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WTO rules and practices for transparency and engagement with civil society organizations

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World Trade Organization
Economic Research and Statistics Division

<p>WTO rules and practices for transparency and engagement with civil society organizations</p>
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by

Maria Perez-Esteve

World Trade Organization

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WTO rules and practices for transparency and engagement with civil society organizations

Maria Perez-Esteve¹

Abstract:

In a rapidly changing trade environment, marked by economic slowdown and impasse in the Doha Round, the success of the WTO in promoting and legitimizing the rules-based multilateral trading system rests, to a large extent, on maintaining effective relations with civil society, including non-governmental organisations.

This paper provides an overview of the WTO's rules and practices for transparency and engagement with NGOs. First, it looks at both internal and external transparency. Second, it deals with how the WTO engages with civil society and illustrates how this has evolved over time. Third, it looks at how NGOs and civil society contribute to the dispute settlement process. In concluding, it explores whether there is scope for enhancing the WTO's current practices for engagement with NGOs, and if so how. It also offers some suggestions on how NGOs can render the WTO more accountable to the public.

One area in which the WTO's practices for transparency and channels of engagement with civil society actors has evolved considerably is dispute settlement. Although only WTO members can bring a dispute to the WTO, the practice of opening hearings to the public, upon the parties' request, and inviting contributions from non-members, including NGOs, shows to what extent WTO transparency and engagement with civil society have improved in recent times. In particular, NGOs have assisted parties to a dispute prepare their briefs. This has included annexing studies to the parties's submissions, submitting amicus curiae briefs, and supporting the panel as experts under Article 13 of the WTO's Dispute Settlement Understanding (DSU).

Forging links with civil society is a formidable task for any intergovernmental organization; at issue are the rights of governments to set WTO policy and the need to respect the voices of those without a vote. Although the WTO's rules for engagement with civil society based on Article V:2 of the Marrakesh Agreement and further elaborated in the 1996 Guidelines have not been updated, the actual practices for engagement have evolved considerably over time and it is likely that they will continue to be improved upon in the future.

Keywords: NGO's, WTO, Civil Society, Transparency

JEL Codes: F1, F5, F6

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Introduction

The World Trade Organization (WTO) is the guardian of the rules-based multilateral trading system (MTS), negotiated by its Members and safeguarded by dispute settlement. Adherence to WTO core principles of non-discrimination, predictability and transparency helps Members achieve gains from trade, thus enlarging consumer choice and catalysing growth. Since its founding after World War II, the GATT/WTO has proven to be an invaluable public good; never more so than in the present financial crisis when its rules and disciplines have been a blueprint for containing protectionism, thus avoiding the pitfalls of the early 1930s. But the strengths of the MTS are not readily understood based as they are on arcane economic arguments. As Samuelson argues, the principle of comparative advantage is the most counter-intuitive truism in economics.² Consequently, as a result of these misconceptions, often expressed in emotional terms, anti-WTO protests -as exemplified by the riots in Seattle in 1999, have gone a long way in contesting the benefits of the MTS. In response, the WTO has built an extensive outreach program over the years to gain support as a public good that is central to economic welfare.

Against the background of a rapidly changing trade environment, the multilateral trading system embodied by the WTO is facing new challenges while it is still in the process of dealing with old ones. After ten years of negotiations, four ministerial conferences, thousands of pages of negotiating texts, and several near collapses, the latest Round of multilateral trade negotiations --the Doha Round is at an impasse. Launched a decade ago, Doha is the first trade negotiation under the auspices of the WTO, following on the heels of nine GATT rounds conducted over more than four decades. The Doha impasse carries costs in terms of economic growth, jobs, poverty reduction, business confidence and public support of the WTO.

Given the current global economic situation and the impasse of the Doha Round, the success of the WTO in promoting and legitimizing the rules-based multilateral trading system rests, to a large extent, on maintaining effective relations with civil society, including non-governmental organisations (NGOs).³ As the reach of the multilateral trading system continues to expand to new areas beyond traditional tariff-cutting and the rules are being applied domestically, NGOs and the general public are increasingly holding the WTO to account. The WTO is being called upon to respond to the concerns of the average citizen and is being held accountable for a range of complex issues including the impact of trade and trade policy on health, food security, the environment,

² In simple terms, the principle of “comparative advantage” says that countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best. Although, comparative advantage is evident whenever countries trade and in whatever format – bilateral, regional or even outside any trading arrangement it remains part of the foundation of the economic case for an open multilateral trading system.

³ Within the WTO there is no formal definition of what constitutes an NGO neither is there any criteria that differentiates the different types that exist. Public action NGOs, trade unions and business associations are accredited to attend Ministerial Conferences. In general, within the WTO NGOs have to demonstrate that their work is concerned with matters related to those of the WTO. The use of the term NGOs within the present WTO context comprises public action NGOs, trade unions, and business associations. The wider concept of civil society refers to, amongst others, professional associations, coalitions and advocacy groups, citizen's networks, NGOs and the general public.

economic development, and human rights (WTO 2007). In addition, NGOs are increasingly mobilizing to influence trade-policy making at the WTO, including the negotiations and the position of WTO Members to pursue their particular agendas, interests and objectives.

This paper provides an overview of the WTO's rules and practices for transparency and engagement with NGOs. The aim is to look at what these practices are and to explore possibilities of further engagement within the confines of the existing mandate.

The main findings suggest that although there is scope for designing and implementing new creative initiatives that will continue to enhance the WTO's engagement with NGOs and civil society, the reality is that the WTO has done as much as possible within the confines of its current mandate and taking into account the intergovernmental and Member-driven character of the WTO. Although nobody contests the added value that greater participation of NGOs would bring to the work of the WTO including, additional information and technical expertise, on-the-ground experience, perspectives that transcend national interests in dealing with economically and politically sensitive issues, and enhanced accountability of the WTO to the public at large, there are certain WTO members that challenge NGOs' direct involvement in the WTO, particularly in the decision-making process. The current improvements in the WTO's practices for transparency and engagement with NGOs and civil society, although significant are considered modest concessions relative to the demands made by a number of WTO Members, NGOs, and civil society actors. The reluctance to reconsider WTO procedures on relations with NGOs and civil society actors is due to a lack of consensus among Members.

One area in which the WTO's practices for transparency and channels of engagement with NGOs and civil society actors have evolved considerably is dispute settlement. Although only WTO Members can be parties to a WTO dispute, the practice of opening hearings to the public, upon the Parties' request as well as the contributions that non-Members are permitted, including NGOs and civil society actors demonstrate that these practices have advanced over time. In particular, they have contributed by assisting the parties to the dispute to prepare their briefs or annexing studies to their submissions, submitting *amicus curiae* briefs, and supporting the panel as experts under Article 13 of the Dispute Settlement Understanding (DSU).

The objective of this paper is neither to assess the legitimacy of NGOs' claims to enhanced transparency and participation in the WTO's work nor to consider the validity of some of the views put forth by WTO Member governments in this regard. The aim is to provide an overview of the WTO's rules and practices for transparency and engagement with NGOs and to assess these taking into account the current realities as they exist today -the split among Member governments regarding this issue and the intergovernmental and Member-driven character of the WTO.

The structure of the paper is as follows. First, it looks at the WTO's rules and practices for transparency, including internal and external transparency. Second, it provides an overview of the WTO's rules and practices for engagement with civil society and illustrates how they have advanced over time. Third, it looks at how NGOs and civil society can contribute in the dispute settlement process. In concluding, it explores whether there is scope for enhancing the WTO's current practices for engagement with NGOs, and if so how. Finally, it offers some suggestions on how NGOs can render the WTO more accountable to the public.

I. WTO rules and practices for transparency

Transparency is one of the main pillars of the multilateral trading system. The definition provided in the WTO Glossary refers to transparency as the degree to which trade policies and practices, and the process by which they are established, are open and predictable (Halle and Wolfe 2010). The transparency function within the WTO fills information gaps, enables compliance and assists parties to uphold their rights (WTO 2007).

Within the WTO one can distinguish between two types of transparency; internal and external transparency. Internal transparency refers to the practices for transparency between Member governments, whereby governments have to inform the WTO and fellow-Members of specific measures, policies or laws through domestic publication obligations and regular "notifications" to the WTO; the WTO also conducts regular reviews of individual countries' trade policies through the trade policy reviews and the transparency mechanism for all Regional Trade Agreements (RTAs). More recently, the WTO also carries out regular reviews of developments in the international trading environment within the context of the economic and financial crises. External transparency refers to the practice of keeping the public informed of the WTO's work and activities, including the negotiations.

