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Marceau, Gabrielle Zoe; Pedersen, Peter N.

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Is the WTO Open and Transparent?

A Discussion of the Relationship of the WTO with Non-governmental Organisations and Civil Society's Claims for more Transparency and Public Participation

Gabrielle MARCEAU and Peter N. PEDERSEN*

I. INTRODUCTION

In the last few years the World Trade Organization (WTO) has been under pressure to increase the transparency of its work and public participation in its functions. This is a new phenomenon.

Initially, the work pursued by the governments in the General Agreement on Tariffs and Trade (GATT) of 1947, the WTO's predecessor, was rarely criticised as exclusive and secretive. No one really cared about the GATT. In fact, very few people knew about the GATT (compared, for instance, with the International Monetary Fund or the World Bank). Conceived as a provisional agreement between countries, the administration of which was facilitated by a very modest secretariat, the GATT was concerned primarily with technical matters of international commerce and trade. However, the GATT was not legally an "international organisation"; it handled its scope of work in a pragmatic, efficient, discreet and, arguably, non-transparent manner.

Yet, as the sole multilateral agreement containing trade disciplines, the GATT evolved into a *de facto* forum for countries to undertake negotiations, survey the implementation of such negotiated obligations and develop a system of dispute settlement. For various reasons, including a desire to maintain effective and efficient control of these activities, the GATT countries always insisted that the only actors in the forum be the countries' representatives themselves and that their activities be handled in a pragmatic manner. The secretariat has always been very small, with defined and limited functions. Countries' representatives have always had the exclusive authority to initiate discussions and negotiations, and representation and participation has always been limited to governments' representatives in all forums of the GATT. Non-governmental interest groups have never been formally present in the negotiating room or even in the corridors of the GATT

* Gabrielle Marceau is from the Legal Affairs Division and Peter N. Pedersen is from the External Relations Division, WTO Secretariat. The opinions expressed are strictly personal and cannot bind the WTO Secretariat. Any mistakes are the authors' alone. The authors are most grateful to Nadir Alikhan, Jesse Krier, Rachel Pedersen, Valeska Populoh and Matthew Stilwell for their useful comments on previous drafts.

building. Although the GATT lacked formal and legal existence, the body was a successful institution for 50 years, setting up a system of trade disciplines which have now infiltrated multifarious dimensions of commerce, trade and trade-related areas. From this standpoint, the GATT functioned well.

The GATT 1947 (now called the GATT 1994, but hereafter referred to as the GATT) became one part of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) which entered into force on 1 January 1995. The formal legal personality of the WTO, as an international organisation, is now recognised in Articles I and VIII of the WTO Agreement.¹ Generally, the WTO continues to function as the GATT did. The main actors in the WTO forum remain the Member governments. In all areas of activities, Members must initiate, conduct and terminate actions. The WTO now has a formal Secretariat, the powers of which are still rather limited compared to other international bodies, such as the Commission of the European Communities or the Secretariat of the Organisation of Economic Co-operation and Development (OECD). Throughout the various WTO agreements, and with the limited circumstances of the Trade Policy Review Mechanism, the responsibilities of the WTO Secretariat do not include any investigation or assessment power. Only Members can initiate negotiations in which they are the sole participants. In the area of dispute settlement, initiation of the process, request for the adoption of panel or Appellate Body reports, and surveillance of the adequacy of implementation of the conclusions of dispute settlement reports are limited to Members. Thus, the main focus and *raison d'être* of the WTO are the interests of governments.

The increasing ramifications of international trade, as well as those of the WTO and its far-reaching agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) and the General Agreement on Trade and Services (GATS) and dispute settlement mechanism, are changing the dynamics of the old GATT. In recent years many non-governmental organisations (NGOs) have claimed that the rights of citizens and civil society have been infringed by GATT/WTO rules, and that certain interest groups have been able to exercise a disproportionate influence. Consequently, groups have been demanding increased access to and participation in WTO functions to ensure the representation of all interests. To this extent, the WTO should allow for a larger and more diverse number of civil society groups to express their views, independent of the positions of the governments and countries in which they are located.

Many proponents of greater public participation in WTO processes emphasise the wealth of knowledge, resources and analytical capacity in the NGOs' respective areas of expertise. Therefore, NGOs can act as "intellectual competitors"² to governments in the quest for optimal policies. One central argument supporting NGO participation in WTO

¹ Art. I reads as follows: "The World Trade Organization (hereinafter referred to as 'the WTO') is hereby established". Art. VIII:1 states: "The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its function".

² Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Co-operation, Competition, or Exclusion*, *Journal of International Economic Law*, Vol. 1, No. 1, 1998, p. 123.

matters and greater access to WTO work is the role that NGOs can play in disseminating information at the national level. This could ensure broader public support and understanding for trade liberalisation in general and the functioning of the WTO in particular.

There is evidence,³ both within as well as outside the WTO, that governments recognise the capacity of NGOs to provide quality input, particularly in the areas of environment and development, drawing on valuable on-the-ground experience. Already, NGO representatives are invited to participate as members of their national delegation in Ministerial Conferences, as well as other WTO meetings. In adopting the guidelines for relations with NGOs, Members recognised the role of NGOs in increasing public awareness. More recently, this has been reflected in a large number of the speeches delivered by Heads of State and Ministers at the Geneva Ministerial Conference as well as in the final declaration of the meeting.⁴

This also confirms that the issue of whether the WTO is open and transparent is not limited to NGO and public participation in the dispute settlement mechanism. The issue of transparency is also about increased access to documents, the decision-making process of governments on trade matters (domestically and in the WTO forum), and greater public participation in WTO meetings, all of which would lead to a better understanding of the activities surrounding the multilateral trading system.

Yet, the purpose of this article is not to assess the legitimacy of NGO claims for greater transparency and further public participation in the WTO. Instead, it discusses the actions that the WTO Members and the WTO Secretariat have taken to increase transparency, to delineate the legal parameters of WTO agreements in this area and, consequently, to highlight the existing limitations that need to be pushed forward should Members decide to change the situation as it stands today.

GATT practice has demonstrated that constructive and open debates are essential for effective negotiations. The evolution of the NGO issue in the context of the multilateral trading system confirms this point. Therefore, the authors hope that this modest contribution on the "state of affairs" of NGO and civil society claims for greater transparency and increased participation in WTO work, as well as the response of the institution, will enrich the on-going discussions.

Section II outlines the history of NGO relations with the WTO, traces the evolution of this relationship through the adoption of guidelines on NGO participation and the

³ For example, the discussion by Charles Dileva, *International Environmental Law and Development*, Georgetown International Environmental Law Review, Winter 1998, p. 525.

⁴ These are the claims of the so-called civil society, a concept not easily defined which would include all the individual and collective interests lying outside the more defined and structured interests and powers of governments. Although environmental NGOs (Green NGOs) are generally the most vocal, the very idea of NGOs includes any non-governmental interest group, which is organised enough to be able to express a position on any issue. It would appear that the concept of civil society is perhaps wider than that of NGOs and would also reach the non-organised interest of individuals in society, such as individual consumers. For the purpose of this article, the authors use the practical working definition of NGOs as applied in the day-to-day work in the WTO Secretariat, i.e. that mentioned in Art. V:2 of the WTO Agreement: "non-governmental organisations [non-profit] concerned with matters related to those of the WTO". Whenever the term "interest group" is used, it is intended to cover a wider range of entities including profit, private as well as public and non-profit NGOs.

Singapore Ministerial Conference, and discusses the recent proposal of the Director-General in this context. Section III examines transparency, publication and notification requirements in the WTO Agreement, and provides a context to understand the scope of NGO claims for greater transparency. Section IV discusses the participation and influence of NGOs and other non-governmental interest groups in the dispute settlement mechanism of the WTO. Section V focuses on the participation of non-governmental interest groups in the policy-making leading to WTO provisions and in the work of the WTO generally. Finally, in section VI, there is a conclusion.

II. THE RELATIONSHIP BETWEEN THE GATT/WTO AND THE NGOS

A. THE HISTORICAL BACKGROUND

Early Considerations on Relations with NGOs

Although the debate about the role of civil society within the multilateral trading system has intensified over the last few years, the issue did receive significant attention during the early, but unsuccessful, attempts to create the International Trade Organisation (ITO). In fact, for the second session of the Executive Committee of the Interim Commission for the International Trade Organisation (ICITO)⁵ item 5 on the provisional agenda specifically refers to Paragraph 2 of Article 87 of the Havana Charter, which provides that "the Organisation may make suitable arrangements for consultation and co-operation with non-governmental organisations concerned with matters within the scope of this Charter".⁶

The note prepared by the Secretariat of the ICITO on relations with NGOs provided the Executive Committee with a brief *tour d'horizon* of the arrangements made by the Economic and Social Council (ECOSOC) of the United Nations (UN),⁷ as well as the specialised agencies for consultation with NGOs. In addition, the Secretariat's note presented a set of conclusions and recommendations on how the procedures regarding NGOs could be adapted to suit the ITO.

These recommendations never materialised into a concrete set of procedures for dealing with NGOs within the context of the multilateral trading system (particularly as the ITO was never established). They do, nevertheless, merit a few comments, particularly because they have served as the basis of the current WTO guidelines for relations with NGOs⁸ and raise a number of issues which remain at the forefront of the WTO-NGO debate today.

The conclusions and recommendations of the Secretariat's note emphasised that as the Havana Charter required the ITO to deal with such an immense number of commercial and technical matters, "it is clearly desirable that the ITO should be able to take full

⁵ ICITO/EC.2/11, 15 July 1948 (Note by the Secretariat).

⁶ Havana Charter, Art. 87, para. 2.

⁷ The Constitutional Provision for arrangements with NGOs is found in Art. 71 of the UN Charter.

⁸ WT/L/162.

advantage of the knowledge and expertise of the non-governmental organisations in these various fields".⁹ However, when it came to defining specific procedures regarding NGOs, the model adopted by the ECOSOC with its provisions for different categories of consultative status was seen as being too rigid and potentially counter-productive. First, rigid categories where certain NGOs had to be consulted as a matter of principle would have eliminated the flexibility of *ad hoc* consultations with specialised NGOs. Second, imposing a system of categories could have generated questions of prestige and rank, and could have been misinterpreted as endorsing certain NGOs as more important than others. Therefore, to circumvent potential conflict, no formal procedure was developed and a flexible case-by-case scenario of consultations was allowed to continue. As will be seen below, this principle of flexibility is a prominent feature of the guidelines for arrangements on relations with NGOs which Members adopted in July 1996.¹⁰

The Secretariat's recommendations resulted from an evaluation of existing approaches for dealing with NGOs in other inter-governmental fora. Finding them inadequate for the ITO, the Secretariat's note recommended a number of measures which would have institutionalised the role of civil society within the ITO. Based on the Secretariat's note, the Executive Secretary of the Interim Commission for the ITO, Mr Eric Wyndham White, made a number of practical suggestions to the Executive Committee.¹¹

Among these suggestions was the idea of adopting a list of "consultants" chosen from the ECOSOC list of NGOs with consultative status, on the recommendation of the Director-General and with the approval of the Executive Board. These NGOs were to be invited to send observers to the Annual Conference of the ITO and receive the Conference documentation. In addition, they would be allowed to propose items for the Conference agenda. The Executive Committee would consider these proposals and would hear the views of the NGOs which had suggested an item for the agenda. For meetings other than the Annual Conference, the Director-General would be entrusted to ensure that consultations with relevant NGOs took place. If a committee and/or a commission deemed it valuable, NGOs would be invited to address the specific meeting directly.

On more general matters, the Director-General would have the authority to set up, if considered appropriate, an advisory committee of representatives of the NGOs. The Director-General would also be given a relatively free hand in deciding whether to distribute NGO documentation to the Annual Conference and would ensure that a comprehensive list of all NGO material received by the Secretariat from listed NGOs be circulated to Members. Such documents were to be circulated in full at the request of any Member government.

