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## Public participation in the World Trade Organization

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We must build a trading system for the 21st century that honours our values as it expands opportunity.<sup>1</sup> . . . We must do more to ensure that spirited economic competition among nations never becomes a race to the bottom. We should be leveling environmental protections up, not down . . . Sustainable development is a stated objective and mission of the WTO. Achieving this goal will require greater inclusiveness and transparency in WTO proceedings to win the confidence of people around the world.<sup>2</sup>

(President William Jefferson Clinton)

### Introduction

For the past 50 years, the World Trade Organization (WTO) and its predecessor organization, the General Agreement on Tariffs and Trade (GATT), have been—in common parlance—on a roll. The volume of trade governed by WTO rules during that period has grown 13-fold, reaching annual levels of US\$6 trillion in merchandise and US\$2 trillion in services. Tariff levels that in 1947 averaged 40–50 per cent of the value of goods, today average 4 per cent. Membership in the organization now boasts 138 countries, with 30 more aspiring to join.<sup>3</sup>

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These successes have fulfilled many of the aspirations of the WTO's founders who, after World War II, saw a trade-liberalizing organization as a further insurance policy against the high tariff walls and resulting tariff disputes characteristic of the 1930s, which, they believed, had led to world conflict. The argument that these changes, overall, have both raised living standards and encouraged political stability seems overwhelmingly justified. It is an encouraging and good story—but it is not the whole story.

For these very changes (increased trade, low tariff levels, explosion of membership), plus other concurrent revolutions in our societies, have produced an urgent need to adjust the organization's way of doing business:

- As the volume of trade grows, more and more people will be affected directly by it, and even more will feel themselves affected. Not surprisingly, they will demand a higher level of understanding of this previously arcane organization, and some input into its policies.
- As tariff levels drop and competition among nations sharpens, subtler issues will come to the fore—such as the treatment of non-tariff barriers and intellectual property rights.
- As membership grows, and the club of mainly industrialized nations is transformed into a near-universal organization, two consequences become apparent: (i) the difference in the outlook between industrialized and developing countries will soon take centre stage—as it has in most international organizations, and (ii) the process of decision-making will have to be adjusted.

Although these changes in the organization by themselves have demanded reaction, developments in society as a whole add heightened urgency for change:

- the increased interdependence of the world economy and rapid globalization;
- the rise in membership numbers and the increased sophistication and political activism of the non-governmental organization community;

- the dramatic increase in the speed and ease of communication (which, among other consequences, has multiplied the influence of non-governmental organizations);
- the exponential increase in our understanding of the environmental impact of goods traded internationally, specifically considering consumption patterns and methods of production.

The birth of the WTO as successor to the GATT—a product of the Uruguay Round concluded in 1994—brought about some significant improvements in the workings of the organization, the most important of which was the dispute settlement system of 1995. But both the WTO proceedings as such and the dispute settlement system have taken only modest steps toward enabling the interested public—meaning principally non-governmental organizations (NGOs), the business community, and the media—to observe the WTO at work. The failure of the WTO to make itself more transparent has contributed mightily to the ignorance, suspicion, and hostility that the organization has engendered.

This chapter seeks, first, to explore the useful roles that NGOs could play in the WTO, and includes a look at their role in other institutions, past and present, and, second, to outline some specific, though modest, steps that the WTO could and should take promptly to remedy this “transparency deficit.”

### Defining a useful role for civil society—the NGOs

The NGO community clearly plays a role today as never before, but there is nothing new about non-governmental organizations attempting to influence government decision-making. As early as the 1800s, such organizations were actively promoting the passage of anti-slavery laws and treaties in England and elsewhere in Europe and, later in that century, they attacked human rights abuses in the Belgian Congo. By the turn of the nineteenth century, groups such as the Anglo-Oriental Society for the Suppression of the Opium Trade were part of an influential anti-drug movement that culmi-

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nated in an agreement by states to approve the 1912 Hague Opium Convention. In 1945, NGOs were largely responsible for inserting human rights language into the United Nations Charter and, since then, have placed almost every major human rights issue on the international agenda.

In 1947, the drafters of the International Trade Organization (ITO) included a role for NGOs in the structure of the organization. The ITO was intended to be the third leg of the Bretton Woods institutions, alongside the World Bank and the International Monetary Fund. In the end, it failed to garner enough support, and the weaker GATT became an interim solution. The ITO framers envisaged that commercial and public interest NGOs would maintain regular contact with the ITO Secretariat, receive unrestricted documents, propose agenda items, and participate as observers and occasional speakers at conferences. The proposed charter for the ITO contained some of the same language as the WTO Charter, providing for “consultation and cooperation” with NGOs. Ironically, in the year 2000 the WTO faces requests from NGOs that could be met by adopting the standards for participation that the original ITO framers proposed a half-century earlier.<sup>4</sup>

The NGO community at the beginning of the twenty-first century looks very different from that of 1947. In recent times—roughly coincident with the birth of the WTO itself—the NGO community has grown in numbers, in its political influence, and in its capacity to make intellectual contributions to the problems it addresses.