1. Internal Transparency

a) Publications and Notification Obligations: Keeping fellow-Members and the WTO Informed

Transparency between Members has always been a basic GATT obligation. The old GATT contained multiple domestic publications, notification to the GATT Secretariat and transparency requirements, both at the national or domestic level. The basic provision on transparency and publication is contained in Article X of the GATT on *Publication and Administration of Trade Regulations*. It calls for Members to publish promptly in a domestic accessible Gazette any measure, including laws, regulations, judicial decisions, and administrative rulings of general application relating to GATT matters, as well as any agreement affecting international trade policy to enable governments and economic actors to become acquainted with them. These old obligations have been expanded in the WTO Agreement.

Often the only way to monitor whether commitments are being implemented fully is by requiring countries to notify the WTO promptly when they take relevant actions. For that reason, all WTO agreements require governments to notify new or modified trade measures at the national level first and to the WTO Secretariat before being implemented.⁴ For instance, specifics of any new antidumping or countervailing legislation, new technical standards affecting trade, changes to regulations affecting trade in services, and laws or regulations concerning the intellectual property agreement all have to be notified to the appropriate body of the WTO (WTO 2010a). Special groups are also established to examine new free trade arrangements and the trade policies of countries joining as new members (WTO 2010a). Another means of improving internal transparency since the beginning of the WTO is through cross-notifications, whereby a Member notifies the WTO of a

⁴ For a detailed overview of the notification requirements at the WTO see Marceau and Pedersen, 1999.

measure not notified by another Member – this is possible under the SCM Agreement and the RTA Transparency Mechanism. This practice ensures further transparency and forces the initiating Member to justify its position concerning such cross-notified measure. Overall, although the record of compliance with notification requirements has improved considerably in the past two years, more needs to be done, particularly in some areas, in order to ensure full transparency between Member governments.

b) Peer Reviews: The Trade Policy Review Mechanism, the Transparency in RTA Mechanism and the Trade-Monitoring and Surveillance Exercise

The other main practice for ensuring transparency between Member governments is through the WTO's distinct practice of "peer review" in committees and other bodies which plays an important role in this regard. The regular surveillance of national trade policies carried out through the Trade Policy Review Mechanism (TPRM) is a good example of this practice. These reviews encourage governments to follow more closely the WTO's rules and disciplines and to fulfil their commitments. They also enable outsiders to understand a country's policies and circumstances, and they provide feedback to the reviewed country on its performance in the system. Above all, this mechanism offers an additional means of encouraging transparency both domestically and at the multilateral level.

Moreover, in 2006, the General Council established, on a provisional basis, a new transparency mechanism for all Regional Trade Agreements (RTAs).⁵ This mechanism adds precision to the notification requirements under Article XXIV, the Enabling Clause and Article V of the GATS. In addition, pursuant to the RTA transparency mechanism, members participating in new negotiations aimed at concluding an RTA and those party to a newly signed RTA shall endeavour to inform the WTO and provide it with information about the agreement in the form of an "early announcement" (including the official name, scope, date of signature, foreseen timetable for the entry into force, etc.). Following entry into force and notification of the Agreement, the parties are required to provide substantial information about the agreement (such as tariff concessions under the agreement and MFN duty rates – for goods, trade or balance of payment statistics, GDP data or production statistics, etc.) to enable the Secretariat to prepare a factual presentation of the Agreement. Another important feature is the requirement that Members notify the Secretariat every time there is a change in their agreement and also provide a summary of implementation once the agreement is fully implemented. The mechanism also contains other modalities to facilitate the notification and transparency, such as allowing for technical support for developing countries that would require it and a database on RTAs which makes publicly available information on all RTAs notified to the WTO.

More recently the WTO's trade-monitoring exercise initiated by the WTO Director-General in early 2009 to monitor developments in the international trading environment within the context of the economic and financial crises is another good example of the role of multilateral "peer review" for transparency purposes. The trade monitoring has become an important exercise which provides Members and the general public the possibility to examine protectionist trends around the world. It has shown that the WTO proved to be a useful multilateral insurance policy against

⁵ WTO (2006) document WT/L/671 of 18 December 2006.

resurgence of protectionism in times of crisis. A similar monitoring exercise that looks at both trade and investment measures was activated subsequently, in response to the G20 request. This monitoring and surveillance exercise undertaken by the WTO, OECD and UNCTAD relies heavily on governments' provision of relevant information and the verification of recorded trade measures. But, the WTO Secretariat also draws on additional sources of information. This exercise aims to contribute to improve the multilateral transparency of trade and investment policies and confirms the importance of increased transparency for the smooth functioning of the multilateral trading system. Further progress in this area ultimately depends on active participation by all Members.

c) Transparency in the Decision-Making Process

The need to enhance transparency in the WTO's decision-making process became apparent during the first Ministerial Conference held in Singapore in 1996 when a number of developing countries were sharply critical of the WTO's informal consultative decision-making process because of its exclusive nature. In particular, the configuration of the informal consultations held in the "Green Room" which included a number of Members while excluding others from the negotiations, in particular smaller delegations, was criticized by many who began campaigning for change. These criticisms were best exemplified during the Seattle Ministerial Conference (MCM) in 1999. This Conference brought to light, once again, serious concerns related to internal transparency and the continual exclusive nature of the decision-making process. In order to address these concerns, the General Council decided in February 2000 to devote special attention to examine the WTO's practices for internal and external transparency and inclusiveness of WTO decision-making.⁶

The results of the consultative process undertaken by Members in 2000 and again in 2002 following the launch of the Doha Round in 2001 lead to the articulation of a series of principles and practices for the negotiations to guide the organization of work of the newly established Trade Negotiations Committee (TNC) and the work of the Chairpersons of the negotiating groups.⁷ These principles and practices were articulated in the statement made by the Chairman of the General Council at the first meeting of the TNC held in February 2002; and endorsed at that meeting. The Principles and Practices set out in Section B dealing with transparency and process point to the need for the TNC in the organization of its own work, and also in its supervision of the conduct of the negotiations to build on the best-practices established over the past two years with regard to internal transparency and participation of all Members.⁸ In addition, these principles and practices when they refer to the role and obligations of Chairpersons of the TNC and negotiating bodies indicate that Chairpersons should ensure transparency and inclusiveness in decision-making and consultative processes taking into account the intergovernmental and Member-driven character of the WTO. Although these principles and practices are expressed in best endeavour language - meaning non-binding - they remain the main point of reference that guides the WTO's current decision-making practices (WTO 2007). Since their adoption there have been fewer expressions of discontent by the Membership regarding the internal transparency decision-making process (WTO 2007). The practice of

⁶ For an overview of the discussions held on transparency in this context see Pedersen (2006) and WTO (2000) document WT/GC/M/57 of 17 and 19 July 2000.

⁷ WTO (2002) document TN/C/1 of 4 February, 2002.

⁸ Ibid.

announcing that a consultative process will take place and the reporting back on the results of these discussions to the whole Membership has injected an element of predictability and transparency that was not present before (WTO 2007). Members that feel they should be consulted normally contact the Chairperson or the WTO Secretariat in order to guarantee that they are part of these informal consultative processes (WTO 2007).

As decisions are made by consensus, informal consultations within the WTO play a crucial role and a lot of efforts are made to ensure that the process is handled correctly, with regular reports to the full membership. The way decisions are forged is through a series of informal consultations of different configurations starting with delegations individually, in twos or threes, in groups of 20-30 interested delegations or "Green Room" meetings and culminating in meetings of the full Membership where the decision is taken. Members consider these practices to be the best compromise possible between efficiency, inclusiveness and transparency in the WTO's decision-making processes.

2. External Transparency

As in the case of internal transparency the need to enhance the WTO's practices for external transparency became evident in the aftermath of the Seattle Ministerial Conference Meeting (MCM). Following the demonstrations and the criticisms voiced during the Seattle MCM by a significant number of NGOs at their inability to participate in and access information regarding the WTO's activities and negotiations, Members acknowledged the need to devote particular attention to the issue of external transparency. Consequently, upon return to Geneva the issue was placed at the top of the WTO's agenda. The outcome of the discussions that ensued resulted in a series of post-Seattle improvements to the WTO's practices for external transparency that have been highly praised.

The WTO's Website: Keeping the Public Informed

The WTO's website plays a vital role in ensuring the transparency of WTO activities. With its frequent postings of news items, official documents, podcasts and videos, it acts as the best source of information on the WTO and is accessible to all.