Finally, in the event of a difference of opinion between the Director-General and any listed NGOs regarding the implementation of these arrangements, the matter would

⁹ ICITO/EC.2/11, 15 July 1948.

¹⁰ WT/L/162.

¹¹ ICITP/EC.2/SC.3/5, 2 September 1948.

be referred to the Executive Board. The arrangements would be subject to review from "time to time",¹² in which the input of the NGOs would be given full consideration.

Interestingly, these very first documents concerning the relationship between the multilateral trading system and civil society reflect the genuine belief that the ITO needed the expertise and experience of specific NGOs to advance and implement the trading agenda. Although these recommendations never materialised into a tangible and formal role for NGOs in the ITO (and subsequently the GATT), they certainly demonstrate that from the very beginning the importance of NGOs as providers of knowledge and experience was recognised. With this in mind, it is hardly surprising that the provisional list of NGOs which might be consulted, found in Annex A of ICITO/EC.2/11, includes a large number of specific business and industry associations. Adding to this impression is the letter from the International Chamber of Commerce (ICC) included in Annex B which, point by point, argues how the deeper involvement of the ICC in the activities of the ITO would support the promotion of an international trade regime.

Despite these early attempts to institutionalise the involvement of NGOs, civil society was not accorded a formal role within the international trade system along the lines of the ECOSOC of the UN. NGOs pursued informal and *ad hoc* contacts with both GATT Contracting Parties and the Secretariat, but were denied accreditation and access to specific meetings and annual conferences. At the Ministerial Meeting in Marrakesh in April 1994, establishing the WTO, no provisions existed for inviting NGOs. Those NGOs that actually attended the Marrakesh Ministerial Meeting had to acquire press credentials and register as members of the press.

Nevertheless, the signing of the Final Act of the Uruguay Round and the Marrakesh Agreement, with or without the presence of civil society, signalled the beginning of an irreversible process of recognising the role that NGOs can play *vis-à-vis* the multilateral trading system.

B. THE WTO AND NGOs

The purpose of this section is to examine the legal basis of current WTO-NGO relations, and to examine the evolution of this relationship from a practical and procedural perspective.

1. Article v:2 of the Marrakesh Agreement

Article v:2 of The Marrakesh Agreement reads:

*"The General Council may make appropriate arrangements for consultation and co-operation with non-governmental organisations concerned with matters related to those of the WTO."*¹³

Although the significance of finally including a reference to NGOs within the framework of the multilateral trading system cannot be overstated, Article v:2 initially

¹² WT/L/162.

¹³ *The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts*, p. 9.

provided little guidance as to how civil society could play a more active part in the multilateral trading system. Such clarification and guidance came at a meeting of the General Council in July 1996.

2. *The 1996 Guidelines for Relations with NGOs*¹⁴

On 18 July 1996, the General Council adopted a set of guidelines clarifying the framework within which NGOs could work with the WTO. The guidelines acknowledge the importance of NGOs in the public debate and address key issues such as transparency, the derestriction of documents,¹⁵ the role of the WTO Secretariat and WTO Chairpersons, and the restrictions on NGO participation in WTO meetings. Adoption of the guidelines appears to have been propelled by two factors: the need for the clarification of Article V:2 and the Ministerial Conference in Singapore in December 1996.

The last paragraph of the Marrakesh Decision on Trade and Environment of 14 April 1994 is significant, inviting the Sub-Committee of the Preparatory Committee, and the Committee on Trade and Environment, once established, to “provide input to the relevant bodies in respect of appropriate arrangements for relations with inter-governmental and non-governmental organisations referred to in Article V of the WTO”.¹⁶ Subsequently, the WTO Secretariat utilised outside funding to organise a Trade and Environment Symposium in June 1994, thereby initiating a process of informal consultations between the Secretariat and civil society—a relatively daring endeavour for the Secretariat at the time. The explicit mention of *symposia* in the 1996 guidelines is largely due to the success of this first symposium and the fact that Members found it to be a useful, if arms-length, exercise in NGO-WTO relations, with the Secretariat serving as a “buffer” between Members and NGOs.

In regards to transparency, the guidelines establish a commitment to ensure that de-restricted documents be made available to the public more systematically and promptly than in the past. The specific issue of derestriction of documents is discussed in more detail below. The launch of the WTO Web Site in September 1995 marks a significant step towards transparency. Visitors to the site have access to comprehensive information about the WTO and the ability to directly submit questions, request information and download de-restricted documents. Currently, the Web Site is visited by an average of 36,000 individual users every month, who download approximately 18 gigabytes or around 15 million pages of documents.¹⁷ The most recent initiative by the WTO Secretariat for greater transparency has resulted in the addition of a special section for NGOs to the WTO Homepage in September 1998.

The guidelines allow the Secretariat manoeuvring room in pursuing dialogues with

¹⁴ See Annex A (WT/L/162), below.

¹⁵ At the same General Council meeting on 18 July 1996 Members also adopted the Decision on Derestriction of documents (WT/L/160.REV1). See further discussion, below.

¹⁶ *The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts*, pp. 469–471.

¹⁷ This makes the WTO Web Site one of the most popular Web Sites among international inter-governmental organisations.

civil society,¹⁸ yet are more restrictive of the WTO Chairpersons' interactions with NGOs. Chairpersons can meet with NGOs in their personal capacity only if the council or committee does not decide otherwise. The guidelines also address the inevitable question of a more direct role for NGOs in the WTO. This matter did receive considerable attention during informal meetings of the General Council, but there was no consensus on giving NGOs a more direct or formal role to play. Members generally held that the character of the WTO, as a legally binding inter-governmental treaty among its Members and a forum for negotiations, bars direct NGO involvement in its affairs. In addition, the General Council has noted that the primary responsibility for consulting with civil society lies in processes at the national level and that, therefore, NGOs should focus their attention on domestic trade policy discussions.

There will be a return to the guidelines below to demonstrate how this framework for interaction with civil society is constantly being reinterpreted. Suffice to say at this point that the adoption of fairly broad guidelines left the Secretariat with a relatively free hand in defining its relationship with NGOs and allowed it to become increasingly pro-active in its undertakings with civil society, as highlighted by the first Ministerial Conference of the WTO in Singapore.

3. *Discussions on NGO Attendance at the Ministerial Conference in Singapore*

The guidelines only provided the Secretariat with a broad framework for NGO presence at the Ministerial Conference. Considerable work remained in order to achieve an effective and workable model for NGO involvement in Singapore that would also be acceptable to Members. The practical difficulties of hosting a multitude of NGOs were compounded by Members of the consensus-driven WTO remaining sharply divided over NGO attendance and their role in the context of the meeting.

It became increasingly apparent that a growing number of Members were facing domestic pressure to ensure that NGOs would be allowed to play a role at the Singapore Ministerial Conference. In most of the informal meetings of the General Council preparing for the Ministerial Conference, the issue of NGO attendance figured high on the agenda, sparking debate on the merits of inviting civil society to attend the conference, on the modalities for NGO attendance and the procedures for defining which NGOs would be invited.

Members mandated the Secretariat to draw up a proposal for how representatives of civil society would be accommodated at the conference, which, for practical purposes, included close collaboration with the Singapore Mission to the WTO. Essentially, this proposal focused on ensuring that NGOs could attend the Plenary sessions of the Ministerial Conference and would have at their disposal an NGO Centre with adequate facilities for organising their own meetings and workshops. The Secretariat's proposal for inviting

¹⁸ The wording of Art. v:2 is repeated in the first paragraph of the guidelines. Particularly important is the reference to organisations "concerned with matters related to those of the WTO", which avoids any specific definition of which NGOs may be consulted.

NGOs to attend the conference in Singapore was specifically designed to ensure that only NGOs whose activities were "concerned with those of the WTO" would be considered.¹⁹ The proposal envisioned a procedure requiring NGOs to submit a written request for registration materials delineating their scope of work within the definition of Article V:2. Following expiration of the deadline, the resulting list of NGOs would be circulated among Members for review and comment. After a period of two weeks, barring objections, registration forms would be forwarded to the NGOs.

Members did not have to approve the NGOs to be invited and, in fact, the Chairman of the General Council specifically stated that there was no reason to take a formal decision on the matter.²⁰ Instead, Members were encouraged to consult informally with the Secretariat on specific matters relating to the list of 159 NGOs that had submitted registration requests. Consultations did take place shortly after the list of the NGOs was circulated, but instead of resulting in requests for NGOs to be taken off the list, the discussions focused on ensuring that all NGOs had submitted the required description of their activities. Although a number of the NGOs detailed activities in contentious areas surrounding preparations for the Ministerial Conference, all 159 NGOs received registration forms.²¹

Two other issues relating to the NGO presence at the conference were brought up during the informal consultations among Members: defining the status of NGOs at the Ministerial Conference and the danger of creating a precedent for NGO involvement in WTO meetings.

NGO presence at the Ministerial Conference originally appeared on the General Council meeting agenda as a sub-item of a proposal to grant international inter-governmental organisations (IGOs) observer status in Singapore.²² Some Members expressed concern that granting NGOs observer status would create the impression that these organisations could both participate and intervene at the meetings in Singapore. This discussion of semantics resulted in a concerted effort to replace the word "observe" with the more neutral "attend" (emphasis added).

Members also voiced concern that approving NGO presence in Singapore would set a precedent for future meetings of the WTO. Members referred to provisions in the newly adopted guidelines for interaction with NGOs to be pursued on an *ad hoc* basis rather than through a formal or institutionalised process. Therefore, it was decided that the issue of NGO attendance at the 1996 Ministerial Conference would not set a precedent for

¹⁹ Admittedly, the majority of NGOs can claim that their activities are in some way related to trade liberalisation itself and/or the effects of it.

²⁰ For further discussion on the position of Members on this issue, see the minutes of the meeting WT/GC/M/13.

²¹ The deadline for submission of NGO requests for registration forms was 1 October 1996. The announcement of this deadline and the requirements for applying was made in the 11th issue of the WTO Newsletter, FOCUS, on 27 August 1996, in the Trade and Environment Press Release of 26 August 1996 and on the WTO Web Site. At the close of business on 1 October, 118 requests had been received. Following the circulation of the list of NGOs that had requested a registration form, Members decided to extend the deadline to 15 October to accommodate late requests. In total, 159 requests were received.

²² Virtually every council or committee in the WTO has a roster of IGOs which have been granted observer status and as a consequence are invited to the formal meetings where they may be invited to make statements.

future conferences and that, for the Geneva event, Members would re-visit the issue "based on the experience from Singapore".

The informal discussions among Members on how to accommodate civil society at the Singapore Ministerial Conference did not address the issue of how to handle the actual accreditation of NGOs in any detail. Hence, the rather awkward task of differentiating between those organisations which could be accredited and those which could not was left to the Secretariat.

The approach taken to this task was a cautious one, particularly because determining which NGO is truly representative and legitimate and which one is not remains controversial. In addition, engaging an investigation of who certain organisations represent was (and is) beyond the resources of the Secretariat. Instead, it was decided that any "non-profit" organisation which could point to "activities related to those of the WTO" would be considered. The Secretariat received a large number of requests for application forms for the Ministerial Conference from private companies and law firms. These companies and firms were informed that in order to qualify for accreditation they would have to register through their respective industry association or professional grouping. This practice of accrediting only "non-profit" organisations was also used for the Geneva Ministerial Conference. However, private entities have been invited to participate in some meetings, e.g. environment and trade facilitation symposia. Although the accreditation process has been done so far on a case-by-case basis, there is little doubt that in the long run a more systematic approach will have to be developed.

The above account demonstrates the importance of the guidelines in developing NGO-WTO relations and in guiding the process towards securing NGO attendance at the Singapore Ministerial Conference. More importantly, however, the account highlights the sensitive and controversial character of NGO presence at the time, and the caution WTO Members exercised in allowing representatives of civil society to play a role at the first Ministerial Conference. It must be emphasised that these sorts of discussions never occurred in the GATT, and that the entire concept of NGOs was still uncharted territory for many delegations and the Secretariat. Thus, it was almost inevitable that the initial steps were so timid and the process so slow.

