

PUBLIC PARTICIPATION IN THE INTERNATIONAL TRADING SYSTEM

Why the World Trade Organization Needs Environmental NGOs

Daniel C. Esty
Yale Center for Environmental Law and Policy

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INTRODUCTION

From the Catholic Church to Amnesty International, non-governmental organizations (NGOs) have long had influence above and beyond their participation in national political discourse (Ghils 1992). NGO prominence as an important dimension of international civil society has increased in the twentieth century (Charnovitz 1997). Trade unions and businesses, for example, have been voting members of the International Labor Organization (ILO) since its creation in 1919. Starting in the 1970s, environmental NGOs¹ emerged as active participants in certain international organizations and supranational political debates (Conca 1996; Princen et al. 1994). NGOs played a very significant role in the negotiations leading up to the 1992 Earth Summit in Rio de Janeiro (Esty 1993; Gardner 1992). The influence of environmental organizations in the creation and enforcement of the Convention on Trade in Endangered Species (CITES) and in the debates over the Montreal Protocol as well as the Law of the Sea is also undeniable (Stairs and Taylor 1992).

Until recently, however, environmental NGOs played a relatively modest role in the wider international domain and, especially, within the international trade regime. Their recent emergence on the trade scene has produced discomfort and even hostility. This reaction, while perhaps understandable, is misplaced. This paper argues that the World Trade Organization (WTO) should accept environmental NGOs, and indeed that the future success of the international trading system depends in part on embracing non-government entities and developing formal roles for them within the WTO.

This article examines the theoretical arguments for and against increased NGO participation in international trade debates, specifically in the context of the WTO. The paper concludes that there is a strong case for expanded NGO activity at the WTO. A formal WTO role for NGOs would help to:

- ensure that environmental externalities do not cause market failure in the international economic system and improve the quality of WTO environmental decisionmaking by providing “competition” to governmental views and by subjecting the prevailing wisdom to ongoing and rigorous review;
- provide the WTO with a better system of checks and balances reflecting the diversity of interests and views in the international policy domain and, in doing so, keep the international trading system abreast of the evolution in international civil society; and
- enhance the WTO’s legitimacy as part of the fabric of global governance by broadening the coalition supporting liberalized trade and blunting environmentalist opposition to open markets.

I. BACKGROUND AND GENERAL UNDERPINNINGS

Environmental groups have recently awakened to the importance of international trade.² A wide range of groups are actively seeking to participate in trade policy debates at both the national and international levels. Within the United States, environmental groups have been given

broad access to the policy development process (Esty 1995). Environmentalists sit on the U.S. Trade Representative's Public Advisory Committees. They are included in Administration briefings on trade issues. They are consulted by USTR attorneys when GATT dispute settlement cases include environmental matters. Environmental leaders regularly testify before congressional committees looking into trade policy issues.

The international picture is, however, rather different. There is no formal role for NGOs at the WTO. They are not allowed to observe, never mind participate in, WTO debate or dispute settlement proceedings. Unlike other international bodies, the WTO has no advisory groups that include environmental groups.³

This paper explores what the proper role of NGOs should be in the international trading system. It examines arguments against broader environmental group participation in the workings of the WTO and then takes up the case for a more formal NGO role.

A. THE CASE AGAINST NGOS

The case *against* a formal role for NGOs in the international trade regime has several dimensions. First, environmental groups may act as "special interests" and thereby distort WTO policymaking. Whenever lobbying of a decisionmaking body is permitted, there exists a risk that certain interests will exert disproportionate influence (Downs 1957; Olson 1965; Lowi 1969; Buchanan and Tullock 1971). According to some critics, the presence of NGOs within the walls of the WTO headquarters on Lake Geneva would lead to such distortions.

This fear seems exaggerated in the WTO context. Special interests already inhabit the WTO. Adding a variety of environmental perspectives to the WTO's internal debates would help to

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counteract the influence of (often protectionist) business interests and therefore reduce, not increase, the risk of special-interest-driven policies. Providing a more diverse set of interests with access to the WTO would allow the groups to monitor each other, exert countervailing pressures, and generally diminish the prospect of "capture" of the WTO by any single interest group.

A more refined version of the special-interest-domination fear focuses on the fact that governments have to trade off competing domestic interests in order to strike agreements that liberalize trade. Trade officials in particular see great benefit in going behind closed doors to cut deals that sacrifice inefficient industries that are hiding behind tariff barriers or other protectionist walls in favor of more open markets. Pursuing the right answer is hard enough, they argue, given the interest group asymmetries and "public choice" problems inherent in trade policymaking (Nichols 1996, 319; Petersmann 1992). Industries that have a great deal at stake in trade policy invest considerable resources in the political process to protect their established positions while the general public, which benefits broadly but not deeply from freer trade, faces much smaller

incentives to become politically active. Many trade observers fear that any role for NGOs will heighten the asymmetries of interest and action among the contending parties.