Use of the WTO website as a means of direct communication with the public dates back to 1996, when the General Council decided to make more information about WTO activities available publicly and to ensure that public information, including derestricted WTO documents, would be accessible on-line. Following the General Council Decision of 2002 on *Procedures for the Circulation and Derestriction of WTO Documents*,⁹ more documents have been made available to the public as soon as they are circulated and the minority of documents that are restricted are now made public more quickly, approximately two months later, instead of the previous six. For example, all notifications by WTO Members are now posted on the WTO's website and are accessible to all. This is important information for the private sector, which may be directly affected by the measures that are notified.¹⁰

⁹ WTO (2002) document WT/L/452 of 16 May, 2002.

¹⁰ A WTO document is an "official" WTO document only if it has been given a WTO symbol. All documents with a symbol are posted on the WTO website. To get a symbol a WTO document must be translated in the

Access to the notifications, which contain information about Members' trade policies and practices, provides private sector enterprises with the stability and predictability needed for them to conduct their day-to-day activities. It also provides NGOs and the general public with information that can be of use for holding governments accountable for their actions.

According to the latest on-line survey undertaken by the WTO in 2011, the primary reason for users to visit the WTO's website is to search for general information on the WTO, news of the negotiations, documents online, material on disputes, trade statistics and publications.¹¹ Over 90 per cent of the survey participants reported finding the WTO web site "very useful" or "fairly useful". In addition to regular updates, interactive features such as on-line chats with the WTO Director-General and discussion forums on specific issues provide interested stakeholders with an opportunity to ask questions and to make their views and concerns known.

Recent figures on visits to the WTO website (14 million visits in 2011, averaging about 1.1 million per month) and feedback from users illustrate the web site's importance as a tool for promoting openness about the WTO's activities to the wider public. The continuous efforts by the Secretariat to make improvements to the website, through greater use of webcasts, podcasts, videos, and discussion forums, attests to the WTO's desire to enhance its communication with the wider public. By the end of 2011, approximately 149,000 individuals had registered with the contacts database to obtain regular email announcements on WTO news (see Figure 1). This contact list is made up of academics, consultants, government officials and students with a particular interest in trade issues.

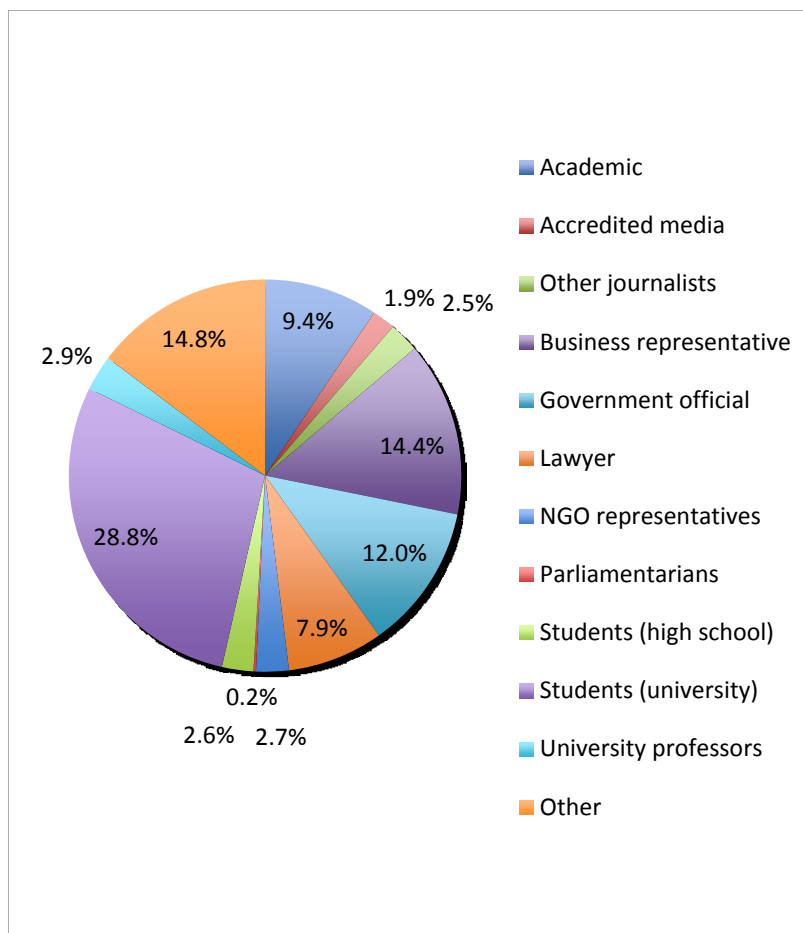
These improvements to the WTO's transparency have benefited both Member governments and other constituencies. In particular, Member governments from developing and least-developed countries who are not able to send large delegations to WTO meetings in Geneva, or who do not have resident delegations in Geneva, have benefited from online access to information about the WTO's work, including the negotiations. Equally, the general public, companies, NGOs, and the academic community are able to keep up to date about the WTO's activities through the website and its email alert system which has 150,000 subscribers, to date.

three official WTO languages. On the website all the WTO documents are available in the three languages and have a WTO symbol which makes the search easier.

¹¹ This information was compiled by the Secretariat from the 2011 WTO Website Survey.

Figure 1:

Individuals registered with the WTO's contacts database, as of end 2011*



*The total may not add up to 100% due to rounding

Source: WTO Annual Report 2012

II. WTO's rules and practices for engagement with civil society

1. WTO rules for engagement with civil society

a) Legal basis

The legal basis for the WTO's rules for engagement with NGOs is provided in paragraph 2 of Article V ("Relations with Other Organizations") of the Marrakesh Agreement Establishing the WTO. It states that:

"The General council may make appropriate arrangements for consultations and co-operation with non-governmental organizations concerned with matters related to those of the WTO" (WTO 1995).

While the importance of including a reference to NGOs in the founding text of the WTO cannot be overstated, Article V:2 does not provide explicit guidance on the procedures for engagement with these organizations. A few directions, in this regard, are provided in the *Guidelines for arrangements on relations with Non-Governmental Organizations*¹² adopted by the General Council in July 1996 (hereafter referred to as the 1996 Guidelines). The 1996 Guidelines establish the guiding principles and course of action for the conduct of the WTO's relations with NGOs. While they recognize the role that NGOs can play in increasing the awareness of the public with respect to the activities of the WTO, and agree to improve the WTO's practices of transparency and communication with them, the 1996 Guidelines also clearly spell out the limits of the WTO's engagement with NGOs in at least three distinct ways.

First, the 1996 Guidelines explicitly refer to the special character of the WTO as both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. Second, they acknowledge the widespread view among Members that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Lastly, they specify that closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.¹³

To date, these principles have not changed and remain the foundation of the WTO's practices for engagement with NGOs. Thus, while the Secretariat retains flexibility on how it goes about informing, consulting and co-operating with NGOs concerned with matters related to those of the WTO, the authority to take decisions that would make them eligible for enhanced participation, including access to participate in WTO meetings can only be approved by a consensus of Member governments. For instance, these principles remain the basis for the Secretariat's engagement with NGOs and relevant stakeholders through the annual WTO Public Forum and the NGO briefings scheduled after meetings of the General Council, Trade Negotiations Committee or within the context of WTO Ministerial Conference meetings as well as other information activities. Another practice that falls within under the scope of these principles, even though it is not targeted exclusively to NGOs but to the public in general, is the organization of WTO's Open Day during which the WTO opens its doors to the public in general to learn more about the work undertaken by

¹² WTO (1996) document WT/L/162 of 23 July 1996.

¹³ See paragraph 6 of the 1996 Guidelines.

the organization. The WTO opened its doors to the public for the first time in 2009, attracting some 5,000 visitors and again in 2010.

b) The Information and External Relations Division

The WTO's focal point for co-operation with civil society, including NGOs, business, trade unions, parliamentarians, journalists and the general public is the Information and External Relations Division (IERD). The External Relations (ER) Section within the IERD is responsible for implementing outreach activities to enhance dialogue and promote the rules-based multilateral trading system with NGOs, civil society, parliamentarians and the private sector. Its activities also include coordinating the organization's work with that of other inter-governmental organizations and supervising protocol matters. The ER Section interacts with its stakeholders through a variety of means and communication channels. Over the years, the WTO's practices for engagement with civil society have gradually evolved into a stable, professional and mutually constructive relation. Although the ER Section is the focal point that channels WTO's practices for engagement with NGOs and civil society, a number of WTO Divisions have also established relations with NGOs with whom they work regularly.

c) The Office of the Director-General

The Office of the Director-General provides direction on the WTO's practices for engagement with NGOs and civil society. Much of the WTO's day to day contact with high level representatives of NGOs, business and trade unions is managed directly by the Director-General's office. The Director-General also often participates in NGO-organized activities both in and outside of Geneva.

