

NEW GLOBAL CONTRACT

PROMOTING HUMAN RIGHTS AND THE ENVIRONMENT IN TRADE AND FINANCE RULES

MARÍA JULIA OLIVA



Institute for Agriculture and Trade Policy

New Global Contract: *Promoting Human Rights and the Environment in Trade and Finance Rules*

By Maria Julia Oliva

Published June 2008 ©2008 IATP. All rights reserved.

Maria Julia Oliva is a lawyer with extensive experience in international law, particularly in the areas of environment, trade and intellectual property. She has worked on these issues for a number of NGOs and as a consultant to UN organizations, and has been published in various journals and books. The author would like to thank Nathalie Bernasconi Osterwalder, John Foster, Manoela Roland, Carin Smaller and Matthew Stilwell for their comments and suggestions. She especially thanks Alexandra Spielfoch and Sophia Murphy for their valuable input in the drafting of this paper.

The Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems.

IATP would like to thank the Ford Foundation for supporting our work.

Table of Contents

Acronyms	4
Foreward	5
I. Introduction	6
II. Multilateral Trade, Investment and Intellectual Property Organizations	7
Trade	7
Investment	7
Intellectual property	8
Other international rules and organizations	8
Multilateral environmental agreements	8
UN human rights bodies	9
III. Tools and strategies	10
III.1 Engaging in trade, investment, and intellectual property discussions and disputes	10
Observer status	11
Consultative mechanisms	13
Informal participation in trade and investment negotiations	15
Orienting activities toward specific modifications to trade rules and policies	16
Reframing trade-related discussions to prioritize public policy concerns	16
Public participation in trade and investment disputes	17
Amicus curiae briefs	17
Investment dispute settlement processes	19
III.2 Addressing trade and investment in health, environment and human rights organizations	20
Trade-related measures in health and environmental agreements	21
Trade and investment in human rights assessments and reviews	22
IV. Conclusion	23
V. Bibliography	24
Annex 1 Case Studies	26
Trade in Conflict Diamonds	27
Doha Declaration on TRIPs and Health	28
Methanex: Environment and Investor-State Arbitration under NAFTA	30
The Tobacco Convention and Trade Rules	32
<i>Amicus Curiae</i> Briefs at the WTO: EC-Biotech and Brazil-Retraded Tyres	33
Using Human Rights Mechanisms to Safeguard Access to Medicines	35
Environment in the Context of Bilateral and Regional Trade Agreements	36
WIPO Development Agenda	38
Cartagena Protocol on Biosafety	39

Acronyms

ACP	African, Caribbean and Pacific Group of Countries
BITs	Bilateral investment treaties
CBD	Convention on Biological Diversity
CESCR	Committee on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CONGO	Conference of NGOs in Consultative Relationship with the United Nations
ECOSOC	United Nations Economic and Social Council
EPAs	Economic Partnership Agreements
EU	European Union
FTAA	Free Trade Area of the Americas
GEF	Global Environment Facility
GMOs	Genetically modified organisms
ICSID	International Centre for Settlement of Investment
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore
IUCN	World Conservation Union
MAI	Multilateral Agreement on Investment
MEAs	Multilateral Environmental Agreements
Mercosur	Mercado Común del Sur
NAFTA	North American Free Trade Agreement
NGOs	Non-governmental organizations
OECD	Organization for Economic Cooperation and Development
POPs	Persistent Organic Pollutants
TEPAC	Trade and Environment Policy Advisory Committee
TRIPs	Agreement on Trade-related Aspects of Intellectual Property Rights
UN	United Nations
UNEP	United Nations Environment Program
UNESCO	United Nations Education, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Foreword

This paper is a contribution to an initiative looking at how to change the paradigm that dominates government negotiations on trade, finance and intellectual property. The organizations involved in this work are committed to bringing trade and investment rules into conformity with multilateral social and environmental obligations, including to the realization of human rights conventions. This struggle goes on in myriad ways around the world every day. It is our contention that we are winning, but that progress is too slow, with too much human suffering as a result. Moreover, the planet is running out of time: natural resources are being depleted at unsustainable rates. If governments cannot be persuaded, and soon, to take challenges such as climate change and water wastage more seriously, then we will face significant social, economic and physical disruption to life as we have known it in our lifetime.

This paper is one of several to be produced by the initiative. It is written to lay the groundwork for further research and advocacy. The paper is focused on some of the ways that civil society organizations have successfully made the case to governments that commercial interests have to be subordinated to social and environmental norms. The examples here illustrate ways in which civil society has been able to move the outcome of multilateral negotiations in favor of better—fairer and more sustainable—outcomes.

I. Introduction

Twenty years after the Brundtland Report called for major changes in international economic relations in the pursuit of sustainability, much remains to be done to adequately bring trade and investment rules into conformity with multilateral social and environmental obligations. WTO negotiations have failed to fulfill a mandate to focus on development and the alleviation of poverty, as well as to advance the mutual supportiveness between the multilateral trading system and the protection of the environment. The number of regional and bilateral trade and investment agreements continues to grow, while their potential to undermine broader policy objectives remains undiminished. The opportunity for civil society to raise social and environmental concerns in the development and interpretation of trade and investment rules remains limited.

Nevertheless, governments have taken some steps toward strengthening economic, social, and environmental rules and concerns. Trade and investment regimes have recognized—at least nominally—the relevance and significance of public policy objectives to their activities. WTO members, for example, adopted the Doha Declaration on the TRIPs Agreement and Public Health in 2001, which generally states that public health, including access to medicines, must not be undermined by rules on intellectual property. At the same time, governments have increased transparency in the trade system, for instance through opening some hearings in the trade dispute resolution process to the public. From the other side, governments are increasingly addressing the interface between trade and sustainable development in health, environment, and human rights negotiations and debates, establishing a more inclusive and informed approach.

Civil society has played a fundamental role in advancing sustainable development priorities within trade and finance agreements. NGOs have consistently raised the need to reform trade, investment, and intellectual property rules and policies, and have promoted the importance of social and environmental concerns. Given the lack of transparency and public participation in trade

and investment policy-making, civil society has had to identify openings where they can promote NGO access to these openings, and thereby create official and unofficial processes where public policy concerns can be raised.

It is true that success, measured in terms of achieving substantial reforms to economic rules and policies, has been limited. Growing public disapproval of many trade-related rules and institutions is a clear indication of mounting frustration over the lack of reform in trade and investment policies. Nevertheless, a series of accomplishments—including the increasing consideration of sustainable development in the WTO dispute settlement process and the inclusion of trade measures in several multilateral environmental agreements (MEAs)—deserve recognition as a direct result of public engagement in shaping international law and policy.

This paper provides an overview of some of the mechanisms that have allowed civil society to engage directly on legal and policy issues in the trade and sustainable development field. The focus is on international legal and policy tools, although similar mechanisms may exist and be equally important at the national level. The emphasis placed on participation in legal and policy instruments should not be understood to minimize the relevance of other advocacy strategies. Indeed, mobilizing, networking and using the media are crucial in creating the political space for participation to be effective. Legal and policy tools only work if they provide an entry point for the concerns reflected in popular campaigns to influence economic negotiations and disputes.

This paper concentrates on specific legal and policy approaches used to raise and promote social and environmental concerns and objectives in the development and implementation of multilateral trade and investment rules, as well as in trade-related discussions under other auspices. In Annex 1, we have included case studies of where NGOs have had some success.

II. Multilateral Trade, Investment and Intellectual Property Organizations

Governments have created a number of institutional and legal frameworks to govern international economic relations, thereby establishing overlapping rules and principles at the multilateral, regional and bilateral levels. These norms and institutions increasingly define how countries should design their domestic laws and policies in areas such as trade in goods and services, economic integration, investment, and intellectual property (UNEP and IISD, 2005). In the past 20 years, these frameworks have impinged increasingly on many aspects of human life, including critical social, cultural and environmental issues of our time.

A number of these norms and institutions recognize the links between trade, investment and sustainable development. In founding the WTO, for example, the member governments made sustainable development an objective for the organization and its agreements. Trade rules may also explicitly address related issues, such as the bilateral and regional free trade agreements signed by the United States, some of which include chapters or side agreements establishing environmental cooperation and/or a forum to hear labor disputes. However, none of these mechanisms are sufficiently inclusive or balanced.

Trade

In the trade context, the cornerstone of the international regime is the WTO, established in 1995. The WTO agreements cover issues such as trade in manufactured goods, agriculture and services, as well as sanitary and phytosanitary measures, subsidies and intellectual property rights. These agreements are the legal ground rules for international commerce. The WTO administers these agreements and provides a forum for further trade negotiations. In addition, the

WTO has a procedure for members to settle their trade disputes on the basis of an agreed legal foundation—the Dispute Settlement Agreement, which establishes the Dispute Settlement Body (DSB).

In addition to the WTO, governments are signing a growing number of regional and bilateral trade agreements. The objectives behind these agreements range from lowering tariffs to establishing more comprehensive economic integration. One well-known regional trade agreement is NAFTA, which is formed by the United States, Canada and Mexico. NAFTA includes a range of trade, investment and intellectual property provisions that have significantly affected economic and other public policy objectives in the member countries. The Economic Partnership Agreements (EPAs) currently being negotiated by the EU and the ACP countries are another example of regional trade agreements. There are also a number of South-South trade agreements, including Mercosur, a regional trade agreement between Brazil, Argentina, Uruguay and Paraguay, established in 1991. Recent regional trade negotiations frequently go for deeper economic integration and are more far-reaching than the WTO requires (OECD, 2003).

Investment

No multilateral investment agreement is currently in force. The proposal to establish an international investment regime has been extremely controversial. Proponents have called for a more uniform and comprehensive framework to promote investment and protect foreign investors. There are significant concerns within civil society organizations, however, that such a framework would curtail important policy space in developing countries and make it harder for developing countries to benefit from commercial development through such measures as local content requirements and restrictions on the expatriation of profits. In 1998, after an unprecedented international campaign by a wide range of groups, the OECD's Multilateral Agreement on Investment process was permanently abandoned (IISD, 2004).

Nevertheless, more than 2,000 bilateral investment treaties (BITs) currently govern transboundary investment, along with many investment rules that form part of regional and bilateral trade agreements (IISD, 2004). These agreements establish a series of requirements for countries with respect to foreign investors, including limits on governments' ability to expropriate. In addition, BITs typically provide an investor-state dispute mechanism, allowing private parties to sue host states directly. As a result, in cases such as Methanex, the economic interests of investors have clashed with countries' policies designed to protect human health and the environment. One of the most common forms of arbitration referenced in treaties is that offered by ICSID, whose procedures are characterized by a lack of transparency and openness.

Intellectual property

In the intellectual property context, there are two principle organizations: the World Intellectual Property Organization (WIPO), which is part of the UN system, and the Trade Related Intellectual Property Rights (TRIPs) Agreement, housed at the WTO. TRIPs establishes minimum levels of intellectual property protection that all WTO members must put in place. Increasingly, bilateral trade agreements offer even higher and more comprehensive levels of protection than TRIPs. Nevertheless, WIPO retains strategic importance. WIPO's broad range of norm-setting and administrative and technical assistance activities fundamentally affect intellectual property rules both at the international and national levels. The WIPO Development Agenda has contributed to a discussion of the development impact of all of these activities. WIPO has 184 member states.

Other international rules and organizations

The impact of economic bodies, rules and trends on a range of public policy issues has led a growing number of international organizations to expressly address trade and sustainable development linkages. These efforts to consider and tackle trade issues in non-trade fora are often controversial. In negotiations toward the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, for example, the United States objected to trade-related language and wanted to ensure that the Convention would not modify existing rights and obligations in trade agreements. Similarly, the consideration of trade-related aspects of multifunctional agriculture policies and the use of trade-related measures in the design and implementation of MEAs has proved contentious, with a handful of governments raising strong objections to any attempt to set limits on trade or finance deregulation to protect public policy ends.

Interaction between economic, social, cultural and environmental issues is inevitable. To develop comprehensive and effective solutions for sustainable development, this interaction must be addressed in a range of international bodies and discussions. Moreover, non-trade and finance organizations and debates—which tend to be more open and transparent than their trade and finance equivalents—provide a significant entry point for a more balanced consideration of trade and sustainable development issues.

Multilateral environmental agreements

Only a few MEAs contain trade-related provisions. Even fewer of these MEAs are of much significance to the environment and trade interface, since their trade-related provisions do not affect broad trade flows, and the value of the trade flows they do affect is not significant in global terms (UNEP and IISD, 2005). Nevertheless, the few MEAs that have a significant trade component address an

important variety of issues, including some of the critical environmental challenges of our time, such as climate change and biodiversity loss. Moreover, within these regimes, trade-related measures serve important functions, such as ensuring equity among countries, regulating trade in hazardous substances, addressing a lack of information and technological know-how in developing countries, and assisting in compliance and enforcement.

