Bridging the Gap between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO under the Rio Principles

Maki Tanaka

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Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO Under the Rio Principles

Maki Tanaka*

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INTRODUCTION

In December 1999, massive street demonstrations blocked the Seattle Ministerial Conference of the World Trade Organization ("WTO") calling for increased public participation and the inclusion of "new issues," such as the environment and labor rights, in multilateral trade negotiations. On the other side, developing country members of the WTO officially protested the exclusion of their representatives from key negotiations and resisted considering "new issues" until their developmental concerns were addressed. Two years after the controversy in Seattle, environmental issues remained matters of contention between the North and the South at the Doha Ministerial Conference. Ultimately, a compromise was reached between the two

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1. See Davis P. Goodman, The WTO in Seattle: Did We Lose a Battle or the War?: The View from the Front Lines, 13 WORLD TRADE 38 (2000) (describing mass protests that caused the cancellation of the first day of the Seattle Conference in 1999); Citizens' Groups: The Non-Governmental Order: Will NGOs Democratise, or Merely Disrupt, Global Governance, ECONOMIST, Dec 11, 1999, at 20 (1999) [hereinafter The Non-Governmental Order] (discussing labor-environmental coalitions in protest movements at the Seattle Ministerial Conference); see also Monica Araya, Lessons from the Stalemate in Seattle, 9 J. ENV'T & DEV. 183, 186 (2000) (considering that Seattle protesters indicated that they did not tolerate trade policymaking exclusively among trade officers within the WTO, which failed to offer sufficient participatory opportunities to NGOs). Although U.S.-based NGOs have been conspicuous in direct actions, NGOs in other countries have also played a leading role in campaigns against unrestricted trade liberalization. See, e.g., NGOs from 60 Countries Team Up to Halt Next WTO Round on Environmental Grounds, INT'L ENV'T DAILY (BNA) (May 20, 1999) (reporting that Friends of the Earth ("FoE") in the United Kingdom led the coalition of 570 environmental groups from over sixty countries campaigning against the WTO).

2. See Goodman, supra note 1 (reporting that many developing country delegates rejected the inclusion of labor and environmental issues in trade negotiations); WTO Impasse Shows Global Trade Inequalities for Africa Recovery, FIN. GAZETTE, Jan. 13, 2000 [hereinafter WTO Impasse] (reporting statements made by African and Caribbean nations protesting the exclusion of their delegates), available at Lexis-Nexis Academic Universe.

3. In this Comment, the South refers to developing and least-developed countries in Asia, Africa, and Latin America, most of which are former colonies and currently underdeveloped, while the North consists of advanced industrial democracies in Western Europe, the Americas, and Asia-Pacific. See Padideh Ala'i, The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption, 33 VAND. J. TRANSNAT'L L. 877, 880 n.5 (2000); see also DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 276–77 (1998) (explaining that existing literature on international environmental issues uses the North-South dichotomy to represent the world divided by the persistent economic inequity, although the conventional geographical reference does not precisely capture the reality); Gregory C. Shaffer, The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters, 25 HARV. ENVTL. L. REV. 1, 2 n.4 (2001) (de-emphasizing the west/non-west dimension of the trade-environment debate).
sides to launch a new round of global trade negotiations when the European Union, the strongest supporter of an environmental agenda, decided to negotiate on the reduction of trade-distortive agricultural subsidies, a measure advocated by many developing country members.

The Northern environmental community and Southern sovereigns still disagree about public participation in the WTO. In particular, the unsettled status and treatment of amicus curiae briefs submitted by nongovernmental organizations ("NGOs") create dissatisfaction among both Northern NGOs and Southern sovereigns. Northern NGOs have advocated for direct public participation through amicus submissions, while Southern sovereigns have argued for national representation and have rejected nongovernmental amicus submissions. WTO members agreed to clarify and improve dispute settlement procedures at the Doha Conference, but its Ministerial Declaration did not explicitly refer to amicus procedures. Nevertheless, amicus submission has emerged as a salient North-South issue through exchanges between the European Union and India in the post-Doha negotiations on the reform of dispute settlement procedures.


6. In this Comment, unless otherwise noted, NGOs refer to nongovernmental, nonprofit organizations that purport to represent values and interests associated with the public, rather than with business or the state. See Jacqueline Peel, Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization, 12 COLO. J. INT'L ENVTL. L. & POL'Y 47, 48 (2001) (defining NGOs in terms of their nongovernmental, nonprofit status and their association with the public); Diane Otto, Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society, 18 HUM. RTS. Q. 107, 109, 112 (1996) (explaining that NGOs represent the public in their areas of expertise). Technically speaking, however, NGOs may include any non-state entity, for example corporations and trade associations, regardless of their profit oriented objectives and activities. Peel, supra, at 47–48. The WTO shares this latter view in its definition of NGOs. The constitutional instrument of the WTO refers to "non-governmental organizations concerned with matters related to those of the WTO," Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Apr. 15, 1994, art. V:2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994); see also WTO, FINAL STATISTICS OF THE 2ND WTO MINISTERIAL CONFERENCE IN GENEVA (2001) (categorizing NGOs accredited in the Geneva Ministerial Conference into business, trade unions, and farmers, as well as environmental, developmental, and consumer groups), at http://www.wto.org/english/forums_e/ngo_e/statgen_e.htm.

7. See WTO Ministerial Conference, supra note 4, para. 30.

8. See WTO Dispute Settlement Body ("DSB"), Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, Annex, para. 10 (Mar. 13, 2002) [hereinafter EC's Proposals]
The WTO first addressed the issue of nongovernmental amicus submissions in dispute panel proceedings in United States—Import Prohibitions of Certain Shrimp and Shrimp Products ("Shrimp-Turtle"), commenced in 1997.\(^9\) India, Malaysia, Pakistan, and Thailand brought this case against the United States to challenge a unilateral import ban imposed on shrimp and shrimp products that failed to satisfy U.S. domestic environmental regulations.\(^10\) Northern environmentalists submitted amicus briefs to the panel to support the domestic environmental regulation that sought to effectuate the transboundary conservation of sea turtle species.\(^11\) In response, the Southern sovereigns requested that the panel disregard the NGOs' submissions because there were no explicit procedural rules covering unsolicited amicus briefs.\(^12\) The

(proposing a procedural amendment to provide explicitly for non-governmental amicus submissions to panels and the Appellate Body), available at http://docsonline.wto.org/ddfdocuments/t/tn/ds/w1.doc. In response, India expressed its concern about disadvantages to the developing country members and Southern NGOs in the proposed amicus procedures. See WTO DSB, India's Questions to the European Communities and Its Member States on Their Proposal Relating to Improvements of the DSU, TN/DS/W/5, para. 31 (May 7, 2002) [hereinafter India's Questions], available at http://docsonline.wto.org/ddfdocuments/t/tn/ds/w5.doc. The European Communities made a counterargument that the proposed amicus procedures are not biased toward developed-country members because Northern NGOs do not necessarily support the positions of their governments. See WTO, The European Communities' Replies to India's Questions, TN/DS/W/7, at 7 (May 30, 2002) [hereinafter EC's Replies], available at http://docsonline.wto.org/ddfdocuments/t/tn/ds/w7.doc. The United States also attempted to raise the issue of amicus procedures in the post-Doha negotiations, although taking a more cautious position. See WTO DSB, Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency: Communication from the United States, TN/DS/W/13, at 3 (Aug. 22, 2002) [hereinafter U.S. Contribution] ("Members may wish to consider whether it would be helpful to propose guideline procedures for handling amicus curiae submissions to address those procedural concerns that have been raised by Members, panels, and the Appellate Body."). available at http://docsonline.wto.org/ddfdocuments/t/tn/ds/w13.doc. On the other hand, Taiwan shared India's concern about the prejudicial effect of the amicus procedures proposed by the European Communities. See WTO DSB, Contribution by the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu to the Doha Mandated Review of the Dispute Settlement Understanding (DSU), TN/DS/W/25, at 2, para. 1.2 (Nov. 27, 2002) [hereinafter Taiwan's Contribution], available at http://docsonline.wto.org/ddfdocuments/t/tn/ds/w25.doc (last visited Jan. 3, 2003).


10. See Panel Report on Shrimp-Turtle, supra note 9, paras. 1.1—1.3, 2.7—2.10 (dealing with United States' import ban on shrimp and shrimp products from India, Malaysia, Pakistan, and Thailand that were harvested by vessels without using turtle excluder devices).

11. See Panel Report on Shrimp-Turtle, supra note 9, para. 3.129. The Center for Marine Conservation ("CMC") and the Center for International Environmental Law ("CIEL") jointly submitted an amicus brief while the World Wide Fund for Nature ("WFN") filed an independent amicus brief. See id.

12. See id. paras. 3.129, 7.7.
panel concluded that it lacked authority to accept unsolicited nongovernmental amicus briefs. The Appellate Body ultimately reversed the panel’s ruling on this issue and held that the NGOs’ amicus briefs were acceptable in panel proceedings, although it upheld the panel’s conclusion that the U.S. import ban was unjustifiable.

In 2000, Malaysia sought recourse against the United States alleging that the United State’s modified environmental regulation did not conform to the panel’s rulings and recommendations in Shrimp-Turtle because it failed to lift the unilateral import ban immediately. India and Thailand actively intervened in the recourse panel as third parties, generally supporting Malaysia’s contentions. Northern NGOs led several transnational coalitions in submitting amicus briefs to prevent the complete invalidation of the sea-turtle conservation measure. In reaction, Malaysia, together with Mexico participating as a third party, argued against the panel’s acceptance of NGOs’ amicus briefs despite the Appellate Body’s previous holding.
This Comment argues that procedural rules should be revised to clarify amicus procedures and to enhance third-party rights in order to facilitate participation of both Northern NGOs and Southern sovereigns in WTO dispute settlements. In international trade-environment disputes, each side speaks for distinct public values and interests that reflect different historical experiences and existing disparities in socioeconomic development. Northern NGOs’ amicus briefs have conveyed transnational environmental concerns that are not adequately channeled through national representatives. However, merely encouraging nongovernmental amicus submissions would result in further overrepresentation of Northern values and interests, without addressing existing disadvantages faced by Southern sovereigns to represent their own constituencies in dispute settlement proceedings.

To better understand the major controversies regarding amicus briefs, Part I explains the factors that have produced the underlying tensions between the two sides in international trade-environment disputes. This section compares Northern environmental values and interests shaped under advanced industrialism with Southern developmental values and trade interests molded by the legacy of colonialism. This section also contrasts the Northern pursuit of


20. See supra note 17 (describing the transnational coalitions led by Northern NGOs that submitted amicus briefs to the recourse panel in Shrimp-Turtle); see also Padideh Ala’i, Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience, 24 FORDHAM INT’L L.J. 62, 82 n.123 (2000) (noting that the American Public Health Association and the Australian Centre of Environmental Law filed applications for leave to submit amicus briefs to the Appellate Body concerning the French ban on Canadian products containing asbestos).


22. See DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 15 (1973) (defining a postindustrial society, in which the tertiary sector constitutes more than half of the labor force). This section applies modernization theories with the core thesis that industrialization is associated with particular processes of sociopolitical transformation. See RONALD INGLEHART, MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC, AND POLITICAL CHANGE IN 43 SOCIETIES 8–9 (1997).

23. The author is aware that public values vary within the South according to differing histories, social traditions, and political cultures. See Benjamin J. Richardson, Environmental Law in Postcolonial Societies: Straddling the Local-Institutional Spectrum, 11 COLO. J. INT’L ENVTL. L. & POL’Y 1, 7 (2000) (emphasizing the heterogeneity in global environmental problems and policy responses across developing countries while considering it inadequate to generalize Southern environmental perspectives simply as a result of transnational economic and political influence or colonial legacies). Nevertheless, as this Comment purports to fill the gap between the Northern and Southern public constituencies, it focuses on colonial factors and
participatory democracy and the Southern quest for representational democracy in the WTO.

Part II analyzes WTO dispute settlement rules to identify present procedural deficiencies. This section examines Southern sovereigns’ difficulties with exercising rights in dispute settlements and highlights the importance of their third-party rights. It then investigates the evolution of amicus procedures through panel and appellate rulings and practices. Part II further explains how ad hoc amicus procedures ultimately foreclosed participatory opportunities for Northern NGOs without due process while creating prejudice to the existing participatory rights of Southern sovereigns.