Numbers begin to tell part of the story. In 1996, at the first WTO Ministerial Conference in Singapore, some 159 NGOs registered, of which 108 were present. In 1999, in Seattle, while more than 700 NGOs engaged in the Ministerial proceedings, 1,478 NGOs submitted position papers. The Union of International Associations, publisher of the *Yearbook of International Organizations*, now counts more than 50,000 international NGOs in its data base, up from just 6,000 in 1990.<sup>5</sup> The World Wide Fund for Nature has some 5 million members, up from 570,000 in 1985, and, in the United States, the Sierra Club boasts 572,000 members, up from 181,000 members in 1980.

In other ways, the NGO community stands in contrast to what it was even 20 years ago. First of all, there are many more NGOs from developing countries. Secondly, present-day non-governmental organizations are linked to one another through broad networks and coalitions that render them more effective and sophisticated than their counterparts from earlier times. For example, the International Campaign to Ban Landmines (ICBL) was founded in 1992 by six concerned organizations based in a handful of countries. Today that network represents more than 1,100 groups in as many as 60 countries that are striving to implement the Landmines Convention and to ban antipersonnel landmines locally, nationally, regionally, and internationally. In 1997, the ICBL and its coordinator, Jody Williams, received the Nobel Prize.<sup>6</sup>

In 1996, the Coalition for an International Criminal Court (CICC) began a process to bring together a broad-based coalition of NGOs and international law experts as advocates for the creation of an effective court to try crimes against humanity. Today, the ICC Rome Statute has 97 signatories and has been ratified in 13 countries.

The ICBL and CICC are powerful examples of international networks operating over a multi-year period to accomplish specific objectives. Not all NGOs have such a record of accomplishment. Yet when one regards the full sweep of active NGOs—whose causes range from humanitarian to the environment, human rights, women's rights, free trade, and a host of other issues—it becomes apparent that they have redefined the political landscape the world over, and are a contemporary force with which leaders, locally and globally, must reckon more imaginatively.<sup>7</sup>

Contemporary NGOs, unlike their predecessors, are wellsprings of important scholarly efforts. Throughout the 1990s, members of the NGO community made significant intellectual contributions to the body of knowledge that underpins the field of trade and environment. For example, some of the most important thinking and writing about process and production methods emanates from the NGO sector, which includes, in particular, the work of Konrad von Moltke, of the World Wide Fund for Nature.

The London-based Foundation for International Law and Development, the US-based Center for International Environmental Law,

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the Environmental Defense Fund, and others have grappled adroitly with the issues that fall at the intersection of environmental policy and trade law. The World Conservation Union (IUCN) supplies objective, science-based information and analysis to various organizations—notably to the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Increasingly, the perspective of the developing South is presented with a good deal of vitality. The Centre for International Trade, Economics & Environment in Jaipur, India, and the Centre for Strategic and International Studies in Jakarta, Indonesia, are two examples of Southern NGOs that bring important perspectives to any discussion of trade and the environment.

### The WTO and NGOs

The rules governing inter-nation trade often presage serious environmental consequences. Therefore, finding an effective role for NGOs in the WTO process has taken on new urgency. This relationship between the rules governing international trade and environmental consequences—unknown or at most marginal in 1947—has become a central and usually controversial element in international trade discussions and negotiations. The controversy starts with the proposition, advanced by environmental advocates and economists alike, that trade restraints and environmental degradation are costly—both reduce GDP—and, therefore, are worth addressing with parallel and equal determination. The environmentalists charge, with some justification, that this view has yet to pierce the parochial world-view of those who see trade not just as a means to the end of economic growth, but as an end in itself.<sup>8</sup>

Yet many object to the direct participation of NGOs in the WTO and charge that these organizations are not necessarily democratic, accountable, or even broadly representative, and are really nothing more than self-appointed representatives of themselves. Nonetheless, NGOs demand accountability and democratization of the WTO and insist that individuals have a voice in setting the international trade rules that they believe increasingly affect their lives.