MEAs with trade-related measures include:

- The Convention on International Trade in Endangered Species, which aims to ensure that international trade in specimens of certain wild animals and plants does not threaten the survival of these species;
- The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, which addresses the challenges posed by the generation, transboundary movement, and management of hazardous wastes and other wastes;
- The Cartagena Protocol on Biosafety, which seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology, taking into account risks to human health;
- The Montreal Protocol on Substances that Deplete the Stratospheric Ozone Layer, which aims to protect the stratospheric ozone layer—and thus human health and the environment—by equitably controlling the production and consumption of substances that deplete it, with the ultimate objective of ending all use of those substances;
- The Kyoto Protocol to the United Nations Framework Convention on Climate Change, which seeks to reduce greenhouse emissions;
- The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, which provides countries considering the importation of certain hazardous pesticides and chemicals the tools and information they need to identify potential risks and exclude chemicals they cannot manage safely; and
- The Stockholm Convention on Persistent Organic Pollutants, which protects human health and the environment from POPs.

UN human rights bodies

The links between trade and human rights are both legal and practical (OHCHR, 2003). As a matter of law, all WTO Members have undertaken obligations under international human rights law, which requires trade rules to be interpreted consistently with those norms and standards whatever the treaty commitments of countries in trade matters. As a matter of practicality, it is only through promoting respect for human rights, democracy and the rule of law that trade can deliver economic growth and prosperity.

As a result, several UN human rights bodies have called for a “human rights approach to trade.” In a background note provided for the 2003 WTO Ministerial in Cancun, Mexico, for example, the Office of the High Commissioner on Human Rights (OHCHR) noted the need, inter alia, to promote popular participation in the development of trade rules and policies, to monitor the potential and real impacts of trade rules and policies on human rights by individuals and groups, and to encourage international cooperation and assistance so that poorer countries can adjust to—and therefore benefit from—the trade reform process (OHCHR, 2003). Other resolutions and reports by expert and political bodies of the UN human rights system have looked at particular trade, investment and intellectual property issues. Other reports by the OHCHR, for example, address the impact on human rights of the TRIPs Agreement, globalization and agricultural trade, trade in services and investment liberalization.

III. Tools and strategies

Civil society participation in the organizations and negotiations reviewed above, as well as in the international legal system more generally, is restricted. Although the traditional view of States as the only subjects of international law has largely been overcome, only a limited number of international regimes formally recognize non-State actors or afford them a role in rule-making. Moreover, initiatives for increased engagement of non-State actors sometimes focus solely on the private sector. As a result, despite a broad acknowledgement of the relevance of civil society in the international policy framework, there are still few opportunities for NGOs to raise their issues and interests. The “expertise and concerns that can help make the international system more broad-based, democratic, fair, and responsive” to broader policy concerns are thus often excluded (Maggio and Lynch, 1997).

In recent years, however, civil society has effectively focused on increasing the scope for participation in international rule-making. In the context of the UN, the different summits and discussions on sustainable development in the 1990s marked a new era of increased relations with NGOs, including national and even some local organizations. In the trade context, progress has been slower but also important. Governments have established both formal and informal mechanisms for civil society engagement in the development of international rules on trade and investment, while other mechanisms have been created by NGOs themselves. Civil society has pushed to enlarge the space for trade-related discussions in the context of other international rules. In addition, civil society organizations have successfully advocated for a central role for human rights and environmental protection in the development of economic development objectives and disciplines. Largely due to civil society, for instance, the WTO has devoted considerable attention to the linkage between trade and environment, and pertinent WTO jurisprudence has experienced “significant advances” (Charnovitz, 2007).

Certain tools and approaches have been particularly useful in augmenting and enhancing the participation of civil society in international norm-making. These tools and approaches allow civil society to raise issues and concerns in different stages of rule-making—from the negotiation to the interpretation of rules—and thus, within broader campaigns and strategies, influence the interface between economic, social and environmental policies and structures.

III.1 Engaging in trade and investment negotiations and disputes

As governments have extended the scope of the international trade regime, increased transparency and public participation in trade policy-making have become more and more important to protect social and environmental norms. Today, trade rules address not only tariff levels, but also non-tariff barriers, services, technical regulations and product standards, sanitary and phytosanitary measures, and intellectual property protection—issues of relevance for a variety of social, health and environmental objectives, norms and policies. Trade regulation, however, continues to be conducted without adequate consideration of wider issues.

Despite public concern, trade and investment organizations at the multilateral, regional and bilateral levels remain largely secretive. Most of their activities are closed to civil society engagement. Yet NGOs have made significant headway in enhancing spaces for formal interaction. In addition, civil society has developed and effectively used a variety of informal entry points to increase their influence.

Opportunities for formal and informal participation vary across different trade, investment, and intellectual property negotiating processes. The agreement establishing the WTO recognized the need for civil society involvement. The 1996 General Council guidelines on arrangements for relations with civil society, how-

ever, emphasized that the intergovernmental character of the WTO precludes any direct involvement of NGOs in its work or meetings. Indeed, the possibility of civil society participation in the WTO received negative reactions from a number of members, particularly developing countries. Formal participation of NGOs was excluded, although the guidelines encouraged increased availability of documents and informal exchanges.

Since these discussions soon after the WTO was founded, attitudes of WTO members toward civil society participation have evolved significantly, primarily due to the positive experiences of collaboration between NGOs and governments, especially developing countries. Some intergovernmental agencies, such as the South Centre, have also helped build a bridge between governments and civil society. The engagement of the WTO secretariat with NGOs has also increased.

As a result, although formal participation mechanisms for civil society have still not been established, NGOs have successfully joined discussions and negotiations at the WTO through a range of informal tools and strategies. According to the Congress of NGOs (CONGO), such informal opportunities for NGOs to interact with the WTO include participating in symposia on WTO-related issues, submitting position papers to be circulated among member states, attending the Plenary Sessions of WTO Ministerial Conferences, and receiving information and briefings on WTO activities (CONGO, 2006). As is described in more detail below, NGOs have also used the Dispute Settlement Body to engage with the WTO, through the submission of “Friends of the Court,” or amicus, briefs for consideration during legal proceedings.

Civil society commentators have criticized trade and investment-related negotiations at the regional and bilateral level for not including opportunities for civil society participation. Negotiating demands and draft text are considered confidential and are not made public (though they are sometimes “leaked”) until an agreement

is reached, which makes outside contributions or participation more difficult and less effective. However, through mechanisms for consultation, civil society has managed to raise important points and concerns in the negotiation and implementation of bilateral and regional trade agreements, and in disputes based on bilateral investment agreements.

In spite of differing approaches to civil society participation in the various multilateral organizations for trade, IP and finance regulation, there are a number of common entry points and strategies that have permitted NGOs to engage in relevant negotiations and disputes. Other tools are more specific to particular organizations or negotiations.

Observer status

Of all the international organizations dealing with trade, finance and intellectual property rights, only WIPO grants observer status. For WIPO, an NGO is any organization that is independent from government, and the term thus includes business groups and other private sector organizations. Indeed, until recently, observers to WIPO were primarily organizations representing the interests of intellectual property rights-holders. Nevertheless, as awareness about the relevance of intellectual property protection to health, biodiversity and economic development policies has increased, so has the broader participation of civil society.

According to the WIPO Convention, NGOs may be admitted by the General Assembly as permanent observers to WIPO. WIPO-accredited groups, from rights-holders and business representatives to civil society organizations, have the right to participate in all the meetings of WIPO governing and subsidiary bodies. In addition, WIPO subsidiary bodies may admit NGOs as ad hoc observers; that is, to participate in the meetings of a particular body. Informal NGO engagement in ongoing WIPO negotiations, including developing substantive input and positions and disseminating information to various stakeholders, has complemented and enhanced formal participation.

Many of the civil society organizations that now engage with WIPO started their participation in 2000 with the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC), a committee of WIPO which grants ad hoc observer status. Today, over 90 civil society organizations, including a number of indigenous peoples groups, participate in the IGC sessions, providing vital information and perspectives. Many civil society organizations have gone on to obtain permanent observer status and are involved in WIPO discussions in a cross-cutting manner, significantly enriching and balancing the debate.

Although the numbers in most discussions still favor observers from industry and other private sector groups, collaboration among public interest NGOs has enhanced civil society participation in WIPO discussions. The Civil Society Coalition (CSC), for example, was created in 2001 as a network of organizations and individuals dedicated to facilitating greater public participation in global trade and standard setting bodies. By requesting and obtaining permanent observer status at WIPO as a coalition, its members—several NGOs of varying sizes and interests—were able to avoid going through the lengthy process separately. The coalition has also provided a basis for significant substantive cooperation, including through joint statements and interventions.

An example of the success of civil society in introducing social, equity and environmental concerns in intellectual property discussions was the launch of the WIPO Development Agenda in 2004. Building on the active engagement of civil society, and those developing countries that had raised serious questions about the sustainable development implications of WIPO's work, the Development Agenda was the first time governments asked WIPO to specifically address its role with respect to internationally agreed development goals. The role of NGOs and public participation in establishing a WIPO Development Agenda was evident in both proposals and discussions. The WIPO members proposing the Development Agenda, for example, noted that “given the broad public

policy implications of intellectual property, it is crucial to involve a commensurately broad range of stakeholders in the discussions on intellectual property, both at the national and international levels, including in all norm setting activity” (Brazil et al, 2004). NGOs were also able to actively contribute to discussions on the WIPO Development Agenda, providing information on the impact of intellectual property on access to educational materials, consumer rights, access to medicines and biodiversity policy.

Observer status, although limited, is important for ensuring accountable decision-making and provides an entry point for public interest considerations to be voiced in international negotiations. The WIPO experience demonstrates that more transparency and public participation improves rather than undermines the work of intergovernmental bodies. In international environmental negotiations, civil society participation is viewed by many involved as a useful way to inform negotiators on many aspects of the issues under debate (Loy, 2001). Accreditation to WTO Ministerial Conferences, even if it only provides the possibility of attendance, draws more and more NGOs to engage in and contribute to trade-related discussions.

Nevertheless, significant work remains to be done to secure observer status for NGOs at trade talks. At the WTO, opening formal sessions to NGO observers would not only increase an understanding of the rule-making process, but would also force a more balanced discussion of the issues at stake. Important next steps should include allowing civil society to participate in the WTO committees that deal with specific WTO agreements, cross-cutting issues and trade policy reviews. Indeed, if secrecy was ever necessary for tariff negotiations, the same rationale cannot be applied to negotiations that affect domestic standards, or the resolution of potential conflicts between trade and health or trade and environmental policies (Enders, 1997).

Objections to such increased participation are easily overcome. To address the perception that civil society represents primarily national interests and concerns, some have suggested that the WTO could limit observer status to international organizations, which is the practice in relation to general consultative status in ECOSOC (although ECOSOC does allow other types of consultative relationships with regional, sub regional and national NGOs). Others have suggested limiting observer status for NGOs to meetings of WTO bodies concerned with supervisory functions, such as the General Council and the various councils dealing with specific WTO Agreements, and excluding the negotiating committees (Enders, 1997).

Consultative mechanisms

These mechanisms are primarily established under national legislation but also exist at the regional and international level. Although the development and implementation of consultative mechanisms for trade and investment regulations is still in its early stages (none is properly adequate and many countries have no provision whatsoever for consultation with the public on trade rules), NGOs have already made some noteworthy achievements. These experiences have also provided important lessons for the future.

Consultative mechanisms are foreseen in relation to trade negotiations in many developed countries, but their importance and limitations have come to the forefront particularly in relation to bilateral and regional trade agreements. The experience of trade advisory groups in the United States, which have been actively engaged in bilateral and regional negotiations, for example, illustrates some of the challenges faced by civil society attempting to engage in consultations effectively. The U.S. Trade Representative (USTR) advisory committees were created to ensure that stakeholders could provide input in the formative stages of trade agreements. Yet a 2002 report from the U.S. Government Accounting Office (GAO) on the trade advisory system found that new stakeholders in the trade

process, such as public interest civil society organizations, have limited or no membership in the committees, despite their interest in the topics addressed (U.S. GAO, 2002).

Civil society organizations have actively sought to modify the U.S. committee system to advance a more balanced approach to trade negotiations. Public health NGOs, for example, led by CPath, have demanded the creation of a new public health trade advisory committee and public health representation in the over-arching committee for trade policy and negotiations, as well as on seven area-specific industry committees. Although these objectives have not been completely obtained, there have been important advances. As a result of CPath's efforts, a tobacco control advocate sits on a technical advisory committee on tobacco and a representative from the Generic Pharmaceuticals Association is on the industry advisory committee on chemicals and pharmaceuticals. The intellectual property advisory committee will now also include a public health representative. Moreover, the U.S. Congress is currently considering a bill, the Trade Advisory Committee Reform Act, which would require, inter alia, each advisory committee to include at least one environment, one healthcare and one labor representative.

In the advisory committees in which they participate, NGOs have addressed a number of issues and concerns relating to trade negotiations. Overall, they have raised awareness of the need for a more comprehensive and balanced approach to trade agreements.