To resolve the current impasse, Part III recommends both the enhancement of third-party rights in panel proceedings and the introduction of formal amicus procedures. To maintain a balance between the two sides, the principles of “common but differentiated responsibilities” and public participation adopted in the Rio Declaration on Environment and Development must be utilized in revising the relevant rules of WTO dispute settlement procedures. In conclusion, this Comment calls for the adoption of these procedural revisions at the new round of trade negotiations, in order to attain fair accommodation of diverse public values and interests in international trade-environment disputes.

I.

BACKGROUND: WHY DOES THE PARTICIPATION OF NORTHERN NGOS THROUGH AMICUS BRIEFS ENCOUNTER STRONG OPPOSITION FROM SOUTHERN SOVEREIGNS?

A. Fundamental Tensions Between Northern Environmental Values and Southern Developmental Values

Southern sovereigns’ opposition to amicus submissions by Northern environmental NGOs reflects the underlying tension between the two sides in the trade-environment debate. One source of tension lies in their different value structures. Northern NGOs support environmental values associated with nature conservation and environmental protection while
Southern sovereigns prioritize developmental values that include the utilization of natural resources and economic growth.\textsuperscript{27} While the North has reached the stage of advanced industrialism with unprecedented affluence, most of the South still struggles for industrialization and economic development to alleviate mass poverty left under the legacy of colonialism. These socioeconomic disparities generally explain different value priorities between the North and the South.\textsuperscript{28}

1. Northern Environmental Values Shaped Under Advanced Industrialism

Despite cultural and regional differences, Northern environmentalists generally share a similar set of environmental values.\textsuperscript{29} They typically attach priority to nature conservation over the utilization of natural resources.\textsuperscript{30} While industrialization and economic growth have produced environmental deterioration, changes in the human-environment relationship have stimulated value shifts among the wealthier strata of the Northern public, people generally lacking involvement in direct consumption of natural resources.\textsuperscript{31} Nature conservation movements can be traced back to mid-Nineteenth century

\textsuperscript{27.} See generally Lester W. Milbrath, Environmentalists: Vanguard for a New Society 26–28 (1984) (discussing value conflicts between preserving or utilizing nature and between prioritizing environmental protection or prioritizing economic growth).

\textsuperscript{28.} See supra note 19. Because this section focuses on shifts in dominant social values under modernization, the subsequent discussion regarding public value priorities does not include indigenous peoples, who often maintain distinct communal values associated with their cultural heritages and ancestral territories. See Henry Steiner & Philip Alston, International Human Rights in Context 1007 (1996).

\textsuperscript{29.} See Milbrath, supra note 27, at 26–28, 35 (identifying the new environmental paradigm shared by environmentalists in West Germany, England, and the United States). Within this universal framework, however, Northern environmentalists may exhibit some different characteristics shaped by local political cultures and local surroundings. See John C. Pierce et al., Vanguard and Rearguards in Environmental Politics: A Comparison of Activists in Japan and the United States, 18 Comp. Pol. Stud. 419, 442–43 (1986) (observing the penetration of environmentally-oriented values among Japanese environmental leaders akin to their U.S. counterparts, although suggesting some cultural differences in organizational structure and strategies).

\textsuperscript{30.} See Milbrath, supra note 27, at 16–18.

\textsuperscript{31.} See Phillip W. Sutton, Explaining Environmentalism: In Search of a New Social Movement 87–89 (2000) (noting that shifts in public attitudes toward nature preservation resulted from the separation of social life and production from the natural surroundings and from the reduction of fear about unknown natural forces that encouraged aesthetic appreciation of nature); Joseph W. Meeker, Red, White, and Black in the National Parks, in On Interpretation: Sociology for Interpreters of Natural and Cultural History 127, 128 (Gary E. Machlis & Donald R. Field eds., 1984) (noting that people tend to exhibit stronger love of nature where humans perceive themselves as independent from nature); see also R. Prosser, Societal Change and the Growth in Alternative Tourism, in Ecotourism: A Sustainable Option? 19 (Erlet Cater & Gwen Lowman eds., 1994) (discussing the trend in popular natural tourism in which the wealthier strata enjoy a new natural tourist spot discovered by an explorer and cultivated by students, a trend later followed by the middle class).
England after the Industrial Revolution, where local notables created nature conservation groups. As society attained advanced industrialization, the majority of the labor force shifted to service sectors that do not involve direct consumption of natural resources, while increased leisure time and improved transportation popularized natural tourism. Under these conditions, nature conservation increasingly gained public support. Between the 1960s and 1990s, major nature conservation NGOs increased membership more than tenfold on both sides of the Atlantic.

Rapid economic growth produced the conditions for value shifts supportive of environmental activism. According to the theory of postmaterialism, those who have satisfied their basic needs under prevailing affluence in advanced industrial societies put less emphasis on materialist values including economic growth, security, and social order. In turn, they develop quality-of-life concerns that attach more importance to postmaterialist values, such as self-expression, meaningful work, and aesthetics. Notably, public support for environmental protection persists regardless of the improved conditions in the


33. See BELL, supra note 22 (defining postindustrial society in which the tertiary sector accounts for more than half of the labor force); see also SUTTON, supra note 31, at 9 (explaining that the labor force in manufacturing sectors declines while that of service sectors increases in advanced industrial societies).

34. See BELL, supra note 22, at 456 (discussing that postindustrialism brings about “leisure society”); see also Meeker, supra note 31, at 128 (noting that people tend to find nature as a refuge from urban life and feel “personal sanctity” in natural surroundings, and thus recognize a strong need for nature conservation).

35. In the United States, for example, the National Audubon Society increased its membership from 41,000 to 600,000 between 1962 and 1991. See BENTON & SHORT, supra note 32, at 113. The Wilderness Society also grew from 27,000 to 350,000 between 1964 and 1991. See id. In the United Kingdom, the National Trust had 159,000 members in 1967 and reached 2,000,000 in October 1990. SUTTON, supra note 31, at 123. Similarly, the Royal Society for the Protection of Birds expanded its membership from 25,000 to over 1,000,000 by 2000. Id.


37. See INGLEHART, supra note 22, at 33–107 (explaining the key theses in the theory of postmaterialism in which individual’s value priorities are a reflection of socioeconomic conditions while value shifts require long-term adjustment through socialization processes).

38. See id. at 77–78, 108–09; see also Ronald Inglehart, Public Support for Environmental Protection: Objective Problems and Subjective Values in 43 Societies, 28 POL. SCI. & POL. 57, 57 (1995).
According to the 1990-1993 World Values Survey, Nordics, who show the strongest postmaterialist orientation, exhibit the highest support of environmental protection among forty-three countries including developed and developing nations, although they currently enjoy the world's cleanest air and water.

2. **Southern Developmental Values Structured Under Colonialism**

While environmental values have prevailed among affluent Northern communities through their internal processes of modernization, developmental values penetrated in Southern sovereigns through the processes of colonization and economic dependence on the North. Centuries of colonization and its legacies have significantly affected the life and surroundings of local people in former colonies. Colonial forces massively exploited raw materials in colonies to supply the production of export commodities to their home countries. While the North absorbed the natural wealth, the South was left with environmental depletion and an impoverished population. Decolonization, in many instances, merely

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40. See Inglehart, supra note 38, at 57.

41. See BENTON & SHORT, supra note 32, at 29 (identifying the “commodification of nature” as one common characteristic of environmental discourse in Europe during the colonial era, where communal sanctions and taboos were superseded by market forces as primary determinants in human interactions with the environment).


43. See BENTON & SHORT, supra note 32, at 28; see also M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 31 (1994) (giving examples of mining agreements with long-term concessions in gold fields of Ghana and in ruby mines of Burma that could last for a hundred years).

44. See id. (stating that colonies are regarded as inexhaustible sources of minerals and raw materials in accordance with dominant mercantilist theories).
recast the skewed economic relations despite political independence. The dominant forces and commercial interests occupied productive land and forests for the production of the primary commodities exported to the North, while poor farmers were forced to sustain their lives on unfertile land and forests. Some developing countries enjoyed marked economic growth in the 1980s, facilitated by Northern multinationals' direct investment. Foreign direct investment, however, in some instances produced intense environmental externalities, such as the Union Carbide's release of toxic gas in Bhopal, India, and the dumping of radioactive waste by a Japanese joint venture in Malaysia. As a result, the society at large lacked the conditions conducive to conservationism.

Despite improved physical and material conditions in the population as a whole, mass poverty still prevails in the South. Currently, of the 4.6 billion people in the South, 2.8 billion live on less than two dollars a day.

45. See Samuel K. B. Asante, The Concept of Stability of Contractual Relations in the Transnational Investment Process, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 234, 244 (Kamal Hossain ed., 1980) (stating that developing countries could not repudiate disadvantageous agreements with colonial forces when they became politically independent); see also RAÜL PREBISCH, CHANGE AND DEVELOPMENT—LATIN AMERICA'S GREAT TASK 155–56 (1971) (arguing that because international trade relations did not go through structural changes, developing countries had to depend on the "goodwill" of developed countries to remove trade barriers in Northern markets).


47. See id. at 29–31; see also PREBISCH, supra note 45, at 5.


49. See Peggy Rodgers Kalas, International Environmental Dispute Resolution and the Need for Access by Non-State Entities, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 193 (2001) (stating that multinational corporations played a major role in transferring technology and providing international trade networks to developing countries).

50. See id. at 193 n.3. The Union Carbide accident claimed lives of 3,500 people and injured over 200,000 in Bhopal, India. Id. at 201. But see RONIE GARCIA-JOHNSON, EXPORTING ENVIRONMENTALISM: U.S. MULTINATIONAL CHEMICAL CORPORATIONS IN BRAZIL AND MEXICO (2000) (contending that U.S. chemical companies promote environmental norms and policies through their operations and business relations in Brazil and Mexico).

51. See Shaffer, supra note 3, at 66 (noting that Southern constituencies show far less attachment to nature conservation). However, a notable exception is Costa Rica, which is well recognized for its environmentally sustainable resource management. See James Salzman et al., Protecting Ecosystem Services: Science, Economics, and Law, 20 STAN. ENVTL. L.J. 309, 324 (regarding Costa Rica as a leader in protecting ecosystem services and explaining its national forest management system aiming to prevent deterioration of local ecosystem services).

52. See UNDP, supra note 48, at 9. Income disparity persists between the North and the South. In 1998, people in Latin America and the Caribbean, whose income were the highest in the South, earned only about a third of the high-income countries in the Organization for Economic Cooperation and Development ("OECD"). See id. at 16. Furthermore, in many
Although environmental values are beginning to prevail among the wealthier urban South, economic conditions in the impoverished rural South are not conducive to the development of these quality-of-life concerns. Accordingly, even with the overall increase in their living standards, Southern constituencies generally emphasize materialist values including economic gains, security, and social order. The World Values Survey of 1990-1993 shows that materialist value priorities remain prevalent in Brazil, China, India, South Africa, South Korea, and Nigeria. As a result, developmental values shaped under colonialism still dominate Southern societies while environmental values have gained popularity under advanced industrialism in the North.

B. Conflicts Between Northern Interests in Transnational Environmental Issues and Southern Interests in Autonomous and Equitable Economic Relations

These different value priorities may not hinder a tactical alliance between Northern NGOs and Southern sovereigns as long as they can find a win-win situation regarding their interests in international trade and the environment. In most instances, however, Northern

instances, socioeconomic disparities have widened between rural and urban areas within the South. See id. at 13, 15.


54. See supra note 52 and accompanying text.

55. See supra note 38 and accompanying text.

56. See RONALD INGLEHART ET AL., HUMAN VALUES AND BELIEFS: A CROSS-CULTURAL SOURCE BOOK: POLITICAL, RELIGIOUS, SEXUAL, AND ECONOMIC NORMS IN 43 SOCIETIES, fig. V405 (1998) (showing that more than 35% of respondents to the survey supported materialist value priorities in Brazil, China, India, South Africa, South Korea, and Nigeria and less than 16% advocated for the same value priorities in ten advanced industrial democracies). Although the public in some developing countries shows strong support for environmental protection, its support may result from reactions to acute environmental problems caused by uncontrolled development. See Inglehart, supra note 38, at 58.