Many of these individuals have multiple identities and do not necessarily identify solely with the geographic, political jurisdiction in which they live. Instead, they also find common cause with NGOs that cut across political boundaries and define communities of interest (human rights, animal welfare, opposition to trade in biotech products, or any number of other issues). These citizens care first and foremost about an issue and are likely to feel that their views are better represented by an environmental NGO than by their own governments.<sup>9</sup>

The events in Seattle in 1999 were fuelled by a vociferous coalition of NGOs built on the World Wide Web. Their voices placed the public at the centre of a vital public policy discussion that was traditionally dominated by governmental representatives in closed meetings. As a result, the WTO has been forced to recognize other actors on the international stage. Failing to do so would threaten the viability of the trading system.<sup>10</sup>

Clearly, the way to develop a free trade constituency is to engage the opposition and address their legitimate concerns. Intergovernmental institutions such as the WTO, which lack leverage with individual legislators as in the United States, must make an effort to satisfy and address the principal concerns of NGO groups by inviting them in from outside the closed doors. As a central, new component of its work, the WTO needs to continue to enhance its dialogue with the NGO community.

Individual WTO members must also establish, at a domestic level, broad consultative processes with civil society that provide the public with opportunities to contribute to the formulation of national trade policies. In the United States, for example, much has been done to ensure that public opinion contributes to the formulation of trade policy. Through “notice and comment” rule-making procedures, the public can weigh in on trade policy decisions. Trade policy makers in the United States are advised not only by the rest of the US government but also by public advisory committees. Through successive trade legislation beginning in 1974 and again in 1984 and 1988, the US Congress mandated closer relations between US trade officials and the “private sector”—viewed then and in this context as consisting largely of trade and commercial interests. This

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committee structure now includes a Trade and Environment Policy Advisory Committee, composed of business and environmental representatives, and the presence of NGO representatives on a large number of other committees that advise the government agencies responsible for foreign affairs and trade and commercial policies. Though not actually in the room sitting side by side with US negotiators, these “advisers” are just outside the door, where they are updated on offers and counter-offers.<sup>11</sup>

Since 16 November 1999, when President Clinton announced Executive Order 13141 on “Environmental Review of Trade Agreements,” it is the policy of the United States to conduct “environmental reviews” of the trade policy decisions that are most likely to affect the US environment and, as appropriate, have an impact that is transboundary and global. Such policy reviews include decisions to participate in comprehensive multilateral trade rounds, bilateral or plurilateral free trade agreements, and major new trade liberalization agreements in natural resource sectors. These reviews, which assess the interlinkages between trade negotiations and the environment, involve public outreach at various stages in their preparation. This includes public notice of draft documentation and an opportunity to comment orally and/or in writing. In performing these reviews, it is the goal of the United States to complete them sufficiently early in the negotiating process that they can be taken into account in the formulation of national positions. The United States will continue to encourage its trading partners to conduct similar reviews and to exchange such information so that a global picture emerges of the environmental impacts of trade agreements. Though highly desirable, this process is not, by itself, enough, particularly when it comes to certain environmentally sensitive sectors.

Much of the mistrust and many of the misconceptions about the WTO stem from its lack of transparency. When members of the public are excluded from a process, they tend to imagine the worst. If it is so difficult to find out what the WTO is doing, then the organization is perceived as having something to hide. Very many of the complaints one hears could be addressed by providing accessible information on WTO activities. Except where this information would interfere with the end game of concluding a trade round, why

not open up the proceedings? Policy formulation would benefit from well-informed contributions from public interest groups. If environmental groups that have felt excluded from the trade policy-making process consider that they are included in that process and have been given a fair opportunity to help shape decisions, they are much less likely to obstruct trade liberalization efforts.

The benefit of a strategy of inclusiveness was demonstrated during the course of the debate in the United States over the North American Free Trade Agreement (NAFTA) between 1991 and 1993. Both the Bush and Clinton administrations worked hard to ensure that environmental groups were briefed regularly, included in the public advisory committee groups, and given access to the negotiation process.<sup>12</sup> In the end, a number of large environmental NGOs endorsed the treaty as a net “positive” for the regional environment.

Today, the WTO is perceived as not being accountable or even responsive to public concerns. Currently, non-governmental representatives are not permitted to participate in or observe the processes of any regular WTO activities. This predicament needs to change.

### Modest proposals for reform

The United States has long held that increased transparency and public participation should be integral components of WTO operations. At the May 1998 WTO Ministerial Meeting in Geneva, President Clinton formally urged the WTO to take every feasible measure to bring openness and accountability to its operations. He called for the WTO to embrace change boldly by opening its doors to the scrutiny and participation of the public. Since then, the Clinton administration has developed specific proposals designed to enlarge the “window in” through which the public can understand its functioning in all proceedings, including those of dispute resolution. Overall support for these proposals has been marginal, and in certain instances the overwhelming governmental reaction has been hostile. Nevertheless, headway could have been made in Seattle in December 1999 had the talks not collapsed. In the meanwhile,

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without waiting for the next global trade round to begin, the United States will continue to press for an agenda of reform.

