

November / December, 2000

24 *Fordham Int'l L.J.* 173

OPENING THE WTO TO NON-GOVERNMENTAL INTERESTS

Steve Charnovitz

INTRODUCTION	1
I. EARLY YEARS OF NGO RELATIONS WITH THE TRADING SYSTEM	2
II. RECENT DEVELOPMENTS IN WTO RELATIONSHIPS WITH CIVIL SOCIETY	6
A. The Battle Over Amicus Curiae Briefs	6
B. WTO Symposia Involving NGOs	9
C. Other Initiatives by the Secretariat	10
D. Seattle Ministerial Conference	10
E. E-Transparency in 2000	11
III. THE STATIST PERSPECTIVE: KEEPING THE WTO CLOSED	13
IV. THE INDIVIDUALIST PERSPECTIVE: OPENING THE WTO	15
V. RECOMMENDATIONS AND CONCLUSION	20
A. Legislative	20
B. Executive	20
C. Judicial	21
CONCLUSION	22

INTRODUCTION

What is the World Trade Organization n1 ("WTO")? A reader of the Marrakesh Agreement Establishing the World Trade Organization would see that it is an international organization set up to supervise national trade policy. As of December 2000, the WTO had 141 member governments. The WTO is located in Geneva and led by a Director-General. Unlike some other international agencies (such as the International Monetary Fund), the WTO is a consensus-based institution driven by the member governments themselves, rather than by the Director-General or the staff of the Secretariat. Thus, in some ways, the WTO is directed not only in Geneva, but also in each of the national capitals from Tirana to Harare.

International trade has been a controversial issue many times in the past, as it is today in a wave of globalization. n2 In the early 1990s, a new school of criticism developed about the impact of world trade on development, the community, the environment, and public health. This led to questions about how world trade rules are made and who makes them. Some commentators began to claim that the trade regime has a "democratic deficit" and that it is not accountable to the public. The street protestors at the WTO Ministerial Conference in Seattle in late 1999 voiced all of these concerns.

In contrast to the United Nations, the WTO operates in a closed manner. Although nongovernmental organizations ("NGOs") have always had opportunities to participate in many U.N. activities, NGOs lack equivalent opportunities at the WTO. n3 Thus, NGOs that want to

influence the WTO have to localize their campaigns. Many NGOs contend that the WTO needs to change by becoming more open to nongovernmental interests.

This Essay examines the debate over how the WTO and the public interact. Since the mass public is cacophonous, the debate centers on what role NGOs should play in the WTO. NGOs are voluntary organizations of individuals who come together to achieve common purposes. n4 As used here, NGOs include business and labor groups.

This Essay contains five parts. Part I provides background for readers just joining the debate. Part II gives an overview of the major developments over the past three years (1998-2000). Parts III and IV offer a synthesis of the key issues. Part III presents the Statist perspective for why the WTO should deny deeper participation to NGOs. Part IV counters with the Individualist perspective for why the WTO should broaden its participation beyond governments to include NGOs. (Part IV reflects the author's own views.) Part V provides specific recommendations for how the WTO should increase opportunities for NGOs.

I. EARLY YEARS OF NGO RELATIONS WITH THE TRADING SYSTEM

For most of the history of the General Agreement on Tariffs and Trade n5 ("GATT"), the relationship between the trading system and nongovernmental actors was not an issue. n6 The International Chamber of Commerce ("ICC") occasionally participated in GATT organs, and this practice was apparently not questioned. n7 But no other NGOs sought to be included. In his comprehensive study of the GATT published in 1969, John Jackson devoted a short section to the "Private Citizen and GATT Obligations," in which he noted that "in accord with traditional international law thinking ... a citizen can usually only make policy recommendations to GATT through his government and can only in that way seek relief if he is injured by foreign activities inconsistent with GATT." n8 Looking ahead, however, Jackson foresaw "the value at some future time of considering institutional arrangements that would give a hearing to private individuals in international economic affairs." n9

This future time arrived twenty years later. As the Uruguay Round (1986-1994) trade negotiations intensified in the late 1980s, NGOs interested in agriculture, development, and food safety began monitoring the trade talks. The emerging agreements provoked alarm. n10 More consternation arose when the NGOs found it impossible to provide the negotiators with direct input. When the GATT Ministerial Conference met in Brussels in December 1990, a group of NGOs came to the conference site and denounced the ongoing round as a "GATTastrophe." n11

By 1990-1991, a somewhat new issue catapulted into the public consciousness, the relationship between trade and the environment. After the GATT panel in the infamous case United States - Restrictions on Imports of Tuna ("Tuna-Dolphin") issued its decision in summer 1991 - holding that a U.S. conservation law violated GATT rules - environmentalists around the world took notice and began scrutinizing GATT. n12 The initial assessment was that GATT panels were secretive, closed, and made decisions about the environment without adequate input. n13 Shortly after the Tuna-Dolphin decision was handed down, the Washington and Lee University School of Law held a symposium on "Environmental Quality and Free Trade" that addressed these developments. One of the speakers was John Jackson, who pointed out that the GATT could enhance its "transparency" by allowing NGOs and other inter-governmental organizations to gain some "participation in the GATT processes, possibly through an annual

open meeting." n14 With regard to dispute settlement, he suggested that some way might be found for interested groups to transmit "arguments, information and evidence."

Although little noted at that time, change was underway. The draft text for a Multilateral (later changed to World) Trade Organization included a provision authorizing "suitable arrangements for consultation and cooperation with non-governmental organizations concerned with matters within the scope of the MTO." n15 This provision had been lifted almost verbatim from the Charter of the International Trade Organization ("ITO") of 1948. n16 In 1991, the language on NGOs came into the Uruguay Round as part of a compromise negotiating text cobbled together by Arthur Dunkel, then Director-General of GATT. The trade negotiators did not discuss this NGO language in detail. Had they done so, it might have been deleted.

Outside the trading system, several foundations, institutes, and NGOs took the GATT's measure and began working to increase its openness. A handbook sponsored by the Environmental Grantmakers Association and the Consultative Group on Biological Diversity pointed out that "GATT deliberations remained closed to citizen input and involvement," and noted the contrast with U.N. agencies that were open to such input. n17 In 1993-1994, a group of experts drafted the Winnipeg Principles on Trade and Sustainable Development, and one of those principles was that GATT panels "should entertain written submissions from non-governmental organizations." n18 In early 1994, some foundations sponsored what became known as the Talloires Group. This was a back-channel process, chaired by Harvard Law School Professor Abram Chayes, that sought to bring together national delegates to the GATT, former government officials, academics, and executives from other international agencies for the purpose of seeking common ground on environment and transparency issues. n19

By the mid-1990s, several articles set the tone for the future debate. Naomi Roht-Arriaza called for "Democracy, Transparency, and Participatory Mechanisms Within GATT," such as notice and comment procedures. n20 Robert Housman called for "Democratizing Trade Negotiations" by according observer status to NGOs. n21 His proposals were based on the thesis that individuals have a right to participate in international decisions that affect their interests. n22 The author and John Wickham researched the history of the provision in the ITO Charter regarding NGOs, focusing in particular on the plans for implementation in 1948-1949. n23 Their study also pointed out that NGOs participated in the conference that drafted the ITO Charter. n24

Concerns about the closed nature of GATT dispute settlement resurfaced as an issue in the U.S. Congress in 1994 as it began the process of approving the Uruguay Round trade agreements. In a speech on Capitol Hill, U.S. Trade Representative Mickey Kantor characterized the GATT panel process as "star chamber proceedings that are making the most important decisions that affect the lives of all of our citizens - especially in the environmental area--and there is no accountability whatsoever." n25 The U.S. Congress responded by directing the U.S. Trade Representative to seek the adoption of procedures at the WTO to ensure "the principle of transparency" through "open and equitable procedures in trade matters by the WTO Ministerial Conference and the General Council, and by the dispute settlement panels and the Appellate Body." n26

It took the WTO General Council about eighteen months to implement the NGO provision in the Agreement on Establishing the World Trade Organization. That provision is Article V(2), which states that "the General Council may make appropriate arrangements for consultation and

cooperation with non-governmental organizations concerned with matters related to those of the WTO." n27

In July 1996, the Council approved "Guidelines for Arrangements on Relations with Non-Governmental Organizations" n28 ("Guidelines"). The NGO Guidelines directed the Secretariat to "play a more active role in its direct contacts with NGOs" through various means such as symposia and briefings. n29 The Guidelines noted that the chairpersons of WTO councils and committees could meet with NGOs, but this would be in their "personal capacity" unless the council or committee decided otherwise. n30 The key guideline came at the end and stated:

Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making. n31

The Guidelines did not explain why the national level should be the primary one for taking into account the different elements of public interest regarding trade policymaking. One might have thought that the WTO, on the international level, was established to reach agreements that meld the different elements of public interest. After all, in the Marrakesh Declaration concluding the Uruguay Round, the Members affirmed "that the establishment of the World Trade Organization ... ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples." n32 This Essay will return to these issues in Parts III and IV when it discusses how open the trading system should be, how to facilitate global economic cooperation, and whether ideas for improving the benefit and welfare of peoples need to be exclusively channeled through a government.

As the WTO was launched in 1995, an academic debate began on the merits of NGO involvement. Richard Shell proposed a "Trade Stakeholders Model" for opening up the WTO dispute settlement to all groups with a stake in the outcome of trade decisions. n33 Using the idea of civic republicanism in a constitutional democracy, Shell projected it to the international level and pondered whether the WTO "can be encouraged to open its processes to nongovernmental actors so as to make more legitimate decisions regarding trade issues." n34 Philip Nichols responded by pointing out that Shell assumes both "that national governments do not adequately represent the interests of all of their constituents" and that participatory governance can work at the WTO level. n35 Nichols denied these propositions and denied that the WTO is undemocratic. Furthermore, he listed several potential disadvantages of greater interest group involvement in WTO dispute settlement--such as an irreconcilable dissonance in negotiations, a boon to well-monied interest groups, and a possible slowdown in trade liberalization. Steve Charnovitz responded to Nichols by explaining that the case for NGO

participation at the WTO "is not premised on the incompetence of national governments to balance domestic interests.... Instead the contention is that international organizations will perform more effectively if they have the input of interest groups." n36 Nichols responded to Charnovitz by asserting that interest group participation would impose costs on the WTO and that such groups may not be accountable to the constituencies they purport to represent. n37 His article ends, however, with the concession that "Charnovitz and I do not disagree that the World Trade Organization should benefit from the input of entities other than its own members. I am troubled, however, by the lack of a rational basis for participation by interest groups." n38

Back in Geneva, the WTO began to implement its NGO Guidelines. In November 1996, the Secretariat commenced informal sessions with NGOs. n39 By providing some funding for travel, the Secretariat was able to encourage attendance of several NGOs from middle-income or poor countries, including Bangladesh, Brazil, Ecuador, India, Malaysia, Mexico, Pakistan, the Philippines, Senegal, Thailand, Uruguay, and Zimbabwe. Another key participant was the new International Centre for Trade and Sustainable Development ("Centre" or "ICTSD"), which had just been established to enhance interactions between the WTO and civil society. n40

In 1996, the General Council took the important step of permitting NGOs to attend the WTO Ministerial Conference. n41 About 108 NGOs went through the accreditation process and journeyed to Singapore. n42 The Council apparently thought that inviting NGOs to "observe" implied too much recognition, so NGOs were merely permitted to "attend." n43 At the conclusion of the Ministerial, the NGOs sought to make a statement, but were turned down. n44 Outside of the Ministerial, many NGOs held educational fora. The Singapore government prohibited any public protests. n45

Some further progress in WTO/NGO relations occurred in the following year. In September 1997, the WTO and the U.N. Conference on Trade and Development ("UNCTAD") co-sponsored an NGO Symposium on Trade-Related Issues Affecting Least-Developed Countries. n46 The conclusions and recommendations of this Symposium were officially forwarded to a high-level inter-governmental meeting shortly thereafter. n47

No parallel progress occurred in dispute settlement, however, or at least not on the surface. In summer 1997, two NGOs sent amicus curiae briefs to the WTO panel considering United States - Import Prohibitions of Certain Shrimp and Shrimp Products ("Shrimp-Turtle"). n48 One of the briefs came from the World Wide Fund for Nature ("WWF") on behalf of WWF affiliates in thirty-one countries. n49 The other came from the Center for Marine Conservation in the United States. n50 In September, the panel informed the parties that it would not consider the briefs because it did not have authority to do so under the WTO Dispute Settlement Understanding ("DSU"). n51 While this spelled failure for the petitioning NGOs, there was a roundabout gain in getting the panel to make a decision on whether it had the legal authority to read the briefs. In two episodes in 1996, an NGO had submitted a brief to the WTO panels on gasoline and meat hormones, but the panels had refused to acknowledge those submissions. n52

In summary, in its first three years, the WTO began to implement its constitutional provision for WTO-NGO relations. The range of consultation and cooperation was very timid at first, but it expanded as different techniques were tested. These interactions deepened in 1998, a year that opened a new chapter in WTO relations with nongovernmental actors.