TEPAC, for example, includes representatives from Transparency International, the Audubon Naturalist Society, the Consumers Union and the Center for International Environmental Law. In its various reports on bilateral and regional trade negotiations conducted by the United States, TEPAC has evaluated the positive and negative effects on environmental protection provisions related to: public participation, investment protection, dispute resolution and intellectual property protection. Even if committee members disagree in their assessments of these issues, the public interest NGOs present have been able to use TEPEC membership to voice their concerns on a number of issues including: the problems as-

sociated with allowing investor-state disputes (when companies sue governments for lost profits); the lack of adequate protections in many trade agreements for maintaining sanitary and phytosanitary standards; excessive reliance on trade as a means of advancing environmental objectives; and, the health implications of delaying the introduction of generic medicines caused by intellectual property provisions in trade and investment agreements.

Mechanisms and structures for public participation in trade-related discussions also exist in the developing world. They have often proved useful for the introduction of broader public policy concerns in trade discussions. The Philippine Council for Sustainable Development, for instance, institutionalizes the participation of members of civil society as counterparts of government representatives in discussions that affect sustainable development, including those linked to economic issues. In Uganda, a task force composed of government and civil society representatives was formed to review the process of implementing the TRIPs Agreement. The Brazilian government involved civil society in FTAA negotiations, inviting NGOs to participate in different meetings and giving them access to negotiating documents (de Motta Veiga, 2007).

Another interesting example of this kind of mechanism is the South African National Economic Development and Labour Council (NEDLAC). NEDLAC is made up of representatives from government, business, labor, and community and development interests. Its objectives include striking a balance among economic growth, participation in economic decision-making and social equity goals. In particular, NEDLAC seeks to reach consensus on social and economic policy. The council considers all major changes to social and economic policy before they are introduced in Parliament, and encourages a coordinated approach to social and economic matters.

Engagement of civil society in NEDLAC has proved a significant force for a more just and balanced policy on trade and economic matters. The Congress of South African Trade Unions (COSATU),

one of the representatives of organized labor on the council, has been particularly active in relation to South Africa's positions in WTO negotiations. COSATU has conducted research, and has provided NEDLAC and the South African government with statistical evidence supporting COSATU's position that the proposed liberalization of tariffs on industrial goods in the Doha Agenda will hurt industrial development and employment. This work has clearly affected the position of South Africa at the WTO. Indeed, South Africa currently leads the NAMA-11 group of developing countries at the WTO, which was formed to ensure that increased non-agricultural market access does not harm industrial development and employment in developing countries.

If public consultation mechanisms for trade negotiations are primarily a tool for national policy-formation, some trade agreements themselves include provisions to involve the public in implementation of the commitments, particularly on environmental issues. A recent OECD study noted many bilateral and regional trade agreements include provisions on public consultation during the implementation of environmental aspects of the agreement (OECD, 2007). For instance, the Trans-Pacific Strategic Economic Partnership Agreement, signed by Brunei, Chile, Singapore and New Zealand, has an accompanying environmental cooperation agreement, which provides that each Party may consult with its public and non-governmental sectors, and invite relevant experts or organizations to provide information for meetings held in relation to environmental cooperation issues. Some agreements go further, establishing processes that allow public submissions on any perceived lack of enforcement of environmental laws. The environmental side agreement of the NAFTA allows NGOs and even individuals established or residing in the territory of a Party to make submissions on enforcement issues that fall under the mandate of the Commission on Environmental Cooperation. Unfortunately, few NGOs would conclude these submissions have succeeded in improving the environmental impact of NAFTA.

Informal participation in trade and investment negotiations

Given the limitations of formal participation, informal civil society mechanisms to engage in and influence trade and investment fora have proved particularly valuable. Interaction with government delegates, for instance, has been essential to identify common concerns and develop joint or complementary strategies to obtain better consideration of these concerns. Civil society strategies often include media outreach and mobilization, creating a more conducive environment for social, environmental and human right issues to be addressed.

An example of these informal mechanisms can be found in the civil society campaign on access to medicines leading to the Doha Declaration on TRIPs and Health, agreed by WTO members at the 4th WTO Ministerial Conference, in Doha in 2001. In the late 1990s, several developing countries attempted to use the TRIPs Agreement compulsory licensing provisions or other flexibilities to address the mounting AIDS pandemic, but faced political pressure, trade sanctions and legal disputes from developed countries and multinational pharmaceutical companies. Active engagement by NGOs effectively forced developed country governments to shift their position. U.S. NGOs worked with a broad international coalition, including Health Action International, Oxfam, Médecins Sans Frontières (MSF), ACT UP Paris and Treatment Action Campaign, to support the South African laws that had been challenged by industry as inconsistent with the TRIPs Agreement. There was also extensive national and international NGO support in defense of the Brazilian government's policies on health against attack from developed countries and the big pharmaceutical firms.

Strong public support for an international coalition of developing countries and civil society organizations led to the Declaration on TRIPs and Health from the 2001 WTO Ministerial Conference in Doha. The declaration reaffirmed the right of WTO members to

make full use of the flexibilities of the TRIPs Agreement to protect public health. The civil society campaign on access to medicines was critical to the Doha Declaration on TRIPs and Health in several ways (Odell and Sell, 2005). At the international level, civil society had an important role in supporting the coalition of developing country governments, led by the African Group, which worked for the declaration. NGOs such as the International Centre for Trade and Sustainable Development (ICTSD) and the Quaker United Nations Office (QUNO) facilitated meetings and discussions. They also provided legal and economic expertise to support negotiating positions. Other civil society organizations, including Oxfam, MSF and Third World Network maintained media and public interest on the issue, increasing the influence of the developing country coalition and putting pressure on developed country governments to change their positions.

Despite subsequent developments at the bilateral and regional level that have called into question the effectiveness of the Doha Declaration on TRIPs and Health, the declaration remains a milestone in the trade and public health debate. The declaration provides a strong reference point to oppose limitations on the right of WTO members to give priority to public health in their intellectual property protection regimes.

Side events organized in parallel to trade and investment discussions have also proved useful to advance alternative views, and conduct more balanced and inclusive debates. Events organized by civil society around the FTAA negotiations illustrate the importance of such informal participation. People's Summits, events held in parallel to FTAA ministerial meetings from 1998 onwards, played an important role in highlighting the range of sustainable development concerns raised by trade negotiations. For example, in 1999 Common Frontiers (a Canadian trade justice network) and the Hemispheric Social Alliance held a People's Summit in Toronto only a few meters from where trade ministers were engaged in the FTAA negotiations. The event brought in civil society organizations from across the Americas, and allowed exchanges between these organizations and government representatives.

In 2005, during the WTO Ministerial Conference in Hong Kong, ICTSD, along with the University of Hong Kong and the Institute for Agriculture and Trade Policy (IATP), organized a Trade and Development Symposium. The goal of the symposium was to encourage innovative thinking on issues related to trade and development to then be translated into inputs for negotiations. The organizers sought to increase understanding of development-related impacts and concerns of trade policies, and to promote policy coherence for sustainable development. Over 40 organizations, including intergovernmental organizations, academic institutions, NGOs and consumer groups, organized panels on different topics, looking at trade and public policy objectives related to poverty eradication, equity, education, health, nutrition and more. Other similar symposiums were organized in connection with the Seattle (1999), Doha (2002) and Cancun (2003) Ministerials as well.

All of these informal mechanisms have been useful for civil society. Moreover, these informal participation mechanisms have been enhanced by two cross-cutting strategies that surfaced in recent civil society campaigns: first, focusing on changes to specific trade rules and policies; and second, reframing debates on trade rules and policies to highlight public policy concerns, often in cooperation with UN bodies such as UNEP or the FAO. These strategies are explored below.

Orienting activities toward specific modifications to trade rules and policies

One example of a successful campaign on a specific aspect of trade rules was the 1999 campaign against the establishment of a Working Group on Biotechnology in the WTO. Another was the campaign that led governments to reject the inclusion of the so-called Singapore issues (investment, competition, trade facilitation and government procurement) in the Doha Agenda at the 2003 Cancun Ministerial.

Civil society organizations have also led successful campaigns to change existing trade rules. In the case of the Kimberley Process, for example, countries focused on obtaining a WTO waiver to allow discriminatory restrictions to control the trade in diamonds from regions where human rights abuses were endemic. In the late 1990s, thanks in large part to the work of civil society, the link between the diamond trade and human rights abuses in some parts of Africa became increasingly clear. The UN Security Council adopted a series of resolutions aimed at restricting trade in these “conflict diamonds.” In 2002, the Kimberley Process Certification Scheme was adopted. The scheme requires the countries that sign-up to ensure certificates that authenticate the diamonds’ provenance accompany shipments of rough diamonds to and from their countries. The scheme prohibits shipments of diamonds to or from non-participants to the program.

The trade-related measures needed to implement the scheme were raised as a problem by some participants, who thought the measures would not conform to WTO rules. Civil society pressure at the national level, however, ensured that governments chose to prioritize the protection of human rights over trade rules and principles. A temporary waiver from WTO rules was sought and obtained in 2003, thereby providing legal certainty for the domestic trade measures taken under the Kimberley Process. The waiver, which has now been extended until December 31, 2012, demonstrates that it is possible to secure concrete WTO decisions that allow trade restrictions on sustainable development grounds.

Reframing trade-related discussions to prioritize public policy concerns

“Trade Matters!” is the title of an IUCN publication on why the international trade regime is important for biodiversity. Indeed, as has been noted in this paper, trade, investment and intellectual property rules have a significant impact on a number of public policy objectives and concerns. Yet, as civil society has worked to address the impact of these rules and advance a more balanced

approach to the interface of trade and sustainable development, it has often been difficult to raise attention and effectively influence discussions on important yet technical issues such as expropriation, patentability and agricultural subsidies.

Reframing these issues in light of human rights and the environment has been critical to focusing these discussions on the key public policy concerns at stake, and mobilizing governments, civil society and public opinion. Expropriation rules in BITs affect the government's ability to issue environmental regulations, for instance. Patentability rules impact whether there are private rights over living organisms. Rules on agriculture determine whether industrialized countries are able to dump produce on developing countries, driving down the price of local produce and devastating the local economy.

In the case of conflict diamonds, for example, civil society played a critical role in raising awareness of the link between trade in diamonds and guns in parts of Africa. Civil society thereby strengthened the pressure on governments to take measures to end trade in diamonds from these regions. In the campaign to achieve the Doha Declaration on TRIPs and Health, civil society highlighted the public health dimensions of the issue, shifting the emphasis away from intellectual property protection, where the public interest is muted or absent. As a public health issue, the right of NGOs to be present and heard in the debate was much harder for governments to ignore. Public interest in safeguard provisions in the context of patent protection may have been minimal, but talking about the issue in terms of a lack of access to essential medicines was a concern to which it is easy to understand and relate.. The way NGOs defined and talked about the problem and their proposed solutions were fundamental to the success of the civil society campaign (Odell and Sell, 2006).

Public participation in trade and investment disputes

Trade and investment dispute settlement mechanisms present a number of challenges and opportunities for civil society to raise public policy issues and concerns. The relevance of trade and investment disputes to the work of civil society is clear: health, food security, environmental and social policies have been challenged repeatedly as inconsistent with the trade and investment provisions of multilateral, regional or bilateral agreements. Yet international trade and investment dispute settlement remains woefully inadequate in terms of transparency and civil society participation. At the same time, trade and investment dispute settlement mechanisms have evolved from a political to a rules-based approach that has sometimes proved better equipped to address controversial trade and sustainable development issues. The dispute settlement system, for instance, offers the only possibility of formal participation for NGOs in the WTO context, through the presentation of *amicus curiae* briefs (described below). By engaging in dispute settlement processes, civil society has achieved important successes in advancing a more socially and environmentally responsible interpretation of trade law.

Amicus curiae briefs

In the trade context, dispute settlement systems provide a mechanism through which countries, as signatories to the bilateral or regional agreement or WTO members, can ensure the enforcement of their rights. As a result, these systems are designed for state-to-state disputes in which only countries may present claims or defend the challenged measures. Nevertheless, there is increasing recognition of the role of non-state actors in contributing additional perspectives to the analysis and findings of international trade tribunals, even if the issue remains controversial. In particular, since private actors have no right to file a claim or otherwise intervene as parties, briefs presented as *amici curiae* or “friends of the court”

(also known as amicus briefs) are the means through which businesses and civil society groups have been able to present their views to various trade and investment tribunals.

In the WTO dispute settlement system, WTO tribunals have discretionary authority to accept and consider unsolicited amicus briefs. Indeed, as WTO rules are silent on the matter, it was the submission of amicus briefs by civil society that prompted the WTO tribunals to address the extent of public participation allowed in the dispute settlement system. In the case *US-Shrimp*, the Appellate Body ruled that only WTO Members who were parties to the dispute, or who have notified their interest in becoming third parties in the dispute, have a legal right to make submissions to the panel. Nevertheless, the ruling also said the DSU grants panels a wide scope to determine the process by which their members obtain information on the relevant facts of the dispute and the legal norms and principles that apply. This scope implicitly acknowledges, according to the Appellate Body, the discretionary authority available to panels to accept or reject information and advice submitted to it, whether requested or not (WTO AB Report, 1998).