A meaningful agenda of reform would include:

- expanding interaction and exchange of information with the public through the creation of consultative mechanisms;
- promoting the institution and its work through public awareness efforts;
- forging relationships with other intergovernmental organizations;
- providing timely access to a wider range of documents such as submissions to WTO meeting minutes;
- providing avenues for filing *amicus curiae* briefs;
- opening dispute settlement hearings in WTO disputes.

### Creating mechanisms for better input from the NGO community

The WTO has some history of consultation and cooperation with NGOs where there have been concrete results. Article V.2 of the Agreement establishing the WTO states that the General Council may make appropriate arrangements for consultation and cooperation with NGOs. Some of the architecture is already in place to begin this process. An Internet web page has been created<sup>13</sup> and, as of October 1999, more than 200,000 people had logged on to the site—a 60 per cent increase since January of that year.<sup>14</sup>

In July 1996, the General Council established “Guidelines for Arrangements on Relations with Non-Governmental Organizations.” These guidelines mention the need to make documents more readily available than in the past, require the Secretariat to engage actively with NGOs, and recommend the development of new mechanisms for fruitful engagement, including symposia on WTO-related issues. However, it is significant that the guidelines note 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.”

The organization is nervous about giving NGOs an explicit role, as illustrated in the *Report (1996) of the Committee on Trade and Environment* prepared for the 1996 Singapore Ministerial. The report

noted that “[t]he CTE considers that closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where primary responsibility lies for taking into account the different elements of public interest which are brought to bear on trade policy-making.”<sup>15</sup> Yet, even if the primary responsibility does lie at the national level, clearly the WTO has a secondary responsibility to allow consultation by international NGOs—such as Consumers International or WWF International.<sup>16</sup>

Allowing NGOs into the workings of the organization worries members because they believe that the WTO is a special case. They justify their reluctance on the grounds that the WTO differs from many multilateral organizations. And it does. For trade negotiations to conclude successfully, national representatives must subordinate certain national interests in order to achieve marginally acceptable or “sub-optimal” compromises that, by definition, require trade-offs. Thus, one seems justified in asking if the system can still work if these trade-offs are open to scrutiny by the very special interests that would have opposed them.

However, the WTO is by no means the only international organization that strikes compromises among competing points of view. Such compromises occur in truly every negotiation, whether the negotiations concern the environment, human rights, or any other issue. No one seriously disputes the need for governments to conduct actual negotiations through government-to-government exercises—which means, among other things, that many sessions will be closed to non-governmental actors.

The WTO could begin by looking at some negotiations conducted under the auspices of United Nations specialized agencies. Consider the Montreal Protocol on Substances that Deplete the Ozone Layer, signed in 1987. Substantial business interests were affected, and the agreement brought marked change to an entire industry. Interestingly, the experience also brought change to the community of environmental organizations. The negotiations in fact spawned an international network of NGOs linked by electronic media, which today regularly consult, coordinate positions, and work jointly to influence government positions on international

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environmental issues and negotiations—including WTO negotiations. In the Montreal Protocol, the influence of NGOs proved of critical importance in pushing the parties toward ever-stronger controls over ozone-depleting substances.<sup>17</sup>

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) also operates with particularly vigorous NGO participation. In spite of the objections of some parties, the collaboration has intensified over the years. This participation ranges from rather straightforward, generally quite informal lobbying by organizations, such as Safari Club International and animal rights organizations, to the scientific and legal work of the IUCN, which operates more as an in-house think tank.

The negotiations of the International Framework Convention on Climate Change and the follow-on Kyoto Protocol provide another example. Throughout the negotiations, NGOs such as the Environmental Defense Fund and the World Business Council for Sustainable Development (to name just two) crafted compromise proposals that were designed to help negotiators reconcile environmental and commercial interests.<sup>18</sup>

Conversely, the initial lack of effective NGO participation in the Intergovernmental Panel on Climate Change raised questions of its legitimacy and led to the establishment of an ad hoc working group to encourage greater developing country involvement. Because participation contributes to popular legitimacy by giving stakeholders a sense of ownership in the process, restricted participation can provoke dissatisfaction on the part of those excluded, creating the basis upon which a regime's legitimacy can be challenged.<sup>19</sup>

It is a well-known irony that the strongest opposition to NGO participation comes from developing countries—even as those very NGOs purport to promote their countries' interests. The explanation is not too subtle. For one thing, the environmental agenda is viewed by most developing countries as counter to their development agenda. But there is a second reason. Developing country NGOs at times are lacking and, when they do exist, they often do not have the financial resources to attend negotiating meetings. Therefore, the NGOs that do attend will be those from industrialized countries, which may appear to stack the deck even more.