57. See, e.g., World Wildlife Federation ("WWF"), REPORT NO. 2: FROM THE WTO MINISTERIAL MEETING IN SEATTLE (1999) (reporting that WWF led the campaign against fisheries subsidies and called for WTO action, together with representatives from seven WTO members including the Philippines and Argentina) (on file with author). Both sides share a common interest in this issue because fisheries subsidies stimulate overfishing to deteriorate the marine environment, while traditional fishing communities in developing countries have a difficulty competing with subsidized Northern commercial fisheries for shrinking fisheries resources. See WWF, CAN THE WORLD TRADE ORGANISATION LIVE UP TO THE CHALLENGES OF A GLOBALIZING WORLD? 4-5 (2001). WWF continued campaigning for the elimination of fisheries subsidies while developing countries negotiated at the 2001 Doha Conference to bring about "win-win-win" opportunity among the environmental community, developing countries, and the WTO. See id. WTO, THE DOHA DECLARATION EXPLAINED, at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last visited Nov. 22, 2002). The Doha Ministerial Declaration reflects their efforts by recognizing fisheries subsidies as part of the agenda of the global trade round. See WTO Ministerial Conference, supra note 4, para. 31.
environmental NGOs and Southern sovereigns have been engaged in a zero-sum game because Northern NGOs have supported transboundary environmental interests by using trade measures that effectively undermine Southern interests in autonomous and equitable economic relations.  

1. Northern Attempts to Preserve Global Commons and Southern Efforts to Defend Permanent Sovereignty over Natural Resources

Northern environmental NGOs tend to resort to unilateral trade sanctions in addressing the deterioration of global commons, where the international community maintains a collective interest through global environmental concerns. Extra-jurisdictional environmental problems have been exacerbated as human activities and their consequences expansively cross national borders, but states do not have direct authority over environmentally harmful activities within the jurisdiction of another state. Although states have engaged in various multilateral environmental agreements ("MEAs"), NGOs perceive MEAs as inefficient because they involve prolonged negotiations among states with different social priorities. Most MEAs also lack a mechanism to impose effective sanctions for non-compliance. Without direct influence on


59. See, e.g., Hilary French, Challenging the WTO, 12 WORLD WATCH 22, 25 (1999) (advocating states' rights to take unilateral measures to protect the extra-jurisdictional environment, such as "the atmosphere, the oceans, and other parts of the global commons"); GREENPEACE, SAFE TRADE IN THE 21ST CENTURY: THE DOHA EDITION 24 (Aug. 2001) (noting that Greenpeace has attempted to preserve global commons since the early days of its advocacy work in their policy proposals that support unilateral measures), available at http://www.greenpeace.org/politics/wto/doha_report.pdf.

60. See HUNTER ET AL., supra note 3, at 343.


62. See Rio Declaration, supra note 25, princ. 2 (recognizing states' responsibility to control environmentally harmful activities only within "the limits of national jurisdiction.").


64. See, e.g., HUNTER ET AL., supra note 3, at 215 (giving examples of prolonged negotiations for international environmental agreements, such as the U.N. Convention on the Law of the Sea, which was concluded after ten years of negotiations, and the Montreal Protocol, which was concluded more than a decade after ozone depletion began to draw international attention).

65. See Neil Craik, Recalcitrant Reality and Chosen Ideals: The Public Function of Settlement in International Environmental Law, 10 GEO. INT'L ENVTL. L. REV. 551, 573 (1998) (explaining that international environmental law tends to depend on "soft law" instruments that do not bind parties legally but provide for general principles and objectives to accommodate
foreign governments, Northern NGOs resort to domestic trade measures to prompt international negotiation and compliance by foreign governments. In particular, unilateral trade measures offer more direct, immediate, and easier solutions for Northern environmental NGOs in protecting endangered species in extra-jurisdictional habitats.

However, Northern unilateral trade measures have encountered strong resistance among Southern sovereigns, who have sought to shield further penetration of Northern influences and interests throughout the period after decolonization. Since the 1950s, Southern sovereigns have attempted to restructure the existing skewed economic order. In 1962, they successfully persuaded Northern counterparts to adopt the United Nations ("U.N.") declaration that recognized permanent sovereignty over natural resources. Southern sovereigns have further claimed the creation of a new international economic order ("NIEO") to obtain economic autonomy from the North. Although Southern efforts brought about a U.N. declaration on this issue, they had little actual gain

diversity across nations with different economic, social, and political structures and at different stages of economic development).

66. See, e.g., French, supra note 59, at 24 (emphasizing that the U.S. trade ban on shrimp and shrimp products spurred sixteen nations, including thirteen Latin American nations and Indonesia, Nigeria, and Thailand, to introduce the requirement of the turtle excluder devices in their domestic regulations in order to protect sea turtles that "are both extremely endangered and highly mobile"). See generally David M. Driesen, What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate, 41 VA. J. INT'L L. 279, 321 (2001) (stating the effectiveness of trade bans to induce foreign states' environmental actions).


68. See Komal Hossain, Introduction: General Principles, the Character of Economic Rights and Duties of States and the NIEO, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, supra note 45, at 1, 5-6 (stating that developing countries have sought legal protection from coercive forces from the North in attempting to reform the existing economic order). See generally Neumayer, supra note 67 (arguing that powerful states alone can use unilateral measures, which impose their particular value priorities on the remaining states).

69. See Milan Bulajić, Legal Aspects of New International Order, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, supra note 45 (stating that Southern attempts to reform the existing economic order can be traced back to 1952, when Chile mentioned this issue in negotiating the Draft International Covenant on Human Rights).


71. See Hossain, supra note 68, at 1 (stating that Southern sovereigns collectively called for the NIEO at the Non-Aligned Summit in 1973).

concerning the NIEO, especially regarding the treatment of transnational corporations.  

Southern sovereigns perceive that Northern NGOs have attempted to nullify their permanent sovereignty over natural resources by preserving Southern natural wealth as global commons through unilateral trade measures. In 1971, in response to the Northern initiative to internationalize environmental protection issues, Southern sovereigns collectively passed a U.N. resolution. The resolution emphasized the full respect for permanent sovereignty over natural resources while accusing the North of irresponsibility in causing industrial pollution. The Southern sovereigns’ position was reflected in the Stockholm Declaration of the U.N. Conference on the Human Environment in 1972 and reiterated in the Rio Declaration in 1992 through provisions regarding sovereign rights to use natural resources pursuant to national environmental policy. The Rio Declaration also specifically refers to the avoidance of unilateral environmental measures. Despite the principles

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73. See MILAN BULAJIĆ, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER 169–74 (2d ed. 1993) (explaining that developing countries attempted to introduce a U.N. Code of Conduct on Transnational Corporations that would give them power to regulate the conduct of transnational corporations); see also NIEO Declaration, supra note 72, para. 4(g) (calling for “[r]egulation and supervision of activities of transnational corporations”). Although the Code of Conduct was actively negotiated in the United Nations Commission on Transnational Corporations in the early 1980s, the negotiation was stalled by the late 1980s. See BULAJIĆ, supra, at 169–74. The Code has not yet reached at the final draft stage and the prospect for completion has not been encouraging, especially since the mid 1990s, when the Commission was dissolved and reorganized into a smaller unit within the United Nations Conference on Trade and Development. See BULAJIĆ, supra, at 173; ERIC KOLODNER, TRANSNATIONAL CORPORATIONS: IMPEDIMENTS OR CATALYSTS OF SOCIAL DEVELOPMENT?, OCCASIONAL PAPER NO. 5, Part 3 (1994), available at http://www.rrojasdatabank.org/op05-07.htm#P500_94310.

74. See HUNTER ET AL., supra note 3, at 280–81.


76. See id. pmbl. ¶ 2.


78. Rio Declaration, supra note 25, princl. 12 (“Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.”). The WSSD Plan of Implementation also recommends that states “[t]ake steps with a view to the avoidance of and refrain from any unilateral measure . . . that impedes the full achievement of economic and social development.” WSSD Plan of Implementation, supra note 42, para. 96.
articulated in these instruments, dissonance still persists between the two sides in several areas, such as forest management, protection of endangered species, and conservation of biological diversity.79

2. Northern Concerns About the Race to the Bottom and Southern Concerns About Disguised Protectionism

Environmentalists worry that the expansion of free trade could result in a "race to the bottom" to weaken domestic environmental regulations.80 Northern environmentalists have sought to prevent irreparable harm with stringent environmental standards based on the precautionary principle of the Rio Declaration.81 If national environmental standards were applied only to domestic production processes, industries would migrate into countries with loose environmental standards to take advantage of lower compliance costs.82 In response, Northern governments would relax national standards to attract investments,83 while "pollution havens" would emerge in the South.84 Thus, Northern NGOs support the imposition of domestic environmental regulations on foreign producers, as well as on domestic

79. See supra notes 9–18 and accompanying text (discussing the Shrimp-Turtle disputes); see also ANS KOLK, FORESTS IN INTERNATIONAL ENVIRONMENTAL POLITICS: INTERNATIONAL ORGANISATIONS, NGOs AND THE BRAZILIAN AMAZON 159–60 (1996) (discussing that Southern sovereigns opposed adoption of a binding international forest agreement supported by the North because they perceived the Northern attempt at "supranational control" of Southern forests as an easy method of counteracting Northern carbon dioxide emissions); Fred Powledge, Patenting, Piracy, and the Global Commons, 51 BIOSCIENCE 273, 274 (2001) (explaining that Southern sovereigns, as they fought for permanent sovereignty over natural resources, claimed sovereign control over biological resources, which have been exploited by Northern companies and researchers without compensation).
80. See Neumayer, supra note 67, at 142.
81. Rio Declaration, supra note 25, princ. 15 ("Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation."); see also GREENPEACE, supra note 59, at 9–12 (advocating preventive measures under the precautionary principle to ensure safe trade while demanding the WTO refrain from interfering with domestic applications of the precautionary principle); French, supra note 59, at 25–26 (reiterating the precautionary principle in discussing food safety controversies in traded goods, such as food additives, beef hormones, and genetically modified organisms).
82. See generally Matthew A. Cole, Examining the Environmental Case Against Free Trade, 33 J. WORLD TRADE 183, 190 (1999) (explaining that proponents of transnationally applicable standards often argue that nations with the lowest environmental standards would gain competitive advantage without harmonizing environmental standards internationally).
83. See Neumayer, supra note 67, at 142 (stating that environmentalists worry that states would become weary of raising environmental standards or even inclined to lower standards to avoid capital outflows); see also Cole, supra note 82, at 190 (explaining that advocates of transnationally-applicable standards are concerned that states, in competition, would undermine environmental standards of their rivals).
84. See Cole, supra note 83, at 190 (noting that environmentalists fear substantial environmental deterioration in pollution havens).
producers, to ban imports of goods produced through unqualified processes. 85

The South has been skeptical about Northern environmental standards that fail to include special and differential treatment for the South. In seeking the NIEO, Southern sovereigns have repeatedly demanded preferential treatment to rectify inequitable international economic relations. 86 In 1966, Southern sovereigns introduced special and differential treatment provisions in the General Agreement on Tariffs and Trade ("GATT"). 87 In 1971, shortly before the Stockholm Conference, Southern sovereigns collectively demanded that industrialized countries "[a]void any adverse effects of environmental policies and measures on the economy of developing countries . . . including international trade." 88 The Southern demands were ultimately incorporated in the Rio principles dealing with the special needs of the South, 89 common but differentiated responsibilities, 90 and mutually supportive trade and environmental policies to attain sustainable development. 91 These principles are essentially reiterated in the preamble of the 1994 Agreement Establishing the World Trade

85. See Goodman, supra note 1 (reporting that environmental NGOs want to confirm that foreign producers are not benefited or encouraged because of "less than strict environmental rules and regulations."). However, the theory of race to the bottom has not been confirmed academically with coherent results of empirical studies. See Cole, supra note 82, at 190–91. In the manufacturing sector, normally, environmental compliance costs are a fraction of overall costs. See Neumayer, supra note 67, at 144. Moreover, several other factors affect transnational corporations’ behavior. See id. (identifying factors that deter transnational corporations from migrating out of ‘greener’ countries, such as the risk of environmental liability, reputational harm, consumer pressure, and the expectation of future tougher environmental standards in the present pollution havens). On the other hand, a race to the bottom might occur where an environmental measure imposed relatively substantial compliance costs on production processes, especially in natural resource sectors. See id. at 143–44.

86. See Hossain, supra note 68, at 5–6 (explaining that developing countries sought affirmative actions to remedy disadvantageous conditions through NIEO instruments).

87. General Agreement on Tariffs and Trade, Oct. 30, 1947 [hereinafter GATT 1947], Protocol Amending the General Agreement to Introduce Part IV on Trade and Development and to Amend Annex I, Feb. 8, 1965, 17 U.S.T. 1977, 572 U.N.T.S. 320 (incorporating Article XXXVI into the GATT 1947 to provide non-reciprocal advantages to developing countries); see also Asoke Mukerji, Developing Countries and the WTO: Issues of Implementation, 34 J. WORLD TRADE 33, 36 (2000) (stating that the GATT and the WTO allow developing countries to resort to exceptions to protect domestic industries because the promotion of development in such countries are consistent with WTO objectives).