Many free traders' fear of NGOs is aggravated by a suspicion that environmental lobbyists are closet protectionists or, at least, that they are in league with interests, such as labor unions, that are fundamentally anti-free-trade.⁴ WTO staffers take seriously their role as defenders of the faith with regard to trade liberalization. They seek to fend off protectionists of every stripe no matter how loud the calls for "managed" trade or other actions to soften the competitive pressures of the marketplace. They see a vivid lesson in the experience of the 1930s when protectionist trade policies triggered retaliation around the world, resulting in economic chaos, the Great Depression, and World War II. The WTO Secretariat and many of the national representatives to the WTO see themselves as the guardians of a critical yet fragile international commitment to collective action in support of open markets.

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A second major argument against an expanded NGO role derives from the belief that the WTO should be an *intergovernmental* body. According to this view, the trade policy process works best when governments can speak clearly to each other without a cacophony of other voices. As Nichols (1996, 317) suggests, "the spectacle of domestic constituencies opposing the positions of the governments that are supposed to represent those constituencies" can be distracting. Another strand of this argument recoils at NGOs getting two bites at the apple: one in the national debate over what position their government should take to the WTO and a second one at the WTO itself.

There are two rebuttals to these claims. First, giving NGOs a voice at the WTO, and, more importantly, the opportunity to observe WTO debates and dispute settlement proceedings does not preclude governments from discussing some issues behind closed doors. Second, as discussed in the next section of this paper, we live in a multi-level civil society in which some political debates are better conducted at the international level. Institutions which reflect the complex structure of modern life are likely to be more democratic and durable. Not all countries provide an opportunity for domestic interests to be heard at the national level. Some interest groups, moreover, are transnational in scope (e.g., the Worldwide Fund for Nature). Furthermore, internationally-minded NGOs enrich *national* political discourse by injecting it with learning from international policy debates.

A third set of concerns about the role environmental groups might play in the WTO relates to the *representativeness* of NGOs. It may be difficult to ascertain how many people a particular group represents, and NGOs with ostensibly similar constituencies may present conflicting views. While the risk of confusion is real, it need not be crippling. Just as national officials learn over time which groups represent important perspectives, so too would the officials at the WTO.

At the international level, the credibility and weight given to NGO positions would vary, as it does at the national level, with the political mobilization potential of the group and the quality of its

past contributions to public debates. Some groups would develop reputations for thoughtfulness and good analytic work while other would be known for their misinformed and ill-considered positions.⁵ While the accountability of non-government organizations is an important issue (Tarlock 1992, 75), the need to preserve the value of one's reputation serves as a powerful mechanism of self-discipline.

A fourth series of objections to an expanded NGO role at the WTO centers on inequities that might be created or exacerbated by the particular mix of entities likely to take up the invitation to participate in the work of the trade regime. Environmental groups themselves sometimes seem not to realize that if WTO negotiations are to be opened to them, business representatives must be accorded similar access. When faced with this prospect, environmentalists often become concerned that their voices will be drowned out by better- financed business interests. But the sharpest equity objections arise from developing countries.

Indeed, it is likely that Northern interests, whether environmental groups or business associations, will have more resources to devote to WTO lobbying than Southern interests. Many developing countries object to a greater NGO role at the WTO for just this reason. They fear further dilution of their already modest influence within the international trading system if NGOs, with overwhelmingly Northern perspectives, are allowed to shape WTO policies and decisions. Some countries also fear (although they do not admit it publicly) that NGOs will be less polite than diplomats and draw attention to environmental policy shortcomings, human rights violations, and other governmental failures.

These equity concerns can be addressed. First, much of the NGO participation in the WTO is likely to be "passive." Groups will observe what happens and report back to their members. Second, clear rules should be established to govern NGO lobbying. Limits should be placed, for example, on meals, gifts, trips, etc. that WTO staff can accept from those with interests in WTO decisions. Third, lobbying efforts should be made subject to disclosure requirements. WTO staff (and perhaps national representatives as well) might be required to file reports on who lobbied them on what issues.⁶

The fear that bad policies will be exposed offers no substantive argument against NGOs whatsoever. Policy failures should be put under a spotlight whenever and wherever they occur. Of course, no matter how healthy from a policy point of view, the fear-of-exposure objection presents a very real political obstacle to enhanced NGO participation in the WTO.