2. WTO practices for engagement with civil society

Over time, WTO's practices for engagement with civil society, including NGOs, have significantly advanced. The debate no longer focuses on *whether* NGOs should be involved but rather on *how* they can be given an appropriate role within the WTO (Marceau and Pedersen 1999). The practices in place today respond to this reality and continue to be enhanced through the design and implementation of new initiatives which have grown out of the flexibility inherent in the 1996 Guidelines, the expertise developed by NGOs on trade-related issues over the years, and the increasing degree of trust established between the WTO Secretariat and representatives of civil society that regularly follow and participate in WTO activities, including NGOs based in India.

In the early days the WTO's engagement with NGOs were primarily aimed at countering criticisms concerning the WTO's procedures for participation in meetings and access to information. In other words, they were largely focused on procedural matters. In the last ten years, NGOs' efforts focus on seeking to influence the WTO's agenda and trade-policy making at the WTO, including negotiations from the perspectives of their aims and interests. As a result, they have evolved to a more substance-driven agenda (WTO 2007). In particular, they are interested in influencing the regulatory framework rather than the market access component of the negotiations. Their main reasons for seeking to influence trade policy formulation at the WTO are to ensure it is inclusive and engaging, to propose policy solutions and to open up space for public debate (Capling and Low 2010). NGOs change of attention from procedural matters to substance-driven issues prompted them to direct their efforts at lobbying Members rather than focusing on the WTO *per se*.

This evolution underlies, to a large extent, the WTO's practices for transparency and engagement with NGOs and civil society. The practices in place today continue to be enhanced through the design and implementation of new initiatives shouldered by the flexibility inherent in the 1996 Guidelines, the amount of expertise developed by NGOs on trade-related issues over the years and the increasing degree of trust established between the WTO Secretariat and representatives of civil society that regularly follow and participate in WTO activities. A number of NGOs have also developed close relations with WTO Members; some Members have partnered with them to seek technical expertise or advice on a given trade-related issue. All of these elements have had a significant impact on the kind of practices that the Secretariat has been able to develop with NGOs over time.

a) GATT/WTO practices for engagement with civil society (1980s-1990s)

NGO's interest in influencing multilateral trade policy formulation at the WTO became apparent during the end of the 1980s and early 1990s as the Uruguay Round (1986-1994) negotiations were intensifying. During this period a number of organizations concerned with environment and development issues began to take an interest in the activities of the GATT. This interest rapidly turned into disapproval by the time the GATT dispute settlement panel in the case *United States - Restrictions on Imports of Tuna* issued its decision in the summer of 1991.¹⁴ In addition to the substantive environmental concerns raised, the panel process itself was criticized for lacking transparency and for being closed to the public. Environmental activists argued that important decisions about the environment were being taken by faceless bureaucrats, in a secretive organization that was managed by a club of rich countries without adequate participation and input. As a result, NGO's interest in the GATT at the time was mostly limited to criticism and calls for greater transparency and openness (Capling and Low 2010).

The period covering the creation of the WTO in 1995 to the protests in Seattle in 1999 is characterized by NGO's growing dissatisfaction and rising criticism as the WTO's reach expanded within borders to new areas such as intellectual property, services, environment and development (WTO 2007). While NGOs were largely absent from multilateral trade negotiations during the Uruguay Round, the situation gradually started to change in the second half of the 1990s, with their interest peaking between 2000 and 2003 when a number of NGOs established a presence in Geneva (Capling and Low 2010).

The first procedure that outlined the guiding principles for engagement with civil society is the 1996 Guidelines. The activities for the WTO's engagement with NGOs as outlined in these guidelines include: (i) the accreditation granted to NGOs concerned with matters related to those of the WTO, to attend WTO Ministerial Conference Meetings (MCMs); the organization by the WTO Secretariat of *ad hoc* issue-specific symposia on matters of interest to NGOs; and the day-to-day contact between the WTO Secretariat and NGOs.

The outline of the practical arrangements for the accreditation of NGOs to attend the MCM was left in the hands of the Secretariat to define. The one element that was clear was that in order to be

¹⁴ Principally, the panel ruled that a conservation law, that was being enforced unilaterally and extraterritorially by the United States violated GATT rules. This ruling created an outcry among environmentalists and placed the GATT on the black list of environmental organizations worldwide.

eligible for accreditation NGOs had to prove they worked on matters related to those of the WTO. Accordingly, the Secretariat put together a proposal that ensured: NGOs attendance to the plenary opening and closing sessions of the MCM; the set-up of an NGO Centre with adequate facilities for NGOs to organize their own meetings and workshops; as well as a registration procedure, whereby interested NGOs would provide evidence of working on relevant trade-related issues after which they were placed on a provisional list before accreditation to attend the MCM was granted. This list was subsequently circulated to Members for approval. However, the Chairman of the General Council at the time stated that there was no need to take a formal decision on this issue and interested Members were invited to consult the list (Marceau and Pedersen 1999). The arrangements that governed the accreditation of NGOs to the WTO's First MCM in Singapore in 1996 have been replicated ever since. A series of improvements to the practices established for Singapore concerns the activities introduced in the NGO Centre during the Geneva MCM in 1998, namely the organization of daily briefings on the MCM itself undertaken by the WTO Secretariat, including the Director-General (DG). This widely acclaimed practice has been continued ever since and extended during the Geneva MCM in 2011 to include background briefings on specific issues organized by the WTO Secretariat. In addition, in 2011, for the first time, the NGO Centre hosted the Trade and Development Symposium organized by the International Centre for Trade and Sustainable Development (ICTSD) to provide a forum for multi-stakeholder discussion outside the formal negotiation arena and to exchange views on the future of the multilateral trading system. This is the fourth symposia organized by ICTSD to coincide with WTO MCMS; the other three were held in Cancun (2003), Hong Kong (2005) and Geneva (2009).

The organization of ad hoc issue specific symposia on matters of interest to NGOs started as early as 1994 during the GATT. A series of NGO symposia were organized by the Trade and Environment Division to keep civil society informed of the work under way in GATT/WTO on trade and environment and to allow experts in the field to examine and debate the relationship between trade, environment and sustainable development. In addition, two other issue specific symposia were organized by the WTO Secretariat to which NGOs were invited, one on trade and development and another one on trade facilitation. These symposia provided, on an informal basis, the opportunity for NGOs to discuss specific issues of interest to them with representatives of WTO Member countries.

Overall interest and participation from Members in these symposia were relatively moderate. As a result, NGOs expressed concern and noted that these discussions would only be useful if Member governments participated (Marceau and Pedersen 1999). Although the results did not fully meet the NGO's expectations – due primarily to the low turnout on the part of Members, these symposia put into practice the 1996 Guidelines and planted the seeds for the organization of multi-stakeholder discussions at the WTO and for WTO's practices for engagement with NGOs that emerged shortly thereafter.

b) WTO's practices for engagement with civil society (1998-2001): First wave of improvements

In July 1998, the then WTO Director-General Renato Ruggiero announced a series of arrangements to supplement the WTO's practices for transparency and engagement with NGOs. These initiatives were implemented by October 1998. Within the context of these new initiatives, the Director-

General introduced the practice of holding regular informal meetings with different NGO representatives, with the goal of improving and enhancing mutual understanding. In addition, the WTO Secretariat started organizing briefings for NGOs on the work undertaken in different WTO committees and working groups and a list of NGO position papers, previously submitted to the Secretariat, was circulated to Members and submissions were made available to them, on request. Finally, a dedicated NGO section on the WTO's website was created. The list of documents submitted to the Secretariat by NGOs appeared on this site, as well as relevant information regarding the WTO symposia and other events organized for NGOs. These steps constitute the first wave of improvements to the WTO's practices for engagement with NGOs.

c) WTO's practices of engagement with civil society (2001-2006): Second Wave of Improvements

In April 2001 the WTO Secretariat issued an information note to Members¹⁵ on *WTO Secretariat Activities with NGOs* outlining a range of new initiatives on undertakings with NGOs in the lead up to the Fourth WTO Ministerial Conference in Doha, Qatar. The new programme of activities intended to facilitate and encourage substantive and responsible discussions with NGOs on issues falling within the WTO's mandate. It suggested the organization of specific activities to be carried prior to as well as throughout the duration of the MCM. It also included a series of NGO outreach activities, including the organization of technical seminars both in Geneva and at the regional level. NGO participation in online discussions and chat rooms through the WTO's website were also suggested. In addition, the website was used to disseminate information about logistical arrangements for NGOs attending the MCM and for NGO accreditation procedures (ICTSD 2001). In the lead up to Doha, the arrangements proposed focused on the organization of NGO dialogues and regular briefings on the preparations for the MCM. During the MCM itself, activities planned for registered NGOs included the organization of general and issue-specific briefings as well as workshops organized by the WTO Secretariat on issues of interest to NGOs. These new practices for WTO's engagement with NGOs was circulated in the lead up to the Doha MCM despite continuing disagreement among Members over how the WTO should deal with external transparency issues and co-operation with civil society.