In concluding this discussion of the early implementation of Article V(2), it should be noted that one WTO agreement does provide for an NGO role. That is the Agreement on Preshipment

Inspection, which calls for the establishment of an "Independent Entity" to oversee binding arbitration between exporters and inspection entities. n53 In 1995, the WTO established this Independent Entity through an agreement with the ICC and the International Federation of Inspection Agencies ("IFIA"). n54 Furthermore, these two NGOs have assisted the WTO in its operational work on preshipment inspection. For example during 1998, the WTO Working Party on Preshipment Inspection held "informal" meetings with interested international organizations, the IFIA and the ICC. n55 This cooperation did not take place under the NGO Guidelines.

II. RECENT DEVELOPMENTS IN WTO RELATIONSHIPS WITH CIVIL SOCIETY

Part II of this Essay examines the most recent steps by the WTO to interact with NGOs and efforts by NGOs to influence the WTO. The emphasis will be on the legal developments, particularly regarding dispute settlement. Part II also will provide an overview of NGO-related activity at the WTO.

A. THE BATTLE OVER AMICUS CURIAE BRIEFS

The DSU does not contain any provision for the submission of briefs by NGOs (or for that matter by governments that are not Members of the WTO). Individuals who want to give information to a panel have no prescribed procedure for doing so. The DSU rules point to the interest of "full transparency," but this is contradicted by the requirement that panels meet in closed sessions. This would seem to rule out public hearings. The DSU does permit a panel "to seek information and technical advice from any individual or body which it deems appropriate." n56 When doing so, panels are required to inform a government before seeking information from within its jurisdiction.

Despite the rejection of their intervention by the Shrimp-Turtle panel, the environmental NGOs were not deterred. As the U.S. government had appealed the Shrimp-Turtle decision regarding the scope of GATT's General Exceptions, the NGOs saw an opportunity to offer their views to the WTO Appellate Body. n57 Because the U.S. government was also appealing the panel's decision that it lacked authority to consider the NGO briefs, the forthcoming proceeding provided an avenue for NGOs to influence the legal review of their status.

The NGOs seized these opportunities with alacrity. The groups' drafting briefs included: (1) Earth Island Institute, the Humane Society, and the Sierra Club; (2) the Center for Marine Conservation and the Center for International Environmental Law ("CIEL"), on behalf of these two centers plus the Environmental Foundation Ltd. in Sri Lanka, the Philippine Ecological Network, the Red Nacional de Accion Ecologia in Chile, Sobrevivencia in Paraguay, and the Mangrove Action Project; n58 and (3) the WWF. n59 The NGO briefs came to the Appellate Body as attachments to the U.S. submission.

In August 1998, the Appellate Body announced that it would consider the legal arguments offered in the NGO briefs and that it had accepted a revised brief directly from CIEL. n60 By issuing this procedural ruling, the Appellate Body put the complaining parties on notice that it was admitting the briefs so that the parties would have time to respond. During the hearing on the case, Appellate Body members asked the U.S. government questions about the substance of the NGO briefs, thus signaling that they had been read. n61

In October 1998, the Appellate Body reversed the lower-level ruling on whether a panel had the authority to consider amicus briefs. n62 While explaining that NGOs do not have the "right" to have their briefs considered and that the panels do not have the obligation to consider them, the Appellate Body found authority in the interstices of WTO rules for panels to consider such unsolicited NGO briefs. n63 The responding governments contended that the panel was right to exclude such submissions which could be "strongly biased" and could deluge the panel with unsolicited information from around the world. n64

Many governments criticized this decision on the grounds that it was not in conformity with the WTO Agreement. n65 Indeed, some governments argued that the Appellate Body had given NGOs greater rights than WTO members who were not party to the dispute. n66 Pakistan called for amending the DSU to overturn the Appellate Body's ruling. n67 In August 1999, a communique of the G-15 countries argued that because WTO dispute settlement is a government-to-government exercise, the consideration of amicus curiae briefs would "prejudice an objective and legal examination of issues." n68

The first case after Shrimp-Turtle in which an NGO importuned a panel to consider an amicus brief was in United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom ("Carbon Steel"). n69 In July 1999, the American Iron and Steel Institute submitted an amicus brief, but it was rejected by the panel on account of its "late submission." n70 In the subsequent litigation before the Appellate Body, the U.S. steel industry did not make that mistake again. On the same day that the U.S. government submitted its first brief, the Appellate Body received an unsolicited brief from the American Iron and Steel Institute and the Specialty Steel Industry of North America. n71 The parties to the dispute contested whether the Appellate Body had the authority to accept the briefs directly, rather than as attachments to a government's brief which was the procedural posture in Shrimp-Turtle.

Some claims of the parties should be noted. The European Commission argued that NGOs briefs were "inadmissible" to the Appellate Body because WTO rules did not provide this opportunity. n72 Brazil contended that the Appellate Body lacked authority to accept nongovernmental briefs, and furthermore that the participating governments were "uniquely qualified to make legal arguments regarding panel reports and the parameters of WTO obligations." n73 The United States responded that the Appellate Body had the requisite authority to accept unsolicited briefs. n74

In its decision in May 2000, the Appellate Body agreed with the United States regarding amicus briefs. (The United States lost the case on the merits.) The Appellate Body held that it has the legal authority to accept and to consider amicus briefs when "we find it pertinent and useful to do so." n75 In the instant case, however, the Appellate Body concluded that it was not necessary to take the two briefs into account. n76

The Appellate Body's decision led to a new wave of criticism by WTO governments. n77 Japan said it was highly regrettable that the Appellate Body made this important decision without taking into consideration opposing positions of numerous governments. India protested that the WTO dispute settlement system was meant to be exclusively for governments. Officials from several countries pointed out that the Appellate Body did not provide sufficient guidance to governments as to when briefs would be considered pertinent and useful. n78

Subsequent to the Carbon Steel panel proceeding, NGOs have submitted briefs to four panels. In Australia - Measures Affecting Importation of Salmon ("Salmon"), the compliance review panel accepted a letter from the Concerned Fishermen and Processors in South Australia. n79 In European Communities - Measures Affecting Asbestos and Asbestos-Containing Products ("Asbestos"), four NGOs submitted briefs early in the panel process. n80 Subsequently, the defendant European Communities attached two of the briefs to its submission. Thereafter, the panel announced that it would consider the two attached briefs, but that it would not consider the other two briefs. n81 The panel gave no reason. Over six months later, another NGO submitted a brief. The panel then informed the parties that it would not take this new brief into account because it came in too late. n82 In European Communities - Antidumping Duties on Imports of Cotton-type Bed Linen from India ("Cotton Bed Linen"), the panel accepted a brief from a trade association, but reported it did not take it into account. n83 In December 2000, a coalition of NGOs from several countries submitted a brief to the panel considering whether the U.S. government had complied with the Appellate Body's Recommendation in the Shrimp-Turtle case.

Canada's appeal of its loss in the Asbestos case provided a fresh opportunity for NGOs to make submissions. About two weeks after the appeal commenced, the Appellate Body established a procedure for considering briefs by private individuals or groups. n84 The procedure required applicants to file for leave to file a brief. The application had to respond to a set of questions, among them the objectives and financing of the applicant and how the proposed brief will make a contribution that is not likely to be repetitive to what the governments have already said. In making the announcement, the Appellate Body stated that it was acting to promote the "interests of fairness and orderly procedure." n85 Earlier, several governments had pointed to the need for clearer procedures regarding amicus briefs. n86 Commentators had also advocated adoption of working procedures. n87

The Appellate Body's decision apparently surprised governments and provoked a political counterattack. Egypt called a special session of the WTO General Council where many governments vented their criticism. n88 Some governments (such as India) argued against the whole idea of amicus briefs. Other governments criticized the Appellate Body for usurping the governmental role in legislating dispute procedures. For example, Uruguay complained that when the Appellate Body overruled the Shrimp-Turtle panel, the Appellate Body should have asked the WTO General Council for an interpretation of WTO rules that could be applied in future cases. n89 Shortly thereafter the Appellate Body summarily rejected all seventeen of the applications for leave to submit a brief. n90 According to one delegate from a developing country, "the Appellate Body seemed to hear the message." n91

In response to the form-letter rejections, several NGOs put out a critical press statement. n92 The statement complained that the Appellate Body gave no reason for the rejections. Among the signatories to the statement were two large environmental NGOs, the WWF, and Greenpeace International.

The issue of amicus briefs at the WTO will continue to play out in the months ahead. It is conceivable that one of the WTO organs may, in effect, overrule the Appellate Body decisions that established the opportunity for NGO submissions. Alternatively, the Appellate Body and panels might refrain from taking NGO briefs into account, in the expectation that NGOs will stop investing resources in writing them. If so, this would vindicate one commentator, Jeffrey Dunoff, who has downplayed the significance of the Appellate Body's decision in Shrimp-Turtle. n93

In my view, however, the new WTO jurisprudence on amicus briefs is significant. n94 At the very least, it demonstrates how NGO activism can promote a new opportunity for formal participation in governance. The DSU has no provision for the submission of amicus briefs. Yet even in the absence of such procedures, NGOs decided to go ahead and submit amicus briefs anyway. n95 This episode shows how NGOs can catalyze changes in the practices of international organizations through transnational public law litigation. n96 In other words, the NGOs decided to act as though the WTO had open procedures as a strategy for securing such procedures. While such activist strategies have been used in municipal public law litigation for some time, they are unusual in an international court. To be sure, the key factor was the willingness of the Appellate Body to be accommodating. But so long as an independent tribunal exists, advocates can use litigation to promote the progressive development of law.

B. WTO SYMPOSIA INVOLVING NGOs

The recent advances by NGOs in the WTO's judicial functions have not been matched in the executive and legislative functions. The restrictive NGO Guidelines of 1996 remain in effect, and so NGOs have not been directly involved in the WTO's work. Nevertheless, some important episodes of cooperation have ensued.