Concerns about North-South imbalances could be addressed in a variety of ways. Funds, from either the WTO or member governments, might be made available to support the participation of developing country NGOs. The risk of Northern dominance is, moreover, overstated. Environmental groups exist all over the world, and with modern communications, even the smallest and most distant groups can now make themselves heard. Furthermore, the fact that the number of Southern NGOs is small is not in and of itself troubling. The views of those that do partici-

partate are likely to be given considerable weight because they will be seen as speaking for significant interests. The many competing voices from the North will often present contradictory viewpoints and cancel each other out. In short, the idea of monolithic Northern NGOs overwhelming underfunded Southern interests does not comport with reality.

The fear that bad policies will be exposed offers no substantive argument against NGOs whatsoever. Policy failures should be put under a spotlight whenever and wherever they occur. Outright rudeness can be punished by exclusion from future access, but a lack of *diplomacy* on the part of NGOs — a willingness to say what governments dare not — should be encouraged, not discouraged. Of course, no matter how healthy from a policy point of view, the fear-of-exposure objection presents a very real political obstacle to enhanced NGO participation in the WTO.

A final set of criticisms leveled at expanded NGO participation in the WTO concern the practical difficulties of credentialing NGOs and controlling their activities within the organization. While not trivial, the administrative burden should be manageable. Despite the undeniable allure of the WTO, it seems unlikely that all that many NGOs would really be interested in its ongoing work. Moreover, there are a number of models of environmental “crowd control” to draw upon. The preparatory meetings leading up to the 1992 Earth Summit successfully included thousands of NGOs (Gardener 1992). Many national governments also have well-established procedures for coordinating NGO participation in public decisionmaking. Charnovitz (1996) offers examples from a number of international bodies and U.S. structures that could be built upon in establishing workable modalities for NGOs in the WTO.⁷

B. THE CASE FOR NGOS

The growing literature on NGOs identifies a variety of roles that nongovernment entities play on the international scene. Depending on the circumstances, they may act as:

- service providers, often as government subcontractors (Bebbington and Farrington 1993);
- watchdogs or private enforcement agents (Wapner 1995; Cameron and Ramsey 1995; Sands 1996);
- lobbyists (Zadek and Gatward 1996; Cameron and Ramsey 1995);
- stakeholders (Shell 1996) or countervailing interests (Eikeland 1994);
- agents of civil society enriching the public dialogue and representing interests not reflected in national government viewpoints (Spiro 1994; Susskind 1994);
- policy analysts or expert advisers to governments (Charnovitz 1996; Susskind 1994; Cameron and Ramsey 1995);
- mobilizers of public opinion (Lindborg 1992; Clark 1995);
- bridges between state and non-state actors connecting local and global politics (Princen and Finger 1994; Gordenker and Weiss 1996);
- change agents offering new viewpoints (Susskind 1994; Nerfin 1986); and
- consultants to industry (Eikeland 1994).

The purpose of this article is not, however, to catalogue *what* NGOs could do at the WTO but rather to explore *why* they should play an expanded role in the international trading system. There are three strands to this analysis, which might be called the *economic*, *political theory*, and *political economy* arguments for opening the trade regime more formally to environmental NGOs.

1. The Case from Economics

The economic case for expanded roles for NGOs at the WTO derives from the risk of market failure in the international economic system in the absence of a mechanism for internalizing environmental externalities. It is well established that transboundary pollution spillovers create a risk of market failure that could undermine international economic efficiency and diminish the welfare gains from an open world trading system (Bhagwati and Srinivasan 1996, 167; Baumol and Oates 1988). What seems to be disputed, or is at least the source of confusion, is the scope of transboundary environmental externalities. Recent advances in environmental analysis have resulted in the discovery of a number of previously unrecognized pollution externalities. These include, most notably, depletion of the ozone layer by chlorofluorocarbons (CFCs) and possible climate change due to the accumulation of greenhouse gases in the atmosphere (Kerr 1994; 1995). Recent scientific work has also broadened the acknowledged geographic scale of a number of previously identified environmental problems. For example, scientists believe that the discovery of DDT, long banned in Canada and the United States, in the Great Lakes demonstrates that high level winds can transport airborne chemicals thousands of miles, in this case from Mexico (Rappaport 1985). Other recent studies have revealed significant transboundary spillovers of acid rain, heavy metals, and bioaccumulative toxins (Fitzgerald 1993; British Antarctic Survey 1996).