89. Rio Declaration, supra note 25, princl. 6 ("The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.").

90. See supra note 22.

91. See Rio Declaration, supra note 25, princl. 12 (urging states to cooperate in promoting "a supportive and open international economic system that would lead to economic growth and sustainable development in all countries to better address the problems of environmental degradation.").
In particular, the South needs open and equitable market access to diversify export commodities and thereby promote balanced social development to reduce ecological stress.\(^9\)

The North has maintained the skewed trade relations by using political and economic power to erect various trade barriers, which have effectively nullified preferential treatment offered to the South. To discourage exports from the South, the North has maintained high tariffs and used non-tariff barriers, such as bilateral orderly marketing arrangements and voluntary export restraints.\(^9\) Southern sovereigns have also perceived anti-dumping measures as Northern protectionist devices. Between July 1991 and June 1993, for example, U.S. anti-dumping measures were questioned in thirteen active GATT cases, nine of which involved developing countries.\(^9\) Moreover, Northern agricultural subsidies have effectively undermined the competitiveness of Southern agricultural commodities. Agricultural subsidies provided by the United States, Europe, and Japan amount to four-fifths of the world's total.\(^9\)

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92. See WTO Agreement, supra note 6, pmbl. (considering the promotion of fair and non-discriminatory international trade relations “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”). Moreover, “the benefits and costs of globalizations are unequally distributed, with developing countries facing special difficulties in meeting this challenge.” Johannesburg Declaration on Sustainable Development, U.N. Doc. A/Conf. 199/L.6/Rev.2, para. 14 (2002) [hereinafter Johannesburg Declaration]. Accordingly, the WSSD Plan of Implementation highlights the principle of common but differentiated responsibilities and reaffirms the need to “secure [developing countries'] share in the growth of world trade commensurate with the needs of their economic development” and to promote mutually supportive trade, environment, and development measures. WSSD Plan of Implementation, supra note 42, paras. 2, 84, 91, 92.

93. See WCED, supra note 46, at 29. At the WSSD, the participating states explicitly acknowledged the need of trade diversification in commodity-dependent countries to promote sustainable resource management. See WSSD Plan of Implementation, supra note 42, para. 88.

94. See Ernest M. Hizon, Virtual Reality and Reality: The East Asian NICs and the Global Trading System, 5 ANN. SURV. INT’L & COMP. L. 81, 107 (1999); see also Tan Sri Ramon Navaratnam, Hypocrisy of Developed Nations Causes WTO Talks in Seattle to Fail Focus, STAR (Malaysia), Dec. 9, 1999, at 1 (calling for lowering customs duties imposed on labor-intensive export commodities, such as agricultural and textile products, from developing countries to realize free and fair international trade); WSSD Plan of Implementation, supra note 42, para. 86 (“Aim to reduce or, as appropriate, eliminate tariffs on non-agricultural products, including the reduction or elimination of tariff peaks, high tariffs and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries.”).

95. See Hizon, supra note 94, at 107. Given the huge disparity in market power, Southern sovereigns are susceptible to a mere threat of imposing anti-dumping sanctions. See id. at 118; see also Goodman, supra note 1 (interviewing Costa Rican Minister Samuel Guzowski Rose who noted that the nation has difficulty playing a substantial role in international trade affairs because of its small population and size).

96. See Business Special, Patches of Light: Liberalising Agricultural Trade, ECONOMIST, June 9, 2001, at 69. The amount of agricultural subsidies annually provided within the OECD countries is more than Africa's entire GDP. See id. Although the North agreed to consider the elimination of agricultural subsidies in the 2001 Doha Ministerial Declaration, the United States'
addition, Northern NGOs have supported domestic environmental standards that impose technical barriers and compliance costs on disadvantaged Southern producers. As a result, Southern sovereigns have condemned Northern environmentalism as "veiled protectionism," while demanding persistently to strengthen special and differential treatment provisions in the WTO.

C. Northern Pursuit of Participatory Democracy and Southern Pursuit of Representational Democracy

The differences in public values and interests, however, do not explain the cause of direct conflicts between the two sides in coordinating decision to substantially increase agricultural subsidies has virtually nullified the Northern pledge, as the U.S. policy discourages Japan and the European Union from abandoning protectionist agricultural policies. See Frances Williams & Guy de Jonquières, Stalled in Geneva, FIN. TIMES, June 19, 2002, at 22. Under these conditions, the WSSD Plan of Implementation reiterates the negotiation of agricultural subsidies in the Doha Ministerial Declaration with great emphasis. See WSSD Plan of Implementation, supra note 42, para. 86.

97. See Mukerji, supra note 87, at 51 (arguing that several Northern standards and regulations supported by "environmental lobbies" effectively nullified international commitments to increase market access for the South by erecting another trade barrier); see also Peel, supra note 6, at 73 (stating that domestic product standards endorsed by environmental NGOs often affect developing countries by creating trade barriers).

98. Egypt Fights "Veiled Protectionism" from Developing Countries, AGENCE FRANCE-PRESSE, Nov. 30, 1999, available at 1999 WL 25153135 (reporting that an Egyptian top foreign ministry official stated that Egypt, as President of the G-15 group that includes Algeria, Argentina, Brazil, Chile, Egypt, India, Indonesia, Kenya, Jamaica, Malaysia, Mexico, Nigeria, Peru, Senegal, Sri Lanka, Venzuela, and Zimbabwe, would "not yield" in its rejection of new labor and environmental standards, which amounts to "veiled protectionism"). Despite Costa Rica's well-known efforts in environmental conservation, Costa Rican Minister Samuel Guzowski also argued that the environment "had no place in trade negotiations" and should not be exploited for protectionism. See Goodman, supra note 1; see also supra note 51. Although developing countries agreed to include environmental issues in the 2001 Doha Ministerial Declaration, they maintain the fear that the North would use a breach of environmental standards as a pretext to increase trade barriers to exports from the South. See Frances Williams, Early Trade Talks Are Top Priority, Says New WTO Chief, FIN. TIMES, Sept. 3, 2002, at 8.

99. See WTO General Council, Preparations for the Fourth Session of the Ministerial Conference: Proposal for Framework Agreement on Special and Differential Treatment, WT/GC/W/442 (Sept. 19, 2001), available at http://docsonline.wto.org/DDFDocuments/ t/WT/GC/W442.doc. This proposal was collectively made by Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe in preparation for the 2001 Doha Ministerial Conference. See id. at 1. The proposal was recognized in the Doha Ministerial Declaration. See WTO Ministerial Conference, supra note 4, para. 44. Furthermore, the WSSD Plan of Implementation explicitly calls for the review of "all special and differential treatment provisions with a view to strengthening them and making them more precise, effective, and operational, in accordance with paragraph 44 of the Doha Ministerial Declaration." WSSD Plan of Implementation, supra note 42, para. 86(a). Accordingly, special and differential treatment provisions are currently in negotiation. See WTO DSU, Negotiations on the Dispute Settlement Understanding: Special and Differential Treatment for Developing Countries—Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/19 (Oct. 9, 2002), available at http://docsonline.wto.org/DDFDocuments/ t/tn/ds/W19.doc.
trade and environmental policies through WTO dispute settlements. In modern democracies, public policy acquires legitimacy through participatory policy processes and fair decision processes. Northern environmental NGOs seek participation in the WTO to represent transnational environmental interests while Southern sovereigns reject


101. See Michael Mason, Environmental Democracy 73 (1999) (emphasizing increased participatory opportunities to citizens in all policy decisions as the test of democratic legitimacy); id. at 12 (stating that democratic legitimacy involves the recognition of freedom and equality in decision-making). Although Dr. Mason is apparently not concerned about the distinction between “policymaking” and “decision-making,” the distinction is crucial to understand the remaining sections of this Comment. In national political systems, the general public can directly participate in policymaking through various channels including lobbying by interest groups and notice and comment processes, while only institutional actors on behalf of the public can directly participate in national decision-making, unless the public has the right to national referendum. See John W. Kingdon, Agendas, Alternatives, and Public Policies 145–53, 166 (1994) (discussing “the political stream” in policymaking where interest groups and elected politicians exert influence in mobilizing public pressures to frame legislative and bureaucratic policy choices to form a decisional agenda, which then extends to governmental decision-making processes); George Tsebelis, Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentalism, Multicameralism and Multipartism, 25 Brit. J. Pol. Sci. 289 (1995) (discussing how party systems and institutional arrangements of the executive and legislative branches shape key veto players, who have power to block legislation and thus exert influence on the outcomes of legislative decision-making). Similarly, at the international level, only states as institutional actors represent their citizens in international decision-making while NGOs and sectoral interest groups seek to have influence on international policy through transnational activities including lobbying, policy proposals, and global campaigns. See Michael Edwards, Introduction, in Global Citizen Action 1, 7 (Michael Edwards & John Gaventa eds., 2001) (recognizing that states are best suited to represent their public constituencies at the international level); Kal Raustiala, Note, The “Participatory Revolution” in International Environmental Law, 21 Harv. Envtl. L. Rev. 537, 551–52, 567 (1997) (explaining that NGOs and business groups enjoy increasing participatory opportunities in environmental treaty processes and official meetings in the context of the U.N. Economic and Social Council while they are normally excluded from negotiations between state delegations).

102. See supra note 20 and accompanying text. The author is aware that differences exist within the Northern environmental community regarding ideological orientation and tactical choices. See Frederick W. Mayer, Interpreting NAFTA: The Science and Art of Political Analysis, ch. 6 (1998) (explaining the difference between radical groups, which tend to use advocacy actions and are less tolerant to the role of economics in environmental protection, and mainstream groups, which are well-funded and tend to pursue policy reform through lobbying with a positive view of the role of economics in environmental protection). The successful launch of the North American Free Trade Agreement (“NAFTA”) in 1993 partly resulted from strategic shifts by mainstream groups to support the establishment of the NAFTA with the environmental side agreement, while radical groups almost categorically refused the idea of the free trade regime. See id. ch. 4. In the WTO, currently, mainstream groups generally seek to reform the trade institution while radicals seek to ultimately abolish the WTO. See Robert O’Brien et al., Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements 141 (2000). Nevertheless, distinctions between mainstreams and radicals are neither clear-cut nor static because social movements are, by nature, flexible and dynamic. See id. at 15. Therefore, unless otherwise noted, this Comment deals with Northern environmental NGOs generally in order to focus on the larger and more substantive differences between Northern and Southern NGOs. See id. at 113 (noting that the
Northern participatory democracy in favor of securing fair national representation in WTO decision-making arenas. Although Northern NGOs purport to represent the global public, Southern NGOs, which generally lack capacity to represent the Southern public independently, attach priority to the greater participation of their governments in international trade policymaking while maintaining uneasy relationships with their Northern counterparts. Thus, in order to resolve the procedural disagreements in WTO dispute settlements, it is essential to have a critical understanding of democratic politics in the North and the South.

103. See WTO DSB, India's Questions, supra note 8, paras. 31–32 (emphasizing “the intergovernmental character of the WTO” in which governments represent domestic stakeholders while showing concern that the existing disadvantages to developing countries in the international trade system would be increased by amicus submissions mostly made by Northern NGOs); see also WTO General Council, Minutes of Meeting: Held in the Centre William Rappard on 22 November 2000, WT/GC/M/60, paras. 16, 21 (Jan. 23, 2001) (reporting that Egypt, on behalf of the Informal Group of Developing Countries (“IGDC”), regards the WTO as a “Member-driven” international organization and that Egypt worries that beneficiaries of increased public participation would be mainly NGOs from the North), available at http://docsonline.wto.org/DDFDocuments/t/WT/GC/M60.doc.

104. See CIEL, AN INTRODUCTION: THE SHRIMP-TURTLE DISPUTE AND CIEL’S AMICUS BRIEF (stating that CIEL submitted an amicus brief in Shrimp-Turtle on behalf of seven NGOs “from around the world”), at http://www.ciel.org/Tae/shrimpturtle.html (last visited Nov. 22, 2002); FOUNDATION FOR INTERNATIONAL ENVIRONMENTAL LAW AND DEVELOPMENT (“FIELD”), EUROPEAN COMMUNITIES—MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS (AB-2000-11): SUBMISSION OF WRITTEN BRIEF BY NON-PARTIES, at iii (2001) (advocating for formal procedural rules concerning “non-party submissions from unrepresented members of the global community”), available at http://www.field.org.uk/papers/pdl/asbestosamicus.pdf; see also GREENPEACE, supra note 59, at 17 (stating that “Greenpeace has campaigned globally to protect global commons... on issues of global concern”) (emphasis added).