In March 1998, the WTO Secretariat sponsored two symposia. The first was on Trade Facilitation and included corporations, business NGOs, and international organizations. The second was on Trade, Environment, and Sustainable Development. n97 This Symposium was notable in having a broad participation from international organizations, NGOs, corporations, foundations, academics, and law firms. Each participant had a name card listing her organization. More than sixty governments also sent representatives, some of whom spoke.

In March 1999, the WTO sponsored two "high level" symposia on environment and development. n98 These sessions were webcast live. A Joint Civil Society Statement released at the symposia called for "accountability [of the WTO] to parliaments and civil society, as well as to existing international legal norms." n99 Perhaps in response, several governments expressly opposed further steps to open up the WTO to NGO input. For example, India's Ambassador to the WTO declared that "an intergovernmental organization like the WTO cannot effectively function if it has to simultaneously deal with government representatives as well as nongovernmental representatives." n100 On the whole, however, the interchange between governments and NGOs proved mutually beneficial. Many participants applauded when the renowned environmentalist Konrad von Moltke, having been invited to sum up the environment symposium, began his remarks by stating that "we've got to stop meeting like this." Von Moltke then called for a legitimate ongoing relationship between NGOs and the WTO.

The issue of civil society participation was discussed at the Ministerial Conference in Geneva in May 1998. U.S. President Bill Clinton proposed that the WTO establish a consultative forum where business, labor, environmental, and consumer groups could provide "regular and continuous input" to help guide further evolution of the WTO. n101

On November 29, 1999, in Seattle, the WTO and the U.S. Government sponsored a pre-Ministerial symposium for NGOs. The program got off to a late start because of police barriers. But in the eyes of many of the NGOs, the symposium was just a distraction from the well-organized panels and teach-ins being carried out by research institutes and NGOs. Many of the

government delegates were also uninterested in the official forum. Von Moltke had gotten it right: the WTO would either go forward by deepening NGO involvement or it would fall back. But it could not continue the broad symposia as a substitute for real cooperation on specific issues. During 2000, the WTO Secretariat did not organize any symposia.

C. OTHER INITIATIVES BY THE SECRETARIAT

The WTO launched its website in 1995, and it soon became a valuable resource for NGOs and, indeed, everyone. n102 The most distinctive features are full text searching of derestricted WTO documents, rapid posting of new WTO panel and Appellate Body decisions, a complete database of adopted GATT panel judgments, the texts of the WTO agreements, and a schedule of upcoming WTO meetings. n103 The website empowers NGOs by giving them easy access to information.

In mid-1998, then WTO Director-General Renato Ruggiero announced some additional initiatives to cooperate with NGOs. n104 These included a monthly listing of NGO documents received, a new section on the website devoted to NGO issues, and expanded efforts by the WTO's External Relations Division to provide briefings to NGOs.

A few weeks before the Seattle Ministerial, the Secretariat created a web page to respond directly to outside criticisms of the WTO. While it provides some useful information, the new section strikes a combative tone about civil society. For example, it explains that NGOs cannot participate directly in the WTO and "can only exert their influence on WTO decisions through their governments." n105 It also states that the WTO "shields governments from narrow interests" such as "powerful lobbies" and "narrow interest groups." n106 These statements have recently been echoed by commentators who contend that "providing NGOs with special access [to the WTO] would undermine the key benefits of a properly constructed international trade regime - mechanisms that reduce the power of interest groups in order to permit trade and democracy to flourish." n107

In February 1999, the General Council asked the Secretariat to consider ways to promote the "institutional image" of the WTO. n108 In response, the Secretariat generated a number of interesting ideas, such as organizing "Model WTOs" for university-level students along the lines of the Model U.N. The Secretariat did not, however, advocate deeper WTO-NGO relations as a method of improving the WTO's image.

D. SEATTLE MINISTERIAL CONFERENCE

A lot has been written about the activities of civil society, and uncivil society, at Seattle. n109 In this brief Essay, four episodes should be noted. First, at the initiative of U.S. Senator Bill Roth, then chairman of the Senate Finance Committee, U.S. members of Congress met with their counterpart parliamentarians from other countries. This informal meeting was successful and the participants agreed to hold a future session. n110 The WTO Director-General, Mike Moore, welcomed the inter-parliamentary meeting. n111

Second, although much of the media attention was on the American protestors, the meeting drew many serious-minded NGOs from around the world. For example, the Competitive

Enterprise Institute organized a worldwide coalition calling itself "International Consumers for Civil Society" with participants from conservative think tanks favoring freer trade. Seattle also marked a watershed in attracting attendance by NGOs beyond the fields of business, environment, labor, and development. The most important newcomers included health groups (e.g., *Medicins Sans Frontieres*) and human rights groups. n112 In total, 686 NGOs attended the Ministerial with accreditation.

Third, while environmental groups had spearheaded the initial campaign for NGO participation in the trading system, by 1999 many other NGOs were making similar recommendations. For example, The Business Roundtable proposed that once a year, the WTO convene a meeting of business, consumer, environment, and labor groups in order to improve communication between the trade regime and nongovernmental stakeholders. n113 Consumers International went even further and recommended that the WTO set up an accreditation system for international NGOs. n114

Fourth, the Clinton Administration catalyzed the NGO activism to some extent. In October 1999, President Clinton stated that "if we want the world trading system to have legitimacy, we have got to allow every legitimate group with any kind of beef, whether they're right or wrong, to have some access to the deliberative process of the WTO." n115

In November, President Clinton elaborated on this theme and explained that:

Every group in the world with an axe to grind is going to Seattle to demonstrate. I'll have more demonstrators against me than I've had in the whole 7 years I've been President. I'm kind of looking forward to it. I'll tell you why. I told them all I wanted them to come. I want all the consumer groups to come. I want all the environmental groups to come. I want everybody who thinks this is a bad deal to come. I want everybody to get all this out of their system and say their piece of mind. And I want us to have a huge debate about this. n116

Many groups who worried that new WTO agreements would be a bad deal did indeed come to Seattle. Yet the quality of the ensuing debate was poor. If President Clinton really wanted the Ministerial to succeed, then he seriously miscalculated by inviting everyone to come without preparing to handle the crowds.

E. E-TRANSPARENCY IN 2000

After Seattle, many WTO governments realized that improvements were needed both in the WTO's internal decision-making and in its external relations. The former is now called "I-Transparency" and the latter "E-Transparency." Director-General Moore has worked hard on both. On E-Transparency, one of his most important initiatives has been to strengthen the Secretariat's External Relations staff, which interacts with NGOs on a daily basis.

In November 2000, the General Council discussed external transparency. n117 No decisions were taken, but several governments argued against allowing any deeper involvement by NGOs. For example, Hong Kong contended that direct participation of civil society in the WTO was not

desirable because it would risk "politicising the operations of the Organization due to sectoral and electoral interests." n118 Colombia explained that "at the level of the multilateral system," it was important that "the necessary state responsibility is maintained over positions and proposals." On the other hand, a few governments called for doing more to increase E-transparency. Canada proposed opening the WTO Trade Policy Reviews to accredited observers. n119 Canada also advocated experiments to test other forms of transparency, such as (1) holding small dialogues among governments, academics, and NGOs to tackle focused issues, and (2) authorizing the Secretariat to create advisory boards for issues like E-commerce. The United States called for greater transparency in WTO dispute settlement and suggested that the lack of openness makes it harder to settle disputes. n120

In October 2000, Australia asked the WTO to circulate two nongovernmental statements advocating greater liberalization in agricultural trade, a position consistent with that of the Australian government. n121 The statements came from the Cairns Group Farm Leaders and the Global Alliance for Sugar Trade Reform and Liberalization. The Cairns Group Farms Leaders are agricultural associations in eleven countries spanning North America, Central America, South America, East Asia, and South Africa. They share a joint interest in securing better WTO agricultural rules.

In November 2000, EU Trade Commissioner Pascal Lamy gave a thoughtful speech about the WTO in which he pointed out that "the internet has made the market for political ideas contestable" and that this enables NGOs to engage in "borderless, real time networking." n122 As a result, he said, policymakers have lost any monopoly in setting the international trade agenda, if they ever had one. Lamy did not discuss the implications of this insight for the organization of the WTO except to call for a broad public debate involving "policy-makers at various levels of governance (national, regional and global), parliamentarians, business, trade unions, [and] NGOs."

In late 1999 and throughout 2000, Director-General Moore used his speeches to articulate the institutional underpinnings of the WTO and its relationship to the public. He explained that "the WTO is not a supranational government," but rather an organization whose decisions are made by Member States and whose agreements are ratified by parliaments." n123 Furthermore, he claimed that the WTO is a democratic process. Indeed, "what could be more democratic than sovereign governments instructing Ambassadors to reach agreements that are then accepted by cabinets and parliaments?" n124 In his view, the "WTO is member driven;" its "base constituency must be the nation state." n125 Yet in some of his speeches, Mr. Moore has lifted the government veil to consider the people within. For example, he hypothesized that "if the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business." n126 In another speech, he declared that "our mission must be to ensure that people and Parliaments own us, that the people are the masters of globalization and not the servants." n127 Noting that the WTO had already approved four new Members in 2000, Moore boasted that "[a] few thousand protesters may demonstrate against the WTO, but 18 million people have joined the WTO this year." n128

My survey of recent developments ends in December 2000. The next parts of this Essay provide a normative discussion of the two sides of the WTO/NGO debate. As we will see, Moore's speeches offer some support to both Statists and Individualists.

III. THE STATIST PERSPECTIVE: KEEPING THE WTO CLOSED

Part III lays out one side of the debate by summarizing the arguments for why the WTO should remain closed to greater engagement with NGOs. It is termed the "Statist" perspective, because it presents the view that the WTO is an organization of Member States who are each the exclusive spokesman for the individuals who comprise them. n129 My presentation of the Statist perspective is stylized; it is a composite of what Statists say about the WTO. Note that the term "Statist" is a bit inapposite for the WTO in that it is open to, and has members that are, neither States nor U.N. Members - at present, the European Communities, Hong Kong, and Macau. n130 Nevertheless, Statist will be used here for want of a better descriptor.

The Statist perspective sees a sharp distinction between the national and global levels of decision-making. At the national level, individuals are free to voice their interests within the political and legal systems of each country. Such processes of pluralism are appropriate in a national democracy to supplement the formal methods of voting. But at the global (or international) level, no polity exists. The idea of "The People" is specific to a nation. So, at the global level one can speak of "the peoples of the United Nations" but not the people of the world. n131

Because the global level is different from the national level, many of the governance concepts we think about nationally have no relevance internationally. For example, citizenship exists only at the national level. More fundamentally, democracy has little meaning outside of a nation because democracy presupposes a demos (or people), and at the global level no demos exists. n132 Martin Wolf takes this view to its extreme by asserting that "as an agreement among states, the WTO itself cannot be democratic." n133

No WTO diplomat or civil servant would say it that bluntly. Rather, Director-General Moore and others insist that the WTO is democratic, yet achieves this in an indirect rather than direct way. The WTO is accountable to the people transitively, by being accountable to government Members who are themselves accountable to their citizens. Conversely, the WTO has legitimacy as a decision maker because the people in each country elect their government, and those governments collectively manage the WTO. Furthermore, because the WTO acts through consensus, no government has to accept a change in rules that it does not agree to. So citizens are protected against supranational decisions being imposed on a government without its consent.

As a functional international organization, the WTO is not endowed with the full competences of its Members. On the contrary, the WTO is set up with a specialized mandate and can only do what the governments authorize it to. So an NGO has no basis for expecting the same opportunities (or rights) for participation at the WTO in Geneva as the NGO currently enjoys with its government at home.