In addition to the potential for market failure from transboundary externalities, the “tragedy of the commons” poses additional risks to the international economic system. Absent a mechanism for achieving “collective action,” individual nations and their industries have no incentive to manage common resources in a sustainable fashion. The rapid depletion of the world’s fisheries provides an example of what can happen without policy coordination.

Without a mechanism for achieving “collective action,” individual nations and their industries have no incentive to manage common resources in a sustainable fashion. The rapid depletion of the world’s fisheries provides an example of what can happen without policy coordination.

One need not expand the list of potential market failures to the more controversial claims about “economic” externalities and the risk of a regulatory race to the bottom (Esty 1996; Revesz 1992), psychological externalities (Anderson 1992), and intergenerational equity (Brown Weiss 1989) to be convinced of the need for environmental policy coordination on a global scale. Of course, the first good alternative might be a stronger international

environmental regime. Authoritative environmental analysis and decision-making by a Global Environmental Organization (GEO) could be incorporated by reference in the decisions of the WTO (Esty 1994). But there is little prospect of a GEO being created in the near future. Thus the trading regime must manage the risk of environmentally-derived market failures. Failure to do so invites inefficiency and reduced social welfare, not to mention environmental degradation.

One can, of course, accept the need for an environmental dimension to the international trading system without believing that environmental NGOs should have an expanded presence at the WTO. Because environmental policymaking is fraught with uncertainties, it is extremely valuable to have a diversity of perspectives challenging the prevailing science, risk analysis, and

policy conclusions. Thus, if the best thinking and analysis about environmental problems is to be brought to bear, NGOs must be involved. Some trade analysts argue that competing viewpoints are welcome but it is the responsibility of national governments to advance such alternative policy perspectives. “Regulatory competition” theory also suggests that a world of decentralized governments “competing” for new investment and industries will generate various responses to difficult environmental policy questions and thus yield optimal results (Revesz 1992).

Policy “competition” is certainly to be encouraged. In light of the high degree of uncertainty interest in environmental decision-making having a range of approaches to any particular problem being tested and implemented by various governments is likely to generate useful information. One should not, however, assume that the best “competitors” in the environmental policy “market” will be governments (Esty 1996b). While the American legal literature is rich in references to the benefits of states as “laboratories,” in the environmental realm, the best intellectual competition to governments comes from NGOs.

Because so much of the difficulty in environmental policymaking derives from weak technical and scientific underpinnings and faulty causal assumptions, what is most needed for good policy is better data collection and analysis.

Because so much of the difficulty in environmental policymaking derives from weak technical and scientific underpinnings and faulty causal assumptions, what is most needed for good policy is better data collection and analysis. This requires laboratory resources, skilled personnel, and carefully gathered ecological and epidemiological data. Most WTO members cannot mount this type of serious technical work, and especially not across the full spectrum of public health and ecological issues. Thus, relying on competing government analyses to sharpen the analytic content of WTO decisions at the intersection of trade and environmental policy makes little sense. In the environmental field, states are not the best laboratories; laboratories are the best laboratories. To the extent technical sophistication and analytic rigor are needed to put forward the best environmental thinking, NGOs are often well-positioned to advance the debate.

The benefits of competing analysis by business and environmental groups is well established in the domestic realm. The New York-based Environmental Defense Fund’s work on emissions trading directly shaped the acid rain provisions of the 1990 U.S. Clean Air Act. Pollution prevention as an environmental strategy advanced considerably as a result of the analysis of the environmental think tank INFORM. Similar benefits can be expected at the international level if the proper structures are put in place to receive the information available from NGOs.⁸

To return to the economic argument, a WTO without NGO perspectives resembles a monopolized market. If high barriers to entry are erected, potential producers who are able to offer goods (in this case, ideas) at a lower price or better quality are kept out of the market to the detriment of consumers (Downs 1957). To the extent that information and ideas are such a commodity in the international economic context, there are important reasons to open up the WTO debate to a wider range of intellectual competitors. Because the internal coherence and success of the international trading depends on finding effective and efficient ways to address environmentally-derived threats of market failure, the WTO should support the broadest degree of competition in new thinking possible.

2. The Argument from Political Theory

International relations theory once focussed on states as the prime (or even the only) actors on the international stage. The ‘liberal’ critique of traditional “realist” theory suggests that an important array of non-state actors already exists (Shaw 1994) and that international affairs are not solely a function of the individual wills of governments (Gordenker and Weiss 1996). As noted earlier, NGOs have played an active part in the international environmental arena for some time. Because this trend toward an expanded role for non-government actors seems likely to be repeated in other international fora, it seems clear that the “quiet days of trade adjudication and policymaking are gone” (Shell 1996, 380).

