's definition suggests a trans-border identity for NGOs, implying that NGOs do not have a national identity *per se*. While this definition focuses on the geographical scope of NGOs it does not identify a function for NGOs. The UN Central Evaluation Unit definition addresses this point. NGOs are "professional associations, foundations, trade unions and business associations as well as research institutes dealing with international affairs and associations of parliamentarians."¹¹ This definition de-emphasizes geography as a feature

law rarely recognized NGOs; rather, an NGO's juridical status and rights were determined by national law).

9. *See id.* at 37. *See also* TVEDT, *supra* note 6, at 13–14. The United States ("U.S.") defines NGOs according to tax laws. In the U.S. NGOs are defined as "incorporated entities that qualify for exemption from federal income tax under any of the 26 specific subsections of the Internal Revenue Code." Lester M. Salamon & Helmut K. Anheier, *In Search of the Non-Profit Sector I: The Question of Definitions*, 3 VOLUNTAS 125–52 (1992).

10. *General Review of Arrangements for Consultations with Non-governmental Organizations: Report of the Secretary-General*, U.N. ESCOR, 1st Sess., Agenda Item 3, at 4, U.N. Doc. E/AC.70/1994/5 (1994). *See also* Peter R. Baehr, *Mobilization of the Conscience of Mankind: Conditions of Effectiveness of Human Rights NGOs*, in REFLECTIONS ON INTERNATIONAL LAW FROM THE LOW COUNTRIES IN HONOUR OF PAUL DE WAART 137 (Erik Denters & Nico Shriver eds., 1998).

11. *See* TVEDT, *supra* note 6, at 13 (agreeing that national law defines an entity as an NGO). Tvedt also comments on the diversity of definitions. Some definitions exclude business and research entities; others exclude trade unions.

and is also consistent with Kate Wellard and James Copestake's research, which defines NGOs as "registered, private independent, non-profit organizations."¹² These definitions individually are helpful in determining what types of organizations are perceived to be NGOs. However, when these three definitions are compared, they raise the question of whether NGOs should be identified according to their function or geographic location. The answer is neither. To suggest one approach would minimize the importance of the other and possibly exclude legitimate NGOs.

The research of commentators Lester M. Salamon and Helmut K. Anheier supports this point. Salamon and Anheier propose four ways to classify an organization as an NGO.¹³ The first classification is the legal model, which defines NGOs according to the laws of a country.¹⁴ The second classification is the economic/financial model, which requires that an NGO be a membership organization with the bulk of its income derived from membership dues.¹⁵ This model excludes any entity that receives more than 50% of its income from government sources.¹⁶ The third is the functional model, which is a common criterion used in the development field.¹⁷ The functional model looks at an organization's functions and working methods.¹⁸ Finally, NGOs can be defined using the structural or operational model, which asserts that an entity's structure and operation will define it as an NGO.¹⁹ An organization will be defined as an NGO under the operational model if: the organization is formally constituted, the basic structure is non-governmental (although government funding is permissible), the organization is self-governing, profits are not distributed

12. *See id.* (quoting Wellard & Copestake's research).

13. *See id.* at 14 (quoting Lester M. Salamon & Helmut K. Anheier, *In Search of the Non-Profit Sector I: The Question of Definitions*, 3 *VOLUNTAS* 125-52 (1992)).

14. *See id.* at 13.

15. *See id.* at 14.

16. *See id.*

17. *See id.*

18. *See id.* Critics of the functional model cite the model as being difficult to apply in different countries at different times because highly normative criteria are used.

19. *See id.* at 13 (noting that the structural model was the one which Salamon and Anheier preferred).

and its membership is to some extent voluntary.²⁰ Salamon and Anheier's broad approach is compatible with the WTO's broad jurisdiction over and goals regarding trade. This approach also reflects the varied types of WTO stakeholders representing the global population (including member states and NGOs) and incorporates the diplomatic and legal nature of the WTO.

This collection of definitions highlights the dynamic nature of international law and in particular the topic of NGOs' relationships with international institutions like the WTO. Since World War II, NGOs have increasingly been recognized as legitimate actors in the global arena.²¹ This increased recognition and improved access to decision-makers indicate that international law is moving away from the traditional recognition of the nation as the supreme player and toward a greater focus on individuals.²²

The WTO has no institutional definition to efficiently filter stakeholders seeking consultation. As seen, many definitions are available for the WTO to adopt. Without preferring one definition over another, this Article advocates that the WTO adopt a definition that will include those stakeholders who can help the WTO achieve its mission.

A. Proposed Role for NGOs at the International Trade Organization

The history of NGOs within the international trade regime is complicated. The WTO's proposed predecessor — the International Trade Organization ("ITO")²³ — contemplated a consultative role for NGOs. Article 87(2) of the ITO's Charter states that: "[The ITO] may make suitable arrangements for consulta-

20. See *id.* at 15. The voluntary requirement did not mean its staff was required to be volunteers, but that, rather, the board of directors did not receive compensation.

21. See LAWRENCE ZIRING ET AL., INTERNATIONAL RELATIONS: A POLITICAL DICTIONARY 425 (5th ed. 1995).

22. *Id.*

23. See JOHN H. JACKSON, THE WORLD TRADING SYSTEM 37–38 (2d ed. 2002) (detailing the ITO's history). The ITO was never created, due in main part to the failure of the U.S. Senate to ratify the Havana Charter. *Id.*

*tion and co-operation with non-governmental organizations concerned with matters within the scope of this Charter.*²⁴

Following the Havana Conference, the parties to the Havana Charter established an Interim Commission of the International Trade Organization which focused on the implementation of Article 87.²⁵ The outcome of the meeting included a recommendation that the Havana Conference adopt a list of consultants, preferably those NGOs already with consultative status at the UN Economic and Social Council.²⁶ These NGOs would be observers at the ITO meetings, have access to all Conference documentation and have the ability to propose agenda items.²⁷ At meetings other than the ITO's Annual Meeting, NGOs with competence in a particular subject matter were to be consulted.²⁸ However, the ITO was never established.²⁹ While countries negotiating the ITO charter appeared to foresee and plan for consultation with NGOs, the ITO's established successor, the GATT, included no language providing NGOs with any consultative status.

B. NGOs' status under the GATT

It is unclear whether the GATT Secretariat or the Contracting Parties ever granted NGOs consultative status. During the 6th Session of the Contracting Parties, the Contracting Parties invited representatives from the International Chamber of Commerce ("ICC") to make statements regarding three resolu-

24. Havana Charter for an International Trade Organization, U.N. Conference on Trade and Employment, Final Act and Related Documents, art. 87(2), U.N. Doc. E/CONF. 2/78 (1948), available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf

25. INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, ACCREDITATION SCHEMES AND OTHER ARRANGEMENTS FOR PUBLIC PARTICIPATION IN THE INTERNATIONAL FORA 6 (1999), available at <http://www.ictsd.org/html/accreditation.pdf> [hereinafter ICTSD REPORT].

26. *Id.*

27. *Id.*

28. *Id.*

29. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 76 (2d ed. 1986) (describing the co-existence of the GATT and the proposed ITO). The GATT was intended to address tariffs while the ITO would be an institution like the World Bank and the International Monetary Fund. *Id.*

tions.³⁰ Despite this invitation, it seems that the ICC representatives never did address the Contracting Parties because a later note from the GATT Secretariat's Office indicated that no NGO had ever been admitted as an observer to any of the GATT working party sessions.³¹ The Secretariat's note also concluded that no NGO had ever obtained consultative status.³² This clouded history illuminates the current status of NGOs at the WTO.

C. Current status of NGOs at the WTO

Article V(2) of the Agreement establishing the World Trade Organization states: "*The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.*"³³ The Agreement distinguishes between non-governmental organizations and other intergovernmental organizations.³⁴ Specifically, the WTO's General Council is required to make appropriate arrangements for cooperation with other intergovernmental organizations with similar responsibilities to the WTO.³⁵ Conversely, the General Council has the discretion to consult and cooperate with NGOs on WTO-related concerns.³⁶ The WTO Agreement gives NGOs obligations in two sub-agreements, the Technical Barriers to Trade Agreement ("TBT Agreement")³⁷ and the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement").³⁸

These two agreements include NGOs within their scope. The TBT Agreement requires members to ensure that NGOs, cen-

30. See GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 1043 (6th ed. 1994).

31. *Id.*

32. *Id.*

33. WTO Agreement art. V, ¶¶ 1-2.

34. See *id.*

35. See *id.*

36. See *id.* ¶ 2.

37. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement Annex 1A, available at <http://docsonline.wto.org/DDFDocuments/t/UR/FA/17-tbt.doc> [hereinafter TBT Agreement].

38. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement Annex 1A, available at <http://docsonline.wto.org/DDFDocuments/t/UR/FA/15-sps.doc> [hereinafter SPS Agreement].

tral or national governments, and local governments all follow the same obligations to set and monitor standards.³⁹ The TBT Agreement's Annex I defines a non-governmental body as a "body other than a central government body or a local government body, including a non-governmental body which has the legal power to enforce a technical regulation."⁴⁰ The SPS Agreement also contains a requirement that WTO members ensure compliance with the SPS Agreement by non-governmental bodies.⁴¹ The inclusion of NGOs in the text of these agreements and the imputation of obligations upon them provides some justification for NGOs' demand for more effective consultation.⁴²

39. See TBT Agreement arts. 3, 8. Specifically, Article 3.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement") requires WTO members to take reasonable measures to ensure that NGOs comply with the TBT Agreement's Article 2, which creates obligations for central governments when adopting technical regulations and standards. Article 8 also requires members to ensure that NGOs' conformity assessment procedures comply with those required of the central government. This provision also highlights the role of state and local governments in the WTO. While this is similar to the NGO issue, it is more complicated given the definition of federalism in the United States. However, as the accompanying database reveals sub-federal entities have attended and participated as NGOs in the WTO.

40. See *id.* Annex 1, ¶ 8.

41. See SPS Agreement art. 13.

42. See TERRENCE P. STEWART, *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992)*, at 1068-77 (1993) (describing the history of the Technical Barriers to Trade Agreement). During the GATT, contracting parties signed on to a Standards Code that applied to standards developed by NGOs. The European Community sought to require contracting parties to agree to use best practices to ensure that NGOs comply with the GATT's Standards Code. To this extent the TBT and the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") can be construed as obligating NGOs. As WTO members are bound by the TBT and SPS Agreements to insure compliance by NGOs, NGOs will be bound by their national governments to adhere to the TBT and SPS Agreements. Since no WTO member can opt out of the SPS or TBT Agreement, any measure taken by an NGO must comply with the TBT and SPS Agreements.