In retrospect, the period from July to December 1996 was a milestone in WTO-NGO relations because the process of engaging with NGOs was moved forward significantly. Similarly, the significance of the process of confidence-building between the Secretariat and Member countries with respect to interpreting the guidelines and dealing with NGOs cannot be overstated.

4. *The Singapore Ministerial Conference*

Of the 159 NGOs that submitted requests to attend the Ministerial Conference, 108 actually came to Singapore.²³ Each accredited NGO was allowed a maximum of four

²³ The difference between the NGOs that received registration forms and those that actually came to Singapore can, to a large degree, be explained by the considerable cost of sending a representative to Singapore for one week.

representatives and the total number of individuals reached 235.²⁴ The facilities provided for NGOs by the government of Singapore were of a quality that will be difficult to match in the future. The NGO Centre was located in the Westin Hotel, one block away from the Suntec Conference Centre where the week-long Ministerial Conference took place.

Upon arrival at the NGO Centre, registered NGOs were provided with a special green badge allowing them access to the Plenary Sessions of the Ministerial Conference, the press area and the floor level of the Suntec Centre. The NGO Centre consisted of one large conference room and five smaller meeting rooms available for NGO meetings. The main conference room, with a seating capacity of approximately 250 persons, contained a computer facilities area (each NGO was given a separate e-mail account), a document distribution area and TV screens transmitting live from the plenary sessions. In the Suntec Centre itself, two rooms were reserved for NGOs wishing to meet with delegations and an area outside the room where the informal meetings were held was reserved for NGO materials.²⁵ NGOs were invited to participate in all of the social events taking place during the Conference.

Although some NGOs considered the arrangements insufficient, the prevailing sentiment among NGOs was that the Singapore Conference marked a significant step towards acknowledging civil society. A special feature of the Conference contributed to this sentiment. A taskforce was created to deal with specific problems and requests concerning NGO arrangements. The group, which met early each morning, consisted of representatives from the different segments of civil society and a member of the WTO Secretariat. Apart from serving a practical purpose, these meetings also came to symbolise the confidence-building process between NGOs and the WTO. The co-operative spirit of the NGOs aided the success of these meetings and the process of interaction eliminated some of the misunderstandings which had frustrated communications between NGOs and the WTO Secretariat.

5. *Symposia and the Geneva Ministerial Conference*

Since Singapore, the WTO has continued to pursue interaction with NGOs. The WTO Secretariat has continued to organise NGO activities and launch initiatives to develop a closer dialogue with civil society. The following discussion provides an overview of these activities and delineates the new set of initiatives announced by the Director-General on 15 July 1998.

²⁴ This number is somewhat misleading, insofar as a significant number of additional NGO representatives turned up at the NGO Centre requesting accreditation. These NGOs again had to demonstrate that their activities were trade-related and were subsequently accommodated with a white pass which secured access to the NGO Centre, but not to the Suntec Conference Centre. For an overview of the statistics on NGO attendance at the Singapore Ministerial Conferences, the reader may want to consult Annex B.

²⁵ NGOs did not have direct access to this area, but Secretariat staff ensured that such material was placed on the two tables outside the meeting rooms.

(a) *Symposia*

The Trade and Environment Division pioneered the concept of issue-specific NGO symposia as early as June 1994. These symposia were designed to broaden and improve the dialogue between the WTO (in 1994 the GATT) and NGOs on the relationship between international trade, environmental policies and sustainable development. Although the symposia in 1994 and 1997 were both successful insofar as they specifically sought input from NGOs, interest among Members was only moderate. NGOs argued that although the exercise of exchanging views with the WTO Secretariat had been useful, the discussions would only be fruitful if Member governments were present and participated in the dialogue.

In late September 1997, a two-day joint WTO-United Nations Conference on Trade and Development (UNCTAD) NGO Symposium on Trade-Related Issues Affecting Least-Developed Countries was held in Geneva. The timing of this symposium was of particular importance because the High-Level Meeting (HLM) for Least-developed Countries was planned to take place two weeks later. In defining the framework for the Symposium, the first priority was to ensure the participation of NGOs from as many least-developed countries (LDCs) as possible. To achieve this goal, a specific portion of the HLM budget was allotted to finance the attendance of LDC NGOs. The Symposium was attended by approximately 34 NGOs, the majority from LDCs, and a consistent presence of several Member countries.

To maximise NGO-WTO Member interaction, the NGO Symposium was designed to mirror the agenda of the Thematic Roundtables of the HLM, i.e. capacity-building and encouraging investment in LDCs. The conclusions and recommendations of the NGO proceedings were then forwarded to the HLM as an official WTO document. In the end, the two Chairpersons of the NGO Symposium were invited back to Geneva for the HLM to present these conclusions directly. The official submission of the NGO recommendations to the HLM, as well as the direct NGO intervention at the meeting, signified a new level of NGO involvement in the multilateral trading system.

The Trade and Environment Symposium in March 1998 marks another significant improvement in NGO-WTO relations. First, the list of invitees for the Symposium included over 150 individuals from environment and development NGOs, private corporations and academia—reflecting the widening scope of the trade and environment debate. Second, more than 60 individuals from Member countries participated in the two days of panel discussions. Third, the presence of the heads of the WTO, UNCTAD and UNEP on the opening day of the Symposium highlighted that the trade and environment debate crosses not only national, but also institutional boundaries.²⁶

In March 1998, the WTO Secretariat also hosted a Symposium on Trade Facilitation, including a large number of NGOs and representatives from large corporations. The

²⁶ A full report on the Symposium was done by the International Institute for Sustainable Development (IISD) and is available from their Web page on the Internet (<http://www.iisd.ca>).

objective of this Symposium was to help identify the areas where traders face obstacles when moving goods across borders. To this extent, the event provided a direct interface between the practical level (traders) and the trade policy level (officials in capitals and Geneva).

These examples illustrate the evolving relationship between civil society and the WTO, highlighting the increased presence of NGOs at WTO meetings. NGO symposia have become more frequent within the WTO and future activities are being organised by the WTO Secretariat.

(b) *The Geneva Ministerial Conference*

The evolving relationship between the WTO and NGOs, as well as the growing interest of civil society in the work of the WTO, is also highlighted by an account of the May 1998 Geneva Ministerial Conference and 50th Year Celebration of the multilateral trading system.

As in Singapore, the NGOs represented a broad cross-section of environmental, development, business, consumer, labour and farm interests.²⁷ The same application procedures used for Singapore were applied for the Geneva event, yet this time not a single Member of the WTO approached the Secretariat for consultation on the list of NGOs requesting registration materials.

Of the 152 NGOs that registered to attend the Plenary Sessions in Geneva,²⁸ 128 NGOs, comprised of 362 representatives, actually attended the Conference at the Palais des Nations. The facilities provided for NGOs, including an NGO Centre, meeting rooms and computer facilities, were similar to those in Singapore, yet a number of arrangements for NGOs marked a significant improvement over the last conference. Most importantly, NGO facilities were housed in the same building as the Ministerial Conference itself, providing representatives of civil society with improved access to delegates.²⁹ In addition, NGOs were allocated tables near the official document distribution desk to make printed materials available to interested parties. Finally, for the Plenary Sessions of the Ministerial Conference and the 50th Year Celebration a special NGO Gallery with 50 seats was reserved in the General Assembly Hall. These seats were allocated on a first-come, first-served basis and those NGOs that did not receive a seat in the gallery had access to a live transmission of the proceedings broadcast on three TV monitors.

As in Singapore, the Director-General addressed NGOs on the opening day of the Conference. Throughout the three-day event, NGOs were briefed regularly by the WTO

²⁷ For a comparative overview of the statistics on NGO attendance at the two Ministerial Conferences, see Annex B.

²⁸ Each NGO was allowed to register a maximum of four representatives. In the context of a Ministerial Conference it is also worth noting that for the Geneva event the number of NGO representatives outnumbered members of the media by a very large margin.

²⁹ Despite these improvements over Singapore, the logistics of the Palais des Nations unfortunately made it impossible to cluster all the NGO meeting rooms in one place.

Secretariat on the progress of the informal working sessions³⁰—an improvement on Singapore. NGOs welcomed the briefings as a genuine sign of commitment to ensure transparency and as acknowledgement of the importance of civil society.

Despite overall praise for the Secretariat's efforts to accommodate civil society, some groups criticised NGO exclusion from informal working sessions, the logistical difficulties of finding the various meeting rooms in the Palais des Nations and the very tight security at the Conference. Outside the official event itself, a number of demonstrations against the WTO and globalisation took place. These demonstrations, organised by a relatively large, but loose coalition of international NGOs and local squatters, succeeded in capturing some headlines due to the violence and extensive property damage which ensued. However, the overall impression left by the Geneva Ministerial Conference and the attendance of NGOs was positive and confirmed that this relationship continues to mature.

(c) *Lessons from the past*

In an effort to maintain and further develop a constructive dialogue with civil society, the WTO Secretariat expends great energy in continuously assessing the value of the various initiatives for all involved parties. The authors' evaluation has relied extensively on the constructive input of NGOs. A number of useful conclusions can be drawn from this review and it is possible to offer recommendations as a result.

First, large symposia often produce equally large frustrations, as NGOs with different agendas compete for "air time". This jockeying for position among NGOs results in poorly focused discussions, general conclusions and the unfortunate impression that the NGO approach to the debate sometimes lacks innovation.

Second, and perhaps the logical extension of the above, issue-specific symposia with limited agendas as well as fewer participants are more likely to produce constructive results. The NGO Symposium prior to the HLM is the best example. The attempt to place NGO symposia back-to-back with meetings of the Committee on Trade and Environment is a timid, albeit fairly controversial, step.³¹

Third, the participation of Member governments in NGO symposia remains crucial for such events to be useful. The idea of an arms-length NGO symposium as a purely political exercise will not achieve optimum results and holds the potential for backfiring.

Solving the above conundrum is complicated by the WTO Secretariat's small size and limited resources. The Secretariat does not have a separate budget for organising NGO symposia, relying entirely on donations from Member countries. In addition, the prospect of an increasing number of issue-specific NGO events is a daunting challenge for a small Secretariat.

³⁰ These working sessions on implementation of existing WTO agreements and the future work of the multilateral trading system took place at the WTO headquarters located near the United Nations.

³¹ In September 1998 the Trade and Environment Division held a regional symposium for Latin American government officials in Santiago, Chile. Back-to-back with this meeting, and using the same facilities, an NGO seminar was organised, bringing together the government representatives and a large number of environmental NGOs. Another such WTO symposium followed by an NGO seminar will take place in Harare in February 1999.

The solution probably lies somewhere in the middle, i.e. large NGO events with short introductory plenary sessions followed by "break-offs" into smaller fora. Finding a more appropriate and perhaps creative formula for productive NGO events is one of the issues currently discussed in the WTO Secretariat, and this is certainly an area where input from NGOs would be welcomed. In any event, defining what is to be achieved by hosting an NGO event remains the key issue when deciding on the format.

The experiences from two Ministerial Conferences with NGO attendance should also serve as the basis for reflections on how to better accommodate civil society at the third Ministerial Conference of the WTO to be held in the United States in late 1999.

C. NEW INITIATIVES

Since 1996 the External Relations Division of the WTO Secretariat has served as the overall focal point for NGOs and has been in charge of developing what could be labelled as a systemic approach to the interaction with civil society.³² Although the process of developing a coherent and active approach to improving the dialogue with NGOs has been slow, the increased attention given to this issue is perhaps best illustrated by a number of new initiatives announced by the Director-General during the General Council meeting on 15 July 1998.