The Statist perspective does not deny that nongovernmental interests in one country may want to influence another. As the GATT Secretariat explained in 1992, "there is nothing under customary international law and practices that would prevent nongovernmental organizations in one country from actively diffusing their environmental ideas to residents of other countries, so as to create popular support for changes in environmental policies." n134 The Statist argument is narrower: Nongovernmental interests have no place in an intergovernmental organization. For instance, Alan Oxley argues that "the WTO is ... the business of governments. There is no scope

or logic to giving non-state parties a role in a process which tests commitments among state parties." n135

Nongovernmental interests must be communicated solely to one's own government. As Robert Keohane and Joseph Nye explain (in critiquing this view), the WTO "club model" perceives "the nation state as a hierarchy, so that individuals within each state only interact politically with people in other states through their governments." n136 Each State is a hierarchy or pyramid, and inter-governmental negotiations take place through an exclusive communications network which links the top of the pyramids. Thus, an NGO seeking to influence an international negotiation (or an international organization) has only one channel for doing so, its own government. n137 In other words, the national level of government has responsibility for taking into account the different elements of public interest which are brought to bear on trade policymaking. n138

Given this channel of participation at home, a process that gives NGOs a voice in Geneva would be unprincipled. n139 It would give the NGO "two bites of the apple," one at home and one at the WTO. n140 Yet like everyone else, the NGO is entitled to just one bite. n141 Far from enhancing democracy, two-bite participation would undermine it. n142 An NGO whose view is being advocated by its government would have little reason to participate, so perforce it is only the NGOs articulating minority interests who want to use their voice. But those ideas are illegitimate because they were already rejected through the domestic democratic process. n143 Allowing unelected NGOs to say things in Geneva that contradict what the elected representatives (or their agents) say is anti-democratic because countries must speak with one voice. As John Bolton has argued, "the civil society idea actually suggests a corporatist approach to international decision-making that is dramatically troubling for democratic theory because it posits interests (whether NGOs or businesses) as legitimate actors along with popularly elected governments." n144

The Statists view transnational interests as just a basket of distinct national interests. Thus, no channel to an international organization is offered for transnational interests like free trade. A transnational NGO, such as the ICC, is told, in effect, to disaggregate its identity and message.

The Statist view is presented a-historically. No effort is made to reconcile the dogma with the long history of active NGO involvement with international organizations. Some recent examples of this phenomenon are the groups Reporters Without Borders and the older *Médecins Sans Frontières*. For example, soon after it was established in 1920, the ICC worked with bodies in the League of Nations to write trade rules. n145 Several decades later, the ICC worked with organs in GATT as noted above. n146 In 1997, the ICC asked for an "official dialogue" with the WTO. n147 The Statists cannot account for these customary practices, and so ignore them.

The Statists recognize that NGOs are currently involved in other international organizations, but they have an answer for why that experience should not be followed in the WTO. The answer is WTO Exceptionalism, the idea that the WTO is different from other international organizations. n148 The WTO, it is said, is a rule-based organization with running negotiations and enforcement of contractual obligations. By contrast, the United Nations is a power-based organization with few rules and little enforcement. When pressed, the Statists will admit that the U.N. system does have negotiations, rules, and enforcement, but the WTO is said to differ because it is more effective.

The argument that NGOs should be excluded from the WTO because it is effective is in tension with another central argument of the Statists - namely, that the WTO does not directly affect people. If WTO decisions did affect the individual - for example, food safety--then the Statist view would be vulnerable to the argument that an individual affected by a decision in Geneva should have an opportunity to influence it. So the Statists insist that the WTO does not directly touch the individual. WTO rules are addressed to governments who have the final say on how to behave. While it is admitted that domestic NGOs can influence their own government's decision in joining the WTO and in complying with its rules, the Statists sometimes deny the converse: that WTO supervision of governments affects individuals. The Statists walk a thin line in explaining how the WTO can be much more effective than other international organizations while not actually affecting people. Even the WTO website admits that the WTO affects people by shielding their governments from narrow interest groups. n149

NGO participation at the WTO is opposed for instrumental reasons. The Statists claim that the presence of NGOs would make it harder for WTO member governments to reach a consensus. The negotiating process works because each government presents a unitary view and then bargains with others that have different views. n150 Were NGOs allowed to observe and make comments, the negotiations would get bollixed. That is because NGO participation would expose the unitary view as a fiction. For example, it would be harder for a delegate to say that "the United States thinks X" when NGOs in the room retort that public opinion in the United States actually supports "Not X." Another problem is that the mindset of the GATT/WTO - that a trade negotiation is deal making among economic nationalists - would be challenged by NGOs who seek market-oriented solutions to global problems. n151

In summary, the Statist perspective is a mix of formalism and instrumentalism. The WTO is formally an organization of governments and should so remain. Yet even if all member governments wanted to admit NGOs, they should resist because the ensuing practices would undermine the effectiveness of the trading system in shielding governments from domestic pressure groups.

IV. THE INDIVIDUALIST PERSPECTIVE: OPENING THE WTO

Part IV presents the other side of the debate by summarizing the arguments for why the WTO should open up to greater consultation and cooperation with NGOs. It is termed the "Individualist" perspective because it presents the view that, as an agency of global governance, the WTO should maintain a vital connection to the individuals who inhabit the planet. The Individualist perspective recognizes the distinction between the national and international levels of decision-making, but contends that both are appropriate for participation by individuals and their voluntary associations. n152

Consider, briefly, the proposition that governments are not free to establish international organizations totally shut off from the public. Such closed organizations could contradict both national and international law. At the national level, one might ask whether a democratic government - which respects the core rights of association, assembly, and petition - can bind itself to recognize the authority of a treaty and international agency in which these core rights are denied to individuals. n153 At the international level, one might ask whether consultation with

NGOs has become customary for international organizations and part of their international personality. n154

This line of argument is superfluous, however, because the WTO treaty already states that "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." n155 This provision is based on a similar one from the Charter of the International Trade Organization of 1948. n156 The 1948 provision expanded upon the U.N. Charter of 1945, which provides that the Economic and Social Council "may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence." n157 Thus, the founders of the trading system went beyond the formal U.N. model to explicitly seek cooperation with NGOs.

Therefore, the real issue is not whether NGOs should receive recognition from the WTO, but rather what forms of consultation and cooperation are appropriate. This issue is complex because one must consider all three functions (or branches) of the WTO - the legislative, executive, and judicial. n158 Although the WTO's executive and legislative decisions normally require consensus (which might mean that the decision is taken in each national capital), the adoption of dispute settlement judgments occurs without a consensus. n159

In deciding what modes of cooperation are appropriate, governments are being hindered by verbal barriers. Phrases like "NGOs should be able to participate" or "NGOs deserve a seat at the table" are ambiguous in English and probably equally confusing in other languages. Thus, at least some of the conflict about NGOs may result from verbal misunderstanding rather than real disagreement.

With sufficient discourse, it might be possible to gain a consensus among WTO governments on the following three propositions. First, although WTO rules and decisions are applied only to members, they do in fact affect people. Second, the WTO needs to attain broader public support and improving the dialogue between governments and NGOs may be one way of achieving this. Third, no government or mainstream civil society organization is suggesting that NGOs be given a vote in the WTO, and therefore, opposition to that hypothetical NGO role should not be used as an excuse to oppose appropriate consultation and cooperation. n160 Of course, even with these three propositions as a foundation, WTO members will still disagree on whether consultation should occur solely with governments or also with the WTO.

The case for allowing the WTO to hear nongovernmental interests is strong. When individuals are affected by an official decision, they ought to be able to have input into the decision-making at the level where the decision is being made. n161 The claim that governments set their WTO policies at home ignores the fact that key decisions in the WTO emerge as a result of face-to-face negotiations between governments. Obviously, the best way to influence such negotiations is to be in the room (if not at the table). It may be true in some countries that amendments to the WTO treaty have to be approved by a parliament or congress. Such parliamentary votes, however, will happen too late for an NGO that wants to shape the results. An NGO can fight against ratification, but that will usually be ineffective to achieve the NGO's constructive policy goals. Moreover, in view of the growing economic importance of WTO membership, no country is likely to reject ratification of new WTO agreements.

What NGOs typically want is to increase intergovernmental cooperation. Support merely from one's own government will rarely be sufficient for achieving an NGO's international goals.

n162 This is especially true in the WTO, which needs a consensus of governments, to make a decision.

As noted in Parts II and III, some governments and commentators argue that NGO views should be channeled exclusively through governments. But often, an NGO cannot rely upon a government to communicate its views. n163 An NGO for free trade may gain little help from a government pursuing mercantilist or protectionist trade policies. The NGO's dissonant views will be filtered out. An NGO located in a small, developing country may get little support from a government that cannot afford to send a permanent representative to the WTO. Even more problematic, an NGO might be located in countries like China and Russia that have not yet been admitted as WTO Members. What channels should those 1.4 billion people use to communicate with the WTO?

At the national level, a citizen does not exhaust his democratic participation by what he does alone in the voting booth. He lobbies, serves on advisory groups, circulates petitions, testifies at public hearings, and participates in "town meetings." These are a manifestation of democracy, not a distortion of democracy. n164

If a citizen can rightly be an activist within local and national government, why should one forego that in international governance? n165 Since no one can exit from the Earth, the only way to influence world order decisions is through citizen voice - vertically through one's own government or diagonally to other governments. n166 Diagonal discourse can also operate through NGOs in other countries. n167

The idea that an NGO should speak only through its government has an even deeper problem. Many NGOs concerned about the WTO's activities engage in transnational relationships. n168 This is not surprising. Throughout the 19th and 20th centuries, individuals responded to international problems by setting up transnational NGOs. n169 This extranational activism reaches across political borders to find like-minded individuals in other countries who will work together to influence governments and international organizations. (One current example of this phenomenon is the group *Medicins Sans Frontieres*.) For the WTO to send transnational environmental groups or business groups down (or back) to their "own" governments is tantamount to denigrating the causes they espouse. Daniel Esty put it well when he said that "telling these groups that they must exert influence only at the national level is to deprive them of their transnational essence." n170

Because key WTO policies are being determined both in national capitals and in Geneva, it is logical for a transnational NGO, like WWF, to operate simultaneously at both levels. This is not taking two bites of the apple. Rather, it is biting into two different apples, national and global. n171

Although the Statists claim that NGOs who want to influence the WTO should go out and win national elections, that argument is sterile. Elections are much more about picking politicians than about deciding issues. n172 Even when the WTO is discussed in an election campaign, this issue is likely to be on a third or lower tier. So the fact that an individual is frustrated with WTO policies does not imply that the individual's preferred candidate lost the most recent election. One can vote for the winning candidate and still be disappointed in the decisions he makes regarding the WTO (or the decisions made by his agents, the trade bureaucrats).

Furthermore, even if an idea is voted down in one country, that should not necessarily put the idea to rest. An NGO in Country A could develop an idea that A's public opposes yet the rest of the world would favor. If the NGO were able to offer this idea to the WTO, then the other governments might bargain with Government A to accept it. To be sure, speaking at the WTO is not the only way for an NGO to present its idea. The NGO's chairman can write an op-ed. But the unpopularity of an idea in its country of origin should not bar it from intergovernmental discourse.