The presence of NGOs in the trade policy process mirrors the emergence of a broader set of actors in “global civil society.” People’s interactions with each other no longer occur solely through the medium of national governments. A variety of transnational forces and groups shape individual identity and thus international relations. These new voices promise to complicate negotiations, but they may also help to produce more sound and durable results. Indeed, NGOs can help to mediate disputes between governments, provide new fora for discussions and policy development, and filter information down to everyday citizens about the activities taking place at the global level. As Shell (1996, 380) suggests, trade liberalization through closed-door negotiations among diplomatic elites from various nations is no longer a tenable means of achieving policy progress. We must anticipate, he observes, a new “noisier” process of trade negotiation.

States are, furthermore, imperfect representatives of public opinion. When governments speak with one voice they inevitably neglect minority viewpoints within their jurisdiction. NGOs can ensure that views not reflected by national governments can be heard in the course of the international policy development process. Moreover, where individuals from various countries share a common vision about international policy across national boundaries, they can form a global NGO that might be more effective internationally than in any country alone. The Worldwide Fund for Nature, with its global programs of wildlife conservation, might represent one example of this phenomenon. The extensive geographic scope of many ecological, public health, and animal welfare concerns makes this transnational representation especially valuable.

Broader public participation will make the WTO a stronger and more democratic organization. For this reason, governments ought to promote the activities of their citizens in engaging in policy debates beyond the state level (Streeten 1993). By creating a broader and richer “WTO politics,” NGO participation in the international trading system would make the WTO more representative and better able to perform its responsibilities in the emerging system of global governance.

3. The Political Economy Argument

Because an NGO-enriched WTO would consider a diverse range of viewpoints and make decisions more democratically, it would gain legitimacy. Public participation in and understanding of the trade regime’s decision processes is critical to the acceptance of its political outcomes as fair and worthy of respect. Enhanced WTO legitimacy will be critical to public support for further trade liberalization. It is of more than academic interest that while the panel decisions of the WTO (and GATT before it) have been subject to virulent attack, the U.S. Supreme Court,

which has invalidated a much larger number of state environmental laws deemed inconsistent with the Commerce Clause of the U.S. Constitution, has never been similarly attacked for its “trade-environment” decisions (Geradin 1997). Clearly, the Supreme Court has much more institutional legitimacy than the WTO.

Respect for the U.S. Supreme Court’s decisionmaking derives, in part, from the fact that arguments are heard in open court, briefs are made public, and decisions are published as soon as they are rendered. Any party that wishes to provide input to a case before the Court may do so in an *amicus curae* brief. The Supreme Court’s environmental decisions are viewed as authoritative in part because the Court elicits technical information when cases require it. Submissions from NGOs are often part of the data pool on which the Court draws. Special “masters” are even appointed when particularly important technical questions underlie a decision.

**A greater NGO role
would strengthen the
WTO as a whole.**

Although new WTO provisions allow dispute panels to seek technical or scientific advice when environmental issues are at stake, no panel has availed itself of this opportunity. And the WTO has no provision for soliciting expert opinions from interested non-governmental bodies. A greater NGO role at the WTO would enrich the institution’s deliberations, enhance the legitimacy of its dispute settlement process, and strengthen the institution as a whole.⁹ For WTO decisions to have legitimacy, they must be reached fairly and openly, be based on complete information, and consider the full array of interests at stake. NGOs can help to fulfill these requirements, and thus help to preserve the integrity of the international trading system. Rather than treating environmental groups as unwelcome special interests, the WTO should therefore open its doors and invite them to contribute to the maintenance of the international economic system.

Not only would broader NGO participation in the WTO improve the quality of its decisions and the legitimacy of its judgments, it would also expand support for trade liberalization more generally. If environmentalists felt that the WTO took their concerns seriously, there would be much less environmental opposition to expanded free trade. As a matter of political strategy, bringing more environmental groups into the always fragile pro-free-trade coalition would be very beneficial, particularly in light of the role environmentalists often play in the United States as a “swing” constituency in hard fought battles over trade agreements.

II. MODELS FOR A NEW NGO ROLE AT THE WTO

Environmental NGOs have dramatically broadened their horizons in recent years (Bramble and Porter 1992). The “sustainable development” paradigm developed by the Brundtland Commission in 1986 and advanced at the 1992 Rio Earth Summit has led many groups to focus on the interaction between economic forces and environmental results. This emphasis on policy linkages led environmentalists in the late 1980s and early 1990s to target the role of the World Bank as an engine of environmental degradation and possible future environmental improvement (Rich 1994). Success in building greater environmental sensitivity into the Bank’s rules and procedures has driven the environmental community to look for other points of economic-environmental leverage and other institutions to “green.” Their interest in international trade is unlikely to abate until comparable progress has been achieved.