In the past, WTO members have left it to the Secretariat to find special funds to help bring G-77 NGOs to WTO symposia, and have not been prepared to provide for this in the regular WTO budget. WTO members need to explore ways of funding such initiatives to ensure that Southern NGOs are also properly represented.

Regular briefings for NGOs on WTO activities have begun and NGO-produced documents are made available to WTO members. In the last several years, representatives from the secretariats of the major multilateral environmental agreements have reported to the WTO Committee on Trade and Environment (CTE) on the workings of these conventions, as well as recent developments, and have engaged in discussion of the trade implications of their activities.

In May 1998, President Clinton called for "a forum where business, labour, environmental and consumer groups can speak out and help guide the further evolution of the WTO."<sup>20</sup> Later that year, the WTO Secretariat organized seven regional trade and environment seminars in developing countries, two of which concluded with meetings between government and NGO representatives. The objective was to improve policy coordination. Indeed, some participants indicated it was the first time they had actually met their trade or environment ministry counterparts.

In March 1999, the WTO hosted a High Level Symposium on Trade and Environment in which governmental and non-governmental participants from the trade and environmental communities participated. In September 1999, in Geneva, Switzerland, a privately sponsored high-level Forum on Trade and Environment was held where trade and environment ministers, heads of various environmental and business NGOs, and international trade and environment and development organizations sought to identify areas where progress might be made at the Ministerial Conference in Seattle.

### Earlier derestriction of WTO documents

In 1996, the WTO took initial steps to improve public access to documents. In July 1998, WTO members continued to address the issue of transparency when they began devising additional WTO procedures involving earlier derestriction of documents, including

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minutes of WTO meetings. Although the WTO must be applauded for the extent to which it has already managed to increase the availability of documents to the public, current derestriction procedures have significant shortcomings. The delay in derestriction seriously limits the value of documents as public information and makes it more difficult for WTO members to explain clearly to domestic constituencies the basis for national activities regarding the WTO. These artificial delays have no real rationale other than traditional practice. That is why the United States and Canada extended a proposal to the WTO General Council that would greatly improve public access to WTO documents. There ought to be a general presumption under which most types of WTO documents are immediately derestricted unless a compelling reason is put forward.

### Public participation in the WTO

In some quarters of the trade community, proposals for public observation of and participation in WTO meetings, including committee meetings, tend to generate widespread anxiety that this level of involvement might negatively affect the intergovernmental character of the WTO. The ideas put forth by the United States in Seattle maintained the government-to-government nature of the WTO as an institution. Several bodies of the United Nations that are essentially governmental in character appear largely unaffected by a liberal approach to transparency, public observance, and even public participation; and their work continues unimpeded. For example, at the conclusion of a discussion during negotiations within the UN Environment Programme, NGO statements are generally viewed as a useful way to transmit information to negotiators that helps them to make the right decisions.

WTO committees should always be able to go into executive session as their work demands it. Indeed, one should question the wisdom of opening negotiation sessions where the actual horse-trading occurs to persons other than those representing WTO member governments.

### Transparency, public observation, and participation in WTO dispute settlement proceedings

Since the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) was agreed in 1995, a number of high-profile environment-related disputes before the WTO have led to changes in the environmental and conservation laws and regulations affecting WTO members, including the United States. These cases can be complex and difficult to resolve. Environmental, health, and safety measures can be protective of the environment and reflect genuine public concern for the environment, human health, and safety and still be unduly trade restrictive or a disguised barrier to trade.

The very first case to be heard by the new DSU is a good example: the United States reformulated gasoline rules that were successfully challenged by Venezuela and Brazil. In another case, the European Union moved to ban the importation of US meat from animals treated with hormones. Its desire to protect the agricultural sector clearly dovetailed with deeply seated public fears—scientifically justified or not—about the possible effect of beef hormones on human health. In a number of countries, domestic trade measures reflect local concerns that are religious, ethical, related to animal rights and other issues, and seem to be inconsistent with WTO guidelines.

Environmentalists and health advocates, among others, have thus been led to scrutinize the dispute settlement system. Public mistrust of the system, fuelled by the manner in which these disputes are resolved generally, undercuts public support for the WTO and for trade liberalization. President Clinton understood this danger when, at the 1998 Geneva Ministerial, he urged that WTO dispute settlement procedures be updated to make the institution more transparent and accountable and to strengthen public confidence in trade agreements. Clearly, as the WTO takes on more difficult and controversial cases, there is an ever-increasing need for transparency in dispute settlement proceedings. Lack of openness and public access can complicate a negotiator's job in resolving disputes. Because private stakeholders become suspicious, this non-transparent process can make it more difficult to find practical solutions.