A nation of individuals does not need to speak with one voice to other nations. Each nation has a government, however, and those governments should speak with one voice to each other. Of course, governments often fail in this regard due to well-known agency problems. Even when governments do speak to each other in perfect modulation, there will be numerous sidebar conversations between individuals of different nations that will express disagreement with one or more governments. Very frequently, individuals of one nation will converse with government officials of another nation. So long as an individual does not falsely purport to speak for his national government, these everyday conversations are unproblematic.

As noted in Part II, Philip Nichols seeks a "rational basis" for NGO participation at the WTO. n173 The answer is simple: governments are imperfect. While governments have a monopoly on the legal use of coercive power, they do not have a monopoly on good ideas for achieving the goals set out in the Preamble of the WTO Agreement such as "raising standards of living," "ensuring full employment," and eliminating "discriminatory treatment in international trade relations."

Thus, governments at the WTO can make that organization more effective by welcoming the ideas of individuals and their NGOs. n174 In making this claim, I am not suggesting that bureaucrats are bereft of good ideas. Nor am I ignoring the fact that bureaucrats and politicians regularly adopt ideas incubated by an NGO. All I am saying is that at every level where governmental decisions are taken, there should be a process for hearing from nongovernmental interests. n175

In an important contribution to the debate, Daniel Esty explains the value of promoting more intellectual "competition" at the WTO:

In an ideal world, governments might be expected to re-evaluate their policies regularly and then be positioned to bring fresh thinking to the fore, making a prominent NGO unnecessary. But in the real world, governmental inertia is overwhelming.... An NGO-enriched WTO decision process would offer better competition for national governments in the search for optimal policies. n176

Optimal policies will not necessarily emerge from a vibrant marketplace of ideas at the WTO. The initial effect may be information overload or political gridlock. But the solution can hardly be to keep a narrow bandwidth on the communications channel.

The call for a more competitive debate at the WTO needs to be distinguished from the contention that the rational basis for NGO participation is to represent interests. To point out that individuals or NGOs have interests (or self-interests) is to state a tautology. But there is an important difference between hearing those interests as ideas or values and hearing from NGOs

as the representative of a bloc of people. In democratic countries, individuals choose their representatives by voting, and these elected officials (and their agents) have the competence to represent the full public at the WTO. n177 So seeking to represent political minorities or the locally disenfranchised is not the function that the NGO should serve.

By viewing NGOs as policy entrepreneurs rather than formal representatives, many of the practical problems of accommodating NGO participation diminish. If an NGO does not claim to be speaking for a segment of the population, then there is no need to examine its charter, scrutinize its contributors, and verify its membership list. The value of an NGO's input is its ideas. As Jeffrey Dunoff observes, "to the extent that NGO arguments are meritorious, it should not matter whether they are representative or electorally accountable." n178

Furthermore, the WTO can gain more than information from NGOs. Nonstate actors can also promote compliance with WTO rules and help educate the public about the WTO and trade. n179 In addition, NGOs are less likely to object to WTO actions when the decision-making process allows them to have their say, even when they do not get their way. n180

Given all these reasons for NGO involvement, why do many countries oppose it? Actually, countries do not. It is the governments in power that are opposing greater consultation and cooperation between the WTO and NGOs. At the risk of over generalizing, it seems that many of these governments, particularly from developing countries, are worried that NGO participation will diminish their sovereignty. In assessing these claims, one should consider sovereignty in its external and internal dimensions. External sovereignty today, as Abram and Antonia Handler Chayes have explained, is really about "status" or "the vindication of the state's existence as a member of the international system." n181 Internal sovereignty refers to the authority structure within a State and to the effectiveness of its control. n182

Both types of sovereignty can be challenged by NGOs. The delegate who represents a developing country at the WTO may be embarrassed by his country's lack of economic and political power, but knows that it has sovereign equality as a WTO Member and that he is the representative of that country. But the value of that status (and his status) can be watered down by NGO participation. The delegate from Country X may despise competition from the more articulate NGO spokesperson from Country X. Internal sovereignty can also be challenged by NGOs. David Robertson has analyzed NGO strategies for the WTO and found that NGOs seek to submit an amicus brief to a panel hoping that it will foster the creation of international law. n183 Such law then becomes "the ammunition that NGOs use to brow-beat national governments." n184 This makes it difficult for governments to exercise "sovereignty against NGO-promoted public outcries." n185

The NGO challenge to internal sovereignty can be particularly acute in non-democratic countries. Although a bare majority of WTO member governments are free and democratic, thirty-two percent are rated "Partially Free" by Freedom House and seventeen percent are rated "Not Free." n186 These latter two groups of WTO member governments may be horrified at the idea of giving a domestic NGO greater opportunities for participation at the WTO than it has at home because the NGO may use this experience to show the backwardness of its government.

In summary, Individualists say that the world trading system is too important to leave to trade technocrats. The WTO Agreement has a provision allowing NGO involvement, but so far governments have opted for shallow participation. If they move forward to provide more opportunities, governments may improve public understanding of and support for the WTO.

n187 Opening the WTO to NGOs will not change the character of the WTO. Director-General Moore's statement that 18 million people "joined" the WTO in 2000, while intriguing, is not correct. n188 The WTO does not have citizens. NGOs will enjoy only a consultative status.

Although I side with the Individualists in this debate, I agree that the narrow Statist perspective has coherence. Yet the current posture of Statists is ironic. To keep NGOs out of the WTO, the political conservatives glorify Leviathan over the individual.

V. RECOMMENDATIONS AND CONCLUSION

All governments - whether national or international - require statism. So the choice we face is not statism versus individualism as absolutes, but rather how to alloy these two principles in each organization. Should the WTO move away from its state-centrism and toward greater respect for the individual? In the author's view, the answer is yes. Economic nationalism and protectionism are deeply rooted, and so providing opportunities for civil society groups to challenge these practices can help the World Trade Organization use trade to achieve a better World.

Consultation and cooperation with NGOs should occur in all three branches of the WTO. Because the legislative, executive, and judicial functions differ, appropriate modalities need to be tailored for each branch. Some suggestions are offered below.

A. LEGISLATIVE

The key legislative activities of the WTO are the Ministerial Conferences, the General Council, and trade negotiations. The government officials who attend the Ministerial Conference are trade ministers who are sometimes elected to parliament within their country but are usually appointed by elected officials. Currently, the WTO permits NGOs to be silent observers at Ministerial Conferences, and that may be sufficient. If the Seattle experiment of having a parallel inter-parliamentary meeting is repeated in the future, the parliamentarians could hold WTO oversight hearings and invite NGOs to testify.

The WTO needs to provide a channel for NGO input into trade negotiations. During the Uruguay Round, business NGOs and transnational corporations worked through governments to influence the negotiations, n189 but other NGOs did not have equivalent access. This author has not yet seen any good proposals for regularizing the infusion of NGO ideas into a future trade round. Until a method is devised, governments could put some individuals from NGOs on their delegations.

B. EXECUTIVE

The executive activities of the WTO occur in the various Councils (such as the Council for Trade in Services), Bodies (such as the Textiles Monitoring Body), and Committees (such as the Committee on Agriculture). n190 At present, none of these organs have organized consultations with NGOs. Yet all of them should.

Article V(2) of the WTO Agreement provides authority for holding such consultations. Until the WTO General Council reaches a consensus to do so, the chairs of the various WTO subsidiary organs should meet with interested NGOs on a regular basis pursuant to the authority in the current NGO Guidelines. n191 For instance, the chair of the Committee on Sanitary and Phytosanitary Measures could meet with NGOs interested in promoting food safety.

Ideally, NGO interventions would spring from experience rather than merely ideology. Some NGOs in Geneva will be part of networks that include local grassroots groups, and often this local-level experience can provide valuable insights to policymakers at the center. n192 If well-structured, the competition among NGOs will help distinguish good ideas from bad.

In preparing for NGO input, the WTO can draw lessons from the way that other international organizations involve NGOs. Two useful examples are the Organisation for Economic Co-operation and Development ("OECD") and UNCTAD. The OECD Trade Committee holds consultations with a broad range of NGOs. n193 So does UNCTAD, and these efforts demonstrate that developing country NGOs can participate effectively. n194 The WTO needs to hear more from Southern NGOs in order to counteract the domination of WTO politics by Northern governments. n195

The WTO can also take advantage of its proximity to the International Labor Organization ("ILO") in Geneva and the World Conservation Union ("IUCN") in Gland to secure convenient NGO input through those organizations. n196 If the WTO agrees to provide observer status for the ILO, as it has with seven other international organizations, then the ILO attendance will be tripartite with governments, employer NGOs, and worker NGOs. The IUCN is a hybrid organization whose membership comprises seventy-eight States, 112 government agencies, and 735 NGOs. n197 By giving the IUCN observer status on appropriate WTO committees, the WTO could secure advice from environment ministries and NGOs.

The approach of mainstreaming NGOs into the WTO's work is better than setting up an overall NGO advisory committee. Recently, Supachai Panitchpakdi, who will be the next WTO Director-General, gave new support to the idea of an NGO advisory committee. n198 But as the WTO symposia showed, bringing a rainbow of NGOs together in one room frustrates any in-depth discussions on particular issues.

C. JUDICIAL

The WTO should establish procedures to enable NGOs and individuals to submit amicus curiae briefs to panels and to the Appellate Body. The government delegates to the WTO apparently believe this matter should be dealt with by them rather than the Appellate Body, and so the governments should act quickly to promulgate needed procedures. Many close observers of WTO dispute settlement would favor such action. Thomas Cottier, a frequent GATT/WTO panelist, has written that "publicity of hearings of panels and amicus curiae briefs from non-governmental organizations could further enhance the legitimacy, and acceptance, of the WTO dispute settlement process." n199 In 2000, the International Law Association recommended "allowing individual parties, both natural and corporate, an advisory locus standi in those dispute settlement procedures where their own rights and interests are affected." n200

Boosting the transparency of the WTO dispute process will improve public confidence in the adjudications and also facilitate the submission of briefs by civil society groups. n201 To that end, the following steps should be taken. First, WTO rules should be changed so that government briefs to the panels become public documents. n202 (Of course, governments should be able to designate specific information as confidential.) Second, the WTO Secretariat should release the names and brief biographies of panelists. Third, the Secretariat should prepare a toolkit for how to submit an amicus brief. Such a toolkit might also be designed by an NGO such as the International Centre for Trade and Sustainable Development. A toolkit could include contact information for law school clinics in the United States or elsewhere that might be willing to prepare a brief for a developing country NGO.

CONCLUSION

The debate about the appropriate role of NGOs at the WTO will continue in the years ahead. Before he joined the WTO in 1999, Director-General Moore wrote about the "virtue" of civil society in exposing "the corruption and inherent dishonesty of closed minds and closed systems." n203 Inside the WTO, Moore has butted against some closed minds. Certainly, NGOs are not more virtuous than governments. Yet as voluntary groups, NGOs consist of individuals who care enough about an issue to work for or against it. The WTO will stand a better chance of reaching enlightened decisions and implementing them if governments welcome competing views and try to get NGOs to work for a better trading system. Moreover, inviting NGOs into the WTO will keep them off the streets.