While the U.S.-Canada Free Trade Agreement attracted little attention from the environmental communities of either country, the announcement in 1990 that the United States intended to

The NAFTA experience may be instructive for the WTO. The environmental community carefully tracked the progress of the negotiations and contributed to the debate over NAFTA at every stage. Some groups aggressively fought the proposal. Others ultimately supported the agreement in return for commitments to environmental provisions both in NAFTA and in an Environmental Side Agreement.

negotiate a trade agreement with Mexico brought home the trade issue for environmentalists (Esty 1994). The NAFTA experience may be instructive for the WTO. The environmental community in the United States and to a lesser extent in Canada and Mexico carefully tracked the progress of the negotiations and contributed to the debate over NAFTA at every stage. Some groups, particularly those that reject sustainable development in favor of a limits-to-growth paradigm, aggressively fought the proposal (Audley 1997; Esty 1994). Others, such as the Environmental Defense Fund and the National Wildlife Federation, ultimately supported the agreement in return for commitments to environmental provisions both in

NAFTA and in an Environmental Side Agreement (North American Agreement on Environmental Cooperation, Sept. 8-14 1993, U.S.-Can.-Mex., 32 I.L.M. 1480).

Both the Bush and Clinton Administrations took seriously the environmental NGOs' interest in NAFTA. United States Trade Representative (USTR) officials met with environmental group leaders on a regular basis. Environmentalists were placed on the key USTR Public Advisory Committees. EPA officials were called before the Congress to testify alongside USTR on progress in meeting environmental goals within NAFTA and in environmental cooperation in parallel with the trade agreement. Congressional committees invited environmental group leaders to comment on the integration of environmental concerns into NAFTA. USTR, with the help of the EPA, produced a NAFTA Environmental Review, which offered a variety of thoughtful recommendations to the negotiators about how various public health and ecological concerns raised by the prospect of freer trade might be handled.

Special environmental provisions were written into NAFTA to ensure that the Parties to the Agreement would not lower their environmental standards or relax their enforcement of environmental rules to attract investors (NAFTA Article 1114). Special provisions acknowledged the importance of major multilateral environmental agreements (Montreal Protocol on ozone layer depletion, Basel Convention on Waste Exports, CITES agreement on trafficking in endangered species, and several others) and made it clear that NAFTA would not override obligations established by these agreements.

The NAFTA Environmental Side Agreement reinforces the commitment to attention to environmental considerations. It places additional emphasis on enforcement by each country of its own national environmental laws and establishes a provision by which any "persistent pattern of failure to effectively enforce" environmental regulations can be raised as an unfair trade practice.¹⁰ It also sets up the trilateral North American Commission on Environmental Cooperation (CEC) (Envtl. Side Agreement, art. 8.2, 32 I.L.M. at 1485).

The CEC's task is to institutionalize NAFTA-related trade-environment linkages. Specifically, it is called upon to:

- facilitate cooperation between countries on environmental issues;
- serve as a forum for regular ministerial-level meetings;
- provide an independent secretariat to report regularly on significant public health or ecological issues confronting the NAFTA parties;
- ensure that enforcement of environmental rules remains a priority in all three countries and produce an annual report on enforcement activities;
- coordinate with trade officials in the United States, Canada, and Mexico on any issue requiring joint trade-environment attention; and
- assure ample opportunities for public participation in the development and implementation of environmental laws and programs in the three NAFTA countries.

All of this was negotiated and exhaustively debated without derailing NAFTA.¹¹ Today the CEC is operating smoothly. It has considered petitions from a number of environmental groups claiming that a NAFTA party has derogated from its environmental obligations (CEC 1995 Annual Report) without disrupting trade flows. In fact, it seems that the CEC provides a useful "safety valve" within the NAFTA institutional structure, ensuring that environmental tensions do not rise to the level where they might disrupt trade.

The Organization for Economic Cooperation and Development (OECD) provides another useful model. It has long undertaken formal outreach to business NGOs through its Business and Industry Advisory Committee (BIAC). Expansion of this process to the environmental community is now being contemplated.¹² OECD members are also free to include NGOs on their delegations to formal meetings, and many nations do so. In addition, the OECD Environment Directorate invites NGOs to informal workshops on almost every issue it considers.