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In accordance with President Clinton's call for greater transparency in WTO dispute settlements, the United States, during the five-year review of the DSU beginning in 1998 and 1999, has advocated the derestriction of country submissions to disputes simultaneously with their submission—except for confidential business information. The United States has also supported maintaining a public docket, open for inspection, of all submissions to dispute settlement panels and the abolition of any “hold” on panel or Appellate Body reports, once these have been issued to the parties to the dispute.

Procedurally, those who believe that they have an interest in the outcome of decisions should have an opportunity to be a part of the decision-making process. Opportunities should be offered to submit views and to observe how a particular outcome is reached. The United States, in advance of the 1999 Seattle Ministerial, argued that panel and Appellate Body proceedings should, as a general matter, be open to public observers on a first-come-first-served basis. Current practice involves hearings that take place behind closed doors and exclude all but the parties to the dispute. The US proposal is to permit the public to observe—but not to speak—at the hearings. The panels would not be compelled to admit observers without limit and the WTO could establish rules concerning their conduct. Such reforms, if instituted, would place WTO proceedings on a par with national court proceedings in many countries and with proceedings before international adjudicating bodies such as the International Court of Justice (ICJ) at The Hague and the European Court of Justice (ECJ) at Strasbourg, both of which are open to the public and to the press. In recent years, television cameras have been allowed at these institutions, and the ICJ has prepared full transcripts of all hearings, which are made available to the public promptly. The fact that any interested party may attend proceedings that are just as sensitive as those before the WTO has not interfered with the government-to-government nature of the disputes handled by either the ICJ or the ECJ.

The United States and the European Union, the two most active users and beneficiaries of the WTO dispute settlement mechanism, should continue to discuss opening to the public, on a trial basis, those disputes to which they are party. Opening disputes on a trial

basis would permit logistical problems to be identified and resolved. This would also be of benefit to developing countries that wish to build greater expertise in this area and gain knowledge about the dispute resolution process. Today, a developing country member wishing to have a window into a particular dispute must bear the expense of intervening as a third party. The new proposal would permit that country to observe the proceedings without having to take a stand or prepare papers.

A workable procedure must be found through which panels would publicly offer interested outside parties opportunities to submit *amicus curiae* briefs.<sup>21</sup> The United States has suggested a mechanism for panels to receive summary (three-page) requests from civil society to provide input. The panel would then exercise the discretion that it already has under existing dispute settlement procedures to seek further information or advice from the submitter. The panel could set page limits on submissions, as well as deadlines giving ample time for the parties to respond. Organizations based in developing countries could even receive more time to prepare their input. These new procedures could be instituted on a trial basis and would not give the right to be heard at panel meetings to anyone other than the parties or third parties.

Because the WTO still faces serious questions about its capacity to deliver substantively correct decisions on trade and environment issues, WTO panellists should be strongly encouraged to seek outside expertise in all disputes involving significant environmental issues that are beyond their principal competency. They are admonished to do so under Article 11(2) of the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures, but only permitted to do so under Article 14 and Annex 2 of the Agreement on Technical Barriers to Trade (TBT). In addition, Article 13.2 of the Dispute Settlement Understanding allows for technical contributions by experts. In practice, WTO panels have requested such contributions in only very few instances. In the Shrimp-Turtle dispute, the panel did request advice from a group of outside experts, including some affiliated with the IUCN, an international NGO.<sup>22</sup>

Such expert recommendations, whether the experts act as a body or each advises the panel individually, should be released to the pub-

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lic together with the Report of the Panel. It would be valuable for the public to see plainly the extent to which the experts agreed and the panellists followed their recommendations.<sup>23</sup> In addition, options should be explored for including technical experts on WTO panels when they are called upon to grapple with environmental or conservation measures alleged to have run afoul of trade rules.

Resistance to most of these reforms is widespread, particularly among developing countries, which fear, among other things, that highly capable developed country NGOs could exert extraordinary influence over panel deliberations if they were given greater access to dispute proceedings. Even some developed countries feel that *amicus* briefs and public observers would delay and politicize proceedings. But these are not the necessary results of such transparency, nor are the fears of harm to the process balanced against the likely benefits to the institution. Indeed, panels should always have the ability to meet in executive session if they desire.