Obligations are imputed to NGOs because NGO status is determined by national law; NGOs that place a WTO member at risk of violating a WTO obligation will face discipline in the domestic setting. See CASSESE, *supra* note 6, at 78 (setting out the traditional position of international law under international agreements can not create direct rights and obligations for individuals). However, international agreements may oblige the contracting parties to adopt rules creating individual rights and obligations which are enforceable in national courts. *Id.* Cassese later demonstrates that, under modern interna-

Reading the TBT and SPS Agreements together with Article V suggests that consultation between NGOs and the WTO is necessary to effectuate these agreements despite Article V's discretionary language. However, the WTO sees itself as a government-to-government institution.⁴³ Consultation with NGOs is thus limited and subject to members' discretion, which threatens a productive relationship between the WTO and NGOs.⁴⁴

The variety of definitions of NGOs' rights and duties further shows that the meaning of the term NGO is unclear. The WTO treaty language also appears ambiguous if not contradictory regarding the level of consultation between the WTO and NGOs. In response to criticism from NGOs regarding the interpretation of Article V, the WTO's General Council directed the Secretariat to issue the Guidelines for Arrangements on Relations with Non-Governmental Organizations ("The Guidelines").⁴⁵ The Guidelines recognize that NGOs have a role in the WTO.⁴⁶ They also state that the WTO is committed to improving communication between NGOs and the WTO.⁴⁷ The Guidelines further contend that the WTO intends to become a more transparent institution by publicizing formerly restricted

tional law, states have lost their exclusive power over individuals. *Id.* at 79. Individuals as "holders of internationally material interests" have been "granted legal rights which are operational at the international level." *Id.* States have extended their international obligations to take into account individuals' demands, concerns and conduct. *Id.* See also Marsha A. Echols, *Sanitary and Phytosanitary Measures*, in *THE WORLD TRADE ORGANIZATION 207* (Terrence P. Stewart ed., 1996) (arguing that the Committee on SPS Measures should have a close relationship with NGOs because in many cases NGOs are able to implement SPS obligations).

43. See WTO Agreement art. V, ¶¶ 1-2. Although the Agreement does not specifically state that only sovereign states can be members of the WTO, this principle is based on the specific language characterizing NGOs as distinct from WTO members and intergovernmental organizations. See, e.g., WTO Agreement, Annex on Telecommunications, ¶ 7(b) (granting Members discretion to consult with NGOs).

44. See *id.* art. V, ¶ 2. The language here is the discretionary "may" rather than the mandatory "shall" of Article V, Paragraph 1.

45. See GATT Secretariat, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162, (adopted July 18, 1996), available at http://www.wto.org/english/forums_e/ngo_e/guide_e.htm [hereinafter Guidelines on NGOs].

46. See *id.* ¶ II.

47. See *id.*

documents more quickly.⁴⁸ The Secretariat is tasked with developing a closer relationship with NGOs through *ad hoc* symposia, NGO-initiated briefings, and a mechanism, not then determined, which would disseminate information to delegations interested in that information.⁴⁹ The Guidelines state that any WTO Council or Committee Chair that met with NGOs did so in an individual, not an official capacity.⁵⁰ The Guidelines also emphasize that the WTO was an intergovernmental organization, which prohibited NGOs from being directly involved in the WTO's day-to-day work.⁵¹ The Guidelines recommend that NGOs work in closer cooperation and consultation with member states at the national level because nation states had the responsibility to formulate trade policy.⁵²

Unfortunately these Guidelines do not clarify the meaning of Article V. Rather, they seem to isolate the member states from NGOs' input by directing the Secretariat to issue the Guidelines, which govern the relationship between NGOs and the WTO, but which were themselves created without input from NGOs.

Understandably, NGOs consider the Guidelines unsatisfactory. First, the Guidelines task the Secretariat with maintaining relations with NGOs while Article V empowers the General Council to consult with NGOs.⁵³ The Guidelines shield WTO members from interaction with NGOs, but it is the WTO members, not the Secretariat that negotiate the trade agreements.⁵⁴

48. *See id.* ¶ III.

49. *See id.* ¶ IV.

50. *See id.* ¶ V.

51. *See id.* ¶ VI.

52. *See id.*

53. *See* WTO Agreement art. V, ¶ 2.

54. *Id.* art. IV (describing the General Council as the architect of the negotiating process). *See also id.* art. IV, ¶ 2 (describing the General Council as comprised of representatives from WTO member states); *id.* art. VI (describing the functions of the Secretariat). The Secretariat is international in nature and its duties and functions come from the Ministerial Conference. *Id.* Arguably, the issuance of the Guidelines outside of a Ministerial Meeting usurps the power of the General Council because the Ministerial Meeting delegates are the same as the General Council. *Id.* art. IX (describing the decision-making practices of the WTO). Only WTO members, not the Secretariat, are empowered to make decisions that affect the operation of the WTO. *Id.*

Thus, NGOs have no way of contributing to the negotiation of trade agreements. The Guidelines are correct that nation states negotiate trade policy, but the WTO was created to benefit all of the world's people,⁵⁵ many of whom are able to speak only through NGOs.

Following the 1996 adoption of the Guidelines, the WTO formulated a procedure for organizations to attend the Singapore Ministerial Meeting.⁵⁶ NGOs were permitted to attend Plenary Meetings of the Singapore Meeting provided the WTO Secretariat accepted their applications.⁵⁷ According to Article V, drafted to regulate how applications were to be accepted, an NGO must show their activities "were concerned with matters related to those at the WTO."⁵⁸ In preparation for the Cancún Ministerial in September 2003, WTO members adopted different registration procedures for NGOs to attend the Fifth Ministerial.⁵⁹ NGOs are directed to file their requests to register and to provide in detail how their NGO is "concerned with matters related to those of the WTO."⁶⁰ Registration requests will be coordinated through the External Relations Division, which is a part of the WTO's Secretariat.⁶¹

III. THE STATUS OF NGOs AT THE WTO

Judging from the number of position papers and *amicus* briefs submitted by NGOs and NGO attendance at WTO ministerial meetings and symposia, it is clear that NGOs are deter-

55. *See id.* at pmb1. (recognizing that the activities of the WTO are intended to raise living standards, to ensure full employment and to expand the production of and trade in goods at the same time, and to allow for the optimal use of the world's resources).

56. *See* World Trade Organization, *Relations with Non-Governmental Organizations / Civil Society*, at http://www.wto.org/english/forums_e/ngo_e/intro_e.htm (last visited Apr. 24, 2003).

57. *See generally* World Trade Organization, *WTO Secretariat activities with NGOs*, at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_ngo_activ_e.htm (last visited May 31, 2003).

58. *See id.*

59. World Trade Organization, *Registration for Non-Governmental Organizations*, at http://www.wto.org/english/thewto_e/minist_e/min03_e/ngo_acc_e.htm (last visited Apr. 19, 2003).

60. *Id.*

61. *Id.*

mined to have a formal and uniform consultative role at the WTO despite the Guidelines' limitations.

A review of the number of NGOs involved with the WTO confirms existing conclusions and reveals the evolution of the role of NGOs in the WTO.

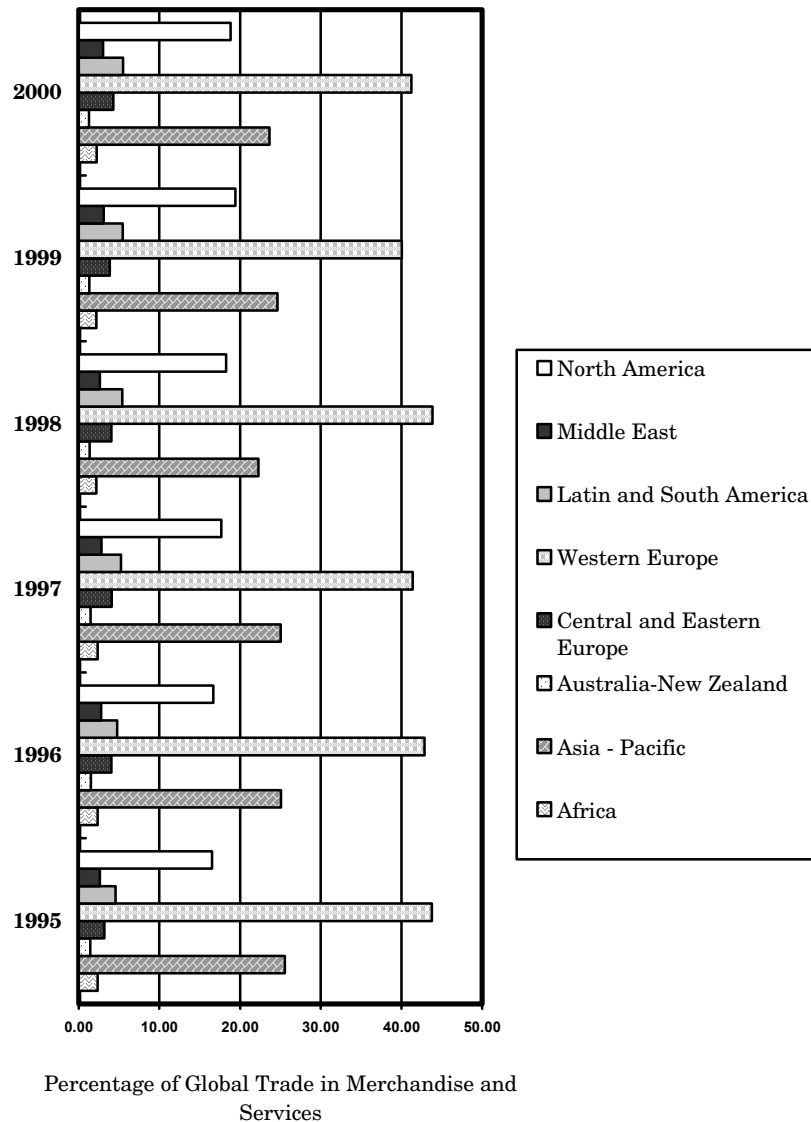
More than 1,490 NGOs have had some interaction with the WTO⁶² most of which are from Europe and North America.⁶³ Of that total, approximately 495 come from North America and 555 from Europe.⁶⁴ Before analyzing NGOs participation at the WTO, it is helpful to first understand global trade flows. The following chart details global trade flows between 1995 and 2000.

62. The author compiled a database tracking every NGO that has been listed as a registrant in a WTO activity or submitted a position paper through February 2003 or has submitted an amicus brief through May 15, 2002 [hereinafter NGO Database].

The NGO Database organizes NGOs by country and groups them by region. The regional categories are: Africa, Asia-Pacific, Australia-New Zealand, Central & Eastern Europe, Western Europe, the Middle East, Latin & South America, and North America. The opportunities listed are broken out into three categories: (1) Ministerial Meetings; (2) Symposia and Position Papers; and (3) Amicus Brief Submissions. These three categories are further divided. In the Ministerial Meeting category, attendance is tracked for Doha, Seattle, the Fiftieth Anniversary in Geneva and Singapore. The Symposia and Position Papers category tracks NGOs attending the Trade and Development Symposia with United Nations Conference on Trade and Development ("UNCTD"), the Trade and Environment Symposia, the Symposia with Civil Society and Position Papers. The Amicus Brief section tracks those NGOs which have submitted amicus briefs to panels by those briefs which panels have considered and those briefs which panels did not consider. Approximately fifteen NGOs were not able to be located in terms of their home country. The source of the information is the WTO's website. The database is on file with author and all questions should be directed to her.

63. NGO Database.

64. *Id.*

Figure 1: Global Trade Flows, 1995–2000⁶⁵

65. See WTO, INTERNATIONAL TRADE STATISTICS 2002 (2002), available at http://www.wto.org/english/res_e/statis_e/its2002_e/its2002_e.pdf.