The process under which recent multilateral environmental agreements were produced provides another example of how NGO participation can be accommodated in government-to-government negotiations. Hundreds of NGO representatives attended the preparatory conferences leading up to the 1992 Earth Summit. They observed formal sessions from the balcony and were able to submit position statements on any matter of interest. In the 1992 Climate Change Convention, NGOs played a similar role. These negotiations appear not to have been hampered by, and may have been facilitated through, the presence of NGOs.

III. NGOS IN THE WTO

Attitudes towards NGOs at the WTO must evolve beyond treating these groups as "special interests" whose participation in the trade policy process is tolerated but not welcomed. Instead, to protect the WTO's critical role as managers of the international economic system, the WTO should embrace NGOs as partners whose participation in the trade policy process is of fundamental importance. Such a change in attitude might lead to a number of refinements in WTO practices and procedures.¹³

1. Dispute Resolution

NGOs could be given observer status during formal presentations to dispute panels. The WTO dispute resolution process has evolved from being merely a forum for negotiations among the disputing parties into a quasi-judicial process. In keeping with this evolution, the dispute settlement process should be restructured. Any party with an interest in a matter under consideration should have an opportunity to submit a statement to the panel hearing the dispute. Evidence should be taken in public proceedings. Panel decisions should be released to the public as soon as they are available to the parties.

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The WTO should also make more regular use of the mechanism available for consulting outside environmental experts when a scientific or technical perspective might assist the panelists in analyzing environmental issues that underlie a trade dispute. Although this provision has now been on the WTO's books since the conclusion of the Uruguay Round negotiations, it has never been invoked. The failure to consult outside environmental experts in the case involving Brazil and Venezuela's challenge to the data collection provisions of the U.S. Clean Air Act is especially egregious. Involving non-governmental organizations in this type of dispute might also improve the technical content of the ultimate panel report and enhance the legitimacy to the institution's role as an arbiter of trade-environment disputes.

2. Policy Development

Opening up the WTO's "formal" sessions to NGO observers would help to illuminate the decisionmaking process that undergirds the international trading system. Such "transparency" would help build public understanding of how the WTO operates. Further outreach might be undertaken through open meetings, to which any interested NGO would be invited, on all issues under debate within the WTO. In addition, the WTO should establish a formal advisory committee on environmental matters that would include representatives from business, labor, consumer, and environmental organizations (Esty 1996a).

The WTO has made some steps to improve the transparency of its procedures over the last several years. It now publishes a variety of newsletters, has a home page on the Internet (<http://www.unicc.org/wto>), and has released summaries of the meetings of its Committee on Trade and Environment. In July 1996, the organization adopted new guidelines for the release of "restricted" materials. While these provisions are likely to mean faster public access to some WTO materials, it is not clear whether they will actually make the work of the WTO truly transparent.

3. Committee on Trade and Environment

The WTO's Committee on Trade and Environment (CTE) has gotten off to a disappointing start. Its lack of progress in finding ways to integrate trade and environmental policymaking can, in part, be attributed to the slanted terms of reference with which it must operate. The call for "surveillance of trade measures used for environmental purposes" does not inspire confidence that the WTO is taking seriously the need to ensure that environmental externalities are controlled to avoid market failure in the global economic system. The CTE's closed structure has also contributed to its difficulties. The debates to date have been dominated by trade officials with little contribution from an environmental perspective. The Committee's work would benefit from more open discussions that included NGOs, not to mention a larger number of environmental officials from WTO governments. Fresh thinking on the range of difficult issues with which it must struggle might break the current policy stalemate. In trying to sort out the appropriate relationship between multilateral environmental agreements and WTO disciplines or the optimal use of eco-labels, the views of various NGOs would help to sharpen the debate.

CONCLUSION

In the absence of a functioning global environmental regime, the WTO cannot avoid making decisions that have environmental policy implications. The WTO needs NGOs to help it achieve a proper integration of environmental considerations into the international trading system. The presence of NGOs will bring new information to bear and provide competition in the marketplace of ideas otherwise monopolized by a too-narrow set of government perspectives. Drawing NGOs into the international trading system will also strengthen the WTO as an institution and ensure that it reflects the growing diversity of international civil society. By embracing NGOs and providing opportunities for their observation of and participation in WTO policy development and dispute resolution processes, the WTO will enhance its credibility, authoritativeness, and legitimacy. The result will be a stronger, not weaker, international trade regime.

END NOTES

¹ This paper considers environmental NGOs to be any organization independent of government that works on public health, ecological, or animal welfare issues. These include single issue organizations, such as Rhino Rescue, multiple issue organizations, such as World Wildlife Fund, and business entities, such as the International Chamber of Commerce. It will, however, focus on environmental groups since this subset of the NGO world is a new presence in the international trading system; business groups have long played a role in trade policy debates (Charnovitz 1995).