There are no specific procedures or parameters for amicus briefs in the WTO, which poses a challenge for NGOs seeking to use the tool to best effect. In *EC-Asbestos*, the Appellate Body established a special procedure that allowed interested parties to submit amicus briefs, setting out timelines and content requirements. The procedure upset many WTO members who considered it was for them to decide if and what type of civil society participation in the dispute settlement system should be allowed. As a result, subsequent cases have not established any rules for the presentation of amicus briefs.

All the same, both WTO panels and the Appellate Body have since reaffirmed their discretionary authority with regard to amicus briefs, and have continued to accept these submissions, including in cases such as *EC-Biotech* and *Brazil-Retreaded Tyres*. In the *EC-Biotech* case, the Panel accepted the three unsolicited amicus

briefs from groups of NGOs and academics. These briefs focused on different aspects of the case, but all sought to provide information that would enable the panel to make a more informed and balanced decision. One of the three, submitted by CIEL, provided factual and technical information to assist the Panel in the interpretation of Article 5.7 of the SPS Agreement (CIEL et al, 2004). The academic submission, on the other hand, drew the panel's attention to major recent developments in the area of risk assessment, particularly concerning GMOs (Busch et al, 2004).

In the *EC-Biotech* case, the amicus briefs were complimented by the "Bite Back: WTO Hands Off Our Food" campaign, initiated by Friends of the Earth, together with ActionAid International, Public Services International (an association of trade unions), Public Citizen (USA), the International Gender and Trade Network, the Confédération Paysanne (France), the Research Foundation for Science, Technology and Ecology (India), and Greenpeace International, and supported by more than 745 other organizations. The main demand of the campaign was that the WTO should not undermine the right of any country to protect its citizens and the environment from GM foods and crops (see below a picture of a "Bite Back" demonstration held in front of the WTO building). The campaigners also obtained and disseminated copies of the *EC-Biotech* submissions and reports, which were only officially released to the public after significant delays.

In *Brazil-Retreaded Tyres*, several amicus briefs were also accepted, both at the panel and the Appellate Body level. For example, the Humane Society International presented a submission that elaborated on the significant hazard that waste tires pose to animal life and biodiversity (Humane Society International, 2006). A coalition of environmental NGOs, including several Brazilian organizations, presented arguments on Article XX of the GATT as a defense for measures to address the public health and environmental problems caused by tire waste and aggravated by trade in retreaded tires (ACPO et al, 2006).

The Brazil-Retreaded Tyres case also illustrates the role of broader civil society campaigns that lead to and support amicus briefs. Indeed, it was national civil society organizations in both Brazil and the EU that created the impetus for the amicus briefs to be written and submitted. These national organizations were also critically important in pointing out the contradiction between the position of the EU in the case, and its broader environmental and sustainable development policies.

Neither in EC-Biotech nor in Brazil-Retreaded Tyres did the panels officially refer to the amicus briefs in their analysis or findings. Nevertheless, the amicus briefs were distributed to and addressed by the Parties to the disputes in their written and oral interventions. The impact of the briefs in the discussions and the decisions has been noted by several of the amici curiae. Indeed, although the country-defending consumer and environmental policies lost in both EC-Biotech and Brazil-Retreaded Tyres, the panels indirectly accepted many of the civil society arguments in favor of such policies, setting significant precedents for future cases.

The increased transparency of WTO dispute settlement hearings will only strengthen the effectiveness of future amici briefs. A number of more recent hearings have been opened to the public, such as those in the follow-up cases to the EC-Hormones and EC-Bananas III decisions. The audience of an interested public coupled with the amicus briefs, demonstrates to negotiators and adjudicators the political considerations that lie behind the social and environmental policies being challenged. These politics have often led WTO members to maintain these policies even though they lose the dispute at the WTO.

Regional and bilateral trade agreements also typically contain provisions on dispute settlement, establishing committees and detailed procedures for handling disputes between parties. The types of procedure vary from agreement to agreement, as do the possibilities for civil society participation. Earlier trade agreements, such as NAFTA, ruled that hearings and submissions be closed to the

public, although NAFTA Ministers have since called for modifications to these provisions (OECD, 2005). Agreements that followed the NAFTA model, as did the one between Canada and Chile, also maintained the confidentiality of procedures, and did not provide for amicus briefs. More recently concluded agreements, however, including U.S.-Australia, U.S.-CAFTA-DR, and EU-Chile, have tended to establish hearings that are open to the public and to oblige dispute panels to consider requests for amicus submissions. Nevertheless, the trend is not universal: other recent agreements either maintain the practice of closed dispute settlement hearings, as is the case in Thailand-Australia and the relevant MERCOSUR protocol, or are silent on the matter, such as the Japan-Mexico agreement.

Dispute settlement systems established by regional and bilateral trade agreements have not yet been the focus of much civil society action. Nevertheless, “choice-of-forum” provisions are likely to increase their relevance in the future. These provisions grant the complaining party the choice of which dispute settlement system to use should there be an alleged inconsistency among trade agreements. Such a choice could encourage a shift from the WTO’s dispute settlement system to bilateral and regional dispute settlement instead, if the complaining party considers the case will be granted a more favorable hearing that way (Drahos, 2007).

Investment dispute settlement processes

Investment dispute settlement processes have also raised a wide range of concerns. An increasing number of BITs and trade agreements establish investor-state arbitration provisions, which are being used to challenge regulatory measures relating to human rights, health and the environment. Although these disputes affect the public interest, they are decided in processes designed to address private and commercial issues, without regard to transparency and public participation (Bernasconi, 2006). For example, under

most of the investment arbitration procedures, information on the formal commencement of the process, the issues at stake and the arbitral awards are not made public.

Nevertheless, civil society has recently requested and obtained unprecedented involvement in international arbitration proceedings. The *Methanex vs. United States* case, a dispute under the NAFTA investment provisions, made international investment law history. The tribunal—in a response to civil society requests—found that it had the authority to accept written amicus curiae briefs on the basis of its “broad discretion” to conduct arbitration. Moreover, the tribunal noted that civil society participation was important given the public interest in the subject-matter of the arbitration and the potential damage to the credibility of the process if civil society were excluded.

In 2004, the first ever civil society submissions in investor-state arbitration were presented, with an amicus brief presented by IISD and another by Earthjustice on behalf of a coalition of NGOs, including the Bluewater Network, Communities for a Better Environment and CIEL. The amicus briefs contributed vital views and considerations, developing arguments based on the broader legal context, including the relationship between investment obligations under NAFTA and international sustainable development objectives.

Although the claim was dismissed on jurisdictional grounds, the tribunal noted and even briefly quoted the amicus briefs in its final award (Mann, 2005). Moreover, Parties such as the United States and Canada recognized that the amici briefs presented a unique perspective and interest as NGOs with expertise in sustainable development and environmental protection. Indeed, the *Methanex* case is a good example of the importance of civil society’s role in raising the lack of balance between governments’ consideration of economic and environmental interests. Since the *Methanex* precedent was set, the NAFTA Free Trade Commission has established a process for amicus submissions in Chapter 11 (investment) cases. In subsequent cases, panels have accepted the possibility of receiving amicus briefs.

III.2 Addressing trade and investment in health, environment and human rights organizations

Efforts to introduce social, environmental and human rights concerns into trade, intellectual property and investment discussions are often inherently limited because the organizations have no mandate for these concerns, too few sectors are represented and the procedures that govern debate do not admit the possibility of widening the scope. As a result, although attempts to directly influence the rules and activities developed in economic organizations remain important to NGOs, many public interest advocates are coming to the position that the trade and sustainable development interface may be better addressed in non-economic organizations. In addition, in many cases, governments now recognize that the problems discussed in social and environmental organizations cannot be solved without considering the trade aspects.

The strategy is not an especially easy one to adopt. Civil society has found that efforts to get governments to tackle trade issues in non-trade organizations are controversial. In the negotiation of MEAs, developing countries tend to call for strong disciplines on trade, but some industrialized countries push for language subordinating the environmental provisions to trade rules and principles, as was the case in negotiations of the Tobacco Convention and the Biosafety Protocol. These positions are not consistent, either across organizations or as a North-South difference: Argentina has been vociferous in its resistance to any measure that would restrict trade in genetically engineered agricultural commodities, for example. The European Union positions are not always consistent across different negotiations, in part reflecting the difficult negotiations that go into achieving a position acceptable to all 25 members. Given the importance of achieving a coherent international legal framework that supports sustainable development, however, governments cannot shy away from tackling trade issues in non-trade organizations.

Trade-related measures in health and environmental agreements

As mentioned, only a minority of MEAs contain trade-related provisions. These MEAs, however, address some critical environmental challenges. In addition, the trade-related measures are central to the success of the MEAs, redressing imbalances of information or economic power among the signatory countries, regulating trade in hazardous substances, and assisting in compliance and enforcement. As a result, civil society has focused on ensuring that trade-related issues are addressed in the development and implementation of MEAs. This work has proved critically important in ensuring a more balanced, robust and effective international legal framework with which to address environmental problems.

The Biosafety Protocol, which seeks to protect biological diversity and human health from the potential risks posed by the trans-boundary movements of GMOs, is a good example of the importance of including trade-related issues in MEAs. Negotiations on the Biosafety Protocol were extremely contentious. Tension between calls for greater environmental and human health protection on the one hand, and concerns about maintaining market access for the products of biotechnology on the other was immediately apparent in the debate. The tension was critically important in the course of negotiations and was still evident in the final text. Indeed, the Biosafety Protocol includes specific WTO language and market access principles, combined with specific international environmental law principles, creating a unique and particularly marked interaction between trade and environment (Mann, 2000).

Civil society organizations played a critical role in the successful culmination of the long and complex negotiation of the Biosafety Protocol. A number of environmental, consumer, development and farmers' organizations actively participated in the development of the Biosafety Protocol. These civil society groups called for a comprehensive and robust agreement that would protect the world's people and biodiversity from the risks, including social and economic, that can be caused by the introduction of GMOs. NGOs were particularly active in noting the need for a focus on biosafety and environmental protection, rather than on facilitating trade.

In the end, the Biosafety Protocol, in spite of preambular language that introduced some degree of ambiguity, adequately addressed the trade, environment and human health interface in the field of biotechnology. However, the fact that trade issues were addressed outside the WTO has been used by some commentators to argue a legal uncertainty in the relationship between the Biosafety Protocol and WTO agreements. In turn, GMO-exporting countries have used this uncertainty argument to attempt to create a "chilling effect" on biosafety regulation and policy in actual and potential importing countries. Nevertheless, under the UNEP-GEF Biosafety Projects, for example, over 120 countries have developed national biosafety frameworks that follow the path set out in the Biosafety Protocol.

There are fewer examples of health agreements that include trade measures. One important agreement that does is the Framework Convention on Tobacco Control (FCTC), the first global health treaty negotiated under the auspices of the WHO. The FCTC includes a range of provisions linked to trade. Articles 6 to 14, for example, establish price, tax and non-price measures necessary to reduce the demand for tobacco. Given the evidence that the liberalization of trade in tobacco products increases tobacco consumption, and the concerns regarding the legality of imposing tobacco control measures under existing WTO rules, it was clear to negotiators that, to be effective, the international tobacco convention needed to directly address trade-related issues. They gave clear priority to health concerns.

NGOs were particularly active in ensuring the comprehensive coverage of the convention. Civil society is widely considered to have been the driving force for the FCTC, from their role in getting governments to agree to negotiate an international instrument to control tobacco sales and trade, to mobilizing pressure for the negotiations at the country and regional levels, to engaging in the negotiation process itself (Mamudu, 2005). NGOs worked as public interest advocates and provided technical support (Collin et al, 2002). NGOs were a strong voice in highlighting the link between tobacco control and trade.

As with MEAs, however, the relationship between trade-related measures in non-trade agreements and the international trade regime was controversial. Most countries and civil society organizations called for the FCTC to reinforce the primacy of public health concerns over commercial interests, (although the European Union, for example, also wanted to ensure that this priority was not used as a means of arbitrary or unjustified discrimination in international trade). Civil society, in particular, called for language reinforcing the primacy of public health over trade and strengthening the ability of governments to defend their tobacco control measures against trade challenges (Campaign for Tobacco-Free Kids, 2001). A smaller number of countries, including the United States, on the other hand, proposed language requiring the implementation of tobacco control measures to be in accordance with existing international rules, thus subordinating the Convention to trade agreements.

The work of civil society organizations was essential to the negotiators' ultimate rejection of the U.S. and like-minded countries' proposals. When the debate focused on the relationship between the FCTC and WTO rules, for example, the Boston-based Corporate Accountability International (at the time called Infact) and the Network for the Accountability of Tobacco Transnationals (NATT) addressed the issue in a press release, calling for countries to stand firm in the face of a few governments' insistence that commercial interests should triumph. Such appeals were successful.