WTO Director-General Mike Moore, in a speech on 6 July 2001 opening the first official WTO Symposium organized by the External Relations Division on *Issues Confronting the World Trading System*, said "civilized discourse" with NGOs will help the WTO do a better job. He said such gatherings with NGOs and civil society should become a regular feature of WTO activities.¹⁶

In 2003 and 2004, WTO Director-General Dr Supachai Panitchpakdi established under his own initiative, an Informal NGO Advisory Group and an Informal Business Advisory Group. A reduced number of representatives from civil society and the business community were personally invited to integrate the group and meet with the DG at the WTO on an annual basis. The purpose of these consultative meetings was to enable the DG to consult these groups and discuss ideas, views and get feedback from them. Both groups were meant to act as personal advisors to the DG. Each group met with the DG twice, once in 2003 and then again in 2004. At the time a few NGOs identified a

¹⁵ WTO (2001) document WT/INF/30 of 12 April, 2001.

¹⁶ http://www.wto.org/english/news_e/spmm_e/spmm67_e.htm

number of shortcomings regarding this consultation mechanism that called into question its effectiveness. Weaknesses were voiced on the form, proposed agenda and objectives of this consultative mechanism; as well as on the selection criteria and the lack of transparency.

Since the early GATT days, similar initiatives have been undertaken to examine and evaluate the working of the multilateral trading system. On several occasions, independent panels of experts in international trade, whether commissioned by the Secretariat or initiated from the outside have assumed the job of examining pressing trade issues looking for timely solutions to trade matters.

For example, since the founding of the GATT/WTO a number of groups have been established including: The Haberler Group established by The Contracting Parties to the GATT (1957-1958); The Leutwiler Group established by Arthur Dunkel, Director-General of GATT (1983-1985); The Eminent Persons Group on World Trade independently established by a group of political and business leaders (1989-1990); The Consultative Board to the former Director-General Supachai Panitchpakdi (2003-2005) that produced the Sutherland Report; The UN Millennium Project, Task Force on Trade established by Jeffrey D. Sachs, in his capacity as Special Advisor to the Secretary-General on the Millennium Development Goals (2002-2005); The Strategic Review of WTO-provided Trade-Related Technical Assistance (TRTA) Activities established by a Steering Committee consisting of WTO Members and appointed by the WTO Committee on Trade and Development (2005-2006) that produced a Report on the Strategic Review of WTO-provided TRTA Activities; The Warwick Commission established by the University of Warwick (2007) that produced the Warwick Report; and The High-Level Trade Experts Group established by David Cameron (Prime Minister, Great Britain), Angela Merkel (Chancellor, Germany), Abdullah Gül (President, Turkey) and Susilo Bambang Yudhoyono (President, Indonesia) (2010-2011).

d) WTO's practices of engagement with civil society (2006- present): New Outreach Programme

In June 2006, WTO Director-General Pascal Lamy in a communication to the staff of the WTO outlined the contours of a broad outreach programme to further enhance the WTO's practices for transparency and engagement with NGOs and civil society.¹⁷ This new programme aims at enhancing the transparency and accountability of the WTO by reporting on a regular basis to NGOs and the public at large; improving the understanding and acceptance of the WTO by making the WTO's complex rules and negotiations more accessible and explaining how the WTO functions; informing and sensitizing the WTO Secretariat and Members to the concerns of civil society; and providing an effective platform for dialogue between NGOs, Members and the WTO Secretariat. Following this communication a number of new practices for engagement with civil society were created to respond to the new outreach programme outlined by the DG.

To better research the positions' of different civil society actors the Secretariat regularly tracks down the release of NGO papers, press releases or communications and summarizes their content in a document referred to as the "NGO mood document". This document is distributed on a weekly or bi-weekly basis to senior management and WTO NGO focal points. This practice has contributed to sensitize the WTO Secretariat to the concerns of civil society. In 2011, eighteen NGO mood documents were circulated.

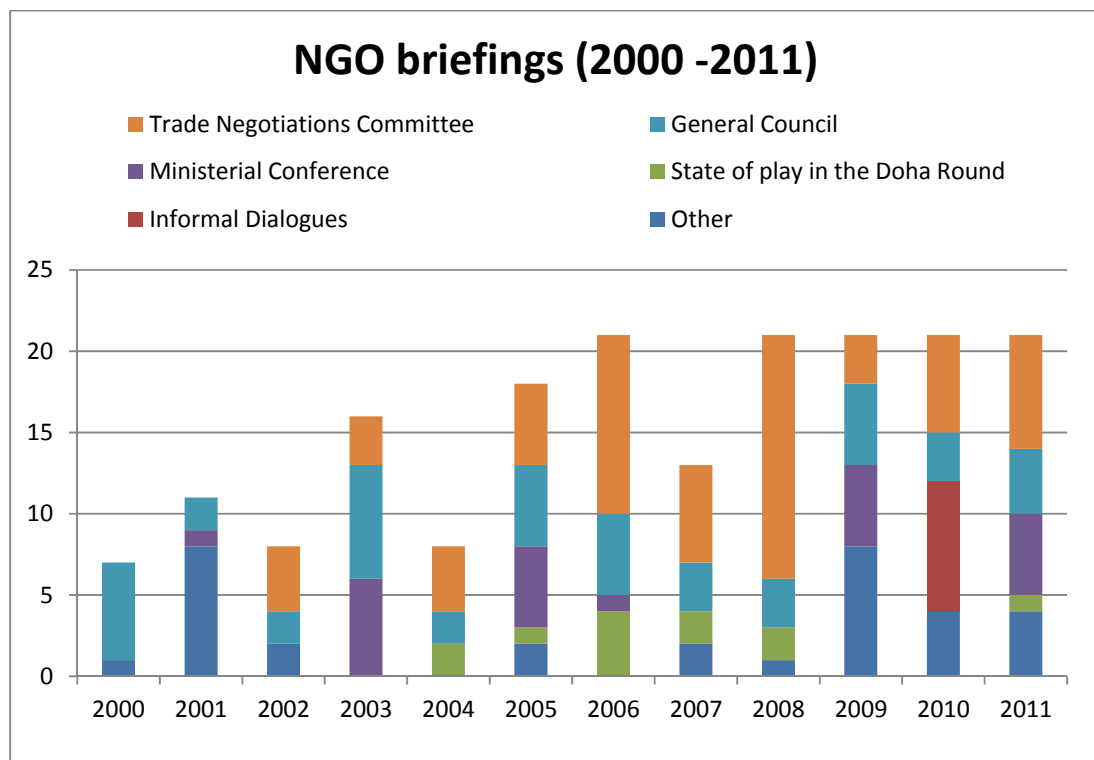
¹⁷ Email message from the Director-General to WTO Staff on Enhancing Relations with Civil Society, 19 June 2006.

The long-standing practice of holding issue-specific and general briefings for NGOs has been institutionalized. As a result, following every General Council (CG) and Trade Negotiations Committee (TNC) Meeting NGOs are timely briefed by the Secretariat which provides them with the statements made by the Chairman of the TNC at both meetings and other relevant information. The statements by the Chairman of the TNC are also made available to the general public on the WTO's website almost immediately upon delivery.

As a means of sensitizing the WTO Members to the concerns of civil society a series of informal dialogues with the Chairs' of the negotiating groups and Geneva based NGOs were organized in 2009/2010. These dialogues allowed NGOs to interact directly with the Chairs of the different negotiating groups. They were designed as informal meetings to provide NGOs with information on the state-of-play of the negotiations in each area and the Chairs were exposed to the views and concerns of civil society on issues of relevance to them. This initiative has been widely praised, both by NGOs and the Chairs of the negotiating groups.