As Figure 1 shows, the majority of trade occurs between developed countries. However, the trade flow data demonstrates an overall increase in trade globally. Since the WTO was established, NGOs have had at least eight Article V consultations with the WTO, have had opportunities to submit *amicus* briefs in over 250 disputes, and have had unlimited opportunities to submit position papers.⁶⁶ Only one NGO, the ICC, achieved the highest possible score, a nine, and only two NGOs — the World Wide Fund for Nature and Greenpeace — have achieved a score of eight.⁶⁷ Using four as the median score, eighty-five NGOs scored above the median.⁶⁸ Six NGOs had a score of seven; eight with the score of six and twenty-two and forty-six with scores of five and four respectively. The highest score for an NGO from a developing country was a seven for the Consumer Unity and Trust Society of India. Breaking down the NGOs with a score of four or better by region, approximately fifty-two are from Western Europe, twenty are from North America, ten are from Asia-Pacific, three are from Africa, and none are from Central and Eastern Europe, Latin and South America, the Middle East, or Australia/New Zealand. These numbers also show that NGOs from Europe participated on average 1.9 times, and surprisingly, that NGOs from North America participated on average 1.52 times.⁶⁹

Facts behind the numbers demonstrate that location of a meeting or symposia influences the NGOs involved. Those meetings held in Europe naturally attract NGOs from Europe while the Seattle Ministerial was overwhelmingly attended by

66. See NGO Database. NGOs consultations with the WTO during ministerial meetings, symposia, position papers, and *amicus* briefs were calculated to determine a score for comparative purposes. As of March 2003, ten opportunities arose for NGOS to be consulted by the WTO. These opportunities consisted of four ministerial meetings, four public symposia, and the unlimited opportunities to submit position papers and *amicus* briefs determined by the number of disputes. Opportunities to submit position papers and *amicus* briefs were classified into one category for each. Adding the four ministerial meetings, position papers, and *amicus* briefs, ten is the minimum achievable benchmark score.

67. See *id.*

68. See *id.*

69. See *id.*

NGOs from North America and predictably so will the Cancún Ministerial.⁷⁰

Figure 2: NGO Participation at WTO Ministerial Meetings

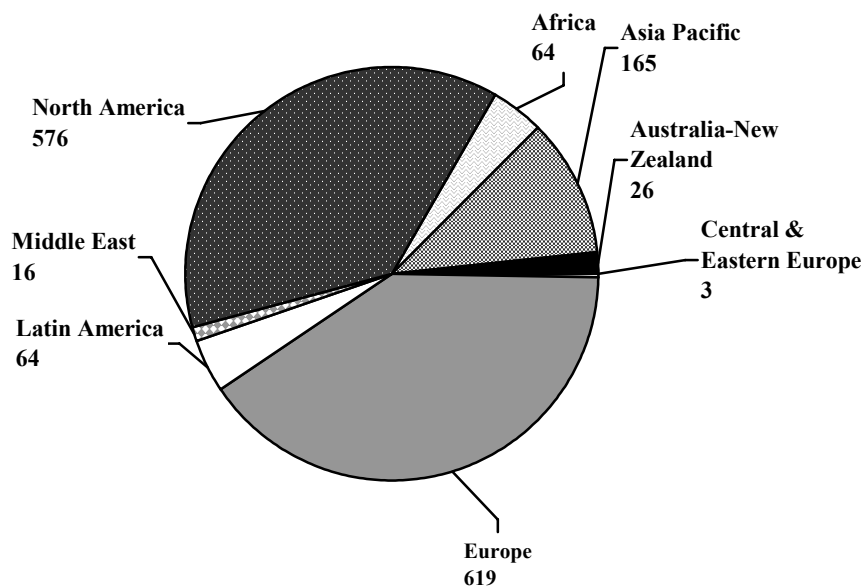
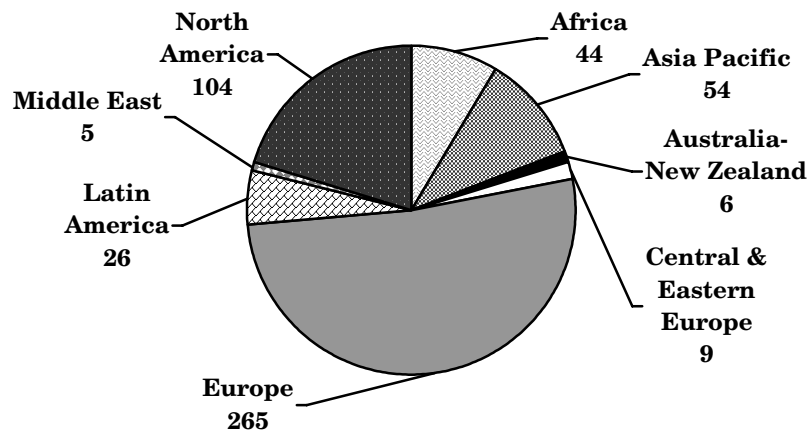


Figure 2 provides the overall level of NGO participation at the four ministerial meetings. More than 425 NGOs attended the 2001 Ministerial Meeting in Doha, Qatar as compared to the approximately 830 at the Seattle Ministerial, 145 at the Geneva 50th Anniversary of the GATT celebration and 115 at the Singapore Ministerial.⁷¹

70. *See id.*

71. *See Figure 2.*

Figure 3: NGO Attendance at Symposia and Position Papers



(through February 2003)

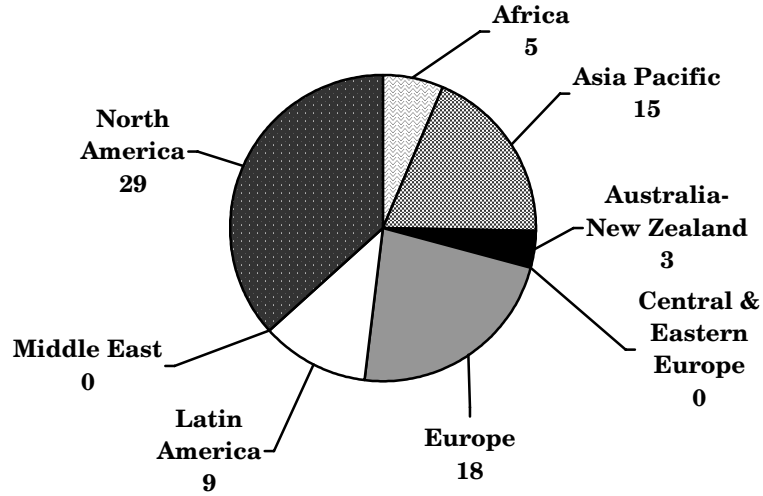
Figure 3 illustrates NGO attendance at four symposia held in Geneva, Switzerland: Trade and the Environment (123 NGOs), Trade and Development (31 NGOs), Symposium on Issues Confronting the World Trading System (244 NGOs) and the most recently the Doha Development Agenda and Civil Society (355 NGOs).⁷² NGOs have also submitted position papers,⁷³ attended scheduled briefings related to the WTO's day-to-day work, and met informally with the Secretariat staff and WTO members' delegations in Geneva.⁷⁴

72. See Figure 3.

73. *Id.*

74. See WTO, *Doha WTO Ministerial 2001: NGO Attendance* (Apr. 12, 2001), at http://www.wto.org/english/thewto_e/minist_e/min01/_min01_ngo_activ_e.htm.

Figure 4: NGO Submissions to the WTO Dispute Settlement System



(through June 2002)

Figure 5: NGO Submissions to Panels — *Amicus Curiae*⁷⁵
Submissions

WTO Dispute	NGO Submitting	Action by Panel or Appellate Body
EC — Asbestos: Panel Report, WT/DS135/R (Sept. 18, 2000)	Collegium Ramazzini American Federation of Labor and Congress of Industrial Organizations (2)	The Panel took the brief into consideration because the briefs were incorporated into the European Communities brief.
	Ban Asbestos Network Institutor Mexicano de Fibro-Industrias A.C.(2)	The Panel did not take into consideration but did not cite a reason.
	Only Nature Endures (1)	The Panel did not consider this brief because it was submitted too far into the panel process.
EC — Antidumping Duties on Cotton Type Bed Linen from India, WT/DS/141/R:Panel Report (Oct. 30, 2000)	Foreign Trade Admini- stration submitted by Dr. Konrad Neundorfer (1)	Brief was circulated to the EC and India to make com- ments. Neither party made comments, so the Panel did not take the brief into con- sideration when it decided the case.

75. BLACK'S LAW DICTIONARY 83 (7th ed. 1999) (defining *amicus curiae*, "Latin for 'friend of the court,' a person who is not a party to a law suit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter"). In The United States Supreme Court case *Muller v. Oregon*, 208 U.S. 412, 419 (1908), future Supreme Court Justice Louis Brandeis, then a prominent Boston attorney, filed a brief on behalf of the State of Oregon in defense of Oregon's statute limiting women factory worker's days to ten or less hours on the grounds that the law protected women's health. The significance of the "Brandeis Brief" was that it devoted two pages to legal arguments and more than one hundred pages to sociological, economic, and physiological data on the effect of long working hours on women's health. This brief set a model for future briefs that would be used to present historical, sociological, scientific, economic and other non-legal information to courts to assist in judicial decision making. See U.S. Department of State, Bureau of Educational and Cultural Affairs, *Backgrounder on the Court Opinion on the Muller v. Oregon Case*, at <http://exchanges.state.gov/education/engteaching/pubs/AmLnC/br30.htm>.

<p>Shrimp-Turtle: 21.5 Proceeding WT/DS58/RW (June 15, 2001)</p>	<p>Earth Justice Legal Defense Fund on behalf of the Turtle Island Restoration Network, the Humane Society of the United States, the American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, and the Fiscalía Del Medio Ambiente (Chile). (6) The National Wildlife Federation on behalf of the Center for Marine Conservation, Centro Ecoceanos, Defenders of Wildlife, Friends of the Earth, Kenya Sea Turtle Committee, Marine Turtle Preservation Group of India, National Wildlife Federation, Natural Resources Defense Council, Operation Kachhapa, Project Swarajya, Visakha Society for Prevention of Cruelty to Animals (11)</p>	<p>The United States decided to attach the National Wildlife Federation brief to its submission in this case. The United States argued that the Earthjustice Submission did not appear to be as relevant to the issues in this dispute as it addressed a hypothetical issue that was not before the Panel. The United States noted, however, that the Panel had the discretion to accept the Earthjustice Submission directly from the submitters. The Panel considered those NGO arguments attached to the United States' submission.</p>
<p>Thailand — Anti-dumping Duties on H — Beams from Poland: Appellate Body Proceeding WT/DS/122/AB/R (Apr. 11, 2001)</p>	<p>Consumer Industries Trade Action Coalition (CITAC), based in the US (1)</p>	<p>The Brief was returned because it contained evidence that CITAC had obtained confidential information contained in Thailand's submission. Poland and CITAC were represented by the same private law firm.</p>
<p>EC—Asbestos: Appellate Body, WT/DS135/R/AB (Mar. 12, 2001)</p>		<p>Appellate Body met <i>en banc</i> and added Rule 16.1 to its Working Procedures to facilitate the submission of briefs from NGOs. Procedure was for this case only and was not a new procedure under Rule 17.9 of the DSU.⁷⁶</p>

76. See Additional Procedure Adopted under Rule 16(1) of the *Working Procedures for Appellate Review*, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/9 (Nov. 8, 2000)

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	<p>Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associacao das Industrias de Produtos de Amianio Crisotilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Metallos (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociacion Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan). (13)</p>	<p>Briefs were returned to the NGOs because they were not submitted in accordance with the adopted procedure. The Appellate Body included with the returned brief a letter detailing the process for seeking leave. Only one, Korea Asbestos filed for leave to submit a brief under the procedure detailed.</p>
	<p>Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturer's Association (India); International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium); Maharashtra Asbestos Cement Pipe Manufacturers' Association (India); Roofit Industries Ltd. (India); and Society for Occupational</p>	<p>Applications from these groups were received by the Division after the deadline specified in the Additional Procedure for receipt of such application.</p>

available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/135-9.doc>. [hereinafter Asbestos Additional Procedure]. This procedure could form the basis of a criteria for dispute settlement panels to consult with NGOs.

	and Environmental Health (United States). (6)	
	Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland).	These applications were received by the Division within the deadline specified in the Additional Procedure for receipt of such applications but were denied because they did not comply with ¶ 3 of the Additional Procedures.
US: Countervailing Duties on Hot Rolled Lead &	American and Steel Institute, Specialty Steel Institute of North Amer-	The Appellate Body ruled that it had the legal authority to accept <i>amicus</i> briefs.