FOOTNOTES:

n1. Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments - Results of the Uruguay Round vol. 1, 33 *I.L.M.* 1144 (1994) [hereinafter WTO Agreement].

n2. See Douglas A. Irwin, *Against the Tide: An Intellectual History of Free Trade* (1996).

n3. See Robert O'Brien et al., *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* 140 (2000).

n4. See generally *The Third Force: The Rise of Transnational Civil Society* (Ann M. Florini ed., 2000); Julie Fisher, *Nongovernments: NGOs and the Political Development of the Third World* (1998); P.J. Simmons, *Learning to Live with NGOs*, *Foreign Pol'y*, Fall 1998, at 82.

n5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

n6. See Gerard Curzon, *Multilateral Commercial Diplomacy* 41, 53 (1965) (noting that the absence of NGOs in GATT and suggesting that this geographic separation in Geneva had improved the climate for trade negotiations). Twenty years later, the "GATT Wisemen" report recommended that "at the international level, trade policy and the functioning of the trading system should be made more open." GATT, *Trade Policies for a Better Future* (1985). But the call for openness referred to national trade policy, not to the GATT as an institution.

n7. See John H. Jackson, *World Trade and the Law of GATT* 444 n.3, 453, 457 (1969).

n8. *Id.* at 187.

n9. *Id.* at 189.

n10. See generally Ralph Nader et al., *The Case Against Free Trade: GATT, NAFTA, and the Globalization of Corporate Power* (1993); Jonathan Rauch, *Demosclerosis: The Silent Killer of American Government* 52 (1994) (discussing Mark Ritchie and the Citizen Trade Campaign); Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 *Minn. J. Global Trade* 195, 196-97 (1994) (discussing anti-trade intellectuals).

n11. John Croome, *Reshaping the World Trading System* 276 (1995).

n12. United States - Restrictions on Imports of Tuna, GATT B.I.S.D. 39S/155 (Sept. 3, 1991) [hereinafter Tuna-Dolphin Case]. See generally Symposium, *Trade and the Environment*, 23 *Env'tl. L.* 387 (1993).

n13. The first time that environmental advocates sought to attend a GATT panel hearing was in 1991 during the Tuna-Dolphin dispute. Joshua R. Floum, *Defending Dolphins and Sea Turtles: On the Front Lines in an "Us-Them" Dialectic*, 10 *Geo. Int'l Env'tl. L. Rev.* 943, 952 (1998).

n14. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 *Wash. & Lee L. Rev.* 1227, 1255 (1992).

n15. Draft of Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA at 93 (Dec. 20, 1991).

n16. See Havana Charter for the International Trade Organization art. 87.2, reprinted in *Also Present at the Creation: Dana Wilgress and the United Nations Conference on Trade and Employment at Havana 171-233* (Michael Hart ed., 1995). The charter was drafted by the U.N. Conference on Trade and Employment, but never went into force. GATT was negotiated during the preparatory sessions for this Conference. Another inspiration for the NGO provision may have been the two GATT Tokyo Round plurilateral agreements that provided for NGO involvement. In the Arrangement Regarding Bovine Meat (1979), the parties established an International Meat Council within the framework of GATT and gave it authority to make arrangements for consultation and cooperation with intergovernmental and nongovernmental organizations. See Arrangement Regarding Bovine Meat, GATT B.I.S.D. (26th Supp.) at 84 (1979). In the International Dairy Arrangement (1979), the parties established a Council with the same authority. See International Dairy Arrangement, GATT B.I.S.D. (26th supp.) at 96 (1979).

n17. Thomas A. Wathen, *A Guide to Trade and the Environment* 25 (1992).

n18. International Institute for Sustainable Development, *Trade and Sustainable Development Principles* 30-31 (1994).

n19. Lawrence E. Susskind et al., *Parallel Informal Negotiation: A New Kind of International Dialogue*, *Neg. J.*, Dec. 1996, at 19.

n20. Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 *J. Env'tl. L. & Litig.* 57, 92-98 (1992).

n21. Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 *Cornell Int'l L.J.* 699, 743 (1994).

n22. *Id.* at 703.

n23. Steve Charnovitz & John Wickham, *Non-Governmental Organizations and the Original International Trade Regime*, 29 *J. World Trade*, Oct. 1995, at 111.

n24. See *id.* at 115.

n25. United States Trade Representative Mickey Kantor, *Remarks on Trade and Environment at the Global Legislators Organization for a Balanced Environment* (Feb. 28, 1994).

n26. Uruguay Round Trade Agreements Subchapter I - Approval of, and General Provisions Relating to the Uruguay Round Agreements Part C - Uruguay Round Implementation and Dispute Settlement, 19 *U.S.C.* 3536 (2000). This provision is vaguer than the one Congress enacted 20 years earlier which called on the President to seek "the adoption of international fair labor standards and of public petition and confrontation procedures in the GATT." Trade Act of 1974 121(a)(4), 88 Stat. 1978, 1986 (repealed 1998).

n27. WTO Agreement art. V(2).

n28. Guidelines for Arrangements on Relations with Non-Governmental Organizations, Decision adopted by the General Council on 18 July 1996, WT/L/162 (July 23, 1996) [hereinafter *NGO Guidelines*].

n29. *Id.* para. 4.

n30. *Id.* para. 5.

n31. *Id.* para. 6 (emphasis added).

n32. Marrakesh Declaration, Apr. 15, 1994, WTO Agreement, Legal Instruments - Results of the Uruguay Round vol. 1, 33 *I.L.M.* 1263 [hereinafter Marrakesh Declaration].

n33. G. Richard Shell, Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, 44 *Duke L.J.* 829 (1995). See also G. Richard Shell, The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization, 17 *U. Pa. J. Int'l Econ. L.* 359 (1996).

n34. Shell, Trade Legalism, *supra* note 33, at 914.

n35. Philip M. Nichols, Extension of Standing in World Trade Organization Disputes to Nongovernment Parties, 17 *U. Pa. J. Int'l Econ. L.* 295, 310 (1996).

n36. Steve Charnovitz, Participation of Nongovernmental Organizations in the World Trade Organization, 17 *U. Pa. J. Int'l Econ. L.* 331, 342 (1996).

n37. Philip M. Nichols, Realism, Liberalism, Values, and the World Trade Organization, 17 *U. Pa. J. Int'l Econ. L.* 851-72 (1996).

n38. *Id.* at 872.

n39. See Report of the WTO Informal Sessions with Non-Governmental Organizations (NGOs) on Trade and Environment, Trade and Environment News Bulletin, TE/016 (Nov. 28, 1996).

n40. See <http://www.ictsd.org>. The Centre has published several studies about NGO participation. See, e.g., ICTSD, Accreditation Schemes and Other Arrangements for Public Participation in International Fora (1999).

n41. World Trade Organization, Annual Report 1998 135-36 (1998).

n42. In descending order of size, the NGOs' groupings were business, development, environment, labor, and other assorted. Final Statistics of the 1st WTO Ministerial Conference in Singapore: Non-Governmental Organizations (NGOs), available at http://www.wto.org/english/forums_e/ngo_e/statsi_e.htm.

n43. Gabrielle Marceau & Peter N. Pedersen, Is the WTO Open and Transparent?, *J. World Trade*, Feb. 1999, at 5, 12.

n44. See Free Telephone Calls, Tiger Beer, Extravaganzas, *Earth Times*, Dec. 16, 1996, at 10.

n45. See O'Brien et al., *supra* note 3, at 93.

n46. Marceau & Pedersen, *supra* note 43, at 16.

n47. See Civil Society Recommendations to the High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development, Report and Recommendations from the Joint WTO/UNCTAD NGO symposium on Trade-Related Issues Affecting Least-Developed Countries, WT/LDC/HL/16 (Oct. 24, 1997).

n48. United States - Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Panel, WT/DS58/R (May 15, 1998) [hereinafter Shrimp-Turtle Panel Decision]. This case involved a complaint by India, Malaysia, Pakistan, and Thailand about a U.S. import ban on

shrimp from countries that the U.S. Secretary of State had not certified as doing enough to safeguard endangered sea turtles vulnerable to being killed during shrimp trawling. This episode was discussed by the WTO Dispute Settlement Body in September 1997. Minutes of Meeting, sec. 8, WT/DSB/M/37 (Sept. 25, 1997).

n49. See United States - Import Prohibitions of Certain Shrimp and Shrimp Products, Brief of Amicus Curiae of the World Wide Fund for Nature (on file with the author).

n50. See United States - Import Prohibitions of Certain Shrimp and Shrimp Products, Brief of Amicus Curiae of the Center for Marine Conservation (on file with the author). The amicus brief was accompanied by a motion to submit an amicus brief.

n51. Understanding on Rules and Procedures Governing Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, Legal Instruments - Results of the Uruguay Round, vol. 31, 33 *I.L.M.* 1226 (1994) [hereinafter DSU]. See Shrimp-Turtle Panel Decision paras. 3.129, 7.8. The panel noted that a government could append whatever it wanted to its submission. Thereafter, the U.S. government attached a portion of one of the briefs to its submission. See id. para. 7.8.

n52. See Daniel Pruzin, WTO Appellate Body Under Fire for Move on Acceptance of Amicus Briefs, *BNA Daily Report for Executives*, Nov. 27, 2000, at A-1. In *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, the brief was submitted by Public Citizen, a U.S.-based NGO. Because its brief opposed the U.S. government position in the case, Public Citizen could not have relied upon its "own" government to represent its views to the panel. See Steve Charnovitz, *The World Trade Organization, Meat Hormones, and Food Safety*, 14 *Int'l Trade Rep.* 1781, 1786 (1997).

n53. Agreement on Preshipment Inspection, WTO Agreement, Annex 1A, art. 4 (Apr. 15, 1994), at http://www.wto.org/english/docs/e/legal/e/final_e.htm.

n54. See Press Release, WTO, Operation of the Independent Entity Established Under Article 4 of the Agreement on Preshipment Inspection (Feb. 9, 1996), at http://www.wto.org/english/news_e/pres96_e/psidoc.htm (containing General Council decision and Agreement between WTO, IFIA, and ICC).

n55. See Draft Final Report of the Working Party on Preshipment Inspection, G/PSI/WP/W/24 (Mar. 5, 1999).

n56. *Id.* art. 13.1.

n57. See United States - Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Shrimp-Turtle Report].

n58. See *id.* (referencing amicus brief of Aug. 3, 1998).

n59. See *id.* para. 79.

n60. *Id.* para. 83. Three governments wrote to the Appellate Body to complain about this decision. Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/50 (Nov. 6, 1998).

n61. Based on interviews with attendees at the closed hearing.

n62. See Appellate Body Shrimp-Turtle Report para. 110; James Cameron & Stephen J. Orava, WTO Opens Disputes to Private Voices, *Nat'l L. J.*, Dec. 7, 1998, at B5.

n63. Appellate Body Shrimp-Turtle Report paras. 99-110. See Donald M. McRae, *The WTO in International Law: Tradition Continued or New Frontier?*, 3 *J. Int'l Econ. L.* 27, 33-35 (2000) (discussing this decision).

n64. Appellate Body Shrimp-Turtle Report para. 32.

n65. Gary P. Sampson, *Trade, Environment, and the WTO: The Post-Seattle Agenda* 113 (2000).

n66. *Id.* at 113-14. This claim is easily refuted. Since NGOs have no "right" to submit amicus briefs, their rights cannot be greater than those of governments. Any WTO member government has a right to intervene as a third party to a case if it has a "substantial interest" in the matter. DSU art. 10.1. Substantial interest is interpreted broadly.

n67. Preparations for the 1999 Ministerial Conference, Dispute Settlement Understanding, Communication From Pakistan, WT/GC/W/162 (Apr. 1, 1999).

n68. G-15 Communique on WTO Ministerial, *Inside U.S. Trade*, Sept. 10, 1999, at 9-10, para. 19.

n69. United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Panel, WT/DS138/R (Dec. 23, 1999).

n70. *Id.* para. 6.3.

n71. United States--Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R (May 10, 2000) [hereinafter Appellate Body Carbon Steel Report].