There is also, it would seem, a legitimate resource concern. The number of dispute settlement proceedings is ever expanding. If this is coupled with the burden of taking into account large numbers of *amicus* submissions by NGOs and other private parties, even in summary form, and of systematic resort to scientific experts by panels, then attention should be given to assessing the additional resources that would be needed so that WTO panels of the first instance and the appellate panels can do their jobs well. The number of appellate panellists on the WTO roster currently stands at seven. Perhaps that number should be increased. In addition, perhaps, there is a need for judicial clerks and other support staff for panels. The WTO staff is small, as is its budget, which stands at only US\$80 million per annum, the equivalent of the IMF travel budget.<sup>24</sup>

### Keeping civil society informed

How are the public, the international environmental community, and even decision makers to be kept abreast of the progress of trade negotiations that directly affect them? In the run-up to Seattle, the United States proposed that the WTO Committee on Trade and Environment be used as a forum to discuss and highlight the envi-

ronmental implications of negotiations taking place in the other groups and to identify the links between areas of negotiation and environmental protection. Indeed, by its own terms of reference, the CTE mandate is to improve the transparency of WTO operations. In proposing such a role for the CTE, the United States intended that the CTE monitor and report on environmental issues raised at the negotiations in order to ensure that such issues would be aired in a systematic and transparent manner. It was never the intention of the United States for the CTE to oversee the negotiations or to serve as a forum for the negotiation of specific text. One expects that the work of the CTE would be valuable because it would provide input to deliberations at the national level on positions to be taken in the actual negotiating groups. Members could then consider whether or how they would weigh in at the negotiations. This committee would serve as a window onto the entire process.

#### **Expanding institutionalized interaction between trade and environment policy makers**

Greater transparency and public involvement at the WTO should be accompanied by renewed efforts on the part of WTO member states to include both trade and environmental policy experts in their internal processes of international trade and environmental policy decision-making. Environmental experts should be on the delegations that conclude trade arrangements whenever environmental issues are involved. They should attend international meetings where the impact of national or global environmental regulations on the world trading system is discussed. It is equally important to include trade experts along with environmental experts on delegations to conclude multilateral environmental agreements (MEAs). These experts would represent governments. More thought should also be given to the role that NGOs might play on national delegations.

At the WTO Committee on Trade and Environment, many countries have not fielded environmental experts along with their permanent Geneva trade representatives. To date, this has created at least part of the problem that the CTE has faced in reaching consensus on how to manage perceived trade and environmental

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conflicts. It is noteworthy that at Seattle a number of member states had environment ministry representation on their delegations and several environment ministers were in attendance. The WTO Secretariat should build upon the work it has already done to bring trade and environment decision makers together to air views that help to de-mystify policy goals and choices. One person's environmental, health, or safety regulation is often another's unfair, unnecessary, or too restrictive non-tariff trade barrier. At environmental agencies in member countries, trade considerations and a review of WTO rights and obligations should always be an integral part of the domestic environmental regulatory regime. At the trade and commercial agencies, those who make policy should engage, routinely and systematically, regulators concerned with the environment, conservation of natural resources and human, plant, and animal life, health, and safety.

Increasingly, the negotiation of MEAs is attracting trade and commercial ministry representation. This is important if the achievement of identified global environmental goals through the use of trade-related measures is to be consistent with countries' WTO obligations, and if painful conflicts before the WTO dispute settlement bodies are to be avoided as much as possible.

### **Increasing cooperation between the WTO and international environmental institutions**

Cooperation needs to be strengthened between the WTO and international organizations concerned with environmental matters. One of the few concrete outcomes of the 1999 Seattle Ministerial was a memorandum of understanding, concluded at the conference, which provides a mechanism for the WTO and the United Nations Environment Programme (UNEP) to work more closely together on matters of common concern. Beginning in 1999, UNEP has undertaken a series of environmental review projects. These country studies focus on a single environmentally sensitive sector of the national economy and constitute the first phase of a project entitled "Capacity Building for Integrating Environmental Considerations into Development Planning and Decision Making."<sup>25</sup> It seems that

there would be opportunities for UNEP to work with the WTO to gather and make available information and data on the likely environmental impact (positive and negative) of WTO initiatives on sectors widely perceived to be “environmentally sensitive.” In this way, a global picture may begin to emerge. Any representations of free trade—its benefits and its costs (such as its potential harm to the environment)—should never be based upon conjecture, uninformed by hard data.

The secretariats of those MEAs employing trade measures to accomplish environmental objectives would benefit greatly from observer status at the WTO. Certainly, presentations by MEA secretariats at the WTO Committee on Trade and Environment have helped to create a greater appreciation, and even acceptance, of the use of trade measures in certain MEAs. One might look to the example of CITES, where the IUCN—which was working to draft CITES—asked the GATT Secretariat whether the trade measures being contemplated in CITES were acceptable under GATT Article XX, to which the Secretary gave them an answer that sounded affirmative. Routine consultation between the WTO and relevant MEA secretariats could thereby help avoid the needless use of overly restrictive trade measures, while enhancing the understanding of the necessity of certain measures for the protection of the environment.