Overall, a total of 186 NGO briefings have been organized since 2000, 118 of them in the past five years. Figure 2 provides information on the number and type of briefing held each year.

Figure 2:
NGO briefings (2000 -2011)



Source: WTO Annual Report 2012

The practice of holding regional and national workshops for civil society in developing countries in collaboration with partner institutions is now a feature of the WTO's Technical Assistance Plan. It attests to the importance that the WTO Membership places on enhancing the dialogue with relevant stakeholders worldwide, thus extending the Secretariat's outreach activities beyond Geneva. The practice of organizing these dialogues in collaboration with partner institutions, including NGOs has numerous advantages. For instance, organizing joint activities significantly reduces the expenses associated with their organization. But, more importantly partner organizations enable the Secretariat to tap into the contacts and on the ground expertise of partners, therefore enhancing effectiveness.

A number of NGOs have also developed close relations with WTO Members; some Members have partnered with them to seek technical expertise or advice on a given trade-related issue. In this regard, a distinction should be drawn between the intergovernmental nature of the WTO and the work of the Secretariat. Nothing prohibits WTO Members from working and partnering directly with NGOs.

Effective partnerships between NGOs and Governments have succeeded in influencing the WTO agenda in a number of cases. For example, WWF and OCEANA contributed in getting the reduction of harmful fisheries subsidies on the negotiating agenda; the work undertaken by Médecins Sans Frontières's was instrumental in getting the TRIPS Agreement amended through the adoption of an agreement on the use of compulsory licences by developing countries without manufacturing capacity, in order to help them access life-sustaining medicines; Oxfam's involvement on the cotton issue helped to include it in the negotiating agenda; ICTSD's contribution through research and expertise to many "trade and subjects" have enhanced awareness of these issues; and CUTS International's involvement in trade and development issues has also contributed to placing them on the radar screen of many Governments. Lastly, the work of IDEAS Centre in helping Laos, Serbia, Montenegro, Tajikistan and Lebanon prepare for WTO accession has also helped the accession process of these countries.

A significant advance in the WTO's practice of engagement with NGOs is the recent accreditation granted to Geneva-based NGOs to access the WTO for meetings and relevant workshops. To date, twenty-four locally based civil society organizations have been granted an NGO badge. This practice enables them to skip the registration procedure they would otherwise have to go through to access the WTO building. The procedure which started as a one year pilot-project is of enormous value because it responds to a specific long-standing request made by NGOs; one that has been on the table since the First WTO MCM in 1996 when NGOs asked for permanent accredited status at the WTO. Up until recently, NGOs accreditation had only been granted during MCMs. In recent years, the NGOs quest for permanent status has more or less disappeared, while access to the WTO-building for Geneva-based NGOs has been granted since 2008.

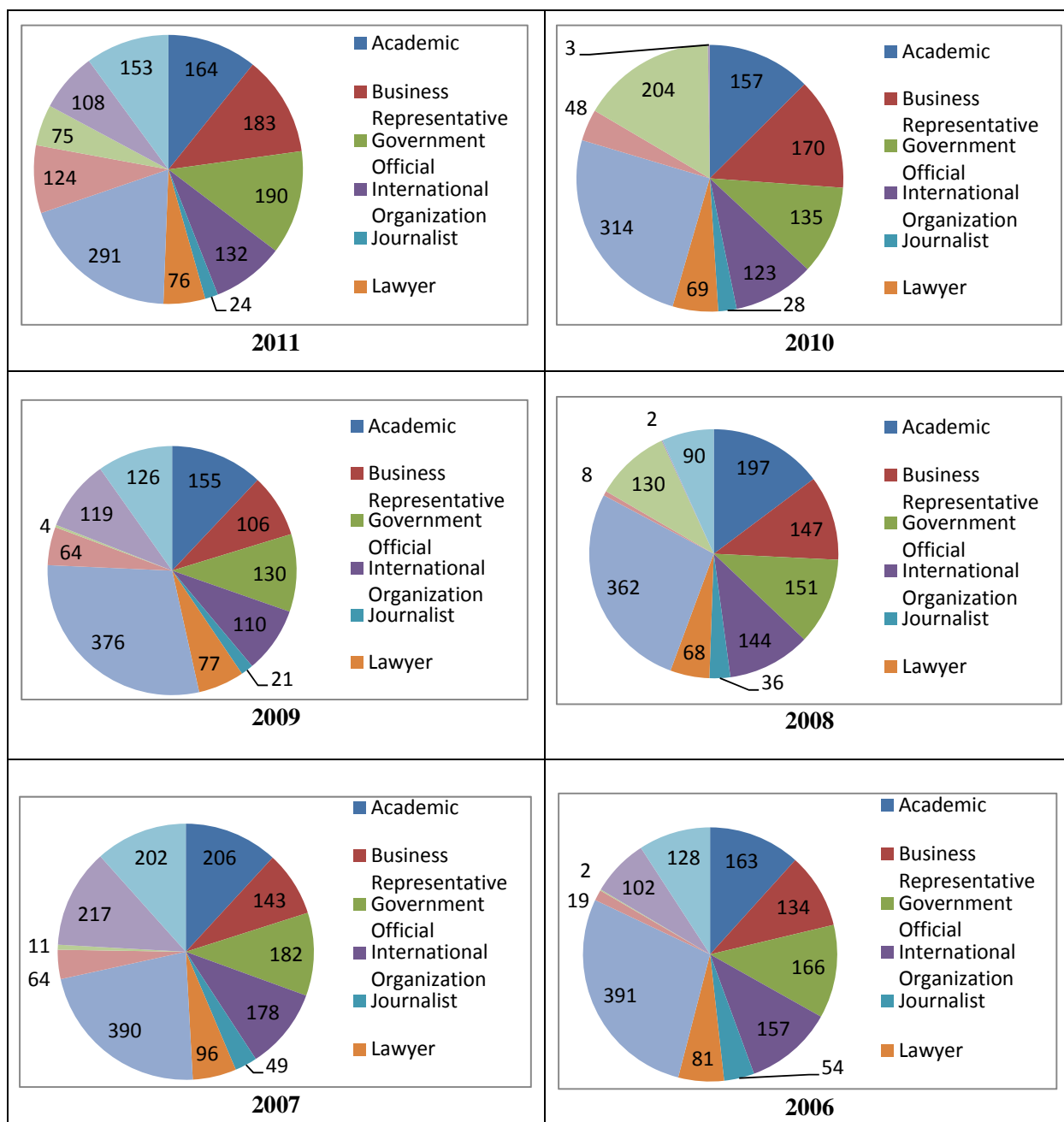
The practices of engagement with NGOs during WTO MCMs that were implemented during the First MCM in Singapore in 1996 have been maintained and improved upon over the years. These practices include the operation of the on-line registration system; the application of the NGO accreditation procedures; the distribution of NGO badges; the setup of the NGO centre with the facilities provided; the content of the NGO programme, including the organization of regular briefings by the Secretariat and the Director-General, as well as background briefings on issues of

interest to NGOs. The feedback collected in recent years commends the Secretariat for the setup of the on-line registration process and organization of the NGO Centre.

Moreover, considerable efforts have been devoted to ensure that the WTO's Public Forum – the largest annual outreach activity organized by the WTO provides a firm platform for NGOs and civil society, along with other relevant actors of the multilateral trading system to trigger ideas and express concerns on the shape, direction, performance and future of the WTO. Given its distinctive ownership structure and set-up the Forum offers NGOs the possibility to organize their sessions themselves. Since 2006, one of the objectives of the public forum has been to promote the participation of experts from all categories of stakeholders in the multilateral trading system, in particular, government officials and business representatives alongside representatives of non-governmental organizations. As a result in 2011, the on-line registration featured record numbers, as compared to 2010, for the following categories of participants: 190 Government officials, a 40% increase compared to 2010; 183 business representatives, a 7% increase compared to 2010 and a 36% increase compared to 2006; 75 parliamentarians, a 56% increase compared to 2010 and triple as many as in 2006. The number of registered lawyers and academics has remained relatively even since 2006, averaging approximately 75 and 160, respectively. Finally, the number of NGO representatives registered on-line has been around 350 participants, per year, since 2006. Figure 3 provides the breakdown of participation per category based on the PF on-line registration figures from 2006 to 2011.