105. See infra notes 166–168, 170. But see infra note 169 and accompanying text (noting that some Southern environmental NGOs participated in Northern led amicus coalitions). In addition, six Southern NGOs including nonprofit groups, academics, and industrial associations independently filed an application to submit amicus briefs in the appellate proceeding in the EC—Asbestos case, although the Appellate Body ultimately rejected all applications. See infra notes 338–339 and accompanying text. In the panel proceeding of the EC—Asbestos case, the group Only Nature Endures (“ONE”), an Indian NGO, attempted to submit an independent amicus brief, which was rejected as untimely. See WTO Panel Report on European Communities—Measures Affecting Asbestos and Asbestos Containing Products, WT/DS153/R, para. 6.4 (Sept. 18, 2000) [hereinafter Panel Report on EC—Asbestos]. To this date, the Instituto Mexicano de Fibro-Industrias A.C. is the sole Southern NGO whose amicus brief was accepted in WTO dispute settlements, although the panel ultimately declined to consider the Southern NGO’s brief. See id. paras. 6.1, 6.3.

106. See infra note 151.
1. Northern Activism to Entrench Public Participation in Global Policymaking

With disparities in socioeconomic development and divergent value priorities, Northern and Southern public constituencies tend to use different channels to convey their policy preferences domestically and internationally. For Northern environmentalists, participatory democracy is inseparable from environmental value priorities. Under conventional representational democracy, free elections have allowed organized economic interests to dominate national politics, while environmental concerns have been marginalized. Since the 1960s, environmentalists have used extra-parliamentary tactics, such as protest movements and lawsuits, while organizing themselves into NGOs to convey public grievances. In advanced industrial societies, socioeconomic transformations have produced social conditions conducive to mass environmental mobilization. For example, occupational shifts have

107. See MILBRATH, supra note 27, at 35 (reporting that environmentalists prioritize openness and participation while business leaders tend to prefer efficient hierarchical institutions).

108. See MASON, supra note 101, at 21–22 (stating that under the increasing complexity of society, individuals are marginalized without meaningful political access to represent the interests of the environmentally affected and future generations). See generally O'BRIEN ET AL., supra note 102, at 12 (noting that in social movements, individuals with common interests act together to have influence on dominant political and economic forces through mass mobilization).

109. See Claus Offe, Reflections on the Institutional Self-Transformation of Movement Politics: A Tentative Stage Model, in CHALLENGING THE POLITICAL ORDER 232, 236–38 (Russel Dalton & Manfred Kuechler eds., 1990) (explaining that new social movements typically advocate for radical campaigns without a clear organizational base and ties to conventional political institutions). See, e.g., HUNTER ET AL., supra note 3, at 280 (stating that raising social movements in the 1960s in the United States led to the enactment of the National Environmental Protection Act of 1969 and other federal statutes dealing with air and water quality and solid waste management); Harutoshi Funabashi, Environmental Problems in Postwar Japanese Society, 1 INT'L J. JAPANESE SOC. 3, 5–6 (reporting that massive protest movements across Japan brought about the Pollution Diet of 1970, which enacted fourteen environmental bills including the Amendment of Basic Laws for Environmental Pollution Control). In addition, court proceedings also offer avenues for orderly public protests. See Offe, supra, at 239; see, e.g., Jun Ui, Conclusions, in INDUSTRIAL POLLUTION IN JAPAN 173, 176 (Jun Ui ed., 1992) (stating that environmental pollution victims successfully obtained compensation through a court battle assisted by lawyers and activists). In addition, environmental groups by themselves may bring a suit to voice public environmental concerns. See, e.g., Sierra Club v. Morton, 405 U.S. 727 (1972) (dealing with Sierra Club's request for an injunction to stop a governmental project to develop a ski resort in the Sequoia National Forest). In the United States, amicus briefs have evolved into popular means for "judicial lobbying." See Ala'i, supra note 20, at 63; see also Susan Hedman, Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court, 10 VA. ENVTL. L.J. 187, 192 (1991) (stating that the United States Supreme Court received at least one amicus brief in 86% of the environmental cases heard by the Court in the 1980s). On the other hand, some movements transform themselves into established organizations. See id. at 238. As a result, in many multiparty parliamentary democracies, NGOs provided the foundation for Green parties; in more rigid party systems, NGOs established themselves as channels of environmental interests through lobbying activities. See BENTON & SHORT, supra note 32, at 116.
created urban middle classes, which tend to be independent from traditional political ties. As discussed, advanced industrialism has also stimulated value shifts conducive to active political participation as well as increased environmental concerns among the public. In addition, improved economic and material conditions have resulted in a relative reduction of the cost of political participation at the mass level. Under these conditions, Northern NGOs have expanded their membership rapidly by drawing sizable support from affluent middle classes.

Northern NGOs not only channel mass preferences, but also become institutionalized and professionalized in order to better shape public administration and legislation. NGOs participate in governmental research and monitoring and create their own policy proposals. In advanced industrial societies, social affluence enables Northern NGOs to obtain considerable private and public funds to sustain their activities and to develop their expertise. For example, the budget of the U.S. big ten environmental groups, in combination, amounted to $250 million by the early 1990s. As of 1995, the non-profit sector constituted more than twelve percent of the work force in the Netherlands, eight percent in the United States, and six percent in the United Kingdom.

Moreover, the collapse of the Berlin Wall emancipated private activities from political ideological constraints. Under the dominance of

110. See generally supra note 33 and accompanying text (noting that the labor force shifts to the tertiary sector in advanced industrial societies).


112. See supra notes 38-39.

113. See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 273 (1957) (explaining that the cost of voting and the cost of information are more burdensome for low-income citizens, who usually show higher abstention rates than high-income citizens).

114. See, e.g., SUTTON supra note 31, at 122 (reporting that members of the Royal Society for the Protection of Birds, the National Trust, the Conservation Society, and FoE are predominantly from the middle classes with higher incomes and education). In the United Kingdom, FoE increased its membership from 2,000 in 1971 to 180,000 by 1990. Id. Greenpeace U.K. also saw its membership grow from around 10,000 in 1980 to 400,000 by 2000. Id. In the United States, the big ten environmental NGOs, in combination, acquired 8 million members by the early 1990s. See BENTON & SHORT, supra note 32, at 113-14.

115. See Peel, supra note 6, at 71; see also Daniél Faber, The Political Ecology of American Capitalism: New Challenges for the Environmental Justice Movements, in THE STRUGGLE FOR ECOLOGICAL DEMOCRACY 48-49 (Daniél Faber ed., 1998) (noting the institutionalization and professionalization of U.S. mainstream environmental NGOs that focus on technical issues and rational solutions).

116. See Faber, supra note 115, at 48-49.

117. See BENTON & SHORT, supra note 32, at 113-14.


119. See Grossman & Bradlow, supra note 61, at 9-10 (identifying the end of the Cold War as one factor that required state-centered international legal systems to address the expansion of transnational actors).
liberal capitalism, Northern NGOs expanded the scope of their activities to monitor socially and environmentally harmful transnational corporate activities. Advanced communication technologies enabled Northern NGOs to overcome borders in information sharing and coalition building. Currently, 5,000 Northern NGOs are known to act transnationally in a variety of fields, although they have only one base in a developed country. Consequently, both commercialism and environmental activism expansively flow from the North.

In the WTO, liberal economists and transnational corporate interests have dominated the discourse to advance free trade. As environmentalists have done domestically, Northern NGOs have struggled to open access to policymaking processes of the international trade institution in order to channel transboundary environmental interests. For example, NGOs have participated in the Symposium on Trade, Environment, and Sustainable Development held by the WTO Secretariat each year since 1994. NGOs have acquired accreditation to

120. See id. at 7–9 (explaining that transnational corporations' activities are one of the most important phenomena of globalization); see also O'BRIEN ET AL., supra note 102, at 15 (noting that social movements have moved into international fora, which have already been occupied by transnational corporate interests with extensive business networks and close ties to powerful states).

121. See Grossman & Bradlow, supra note 61, at 11; see also The Non-Governmental Order, supra note 1, at 21 (reporting that environmental and citizen activists built transnational coalitions before Seattle largely via email). For example, Public Citizen collected signatures from 1,500 NGOs to a protest declaration against the WTO. See The Non-Governmental Order, supra note 1, at 21.


123. See, e.g., Simon Retallack, After Seattle: Where Next for the WTO?, 30 ECOLOGIST 30, 31 (2000) (arguing that the WTO's mandate is to remove trade barriers including "any impediments to corporate profit-making," such as domestic labor and environmental standards, and that the liberal trade agenda is enforced through the dispute settlement system with panels "who have usually made legal careers representing corporate clients on trade issues"); French, supra note 59, at 23 (stating that opponents regard the WTO "as a dangerous supranational entity that elevates corporate rights to a new plane, while devastating local communities and the environment"); see also Shaffer, supra note 3, at 1 n.2 (citing various Northern NGOs' views in which the WTO is recognized as an international institution captured by corporate interests).

124. See, e.g., Steve Charnovitz, Opening the WTO to Nongovernmental Interests, 24 FORDHAM INT'L L.J. 173 (2000) (explaining WTO relationships with NGOs from a nongovernmental perspective); Gabrielle Marceau & Peter N. Pedersen, Is the WTO Open and Transparent?: A Discussion of the Relationship of the WTO with Non-Governmental Organisations and Civil Society's Claims for More Transparency and Public Participation, 33 J. WORLD TRADE 5 (1999) (describing increased opportunities for NGO participation in the WTO through personal experience as officers in External Relations Division of the WTO Secretariat). In contrast to the restrained access to the WTO, NGOs have gained recognition as "representatives of diverse societal interests" to participate substantially in environmental treaty processes in U.N. institutions. Raustiala, Note, supra note 101, at 543–52, 565.

“observe” the Ministerial Conference since 1996. In 1998, the WTO opened the NGO section on their Internet homepage. Despite these incremental changes, NGOs still lacked effective access to key policymaking arenas including the Committee on Trade and Environment, which ultimately brought about the massive protest movements at the Seattle Ministerial Conference in 1999. Currently, Northern NGOs have attempted to widen a channel in the dispute settlement processes, which have significantly reshaped international and domestic environmental policies.

2. Southern Predicaments to Realize Fair Representation in International Decision-Making

While Northern NGOs “deepened” the participatory capacity of the established democratic regimes by their active participation, many Southern nations have only recently adopted democratic regimes. As a result, although Northern NGOs have introduced participatory

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126. See Marceau & Pedersen, supra note 124, 12-14 (explaining that members are wary of opening access for NGOs to the consensus driven conference, which resulted in granting to NGOs an “observer status,” which does not grant the right to intervene in negotiations). Although the accreditation of NGOs was initially contemplated as temporary, the WTO used the same procedure in subsequent conferences. See id. at 13, 17.


128. See Araya, supra note 1, at 186 (stating that critics considered WTO’s efforts to increase public involvement and to improve transparency insufficient to counterbalance the dominant trade interests in the WTO); French, supra note 59, at 27 (explaining that critics accuse the WTO of its closed meetings in most committees and in dispute settlement proceedings); O’BRIEN ET AL., supra note 102, at 149-50, 222-23 (stating that some leading NGOs are campaigning for the abolition of the Committee on Trade and Environment, which has only paid “lip-service” without taking meaningful action to incorporate environmental concerns into international trade policy and to allow their participation as observers).

129. See supra note 1.

130. See Van der Borght, supra note 100, at 1227 (noting that NGOs, especially environmental groups, have led a well-organized action to obtain access to the WTO and its dispute settlement system in particular).

131. See, e.g., French, supra note 59, at 23 (stating that the original decision in Shrimp-Turtle is “alarming” because a state cannot veto the adoption of panel and appellate reports, which, in this case, actually forced the United States to change the domestic environmental regulation without amendment legislation); see also Peel, supra note 6, at 64 (noting that the WTO has increasingly dealt with international trade-environment disputes that affect national environmental policy, thereby stimulating environmental NGOs’ demand for participation in WTO dispute settlement proceedings).

132. See generally MASON, supra note 101, at 21 (highlighting the importance of “widening” or “deepening” opportunities of participation in the established representative democracies).