The announcement of these initiatives to enhance the dialogue with civil society should, to a certain extent, be seen in the context of the calls for greater transparency made by a number of Ministers and Heads of State at the Geneva Ministerial Conference and 50th Year Celebration. There is little doubt that these public statements provided the Secretariat with the necessary backing for moving ahead with the interpretation of the guidelines on relations with NGOs.³³

Immediately following the Geneva event, the Director-General created a taskforce to deal with the issue of how to improve the dialogue with civil society. This taskforce, chaired by the Director-General himself, met twice during the month of June to discuss and propose a number of Secretariat initiatives which, although still within the guidelines, would respond to the calls for greater transparency.

The first of the initiatives announced the beginning of regular briefings by the WTO Secretariat for NGOs on specific meetings. The decision to commence briefings for NGOs was based on a genuine wish to increase transparency and to counter the frequently voiced criticism of excessive secrecy, but a number of other considerations also played a role.

First, previously, briefings were only given to the media and NGOs without press credentials were unable to attend such briefings. Therefore, NGOs were most often left to

³² Of course, other divisions in the WTO Secretariat work directly with NGOs and maintain their own day-to-day contact with representatives of civil society.

³³ Another significant example of political backing for enhancing the dialogue with civil society can be found in the Chair's Statement from the Quadrilateral Trade Ministers' Meeting in Toronto from 30 April to 2 May 1997, which calls for the Director-General to "consult with Members regarding appropriate means for encouraging informal dialogue between WTO working groups and committees and business, non-governmental organisations and other interested parties ...".

use their individual contacts to Member delegations, WTO Secretariat and/or read the papers. Second, as press briefings made the information public anyway, there was little logic in delaying it for others. Third, from a pure efficiency point of view, briefing a room full of NGOs at the same time, as opposed to answering individual phone calls, makes sense for a small Secretariat like that of the WTO. Fourth, although the conventional wisdom has been that NGOs generally do not face the deadlines of the media and, therefore, do not need the information as rapidly, there appears to be a growing convergence in this area. Many NGOs produce weekly newsletters which are distributed electronically to constituencies and members worldwide and, thus, timely information is becoming increasingly important to them.

The inaugural briefing by the WTO Secretariat for NGOs was held on 28 September 1998 with more than 20 Geneva-based NGOs present.³⁴

Another of the initiatives announced by the Director-General concerns the compilation and circulation to WTO Members of a monthly list of NGO position papers received by the Secretariat. If Members wish to consult the material in more detail, they may contact the Secretariat to obtain a copy. As the Secretariat receives a substantial number of NGO publications, brochures, newsletters, etc. every week, only position papers which relate to the activities of the WTO will be included on the list.

Since late October 1998, a special NGO section on the WTO Web Site has been in place. This section holds specific information for civil society, e.g. records and statistics from past NGO events organised by the WTO Secretariat in announcements of registration deadlines for ministerial meetings, etc. In addition, the monthly list of NGO position papers received by the Secretariat and circulated to Members will be featured on the NGO Web Site.

Finally, the Director-General announced the first of a series of meetings with representatives of civil society to discuss how to further enhance the dialogue and improve relations. In the past, Director-General Ruggiero has met with individual NGOs on a regular basis and he remains committed to continue this practice. However, the new initiative addresses the more fundamental problem of how to develop the most constructive and efficient mechanism for dealing with NGOs.

In this endeavour, the Secretariat needs the input and ideas from the broadest possible group of NGOs and to this effect the Director-General met with representatives of the environment, development, consumer, business and labour groups on 17 July and again on 5 November 1998. The Director-General has expressed a strong wish to meet with more NGOs in the near future.

It is still too early to say what this process will lead to, but one significant objective of such informal meetings, apart from the confidence-building, is to establish an overall framework within which WTO-NGO relations can continue to evolve. There is little doubt that the new initiatives have opened a window of opportunity to further explore ways in which consultation can take place, but much will also depend on the ability of NGOs to come up with a common position on how to proceed.

³⁴ The NGO briefings are open to all NGOs "concerned with matters related to those of the WTO" and take place in rooms provided by the International Centre for Trade and Sustainable Development (ICTSD).

III. CLAIMS FOR MORE TRANSPARENCY AND ACCESS TO INFORMATION AND DOCUMENTS

Although the WTO has been criticised for lacking transparency and operating in “secrecy”, the WTO Agreement contains multiple notification, publication and transparency requirements. Most documents are issued as unrestricted under the Decision on Derestriction, discussed below. These provisions ensure a moderate level of transparency of WTO and Member country decisions and measures.

As the GATT was, and the WTO is, a contract between countries, these obligations are addressed to Member countries and all Members are given the right to request compliance with these obligations. Private citizens cannot challenge the validity of any publication or notification, or the lack thereof. Because of the reach of the various WTO obligations and their impacts on non-governmental entities, some agreements do address requests by “any interested party” and obligate information to be provided upon request.

The following section identifies the existing transparency provisions of the WTO agreements operating at the domestic publication and WTO notifications levels.

A. DOMESTIC PUBLICATION

The basic provision of the GATT on transparency is Article X. The first paragraph obligates Members to publish promptly any measures (laws, regulations, judicial decisions, etc.) relating to GATT matters, as well as any international agreement affecting international trade policy, to allow government and trading entities to become familiar with them.

“Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose *confidential information* which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.”

This paragraph in Article X of the GATT has been interpreted by a few GATT panels, and the WTO panel, and Appellate Body to mean the following.

– Such measures *do not have to be published before their entry into force*, as no time-limit or delay between publication and entry into force of the measure is specified therein.³⁵

³⁵ EEC—Restrictions on Imports of Dessert Apples, Complaint by Chile, BISD 36S/33, para. 12.29; EEC—Restrictions on Imports of Apples, Complaints by the United States, BISD 36S/135, para. 5.20–5.23; and Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, BISD 39S, para. 5.34.

- However, the use of a "back-dated" measure is prohibited by such a provision.³⁶
- As Article X:1 deals with measures of general application, neither specific quotas allocated nor licenses issued to a specific company or applied to a specific shipment have to be published.³⁷ However, administrative rulings in individual cases establishing or revising principles or criteria applicable in future cases ought to be published.³⁸ In any case, Article X does not relate to the substantive content of the measure, but only to its publication.³⁹

By exception, Paragraph 2 of Article X prohibits the entry into force of certain limited regulations before publication:

"2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published."

Some of the WTO multilateral trade agreements cross-reference provisions of Article X of GATT, such as Article 6 of the Agreement on Trade-Related Investment Measures (TRIMS):

"Transparency

1. Members reaffirm, with respect to TRIMS, their commitment to obligations on transparency and notification in Article X of GATT 1994
3. Each Member shall accord sympathetic consideration to requests for information, and afford adequate opportunity for consultation, on any matter arising from this Agreement raised by another Member"

Article 12 of the Agreement on the Interpretation of Article VII of the GATT 1994 ("Customs Valuation Agreement") provides:

"Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994 by the country of importation concerned."

The Import Licensing Agreement uses the same wording as Article X and refers to the rights of traders to be acquainted with the supplied information.⁴⁰ However, the

³⁶ EEC—*Restrictions on Imports of Apples, Complaints by the United States*, as note 35, above.

³⁷ EC—*Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, paras 113–114.

³⁸ Japan—*Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, para. 10.388.

³⁹ EC—*Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, para. 115, referring to EC—*Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 200.

⁴⁰ Art. 1.4 reads as follows:

"(a) The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as 'the Committee'), in such a manner as to enable governments and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above."

agreement limits the right to obtain further information on the administration of quotas to Members.⁴¹

Article III of the GATS imposes domestic notification obligations of all laws, regulations and international agreements that may affect the operation of the GATS:

“1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.”

Some WTO agreements recognise the legitimate rights of persons outside the government to request and obtain information on these publications. These individuals are defined as “interested parties”. The Agreement on Technical Barriers to Trade (TBT Agreement) provides for such a notification requirement in order to ensure that any “interested party” be adequately informed:

“2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable *interested parties in other Members* to become acquainted with it, that they propose to introduce a particular technical regulation;”

It is interesting to note that Annex B of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) contains a similar notification obligation, but refers only to the interests of Members in being well-informed. It also imposes a reasonable period of time between publication and the entry into force of any SPS measure.

“Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner *as to enable interested Members to become acquainted with them.*

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.”

Article 63 of the TRIPS Agreement imposes a publication obligation wider than that envisaged in Article X of the GATT for ensuring that rights-holders are adequately informed:

⁴¹ Art. 3.5 reads as follows:

“(a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning: (i) the administration of the restrictions; (ii) the import licences granted over a recent period; (iii) the distribution of such licences among supplying countries; (iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account;”

"1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject-matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments *and right-holders* to become acquainted with them. Agreements concerning the subject-matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."

The Agreement on Safeguards in Article 3, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) in Article 22 and the Agreement on the Application of Article VI (Dumping Agreement) in Article 12 all provide for domestic notification of any measure through which an investigation is initiated and which may result in an import remedy measure. For instance, Article 12 of the Dumping Agreement provides:

"When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given."

Article 12 of the Dumping Agreement imposes fairly detailed requirements on the contents and the explanation to be provided in these public notifications. Article 22 of the SCM Agreement contains similar obligations. Article 3 of the Safeguards Agreement, although requiring less detailed information, goes further in imposing a "public interest" investigation. This type of participation of interest groups in the domestic process is further discussed in section IV, 2 below.

The Agreement on Preshipment Inspection (PSI Agreement) also provides for notification and transparency requirements. The purpose of the PSI is to establish a system of disciplines for private inspection companies hired by importing countries to examine whether imported goods respect their domestic standards and other regulatory requirements. The PSI Agreement requires Members using preshipment companies to maintain transparent activities.

"Transparency

5. User Members shall ensure that preshipment inspection activities are conducted in a transparent manner.

6. User Members shall ensure that, when initially contacted by exporters, preshipment inspection entities provide to the exporters a list of all the information which is necessary for the exporters to comply with inspection requirements

8. User Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them."⁴²

The Agreement on Trade Policy Review Mechanism (TPRM), which introduced trade policy review to the international trade system, contains an explicit transparency policy statement in Section B:

"Domestic transparency

Members recognise the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems."

Therefore, the various WTO agreements contain provisions obligating Members to have domestic systems of access to information on laws, regulations and other measures relating to WTO matters. When there is reference to "any interested party", any citizen submitting a request for information on WTO-related laws or regulations should be granted information pertinent to the request. The limited rights of NGOs to challenge compliance with these domestic publication obligations, both domestically and in the WTO forum, is discussed in further detail below.

B. NOTIFICATIONS TO THE WTO

1. *Obligation to Notify the WTO of Laws, Regulations and other Measures*

Generally, Members are required to notify other Members through the WTO Secretariat of all laws and regulations of *general application*⁴³ concerned with WTO matters. This includes all actions and measures covered by the WTO provisions, especially those actions affecting the rights of other Members, and obligates Members to provide due consideration to requests by other Members for information on such regulations. This obligation, which binds only Member governments, ensures transparency at two levels: first, domestically, individuals and other members of civil society may have access to their own government documents and papers notified to WTO if the domestic system allows for such procedure;⁴⁴ second, at the WTO level, most documents notified to the WTO are circulated to all Members, are accessible to anyone who request a copy and, since the adoption of the Decision on Derestriction discussed below, are posted on the WTO Web Site.

The GATT 1947 contained many notification requirements for measures of general

⁴² Under the PSI Agreement exporting Members are also subject to the same publication requirements. Art. 3.2 of the PSI Agreement states: "Exporter Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them."

⁴³ Members are also obliged to notify any *specific measure* that affect matters covered by WTO provisions.

⁴⁴ For instance, in the United States, the government is obliged to make available to the public most of its position papers and other submissions to WTO bodies.

application, such as those mentioned in Articles II:6(b) for modification of schedules, XII:4 and XVIII:12 for balance of payment problems, XV:8 for exchange restrictions reports, XVI:1 for subsidies, and XXIV:7 for regional arrangements.⁴⁵ Additional notification requirements, such as those for the export of domestically prohibited goods or for any protective measures affecting imports from less developed countries, existed in the provisions of legal instruments under the GATT 1947.⁴⁶ The notifications to the GATT and now to the WTO of laws and measures of general application are parallel to the domestic publication obligation contained in Article X of the GATT.