In the final text of the FCTC, all references to the relationship between its provisions and the rights and obligations of Parties under existing treaties were eliminated. Although some of the elements that public interest groups had initially called for were thus lost, such as references to prevent Parties from using trade rules in ways that conflicted with the Convention's principles and objectives, the deletion of any language that might imply subordination to trade rules was warmly welcomed. Action on Smoking and Health (ASH) and Campaign for Tobacco-Free Kids, for example, in their

analysis of the text, noted that the Vienna Convention on the Law of Treaties defines the established rules in the relationship between treaties, and that there was no need to restate them and no case to alter them for the Tobacco Convention.

Trade and investment in human rights assessments and reviews

The High Commissioner for Human Rights has noted the links between human rights, trade and investment. From a legal perspective, countries have undertaken obligations under international human rights law, obligations that require trade rules to be interpreted consistently with those norms and standards whatever the treaty commitments of countries in trade matters. In practice, however, trade, investment, and intellectual property rules and policies often threaten to undermine human rights obligations. Civil society has been increasingly active in the trade and human rights interface, calling for human rights organizations to insist that signatory countries respect their human rights obligations in their economic policies.

One example of such a civil society campaign is the work toward protecting access to affordable medicines. Access to affordable medicines is an inherent element of several internationally-recognized human rights, including the right to life and the right to health. These human rights contain obligations that countries must take into account in all their policy-making, including on trade. A resolution of the Commission on Human Rights, "calls upon States to conduct an impact assessment of the effects of international trade agreements with regard to public health and to the progressive realization of the right of everyone to the highest attainable standard of health" (CHR, 2005).

In 2004 and early 2005, an NGO called "3D -> Trade - Human Rights - Equitable Economy," took the lead in attempting to

use a number of international human rights mechanisms to make trade rules more accountable and human rights-consistent. The mechanisms used included the UN human rights treaty monitoring bodies and the special procedures of the UN Human Rights Commission. This work was conducted in close collaboration with public-interest NGOs from the North and South. In addition, the results of 3D's work with the UN human rights mechanisms were disseminated to key decision-makers in international organizations, regional organizations and national institutions working on intellectual property and human rights policy.

The treaty-monitoring body process proved a valuable mechanism to expose a human rights problem, as the submissions were widely distributed and discussed. Moreover, the submissions were clearly considered in subsequent recommendations, which repeatedly noted concern regarding the impact of higher levels of intellectual property protection on the human right to health, for example. The Human Rights Council, established in 2006, will undertake a universal periodic review of the fulfilment of countries of its human rights obligations, and is likely to consider trade, intellectual property and investment issues.

The recommendations of UN treaty bodies on trade, intellectual property and human rights were useful for national and international advocacy efforts on access to medicines, particularly in the context of bilateral trade agreement negotiations. Civil society successfully exerted pressure not only on the developing countries whose health policies would be affected by the intellectual property rules, but also on the developed countries imposing these intellectual property rules. For example, in 2007, many of the intellectual property provisions sought by U.S. negotiators in bilateral free trade agreements with Colombia, Korea, Panama and Peru had been identified as problematic for human rights. These measures had to be modified by the USTR's office in an attempt to obtain the necessary bipartisan support in Congress to approve the trade deals.

IV. Conclusion

Given the immense challenge of ensuring that international rules on trade, investment and intellectual property conform to multilateral social and environmental norms, it is difficult to speak of the successes of civil society in this arena. Yet constant action and campaigning over the past years have unquestionably moved governments closer to the establishment of an international economic legal framework that respects human rights and social and environmental obligations. Moreover, such action and campaigning have surfaced strategies and tools that are particularly useful in these efforts, from formal to informal participation in trade-related negotiations and disputes to raising trade-related issues outside the WTO.

This review of some of the different civil society experiences with these successful strategies provides insights into the way ahead. In terms of formal participation, for example, significant work remains to be done. NGOs remain by and large excluded from both trade and finance negotiations, even as arguments against civil society involvement in trade-related negotiations continue to weaken, while trust and interaction between governments and NGOs continues to grow. Formal participation in trade and investment disputes, which has been more significant, will continue to offer important opportunities for civil society to weigh in, including perhaps on issues such as labelling and traceability policies for biotechnology, and intellectual property and development in emerging developing countries.

Trade-related issues arising outside formal trade negotiating bodies will also remain a critical challenge in the coming years. For instance, an informal trade ministers' meeting during the UN Climate Change Conference in Bali in December 2007 showed a convergence of views that a global agreement on climate change was an essential prerequisite for effective climate-related trade policies, and that trade policy tools play a central role in addressing climate change. Civil society has played and will continue to play an absolutely essential role in shaping the trade and climate change interface, as well as the trade and sustainable development interface more generally.

V. Bibliography

- Associação de Combate aos Poluentes (ACPO) et al, “The Brazil - Retreaded Tires Case: Amicus Curiae Brief.” 2006.
- Bernasconi-Osterwalder, Nathalie, “Democratizing international dispute settlement: The case of trade and investment disputes.” CIEL. 2006.
- Brazil et al, “Establishing a ‘Development Agenda’ for the World Intellectual Property Organization,” Submitted to the 40th Series of Meetings of the Assemblies of the Member States of WIPO and to the 31st Session of the WIPO General Assembly, September 27–October 5, 2004.
- Busch, Lawrence et al, “Amicus Curiae Brief submitted in the EC-Biotech case.” 2004.
- Campaign for Tobacco-Free Kids, “Public Health, International Trade, and the Framework Convention on Tobacco Control.” 2001.
- Center for International Environmental Law (CIEL) et al, “Amicus Brief to the EC-Biotech Case.” 2004. http://www.ciel.org/Publications/WTOBiotech_AmicusCuriaeBrief_June04.pdf.
- CIEL and WWF, “Open letter to the European Commission’s Trade Commissioner Mandelson.” 2007. http://www.ciel.org/Tae/BrazilRetreadedTires_Appeal_4Sep07.html.
- Charnovitz, Steve, “Trade and Environment in the WTO,” *Journal of International Economic Law*, Vol. 10. 2007.
- Collin, Jeff et al, “The Framework Convention on Tobacco Control: The Politics of Global Health Governance,” *Third World Quarterly*, Vol. 23, No 2. 2002.
- Commission on Human Rights (CHR), “The right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. E/CN.4/2004/49/Add.1. 2004.
- CHR, “Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria,” Resolution 2005/23. 2005.
- Committee on Economic, Social, and Cultural Rights (CESCR), “General Comment No. 14: The right to the highest attainable standard of health,” UN Doc. E/C.12/2000/4. 2000.
- Conference of NGOs in Consultative Relationship with the United Nations (CONGO), “NGO participation arrangements at the UN and in other agencies of the UN System.” CONGO. 2006.
- Correa, Carlos, “Implications of the Doha Declaration on the TRIPs Agreement and Public Health,” World Health Organization. 2002.
- de Motta Veiga, “Trade Policy-making in Brazil: Changing Patterns in State-Civil Society Relationship,” *Process Matters: Sustainable Development and Domestic Trade Transparency*, IISD. 2007.
- Drahos, Peter, “Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution,” *Journal of World Trade* 41(1). 2007.
- Drezner, Daniel, “Gauging the Power of Global Civil Society: Intellectual Property and Public Health,” presented at the Watson Institute, Brown University. 2005.
- Enders, A., “Openness and the WTO,” IISD Working Paper. 2007.
- Gaines, Sanford, “Environmental Policy Implications of Investor-State Arbitration under NAFTA Chapter 11.” 2005. <http://ssrn.com/abstract=892438>.
- Humane Society International, “The Brazil - Retreaded Tires Case: Amicus Curiae Brief.” 2006.
- International Institute for Sustainable Development (IISD), *A Guide to the Use and the Potential of International Investment Agreements*. IISD. 2004.
- Loy, Frank, “Public participation in the World Trade Organization,” *The Role of the World Trade Organization in Global Governance*, United Nations University Press, 2001.
- Maggio, Greg and Owen Lynch. “Human Rights, Environment and Economic Development: Existing and Emerging Standards in International Law and Global Society,” CIEL. 1997.
- Mamudu, Hadii, “The Politics of the Evolution of Global Tobacco Control: The Formation and Functioning of the Framework Convention on Tobacco Control (FCTC),” Dissertation submitted to the Eberly College of Arts and Sciences at West Virginia University. 2005.
- Mann, Howard, “The Cartagena Protocol on Biosafety: An Analysis,” presented to the ASEAN Workshop on International Trade in ASEAN Agricultural and Forest Products and Measures to Align Trade and Environment, Thailand, June 1, 2000.

Mann, Howard, "Opening the Doors, at least a little: Comment on the Amicus Decision in *Methanex v. United States*," *RECIEL* 10 (2, 2001).

Mann, Howard, "The Final Decision in *Methanex v. United States*: Some New Wine in Some New Bottles," *IISD*. 2005.

Odell, John and Susan Sell, "Reframing the Issue: The Coalition on Intellectual Property and Public Health in the WTO," *Negotiating Trade: Developing Countries in the WTO and NAFTA*, Cambridge University Press. 2006.

Office of the High Commission on Human Rights (OHCHR), "Human Rights and Trade," Background Note to the 5th WTO Ministerial Conference in Cancún, Mexico, 2003. <http://www.unhchr.ch/html/menu2/trade/cancunfinal.doc>.

Organisation for Economic Cooperation and Development (OECD), "Regionalism and the Multilateral Trading System," *OECD Policy Brief*. 2003.

OECD, "Environment and Regional Trade Agreements." 2007.

Oliva, María Julia, "The Cartagena Protocol on Biosafety and the Agreement on Sanitary and Phytosanitary Measures: What will Decisions regarding GMOs have to be Based on?" *International Legal Perspectives*, Vol. 13 Issue 1. 2003.

Oliva, María Julia, 2008, "Promoting and Extending the Reach of Intellectual Property: The World Intellectual Property Organization (WIPO)," *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity, and Food Security*. Earthscan. 2008.

Oliva, María Julia and Simonetta Zarrilli, "WTO Panel Report on the 'EC-Biotech' Case: Considerations for Trade and Development," *UNCTAD Trade and Development Board, Commission on Trade in Goods and Services, and Commodities, Eleventh session, Geneva, 19–23 March 2007, TD/B/COM.1/CPR.4*. 2007.

Ovett, Davinia, *Making Trade Policies More Accountable and Human Rights-Consistent: A NGO Perspective of Using Human Rights Instruments in the Case of Access to Medicines, Economic Globalisation and Human Rights*. Cambridge University Press. 2006.

Pauwelyn, Joost, "WTO Compassion or Superiority Conflict: What to make of the WTO Waiver on 'Conflict Diamonds'," 24 *Mich. J. Int'l L.* 1177. 2003.

Pomerance, Rafe, "The Biosafety Protocol: Cartagena and Beyond," 8 *N.Y.U. ENVTL. L.J.* 614. 2000.

Third World Network (TWN), "Key Issues and Key Elements Needed in the Biosafety Protocol," position paper for the sixth and final Biosafety Protocol negotiations in Cartagena. February 14-19, 1999.

United Nations Environment Programme (UNEP) and International Institute for Sustainable Development (IISD), "Environment and Trade: A Handbook," *IISD*. 2005.

U.S. General Accounting Office (GAO), "International Trade Advisory Committee System should be Updated to Better Serve U.S. Policy Needs," Report to the Ranking Minority Member, Committee on Finance, U.S. Senate. 2002.

World Commission on Environment and Development, "Our Common Future," *UN document A/42/427*. 1987.

WTO Appellate Body (AB) Report, *US-Shrimp*, *WT/DS58/AB/R*. 2001.

Annex 1 Case Studies

Trade in Conflict Diamonds	28
Doha Declaration on TRIPs and Health	29
Methanex: Environment and Investor-State Arbitration under NAFTA	31
The Tobacco Convention and Trade Rules	33
Amicus Curiae Briefs at the WTO: EC-Biotech and Brazil-Retreaded Tyres	34
Using Human Rights Mechanisms to Safeguard Access to Medicines	36
Environment in the Context of Bilateral and Regional Trade Agreements	37
WIPO Development Agenda	39
Cartagena Protocol on Biosafety	40

Trade in Conflict Diamonds

Overview

In the late 1990s, the link between the diamond trade and human rights abuses in some parts of Africa became increasingly clear. The UN Security Council adopted a series of resolutions aimed at restricting the trade in these “conflict diamonds.” Then, in 2000, the UN General Assembly called on the international community to develop, finalize and implement proposals for an international certification scheme for rough diamonds, recognizing the urgency of the situation from a humanitarian and security standpoint.

In 2002, governments adopted the Kimberley Process Certification Scheme for rough diamonds. This certification scheme sought to ensure that shipments of rough diamonds between participants would be accompanied by a certificate that these were not conflict diamonds, and that there would be no shipments of diamonds to or from non-participants. Although it contains no commitments of legal nature, the certification scheme does call on participants to adopt measures at a national level. The heavily concentrated nature of the industry also facilitated the application of the certification scheme.

The trade-related measures needed to implement the scheme raised concerns among participants about WTO conformity. As a result, a temporary waiver from WTO rules was sought and obtained in a 2003 order to give legal certainty to domestic measures taken under the Kimberley Process. In 2006, the waiver was extended until December 31, 2012.