Figure 3:

Public Forum Participation per Category (2006 - 2011)



Source: WTO on-line registration figures for the WTO Public Forum from 2006 to 2011

Ever since 2006, summaries of the proceedings of the Public Forum based on the contributions prepared by all those who organized sessions are published and made available on the WTO's website. In the lead up as well as during the event an on-line forum is set-up linked to the Public Forum's website to provide interested stakeholders an opportunity to make their views known on

the different themes discussed at the Forum. It allows all those interested in doing so to present their views even though they cannot make it to Geneva. The increased engagement of all the relevant stakeholders in the multilateral trading system during the WTO's Public Forum attests to the increasing relevance of the WTO to the wider world. Since 2008, this activity is part of the regular budget of the WTO. As a result, it no longer relies on the generous contributions of individual Member governments for its realization.

In addition, throughout the three-day event, a number of NGO representatives are invited to participate in a series of video interviews on the main themes being discussed. The interviews are posted on the WTO's website along with the audio of the debates in each session. The efforts undertaken to divulge the discussions that take place during the Forum confirm the WTO's commitment towards promoting transparency and dialogue.

An interesting feature has been the establishment of an NGO focal group within the WTO Secretariat. This group includes staff from different Divisions within the WTO. Essentially, their role is to volunteer to help out and/or to mobilize others to do so, when large events involving NGOs take place, such as the annual Public Forum or the NGO-related activities organized during the WTO's MCMs, including the management of the NGO Centre. They also receive information concerning the positions' of NGOs through the NGO mood documents.

Finally, the Director-General during the Eighth Ministerial Conference in December 2011 announced his intention to establish a Panel of multi-stakeholders of the WTO to facilitate Members' discussion on the future direction of the WTO. This Panel of stakeholders will comprise individuals with a deep knowledge of the multilateral trading system, including representatives of the business sector, civil society, governments and academia. This group of experts is meant to look at the status of international trade, consider the medium- to long-term trends in multilateral trade relations, and provide recommendations on how the WTO can remain relevant in a rapidly shifting trade environment. The panel will report their findings and recommendations in one year's time.

III. Dispute Settlement

One area in which WTOs channels of engagement with NGOs and civil society actors have evolved considerably is dispute settlement. Even though only WTO Members can be parties to a WTO dispute, non-Members, including NGOs and civil society actors have contributed through different avenues. First, they have assisted the parties to the dispute by preparing their briefs or annexing studies to their submissions. Second, they have submitted *amicus curiae* briefs, which panels and the Appellate Body are entitled to take into account if they consider them useful. Third, they have assisted the panel as experts under Article 13 of the Dispute Settlement Understanding (DSU), when the panel has sought advice from experts on their own initiative.

There are two issues related to dispute settlement that are of particular relevance: (i) transparency of the WTO Dispute Settlement Mechanism (DSM), concerning non-confidential submissions of the parties and opening panel meetings, Appellate Body hearings and arbitration proceedings to the public; and (ii) enlarging the "participation" in the WTO DSM, including through *amicus curiae* and

the question of whether the private sector can participate in a dispute in their own right and as part of the delegation of a WTO Member party to a panel.

1. Transparency: Opening Hearings to the Public

Transparency in the dispute settlement process has been greatly enhanced by the practice of opening hearings to the public, upon the Parties' request. Between September 2005 and February 2012, eleven panel meetings¹⁸, eight Appellate Body hearings¹⁹ and two arbitration proceedings²⁰ have been opened to the public, including NGOs and civil society. In most cases, oral hearings have been opened to public observation by means of simultaneous closed-circuit viewing shown in a separate meeting room to which duly-registered delegates of WTO Members and the general public have been granted access. In a few cases, deferred showing of the video recording has been used to ensure that no confidential information is inadvertently disclosed, as might happen with simultaneous viewing. Up to October 2011, the number of NGOs that have registered to participate in the open hearings remains relatively low, ranging between one and nine per viewing.²¹

The Panel opened its hearing to the public for the first time in September 2005 in *US – Continued Suspension* in response to requests by the parties to open proceedings to the public. This was later confirmed by the Appellate Body which also decided to open its hearing in July 2008. At that time, the Appellate Body adopted the following special procedures in *US – Continued Suspension* to provide direction on how the open hearing would proceed which continue to provide direction on how open hearings take place:

(a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television. The closed-circuit television signal will be shown in a separate room to which duly-registered delegates of WTO Members and members of the general public will have access.

(b) Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation.

¹⁸ The Panel Meetings which were open to the public are: DS412, Canada — *Renewable Energy*; DS386 and DS384, *US – COOL*; DS375, DS376, and DS377, *EC – IT Products*; DS367, *Australia – Apples*; DS353- *US – Large Civil Aircraft (2nd)*; DS350, *US – Continued Zeroing*; DS322, *US – Zeroing (Japan)*(Article 21.5 – Japan; DS320/DS321, *US – Continued Suspension/Canada – Continued Suspension*; DS316, *EC and certain member States – Large Civil Aircraft*; DS294, *US – Zeroing (EC)* (Article 21.5 – EC); and DS27, *EC – Bananas III* (Article 21.5 – US).

¹⁹ The Appellate Body Hearings which were open to the public are: DS367, *Australia – Apples*; DS353, *US – Large Civil Aircraft (2nd)*; DS350, *US – Continued Zeroing*; DS322, *US – Zeroing (Japan)*(Article 21.5 – Japan); DS320/DS321, *US – Continued Suspension/Canada – Continued Suspension*; DS316, *EC and certain member States – Large Civil Aircraft*; DS294, *US – Zeroing (EC)*(Article 21.5 – EC); DS27, *US – Bananas III* (Article 21.5 – Ecuador II)(Article 21.5 – US).

²⁰ The Article 22.6 Arbitration Proceedings which were open to the public are: DS322, *US – Zeroing (Japan)* (Article 22.6 – US); and DS294, *US – Zeroing (EC)* (Article 22.6 – US).

²¹ Based on the number of NGOs registered to attend Panel Meetings, Appellate Body Hearings and Arbitration Proceedings which were open to the public.

(c) Any third participant that has not already done so may request authorization to disclose its oral statements and responses to questions on the basis of paragraph (a), set out above....

(d) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.

(e) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.

(f) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used in the alternative.²²

This procedure set a clear precedent. Similar procedures have been followed in later cases in response to requests by the parties to open proceedings to the public.

There are two other issues that relate to transparency. One is about the confidentiality of the written submissions. In this respect, the DSU is clear: Article 18 obliges Members to provide a non-confidential summary of their written submissions if requested by a Member. However, this practice is evolving and more and more Members simply make their submissions public and therefore do not have to make such a non-confidential summary. The second issue concerns the fact that final panel reports are not circulated before they are translated in the three WTO official languages. Consequently, due to the delay in translation some Members have copies earlier than others.

The negotiations to clarify and improve the DSU include proposals to enhance transparency which would include open hearings and making submissions public, except for portions dealing with confidential business information.²³

2. *Amicus curiae* briefs

An *amicus curiae* brief is a brief presented by someone interested in influencing the outcome of a dispute but who is not a party to it. There has been an important development in the practice of the Appellate Body with respect to *amicus* briefs. The Appellate Body's initial consideration of this issue was in *US – Shrimp*, when it admitted three *amicus* briefs. However, the *amicus* briefs in that case were appended as exhibits to the U.S. Appellant Submission, and so the Appellate Body concluded that these briefs were part of the submission of a WTO Member. However, in later cases, the Appellate Body received and admitted *amicus* briefs received directly from non-Members or individuals. In *US – Lead and Bismuth II*, the Appellate Body asserted its authority to accept such briefs.²⁴

The most prominent development on *amicus* briefs was in *EC – Asbestos*. The Appellate Body decided to adopt a special procedure under Rule 16(1) of the Working Procedures for Appellate

²² Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 11.

²³ WTO (2011) document TN/DS/25 of 21 April 2011.

²⁴ Appellate Body Report, *US – Lead and Bismuth II*, footnote 58, para. 39.