The general obligation to notify *specific measures* affecting the operation of the GATT has its genesis in the Tokyo Round Decision of the Contracting Parties, whereby any measure affecting the rights of another country had to be notified prior to its entry into force. The Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance states:

"1. The CONTRACTING PARTIES reaffirm their adherence to the basic GATT mechanism for the management of disputes based on Articles XXII and XXIII.1 With a view to improving and refining the GATT mechanism, the CONTRACTING PARTIES agree as follows:

Notification

2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.

3. Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their *adoption of trade measures affecting the operation of the General Agreement*, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures *in advance of implementation*. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party *may seek information on such measures bilaterally*, from the contracting party concerned."⁴⁷

The notification requirement is inscribed into the "GATT mechanism" following a stated reaffirmation of the importance of the GATT dispute settlement mechanism. The two components are inextricably linked. This principle is contained in the Marrakesh Decision on Notification Procedures in a more elaborated form:

"...

Members,

Desiring to improve the operation of notification procedures under the Agreement Establishing the World Trade Organization (hereinafter referred to as the 'WTO Agreement'), and thereby to contribute to the transparency of Members' trade policies and to the effectiveness of surveillance arrangements established to that end;

⁴⁵ For an exhaustible list of the notification requirements under the GATT 1947, consult the Secretariat Document G/NOP/W/2/R.ev.1.

⁴⁶ As note 45, above.

⁴⁷ Decision of the CONTRACTING PARTIES adopted on 28 November 1979 (L/4907).

...

Agree as follows:

I. *General obligation to notify*

Members affirm their commitment to obligations under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, *regarding publication and notification*.

Members recall their undertakings set out in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on 28 November 1979 (BISD 26S/210). With regard to their undertaking therein to notify, to the maximum extent possible, their adoption of trade measures affecting the operation of GATT 1994, such notification itself being without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, Members agree to be guided, as appropriate, by the annexed list of measures. Members therefore agree *that the introduction or modification of such measures* is subject to the notification requirements of the 1979 Understanding.

II. *Central registry of notifications*

A central registry of notifications shall be established under the responsibility of the Secretariat. ...

Information in the central registry regarding individual notifications shall be made available on request to any Member entitled to receive the notification concerned"

This decision led to the creation of a central registry of all notifications and the creation of a working group to improve the system of notification requirements imposed on Members. This system has been criticised, as only representatives of Member countries can consult the registry. The notification requirements developed by the working group have also been criticised as extremely burdensome, especially for developing countries.⁴⁸

It should be noted, however, that often most measures are notified *after* they have been enacted, which reduces the latitude of other Members, and certainly that of non-governmental interest groups, to influence the decision-making process relating to these measures. However, as detailed below, some WTO agreements⁴⁹ explicitly obligate Members to notify certain actions and measures first domestically, and to the WTO Secretariat, before their implementation. Some of these WTO provisions also oblige Members to consult with interested parties.

2. *Notification Requirements Contained in the WTO Multilateral Trade Agreements*

The various WTO agreements refer to three types of notifications requirements: annual, regular and one-time-only. Under the Annex 1A agreements (on trade in goods) alone, there are 175 notification requirements. Some agreements require a one-time notification of regulations or laws in place at the entry into force of the WTO, to be

⁴⁸ This working group issued its report on 7 October 1996. It can be consulted as Secretariat document G/L/112.

⁴⁹ Such as the TBT Agreement and some of the trade remedy agreements, i.e. the SCM Agreement, the Dumping Agreement and the Safeguard Agreement.

followed on an *ad hoc* basis by notification of changes in these regulations and laws. There are also 106 *ad hoc* notification requirements, obligating Members to submit notification only if a specific action is taken. There are also 43 "one-time-only" notification requirements, most of which relate to the implementation of the agreements and were due in 1995 or on a Member's accession. There are also 26 regular, periodic notification requirements which consist of 17 annual notifications, three semi-annual, three biennial and three triennial notification requirements.

For example the Agreement on Agriculture envisages seven annual notification requirements that relate to:

- tariff and other quota commitments;
- special safeguard provisions;
- total aggregate measurement of support;
- export subsidy, budgetary outlay and quantity reduction commitments;
- total exports in the context of export subsidy commitments;
- total food aid in the context of export subsidy commitments; and
- actions taken under the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-food Importing Developing Countries.

The SCM Agreement contains various notification requirements, including the obligation to notify, in advance of its implementation, non-actionable subsidies (Article 8.3 of the SCM Agreement).⁵⁰ Another set of examples concerns the requirements under the TBT Agreement:

"At least once every six months, the standardising body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period ... no later than at the time of publication of its work programme, the standardising body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva."⁵¹

The TRIPS Agreement and the GATS also contain extensive notification requirements which, together with the application of the Decision on Derestriction, ensure transparency *vis-à-vis* other Members and *vis-à-vis* the public in general.

(a) *The possibility of cross-notification*

Another feature of the WTO notification requirements under the various WTO multilateral trade agreements is the opportunity for cross-notification, whereby a Member notifies the WTO of a measure not notified by its originating Member. This process ensures further transparency and forces the originating Member to justify its position regarding such a cross-notified measure. For instance under Article III:5 of the GATS:

⁵⁰ It is interesting to note that the SCM Committee adopted a decision on 22 February 1995 (before the General Council's Decision on Derestriction adopted on 18 July 1996), that all notifications of national SCM legislation would be made public, i.e. would be circulated as derestricted. See Minutes of the SCM Committee, G/SCM/M/1, paras 40-59. Similar decisions were taken by the ADP Committee for Antidumping Legislation, G/ADP/M/1, paras 37-39 and by the SG Committee for the Safeguard Legislation, G/SG/M/1, paras 37-38.

⁵¹ Annex 3, para. (j) of the TBT Agreement. For an exhaustive list of notification requirements under the Annex 1A Agreement, see Secretariat Documents G/NOP/W/5 and G/NOP/W/14.

"5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement."

Similar cross-notifications rights exist under the Agreement for Textiles and Clothing,⁵² the SCM Agreement,⁵³ and the Import Licensing Agreement.⁵⁴

(b) *Request for information and "enquiry points"*

The right to request information flows from the obligation of domestic publication. Some agreements, such as the TBT Agreement and the GATS, also contain obligations on Members to maintain "enquiry points" where any Member, and in some cases any "interested party", can request information on any law, regulation or measure in place domestically. For instance, Article 10 of the TBT Agreement requires Members to maintain enquiry points where *any interested party* may request information:

"10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and *interested parties in other Members* as well as to provide the relevant documents"

Article 6 of the TRIMS Agreement contains a similar obligation, limited only to Members, as does Article III:4 of the GATS:

"Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member *shall also establish one or more enquiry points to provide specific information to other Members, upon request*, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations."

These enquiry points usually provide information to anyone requesting it.

In the context of dispute settlement procedures, which are generally confidential (including submissions by the parties to the panel), Article 18 of the Understanding on Rules and Procedures on Dispute Settlement (DSU) obliges a party to the dispute to provide a non-confidential summary of its submission at the request of any Member. Unfortunately, the DSU does not provide for any deadline for such obligation. Again, this does not provide any rights to non-governmental interest groups, but leaves them the opportunity to pressure their own governments to require a non-confidential summary of submissions.

⁵² Art. 7.3 of the ATC Agreement.

⁵³ Art. 25.10 of the SCM Agreement.

⁵⁴ Art. 5.5 of the Import Licensing Agreement.

The system of notifications under the GATT and the WTO is fairly sophisticated and conducive to transparency. Although these obligations are imposed only upon Members, the Decision on Derestriction extends the information to anyone.⁵⁵

3. *Decision on Derestriction*⁵⁶

The full transparency potential of the above-mentioned notification requirements lies with the Decision on Derestriction (WT/L/160/Rev.1) adopted by the WTO General Council on 18 July 1996. Since the adoption of this decision, the WTO principle has been one of *unrestricted circulation of all WTO documents* with few exceptions. Notwithstanding the exceptions mentioned below:

- any document required to be published under the WTO agreements or containing only publicly available information cannot be restricted; and
- any Member may circulate any document as unrestricted.

The following list of exceptions refers to the present rules on derestriction:⁵⁷

- Working documents are derestricted at the time of their adoption or six months after their circulation (as in the case of Secretariat background papers), whichever is earlier.⁵⁸
- SECRET documents (such as tariff negotiations) are derestricted upon completion of the process. It is difficult to envisage derestriction of these documents, which contain essentially confidential information, before the or a negotiation process is completed.
- Minutes of meetings are derestricted six months after their circulation. Circulation of minutes normally occurs more than a month after the meeting.
- Trade Policy Review reports are derestricted at the expiration of the press embargo.
- Documents relating to working parties on accession are derestricted upon the adoption of the working party report or at the end of the year following the year in which they were circulated.
- Balance-of-payment documents are considered for derestriction at the end of each six-month period.
- Documents submitted by a Member requesting restricted circulation are considered for derestriction at the end of each six-month period.
- Panel reports are circulated as unrestricted unless a Member requests an additional period of restriction, not to exceed ten days. (No Member has ever made use of this ten-day postponement option.)

⁵⁵ However, as further discussed below, non-Members do not have the right to request enforcement of such notification or any related information.

⁵⁶ See Annex C.

⁵⁷ During consultations on these procedures, many Members expressed wariness at "automatic" derestriction, which would prevent them from having the final say. Most derestriction provisions, therefore, call for documents to be "considered" for derestriction by Members upon the expiry of the stipulated time periods for restriction.

⁵⁸ Working documents of some WTO Committees (Market Access, Balance of Payment (BOP), Committee on Trade and Development (CTD), Trade Policy Review Body (TPRB) are to be considered for derestriction at the end of each six-month period (i.e. January-June, July-December). This was the old GATT practice, and was retained to prevent the new procedure (six months after circulation) being more restrictive than the earlier GATT procedures for the documents of these committees.

Reducing the scope of the exceptions listed in the Appendix of the Decision on Derestriction would improve WTO transparency. Providing for earlier derestriction, barring requests for continued restricted status, would promote this process. The Decision on Derestriction is under review at the present time. Four Members, the United States,⁵⁹ the European Communities⁶⁰ and Canada⁶¹ have submitted proposals favouring greater transparency and a reduction of the period during which documents remain restricted. Mexico⁶² has submitted a proposal which insists, among other elements, on the fact that documents should be derestricted only when they are available in the three official languages of the WTO. A set of other countries have expressed contentment with the status quo and have raised their concern that further opening of the WTO process, including an enlarged distribution of documents as unrestricted, will enable private interest groups to frustrate the negotiation powers of governments in the WTO forum. In this regard, some Members stress the contractual nature of the WTO Agreement and emphasise that the WTO is an inter-governmental forum which should not become prey to interest groups. At publication of this article, the negotiations were still continuing.

As is apparent from the above publication and notification requirements, reinforced with their general circulation pursuant to the WTO Decision on Derestriction, the WTO is committed to principles of transparency and access to information of the formal actions of States in WTO-related matters. However, there are limitations to this transparency principle.

First, WTO notifications (and sometimes even domestic publications) often take place after the actions or measures have been implemented. The domestic arena and internal relations between NGOs and their governments still largely determines the ability of non-governmental entities to access information before the final measures are adopted, published and notified. Accordingly, the possibility for NGOs to influence government decision-making may be limited.