² Esty (1994, 27-28) discusses the emergence of environmental NGOs on the trade scene. Note that the U.S.-Canada free trade agreement was negotiated in the mid-1980s with little interest from either country's environmental community.

³ Although this paper focuses on the role of NGOs within the WTO, the arguments apply with equal force in other trade-related organizations such as the European Community, the U.S.-Canada-Mexico structures supporting NAFTA, and the APEC Secretariat. They may also apply in the broader debate over the access of non-state actors to international organizations generally.

⁴ Environmentalists, of course, are not monolithic. Some environmental advocates, especially adherents to the "limits to growth" paradigm, are against freer trade because they fear (correctly) that it will promote economic growth. Others, particularly those that believe in "sustainable development," support trade liberalization as a way of generating economic growth and wealth, some portion of which may be devoted to environmental investments. *See* Esty (1994) and Audley (1997) for a discussion of the diversity of the environmental community with regard to trade issues.

⁵ In fact, the quality of the information, arguments, and analysis that are presented is likely to be the dominant determinant of NGO influence at the WTO where international bureaucrats are more immune to the importuning of wealthy lobbyists advancing self-interested positions.

⁶ Such disclosure requirements would have broad benefits, revealing the full range of interests that have sought to shape outcomes. The light this would shed on WTO decision-making would be both illuminating and helpful as a discipline on special interests of all sorts.

⁷ See also the discussion of the models provided by the OECD, NAFTA, UNCED, and the U.S. Supreme Court offered in Section II below.

⁸ Note, however, that the benefits of NGO participation derive largely from groups operating in an analytic mode. This suggests that NGOs should focus their resources, at least in part, on producing analytically rigorous policy recommendations not just on lobbying, advocacy, or political campaigning. They should also build stronger bridges to the academic and research communities.

⁹ Under the new WTO dispute procedures, in which the decision of a panel will automatically be adopted unless a negative consensus forms, the transparency and openness of the dispute settlement process will be even more important.

¹⁰ Although the agreement permits “monetary enforcement assessments” (Articles 35-6), the range of intervening steps that must be followed before such penalties can be imposed makes it very unlikely that any “eco-duties” will ever be imposed (Esty 1995).

¹¹ A lawsuit by several groups bent on stopping NAFTA sought to compel USTR to produce an Environmental Impact Statement (EIS) under the National Environmental Policy Act. The U.S. Circuit Court of Appeals for the District of Columbia denied the request, sparing USTR the inevitable delay entailed by the full-blown EIS process.

¹² The Declaration from the 1996 OECD Ministerial Meeting “warmly welcomed the proposal of international environmental non-governmental organizations for the establishment of an NGO environmental advisory committee to the OECD” and invited interested NGOs to submit a formal proposal for such a body.

¹³ Not all “public” participation is a good thing. Some forms of NGO involvement in the WTO might result in special interest domination of decision processes. NGO observation and the opportunity for contribution to WTO discussions is valuable but manipulation and contortion of decisions by special interests must be avoided.

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ABOUT THE AUTHOR

Daniel C. Esty is a professor at the Yale School of Forestry and Environmental Studies and the Yale Law School, and Director of the Yale Center for Environmental Law and Policy. He is a Founder and Director of the Global Environment and Trade Study, a consortium of research institutions committed to providing analytic support for efforts to make trade liberalization and environmental protection mutually supportive.

From 1989, Dan served in various positions at the U.S. Environmental Protection Agency including Special Assistant to Administrator William Reilly, Deputy Chief of Staff, and Deputy Assistant Administrator for Policy, Planning and Evaluation. During this period, he participated in a number of international negotiations including the London Amendments to the Montreal Protocol, the 1992 Climate Change Agreement, and the Rio Earth Summit. He was the chief EPA negotiator for the North American Free Trade Agreement and the Uruguay Round GATT negotiations. Dan is the author of *Greening the Gatt: Trade, Environment and the Future* (1994) and editor (with Simon Tay) of *Asian Dragons and Green Trade* (1996) and (with Marian Chertow) of *Thinking Ecologically: The Next Generation of Environmental Policy* (1997).

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GETS can be contacted at: 205 Prospect Street, New Haven, CT 06511; tel: (203) 432-5216; fax: (203) 432-4373 or on the World Wide Web at : <http://www.gets.org/gets>.

The International Centre for Trade and Sustainable Development was founded in September 1996 as a link between the trade, environment and development communities. It seeks to facilitate access of interested non-governmental organizations to the multilateral trading system and to promote more open public participation in international trade decision-making.