Role of civil society

Civil society organizations played a critical role in raising awareness of the link between diamonds and guns in Sierra Leone and other parts of Africa, and ensuring measures were taken to end the international trade in conflict diamonds. Groups such as Amnesty International (AI), for example, recognized that the existing arms embargo needed to be strengthened by restricting the type of diamond trading that was fuelling conflict. Following the World Diamond Congress in 2000, a number of NGOs affirmed that, despite some notable efforts by the industry, governments needed to develop an international certification progress and a system for independent monitoring of the flow of diamonds. NGOs involved included Amnesty International, Fatal Transactions, Global Witness, the Netherlands Institute for Southern Africa, Partnership Africa Canada, Physicians for Humans Rights, and World Vision. Civil society calls for an effective and transparent international certification system continued until such a system was established in 2002. NGOs have also promoted public awareness of the Kimberley Process.

The role of civil society in addressing the relationship between the Kimberley Process certification scheme and WTO rules, however, seems to have been less significant. The Interlaken Declaration that launched the certification scheme stated that “measures taken to implement the Kimberley Process Certification Scheme for rough diamonds will be consistent with international trade rules.” As all national legislation relevant to WTO agreements is subject to the WTO dispute settlement procedure, governments wanted to ensure the measures taken to implement the certification scheme would not be challenged. Of the several possibilities discussed, with apparently little input from civil society, the waiver was preferred by a number of countries to ensure that concerns regarding WTO conformity did not delay the process.

Legal and policy strategies and tools

- *Addressing trade issues and impacts in UN-sponsored process:* Efforts to address the negative impacts of trade in rough diamonds originated not at the WTO, but at the UN and the UN-sponsored Kimberley Process. Such a focus had a number of advantages:
 - It allowed a more inclusive negotiation, which involved governments of diamond producers, exporters and importers, as well as representatives from the diamond industry and non-governmental organizations;
 - It placed an emphasis on the peace, safety and security considerations that required a simple and workable international certification scheme for rough diamonds with the widest participation possible; and
 - It created the presumption that implementing measures fell under the security exception of Article XXI of the GATT, which allows WTO Members to take actions, even if they are inconsistent with other WTO provisions, in pursuance of obligations under the UN Charter for the Maintenance of International Peace and Security.

However, addressing trade issues outside the WTO was also considered by some participants to create legal uncertainty as to the measures used to implement the Kimberley Process certification scheme, which could have resulted in a “chilling effect.”

- *Seeking WTO waiver for measures furthering international objectives:* Countries participating in the Kimberley Process chose to request a waiver from WTO obligations for measures prohibiting import and export from and to non-participants. The waiver aimed to avoid “chilling effect” on the use of the certification scheme due to concerns of inconsistency with WTO rules, as well as to ensure that, as required by UN resolutions and Kimberley Process documents, the certification scheme is consistent with international

trade provisions and commitments. The WTO decision granting the waiver clarifies that it “does not prejudice the consistency of domestic measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions,” and that the waiver is granted for “reasons of legal certainty.”

Nevertheless, there is some concern that, rather than recognize the importance of non-trade concerns, the WTO waiver confirms a “superiority complex” (Paulwelyn, 2003). In particular, it is likely that WTO rules already justified the restrictions called for by the Kimberley Process Certification Scheme. Having opted for a waiver may, therefore, undermine the legal basis of other trade restrictions adopted without a waiver. On the other hand, the WTO waiver only covers trade with non-participants to the Kimberley Process, although issues of WTO consistency could also arise with regards to trade between participants. Paulwelyn considers such a distinction implies that participants considered that, in the case of a WTO dispute amongst them, the Kimberley Process would be considered and justify implementing measures.

Doha Declaration on TRIPs and Health

Overview

The TRIPs Agreement introduced intellectual property into the international trade regime, extending requirements of intellectual property protection to all WTO members and to new technological and industrial sectors, including pharmaceuticals. Requiring patent protection for pharmaceutical products raised significant concerns, given its potential impact on access to medicines in developing countries. The TRIPs Agreement provides “flexibilities,” allowing governments, for example, to issue compulsory licenses of patented medicines to produce generic versions. These provisions, however, were criticized as quite limited, and were soon under threat of further erosion.

In the late 1990s, several developing countries attempted to use the TRIPs Agreement compulsory licensing provisions or other

flexibilities to address the mounting AIDS pandemic, but faced political pressure, trade sanctions and legal disputes. Thailand was warned by the United States that the use of compulsory licenses could lead to sanctions on core Thai exports, for example. Pharmaceutical companies challenged a South African medicines regulation as inconsistent with the TRIPs Agreement. The U.S. also placed South Africa on its “watch list” of countries that were not adequately protecting intellectual property. Brazil faced significant political pressure and a U.S. petition for a WTO Panel to challenge Brazil’s patent and public health policies.

In 2001, faced with rising public opposition and a strong international coalition of developing countries and civil society, the WTO Ministerial Conference in Doha adopted the TRIPs Agreement and Public Health. The Doha Declaration on TRIPs and Public Health made clear that the TRIPs Agreement does not and should not prevent WTO members from taking measures to protect public health. It reaffirmed the right of WTO members to make full use of the flexibilities of the TRIPs Agreement in order to protect public health. It also provided an authoritative interpretation of the TRIPs Agreement that governments could rely on in WTO disputes.

The effectiveness of the Doha Declaration on TRIPs and Public Health, however, has come into question. Subsequent negotiations on an amendment to the TRIPs Agreement that would allow countries with insufficient or no manufacturing capacity in the pharmaceutical sector to use compulsory licensing were considered by most observers not to have been carried out in the spirit of the Declaration. Even more significantly, bilateral trade agreements have been used to further restrict developing country policies in the field of public health, in clear contradiction with the Doha Declaration on TRIPs and Health.

Role of civil society

The contribution of NGOs to the achievement of the Doha Declaration on TRIPs and Health is widely recognized. The Doha Declaration on TRIPs and Health can indeed be characterized, to some degree, as the culmination of a global civil society campaign to scale back intellectual property restrictions on the production and distribution of generic drugs to the developing world (Drezner, 2005).

The civil society campaign on access to medicines was critical to the Doha Declaration on TRIPs and Health in several ways (Odell and Sell, 2005). First, it raised public awareness and discussion of the connection between patents and health. U.S. organizations such as the AIDS Coalition to Unleash Power (ACT UP) in Philadelphia and the Consumer Project on Technology (CPT), for example, used the 2000 presidential campaign to draw attention to patent and health issues. Second, NGOs effectively put pressure on developed country governments to shift their policies. U.S. NGOs also worked with a broader international coalition, including Health Action International, Oxfam, Médecins Sans Frontières (MSF), ACT UP Paris and Treatment Action Campaign, to support the South African medicine regulation. There was also extensive national and international NGO support in defense of the Brazilian government’s policies.

Finally, civil society also had an important role in the coalition of developing country governments, led by the African Group, working toward a TRIPs and health declaration in the WTO. For example, NGOs such as the International Centre for Trade and Sustainable Development (ICTSD) and the Quaker United Nations Office (QUONO) facilitated meetings and discussions. They also sought and provided the necessary legal and economic expertise to support negotiating positions. Other civil society organizations, including Oxfam, MSF and Third World Network facilitated the media and public interest on the issue, increasing the influence of the developing country coalition.

Legal and policy strategies and tools

- *Reframing debate to focus on public policy concerns:* Odell and Sell note that a key instrument used by civil society to bring attention to the debate was to provide a different reference point—in this case, to shift the focus from intellectual property protection to public health. Public interest in safeguard provisions in the context of patent protection may have been minimal, but lack of access to essential medicines was a concern easy to which it is easy to understand and relate. The definition and communication of the problem and the solution were thus fundamental to the success of the civil society campaign.
- *Safeguarding policy space in trade rules through a political statement with legal effects:* The civil society and developing country coalition was clear that the WTO needed to address the relationship between the TRIPs Agreement and public health, which was at the core of the international debate on patents and access to medicines. The options were several, ranging from a political statement and an authoritative interpretation, to an amendment, to the TRIPs Agreement. The declaration was seen as a feasible, less politically costly objective (Odell and Sell, 2006), which would nevertheless provide a guarantee of the right of WTO members to prioritize public health to patent protection.

Correa notes that a “declaration” has no specific legal status in the framework of WTO law. Nevertheless, the Doha Declaration on TRIPs and Health is a strong political statement with legal effects, particularly for the Dispute Settlement Body. In this regard, while strictly not an authoritative interpretation, it has similar effects, creating a binding precedent for future panel and Appellate Body reports (Correa, 2002). To date, no legal disputes have arisen.

Methanex: Environment and Investor-State Arbitration under NAFTA

Overview

NAFTA, as is typical of most recent regional and bilateral trade agreements, contains provisions on foreign investment. In particular, Chapter 11 of NAFTA seeks to encourage foreign direct investment by giving investors legal recourse against potential discriminatory treatment or uncompensated expropriations of investments by the host country (Gaines, 2005). NAFTA affirms that these investor protections do not prevent countries from taking environmental protection measures, yet a number of investor-state disputes under NAFTA have indeed dealt with environmental issues.

Methanex Corporation vs. the United States is one of the investor-state disputes that has been heard under NAFTA Chapter 11. In 1999, Canada-based Methanex, the world’s largest producer and marketer of methanol, challenged a decision by the State of California to phase out methyl tertiary butyl ether (MTBE), a gasoline additive derived from methanol, on the basis of scientific evidence that the substance posed significant risks of water contamination. Methanex claimed the decision was based on unjustifiable recommendations and was thus arbitrary and tantamount to an expropriation of its investments in the United States. It asked for financial compensation from the U.S. of over \$900 million.

In its final award, issued in 2005, the arbitral tribunal stated that it lacked jurisdiction over the claim, and denied compensation to Methanex. The tribunal considered it did not have jurisdiction because the California measure on MTBE did not sufficiently “relate to” investments of a company that supplied methanol to unrelated MTBE producers. Nevertheless, in reaching its determination on jurisdiction, the tribunal also considered the substance of the case, reviewing California’s enactment of legislation, scientific study and assessment of risks, and executive action (Gaines, 2005). On all these aspects, the tribunal supported the government’s actions.

Role of civil society

The Methanex case made international investment law history. Civil society requested and obtained unprecedented involvement in the international arbitration proceedings, which are generally known to lack transparency and to prohibit public participation. Moreover, through their participation, civil society organizations were able to raise and elaborate on important public policy considerations relevant to the case.

Public participation in the Methanex case was secured by the International Institute for Sustainable Development (IISD) and Earthjustice (on behalf of a group of U.S. NGOs, including the Bluewater Network, Communities for a Better Environment and CIEL) in 2000. The organizations sought amicus standing to make written and oral arguments to the tribunal (Mann, 2001). In 2001, the tribunal found it had the authority to accept written amicus briefs on the basis of the “broad discretion” to conduct the arbitration granted by the UNCITRAL Arbitration Rules. It considered the possibility to accept such participation important, given the public interest in the subject-matter of the arbitration and the potential damage to the credibility of the process if civil society were excluded. However, the tribunal rejected the view that they had the authority to allow oral arguments by amici, which it considered required consent by all disputing parties.

In 2003, the tribunal announced the procedures for formally applying for amicus status. The first ever civil society amicus briefs in investor-State arbitration were thus submitted, with an amicus presented by IISD and another by Earthjustice. In addition, following a request by the potential amici, the tribunal opened the hearings to the public (Mann, 2005).

Legal and policy strategies and tools

- *Increasing transparency and public participation in investment arbitration:* As noted by the NGOs that presented *amicus* submissions to the case, the Methanex proceedings—as with other investment arbitrations—raised important public policy issues. Earthjustice, for example, said the tribunal’s decision would set a precedent that would help determine the rights and obligations of governments in implementing health and environmental measures. Yet these issues were discussed and resolved in relative secrecy, with no participation of citizen and civil society groups.

The tribunal’s decision to open its hearings to the public is thus significant. In the Methanex case, for instance, it allowed the *amici* to ascertain that the U.S. was arguing the California action was a health measure protected by the so-called “police powers” exclusions. As a result, they were able to support the government by bringing additional considerations to the analysis of the tribunal, including the argument that both human health and environmental measures are protected by these exclusions.

The issue of access to arbitral documentation was not resolved. The tribunal noted that existing legal materials were contradictory as to the issue, but that in the Methanex case, there was a prevailing confidentiality order agreed to by the disputing parties. Disclosure of some documents, however, was eventually possible using the U.S. Freedom of Information Act.

- *Presenting amicus submissions to investment disputes:* Briefs presented by an *amicus curiae*—literally translated as a “friend of the court”—aim to provide information on a point of law or other aspects of a case in order to assist the judge, court or tribunal in deciding a matter before it. *Amicus* briefs are increasingly used before international tribunals, in which they provide an important entry point for public policy concerns that may not be adequately raised or represented by State or private parties.