Body Review to receive *amicus* briefs. It took the initiative of writing to the disputing parties and the third participants to express its view that “the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only...to deal with any possible submissions....”²⁵ It sought the views of the parties on the possible procedures to receive *amicus* briefs, including a “request for leave” procedure. Following consultations with the parties and third participants, the Appellate Body announced that it had adopted an “Additional Procedure” to “deal with written submissions received from persons other than the parties and third parties to this dispute.”²⁶ The Chairman of the Appellate Body informed the Chairman of the DSB, in writing, of the Additional Procedure adopted, and this letter was circulated to all WTO Members on November 8, 2000. A special meeting of the General Council was convened on November 22, 2000. During this meeting, many developing country Members criticized the Appellate Body because they considered it had created new rules and acted beyond its competencies. The results of these discussions were articulated by the Chairman of the General Council who stated that: “it should be communicated to the Appellate Body that it should exercise extreme caution. On this basis, the Appellate Body would draw its conclusions.”²⁷

Since then, the Appellate Body has systematically ruled that specific *amicus* briefs received were “not necessary” to consider. In the EC – Asbestos case, it denied leave to the 17 applicants that had requested leave to file a written brief.²⁸ Thus, while the Appellate Body has never disavowed its right to receive unsolicited *amicus* briefs, they have been very cautious in their consideration of them.

Unquestionably, NGOs have a keen interest in dispute settlement. This interest is due to the fact that disputes handled by the WTO dispute settlement panels and the Appellate Body deal with matters of their interest. Cases related to environmental legislation were among the first ones that instigated the interests' of civil society. As a result, the DSU has become an area that many of them are keen on following closely and that they seek to influence. These actors argue that they are in a better position to put forward arguments that WTO Members may not want to because of concerns that these same arguments may be used against them in future cases. The consideration by panels and the Appellate Body of unsolicited *amicus curiae* briefs has been very controversial and criticized by a number of WTO Members. They are concerned that civil society may acquire greater access and influence in the dispute settlement process than Members who are not Parties to the dispute. They consider that since there is no specific provision in the DSU that authorizes the acceptance and consideration of *amicus curiae* briefs, such briefs should not be accepted and considered. However, the Appellate Body has confirmed its view on the authority of panels and the Appellate Body to accept and consider unsolicited briefs. Despite this, to date, the Appellate Body has been very cautious in their consideration of independent *amicus curiae* briefs in the proceedings.

²⁵ Appellate Body Report, *EC – Asbestos*, para. 50.

²⁶ Appellate Body Report, *EC – Asbestos*, para. 51.

²⁷ WT/GC/M/60, para. 123.

²⁸ Appellate Body Report, *EC – Asbestos*, paras. 55-57. Six of the applicants were rejected for failing to comply with the time limits. The others met the deadline but were rejected by the Appellate Body. No reasons were provided.

The negotiations to clarify and improve the DSU also include proposals to regulate *amicus curiae* briefs. A number of developing countries suggest amending the DSU to indicate that adjudicators shall not consider unsolicited *amicus* briefs. These issues continue to divide the Membership.

Another issue pertaining to participation concerns the fact that the Appellate Body decided in the first *Banana* dispute that it is for each WTO Member to decide who will compose their delegation in a dispute. Some Members-parties to a dispute bring on board as members of their delegations NGOs, industry representatives or academics.

3. DSU Article 13: Right to Seek Information

Article 13 of the DSU provides panels with the right to seek information and technical advice from any individual or body which it deems appropriate provided certain conditions are met. As a result, NGOs and civil society can participate as experts assisting the panel when the panel seeks their advice. In this case the panel contacts the experts on its own initiative.

Conclusion

The current improvements in the WTO's practices for transparency and engagement with NGOs and civil society, although significant are considered modest concessions relative to the demands made by a number of WTO Members, NGOs, and civil society actors. The reluctance to reconsider WTO procedures on relations with NGOs and civil society actors is due to a lack of consensus among Members.

The principal argument of those Members that challenge the possibility of enhancing engagements with NGOs further, particularly in the decision-making process, revolves around the special character of the WTO - intergovernmental and Member-driven. In addition, a number of members believe that greater participation of NGOs in the WTO's decision-making process translates into privileging special interests at the expense of the general public. Developing country members, in particular, fear that these privileged interests would be those from industrialized countries because their NGOs and civil society representatives would have the means and funds necessary to benefit from increased participation rights. Some argue that direct involvement of NGOs would result in greater difficulties in the decision-making process itself. Lastly, others claim that NGOs lack political and democratic legitimacy because they may not have been directly elected by the constituents they claim to represent. Members often ask who the NGOs are accountable to. As a result, they argue that there is no room for their direct involvement in the WTO's decision-making process. In addition, they consider that the WTO is not accountable to NGOs specifically. In their view, the WTO is accountable to the public at large and this responsibility lies with Member governments.

Although these points have been challenged by many, the reality is that the WTO is an intergovernmental and Member-driven organization. Therefore, until the debate among Member governments does not evolve to guarantee a consensus regarding the desirability of implementing procedural changes for greater participation of NGOs in WTO's decision-making process, NGOs are more likely to succeed in influencing trade-policy making at the WTO through other means.

The single most important mechanism for NGOs to exert their influence on trade policy formulation at the WTO is by lobbying Governments, both Geneva-based delegates and Government officials at the national level, either directly, through their national offices or local NGOs based in the capitals. NGOs can also exert considerable influence by partnering with governments. This practice has enabled NGOs to provide governments with expertise, training and policy advice at different levels. Thus, many NGOs and civil society groups that have attained a certain level of expertise have been invited to participate as members of the national delegations of Member governments in WTO MCs, as well as other WTO meetings to provide advice on particular subjects. In this manner, they have been able to influence the WTO's agenda, including the negotiations.

Examples of this successful contribution of ideas can be found in several of the topics on the negotiating agenda of the Doha Round which are subjects that NGOs have fought long and hard for, including, the issues of intellectual property rights and the access to medicines; the reduction of agricultural subsidies in developed countries; the lowering of environmentally-harmful fisheries subsidies; the trade-opening in environmental goods and services; and ensuring greater compatibility between WTO rules and multilateral environmental agreements (MEAs), to name a few. On all of these issues WTO Members partnered with specialized organizations that had developed particular expertise that contributed towards pushing these issues onto the WTO's agenda. In order to develop this knowledge NGOs have pursued the creation of expertise through research and analysis that feed into the different programs and activities in the areas of interest to them.

Another promising avenue for NGOs and civil society groups is to continue to specialize and gather expertise at different levels on specific subjects based on their aims and interests. By definition an expert is someone that is considered to be an authority in the matter, and thus is often consulted when it comes to their subject or particular area of study. Given the current impasse in the Doha Round negotiations an interesting avenue for NGOs to pursue is to feed Member governments with information on the current realities in which global trade takes place, in particular by looking at how the measure of trade flows in value added terms affects the way we analyse international economics and conduct trade policy.

NGOs can also seek to influence trade policy formulation at the WTO by engaging in public campaigns in trade-related areas of interest to them. For example, OXFAM launched its Big Noise worldwide petition that calls for governments to help end unfair trade practices in 2002 and its 'Make Trade Fair' campaign in 2003 to promote trade justice and fair trade among governments, institutions, and multinational corporations (Capling and Low 2010). Furthermore, with a view to address the problem of over fishing, the WWF, which has been working worldwide to conserve marine resources for more than twenty years, has made the reduction of harmful fisheries subsidies a core element of its on-going 'Endangered Seas Campaign' launched in 1995.

NGOs can also exercise influence through their active participation in the consultative mechanisms established by Member governments at the national level to take into account the different elements of public interest that are brought to bear on trade policy-making at the WTO and to render their Governments accountable for their actions. In this regard Member governments and their institutions should give interested stakeholders a stake in the process. There is a fundamental difference between transparency and participation on the one hand and negotiations on the other — which in the end only Governments can do.

Lastly, a number of NGOs will have the opportunity to participate in the Panel of multi-stakeholders of the WTO established by the WTO Director-General to feed into Members' discussion on the future direction of the WTO. This Panel of stakeholders consists of individuals with a deep knowledge of the multilateral trading system, including representatives of the business sector, civil society, governments and academia. This group of experts is meant to look at the status of international trade, consider the medium- to long-term trends in multilateral trade relations, and provide recommendations on how the WTO can remain relevant in a rapidly shifting trade environment. The panel will be asked to report their findings and recommendations in the beginning of 2013.

In conclusion, forging links with civil society is a formidable task for any intergovernmental organization, the more so for one with the import of the WTO; it touches on the rights of governments to set WTO policy while respecting the voices of those without a vote. Although the WTO's rules for engagement with civil society based on Article V:2 of the Marrakesh Agreement and further elaborated in the 1996 Guidelines have not changed, the actual practices for engagement have considerably evolved over time and it is likely that they will continue to be improved upon in the future.

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