133. See UNDP, supra note 48, at 10 (reporting that in the past decade, military regimes and one-party rules disappeared from more than a hundred developing countries and transition economies). However, a notable exception is India. See INGLEHART, supra note 22, at 357-58 (showing that India had a record of continuous democracy for seventeen years as of 1995).
democracy to rectify biases in established electoral politics. Southern NGOs have needed to begin by enfranchising public constituencies to introduce and effectuate representational democracy. In many parts of the South, as discussed above, the majority of the population is so impoverished that their efforts tend to focus on sustaining their everyday life. Because of such economic disparity, Southern constituencies generally maintain a more materialist orientation, which attaches more importance to economic gains than to self-expression. Under these conditions, the cost of political participation is unaffordable because participation itself does not yield immediate material gains. Consequently, Southern NGOs' activities focus on "rehabilitation and social welfare for the poor and marginalized."

In addition, the legacy of the colonial era and dependency economies has resulted in additional barriers for Southern NGOs to emerge as independent channels of public interest representation. While Northern NGOs enjoy prosperity from sizable urban middle classes, the South was generally devoid of urban middle classes until recently. In rural areas, furthermore, the colonial and dependency factors have typically

134. See Mason, supra note 101, at 21–23 (stating that the constitutional guarantee of universal suffrage was insufficient from the perspective of environmentalism and that participatory democracy is necessary to promote environmental interest representation).

135. See supra note 52 and accompanying text.

136. See supra notes 55–56 and accompanying text.

137. See generally Downs, supra note 113, at 265 (regarding time as a scarce resource, which is consumed in every step of voting). This is especially true if the time necessary to vote conflicts with working time, which makes the cost of electoral participation prohibitive. See id.; see also Suchit Bunbongkarn, Elections and Democratization in Thailand, in THE POLITICS OF ELECTIONS IN SOUTHEAST ASIA, 184, 192 (R.H. Taylor ed., 1997) (noting the low level of political awareness in Thai voters); Syed Hashemi & Mirza Hassan, Building NGO Legitimacy in Bangladesh: The Contested Domain, in INTERNATIONAL PERSPECTIVES ON VOLUNTARY ACTION: RESHAPING THE THIRD SECTOR, supra note 111, at 124, 128 (describing attempts by Bangladeshi NGOs to raise electoral awareness).

138. Qadeer Baig, NGO Governing Bodies and Beyond: Southern Perspective on Third Sector Governance Issues, in INTERNATIONAL PERSPECTIVES ON VOLUNTARY ACTION: RESHAPING THE THIRD SECTOR 120 (describing activities of Pakistani NGOs to provide technical and material assistance to impoverished and marginalized people); see also Williams, supra note 19 (stating that Southern environmental NGOs often associate themselves with poor and deprived people).

139. See supra notes 110–114 and accompanying text.

140. See Salamon & Anheier, supra note 111, at 78 (explaining that colonial forces occupied governmental and commercial middle-class jobs in the South and deprived local people of professional job opportunities). Moreover, even in those few cases where Southern states did maintain political independence, colonial forces managed to seize the limited economic opportunities left there. See, e.g., Pasuk Phongpaichit & Chris Baker, Thailand’s Boom and Bust 12–13 (1998) (describing colonial influence on the Thai economy). In the post-colonial era, until recently, the pattern of social stratification has persisted in the South, with mass poverty and a predominantly agrarian occupational structure. See id. at 63, 78; see also supra notes 45–47 (discussing the structure of dependency economies, which shaped mass poverty and marginalization of local farmers in the South).
molded and sustained the patron-client social structure,\textsuperscript{141} in which affluent elites distribute parochial, tangible benefits to gain electoral support from rural constituencies.\textsuperscript{142} Colonialism generally involved the manipulation of ethnic relations by “divide and rule” strategies to structure and to reinforce ethnic tensions.\textsuperscript{143} The often unstable political conditions encourage states to restrict or suppress NGOs' unconventional activities.\textsuperscript{144} Under these circumstances, Southern NGOs tend to be more active in “service delivery” in poverty reduction, education, and health problems, which can be seen as supplementing local elites’ “patriarchal duty to help the poor.”\textsuperscript{145}

As a result, Southern environmental NGOs generally advocate for broad agendas that combine social development and environmental protection.\textsuperscript{146} Southern NGOs tend to show more concern about

\textsuperscript{141} See supra notes 46-47 and accompanying text (explaining the social bifurcation between the powerful elites and poor farmers in the South created and maintained under the legacies of colonialism and economic dependence on the North).

\textsuperscript{142} See, e.g., Benedict J. Tria Kerkvliet, \textit{Contested Meanings of Elections in the Philippines}, in \textit{THE POLITICS OF ELECTIONS IN SOUTHEAST ASIA}, supra note 137, at 140–42, 146 (describing the penetration of patron-client electoral politics in the Philippines where electorates seek immediate benefits through personal ties); Baig, supra note 138, at 120 (describing Pakistan's established social order as “one of welfare and patronage from above”); Salamon & Anheier, supra note 111, at 73 (noting the patron-client structure as a persistent feature of the Brazilian society).


\textsuperscript{144} See Baig, supra note 138, at 122; see also Hashemi & Hassan, supra note 137, at 126 (reporting that the Bangladesh government threatened local NGOs, whose activities were perceived as a challenge to the existing power structures).

\textsuperscript{145} Hashemi & Hassan, supra note 137, at 125 (discussing “service delivery” of Bangladeshi NGOs in providing micro-credits for the rural poor, non-formal education opportunities for rural children, and access to contraceptive devices and immunization); see also Salamon & Anheier, supra note 111, at 74 (stating that authoritarian social structures provide little room for Southern NGOs' independent activities and that NGOs tend to avoid confrontation with dominant social forces while maintaining passiveness and dependence). In addition, in many instances, an unsuitable legal system also impedes NGOs' operation and makes them susceptible to state intervention in their activities. See, e.g., Baig, supra note 138, at 119–20 (noting inadequacy in the regulatory scheme that governs NGOs in Pakistan); Salamon & Anheier, supra note 111, at 79–80 (explaining legal constraints on NGOs' operation in Brazil, Egypt, Ghana, and Thailand). However, the legacy of colonialism may not necessarily be the primary factor that hinders the development of more suitable legal systems to administer NGOs' activities. \textit{Compare id.} (stating that India has a legal system supportive of nongovernmental sectors), with Sumi Shin, \textit{Global Migration: The Impact of “Newcomers” on Japanese Immigration and Labor Systems}, 19 \textit{BERKELEY J. INT’L L.} 265, 325 n. 342, n. 343 (2001) (explaining that only in 1998 did Japan introduce the Law to Promote Specific Non-Profit Activities as a legal framework to facilitate NGOs' activities, but the law failed to resolve a significant obstacle in the existing tax codes, by not making donations to NGOs tax-deductible).

\textsuperscript{146} See GARETH PORTER, ET AL., \textit{GLOBAL ENVIRONMENTAL POLITICS} 63 (3d ed. 2000); see also Shaffer, supra note 3, at 66 (stating that the concepts of development and the environment are almost inseparable for Southern NGOs).
community organizations and activities than about global campaigns.\textsuperscript{147} Given the depletion of natural resources under colonial and dependency economies,\textsuperscript{148} they put more emphasis on sustainable resource management than the protection of the global environment.\textsuperscript{149} Recently, Southern environmental NGOs have begun increasing their political recognition to contribute public input in national environmental policy.\textsuperscript{150}

At the international level, Southern NGOs maintain uneasy relations with their Northern counterparts.\textsuperscript{151} Northern and Southern NGOs have jointly campaigned against environmentally harmful development projects and debt relief.\textsuperscript{152} However, Northern and Southern NGOs do not always agree on tactical choices in international lending and trade policies because in these areas, Northern NGOs have attempted to introduce labor and environmental standards as conditions to trade and debt concessions.\textsuperscript{153}

Capacity differences also affect the relationship between Northern and Southern NGOs. To sustain operations, many Southern NGOs receive support from international donors and Northern NGOs.\textsuperscript{154}

\begin{footnotesize}
\begin{enumerate}
\item See O'BRIEN ET AL., supra note 102, at 14.
\item See supra notes 43-47.
\item See PORTER ET AL., supra note 146, at 63 (offering examples of land use, forest management, fishing rights, and the allocation of control over natural resources as issues prioritized by Southern NGOs).
\item See id.; see also Desai, supra note 53, at 16 (reporting that environmentalists have increasingly shaped public debates in India, Indonesia, Mexico, Nigeria, Taiwan, Thailand, and Venezuela).
\item See John D. Clark, Ethical Globalization: The Dilemma and Challenges of Internationalizing Civil Society, in GLOBAL CITIZEN ACTION, supra note 101, at 17, 23 (stating that the right to speak for the impoverished constituencies in the South is an "increasingly vex[ing] issue" in relationships between Northern and Southern NGOs).
\item See PORTER ET AL., supra note 146, at 69 (noting that about 150 NGOs worldwide took some part in campaigns for debt reduction and environmentally acceptable development programs in the World Bank in the late 1980s); David A. Wirth, Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues, 100 YALE L.J. 2645 (1991) (describing partnership between the Natural Resources Defense Council and the Environmental Foundation, Ltd. in Sri Lanka to change environmentally devastating aspects of the World Bank forestry loan); Adil Najam, Citizen Organizations as Policy Entrepreneurs, in INTERNATIONAL PERSPECTIVES ON VOLUNTARY ACTION: RESHAPING THE THIRD SECTOR, supra note 111, at 142, 160 (referring to concerted actions between Northern and Southern NGOs against the Narmada Dam Project in India and against the export of polluting mercury-based technology from Denmark to Pakistan); see also The Non-Governmental Order, supra note 1, at 20 (giving examples of global NGO coalitions, such as "Fifty Years is Enough" campaign against the World Bank, mass protests against the Multilateral Agreement on Investment in 1998 and Jubilee 2000 concerning debt relief).
\item See Secular Missionaries, supra note 118, at 26 (reporting that of 120 NGOs that emerged in Kenya between 1993 and 1996, only nine organizations sustain their activities without foreign aid). However, Southern NGOs are not totally dependent and generally raise a sizable amount of money from domestic sources, such as fees and charges. See, e.g., Salamon &
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Northern supporters maintain some control over the governance of Southern NGOs to assure donor representation and accountability. This unbalanced relationship reduces the autonomy of Southern NGOs while allowing the imposition of Northern values and interests. For example, although Northern developmental NGOs have directed the best-recognized campaigns concerning international financial policies, twenty Southern NGOs from Africa jointly demanded Northern NGOs recognize Southern NGOs' "legitimacy and autonomy" in the 1998 Harare Declaration. The African NGOs sought to gain control over development strategies in their home countries and to take the initiative in advocacy work.

Overrepresentation of Northern constituencies in international policymaking processes reinforces Southern NGOs' dissatisfaction. In the WTO, for example, major developed countries, including the United States, the European Union, and, to some degree, Japan, introduced the Committee on Trade and Environment, despite vigorous Southern opposition at the Uruguay Round. Moreover, most Southern states have been systematically excluded from key decision-making processes at the WTO, as evidenced in the 1999 Seattle Ministerial Conference. In Seattle, the African delegates issued the following official statement: "There is no transparency in the proceedings and African countries are being marginalised and generally excluded on issues of vital importance.