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Bismuth Carbon Steel from the UK: Appellate Body Report, WT/DS138/AB/R	ica (2)	However, it was unnecessary in this case.
U.S. — Measures Affecting the Importation of Shrimp: Appellate Body Report, WT/DS58/AB/R (Oct. 12, 1998)	Group 1: Earth Island Institute/Humane Society of US/Sierra Club (3) Group 2: Center for International Environmental Law/Center for Marine Conservation/Environmental Foundation/Mangrove Action Project/ Philippines Ecological Network/Red Nacional de Accion Ecologica/Sobrevivencia (7) Group 3: Worldwide Fund for Nature/Foundation for International Environmental Law and Development (2)	The Appellate Body ruled that the panel made a flawed legal interpretation that panels had no authority to accept unsolicited information from non-governmental bodies. The Appellate Body also held that Articles 13 and 12.1 empowered a panel to modify its procedures after consulting with the parties to solicit information from non-governmental entities. The AB upheld the panel's rejection of the briefs because as panels could seek information from any source; they also could reject it.

Throughout the history of dispute settlement at the WTO, more than seventy NGOs have submitted *amicus curiae* briefs either to dispute panels or the Appellate Body.⁷⁷ Most of these briefs have not been considered by panels or the Appellate Body as independent submissions, unless they were included in a party's submission. However, in the *EC—Asbestos* case,⁷⁸ despite criticism from many WTO members,⁷⁹ the Appellate Body

77. This number is based on references to NGO submissions by panels and the Appellate Body in WTO opinions. The number is probably a conservative estimate. See Andrea K. Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER L. SYMP. J. 87, 96 (2001) (describing NGO submissions to panels that had been rejected automatically; however, in the cases she cites, there are no mention of these submissions by the panels).

78. The World Trade Organization Appellate Body Report on European Communities — Measures Affecting Asbestos and Asbestos-Containing Products § 52, WT/DS135/AB/R (Mar. 12, 2001), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/135-11.doc> [hereinafter *Asbestos Appellate Body Report*].

79. See *India Protests at WTO Appellate Body Move Inviting Amicus Briefs*, M2 PRESSWIRE, Nov. 23, 2000, available at 2000 WL 29588646 [hereinafter *India Protests*].

sought *amicus* briefs, as a procedural matter. The disagreement among WTO members and between the members and the Appellate Body demonstrates that vague rules on NGO consultation create tensions, particularly when the Appellate Body is perceived to have created a new right for itself. This debate also demonstrates that the role of NGO at the WTO has been evolving in an unforeseen way because WTO members have not addressed this issue.

The Appellate Body's request for *amicus* briefs in the *EC—Asbestos* case appears more hortatory than substantive because they did not influence the Appellate Body's final ruling. Nevertheless it is significant because of the attention it draws to this unresolved issue. The issue presented here is not whether NGOs have a role at the WTO, but rather how NGOs can be consulted in a way that is meaningful but does not impinge upon any participating member's rights in WTO dispute resolutions.

The role of NGOs in the multilateral trading arena from the proposed ITO through the provisional GATT, and up to today's WTO has not kept apace with the increasing recognition that international institutions must connect to individuals not only through member governments but also through NGOs. While effectuating NGO consultation is not on the WTO's official priority list, the issue is constantly being debated. This debate, if left unresolved, has the potential to hamstring the WTO's efficient advancement of liberalized trade rules.⁸⁰ This history arguably shows that this topic is a controversial one that requires attention.

80. See Fiona McGillivray, *Democratizing the World Trade Organization*, in HOOVER INSTITUTION: ESSAYS IN PUBLIC POLICY NO. 105, HOOVER INSTITUTION ON WAR, REVOLUTION, AND PEACE 1, 2 (2000). See also JACKSON, *supra* note 23, at 61. Efficient advancement of trade rules refers to the consensus-based model of decision-making at the WTO. Relative to other international institutions, the WTO is efficient in that all members are required to adopt the WTO Agreements as a package. No cherry picking of agreements is permitted. *Id.*

IV. THE DEBATE

A. Three Points of View

The WTO's official position is that it is an intergovernmental organization that operates diplomatically. Granting NGOs greater involvement could potentially impede the diplomatic process because they work through domestic processes to influence global trade policy.⁸¹ However, this presupposes that every WTO member has a transparent and effective process. The WTO's position also assumes that governments incorporate adversarial points of view into a member state's WTO trade policy.⁸² The WTO's official position neglects the fact that, despite its claim to be a strictly government-to-government organization, the WTO requires global support for it to be effective.⁸³ The WTO faces constant scrutiny as its events and happenings are beamed instantly around the globe via satellite or transmitted over the Internet with a click of a mouse.

WTO members claim that the WTO already enjoys popular support because its representatives are democratically elected, whereas NGOs are not.⁸⁴ WTO members claim that this empowers them to negotiate rules, later to be ratified in national legislatures around the world.⁸⁵ For this reason WTO members often repeat the WTO's official position that NGOs should work through domestic processes.⁸⁶ WTO members further justify

81. See Guidelines on NGOs, *supra* note 45, ¶ VI.

82. See, e.g., Trade Act of 1974, 19 U.S.C. § 2154 (2000) (requiring the President of the U.S. to consult with the private and non-Federal government when negotiating trade agreements). *But see* Gary P. Sampson, *The Environmentalist Paradox: The World Trade Organization's Challenges*, 23 HARV. INT'L REV. 56, 58 (2002) (suggesting governments do not satisfy every domestic interest especially in the course of negotiations where bargaining results in trade-offs).

83. See TOMAS LARSSON, *THE RACE TO THE TOP: THE REAL STORY OF GLOBALIZATION* 34 (2001).

84. See McGillivray, *supra* note 80, at 2–3.

85. See Steve Charnovitz, *Opening the WTO to Non-governmental Interests*, 24 FORDHAM INT'L L.J. 173, 197 (2000).

86. See *id.* at 197 (describing the WTO members' viewpoints as a statist perspective). According to the statist perspective, because the WTO is composed of member states, NGOs have no place of their own and must rely on their domestic governments to influence the WTO's agenda. *Id.* However, according to the individualist perspective, "as an agency of global governance,

their refusal to consult with NGOs by claiming WTO negotiations are analogous to legislatures or Cabinet advisors who frequently meet behind closed doors.⁸⁷ The WTO, they argue, should not be forced to do what its member states are not.⁸⁸

WTO members further justify their refusal to consult NGOs by arguing that many NGOs have a propensity towards violence and disrupting WTO proceedings.⁸⁹ Consequently, NGOs who are genuinely interested in the WTO are suspected of attempting to use this interest to mask a hidden anti-WTO or anti-globalization agenda.⁹⁰ WTO members suspect that NGOs are attempting to force the WTO to address issues outside of the institution's competence.⁹¹ Some WTO members believe NGO consultation will result in special interests dominating the WTO agenda over the members' interests.⁹²

While the viewpoints of all WTO members are essential to this debate, developing countries are especially concerned about this issue. Developing countries, which perceive NGOs to be a well-funded European and North American export,⁹³ fear that NGO consultation will dilute their WTO membership rights.⁹⁴ Many developing countries also lack the resources necessary to fully participate at the WTO and believe that NGOs that do have these resources will impinge upon developing countries'

the WTO should maintain a vital connection to individuals who inhabit the planet." *Id.* at 202.

87. See McGillivray, *supra* note 80, at 2.

88. See *id.* See also HETTY KOVACH ET AL., THE GLOBAL ACCOUNTABILITY REPORT: POWER WITHOUT ACCOUNTABILITY? 8 (2003), available at <http://www.oneworldtrust.org/Files/Pubs/GAP%20report/GAP2003.pdf>. This is a pilot report of an on-going research project on the issue of global accountability. The report evaluated inter-governmental organizations, transnational corporations and non-governmental organizations on two aspects of accountability: member control and access to information. The WTO scored high among the five international inter-governmental organizations studied. Undeniably the WTO's dissemination of information is good once the information is derestricted. However, the study emphasizes that WTO members, nation-states, and customs territories control the organization. *Id.*

89. WTO Conferences are marred by antiglobalization protesters, rallied by NGOs. The NGOs seeking constructive reform resent violence being associated with their cause. See ECONOMIST, *supra* note 1.

90. See TVEDT, *supra* note 6.

91. See McGillivray, *supra* note 80, at 3.

92. See *id.*

93. See Schneider, *supra* note 77, at 100.

94. See Charnovitz, *supra* note 85, at 210.

rights as WTO members.⁹⁵ As shown above, most NGOs are in fact from Europe or North America, and so these fears may hold a glimmer of truth.

The reasons put forward to limit NGO consultation are convincing when viewed under the traditional international legal model. However, this model ignores the instability and inefficiency that occurs when non-state viewpoints are ignored.⁹⁶ This model also neglects the fact that while the WTO was originally concerned solely with the reduction of tariffs, it has shifted its focus to creating standards for domestic regulations and their enforcement.⁹⁷ The traditional model of international law assumes state competence in all international law matters, including international trade relationships. This assumption has become less true especially since the Cold War's end, as the world has seen many governments' inability, indifference, or failure to satisfy the demands of their citizens.⁹⁸ Because of the WTO's connection to and impact on individuals, NGOs should have a greater voice.

NGOs deserve an effective and real consultative role at the WTO. NGOs can assist developing countries maximize their power in the WTO and provide technical knowledge, scientific or other expert advice⁹⁹ that would assist the WTO members in negotiating rules in areas like environmental policy, invest-

95. *See id.* at 211 (stating that many WTO members oppose NGOs because the presence of NGOs in the WTO arena waters down governments' status as official representatives). *See* Interview with Stephen Porter, Counsel, Center for International Environmental Law, in Washington, D.C. (Feb. 21, 2002) (on file with author) [hereinafter Porter Interview] (distinguishing NGOs with resources from NGOs with little resources to dominate the WTO's agenda).

96. *See generally* JANET THOMAS, *THE BATTLE IN SEATTLE: THE STORY BEHIND AND BEYOND THE WTO DEMONSTRATIONS* (2000) (chronicling the various NGO groups and individuals present at the Seattle Ministerial Meeting). *See* Charnovitz, *supra* note 85, at 205–06. *See also* LAWRENCE T. WOODS, *ASIA-PACIFIC DIPLOMACY: NON-GOVERNMENTAL ORGANIZATIONS AND INTERNATIONAL RELATIONS* 25 (1993) (seeing NGOs as evolving actors in diplomacy).

97. *See* Jeffrey Atik, *Democratizing the WTO*, 33 *GEO. WASH. INT'L L. REV.* 451, 457 (2001). *See also* Wolfgang Benedek, *Relations of the WTO with other International Organizations and NGOs*, in *INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE* 492 (Friedl Weiss et al. eds., 1998).