In the Methanex case, the United States and Canada recognized that the amici presented a unique perspective and interest as non-governmental organizations with expertise in sustainable development and environmental protection. The *amicus* submissions indeed contributed vital views and considerations, developing arguments based on the broader legal context, including the relationship between Chapter 11 obligations and international sustainable development objectives. Moreover, although it dismissed the claim on jurisdictional claims, the tribunal noted and even briefly quoted the *amicus* briefs in its final award (Mann, 2005). Finally, since the Methanex precedent, the NAFTA Free Trade Commission has established a process for *amicus* submissions in Chapter 11 cases. Other cases have since accepted the possibility of receiving *amicus* briefs.

The Tobacco Convention and Trade Rules

Overview

The Framework Convention on Tobacco Control, which entered into force in 2005, is the first global health treaty negotiated under the auspices of the World Health Organization (WHO). It provides a framework for tobacco control measures to be implemented at the national, regional and international levels. In particular, it includes a range of provisions to address factors contributing to the globalization of tobacco use, including trade liberalization, global marketing and advertising, and contraband sales of cigarettes. Articles 6-14, for example, establish price, tax and non-price measures necessary to reduce the demand for tobacco. Other provisions focus on the supply side, for instance addressing illicit trade in tobacco products.

As in international environmental instruments, the link between trade-related measures and the international trade regime was controversial. Most countries and civil society organizations called for the Tobacco Convention to reinforce the primacy of public health

concerns over commercial interests, affirming its priority over existing trade agreements (although the European Union, for example, also wanted to ensure that this priority was not used as a means of arbitrary or unjustified discrimination in international trade). A smaller number of countries, including the U.S., on the other hand, proposed language requiring tobacco control measures to be implemented in accordance with existing international rules, thus subordinating the Convention to trade agreements.

In the final text of the Tobacco Convention, all references to the relationship between its provisions and the rights and obligations of Parties under existing treaties were eliminated. Although some of the elements that public interest groups had initially called for were thus lost, such as references to prevent Parties from using trade rules in ways that conflicted with the Convention principles and objectives, the deletion of any language that might imply subordination to trade rules was warmly welcomed. Action on Smoking and Health (ASH) and Campaign for Tobacco-Free Kids, for example, in their analysis of the text, noted that the Vienna Convention on the Law of Treaties defines the established rules in the relationship between treaties, and that there was no need to restate them and no case to alter them for the Tobacco Convention.

Role of civil society

Civil society is widely considered to have been the driving force for the Tobacco Convention, actively calling for an international instrument of tobacco control, mobilizing at the country and regional levels, and engaging in the negotiation process (Mamudu, 2005). The negotiation process promoted significant civil society involvement—public hearings held in 2000, for example, provided an opportunity for interested groups to register their views even before the start of intergovernmental discussions. The accreditation procedure was also accelerated and NGOs in Official Relations were granted access to working groups. NGOs also worked in the form of alliances and coalitions—such as the Framework Convention Alliance (FCA), the Network for the Accountability of Tobacco Transnationals (NATT) and the International Nongov-

environmental Coalition Against Tobacco (INGCAT), to increase their effectiveness.

Civil society played a number of important roles, from advocacy and technical support to lobbying (Collin et al, 2002). Through their various roles, NGOs were critical in highlighting the link between tobacco control and trade. As the debate focused on the relationship between the Convention and WTO rules, for example, the Boston-based Corporate Accountability International (at the time called Infact) and NATT addressed the issue in a press release, calling for countries to stand firm in the face of a few governments insisting on prioritizing commercial interests at all costs.

Legal and policy strategies and tools

- *Addressing trade issues in an international health agreement:* Given the evidence on the impact of the liberalization of trade in tobacco products on tobacco consumption, and the concerns regarding the scope for tobacco control measures in WTO rules, an international tobacco convention needed to address trade-related issues in order to be effective. It was clear that trade-related measures would be controversial and that their adoption would depend on issues such as political feasibility, strategy and priority-setting (Campaign for Tobacco-Free Kids, 2001). In this regard, a number of provisions of the Tobacco Convention do address economic factors related to tobacco consumption. As this is a framework convention, it is likely that Parties will eventually negotiate protocols dealing even more specifically with these issues.
- *Avoiding prioritizing trade over public health measures:* Express references to the link between the international tobacco and the international trade regime were not included. At the beginning of the negotiation, civil society had called for language reinforcing the primacy of public health over trade and strengthening the ability of States to defend their tobacco control measures against trade challenges (Campaign for Tobacco-Free Kids, 2001). Such language proved contentious, however, and the counter-proposals presented by some countries threatened to undermine the provisions of the Tobacco Convention, stating that they did not change any rights or obligations in existing treaties. At the end of the negotiations, it was considered preferable to avoid these counter-proposals by eliminating all references to the link between trade and public health, and by relying on existing rules of treaty interpretation to advance the Convention

as a guide for the actions of governments and intergovernmental organizations.

Amicus Curiae Briefs Presented to the WTO: EC-Biotech and Brazil-Retreaded Tyres

Overview

The WTO dispute settlement system provides a mechanism through which member states can ensure the enforcement of their rights. As a result, it is only countries that may make claims or defend the challenged measures. Nevertheless, as other international tribunals, the WTO has increasingly recognized the role of non-state actors in contributing additional perspectives to the analysis and findings in disputes.

WTO tribunals have discretionary authority to accept and consider unsolicited amicus curiae submissions. In US-Shrimp, the Appellate Body found such authority to be indispensable for a panel to discharge its duty to make an objective assessment (WTO AB Report, 1998). The issue remains controversial, however, as most developing country WTO members consider that increased participation of civil society—and particularly the private sector—would make the procedure overly burdensome and unbalanced. These countries are aware that companies and many NGOs in developed countries have more staff and more resources to spend on developing legal arguments than do their governments. As a result, there are no specific procedures or parameters for amicus briefs in the WTO. Notwithstanding, both WTO panels and the Appellate Body have reaffirmed their discretionary authority in regards to amicus briefs, and have continued to accept these submissions.

Role of civil society

Since the US-Shrimp case, civil society organizations have presented amicus briefs to provide the Panel and the Appellate Body with legal, technical and scientific information considered valuable toward more just and well-rounded decisions. Moreover, through the consideration of amicus briefs, the WTO dispute settlement can also be said to benefit from a more inclusive process, as in many cases it is the affected sectors of the public that have made their views and positions known. Amicus briefs in two recent cases, EC-Biotech and Brazil-Retreaded Tyres, provide significant examples.

In the EC-Biotech case, the Panel accepted the three amicus curiae briefs from groups of NGOs and academics. These briefs focused on different aspects of the case, but all sought to provide information that would enable the panel to make a more informed and balanced decision. The CIEL submission, for example, provided factual and technical information to assist the Panel in the interpretation of Article 5.7 of the SPS Agreement (CIEL et al, 2004). The academic submission, on the other hand, aimed to draw the Panel's attention to major recent developments, modifying the conventional understanding of risk assessment, particularly concerning GMOs (Busch et al, 2004).

In Brazil-Retreaded Tyres, several amicus briefs were also accepted. For example, the Humane Society International presented a submission that elaborated on the significant hazard that waste tires pose to animal life and biodiversity (Humane Society International, 2006). A coalition of environmental NGOs presented arguments on Article XX of the GATT as a defense for measures to address the public health and environmental problems caused by tire waste and aggravated by trade in retreaded tires (ACPO et al, 2006).

Legal and policy strategies and tools

- *Using formal participation mechanisms in the WTO dispute settlement system:* As one of the few mechanisms for formal participation for civil society at the WTO, *amicus* briefs are an important entry point for public policy concerns. The submissions to the *EC-Biotech* and *Brazil-Retreaded Tyres* case were not expressly considered by the panels in their analysis or findings. Nevertheless, these *amicus* briefs were distributed to and addressed by the Parties to the disputes in their written and oral interventions. The impact of the briefs in the discussions and the decisions has been noted by several of the *amici curiae*. Indeed, although the country defending the consumer and environmental protection policies lost in both *EC-Biotech* and *Brazil-Retreaded Tyres*, the panels accepted many of the arguments put forth, setting significant precedents for future cases. The increased transparency of WTO dispute settlement hearings—for example, a number of proceedings have been opened to the public, such as those in the follow-up cases to the *EC-Hormones* decision—is likely to make future *amici curiae* interventions in the WTO even more effective.
- *Coordinating amicus briefs with other actions and strategies:* Civil society has supported its use of *amicus* briefs with other tools in order to influence both the specific WTO case at issue and the wider public debate. For example, the *EC-Biotech* case was the focus of the “Bite Back: WTO Hands Off Our Food” campaign, initiated by Friends of the Earth, together with ActionAid Alliance, PSI, Public Citizen, IGTN, the French Confederation Paysanne, the Indian Research Foundation for Science, Technology and Ecology, and Greenpeace International, and supported by more than 745 other organizations. The main demand of the campaign was that WTO rules should not undermine the right of any country to protect its citizens and the environment from GM foods and crops. The campaign was also important in obtaining and disseminating copies of the *EC-Biotech* submissions and reports, which were only officially released to the public with significant delay. In the *Brazil-Retreaded Tyres* case, environmental groups issued press releases around key dates of the dispute settlement process, condemning the EU for challenging the Brazil ban on the import of used tires, which Brazil stated was needed to limit breeding grounds for mosquitoes

(CIEL and WWF Europe, 2007).

Using Human Rights Mechanisms to Safeguard Access to Medicines

Overview

Access to affordable medicines is an inherent element of several internationally recognized human rights, including the right to life and the right to health. The right to life is acknowledged in Article 6 of the ICCPR, as well as in other human rights treaties. To comply with their obligations under the right to life, State parties have an obligation to take comprehensive legal and administrative measures to increase life expectancy, including ensuring access to affordable medicines (Ovett, 2006). The right to health is recognized by Article 12 of the ICESCR and Article 24 of the CRC. States have the obligation to take “deliberate, concrete and targeted” steps toward the full realization of the right to health (CHR, 2004). It is widely accepted that the access to and the affordability of essential medicines play an important role in the realization of the right to health (CESCR, 2000).

Increasingly, there is recognition that these human rights contain obligations that States must take into account in their entire policy making, including trade policy. Paul Hunt, the Special Rapporteur who has spoken on the right of everyone to enjoy the highest attainable standard of physical and mental health, has also noted that “the affordability of essential medicines raises crucial issues, such as drug pricing, compulsory licensing, parallel importing, and the reduction of import duties (Hunt, 2004).” Moreover, a recent CHR Resolution on access to medicines “calls upon States to conduct an impact assessment of the effects of international trade agreements with regard to public health and to the progressive realization of the right of everyone to the highest attainable standard of health” (CHR, 2005).

Role of civil society

Although trade and investment have long generated interest and concern for many human rights groups and advocates, it is only recently that civil society has turned to using human rights tools to support their work in these areas. In 2002, an NGO, 3D -> Trade - Human Rights - Equitable Economy, was created specifically to promote collaboration amongst trade, development and human rights organizations. 3D chose to look particularly at the issue of intellectual property, access to medicines and human rights, having found that most public-interest NGOs active on this issue were not aware of and did not use available human rights tools.

In 2004 and early 2005, 3D used a number of international human rights mechanisms to attempt to make trade rules more accountable and human rights-consistent. The mechanisms used included the UN human rights treaty monitoring bodies, and the special procedures of the UN Human Rights Commission. This work was conducted in close collaboration with public-interest NGOs from the North and South. In addition, the results of 3D’s work with the UN human rights mechanisms were disseminated to decision-makers in international organizations, regional organizations and national institutions working on intellectual property and human rights policy.

There are also other, more general, initiatives on trade and human rights. The ESCR-Net International Trade and Investment Discussion Group, for example, connects over 250 NGOs, grassroots groups and academics working on different aspects of trade, investment and human rights. Members use this space to share tools and resources, updates on trade negotiations and implementation at different levels, information on international financial institutions and development, and possibilities for learning. In addition, the group provides a forum for discussing advocacy opportunities and strategic actions.

Legal and policy strategies and tools

- *Addressing trade and intellectual property issues and impacts in UN human rights mechanisms:* The access to medicines campaign was already an important advocacy movement around the WTO and regional and bilateral trade agreements. A focus on the UN human rights mechanisms, however, increased understanding of the important links between trade, intellectual property and human rights. In addition, using UN human rights mechanisms to address these links ensured that the work of treaty bodies provided useful tools to feed into the broader access to medicines discussions.

The work of 3D focused on the UN treaty bodies: the independent organs that monitor the application of international human rights treaties, which had already been requested by other UN human rights organs to look at the issue of trade, intellectual property and human rights. Moreover, treaty bodies monitor States' compliance with their human rights obligations, and thus provide a high-profile international accountability mechanism. In particular, 3D concentrated its work on countries being reviewed that were either reforming their IP laws, such as Uganda, or negotiating bilateral and regional trade agreements, such as Botswana, Ecuador and El Salvador. In addition, 3D made submissions on two EU countries—Denmark and Italy—to highlight the international obligations of developed countries regarding access to medicines and realization of the right to health in developing countries.