Anheier, supra note 111, at 72 (reporting domestic fund raising of Southern NGOs from case studies in India and in the state of Rio de Janeiro, Brazil).
155. See Baig, supra note 138, at 120.
156. See Clark, supra note 151, at 23. As a result, if there is a conflict between Northern and Southern agendas in international advocacy work, Northern voices prevail. See id.
158. See id.
159. See, e.g., PORTER ET AL., supra note 146, at 64 (discussing Southern NGOs' perception that Northern NGOs have larger voices in the Rio Conference on the Environment and Development); see also Shaffer, supra note 3, at 66 (contending that Northern environmental NGOs, which maintain a "specifically [N]orthern perspective," do not represent "global civil society"); Peel, supra note 6, at 70 (noting the criticism that many NGOs advocate for Northern values and views while failing to represent the international public as a whole).
161. See Frances Williams & Guy de Jonquières, Developing Nations Determined to Have Their Own Voice Heard, FIN. TIMES. Nov. 21, 2001, at 13 (explaining that until recently, only thirty to forty developing countries were active in WTO negotiations although the WTO members include more than a hundred developing countries); see also WTO Impasse, supra note 2 (reporting that at the 1999 Seattle Ministerial Conference, the African group could not continue its caucus meeting when interpreters were abruptly withdrawn in support of an unscheduled meeting concerning labor standards that involved the United States). Moreover, two Caribbean Ministers were physically prevented from participating in a meeting on agriculture in the "Green Room," where key negotiations were held. See id.
to our peoples."162 The Caribbean representatives followed suit.163 After the Seattle Conference, almost all WTO members were, to some extent, engaged in preparatory processes for the 2001 Doha Ministerial Conference.164 Nevertheless, many developing countries still have difficulties in substantially participating in daily operations in the WTO for want of resources and expertise.165

Seeking fair representation, Southern NGOs attach importance to greater participation of their governments.166 Southern NGOs are generally disinterested in NGOs' direct participation in the key policymaking arenas in the WTO167 because this would favor Northern

162. Id.
163. See id.
164. See Williams & de Jonquières, supra note 161, at 13.
165. See ACTION AID ET AL., RECOMMENDATIONS FOR WAYS FORWARD ON INSTITUTIONAL REFORM OF THE WORLD TRADE ORGANISATION 2 (2000), available at http://www.wto.org/english/forums_e/ngo_e/christian_aid.doc. On March 11, 2002, the WTO announced that the WTO members promised to establish a funding mechanism for Trade-Related Technical Assistance programs especially for least-developed countries at the Doha Development Agenda Global Trust Fund Pledging Conference. See WTO Press Release, GOVERNMENTS PLEDGE CHF 30 MILLION TO DOHA DEVELOPMENT AGENDA GLOBAL TRUST FUND (Mar. 11, 2002), at http://www.wto.org/english/news_e/pres02_e/pr279_e.htm. It remains to be seen how the fund will be arranged and provided. The WSSD Plan of Implementation also emphasizes the need for "full and effective participation of developing countries in global decision-making" and especially in trade negotiations. WSSD Plan of Implementation, supra note 42, paras. 4, 45(a).
166. See Chakravarthi Raghavan, Appellate Body Sets Rules for NGO Briefs in Asbestos Case, SOUTH-NORTH DEV. MONITOR, Nov. 9, 2000 (noting that Southern NGOs emphasize "democratic and transparent decision-making among members"), available at http://www.twinside.org.sg/title/briefs.htm; Barun S. Mitra, WTO Protesters vs. the Poor, WALL ST. J., Dec. 9, 1999, at A26 (Mitra, a founder of an Indian think tank, criticizes Northern activists, who seek "democratization" of the WTO, for failing to acknowledge the legitimacy of some democratic governments). See generally Shaffer, supra note 3, at 70 (stating that Southern NGOs advocate for national representation and believe that Northern NGOs' participation would likely result in further underrepresentation of Southern constituencies); O' BRIEN ET AL., supra note 102, at 227 (explaining that Southern NGOs support their governments to enhance the states' influence on development policies of international financial institutions).
167. See Chakravarthi Raghavan, Appellate Body Asserts Right to Receive Amicus Curiae Briefs, SOUTH-NORTH DEV. MONITOR, May 11, 2000 (reporting that although the Appellate Body's decision to set up the Additional Procedure for NGOs' amicus briefs "may please" some Northern environmental NGOs, Southern NGOs are unlikely to be impressed because they are concerned more about inequity among the WTO members), available at http://www.twinside.org.sg/title/amicus.htm. Southern NGOs generally take a position close, if not identical, to their governments in international trade issues with emphasis on the appropriate use of natural resources and improved market access. See Shaffer, supra note 3, at 73-74 (giving examples of NGOs from India, Indonesia, Thailand, and South America); HILARY COULBY, GOING TO QATAR: HOW TO GET AN NGO REPRESENTATIVE ON YOUR GOVERNMENT DELEGATION 10 (acknowledging that "Kenyan NGO positions generally were close to those of their government, while UK NGOs had serious disagreements with government policy" at the 1999 Seattle Conference), available at http://www.wto.org/english/forums_e/ngo_e/ukngol.doc (last visited Nov. 22, 2002). Overall, Northern and Southern NGOs showed substantive disagreements with each other in the trade-environment debate while sharing key strategic interests with their own governments. See Shaffer, supra note 3, at 74.
NGOs with better resources, linguistic skills, and experience in international advocacy and policy research. Although some Southern environmental groups have participated in nongovernmental coalitions to submit amicus briefs, most Southern constituencies have perceived that the acceptance of amicus briefs in the Shrimp-Turtle disputes signified the erosion of fair rule-based system to allow further penetration of Northern values and interests in the WTO. Rather, Southern NGOs generally seek to promote public participation through national policymaking processes to shape governmental positions in WTO dispute settlements.

II. ANALYSIS: RULES AND PRACTICES GOVERNING PARTICIPATION OF SOUTHERN SOVEREIGNS AND NORTHERN NGOs IN WTO DISPUTE SETTLEMENT PROCEEDINGS

Currently, in WTO dispute settlements, Northern environmental NGOs promote transnational environmental interests by seeking direct participation via amicus briefs. In contrast, Southern sovereigns strongly oppose nongovernmental amicus submissions in order to prevent further underrepresentation. Formal procedural rules currently in place...
safeguard Southern sovereigns' rights to fair dispute resolution. The new institutional objective of sustainable development, however, arguably justifies NGOs' access to dispute settlement proceedings. Nonetheless, this tension does not lead to the conclusion that the WTO should leave amicus procedures as discretionary as they are. Indeed, ad hoc amicus procedures ultimately have been used to deny nongovernmental participation while creating uncertainty in fair representation of Southern trade interests, reinforcing the existing tensions between the two sides. Neither side benefits from the current system.

A. Southern Sovereigns' Right to Fair Dispute Resolution

In 1994, the WTO was established as a successor to the GATT regime with a new institutional framework under the WTO Agreement. Importantly, the WTO has strengthened a dispute settlement mechanism. The mechanism entails "multilateral quasi-judicial proceedings," which seeks the efficient resolution of conflicts between national trade policies and articulation of rules and principles

172. Mukerji, supra note 87, at 64 (explaining that the creation of the WTO dispute settlement system was expected to produce security and predictability in international trade relations and to discourage unilateral trade restrictions).

173. See OXFAM GB POLICY DEPARTMENT, INSTITUTIONAL REFORM OF THE WTO: OXFAM GB DISCUSSION PAPER 16 (2000) (emphasizing that the Rio Declaration, together with Agenda 21, acknowledge that public participation is crucial in achieving the objective of sustainable development, which provides "a strong case" for the multilateral trade institution to improve relations with public constituencies in various areas including NGOs' amicus briefs), available at http://www.field.org.uk/papers/pdf/wto7.pdf.

174. WTO Agreement, supra note 6, art. I (establishing the WTO); id. art. XVI:1 (emphasizing that the new trade institution "shall be guided by the decisions, procedures and customary practices" developed under the GATT 1947).

175. Id. art. II (providing for "the common institutional framework" governing multilateral trade relations among its members).


177. DSU, supra note 176, arts. 3.3, 12.8 (recognizing prompt dispute resolution as an essential element in the WTO and fixing the maximum period of panel proceedings to improve procedural efficiency).
governing multilateral trade relations. The Dispute Settlement Body ("DSB") administers the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and the formally adopted Working Procedures, which provide for WTO members' general rights and special and differential treatment for developing countries in dispute settlement proceedings. A close review of these procedural rules is necessary to understand the complex rights and obligations of members in dispute settlements.

1. WTO Members' Rights as Primary and Third Parties in Dispute Settlements

The WTO dispute settlement system consists of provisional panels and the standing Appellate Body. Under Article 4.7 of the DSU, a WTO member is entitled to extensive panel proceedings should a dispute not be resolved through consultation requested by the member. The panel proceedings mainly consist of hearings at the first and second meetings, the interim review, and the issuance of the panel report. The principal parties file written submissions and present oral arguments at the first meeting and make rebuttal submissions and presentations at the second meeting. After the second meeting, the parties further submit written comments to the panel. The panel then issues an interim report to the

178. See Carmody, supra note 176, at 618-19, 622-23 (arguing that the WTO dispute settlement system retains the multilateral characteristics of the old GATT regime to reconcile broad and interdependent interests in international trade among the members). The multilateral characteristics make the WTO dispute settlement system different from municipal courts, which emphasize adjudication between principal parties. See id. at 618; see also DSU, supra note 176, art. 12.7 (providing that panels make findings only when "the parties to the dispute have failed to develop a mutually satisfactory solution"); Van der Borght, supra note 100, at 1228 (stating that many WTO members characterize the dispute settlement mechanism as "an arbitral system" despite its highly formal and quasi-judicial proceedings).

179. DSU, supra note 176, art. 2(1).

180. DSU, supra note 176, art. 1(1).


182. In the WTO, developing country members include transition economies in Eastern and Central Europe and some countries in the former Soviet Union, as well as Southern sovereigns defined in this Comment. See WTO, DEVELOPMENT: DEFINITION: WHO ARE THE DEVELOPING COUNTRIES IN THE WTO? (explaining that the developing country status in the WTO is determined by self-selection by members), at http://www.wto.org/english/tratop_e/devel_e/d/who_e.htm (last visited Nov. 17, 2002).

183. DSU, supra note 176, art. 4.7 (providing for the establishment of a panel upon request by the complaining party if the parties fail to resolve the dispute within the sixty-day period of consultations).

184. See Panel WP, supra note 181, paras. 5, 7.

185. See id. para. 12(a)-(d); DSU, supra note 176, art. 12.6.

186. See DSU, supra note 176, art. 15.1; Panel WP, supra note 181, para. 12(f).
parties. Upon request by a party, the panel holds an interim review meeting. Lastly, the panel issues the final report, which includes parties’ arguments and comments made in each stage of the panel proceedings, to be circulated and considered among WTO members for adoption at the DSB if no party appeals.

Article 17.4 provides that the principal parties have the exclusive right to appeal as “participants.” In appellate proceedings, the Appellate Body only reviews specific legal issues in the panel’s findings and rulings. At the hearing, the participants file written submissions and make oral arguments. After the hearing, the Appellate Body issues a report to “uphold, modify or reverse the legal findings and conclusions of the panel.” The DSB convenes a meeting to consider the appellate report for adoption within twelve months from the establishment of the panel. Thus, in order to exercise participatory rights in dispute settlements, the rules require parties to the dispute to follow a stringent timetable throughout dispute settlement proceedings.

Notably, under Article 10.2 of the DSU, WTO members with “substantial interests” in a disputed matter have the right to intervene as a “third party” in panel proceedings. Once recognized as such, Article 6 of the Panel Working Procedures gives third parties the right to file written submissions and make oral presentations in a special session at

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187. See DSU, supra note 176, art. 15.2; Panel WP, supra note 181, para. 12(g). The interim report includes the panel’s findings and conclusions, as well as factual descriptions and parties' arguments, and will be regarded as the final report if none of the parties files written comments. DSU, supra note 176, art. 15.2-15.3.

188. See DSU, supra note 176, art. 15.2; Panel WP, supra note 181, para. 12(b)-(i).

189. See DSU, supra note 176, art. 15.2-15.3; Panel WP, supra note 181, para. 12(j).

190. See DSU, supra note 176, art. 15.1, 15.3.

191. See id. art. 16.4; Panel WP, supra note 181, para. 12(k).

192. DSU, supra note 176, art. 17.4 (authorizing only parties to the dispute to appeal).

193. DSU, supra note 176, art. 17.6 (allowing an appeal only with regard to “issues of law” and “legal interpretations” in the panel report).

194. Appellate WP, supra note 181, R.22(1)–(2), 27(3). The Appellate Body may ask questions or request additional information from the participants and these questions and the participants’ responses will be disclosed to the other participants. Id. R.28(1)–(2).

195. DSU, supra note 176, art. 17.13.

196. Id. art. 20.

197. Id. art. 12.5 (requiring panels to fix “precise deadlines” for parties’ written submissions and the parties to “respect those deadlines.”); id. arts. 4.7, 7.1, 8.5, 8.7, 12.3 (providing for stringent timelines for requests for the establishment of the panel, the terms of reference, the composition of panels, and the creation of the timetable). A panel has to issue final report within six months from its composition and issuance of the terms of reference. Id. art. 12.8. The Appellate Body also imposes similar requirements of strict timelines. Appellate WP, supra note 181, R.21–23, 27. In particular, Rule 26(2) of Appellate WP provides that the working schedule of appellate proceedings should include “precise dates for the filing of documents” by parties. Id. R.26(2); see also id. R.18 (stating that documents are recognized as filed only if the Secretariat receives them within the time period specified in the schedule).