Second, non-governmental entities have no right of action whatsoever in the WTO. Therefore, any interested party can challenge the absence of publication by another WTO Member, but only if their own government takes on their complaint. NGOs cannot challenge the absence of notification by their own government, unless there are domestic mechanisms in place to facilitate this action. On the other hand, a Member (following a request by its own domestic entities for instance) can challenge the absence of WTO notification or domestic publication by another Member. This situation has led to criticism of domestic openness provisions of the WTO Agreement based on the "sovereignty principle", as creating a "paradoxical situation for domestic citizens in relation to foreign governments", as there is "no assurance that those similar rights will be maintained for

⁵⁹ WT/GC/W/88.

⁶⁰ WT/GC/W/92.

⁶¹ WT/GC/W/98. Canada and the United States also put forward together (WT/GC/W106) a revised proposal taking into account some of the claims of Members with regard to their respective first proposal.

⁶² WT/GC/W113.

domestic citizens".⁶³ If the WTO Agreement had a "direct effect" on the domestic laws of a Member, then private citizens and NGOs would be able to challenge their own governments and other entities for failing to comply with WTO publication requirements.

However, few countries "receive" international law obligations directly into their domestic system. Most countries require domestic implementation legislation for international agreements, such as the WTO Agreement, to enter into force domestically. Usually, such implementing legislation either explicitly or implicitly provides that provisions of the WTO Agreement do not have direct effect on the country, consequently depriving private citizens and non-governmental entities of the right to take action against their own government for failure to comply with WTO obligations.⁶⁴ Therefore, procedural rights of NGOs to challenge the inadequacy or absence of notification (or other WTO obligations) by their own government or of other governments are limited and most often depend on the domestic law of such country.⁶⁵

Civil society is concerned and affected by policy and events at the international level, yet enormous disparity exists between access to information at the domestic level, where measures are to be published before they are adopted, and at the international level, where citizens and NGOs face a six-month delay in being informed of an action. Correcting this asymmetry propels NGO efforts to increase transparency and the dissemination of documents, consequently strengthening their ability to exert influence in a more timely fashion on the WTO decision-making process.

Finally, it also should be noted that the claims of NGOs for further transparency are not only of a procedural nature, such as access to information. NGOs want to be able to challenge the norms-setting that takes place within the WTO. For instance, NGOs have challenged the TBT and SPS agreements' reliance on the harmonisation efforts of Codex Alimentarius and the International Standards Organisation, international bodies which they argue also lack transparency.⁶⁶ Whether such an NGO challenge will be constructive or detrimental for the WTO and international trade depends on the actions Members take in response to the criticism.

IV. PARTICIPATION IN THE DISPUTE SETTLEMENT MECHANISM

A. THE DSU PROCESS

Dispute settlement mechanisms ensure respect for negotiated rules. The new binding set of WTO rules on dispute settlement, the semi-automatic character of the process, and

⁶³ Alice Enders, *WTO Openness*, Washington, IISD's Knowledge Networks Project.

⁶⁴ For a discussion on the different constitutions of WTO Members and whether they receive international law directly as monist countries, or indirectly as dualist countries, see Ian Brownlie, *Principles of Public International Law*, 4th Ed. (Oxford, 1990), pp. 32 *et seq.*

⁶⁵ See, for instance, the US implementation legislation of the Uruguay Round, which provides that any information submitted or any report made pursuant to Art. 8.3 or 8.4 of the SCM Agreement regarding notified subsidy be published domestically, HR 5110, 27 September 1994, p. 311.

⁶⁶ Enders, as note 62, above, p. 18.

the threat of economic sanctions facing a Member not fulfilling its obligations, have led some authors to label the dispute settlement rules of the WTO as the "jewel" of the WTO crown or the "teeth" of the system. Although panels and the Appellate Body are expressly prohibited from adding rights and obligations when adjudicating on disputes,⁶⁷ interpretation of WTO agreement provisions is a necessary component of the dispute settlement process. The line between interpretation and providing clearer parameters of the rights and obligations of Members under these agreements is often very fine. Therefore, it is not surprising that many NGOs request the right to provide evidence, interpretations and their positions on the matters at issue in a dispute settlement procedure.

The rules of the dispute settlement mechanism are initiated by WTO Members, and the DSU is administered by the Dispute Settlement Body (DSB), serving as the parliament of Members for deliberations on disputes. A dispute settlement procedure is initiated with a request for consultation by a Member, or group thereof, claiming that benefits under any of the covered WTO agreements are being nullified or impaired by the failure of another Member, or group thereof, to carry out obligations under the agreement(s). If the complaining country pushes the process further, the DSU provides for a set of steps in the dispute settlement that occur almost automatically. Actions by the DSB are necessary for some of these steps to occur. However, the DSU is drafted so that the Members of the DSB must approve or authorise any action requested by one Member unless, by consensus, all Members decide not to. All Members present, including, most importantly, the Member which has interest in pursuing the process, must agree to stop the process. Therefore, the process is in the hands of the complaining party or parties. Even surveillance and compliance with the panel and Appellate Body reports are in the hands of the Members themselves. There is no independent policing authority and retaliation is possible only between Members involved in the dispute.

The formal participation⁶⁸ of non-Members in the dispute settlement process is consequently limited. The Appellate Body reiterated that only Members can initiate dispute settlement procedures.⁶⁹ However, panels are authorised to obtain information from any source, as is highlighted by Article 13 of the DSU:

"1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such

⁶⁷ Art. 3.2 and 3.4 of the DSU.

⁶⁸ Jeffrey L. Dunoff has argued that firms and other private interest groups have *de facto* been very active and influential in policy-making and dispute settlement procedures, see in *The Misguided Debate Over NGO Participation at the WTO*, Oxford Journal of International Economic Law, Vol. 1 No. 3, 1998, forthcoming.

⁶⁹ See in *Shrimp/Turtles* the Appellate Body in para. 101:

"It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organisations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members 'having a substantial interest in a matter before a panel' may become third parties in the proceedings before that panel."

information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorisation from the individual, body or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.”

This article offers two points in regards to interpretation of Article 13. First, Article 13 is broad and appears to give full discretion to panels to decide whether and what type of information or technical advice it considers it needs or desires from any source. Second, this provision is addressed only to panels and not to the Appellate Body. Consequently, some legal experts argue that this right to obtain outside information is limited to evidence, as opposed to legal arguments.⁷⁰ If Article 13 was intended to cover something other than evidence, which is under the exclusive administration of panels, the provision would also be addressed to the Appellate Body. On the other hand, the second paragraph of Article 13 is broad, referring to “information from any relevant source”.

In the recent environmental dispute *United States—Import Prohibition of Certain Shrimp and Shrimp Products*,⁷¹ the panel received two *amicus briefs* submitted by NGOs. The panel acknowledged receipt of the two *amicus briefs*. The NGOs concerned also sent copies of these documents directly to the parties in the dispute. The complaining parties requested the panel not to consider the content of the *amicus briefs* in its examination of the matter under dispute. The defendant, the United States, stressed that the panel could seek information from any relevant source under Article 13 of the DSU and urged the panel to avail itself of any relevant information in the two *amicus briefs*, as well as in any other similar communications.

Taking the position that it had not requested such information under Article 13 of the DSU, the panel informed the parties to the dispute that it did not intend to take these documents into consideration. The panel observed, however, that if any of the parties to the dispute wanted to put forward these documents, or part of them, as part of their own submission to the panel, they were free to do so; the other parties would then have two weeks to respond to the additional material. The United States availed itself of this opportunity by designating Section III (“Statements of Facts”) of the *amicus brief* from one of these NGOs, as exhibit to its second submission to the Panel. The complaining parties noted that the *amicus briefs* comprised not only technical advice, but also legal and political arguments, and therefore did not fall within the purview of Article 13. The complainant countries also argued that Article 13 of the DSU did not permit anyone to make unsolicited submissions.

⁷⁰ Having said this does not eliminate all questions because evidence, as including expertise and technical advice still has to be defined. It should also be noted that as far as the participation of NGOs in dispute settlement proceedings is concerned, this provision is more restrictive than the situation before other courts, such as the European Court of Justice or the International court of Justice, the procedures of which explicitly envisage the possibility for the courts to invite *amicus briefs* from NGOs.

⁷¹ WT/DS58/R.

In its final report the panel ruled:

“7.1 We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. *Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied...* We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Centre for Marine Conservation and the Centre for International Environmental Law as an annex to its second submission to the Panel.”

This case was brought before the WTO Appellate Body on 13 July 1998. The appellees, or complainants before the panel, objected to the United States’ annexation of NGO submissions, on the grounds that the NGO documents contained more than factual evidence (indeed, they contained extensive legal arguments). In a preliminary ruling dated 11 August, the Appellate Body decided to accept the filing of submissions by NGOs attached to the US submission. The Appellate Body also decided to accept a revised brief notified separately, and arguably independently of the US submission, by one of the NGOs. The Appellate Body ruled:

“83. ... We have decided to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various non-governmental organisations in the three briefs attached as exhibits to the appellant’s submission of the United States, as well as the revised version of the brief by the Centre for International Environmental Law *et al.*, which was submitted to us on 3 August 1998. The reasons for our ruling will be given in the Appellate Body Report.”⁷²

The interesting point is that the legal arguments put forward by some of these NGOs were different from those of the United States. Following a specific question of the Appellate Body on this issue, the United States added that it agreed with the legal arguments in the submissions of the NGOs “to the extent those arguments concur with the US arguments set out in [its] main submission”. This was challenged by the appellees as being against the rules of the DSU and the rules of procedure of the Appellate Body. The Appellate Body then ruled:

“91. We admit, therefore, the briefs attached to the appellant’s submission of the United States as part of that appellant’s submission. At the same time, considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main US appellant’s submission States.”

In its final report, the Appellate Body reversed the first part of the panel’s findings on Article 13 of the DSU with a ground-breaking conclusion that as panels are masters of the panel process, a panel may decide to accept information even if that panel did not initially request such information. The Appellate Body made a distinction between what a panel is “obliged” to do and what it is “authorised” to do with submissions: panels are obliged to take into consideration submissions by parties and are authorised to accept

⁷² *Shrimp/Turtles*, Appellate Body Report.

submissions by NGOs,⁷³ whether the panel initially requested these submissions or not:

"104. ... We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability and relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received."

"108. ... In the present context, authority to seek information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*."

"109. ... Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof ..."⁷⁴

This decision has been criticised as a departure from the clear wording of Article 13 of the DSU, which arguably provides the panel with the exclusive authority to "seek" information from any source. However, as this Appellate Body report was adopted by the DSB on 6 November 1998, NGOs are now expected to forward submissions to panels in disputes addressing issues of concern to them.

Therefore, panels will have to develop working procedures to address:

- initial receipt of NGO submissions;
- *prima facie* examination of the submissions to assess their relevance to the dispute and whether they will be taken into account in the panel adjudication process; and
- procedures for confirming the formal acceptance and distribution of the submissions to all parties to the dispute.

⁷³ "It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organisations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members 'having a substantial interest in a matter before a panel' may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorised* to do under the DSU."

⁷⁴ "Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word 'seek' must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the Panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes."

In this context, the Appellate Body points out that Article 12.1 of the DSU authorises panels to depart from, or to add to, the working procedures set forth in Appendix 3 of the DSU, and in effect to develop their own working procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that panel procedures should provide sufficient flexibility so as to ensure "high-quality panel reports", while not unduly delaying the panel process.

A preliminary selection process of NGO briefs will remain under the panels' full discretionary authority. Yet, this selection process will always remain subject to "review" by the Appellate Body, as panels are required, pursuant to Article 11 of the DSU, to act in an "objective" manner as.⁷⁵

The Appellate Body conclusion in the *Shrimp/Turtle* dispute is ground-breaking insofar as it allows NGOs to access the dispute settlement process from now on by submitting their own argument before panels and the Appellate Body. Even if the panel ultimately decides not to accept the submission by a non-party, the latter has still been given the fundamental opportunity to put forward arguments that may be taken by the panel.⁷⁶

NGOs also have other opportunities to influence and participate in the dispute settlement process. Various agreements, such as the Antidumping, the SCM, the Safeguard and the TRIPS Agreements, provide for rights in favour of individuals and non-governmental bodies affected by measures adopted pursuant to these agreements, as did the GATT in some cases. Such agreements oblige WTO Members to have dispute settlement and other forms of mechanisms in place domestically to assess the legal value of the rights of such "interested party or parties".