The treaty body process proved a valuable mechanism to expose a human rights problem, as the submissions were widely distributed and discussed. Moreover, the submissions were clearly considered in resulting treaty body recommendations, which repeatedly noted concern regarding the impact of higher levels of intellectual property protection on the human right to health, for example. The recommendations were useful for national and international advocacy efforts on access to medicines, particularly in the context of bilateral trade agreement negotiations. Nevertheless, although States have a legal obligation to take into

account treaty body recommendations, whether these recommendations were in fact taken into account remains unclear.

Environment in the Context of Bilateral and Regional Trade Agreements

Overview

The links—both positive and negative—between economic liberalization and environmental protection have long been recognized. “Our Common Future,” the 1987 report of the World Commission on Environment and Development, also known as the Brundtland Report, noted that increases in trade and capital movements have far-reaching ecological implications, and that the “pursuit of sustainability requires major changes in international economic relations.” In particular, the report called for two conditions to be satisfied for international economic exchanges to become beneficial for all involved: “The sustainability of ecosystems on which the global economy depends must be guaranteed. And the economic partners must be satisfied that the basis of exchange is equitable; relationships that are unequal and based on dominance of one kind or another are not a sound and durable basis for interdependence” (WCED, 1987).

It is only recently, however, that agreements dealing with trade liberalization have begun incorporating environmental aspects into their frameworks. The WTO, for example, established sustainable development as an ultimate objective, created a Committee on Trade and Environment, and incorporated environment-related negotiations in the Doha Agenda. Bilateral and regional trade agreements now increasingly address the specific linkages between trade and environment.

The extent to which environmental aspects are integrated in bilateral and regional trade agreements depends largely on the nature and scope of the agreement. Because the goals of these agreements range from reducing tariffs to establishing a more comprehensive integration, environment-related provisions also come in many forms (OECD, 2006). For example, recent bilateral and regional trade agreements have included provisions incorporating environ-

mental exceptions into trade disciplines, affirmative commitments concerning environmental protection and/or cooperation on specific issues or capacity-building more generally. Trade agreements may incorporate these provisions within their main structure or as a side agreement.

Another element that determines if and how environmental issues will be addressed in bilateral and regional trade agreements is the existence and use of public consultation mechanisms in the negotiation and implementation process. Public participation can still be considered restricted, particularly given the lack of transparency, in bilateral and regional trade negotiations. However, consultation mechanisms have proved an important entry point for social, environmental and health concerns raised by proposed or existing bilateral and regional trade agreements.

Role of civil society

Consultative mechanisms used specifically in bilateral and regional trade negotiations respond primarily to national legislation in industrialized countries, which requires public participation in trade policy-making. The U.S., the EC, Canada and Australia, for example, all have requirements for public participation in the negotiation of trade agreements. However, more general mechanisms and structures for public participation in trade-related discussions in developing countries have also been significant entry points for public participation. The Philippine Council for Sustainable Development, for instance, institutionalizes the participation of civil society as counterparts of government representatives in discussions impacting sustainable development, including those linked to economic issues. The Brazilian government involved civil society in FTAA negotiations, inviting NGOs to participate in different meetings and ensuring an ample disclosure of negotiation documents (de Motta Veiga, 2007).

Public participation mechanisms themselves have not ensured a more balanced discussion of public policy concerns surrounding trade agreements. In a 2002 report on the U.S. trade advisory

system, the U.S. Government Accountability Office found that new stakeholders in the trade process, such as various public interest civil society organizations, have limited or no participation, despite their interest in a number of the topics addressed (GAO, 2002). Civil society organizations have actively sought to modify the committee system in order to advance a more balanced approach to trade negotiations. In addition, in committees that allow civil society participation, the consultation mechanisms have been used to raise a range of concerns regarding proposed trade agreements.

NGOs have addressed a number of issues and concerns relating to trade negotiations in advisory committees, and overall raised awareness of the need for a more comprehensive and balanced approach to trade agreements. The Trade and Environment Policy Advisory Committee, for example, includes representatives from Transparency International, the Audubon Naturalist Society, the Consumers Union and CIEL. In its various reports on bilateral and regional trade negotiations conducted by the United States, this committee has analyzed and evaluated the positive or negative impact on environmental protection of provisions on public participation, investment protection, dispute resolution and intellectual property.

Legal and policy strategies and tools

- *Using consultative and public participation mechanisms:* A number of the industrialized countries most active in pursuing bilateral and regional trade agreements have national requirements for public consultation during trade negotiations. Even if these existing mechanisms have been undermined by the lack of transparency of bilateral and regional trade negotiations, and are often criticized for not allowing adequate or balanced input from various stakeholders, their use has allowed an increased consideration and discussion of social and environmental concerns raised by trade liberalization. In U.S. advisory committees, for example, even if there are generally differing viewpoints among committee members, these and other NGOs have been able to express their concerns, for example, on allowing investor-states disputes, excessive reliance on trade as a means of advancing environmental objectives and delays that would be caused by the intellectual

property provisions in the introduction of generic medicines to market.

In addition, many bilateral and regional trade agreements include mechanisms to involve the participation of the public at the implementation stage, particularly on environmental issues. They may allow, for instance, that Parties seek views on the implementation of the environmental side agreement, or the environmental aspects of the overall agreement (OECD, 2006). Some agreements take further steps, establishing citizen submission processes that allow public submissions on a perceived lack of enforcement of environmental laws. The environmental side agreement of NAFTA, for example, allows any NGO or person established or residing in the territory of a Party to make a submission on enforcement matters to the commission on environmental cooperation for its consideration.

WIPO Development Agenda

Overview

WIPO has been—until recently—little known and understood outside intellectual property offices. WIPO is a UN specialized agency with responsibility to promote creative intellectual activity and facilitate the transfer of technology to developing countries in order to accelerate economic, social and cultural development. WIPO has historically regarded its primary objective, however, to be increased levels of intellectual property protection. Nevertheless, the growing acknowledgement of the links between intellectual property and sustainable development has led to more public awareness of and participation in WIPO activities. Indeed, WIPO’s broad range of norm setting, administrative and technical assistance activities is now recognized to have an important impact on a range of public policy objectives.

In 2004, the WIPO Development Agenda was launched to ensure WIPO activities and intellectual property discussions have development-friendly objectives and results. In particular, different proposals were put forth related to the organization’s mandate and

governance, its norm-setting and technical assistance activities, and technology transfer. A number of specific proposals were adopted by the WIPO General Assembly in September 2007. A new Committee on Development and Intellectual Property has been charged with implementing these proposals.

Role of civil society

Initiatives such as the WIPO Development Agenda highlight the importance of civil society participation in raising social, environmental and other public policy issues in international fora dealing with economic-related issues. The WIPO Development Agenda built on the active engagement of civil society in various WIPO bodies, which had raised serious questions regarding the sustainable development implications of activities being undertaken by WIPO. The role of NGOs and public participation in establishing a WIPO Development Agenda was highlighted in both proposals and discussions. The WIPO members proposing the Development Agenda, for example, noted that “given the broad public policy implications of intellectual property, it is crucial to involve a commensurately broad range of stakeholders in the discussions on intellectual property, both at the national and international levels, including in all norm setting activity” (Brazil et al, 2004).

Civil society was also able to actively contribute to discussions on the WIPO Development Agenda, as observers to the organization. WIPO allows NGOs, which it defines as any organization that is independent from government, thus including business groups and other private sector organizations, to obtain observer status. Until recently, observers to WIPO were primarily organizations representing the interests of intellectual property right-holders. Nevertheless, as awareness of the relevance to intellectual property protection to health, biodiversity and economic development policies increased, so did the broader participation of civil society.

Most civil society organizations commenced their participation in WIPO in 2000, when WIPO members established a committee to address intellectual property, genetic resources and traditional

knowledge. The committee's procedural rules encouraged the participation of a wide range of stakeholders through ad-hoc observer status. Today, over 90 civil society organizations, including a number of indigenous peoples groups, participate in the committee's sessions, providing fundamental information and perspectives. Many civil society organizations have since obtained permanent observer status and become involved in WIPO discussions in a cross-cutting manner, significantly enriching and balancing the debates.

Legal and policy strategies and tools

- *Obtaining permanent or ad-hoc observer status:* WIPO is one of the intergovernmental organizations that allow more formal civil society participation. According to the WIPO Convention, NGOs may be admitted by the General Assembly as permanent observers to WIPO. WIPO-accredited groups, from rights-holder and business to civil society organizations, thus have the right to participate in all meetings of WIPO governing and subsidiary bodies. More and more NGOs are obtaining such permanent observer status, providing for increasingly balanced discussions across various WIPO bodies. In addition, WIPO subsidiary bodies may admit NGOs as ad hoc observers; that is, to participate exclusively in the meetings of a particular body. Civil society organizations have found these arrangements useful to their work on particular issues, such as access to medicines or the protection of traditional knowledge. Informal NGO engagement in ongoing WIPO negotiations, including developing substantive input and positions, and disseminating information to various stakeholders, has complemented and enhanced formal participation.
- *Working in coalition with other civil society organizations:* Collaboration among NGOs has proved useful to increase and enhance participation in WIPO discussions. The Civil Society Coalition (CSC), for example, was created in 2001, as a network of organizations and individuals dedicated to facilitating greater public participation in global trade and standard-setting bodies. By requesting and obtaining permanent observer status at WIPO as a coalition, its members—several NGOs of varying sizes and

interests—were able to avoid going through the lengthy process separately. The coalition has also provided a basis for significant substantive cooperation, including through joint statements and interventions. Another noteworthy coalition is the Access to Knowledge (or A2K) movement, which seeks to place copyright and other intellectual property laws in a context that recognizes the need to protect and expand access to knowledge.

Cartagena Protocol on Biosafety

Overview

On January 29, 2000, Parties to the CBD adopted a supplementary agreement, known as the Cartagena Protocol on Biosafety, seeking to protect biological diversity from the potential risks posed by GMOs, particularly in the context of transboundary movements. The Biosafety Protocol establishes procedures to ensure that countries are provided with sufficient information prior to deciding to import GMOs into their territory. It also incorporates the precautionary principle, establishing that insufficient information regarding potential adverse effects does not prevent a country from taking a decision in order to avoid or minimize such effects.

Although the development of appropriate procedures for the transfer, handling and use of GMOs was foreseen in the CBD, negotiations on the Biosafety Protocol proved extremely contentious. Tension between calls for greater environmental and human health protection and concerns about maintaining market access for the products of biotechnology emerged immediately in the debate. These tensions were critical in the course of negotiations and even surfaced in the final text. Indeed, the Biosafety Protocol includes specific WTO language and market access principles, combined with specific international environmental law principles, creating a unique and particularly marked interaction between trade and environment (Mann, 2000).

Role of civil society

Civil society organizations played a critical role in the successful culmination of the long and complex negotiation of the Biosafety Protocol. A number of environmental, consumer, development and farmers' organizations actively participated in the development of the Biosafety Protocol, calling for a comprehensive and robust agreement that would protect the world's people and biodiversity from the risks, including social and economic, that can result from the introduction of GMOs. Civil society worked closely with the Like-Minded Group, which emerged from the G-77/China and wanted to ensure that international rules would protect countries without adequate regulatory or institutional capacity from the unknown effects of biotechnology. Indeed, in several cases, NGO representatives formed part of official delegations.

Civil society was particularly active in noting the need for focus on biosafety and environmental protection, rather than on facilitating trade. This was true not only in the Biosafety Protocol negotiations, but also in the context of the WTO. In 1999, some members of the so-called Miami Group—countries with biotechnology industries concerned that their exports of genetically modified seeds and crops might be disrupted—called for discussions on biosafety to be moved to the WTO, through a “Working Party on Biotechnology.” Civil society—in addition to its broader role at the 1999 WTO Ministerial in Seattle, where this proposal was discussed—was central to the defeat of the idea of such a working party, noting the danger of undermining the Biosafety Protocol negotiations and the ability of countries to regulate imports of GMOs (TWN, 1999).

Legal and policy strategies and tools

- *Addressing trade issues and impacts in multilateral environmental negotiations:* The focus of efforts toward addressing the potential harmful impacts of the transboundary movement of GMOs was developed and maintained in the context of the CBD, despite attempts to shift discussions to the WTO. Such a focus had a number of advantages:
 - It promoted an emphasis on biosafety—rather than trade—concerns during negotiations;
 - It ensured negotiators understood environmental concerns, rather than just trade law;
 - It prioritized a set of comprehensive international rules, in spite of those countries that considered that an international regime was “not wise, workable or necessary” (Pomerance, 2000);
 - It allowed a more inclusive negotiation, in which broader alliances and coalitions were possible and useful; and
 - In spite of the preambular language still having some degree of ambiguity, it avoided subordinating the outcome to trade rules or principles.

However, addressing trade issues outside the WTO could also be said to have maintained some legal uncertainty as to the relationship between the Biosafety Protocol and WTO agreements, which has been used by GMO-exporting countries to attempt to create a “chilling effect” on biosafety regulation and policy.



Institute for Agriculture and Trade Policy