## Conclusion

Reaching the right formula to render the WTO a more environmentally sensitive institution is challenging because, in truth, both trade and environmental policies are intended to improve human welfare. In most societies, the public at large does not really wish to choose between development and free trade on the one hand and protection of the environment on the other; it wants both. And the WTO should be able to serve both.

The benefits of free trade include the additional resources that may be generated for the purposes of environmental protection. Within developing countries, the best hope for creating the resources and building the capacity to confront continuing environ-

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mental degradation is a liberal world trading system combined with sound national, regional, and global environmental management regimes. Therefore, we must apply rigour, will, and wallet to what might be called the institutional or “horizontal” problems faced by the WTO. If countries can muster the same resolve they demonstrated with respect to issues such as the protection of intellectual property rights during the Uruguay Round, we could make significant progress in the coming years as the next round of global trade negotiations is launched.

### Notes

1. H.E. Mr. William J. Clinton, President, WTO Ministerial Meeting, Geneva, 18 May 1998; online at [http://www.wto.org/english/thewto\\_e/minist\\_e/min98\\_e/clinton.htm](http://www.wto.org/english/thewto_e/minist_e/min98_e/clinton.htm).
2. Statement of the President of the United States, High Level Symposium on Trade and Environment, Geneva, 15 March 1999; online at [http://www.wto.org/english/tratop\\_e/envir\\_e/dg\\_clin.htm](http://www.wto.org/english/tratop_e/envir_e/dg_clin.htm).
3. See [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e/htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e/htm).
4. P. J. Simmons, “Learning to Live with NGOs,” *Foreign Policy*, Fall 1998.
5. “Citizens Groups of Non-Governmental Order,” *The Economist*, 11 December 1999, p. 21.
6. See <http://www.icbl.org>.
7. See <http://www.iccnw.org>.
8. Jessica Matthews, “Environmentally Challenged,” *Washington Post*, 14 October 1996.
9. Daniel C. Esty, “Environmental Governance at the WTO: Outreach to Civil Society,” in Gary P. Sampson and Bradnee Chambers, eds., *Trade, Environment, and the Millennium*, Tokyo: United Nations University Press, 1999, p. 102.
10. Ibid.
11. Claude E. Barfield, “The Role of Interest Groups in the Design and Implementation of U.S. Trade Policy,” in Alan V. Deardorff and Robert M. Stern, eds., *Social Dimensions of U.S. Trade Policy*, Studies in International Economics, Ann Arbor: University of Michigan Press, 2000.
12. Esty, “Environmental Governance at the WTO,” p. 102.
13. <http://www.wto.org>.
14. Gary P. Sampson, “Trade, the Environment and the WTO, a Policy Agenda,” Policy Paper of the Overseas Development Council, Washington, DC, November, 1999, p. 8.
15. World Trade Organization, *Report (1996) of the Committee on Trade and Environment*, WTO Doc. WT/CTE/W/40, 12 November 1996.
16. Steve Charnovitz, “A Critical Guide to the WTO’s Report on Trade and Environment,” *Arizona Journal of International and Comparative Law*, 14(2), p. 367.

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17. Richard Elliot Benedict, *Ozone Diplomacy: New Directions in Safeguarding the Planet*, 2nd edn., Cambridge, MA: Harvard University Press, 1998.
18. Simmons, "Learning to Live with NGOs."
19. Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law," *American Journal of International Law*, July 1999.
20. Statement by H.E. Mr. William J. Clinton, President, WTO Ministerial Meeting, Geneva, 18 May 1998.
21. The Appellate Body ruled in the Shrimp-Turtle and countervailing duty disputes that panels and the Appellate Body have the right—but not the obligation—to accept non-requested submissions from non-parties, including NGOs.
22. "Accreditation Schemes and Other Arrangements for Public Participation in International Fora," International Centre for Trade and Sustainable Development, Geneva, November 1999, p. 5, n. 6.
23. In the NAFTA Science Advisory Boards (which advise), the panels on technical scientific issues that arise in SPS and TBT disputes under the NAFTA are made publicly available at the same time as the final panel decision.
24. "Trade at Daggers Drawn," *The Economist*, 8 May 1999, p. 20.
25. United Nations Environment Programme, *Capacity Building for Integrating Environmental Considerations into Development Planning and Decision Making*, 1999.



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