n72. *Id.* para. 36.

n73. *Id.* para. 37.

n74. See *id.* para. 38.

n75. *Id.* para. 42. See generally Arthur E. Appleton, "Amicus Curiae" Submissions in the "Carbon Steel" Case: Another Rabbit from the Appellate Body's Hat?, 3 *J. Int'l Econ. L.* 691 (2000); Issues of Amicus Curiae Submissions: Note by the Editors, 3 *J. Int'l Econ. L.* 701 (2000).

n76. Appellate Body Carbon Steel Report para. 42.

n77. See Daniel Pruzin, WTO Members Make Unfriendly Noises on "Friends of the Court" Dispute Briefs, *BNA Daily Report for Executives*, Aug. 9, 2000, at C1.

n78. *Id.*

n79. Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada, Report of the Panel, WT/DS18/RW para. 7.8 (Feb. 18, 2000).

n80. European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Panel, WT/DS135/R (Sept. 18, 2000) [hereinafter Asbestos Panel Report].

n81. Id. para. 6.3 (suggesting that attached briefs are being considered only as attachments, not as independent submissions).

n82. Id. para. 6.4.

n83. European Communities - Antidumping Duties on Imports of Cotton-type Bed Linen from India, Report of the Panel, WT/DS141/R (Oct. 30, 2000) para. 6.1 & n.10.

n84. European Communities - Measures Affecting Asbestos and Asbestos - Containing Products, Communication from the Appellate Body, WT/DS135/9 (Nov. 20, 2000).

n85. Id.

n86. See supra note 78 and accompanying text.

n87. See, e.g., Robert Howse & Makau Mutua, Protecting Human Rights in the Global Economy: Challenges for the World Trade Organization 15 (2000).

n88. See LDCs Rally Against WTO Appellate Body Bid on NGO Submissions, Inside U.S. Trade, Nov. 17, 2000, at 12-13; Briefs in a Twist: The WTO Tries Too Hard, Economist, Dec. 9, 2000, at 85.

n89. See Decision by the Appellate Body Concerning Amicus Curiae Briefs, Statement by Uruguay at the General Council, WT/GC/38 (Nov. 22, 2000).

n90. Amicus Brief Storm Highlights WTO's Unease with External Transparency, 4 Bridges, Nov.-Dec. 2000, at 1, at <http://www.ictsd.org>.

n91. WTO Members Warn Appellate Body on Amicus Procedures, Inside U.S. Trade, Dec. 1, 2000, at 4.

n92. Press Release, The Center for International Environmental Law, A Court without Friends? One Year After Seattle, the WTO Slams the Door on NGOs (Nov. 22, 2000), at <http://www.ciel.org>.

n93. See Jeffrey L. Dunoff, Border Patrol at the World Trade Organization, 9 Y.B. Int'l Envtl. L. 20 (1998).

n94. Cf. J.H.H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, Harvard Jean Monnet Working Paper Sept. 2000, at 17 (discussing the implications of the Appellate Body's decisions on amicus briefs).

n95. See Whitney Debevoise, Access to Documents and Panel and Appellate Body Sessions: Practice and Suggestions for Greater Transparency, 32 *Int'l Law.* 817, 837-38 (1998).

n96. See Dinah Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 *Am. J. Int'l L.* 611, 616 (1994) (discussing NGO amicus briefs); see also Harold Hongju Koh, Why Do Nations Obey International Law?, 106 *Yale L.J.* 2599, 2626, 2656 (1997) (discussing development of international law through NGO litigation).

n97. See WTO Symposium of NGOs on Strengthening Complementarities Between Trade, Environment, and Sustainable Development, at <http://www.iisd.ca/linkages/sd/wtongo.html>.

n98. See WTO High-Level Symposia on Trade and Environment and Trade and Development, at <http://www.iisd.ca/linkages/sd/wtohls.html>.

n99. Joint Civil Society Statement on the WTO High-Level Symposia (Mar. 1999), at <http://www.globalpolicy.org/cosecon/bwi-wto/wto99-2.htm>.

n100. Developing Countries Resist Expansion of Environment Role for World Trade Body, 22 Int'l Env't Rep. 225, 226 (1999).

n101. Pres. William J. Clinton, Remarks at the World Trade Organization in Geneva, Switzerland, in 34 Wkly. Compil. Pres. Doc. 926, 928 (1998).

n102. Ruggiero Inaugurates WTO Information Service on the Internet, Press Release, PRESS/22 (Sept. 26, 1995).

n103. Id.

n104. See Ruggiero Announces Expanded WTO Plan for Cooperation with NGOs, Press Release, PRESS/107 (July 16, 1998).

n105. The WTO, The System Shields Governments From Narrow Interests (Feb. 22, 2001), at http://www.wto.org/english/thewto_e/whatis_e/tif0b09_e.htm.

n106. Id.

n107. John O. McGinnis & Mark L. Movsesian, The World Trade Constitution, 114 Harv. L. Rev. 511, 571-72 (2000).

n108. Promotion of the Institutional Image of the World Trade Organization, Note by the Secretariat, WT/GC/W/158 (Apr. 14, 1999).

n109. See, e.g., Citizens' Groups: The Non-governmental Order: Will NGOs Democratize, or Merely Disrupt, Global Governance?, Economist, Dec. 11, 1999; Sylvia Ostry, Making Sense of It All: A Post-Mortem on the Meaning of Seattle, in Seattle, the WTO, and the Future of the Multilateral Trading System 81-94 (Roger B. Porter & Pierre Sauve eds., 2000); Jonathan Peterson, Outside Forces Change WTO Forever, L.A. Times, Dec. 5, 1999, at A1; Mark Suzman, Tireless in Seattle, Fin. Times, Nov. 10, 2000, at 26; Susan Tiefenbrun, Free Trade and Protectionism: The Semiotics of Seattle, 17 Ariz. J. Int'l & Comp. L. 257 (2000).

n110. See Press Release, WTO, Moore calls for closer parliamentary involvement in WTO matters, PRESS/169 (Feb. 21, 2000).

n111. See Press Release, WTO, Moore cites role of legislators in WTO, PRESS/159 (Dec. 2, 1999).

n112. See Peter Prove & Miloon Kothari, Human Rights Bodies Gear Up on TRIPS, 4 Bridges, July-Aug. 2000, at 13, at <http://www.ictsd.org>.

n113. The Business Roundtable, Preparing for New WTO Trade Negotiations to Boost the Economy (May 1999) at iii, P 19, at <http://www.brtable.org/document.cfm/321>.

n114. Consumers International, Consumer Rights and the Multilateral Trading System: What needs to be done before a Millennium Round 9 (1999).

n115. Remarks at the Democratic Leadership Council Gala, White House, Office of the Press Secretary, 35 Weekly Comp. Pres. Doc. 2027 (Oct. 13, 1999).

n116. Remarks in a Roundtable Discussion with Harley-Davidson Employees in York, Pennsylvania, 35 Weekly Comp. Pres. Doc. 2321 (Nov. 10, 1999). President Clinton made

similar remarks at George Washington University. Remarks in an On-Line Townhall Meeting, 35 Weekly Comp. Pres. Doc. 2293 (1999).

n117. The General Council also discussed the WTO-NGO relationship in July 1998. General Council, Minutes of Meeting, WT/GC/M/29 (July 15, 16 & 22, 1998).

n118. External Transparency, General Principles, Communication from Hong Kong, China, WT/GC/W/418 (Oct. 31, 2000). It is unclear whether Hong Kong was suggesting that the WTO be impervious to the results of national elections.

n119. See External Transparency, Informal Paper by Canada, WT/GC/W/415 (Oct. 17, 2000).

n120. General Council Informal Consultations on External Transparency, Submission from the United States, WT/GC/W/413/Rev.1 (Oct. 13, 2000).

n121. Cairns Group Farm Leaders Presentation to Cairns Group Ministers, Communication from Australia, WT/L/368 (Oct. 30, 2000). See also Global Alliance for Sugar Trade Reform and Liberalisation, Communication from Australia, WT/L/367 (Oct. 30, 2000).

n122. Pascal Lamy, Challenges Confronting the World Trade System Today, Eur. Foreign Aff. Rev., Nov. 8, 2000.

n123. Press Release, WTO, The WTO is Not a World Government and No One Has Any Intention of Making It One, Moore Tells NGOs, Press/155 (Nov. 29, 1999).

n124. Mike Moore, Challenges for the Global Trading System in the New Millennium, Council on Foreign Relations, Sept. 28, 1999.

n125. Press Release, *supra* note 110.

n126. Mike Moore, The Backlash Against Globalization, Address before Liberal International, Ottawa (Oct. 26, 2000)

n127. Mike Moore, Statement to the 11th International Military Chiefs of Chaplains Conference (Feb. 9, 2000).

n128. WTO, Moore Cites Improved Climate for Trade Talks, Link Foundation, Nov. 6, 2000.

n129. See Gary P. Sampson, Trade, Environment and the WTO: The Post-Seattle Agenda 13 (2000) (stating that because WTO is an intergovernmental organization, member governments "are presumed to be acting on behalf of the collective interests of their diverse constituents").

n130. WTO Agreement art. XII(1). Current membership in the WTO is available at <http://www.wto.org>.

n131. See U.N. Charter pmbl.

n132. Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law, *93 Am. J. Int'l L.* 596, 615-17 (1999).

n133. Martin Wolf, Of Tuna, Turtles and Red Herrings: Concern About the Environment, Labour Rights or Even Democracy Have Little to do With Global Commerce, *Fin. Times*, Nov. 17, 1999, at 27.

n134. GATT, 1 Int'l Trade 90-91, at 34 (1992).

n135. Alan Oxley, Poor Environmental Policy: The Fundamental Problem in the "Trade and Environment" Debate, in *The Next Trade Negotiating Round: Examining the Agenda for Seattle* 63, 69 (Jagdish Bhagwati ed., 1999).

n136. Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and the WTO: Problems of Democratic Legitimacy*, (May 2000), at <http://www.ksg.harvard.edu/cbg/trade/papers>.

n137. Of course, an NGO may not perceive any government as its own. The NGO has no right to vote.

n138. See supra note 31 and accompanying text.

n139. See Jonathan Fried, *Globalization and International Law - Some Thoughts for States and Citizens*, 23 *Queen's L.J.* 259, 274 (1997); see also Peter J. Spiro, *The New Sovereignists*, 79 *For. Aff.* 9, 12 (Nov.-Dec. 2000) (pointing out how critics of unaccountability of international organizations assert that NGO participation makes it even worse).

n140. John R. Bolton, *Should We Take Global Governance Seriously?*, 1 *Chi. J. Int'l L.* 205, 217 (2000) ("Civil society's 'second bite at the apple' raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided."). See also Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 *Int'l Aff.*, Jan. 2001, at 1, 29 ("To give NGOs a second shot independent of the governments which they have elected has no rationale.").

n141. The apple metaphorists are apparently not troubled by the waste in apples.

n142. Thomas M.T. Niles, *Protest Aimed at the Wrong Target*, *Fin. Times*, Dec. 14, 1999, at 18 (arguing that Seattle protest was disregard for principles of democratic governance).

n143. See, e.g., Martin Wolf, *Uncivil Society*, *Fin. Times*, Sept. 1, 1999, at 14 ("If NGOs were indeed representative of the wishes and desires of the electorate, those who embrace their ideas would be in power. Self-evidently, they are not."); David Robertson, *Civil Society and the WTO*, 23 *World Econ.* 1119, 1126 (2000) ("But the NGOs really want a second bite at the negotiating cherry; to participate in trade negotiations after their lobbying has failed to influence governments.").