B. THE RIGHTS OF "INTERESTED PARTIES" IN DOMESTIC DISPUTE SETTLEMENT PROCEEDINGS WHICH MAY LEAD TO WTO PANELS

An important feature of the GATT has always been to ensure that contracting parties maintain an independent domestic system to review decisions by customs authorities regarding customs matters. Article X:3(b) of the GATT provides that:

"(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall

⁷⁵ See case law on standard or review and the interpretation of "objective assessment", for instance in the Appellate Body Report in *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 and DS 48/AB/R, paras 110–119 and 131–134.

⁷⁶ It also remains to be seen whether representatives of NGOs will be attending the meeting of the panel and Appellate Body as jurisprudence now recognises that it is for each Member to decide who attends the meeting as their representatives (Appellate Body report in *Bananas III*, WT/DS27/AB/R and panel report in *National Car*, WT/DS54, 55, 59 and 64/R). If an individual from an NGO were present in the room of the panel or Appellate Body meeting, he or she would be there only as a representative of the Member which invited him or her. It is also conceivable that a party of the panel or the Appellate Body may call such a representative of an NGO to testify or provide evidence in the context of the dispute settlement procedures.

be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.”

Under the WTO, this obligation has evolved to take into account the rights of interested parties other than those of Member governments. For instance, Article 12 of the SCM Agreement⁷⁷ provides:

“12.1 Interested Members and *all interested parties* in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or *interested party* shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters⁷⁸ and to the authorities of the exporting Member and shall make it available, upon request, to other *interested parties* involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.”

“12.2 Interested Members and *interested parties* also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and *interested parties* subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and *interested parties* participating in the investigation, due account having been given to the need to protect confidential information ...”

“12.9 For the purposes of this Agreement, ‘interested parties’ shall *include*:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
- (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.”

Although this list is non-exhaustive, as it employs the word “including”, it refers essentially to two groups concerned with the imported products under dispute: the importers and exporters, and the domestic producers. However, the last paragraph of Article 12.9 provides that “[t]his list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties”.

⁷⁷ The SCM Agreement authorises an importing Member to impose at its border a surtax on imported goods that have been the object of subsidies that are causing injury in the domestic market of that importing country, obliges such an importing country to hold a thorough investigation and to hear the views of private interest groups.

⁷⁸ It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

More importantly, Article 12.10 obligates the importing country to take into account the views and interests of other non-governmental organisations:

“12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for *representative consumer organisations* in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidisation, injury and causality.”

The Dumping Agreement provides in Article 6.12, for a similar mechanism in favour of consumer groups:

“6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for *representative consumer organisations* in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.”

The SCM and Dumping Agreements are often qualified as “producers” agreements, as their main objective is the protection of producers, rather than consumer interests. Although the provisions favouring consumer groups are indeed weaker than those protecting business and trade associations, NGOs could nevertheless make use of these provisions as an opportunity to provide the domestic investigation process with appropriate and relevant information. This NGO input could, therefore, become part of the evidence (and arguments) to be assessed by WTO adjudicating bodies, if such domestic determination is eventually challenged by another Member.

From the perspective of public participation, the Safeguard Agreement is bolder, obligating importing countries to perform a “public interest” investigation to take into account the interest of various stakeholders in the country.

“3.1 A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public *notice to all interested parties* and public hearings or other appropriate means in which importers, exporters and *other interested parties could present evidence and their views*, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the *public interest*. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.”

“Interested parties” are not defined in the Safeguard Agreement and, thus, could include any interest group. If NGOs get involved in the domestic assessment of the “public interest”, their input will become part of the file that will be taken to the WTO dispute settlement procedure, should another Member challenge such domestic determination of public interest (which under the Safeguard Agreement is mandatory).

Article 42 of the TRIPS Agreement, dealing with intellectual property rights held by non-governmental entities, contains provisions in favour of private parties:

"Members shall make available to right holders⁷⁹ civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances ..."

Article VI of the GATS on "Domestic Regulations" contains provisions similar to those of Article X of the GATT and provides rights for private parties to be informed of decisions that could affect their rights:

"2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, *at the request of an affected service supplier*, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review ..."

"3. Where authorisation is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application."

This right of consumer groups and other private interested parties is limited, however. If a Member violates an obligation, and no *domestic* avenues exist to pursue a challenge, the individual or NGO has no enforcement tools at its disposal to pressure its government to attend to their complaint. If such individuals or NGOs are not to be heard by their own government (let alone the government of another Member), where can they take their complaint? With the new ruling of the Appellate Body in the *Shrimp/Turtles* dispute, if the matter is taken to the WTO dispute settlement process, anyone could forward its submission directly to an ongoing panel process. Yet in the absence of such WTO dispute settlement process, NGOs (and individuals) do not have any enforcement rights of any WTO obligation.⁸⁰

C. THE PARTICIPATION OF NGOS IN THE DISPUTE SETTLEMENT MECHANISM UNDER THE PSI, THE SPS AND THE TBT AGREEMENTS

The hybrid nature of the dispute settlement provisions of the PSI Agreement, and arguably the TBT and SPS Agreements, deserve mention. Pursuant to Article 4 of the PSI

⁷⁹ For the purpose of this section, the term "right holder" includes federations and associations having legal standing to assert such rights.

⁸⁰ Art. 11 of the Customs Valuation Agreement also provides for an individual right of appeal in favour of the importer against any determination by such national authority. Art. 11.2 adds: "An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority." Art. 16 of the Customs Valuation Agreement has introduced new rights of information in favour of any importer affected by any such decision of the customs authority: "Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's good was determined."

Agreement, an independent body exists to adjudicate on the dispute between exporters and preshipment inspection bodies that are used by Members for assessing the compatibility of imports and exports with national regulatory requirements. This Independent entity became operational on 1 May 1996. It is constituted of the WTO, the ICC and the International Federation of Inspection Agencies, and is administered by the WTO. The procedural functions of the independent entity resemble those of DSU panels, but the independent entity is inherently different, as it deals with disputes between private individuals. Notably, there are no explicit provisions for non-governmental bodies.

The TBT Agreement contains provisions explicitly addressing actions by non-governmental bodies and standards established by NGOs. It encourages NGOs to follow the provisions of a Code of Good Practice, containing obligations similar to those provided for technical regulations and standards when administered by governments. Thus, the TBT Agreement is a hybrid, providing for obligations on non-governmental bodies, but reserving rights to Members. The TBT Agreement imputes on Members the full liability for actions taken by such NGOs on their territory. Members are obligated to take reasonable measures to ensure NGO compliance with the provisions of Article 2 on non-discrimination and restrictiveness of technical regulations. The same is said of the assessment of conformity by non-governmental bodies and for the preparation, adoption and application of standards by non-governmental bodies which Members shall ensure that NGOs accept and comply with the Code of Good Practice. In addition, Members are prohibited from taking measures which have the effect of directly or indirectly requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

Notably, Article 14.4 of the TBT Agreement provides that:

"The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member. (Articles 3, 4 and 8 of the TBT Agreement are concerned with obligations imposed on non-governmental bodies.)"

The SPS Agreement also contains provisions dealing explicitly with non-governmental bodies, ascribing Members obligations *vis-à-vis* these NGOs and imputing full liability for their actions or absence thereof. Article 13 of the SPS Agreement provides that:

"Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories ... comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such ... non-governmental entities to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement."

This type of provision may have a direct impact on the manner in which governments deal with the non-governmental bodies within their own territory. Traditionally, in public international law, countries are responsible for the actions of citizens in their

territory. However, it is arguably unbalanced that some of the WTO agreements impose specific responsibilities and obligations on these NGOs generally (such as not to do anything that would contravene the agreement), and subject the activities of NGOs to scrutiny by other Members, without providing equivalent rights of defence or rights to complain against to the same entities.

V. PARTICIPATION OF PRIVATE CITIZENS AND NON-GOVERNMENTAL ENTITIES IN POLICY-MAKING AND IN MEETINGS OF THE WTO

The WTO is a forum for governments. Thus, non-governmental interest groups do not participate directly in the negotiation process. However, non-governmental groups do exercise influence on WTO procedures and policies through their lobbying efforts and activities at the domestic level. Charnovitz⁸¹ and Esty⁸² have compiled a long list of international bodies that pursue consultations with non-governmental entities at the international level. As mentioned above, countries considered such a possibility in the context of the negotiations of the ITO. No such process exists at the moment in the WTO forum and under any of the WTO agreements. Therefore, in order to permit the formal participation of non-Members at the international level of the WTO, or permit them to attend any of its meetings, consensus on this matter would have to be reached.

In light of the Appellate Body report in the *Shrimp/Turtle* dispute, which could elicit a flow of NGO submissions on future disputes, governments may want to consider consulting with relevant NGOs prior to the adoption of any such treaty provisions and throughout their negotiations, because such provisions may eventually lead to a WTO dispute settlement. Yet, the obstacle of national sovereignty complicates consultations between governments and NGOs located within the borders of another Member. To circumvent this problem, negotiation procedures at the WTO may need to be reformulated to incorporate NGOs into the norm-establishment process.

Involving non-governmental bodies in the law-making process is addressed by the TBT Agreement. The TBT Code of Good Practice imposes on Members an obligation to include a representative of a non-governmental body on its delegation, whenever possible.

“G. With a view to harmonising standards on as wide a basis as possible, the standardising body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardising bodies of international standards regarding subject-matter for which it either has adopted, or expects to adopt, standards. For standardising bodies within the territory of a Member, participation in a particular international standardisation activity shall, whenever possible, take place through one delegation representing all standardising bodies in the territory that have adopted, or expect to adopt, standards for the subject-matter to which the international standardisation activity relates.”

⁸¹ Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 Michigan Journal of International Law, p. 183.

⁸² Daniel C. Esty, *Why The World Trade Organization needs NGOs*, 1 Public Participation in the International Trading, 1996, p. 11.

The Code also imposes on such non-governmental bodies the obligation to consult all interested parties before the establishment of any standard:

"H. The standardising body within the territory of a Member ... shall also make every effort to achieve a national consensus on the standards they develop ... "

"L. Before adopting a standard, the standardising body shall allow a period of at least 60 days for the submission of comments on the draft standard by *interested parties* within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise ... "

"M. On the request of any interested party within the territory of a Member of the WTO, the standardising body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties."

"N. The standardising body shall take into account, in the further processing of the standard, the comments received during the period for commenting ... "

"Q. The standardising body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardising bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints ... "

Yet, formal participation of NGOs and other non-governmental interest groups in WTO negotiations is non-existent. Business interests and other interest groups, which arguably are well organised and powerful, may exercise influence on a Member's negotiating position. As was emphasised above, this process continues to be played out in the domestic arena of Member countries, and the formal participation of NGOs in the WTO cannot be changed without an amendment of the text of the WTO agreements and its practices.

VI. CONCLUSION

The arguments for greater public participation in WTO processes have pointed to the specific expertise, resources and the analytical capacity of NGOs, their role as intellectual competitors to governments and their information activities on the domestic level. Arguably some of these claims are well founded, but resistance within the WTO to greater NGO involvement persists.

To the specific argument that participation of an increased number of NGOs in the WTO would reduce the risk of narrow special-interest driven policies, it remains unclear whether this would effectively deal with special interest problems at the national level. This argument would appear to promote the idea that developing domestic trade policy positions would have to wait for the international discussion to take place. At a time when an increasing number of people are concerned that they are losing control of domestic policies, it would seem highly controversial to shift the policy-making further away from national constituencies. Yet arguably some interests should be addressed at the international level, independently or parallel to any domestic consideration. However, some would argue that interest groups should not have "two bites at the same apple"—one domestically and one internationally.