98. ZIRING ET AL., *supra* note 21.

99. *See* WTO, *WTO Assistance for Developing Countries*, at www.wto.org/english/trawp_e/teccop_e/tct_e.htm (last visited Apr. 20, 2003).

ment, intellectual property and competition.¹⁰⁰ Considering NGO advice would add much-needed transparency and legitimacy to the WTO.¹⁰¹ Even if WTO members decided to disregard NGOs' advice, WTO negotiations would still be more legitimate if an effective consultation framework was in place.

In conclusion, the main justification for NGO participation is that global society has become more connected in economic relations as a result of the organized multilateral trading system.¹⁰² The multilateral trading system has advanced the liberalization of transportation and communications networks¹⁰³ and played a key role in political liberalization.¹⁰⁴ As a result, individuals can know in real time when proposed trade rules or decisions will affect them.¹⁰⁵

In the fifty years of its evolution, the multilateral trading system has seen a tremendous change in the way states and governments relate. The classical international legal theory, which regarded only states as actors in international law, has transformed into a model recognizing that NGOs and other non-state actors are legitimate actors in international law. Non-state actors in some instances have more power and ability to influence decisions than small nation states like Haiti or the Federated States of Micronesia.¹⁰⁶ Developing countries not present during the original ITO negotiations now comprise a majority of WTO

100. See Sampson, *supra* note 82, at 57.

101. See James P. Durling, *Rights of Access to WTO Dispute Settlement*, in DUE PROCESS IN WTO DISPUTE SETTLEMENT 141, 154–55 (Phillippe Ruttle et al. eds., 2001).

102. See JACKSON, *supra* note 23, at 7.

103. See FRANCES CAIRNCROSS, *THE DEATH OF DISTANCE* 1–26 (1997).

104. See Richard H. Steinberg, *Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism*, 29 L. & POL'Y INT'L BUS. 205, 213. See also JACKSON, *supra* note 23, at 7.

105. See, e.g., LARSSON, *supra* note 83, at 10 (discussing how the Internet and technology has advanced the flow of information, in particular to the developing world). See also CAIRNCROSS, *supra* note 103, at ch. 10 (describing how technology once thought of as a means for government to monitor its citizens in an Orwellian sense actually has become a way for citizens to hold their governments accountable through effective communications between citizen and government and among citizens).

106. See Harold Hongju, *Transnational Legal Practice*, in THE NATURE OF INTERNATIONAL LAW 322 (Gerry Simpson ed., 2001).

members.¹⁰⁷ Individuals are no longer at arm's length regarding trade rule negotiation and application.¹⁰⁸ While the WTO seems not to have acknowledged this change in the global legal regime, other international institutions have acknowledged and embraced this change.¹⁰⁹ These institutions provide useful models for the WTO to study, in deciding how they might consult NGOs in rulemaking and policymaking.

B. How Other International Institutions Can Provide Examples Of How NGOs Can Be Consulted In Negotiation and Rule-making without Infringing Member States' Rights.

Were the WTO to effectively consult with NGOs, it would not be alone among international institutions. Other international institutions provide examples of how successful consultation with NGOs can be permitted without lessening the rights of member states in the institution. These institutions demonstrate that the traditional model of international relations is not the only available model in the 21st century. Although many multilateral organizations consult NGOs,¹¹⁰ at least a dozen international institutions provide workable and acceptable models for the WTO to analyze and to emulate for effective NGO consultation. These institutions are similar to the WTO in terms of their membership size and scope of activities and include official UN agencies, global economic institutions, and international institutions whose missions require interaction with NGO stakeholders in the corporate, environment and labor areas. The WTO thus appears to fall behind its peer institutions when it comes to consultation with NGOs.

107. See generally GATT. See also JACKSON, *supra* note 23, at 319–20 (describing the dissatisfaction that many Latin American countries had with the GATT negotiated in 1947, and viewing the GATT as a disadvantage to developing countries, several Latin American countries having either never joined the GATT or having delayed joining). The original signatories were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the U.S. See GATT.

108. See Durling, *supra* note 101, at 141.

109. See *infra* part B.

110. See ICTSD REPORT, *supra* note 25, at 5–6.

1. UN Agencies

The UN has the same members as the WTO, focuses on globally scoped issues and faces the same logistical challenges in negotiations.¹¹¹ UN agencies consult with NGOs as is appropriate for the particular NGO's size, function, and scope.¹¹² This tiered structure is flexible enough to allow NGO consultation in the negotiating forum or in only the preparatory work to the negotiations.

Article 71 of the UN Charter grants the Economic and Social Council ("ECOSOC") the discretion to consult with NGOs.¹¹³ The ECOSOC has developed a hierarchical status to facilitate NGO consultation: An NGO may be placed on the general, specific, or roster status.¹¹⁴ An accreditation process managed by the Committee for NGOs, comprised of nineteen UN member states, determines which NGOs are placed on which roster.¹¹⁵

111. *See id.* at 7–18.

112. *See generally id.* at 8.

113. U.N. CHARTER art. 71 ("The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.").

114. *See* ICTSD REPORT, *supra* note 25, at 8 (describing the ECOSOC framework as broken down into three categories). General status is granted to those NGOs concerned with ECOSOC's activities. NGOs in this category are those large NGOs with a broad geographical reach. Special status is the second category and may be granted to those NGOs with a special competence specifically with a few fields of activity covered by ECOSOC. The third category is the roster status which may be granted to those NGOs which can make an occasional useful contribution to the ECOSOC's work and are available for consultation upon request. *Id.*

115. *See id.* at 7–8. NGOs with a "General Status" can receive the ECOSOC's agenda, propose agenda items, send observers to public meetings, circulate statements of 2000 words or less at ECOSOC and subsidiary body meetings, speak at meetings and receive invitations to UN conferences. They also must submit quadrennial reports to the ECOSOC Committee on NGOs. In contrast, "Special Status" NGOs can receive the ECOSOC agenda, but may not propose agenda items. They may send observers to ECOSOC and subsidiary public meetings, circulate statements of 500 or less words at ECOSOC public meetings and 1,500 or less words at ECOSOC subsidiary public meetings, speak at ECOSOC subsidiary meetings (but not at ECOSOC meetings), and are also invited to UN Conferences. Special Status NGOs must also submit reports to the Committee on NGOs. "Roster Status" NGOs may receive the ECOSOC agenda but may not propose agenda items. Roster Status NGOs

Currently, 1500 accredited NGOs have the right to attend conferences, brief member countries, and propose agenda items.

The UN Conference on Trade and Development (“UNCTAD”) also has a tiered relationship with NGOs: NGOs are designated general, special, or national.¹¹⁶ UNCTAD’s Trade and Development Board has granted consultative status to more than 200 NGOs. NGOs participate by attending meetings as observers, briefing delegates and proposing agenda items.¹¹⁷ UNCTAD also facilitates the development of NGOs from the developing world by raising funds from the developed world.¹¹⁸ The tiered relationships or structured frameworks used at ECOSOC and UNCTAD are not the only model for UN agencies.

may only send observers to meetings within their field of competence. They may not circulate statements at any ECOSOC public meeting unless invited to do so. Roster Status NGOs may not speak at ECOSOC meetings, unless invited by the Secretary-General or a subsidiary body. Roster Status NGOs are invited to UN Conferences and must submit quadrennial reports. *See also* Press Release, U.N., Committee on Non-Governmental Organizations Concludes Two-week Session (Jan. 28, 2000), *available at* <http://www.un.org> (describing the Committee on NGOs as nineteen members who decide annually which NGOs will have consultative status at the ECOSOC and at which tier). Currently, the Committee on NGOs includes: Algeria, Bolivia, Chile, China, Colombia, Cuba, Ethiopia, France, Germany, India, Lebanon, Pakistan, Romania, Russian Federation, Senegal, Sudan, Tunisia, Turkey, and the U.S. *Id.*

116. *See* ICTSD REPORT, *supra* note 25, at 9 (detailing the UNCTAD framework, set out in Article XV of rule 77 of the Trade and Development Board’s Rules of Procedure and implementing decision 43(VII) as distinguishing between general NGOs and special NGOs). General NGOs have a basic interest in the Trade Development Board’s activities while special NGOs bring a special competence and specific interest. The Trade Development Board determines which NGOs are granted consultative status and which ones receive general or special status. NGOs granted consultative status may send observers to public meetings, sessional committees, and subsidiary organs. They can also circulate documents, may speak upon invitation of the Trade Development Board Chair and approval by the members and may propose agenda items. There is also a third relationship category reserved for national NGOs that may be consulted after the NGO’s member state has been advised. All consultative NGOs receive meeting and conference documentation. The UNCTAD Secretary General may distribute Trade Development Board documents as the Secretary-General deems appropriate. *Id.*

117. *Id.*

118. *Id.*

The UN Conference on the Environment and Development (“UNCED”)¹¹⁹ is an example of a less formalized mechanism for NGO consultation.¹²⁰ UNCED consulted NGOs in the preparatory work for to the Rio Conference.¹²¹ Using the ECOSOC’s rules as a framework, more than 1,400 NGOs participated in the Rio Conference’s formal and informal meetings,¹²² made oral statements as time permitted,¹²³ and by invitation of the UNCED Secretariat, gave input regarding the drafting of Agenda 21.¹²⁴ These UN entities demonstrate that a formal or informal consultation process can work within a multilateral institution like the WTO whose membership is large and includes developed and developing countries without impinging upon member states’ rights.

2. Global Economic Institutions

Looking at other economic institutions provides some insight as to how the WTO could facilitate NGO access to decision makers. The World Bank shows the value of a consultative process where NGOs have access to institutional staff members. The Organization for Economic Cooperation and Development is an example of how an institution can facilitate contact between a multilateral institution, member states and NGOs.

The World Bank has an NGO Committee¹²⁵ that is an informal mechanism for consultation with NGOs.¹²⁶ The NGO Com-

119. See United Nations Environment Programme, *at* <http://www.unep.org/Documents/Default.asp?DocumentID=292> (last visited June 4, 2003), for a description of the UN’s environmental programs. UNCED refers to NGOs as “civil society.” See also United Nations Environment Programme, *Guidelines for Civil Society Participation*, *at* http://www.unep.org/dpd/cso/default.asp?src=New_guidelines.htm (last visited June 4, 2003). While UNCED has no formal definition of “NGO,” its guidelines contain a categorization of what organizations qualify as NGOs: “organizational form used by . . . such as scientific and professional organizations, service clubs, community-based organizations, consumer unions and environmental citizens’ organizations” The guidelines also identify functions for civil society to advance the UN’s environment agenda. See *id.*

120. See ICTSD REPORT, *supra* note 25, at 11.

121. *Id.* at 10.

122. *Id.* at 11.

123. See *id.* at 10–11.

124. See *id.* at 10.

125. *Id.* at 11.

mittee is where NGOs can discuss policy with the World Bank staff.¹²⁷ The NGOs and World Bank staff jointly decide on agenda items for the World Bank's meetings.¹²⁸ The Committee is chaired by a Bank staffer and a representative from an NGO.¹²⁹

Another institution closely related to the WTO is the Organization for Economic Cooperation and Development ("OECD").¹³⁰ The OECD also has a less formal credentialing process for NGOs.¹³¹ Since 1962, labor and employer/industry groups have been the primary representatives for non-governmental interests.¹³² Their consultative status entitles them access to the Secretariat and government delegations, permission to follow OECD committee work, and consultation with the Secretariat prior to the OECD's annual meetings.¹³³ During the annual consultations, the NGOs with consultative status can submit their position papers either orally or in writing.¹³⁴ NGOs also may receive general OECD information and some document summaries.¹³⁵

The consultation processes at the World Bank and the OECD show how institutions tasked with multilateral economic issues

126. *Id.* at 11–12 (describing the Committee as being comprised of an NGO Steering Committee and World Bank staff). The Steering Committee consists of 15 NGO groups, of which there are 2 representatives each from Africa, Asia, Latin America and the Caribbean, Eastern and Central Europe, the Middle East, and North Africa; 2 international representatives and 1 representative each from Europe, North America and Australia, New Zealand, and Japan. The members rotate to ensure diversity of opinions. *Id.*

127. *Id.* at 11.