n144. Bolton, supra note 140, at 218.

n145. See George L. Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce, 1919-1938*, at 21-31 (1938); Denys P. Myers, *Handbook of the League of Nations* 166 (1935) (discussing the ICC's initiative to promote an international convention making bribery a crime).

n146. See supra note 7 and accompanying text.

n147. See Bruce Barnard, *Business Group Wants Special Role in WTO*, *J. Com.*, Mar. 5, 1997, at 3A.

n148. See, e.g., John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 *Chi. J. Int'l L.* 381 (2000) (contrasting trade agreements to human rights and regulatory agreements).

n149. See supra note 106 and accompanying text.

n150. See Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 *J. Int'l Econ. L.* 433, 438-39 (1998) (discussing and critiquing this view).

n151. See GATT art. XXVIII(3) bis (stating that tariff negotiations shall take into account needs of governments and individual industries, and needs of developing countries for more flexible use of tariff protection to assist economic development).

n152. See Florentino P. Feliciano, Jenks, the Common Law of Mankind, *68 Yale L.J. 1039, 1046, 1047 (1959)* (visualizing the world as a graduated series of community contexts and noting participation of pressure groups, private associations, and individuals). Justice Feliciano is a member of the WTO Appellate Body.

n153. See Ernst-Ulrich Petersmann, How to Reform the United Nations: Lessons from the International Economic Law Revolution, *2 UCLA J. Int'l L. & Foreign Aff. 185, 215-16 (1997-98)*.

n154. See Steve Charnovitz, Two Centuries of Participation: NGOs and International Governance, *18 U. Mich. J. Int'l L. 183 (1997)*.

n155. WTO Agreement art. V(2) (emphasis added).

n156. See supra note 16 and accompanying text.

n157. U.N. Charter art. 71.

n158. The legislative functions take place in the Ministerial Conference and in the General Council. See WTO Agreement arts. IV, IX, X, XII. The executive functions take place in the various councils, committees, bodies, as well as through the Director-General and the Secretariat. See WTO Agreement arts. IV, VI, VII, IX. The judicial functions take place in the Appellate Body and the panels. See WTO Agreement art. III. See generally DSU.

n159. See DSU art. 17.14 (adoption of Appellate Body report unless there is consensus not to adopt); WTO Agreement arts. IX, X (non-consensual decision-making). For a good chart on WTO decision-making, see Richard Blackhurst, The Capacity of the WTO To Fulfill Its Mandate, in *The WTO as an International Organization 31, 57* (Anne O. Krueger ed., 1998).

n160. Some analysts have suggested broader NGO roles beyond offering advice. For example, Graham Dunkley points to the possibility of using the model of the International Labor Organization for the WTO so that nations would be represented at the WTO not only by governments, but also by employers, labor unions, and NGOs. See Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism - A Critique 261-62 (2000)*.

n161. See Daniel C. Esty, Linkages and Governance: NGOs at the World Trade Organization, *19 U. Pa. J. Int'l Econ. L. 709, 730 (1998)* ("NGOs can also help to ensure that the public both feels connected to and actually is connected to these most distantly made decisions [at the WTO]."); Gordon Smith & Moises Naim, *Altered States: Globalization, Sovereignty, and Governance xv (2000)* ("People are entitled by right to some meaningful say in the institutions that govern their lives, be it their own legislature or the World Trade Organization.").

n162. Wolfgang Benedek, Developing the Constitutional Order of the WTO - The Role of NGOs, in *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday 228, 232* (Wolfgang Benedek et al. eds., 1999) (explaining that representation of NGOs by state does not satisfy their interests in participation because their concerns are not satisfactorily taken care of on state level).

n163. Daniel C. Esty, Environmental Outreach at the WTO: Outreach to Civil Society, in Trade, Environment, and the Millennium 98, 102 (Gary P. Sampson & W. Bradnee Chambers eds., 1999) ("One of the most important advances in political theory in recent decades is the growing understanding that interactions among people cannot all be mediated through the narrow channels of governments, particularly national governments.").

n164. See Carole Pateman, Participation and Democratic Theory (1970).

n165. See Jenny Bates, Civil Society and the World Trade Organization: A Voice, Not a Vote, Progressive Policy Institute Backgrounder (Nov. 1999), at <http://www.dlcppi.org/texts/trade>.

n166. See Albert O. Hirschman, Exit, Voice, and Loyalty 209 (1970) (comparing options of exit to voice).

n167. Richard W. Parker, The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict, *12 Geo. Int'l Envtl. L. Rev. 1, 71 (1999)* (discussing diagonal discourse).

n168. Transnational relationships are those that are "formed in the world space beyond the framework of the national state and that are at least partially free of the control or mediating action of states." Pierre S. Pettigrew, The New Politics of Confidence 24 (1998). Pettigrew is Canada's Minister for International Trade.

n169. See Constructing World Culture: International Nongovernmental Organizations Since 1875, at 14 (John Boli & George M. Thomas eds., 1999).

n170. Daniel C. Esty, Nongovernmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion, *1 J. Int'l Econ. L. 123, 141 (1998)*.

n171. Thus I disagree with Mark Halle who writes:

If trade policy in all WTO member countries were crafted through a fully participatory process where the views of each legitimate stakeholder were listened to, weighed, and given their due importance, and if each of the WTO Members was a model of democracy and good governance, the work of WTO could by and large be left to the governments on their own. There would be no burning case for civil society involvement.

Mark Halle, Legitimacy: the New Frontier, *3 Bridges*, Mar. 1999, at 13. Even with perfectly representative governments, there would still be a need for NGO involvement to help governments reach the optimal collective decision at the international level.

n172. For example, in the U.S. presidential election of 2000, far more media attention was devoted to how the candidates wanted to handle uncounted ballots in Florida than to what the candidates were saying about any policy issue.

n173. See supra note 38 and accompanying text.

n174. C. Fred Bergsten, Managing the World Economy of the Future, in *Managing the World Economy* 341, 373 (Peter B. Kenen ed., 1994); Jessica Wilson, Why Does the WTO Need Civil

Society, in *Trade, Environment and Sustainable Development: Views From Sub-Saharan Africa and Latin America*, a Reader 85 (Peider Konz ed., 2000).

n175. See Kal Raustiala, *Sovereignty and Multilateralism*, 1 *Chi. J. Int'l L.* 401, 416 (2000) ("Interest groups are important manifestations of political attention and activity that should be channeled, not blocked. As the locus of political decision-making increasingly shifts upwards, away from the state and toward the international level, rules and processes should be adjusted to permit interest groups to follow suit."); Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 *U. Pa. J. Int'l Econ. L.* 587, 635 (1998) (noting that in international organizations that produce results, the importance of private actors becomes more compelling).

n176. Esty, *supra* note 170, at 136-37. See also Daniel C. Esty & Damien Geradin, *Regulatory Co-opetition*, 3 *J. Int'l Econ. L.* 235, 253-54 (2000) (discussing extra-governmental co-opetition to generate winning ideas).

n177. See Michael Edwards, *NGO Rights and Responsibilities* 21 (2000) ("The best representative of civil society is a democratically elected government, complemented by checks and balances provided by non-state membership bodies such as labor unions and pressure groups of different kinds.").

n178. Dunoff, *supra* note 150, at 439.

n179. See Christophe Bellmann & Richard Gerster, *Accountability in the World Trade Organization*, *J. World Trade*, Dec. 1996, at 31, 32 ("NGO participation is not a threat to the WTO and trade diplomacy, but contributes to securing public support for trade in view of sustainable development."); Mark Edward Foster, *Trade and Environment: Making Room for Environmental Trade Measures within the GATT*, 71 *S. Cal. L. Rev.* 393, 441-42 (1998) (discussing how NGOs can call attention to disguised protectionism); Jan Aart Scholte et al., *The WTO and Civil Society*, *J. World Trade*, Feb. 1999, at 107, 111 (noting that civil society can influence ratification of WTO trade agreements).

n180. Cf. Keohane & Nye, *supra* note 136 (noting that "any sustainable pattern of governance will have to institutionalize channels of contact between international organizations and constituencies within civil society").

n181. Abram Chayes & Antonia Handler Chayes, *The New Sovereignty* 27 (1995). The authors call this the "new" sovereignty in contrast to the old definition of sovereignty as "the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity." *Id.* at 26.

n182. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 9-10 (1999). Krasner posits four meanings of sovereignty--domestic (here termed internal), interdependence, international legal, and Westphalian.

n183. See Robertson, *supra* note 143, at 1127.

n184. *Id.*

n185. Robertson, *supra* note 143, at 1128.

n186. Based on data compiled from the WTO website (141 member countries) and the Freedom House website. Thanks to Mindy Charnovitz for doing these tabulations.

n187. Ernst-Ulrich Petersmann, From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" Into WTO Law?, 37 *Common Market L. Rev.* 1363, 1373 (2000) (suggesting that a civil society advisory committee to the WTO might induce more public support for WTO negotiations).

n188. See supra note 128 and accompanying text.

n189. Susan K. Sell, Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights, in *Private Authority and International Affairs* 169-98 (A. Claire Cutler et al. eds., 1999).

n190. Most of the WTO organs might be characterized as "legislative" rather than "executive" because they are composed of governmental representatives. The Textiles Monitoring Body ("TMB") is an exception because it is composed of persons who are appointed by ten governments selected by the WTO Membership. Agreement on Textiles and Clothing art. 8. This Agreement delegates specified authorities to the TMB.

n191. See NGO Guidelines, supra note 28, para. 5.

n192. Edwards, supra note 177, at 23-25.

n193. Lawrence Speer, OECD Discusses Trade Liberalization with NGOs, But Wide Differences Persist, *BNA Daily Rep. for Executives*, Oct. 24, 2000, at A8; Aide-Memoire, Informal Consultation between the Trade Committee and Non-Governmental Organizations (Oct. 23, 2000), at <http://www.oecd.org/ech/NGO/summary>.

n194. UNCTAD began holding annual consultations with NGOs in 1988. See <http://www.unctad.org/en/subsites/ngo>.

n195. See Chee Yoke Ling, No Sleeping After Seattle, 11 *Our Planet* 23-24 (2000), available at <http://www.ourplanet.com/imgversn/111/ling.html>.

n196. Jeffrey J. Schott, The WTO After Seattle, in *The WTO After Seattle* 3, 34-35 (Schott ed., 2000) (discussing ILO); William M. Reichert, Resolving the Trade and Environment Conflict: The WTO and Consultative Relations, 5 *Minn. J. Global Trade* 219, 236 (1996) (discussing IUCN).

n197. See <http://www.iucn.org>.

N198. Future WTO Chief Sees Voting as Alternative to Consensus Decisions, *Inside U.S. Trade*, Sept. 29, 2000, at 9-10.

n199. Thomas Cottier, The WTO and Environmental Law: Three Points for Discussion, in *Trade and the Environment: Bridging the Gap* 56, 59 (Agata Fijalkowski & James Cameron eds., 1998).

n200. Declaration on the Rule of Law in International Trade, Conf. Res. 2/2000 (July 25-26, 2000).

n201. See Chi Carmody, Beyond the Proposals: Public Participation in International Economic Law, 15 *Am. U. Int'l L. Rev.* 1321, 1345-1346 (2000).

n202. See DSU app. 3, para. 3 (permitting government to release its brief but not requiring it).

n203. Mike Moore, A Brief History of the Future: Citizenship of the Millennium 160 (1998).