Furthermore, NGOs argue that States and governments are imperfect representatives of public opinion⁸³ and that allowing NGO involvement in WTO discussions would permit the organisation to hear important voices on issues which are inherently international and can help to compensate for deficient representation at the national level. Although the concerns of NGOs may be authentic and genuine, their legitimacy and capacity to represent the public interest in this particular context is equally questionable. Questions remain about the actual constituencies, financial backing and transparency of some NGOs. This issue remains highly controversial and further thought should be given as to which NGOs are truly representative and legitimate.

At the same time, developing countries have argued that granting NGOs a more prominent role in the multilateral trading system would exacerbate the current imbalance against developing country interests as the large majority of the powerful NGOs represent Western constituencies. An increasing number of participants may slow down the traditional efficiency of the GATT/WTO and inevitably lead to more informal meetings.

As has been discussed in this article, the ongoing debate over the role of NGOs within the multilateral trading system is rather complex, but the mere fact that the issue is receiving so much attention is a positive sign. There is little doubt that the WTO as an institution has much to learn about and from NGOs, and in this context the experiences of other international IGOs in dealing with civil society are instructive. Expecting rapid changes in attitudes of WTO Members with very different cultural and sociological heritages is unrealistic, taking into account the need to find a common consensus-based approach to defining the appropriate relationship with NGOs.

Such differences among countries are found in numerous other international fora, however, there are three important differences between the WTO and other international organisations. First, the nature and objective of the GATT/WTO has traditionally been limited to trade issues, and the attempt to include wider policy issues in the WTO context is new and controversial. Second, contrary to most international organisations, the GATT/WTO has developed a practice for consensus which inherently complicates the decision-making process. This is both the strength and the weakness of the WTO. Third, the new binding and powerful dispute settlement mechanism further complicates the problem. A WTO Member can now be forced to change its domestic policies and become the object of economic sanctions, if the WTO adjudicating bodies uphold the request of another Member. For Members to allow NGOs direct access to this process can be viewed as providing an outsider with tools that some governments do not even give domestically.

Nevertheless, despite the considerable differences on the scope and modalities of NGO participation in the WTO, much has been achieved, both under the existing guidelines and in application of the provisions of the WTO and its instruments, including the Decision on Derestriction. The recent ruling of the Appellate Body in *Shrimp/Turtles* is another example of the evolutionary interpretation of existing provisions of the WTO agreements which have favoured further public participation in the work of the WTO, including

⁸³ As note 80, above, p. 131.

its dispute settlement mechanism. However, addressing the wide range of NGO demands implies amending "the rules of the game" by the consensus of Members.

The most important point at this juncture of the evolving relationship between the WTO and civil society is that the debate no longer seems to focus on *whether* NGOs should be involved, but on *how* they can be given an appropriate role within the WTO.

ANNEX A: GUIDELINES FOR ARRANGEMENTS ON RELATIONS WITH NGOS

Decision adopted by the General Council on 18 July 1996

1. Under Article v:2 of the Marrakesh Agreement establishing the WTO "the General Council may make appropriate arrangements for consultation and co-operation with non-governmental organisations concerned with matters related to those of the WTO".

2. In deciding on these guidelines for arrangements on relations with non-governmental organisations, Members recognise the rôle NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.

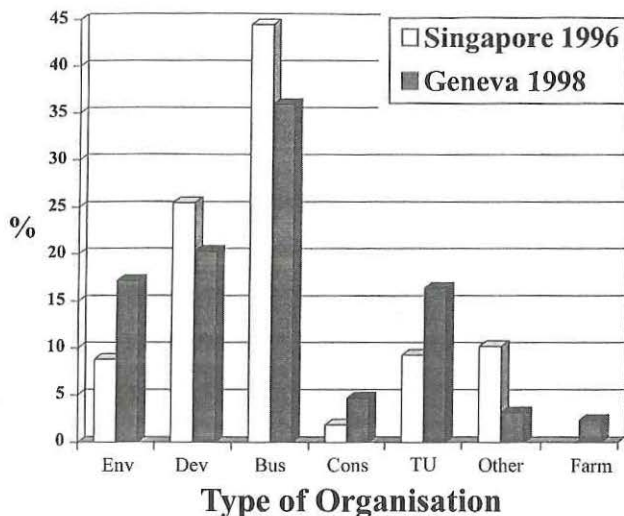
3. To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents.

4. The Secretariat should play a more active rôle in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as *inter alia* the organisation on an *ad hoc* basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.

5. If chairpersons of WTO councils and committees participate in discussions or meetings with NGOs it shall be in their personal capacity unless that particular council or committee decides otherwise.

6. Members have pointed to the special character of the WTO, which is both a legally binding inter-governmental 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 co-operation 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.

ANNEX B: NGO PARTICIPATION AT WTO MINISTERIAL CONFERENCES



	Total No. Orgs	Environ-ment	Develop-ment	Business	Consumers	Trade Unions	Other	Farm
Singapore	108	10	27	48	2	10	11	—
Geneva	128	22	26	46	6	21	4	3

ANNEX C: PROCEDURES FOR THE CIRCULATION AND DERESTRICTION OF WTO DOCUMENTS¹

Decision adopted by the General Council on 18 July 1996²

Revision

The General Council *decides* to adopt the following procedures with respect to the circulation³ and derestriction of documents:

¹ A copy of this decision shall be transmitted to the bodies established under the Plurilateral Trade Agreements for their consideration and appropriate action. Furthermore, the decision does not cover documents outside of a formal document series, such as a submission to a dispute settlement panel, or an interim report of a dispute settlement panel submitted to the parties thereto.

² In adopting these procedures, the General Council took note that Members attached particular importance to the restricted nature of documents so designated, and that individual governments should proceed accordingly in their handling of such documents.

³ The words "circulation" and "circulated" when used in this decision shall be understood to refer to the distribution by the Secretariat of documents to all WTO Members.

1. Documents circulated after the date of entry into force of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement") in any WTO document series shall be circulated as unrestricted with the exception of documents specified in the attached Appendix, which shall be circulated as restricted and subject to derestriction, or consideration thereof, as provided. Notwithstanding the exceptions specified in the Appendix, any document that contains only information that is publicly available or information that is required to be published under any agreement in Annex 1, 2 or 3 of the WTO Agreement shall be circulated on an unrestricted basis.

2. Notwithstanding the exceptions to paragraph 1 set forth in the Appendix,
- (a) any Member may, at the time it submits any document for circulation, indicate to the Secretariat that the document be issued as unrestricted; and
 - (b) any restricted document circulated after the date of entry into force of the WTO Agreement may be considered for derestriction at any time by the Ministerial Conference, the General Council, or the body under the auspices of which the document was circulated, or may be considered for derestriction at the request of any Member.

3. Requests for consideration for derestriction shall be made in writing and shall be directed to the Chairman of the Ministerial Conference, the General Council or the relevant WTO body. Such requests shall be circulated to all Members and placed on the agenda of a forthcoming meeting of the body concerned for consideration. However, in order to preserve the efficiency of work of the body concerned, the Member concerned may indicate to the Secretariat that it circulate to Members a notice advising them of the documents proposed for derestriction and the date proposed for derestriction, which shall normally be sixty days after the date the notice is circulated. These documents shall be derestricted on the date set forth in the notice unless, prior to that date, a Member notifies the Secretariat in writing of its objection to the derestriction of a document, or any portion of a document.

4. The Secretariat shall prepare and circulate a list of all documents eligible for consideration for derestriction, indicating the proposed date of derestriction, which shall normally be sixty days after the circulation of the list. These documents shall be derestricted on the date set forth in the notice unless, prior to that date, a Member notifies the Secretariat in writing of its objection to the derestriction of a document, or any portion of a document.

5. If a document⁴ considered for derestriction is not derestricted because of an objection by any Member, and remains restricted at the end of the first year following the year in which an objection was raised, the document shall be considered for derestriction at that time.

⁴ These procedures shall apply *mutatis mutandis* to the consideration for derestriction of a portion of a document that remains restricted as a result of an objection made pursuant to para. 4.

6. The Secretariat will circulate periodically (e.g. every six months) a list of newly derestricted documents, as well as a list of all documents remaining restricted.

7. In the light of the experience gained from the operation of these procedures and changes in any other relevant procedures under the WTO, the General Council will review, and if necessary modify, the procedures two years after their adoption.

APPENDIX

- (a) Working documents in all series (i.e. draft documents such as agendas, decisions and proposals, as well as other working papers, issued as “-/W/-” documents in a particular series), including documents in the Spec/- series.

Such documents shall be derestricted upon the adoption of the report⁵ or of the decision pertaining to their subject-matter, or considered for derestriction six months after the date of their circulation,⁶ whichever is earlier. However, working documents relating to balance-of-payments consultations, the Committee on Market Access, the Committee on Trade and Development and the Trade Policy Review Mechanism, shall be considered for derestriction at the end of each six-month period.^{7,8} All background notes by the Secretariat, however, shall be considered for derestriction six months after the date of their circulation.

- (b) Documents in the SECRET/- series (i.e. those documents relating to modification or withdrawal of concessions pursuant to Article XXVII of the GATT 1994).

Such documents shall be derestricted upon completion of the Article XXVIII process (including such process initiated pursuant to Article XXIV:6) through certification of the changes in the schedule in accordance with the Decision by the CONTRACTING PARTIES to GATT 1947 of 26 March 1980 (BISD 27S/25).

- (c) Minutes of meetings of all WTO bodies (other than minutes of the Trade Policy Review Body, which shall be circulated as unrestricted), including Summary Records of Sessions of the Ministerial Conference.

Such documents shall be considered for derestriction six months after the date of their circulation.

- (d) Reports by the Secretariat and by the government concerned, relating to the

⁵ Reference to “adoption” of a report in this decision is intended to mean its adoption by the Ministerial Conference, General Council or other relevant WTO body.

⁶ The “date of circulation” means the date printed on the front page of a document, indicating when it has been made available to Members’ delegations.

⁷ Documents circulated during the period January–June would be considered for derestriction directly after the end of that period. Documents circulated during the period July–December would be considered for derestriction directly after the end of that period.

⁸ Notwithstanding these provisions, budget working documents in the Spec/- series shall not be derestricted.

Trade Policy Review Mechanism, including the annual report by the Director-General on the overview of developments in the international trading environment.

Such documents shall be derestricted upon the expiry of the press embargo thereon.

- (e) Documents relating to working parties on accession.

Such documents shall be derestricted upon the adoption of the report of the working party. Prior to the adoption of the report, any such documents shall be considered for derestriction at the end of the first year following the year in which they were circulated.

- (f) Documents (other than working documents covered by (a) above) relating to balance-of-payments consultations, including the reports thereon.

Such documents shall be considered for derestriction at the end of each six-month period.⁹

- (g) Documents submitted to the Secretariat by a Member for circulation if, at the time the Member submits the document, the Member indicates to the Secretariat that the document should be issued as restricted.

Such documents shall be considered for derestriction at the end of each six-month period.

- (h) Reports of panels which are circulated in accordance with the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes.¹⁰

Such reports shall be circulated to all Members as restricted documents and derestricted no later than the tenth day thereafter if, prior to the date of circulation a party to the dispute that forms the basis of a report submits to the Chairman of the Dispute Settlement Body a written request for delayed derestriction. A report circulated as a restricted document shall indicate the date upon which it will be derestricted.¹¹

⁹ Documents circulated during the period January–June would be considered for derestriction directly after the end of that period. Documents circulated during the period July–December would be considered for derestriction directly after the end of that period.

¹⁰ This provision will be subject to review at the time of review of the DSU, and will be discontinued if there is no consensus on the matter.

¹¹ The following standard cover note will be placed on panel reports:

“The report of the Panel on [name of dispute] is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from [date] pursuant to the procedures for the Circulation and Derestriction of WTO Documents [document number]. Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report, an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, and that there shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.”