128. *Id.* at 12.

129. *Id.*

130. See OECD, *About: OECD*, at <http://www.oecd.org/EN/about/0,,EN-about-0-nodirectorate-no-no-no-0,FF.html> (last visited Mar. 23, 2003).

131. See ICTSD REPORT *supra* note 25, at 12 (describing the OECD's Council creating criteria for NGOs to consult with the OECD and its members). In order for the OECD to grant consultative status, the NGOs must: (1) have wide responsibility in general economic matters or a specialized related area; (2) have affiliated bodies belonging to all or most OECD members; and (3) represent non-governmental interests. Only two groups have consultative status — the Trade Union Advisory Committee and the Business and Industry Advisory Group. *Id.*

132. See *id.* at 12–13.

133. See *id.* at 12.

134. *Id.* at 13.

135. *Id.*

are considerate of NGOs' viewpoints in their rulemaking and policymaking processes. Furthermore, these institutions show how the traditional state-to-state negotiating process has been supplanted by a model that factors in all stakeholders' points of view.

3. The Controversial: International Institutions Consulting With NGOs Representing Corporate, Labor, and Environmental Stakeholders

The debate surrounding NGO consultation at the WTO results from the conflicts between WTO members and NGOs representing corporate, labor and environmental issues. Specifically, WTO members are wary that corporate NGOs are attempting to dominate the WTO in order to escape domestic regulation, and fear that labor and environmental NGOs are trying to force the WTO to address issues not necessarily within its scope.¹³⁶ NGOs representing corporate, labor, and environmental interests have funding, strategic direction, and passion, and are thus threatening to WTO members.¹³⁷ For these rea-

136. See Remi Parmentier, *David and Goliath Travel to Qatar*, BUS. WORLD (Manila), Dec. 3, 2001, at P5, available at 2001 WL 31371650. See also Benedek, *supra* note 97, at 493; Durling, *supra* note 101, at 143.

137. See WOODS, *supra* note 96, at 15; Porter Interview, *supra* note 95; THOMAS, *supra* note 102, at 10 (supporting not only the passion of NGOs but also highlighting the misinformation propagated by some NGOs). See also *id.* at 38 (quoting Martin Fleck, Director of Washington State Physicians for Social Responsibility, who stated: "In the WTO rules, governments are not allowed to subsidize industry within their borders. However there is one big, huge, glaring exception, and that's military work — work that can be defined as in the national interests."); *id.* at 53 (interpreting Article III of the WTO to mean that it is "unlawful for a government to discriminate against products that are manufactured, harvested or produced in ways that are destructive to people and/or the environment"); *id.* at 78 (relating an assertion by Charlie Kerhaghan, Executive Director of the National Labor Committee, that the WTO suggests Nike factory workers in El Salvador get a pay cut from \$.60 per hour to \$.36 per hour). These are examples of misinformation and mischaracterization about the WTO. Article III of the GATT deals with national treatment. GATT art. III. Exceptions to national treatment can be found in Article XX and give WTO members the power to withhold national treatment in eight circumstances which include those circumstances "necessary to protect human, animal or plant life or health" and "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." *Id.* art. XX. These exceptions are available provided they are not arbitrary or unjustifiable

sons, WTO members are hesitant to grant any consultation rights beyond what is already allowed.¹³⁸ However, other international institutions consulting with corporate, environmental, and labor NGOs provide useful models for the WTO.

a. NGOs at the International Telecommunication Union and International Labor Organization

Two multilateral institutions have been successful at consulting corporate NGOs in the negotiation process. The International Telecommunication Union¹³⁹ (“ITU”) and the International Labor Organization¹⁴⁰ (“ILO”) are two models for how governments confer with stakeholders during negotiations and rulemaking.

The ITU’s negotiating session, the World Radio Conference (“WRC”) was last held in 2000.¹⁴¹ A significant number of NGOs representing private telecommunications and satellite companies, trade associations, and public interest groups were consulted.¹⁴² The ITU has three levels of membership: “Member States,” which is open only to sovereign states and “sector members,” the latter category being open to all other interested and competent actors.¹⁴³ During the WRC, ITU members like the U.S. and the European Community placed private stakeholders

or act as a disguised restriction on trade. *Id.* Subsidies are permitted in contexts outside of military spending. *See* Agreement on Subsidies and Countervailing Measures, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. at 1179. There is nothing in the WTO Agreement, or in dispute settlement panel or Appellate Body decisions, to support Mr. Kerhagen’s claim alleging the WTO’s ability to set wage rates for workers in El Salvador or anywhere else. This book ignored the several hundred NGOs that do understand the WTO’s rules and agreements. Unfortunately, this book also does a disservice to these responsible NGOs who have an understanding of how the WTO operates.

138. *See* Schneider, *supra* note 77, at 100.

139. *See* ITU, at www.itu.org (last visited Mar. 1, 2003).

140. *See* ILO, at www.ilo.org (last visited Mar. 1, 2003).

141. *See* Jennifer A. Manner, *A Survey: WRC-2000 and IMT-2000: The Search for Global Spectrum*, 9 COMM. L. CON. 5 (2001).

142. *See id.* at 10.

143. *See* ITU, *Membership*, at www.itu.int/members.html (last visited Mar. 1, 2003). Sector members are national entities and organizations engaged in telecommunications, radio communications, or development activities such as network operators, service providers, manufacturers, consultants, financial institutions, university and research, or regulators.

holders on their delegations.¹⁴⁴ These delegates had access to all the government officials and broke down typical diplomatic barriers.¹⁴⁵

This practice also permitted members from the developing world to interact with NGOs.¹⁴⁶ NGO members of the U.S. delegation did not pressure developing countries to adopt an American perspective through this practice.¹⁴⁷ Instead, American NGOs learned about the concerns and objectives of member states from Latin America and Africa.¹⁴⁸ The interactions between U.S. and European delegates and the delegates from developing countries required the delegates from the U.S. and Europe to fully consider the developing world's point of view. At the end of the WRC, a vote was taken on identifying frequency bands for use by IMT-2000 systems¹⁴⁹ and the developing world carried the greatest number of votes.¹⁵⁰

The ILO is an example of an international institution which consults with NGOs representing corporate and organized labor concerns. The ILO has a tripartite structure: members' delegations consist of government officials, usually represented by a Labor Minister or Secretary; representatives of workers from the member states; and representatives of employers from that member state.¹⁵¹ The government representative heads the delegation.¹⁵² The three representatives from a member state are not required to agree or vote consistently. Employer and worker NGOs sit on the ILO's Governing Body along with government representatives. The Governing Body acts on ILO policy, elects the ILO's Director General and establishes programs and the budget.¹⁵³

144. See Manner, *supra* note 141, at 13.

145. See *id.* at 24–25.

146. See generally *id.*

147. See *id.* at 22–23.

148. See *id.* at 19–21.

149. *Id.* at 6. Such systems are commonly known as third generation mobile systems.

150. See Ambassador Gail Schoettler, *Spectrum Allocation: The Developing World Must be Heard*, 1 EUROPEAN AFFAIRS (2000), at http://www.europeanaffairs.org/archive/2000_fall/2000_fall_66.php4.

151. See ILO, at www.ilo.org/public/english/depts/fact.htm (last visited Mar. 1, 2003).

152. See *id.*

153. See *id.*

b. NGOs in the Multilateral Environmental Agreements Forum

WTO members are also concerned about consulting NGOs representing environmental groups. As demonstrated by the parade of protesters armored in turtle costumes at Seattle, environmental groups possess and employ much passion, determination, and creativity in order to get their message across to WTO decision-makers.¹⁵⁴ Frustrated by their exclusion from meaningful consultation, environmental groups reacted through activism.¹⁵⁵ Given the close connection between trade and the environment, environmental NGOs see their consultation at the WTO as justified.¹⁵⁶ Moreover, environmental NGOs have also come to expect meaningful consultation because of the consultative role they are granted in several multilateral environmental agreements (“MEA”).

The Convention on Biological Diversity¹⁵⁷ grants any NGO qualified in conservation, sustainable use of biological diversity, or related fields the right to be an observer at the Convention, provided that one-third or more of the Convention’s members do not object.¹⁵⁸ The Secretariat administers the accreditation process which grants accredited observers the right to be invited to make oral statements and distribute documents at meetings.¹⁵⁹ No NGO may vote, nor may they propose agenda items.¹⁶⁰ Distribution of documents is not at issue because all Convention documents are public.¹⁶¹ NGO observers can attend almost all meetings except the Budget meetings.¹⁶² Other MEAs like the Convention on International Trade in Endangered Species of Wild Fauna and Flora¹⁶³ and the Montreal Protocol on

154. See THOMAS, *supra* note 96, at 28.

155. See *id.*

156. See Porter Interview, *supra* note 95.

157. Convention on Biological Diversity of the United Nations Conference on the Environment and Development, June 5, 1992, U.N. Doc. DPI/1307, reprinted in 31 I.L.M. 818 (entered into force Dec. 29, 1993).

158. See ICTSD REPORT, *supra* note 25, at 10.

159. See *id.*

160. See *id.*

161. See *id.*

162. *Id.*

163. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, art. XI, § 7, 993 U.N.T.S. 243.

Substances that Deplete the Ozone Layer¹⁶⁴ also follow these same procedures for including NGOs in their work.¹⁶⁵ These organizations are a sampling of international institutions whose members are governments, but which also incorporate NGOs into their day-to-day activities.

Consultation procedures adopted by these international institutions demonstrate that the WTO is tardy in recognizing the modern trend toward greater cooperation between NGOs and international institutions. These institutions are highlighted not to embarrass or shame, but to persuade the WTO to adopt an effective consultation process. Clearly the WTO has several paths it could take in adopting a restructured and more effective consultation process.

The WTO could adopt a hierarchical classification of NGOs to manage consultation privileges by status. Like the UN's agencies, the WTO could create tiers that would organize NGO consultation privileges by size, subject matter of an NGO's focus or a particular WTO sub-agreement. Emulating UNCED, the WTO might consult with NGOs during the negotiations or preparatory work for an agreement.

The WTO can also adopt a consultation process like the World Bank. According to this model, the WTO could strengthen the Secretariat's role in setting agendas for WTO negotiations. Similarly, the OECD's informal process could be attractive to the WTO because it manages NGOs' interaction with delegations, coordination with the institution's staff and access to staff.

The ITU, ILO, and MEAs demonstrate how the WTO could effectively consult with NGOs in a constructive manner. These institutions demonstrate how international institutions can effectively consult NGOs without infringing the rights of institutions' member states. The WTO would also be able to raise money through NGO dues, which can be invested into building capacity for developing countries and less developed countries.

164. Montreal Protocol on Substances That Deplete the Ozone Layer, art. XI, ¶ 5, Sept. 16, 1987, 1522 U.N.T.S. 3. The Montreal Protocol was amended four times: in London, 1990; in Copenhagen, 1992; in Montreal, 1997; and in Beijing, 1999. See UN, *Montreal Protocol on Substances that Deplete the Ozone Layer*, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty12.asp> (last visited Apr. 7, 2003).

165. See ICTSD REPORT, *supra* note 25, at 10.

Three important observations can be drawn from the practices of these international institutions. First, the WTO is not on par with other international institutions with regard to having an effective consultative structure that considers the collective expertise, knowledge and diverse views of NGOs. Second, consultation with NGOs need not result in a reduction of the rights or power of any WTO member. Third, any consultation structure devised by the WTO, would still be subject to approval by its members who could engineer and determine which NGOs are consulted and at which level.

The institutions that are connected to their stakeholders and civil society support the broader point that the level of interaction between international institutions and the individuals, which these institutions are intended to benefit, is improving so that public interests beyond those of the sovereign are more fully incorporated. To be sure, the traditional model, which only allows states to have a role at international institutions, is outdated and inefficient. Consultation with NGOs in negotiation and rulemaking will result in the WTO accomplishing its overall objectives and the Doha development agenda.

As the case has been made for the WTO to change the way it consults with NGOs in negotiations and rulemaking, a separate analysis is required to determine what level of NGO consultation within the WTO's dispute resolution process is appropriate.

V. FRIEND OR FOE: NGOS IN THE WTO'S DISPUTE SETTLEMENT PROCESS

A comparison to other international institutions' dispute settlement processes is not helpful in deciding what role NGOs should have within the WTO dispute settlement mechanism. The above-mentioned institutions' procedures for resolving disputes seem archaic in comparison to the WTO.¹⁶⁶ The main

166. See ZIRING ET AL., *supra* note 21, at 353 (describing the UN's dispute settlement procedures as recommendations as non-binding). The UN Charter seeks the pacific settlement of disputes through negotiation, arbitration, conciliation, and use of good offices. The UN Charter acknowledges the most effective means of dispute resolution is through bilateral negotiations. *Id.* See also Bank Information Center, *The World Bank Inspection Panel*, at <http://www.bicusa.org/mdbs/wbg/inspectionpanel/index.htm> (last visited June 4, 2003) (describing the World Bank's Inspection Panel, the means for individuals and NGOs to redress actual or potential harm to their interests from

criticisms are their dispute resolution methods are not binding and their rulings are unenforceable. The debate can only be analyzed in the context of the WTO and its rules. The issue can be broken down into two claims NGOs have made for greater consultation at the WTO. The first claim relates to a fundamental change in the WTO's dispute settlement process: allowing NGOs and other non-state parties to file disputes against governments. The second claim is that NGOs and other non-parties should be able to submit *amicus* briefs to a panel or the Appellate Body. The positions and concerns WTO member states need to be considered as well. The WTO's dispute settlement system will unlikely change to allow private actors, e.g., NGOs, to file claims, but the practice of NGOs submitting *amicus* briefs to panels for review will develop further. The task for WTO members is to structure a system which will incorporate NGOs without infringing on the rights of WTO members.

These differences must be recognized when analyzing the role of NGOs in the WTO dispute resolution, either as complainants or parties in the dispute or as consultants through *amicus* briefs. The WTO's dispute resolution system is different than the dispute resolution mechanisms of the international institutions mentioned above.¹⁶⁷

The WTO's dispute resolution system has revolutionized the resolution of disputes between members of international institutions by making its results binding on its members.¹⁶⁸ Under

World Bank projects). The Inspection Panel process has had a tarnished track record of success given that Bank management has been found to intervene in investigations. See DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW: TEXTS AND MATERIALS 1129 (Karin Oellers-Frahm & Andreas Zimmerman eds., 2001) (describing the process for resolving disputes between ITU members which includes diplomacy, procedures under bilateral and multilateral treaties or any other method mutually agreed upon). Parties may also resolve disputes through arbitration. A party in theory may choose not to resolve a dispute. See ICTSD REPORT, *supra* note 25, at 19 (concluding that the WTO's dispute settlement process has a different character than other institutions). Arrangements with NGOs regarding dispute resolution require the binding and enforceable nature of WTO decisions to be considered.

167. See Benedek, *supra* note 97, at 491–92.

168. See Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES 370 (Friedl Weiss ed., 2000). See also JACKSON, *supra* note 23, at 125–26.

the GATT dispute resolution system, which was purely a diplomatic process, a contracting party could choose not to comply with a GATT panel decision.¹⁶⁹ This defect in the GATT was acknowledged and its change was a priority during the Uruguay Round negotiations which produced the Understanding on the Settlement of Disputes.¹⁷⁰

The Understanding on the Settlement of Disputes¹⁷¹ (“Dispute Settlement Understanding” or “DSU”) affirms that the WTO’s dispute settlement system is a process for members to resolve disputes.¹⁷² There are no provisions for non-WTO members to bring a claim.¹⁷³ Dispute settlement panels are empowered under Article 13 to seek information from any source, which, as interpreted, includes individuals and NGOs.¹⁷⁴ Panels have interpreted that provision to mean that a panel can actively request information, accept unsolicited information, and can disregard information.¹⁷⁵ The Appellate Body under Article 17.9 of the Dispute Settlement Understanding has the power to define its working procedures in coordination with the Chairman of the Dispute Settlement Body and the WTO Director-General.¹⁷⁶ The Appellate Body has interpreted this provision as permitting it to request information from NGOs in the form of *amicus* briefs.¹⁷⁷ NGOs’ claims should be examined, against this important treaty and factual background.

The first claim, that NGOs have standing to bring a dispute at the WTO, has little support outside of the NGO community.¹⁷⁸

169. See Hudec, *supra* note 168, at 370.

170. See *id.*

171. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, in THE FINAL RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS, 33 I.L.M. 1125, 1226 [hereinafter Dispute Settlement Understanding].

172. *Id.* art. 1.

173. See generally *id.*

174. *Id.* art. 13. See *infra* Figure 5.

175. See *infra* Figure 5.

176. Dispute Settlement Understanding, *supra* note 171, art. 17.9.

177. Asbestos Appellate Body Report, *supra* note 78, § 50.

178. See Schneider, *supra* note 77, at 100 (describing India’s justification against third party NGOs involved in WTO dispute settlement as counterproductive because they will impede the diplomatic process). But see John A. Ragosta, *Unmasking the WTO: Access to the System: Can the WTO DSB Live Up to the Moniker “World Trade Court”?*, 31 LAW & POL’Y. INT’L. BUS. 754

Under the DSU's rules, NGOs have no power to bring cases before the WTO.¹⁷⁹ Although some scholars agree that NGOs should have the ability to file complaints because NGOs represent the victims and beneficiaries of the multilateral trading system, the WTO's rules do not support this argument.¹⁸⁰ NGOs also assert that they, like any interested actor, should have standing.¹⁸¹ However, as equitable as the assertion sounds, the WTO lacks any means for NGOs to accomplish this goal by their own accord. Another suggestion is that private parties could also function as private attorneys general, similar to American antitrust law, putting pressure on the more powerful players to obey the rules.¹⁸² This follows from the view that governments can not represent all interests related to a dispute.¹⁸³ However, the suggestion might result in private persons, and by extension, NGOs suing their own governments at the WTO, which does not seem to be the best use of the dispute resolution system.¹⁸⁴ Practically, there is little incentive for WTO members to vote to make this systemic change.¹⁸⁵ This result follows from the fact that the WTO's dispute resolution system is not purely judicial.¹⁸⁶ Furthermore, the binding dispute resolution system

(2000) (referencing Article 50 of the International Court of Justice's Statute permitting international courts to accept amicus briefs).

179. See *Dispute Settlement Understanding*, *supra* note 171.

180. See *Schneider*, *supra* note 77, at 94–95.

181. See *Charnovitz*, *supra* note 85, at 215.

182. See *Schneider*, *supra* note 77, at 94–95.

183. See *id.*

184. See *id.* at 95.

185. See *Durling*, *supra* note 101, at 154.

186. See *JACKSON*, *supra* note 23, at 125–26 (classifying the dispute settlement system as a rules-based system focusing on the rule of law). While this point of view accurately describes the actual panel process, disputes are not resolved only through litigation at the panel level. *Cf.* *Hudec*, *supra* note 168, at 370 (asserting that the system is quasi-judicial evolving from the third viewpoint, a diplomatic process). *But see* *Ragosta*, *supra* note 178, at 739, 741 (describing the WTO as attempting to be a Court for International Trade with the potential to create international trade common law). However, *Ragosta's* viewpoint ignores that a panel finding does not necessarily translate into a remedy in terms of a legal ruling. Diplomacy also prevails in many cases in determining a member's compliance with a panel's finding. The reality is that the WTO's dispute settlement system is, for lack of a better word, quasi-judicial. See *Dispute Settlement Understanding*, *supra* note 171, art. 3. The WTO resolves disputes through litigation at the panel and appellate processes as well as through conciliation, mediation and arbitration. Consequently, the

has become a tool for WTO members to accomplish their trade priorities.¹⁸⁷

In conclusion, NGOs will not achieve consultation through complainant status because the WTO's dispute resolution system is not a purely judicial entity. As no incentive exists for WTO members to change the plainly-worded rules defining who may bring disputes, it is improbable that this change will occur.¹⁸⁸ However, the actions of the panels and the Appellate Body support the argument that consultation with NGOs is desired in some cases by way of *amicus* briefs.

According to the WTO's dispute settlement rules, NGOs do not per se have the right to submit *amicus* briefs to WTO dispute settlement panels and the Appellate Body. Rather, panels including the Appellate Body have interpreted the rules as granting to them the discretion to seek *amicus* briefs from NGO experts and the ability to accept unsolicited briefs. This interpretation of the rules has troubled and angered some WTO members who characterize the panels' decisions as overstepping their mandate.¹⁸⁹ This tension between WTO members and the dispute resolution officials highlights the change occurring in the treatment of NGO-submitted *amicus* briefs.

last three dispute settlement mechanisms reveal that diplomacy is alive and well at the dispute settlement process.

187. See Durling, *supra* note 101, at 144–45. Members bring disputes for a variety of reasons. Disputes are commenced when they are of economic importance to a member as in *EC Measures Concerning Meat and Meat Products (Hormones)*, 1998 WL 25520, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/26-13.WPF>. Disputes are often brought for political reasons as perceived in the recent World Trade Organization Appellate Body Report, United States — Tax Treatment for “Foreign Sales Corporations,” WT/DS108/AB/R (Feb. 24, 2000), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABR.DOC>, and in the World Trade Organization Dispute Panel Report, U.S. Complaint Concerning E.C. Regime for the Importation, Sale And Distribution Of Bananas, WT/DS27/R/USA (May 22, 1997) available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/27RUSA.WPF>. See William M. Funk, *The Thirty-Years Tax War*, 22 TAX NOTES INT'L 65 (2001) WTO members also bring disputes because they hope to bring about systemic change within the WTO. See Durling, *supra* note 101, at 144–45. Thus, despite the attempts of NGOs and other non-WTO actors to characterize the dispute settlement system as a court, it maintains its own unique characterization.

188. See WTO Agreement art. 9, ¶ 1 (describing the decision making process in the WTO as consensus based. Any member can block changes to the DSU.).

189. See *India protests*, *supra* note 79.

Despite this change, the resistance to the resolution of consultation between the WTO and NGOs through *amicus* briefs is worth considering. This resistance focuses on WTO members' concerns that well-funded, more powerful NGOs will destroy the effective dispute resolution system by allocating more power to themselves than to WTO members.¹⁹⁰ Contrary to this viewpoint — and more supportive of the WTO as an institution — is the argument that NGO-submitted *amicus* briefs offer greater benefits.

One concern is that panels have the ability to craft new WTO policy that may not have been foreseen during the negotiation process.¹⁹¹ Granting NGOs access to the panels might give them more power than some WTO members to influence WTO policy.¹⁹²

WTO members are concerned about NGOs' financial ability to fund advocacy at the WTO. Some WTO members are suspicious of NGOs because often the NGOs' funding and agenda are undisclosed.¹⁹³ A related concern is that an open *amicus* brief process will result in highly skilled law firms not representing environmental and human rights NGOs, but well-funded industry or corporate groups instead.¹⁹⁴ NGOs that had the resources to continue to submit briefs would become more successful and have a more persuasive role.¹⁹⁵ This thought leads to the point that *amicus* briefs might lose their function as information devices and become lobbying mechanisms, and this would raise systemic concerns.¹⁹⁶

Another criticism is that any movement away from the WTO as being state-centered would threaten the WTO as a system.¹⁹⁷ Systemic concerns include the notion that the dispute settle-

190. See Schneider, *supra* note 77, at 100. But see USTR Calls for Additional Progress on WTO Transparency (Apr. 4, 2000), available at <http://www.ustr.gov>. The United States called for the WTO to make several reforms to increase transparency. Permitting interested stakeholders to file *amicus* briefs was only one suggestion. USTR repeated this call in October 2000 and again in August 2002. *Id.*

191. See Schneider, *supra* note 77, at 99.

192. See *id.* at 100.

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.* at 106.

197. See *id.* at 100.

ment process is too short to accommodate what could be a flood of briefs, making the process unworkable.¹⁹⁸ A related concern is that NGOs submitting *amicus* briefs will prevent effective and speedy dispute resolution.¹⁹⁹ These systemic concerns need to be addressed seriously and fairly.

The concerns over the money and influence of NGOs on the WTO by way of *amicus* briefs assume that the decision to allow *amicus* briefs would have no parameters. The process crafted by the Appellate Body in the *EC—Asbestos* case, allowing *amicus* briefs, offers a promising and workable solution that would satisfy all members.²⁰⁰ WTO members could modify the *EC—Asbestos* process to channel *amicus* brief submissions so as not to overwhelm the dispute resolution system or impinge on any WTO members' rights or power. More importantly, this subject is up for debate. NGOs and supporters of increased NGO consultation by way of *amicus* briefs must make their case that this type of consultation offers many benefits for the WTO.

By developing a concrete mechanism for consultation via *amicus* briefs, the WTO can deflect criticism that its dispute resolution system lacks transparency, fairness and legitimacy.²⁰¹ These arguments could be dismissed if NGOs had an opportunity to present their information, expertise and viewpoints through *amicus* briefs.²⁰² Critics who assert that some NGOs are working behind the scenes at the WTO would be silenced by opening the process, and promoting fairness.²⁰³ By opening up and regulating the NGO participation process, WTO members could manage the consultation of NGOs.²⁰⁴

Another criticism is that the dispute settlement system lacks legitimacy because in practice panels seem unreceptive to NGO *amicus* briefs. One prominent example illustrating this point was the *21.5 Proceeding*²⁰⁵ in the *Shrimp-Turtle* case.²⁰⁶ Envi-

198. See Ragosta, *supra* note 178, at 755.

199. See Schneider, *supra* note 77, at 99.

200. See Asbestos Appellate Body Report, *supra* note 78, § 52.

201. See Durling, *supra* note 101, at 152, 154–55.

202. See Ragosta, *supra* note 178, at 751.

203. See Durling, *supra* note 101, at 154.

204. See *id.* at 156 (advocating that by opening the WTO dispute settlement to *amicus* briefs will also build legitimacy for the system and its outcomes).

205. Report of the Appellate Body, United States — Import Prohibition Of Certain Shrimp and Shrimp Products, AB-2001-4, adopted Oct. 22, 2001, WT/DS58/AB/RW available at <http://docsonline.wto.org/DDFDocuments/t/>

ronmental groups submitted an *amicus* brief which was attached to the U.S. government brief.²⁰⁷ The panel only considered the brief's points that were consistent with the U.S.'s arguments.²⁰⁸ However, if the WTO created parameters triggering panel consultation with NGOs and these parameters were intended to fully utilize NGO consultation without hindering WTO members' rights, then this issue would be resolved.

Essential to this argument is that the WTO's rules on NGO consultation need to be written to allow for flexibility to accommodate the concerns of WTO members, especially the special and differential treatment of developing and less developed countries. For example, when the parties sought to establish a panel, they could request that the panel set parameters for *amicus* brief submissions. A panel certainly has the authority to tell NGOs how long a brief could be, how many briefs could be submitted and the deadlines for submission.²⁰⁹ Panels also have the authority to accommodate the interests of developing countries and less developed countries by setting specific conditions for *amicus* briefs.²¹⁰ One suggestion is to limit *amicus* briefs to only those NGOs from the developing world when developing countries are parties. Important to note in this proposition is that the WTO members would be defining the rules, not NGOs nor dispute settlement panel members. An important point in this analysis is that NGOs can contribute to the WTO's dispute resolution procedure. For too long, the benefit of NGOs' contribution has been perceived to be outweighed by the costs.

NGOs can make valuable contributions to the dispute settlement system through *amicus* brief submissions. It is unlikely that NGOs will be complainants in the dispute settlement process. WTO members still view the right to complain as an inter-governmental process that has legal, arbitral and diplomatic features. Nevertheless, NGOs still have a stake in the outcome

WT/DS/58ABRW.doc.

206. See Porter Interview, *supra* note 95.

207. See *id.*

208. See Schneider, *supra* note 77, at 99 (positing that interest groups unduly influence the WTO based on their identity and resources).

209. See Figure 5, *supra* (describing WTO panel and appellate body decisions listing panels authority regarding *amicus* briefs).

210. See *id.*

of disputes, because they, like WTO members, collectively account for the interests that will be affected by compliance or an adverse ruling. A diplomatic compromise could come in the form of a managed *amicus* brief procedure which would include panelists considering briefs. The Appellate Body in *EC — Asbestos* showed how the *amicus* brief situation can be managed to achieve the system's goals. WTO members should not criticize the Appellate Body as acting outside its scope but embrace the decision and draft workable procedures.

VI. RECOMMENDATIONS FOR NGO PARTICIPATION AT THE WTO

First and foremost, the WTO needs to adopt a definition of the term NGO that includes those groups that will further the WTO's mission. The second priority must be to develop a meaningful consultative status for NGOs. NGOs have interests in the WTO and should be recognized for the contributions they make to the global society. In exchange for consultative status, NGOs could be required to pay membership dues based on the NGOs' annual budget. Special provisions should be made for NGOs from developing and less developed countries so as to encourage their consultation. NGOs with consultative status should provide information on their organizations' membership, officers, purpose and source of funding. NGOs with consultative status would also submit annual reports about their activities with the WTO.

With consultative status, NGOs would be permitted to observe WTO negotiations, be able to address delegates at the invitation of the Director-General, and submit position papers within a certain page limit that would be distributed to delegations. Consultative status would be open to all NGOs whose activities had relevance to the WTO's activities.²¹¹ A committee of WTO members would review applications for consultative status, present those NGOs that qualify to the General Council and grant consultative status unless there was a consensus that status should not be granted.

Most of the NGOs that have submitted *amicus* briefs have not participated in any other WTO activity. NGOs that wish to be stakeholders need to work at all levels of the WTO, not just

211. WTO Agreement art. V, ¶ 2.

those that seem to suit their immediate concerns. This does not mean that NGOs have to participate in every WTO meeting or dispute. The point is offered to advise NGOs on a means to gain greater credibility and trust of WTO members. NGOs with consultative status would have the privilege of submitting *amicus* briefs at disputes concerning their organization. However, it seems appropriate for WTO members to adopt a provisional period for the dispute settlement system to be accustomed to this process. During the provisional period, the Secretariat and dispute settlement body should analyze the interests of NGOs submitting *amicus* briefs. Special provisions should also be made for disputes involving developing and less developed countries.

Panels can also use their discretion to limit the page numbers and number of briefs submitted in an individual dispute. NGOs often cite their lack of resources as preventing them from overwhelming the panels with numerous, lengthy briefs. As seen in the *Shrimp-Turtle*²¹² and other cases, there is nothing to prevent NGO members from collaborating on an *amicus* brief. Panelists, at the beginning of disputes, need to show that they are willing to accept NGO briefs, especially in those disputes where panels require expert advice and knowledge. For the most part, panelists are trade generalists and do not always have the expertise in the various subjects in dispute, such as intellectual property, financial services, telecommunications and tax.²¹³

212. See, e.g., World Trade Organization Dispute Panel Report, Malaysia - Complaint Concerning U.S. Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/RW (June 15, 2001), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58RW.doc>.

213. See, e.g., Echols, *supra* note 42, at 207 (defining the need for NGOs to serve as experts for panels reviewing SPS measures). See also Note by the Secretariat, Mexico — Measures Affecting Telecommunications Services, Constitution of the Panel at the Request of the United States, WT/DS204/4 (Aug. 30, 2002), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/204-4.doc> (listing the composition of the panel in the dispute over telecommunications services between the U.S. and Mexico. Panelists include Ernest Ulrich-Petersman, Chairman, a world-renowned trade expert, Raymond Tam, and Björn Wellenius. Concerns over the Panel's capability of comprehending the complex issues related to this dispute are dispelled by examining the background of Mr. Wellenius, Telecommunications Adviser, Telecommunications and Informatics Division of the World Bank.).

These recommendations are not an exhaustive list. They suggest a means by which the WTO may adjust to the evolving modern state of relations between multilateral institutions, member states and NGOs representing the individuals intended to benefit from the multilateral institutions.

The main conclusion to which these recommendations aspire is the idea that NGOs can be a partner for the WTO. NGOs will never replace WTO members, but as global actors they have a role at the WTO. WTO members need to include NGOs in all of the system's activities.

Seri Raffia Azziz, the Malaysian Minister of Trade said that globalization needs a human face, with wrinkles and all.²¹⁴ Her message was that the spread of globalization's benefits is an evolving process. Her comment is applicable to NGOs' roles at the WTO. NGOs can put a human face on the WTO. However, like the humans the NGOs represent, they need to be included.

The WTO is a fledgling institution, still developing its identity in the global economy. Since its inception, the WTO has increased its membership to more than 145 countries with another 31 observer countries that are preparing for membership. The WTO survived the Seattle protests. It has also seen over 280 complaints resolved through consultation, arbitration, litigation and diplomacy. Clearly, the WTO members want the organization to survive, and this depends on its acknowledgement that the classical diplomatic model on which the GATT was founded and which has influenced the WTO, is evolving into a model more suited to an interconnected global economy. The players in the multilateral trading environment are no longer only governments. NGOs have an important role in the multilateral trade arena.

NGOs deserve a more realistic and effective consultative place at the WTO negotiation and dispute settlement tables. More effective NGO consultation will ensure the WTO's survival. This paper recommends more effective NGO consultation, not control. In the end, the WTO members will still write the rules and cast the votes. WTO members do not have to cede any power for NGOs to be consulted effectively.

214. See *Like Ageing, Let it Happen Slowly*, N.Z. HERALD, Dec. 8, 2001, available at WL27365681.

In conclusion, as WTO members are tasked by the Doha Ministerial Declaration to conduct negotiations that will improve the lives of all people, especially those in the developing world, partnering with NGOs is a smart step in reaching that goal.