198. DSU, supra note 176, art. 10.2 (defining “third party” as “any Member having a substantial interest in a matter before a panel” and “having notified its interest to the DSB”).
The first panel meeting. A panel is required to include third parties' arguments in its reports. Third parties are also entitled to receive principal parties' submissions prior to the first meeting. The DSU, however, does not provide for third parties' participatory rights in the second panel meeting for rebuttals or the interim review meeting.

In appellate proceedings, third parties have the right to receive the submissions of the principal participants. In addition, according to Rule 24 of the Appellate Working Procedure, third parties have the right to intervene in appellate proceedings as a "third participant" upon written notification to the DSB. Third parties are required to present the bases and legal arguments with their notification. At the appellate hearing, third participants may make oral statements, while the Appellate Body pays due regard to third participants by including their opinions, together with principal participants' arguments, in its report.

Throughout the proceedings, third parties are also required to respect stringent timelines. For example, although Article 10.2 of the DSU does not explicitly address the timeframe for third-party notification, customary practice requires interested members to notify the DSB within ten days to intervene in panel proceedings. To qualify as a third participant in appellate proceedings, a third party must file a written submission within twenty-five days after the appellant filed the notice of appeal to the DSB. Indeed, these requirements are strictly enforced. A WTO member was not allowed to participate as a third party in panel

199. Id.; Panel WP, supra note 181, para. 6 (providing for third parties' right to file a written submission and to make an oral presentation before the panel "during a session of the first substantive meeting of the panel set aside for that purpose").

200. DSU, supra note 176, art. 10.2.

201. Id. art. 10.3.

202. Appellate WP, supra note 181, R. 21(1), 22(1).

203. Id. R.24 (providing that a third party's written submission must be received "within 25 days after the date of the filing of the Notice of Appeal" to participate as a "third participant" in the appeal).

204. Id.

205. Id. R.27(3).

206. Id. R.28(1)-(2) (stating that the Appellate Body may ask questions and require additional information from any third participants and must disclose to the third participants its questions and response by any other participants). See, e.g., WTO Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, para. 37 (May 10, 2000) [hereinafter Appellate Report on U.S.—British Steel] (soliciting opinions about the admissibility of industrial associations' amicus briefs from the third participants including Brazil and Mexico, whose negative response was considered and recorded in the Appellate Body's report, although the Appellate Body ultimately accepted the amicus briefs), available at http://docsonline.wto.org/ddfdocuments/t/WTDS/138ABR.doc.

207. See supra note 197 (examining rules providing for strict timelines in panel and appellate proceedings).

208. WTO DSB, EC's Proposals, supra note 8, at 8.

209. See supra note 203.
proceedings because it notified the DSB after the customary ten-day period had lapsed.\footnote{210}

The WTO members crafted the DSU and the Working Procedures to maintain a subtle balance between efficient dispute settlement and multilateral policy articulation.\footnote{211} The DSU and the Working Procedures greatly emphasize confidentiality so as to facilitate extensive discussion about sensitive matters between parties to the dispute,\footnote{212} while allowing broad participation of third parties in dispute settlement proceedings by using "substantial interests" as a qualification without more articulation.\footnote{213} The adopted rulings and recommendations in a dispute not only have binding effects on parties to the dispute\footnote{214} but also provide coherent guidelines in subsequent dispute settlements with "legitimate expectations among WTO members."\footnote{215} On the other hand, the DSU and the Working Procedures stress that rulings and findings by panels and the Appellate Body shall not affect existing rights and obligations of other members, including participatory rights in dispute settlements.\footnote{216}

Moreover, under Article IX of the WTO Agreement, WTO members retain final decision-making authority despite the strengthened


211. DSU, supra note 176, art. 3.3 ("The prompt settlement of situations... is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.").

212. See id. arts. 14.1, 17.10 (providing for confidentiality in panel and appellate proceedings); id. art. 18.2 (requiring confidentiality of written submissions to the panel and to the Appellate Body except for mandatory disclosure among the parties); Rules of Conduct, supra note 176, pmbl. (suggesting that the WTO members believe that confidentiality in proceedings would enhance "confidence in the new dispute settlement mechanism"); see also WTO, Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162, para. VI (July 23, 1996) (emphasizing extensive discussions among WTO members in the key arenas of the multinational trade regime), at http://www.wto.org/english/forums_e/ngo_e/guide_e.htm.

213. See Carmody, supra note 176, at 637; see also supra note 198 (defining third parties as those having substantial interests in a disputed matter).

214. See DSU, supra note 176, art. 21.3 (providing that the members shall comply with the recommendations and rulings of a panel and the Appellate Body within a reasonable time).

215. WTO Appellate Body Report on Japan—Taxes on Alcoholic Beverages, WT/DS11/AB/R, at 13 (Oct. 4, 1996) [hereinafter Appellate Report on Japan—Alcoholic Beverages] (explaining that the adopted GATT panel reports are of "continuing relevance" in the WTO because WTO members cultivated "legitimate expectations" through experience in GATT dispute settlement panels), available at http://docsonline.wto.org/ddfdocuments/t/WT/DS/8ABR.wpf; see also DSU, supra note 176, art. 3.1 (affirming "adherence to the principles for the management of disputes" applied under the GATT 1947 and "the rules and procedures as further elaborated and modified herein").

216. See DSU, supra note 176, arts. 3.2, 19 (stating that the dispute settlement system serves to preserve the WTO members' rights and obligations provided in the covered agreements including the DSU while recommendations and rulings "cannot add to or diminish the rights and obligations" under the covered agreements).
binding power of the dispute settlement mechanism.\textsuperscript{217} The Ministerial Conference and the General Council composed of all the WTO members have the exclusive decision-making authority, including the power to adopt "interpretations" of the WTO Agreement and Multilateral Trade Agreements such as the DSU.\textsuperscript{218} On the other hand, the DSB serves to "clarify the existing provisions" in panel and appellate rulings and recommendations.\textsuperscript{219}

In summary, the WTO members, as principal parties, are entitled to efficient dispute resolution with stringent timetables, confidentiality, and limited appellate review. The WTO members also maintain rights to intervention as third parties and the authority for final decision to secure their interests in multilateral trade.

2. Southern Sovereigns' Practical Difficulties and the Relative Importance of Third-Party Rights

Southern sovereigns generally value the enhanced legal system because it offers greater opportunities to draw efficient responses from powerful Northern counterparts than do diplomatic negotiations.\textsuperscript{220} For example, shortly after the original appellate decision of \textit{Shrimp-Turtle}, Pakistan obtained technical support from the United States to install turtle excluder devises in shrimping vessels and received an export certificate from the United States.\textsuperscript{221} Southern sovereigns can also use dispute settlements as a shield against unilateral imposition of trade measures by Northern counterparts.\textsuperscript{222} The original rulings in \textit{Shrimp-Turtle} stimulated dialogue between the United States and shrimping

\\textsuperscript{217} WTO Agreement, \textit{supra} note 6, art. IX.

\textsuperscript{218} \textit{See id.} arts. IX:1, IX:2 (providing for a majority vote in decision making and a three-fourths majority vote in adopting interpretations in the Ministerial Conference and the General Council). The WTO adopts a one-state one-vote formula in decision-making, although the WTO Agreement explicitly attaches preference to consensus decision-making. \textit{See WTO Agreement, supra} note 6, art. IX:1. These rules are not applicable to decisions under the Plurilateral Agreements, which are not mandatory and are separately administered. \textit{See id.}, arts. II:3, IV:8, IX:5.

\textsuperscript{219} DSU, \textit{supra} note 176, art. 3.2 (identifying one of the DSB's functions as the clarification of the existing rules while emphasizing that the DSB's rules and recommendations shall not change rights and obligations among the members).

\textsuperscript{220} \textit{See Mukerji, supra} note 87, at 64; \textit{see also WTO, Declaration of the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar: Communication from Cuba, WT/L/424, para. 1 (Oct. 24, 2001) (“The Group of 77 and China support the rules-based multilateral trading system (MTS) as one of the essential instruments for the promotion of economic development, the facilitation of developing countries' integration into the global economy, and the eradication of poverty worldwide.”), available at http://docsonline.wto.org/ddfddocuments/t/WT/L/424.doc.

\textsuperscript{221} \textit{See Panel Report on Shrimp-Turtle: Recourse by Malaysia, supra} note 15, para. 3.159.

\textsuperscript{222} \textit{See Mukerji, supra} note 87, at 64.
states in Southeastern Asia to cooperate in sea-turtle conservation in the region.223

Although Southern sovereigns are increasingly active in dispute settlements, the scope of their participation is limited. Currently, Southern sovereigns constitute about 100 of the 144 members of the WTO.224 As of October 2002, only 20 Southern sovereigns had participated as principal parties in dispute settlement proceedings in approximately half of the 71 cases brought.225 No African members and least-developed countries have brought a case.226 Moreover, the larger developing economies are relatively overrepresented in these participation figures.

The relative inactivity of Southern sovereigns at large is mainly due to structural disadvantages. In particular, Southern sovereigns with a small claim can obtain little benefit from costly dispute settlement proceedings conducted only in Geneva.227 Presently, half of the least-

223. See Panel Report on Shrimp-Turtle: Recourse by Malaysia, supra note 15, para. 2.4. After the original appellate decision in Shrimp-Turtle, the United States and shrimping states in Southeastern Asia adopted several multilateral instruments for conservation of sea turtles, including the Sabah Declaration at the second ASEAN Symposium and Workshop on Sea Turtle Biology and Conservation in Sabah, Malaysia in July 1999; Resolution on Developing and Indian Ocean and South-East Asian Regional Agreement on the Conservation and Management of Marine Turtles and their Habitats at a workshop in Perth, Australia in October 1999; and Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia in Kuantan, Malaysia in July 2000. Id.

224. This number excludes ten transition economies, which are classified as developing country members of the WTO. See WTO, The Organization: Members and Observers (Jan. 1, 2002), at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 10, 2003).

225. WTO DSB, Overview of the State of Play of WTO Disputes, WT/DSB/29/Add.1, at 58–66 (Nov. 29, 2002), available at http://docsonline.wto.org/DDFDocuments/t/WT/DSB/29A1.doc. Thus far, Southern sovereigns have been complainants 31 times, while they have been respondents on 24 occasions. See id. This number does not include recourse panels in which a winning complainant in the original case seeks to resolve disagreements about respondent's compliance. See DSU, supra note 176, arts. 21.5, 22.2, 22.6. In 2002, Southern sovereigns were particularly active as complainants in panel proceedings, partly due to the dispute panel in United States—Continued Dumping & Subsidy Offset Act of 2000, WT/DS217/R (Complaints by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, and Thailand) & WT/DS234/R (Complaint by Canada and Mexico) (Sept. 16, 2002).


227. See WTO General Council, Preparations for the 1999 Ministerial Conference: The Dispute Settlement Understanding (DSU)—Communication from Pakistan, WT/GC/W/162, para. 16 (Apr. 1, 1999) (pointing out that dispute settlements are "often very costly for developing countries" due to the extremely technical panel proceedings and the collection of necessary information), available at http://docsonline.wto.org/ddfdocuments/t/WT/GC/W162.doc (last visited Nov. 21, 2002); Van der Borght, supra note 100, at 1231 (stating that the WTO dispute settlements incur substantial expenses in collecting economic, scientific, and other data needed to sustain a claim).
developed country members keep no representatives in Geneva. Many developing country members have only one trade representative to cover all matters in the WTO, requiring the representative to attend more than forty meetings a week on diverse subjects, such as environmental measures and industrial tariffs. As a result, it is difficult for developing country members to accumulate expertise in the Multilateral Trade Agreements of the WTO.

Southern sovereigns also lack sufficient legal resources to make extensive arguments under complicated WTO rules. In particular, the DSU and the Working Procedures require principal parties to make written submissions pursuant to stringent timelines in order to participate in panel and appellate proceedings. Unlike Northern counterparts, in-house counsel is not readily available for developing country members to prepare thoroughly for and effectively participate in dispute settlements. Developing counties need to obtain counsel from international law firms, which may charge from U.S. $250 to $1,000 per hour for fees in WTO dispute settlements. According to a conservative estimate, even a simple case involves approximately 700 billable hours. Thus, the cost of WTO dispute settlements can prohibit small developing economies from initiating the process.

Although the DSU includes several special and differential treatment provisions relating to dispute settlement proceedings, such rules are not sufficiently effective to address Southern sovereigns'
structural hurdles.\textsuperscript{238} For example, Article 12.10 deals with possible time extensions for a developing country member in preparing and presenting argumentation in panel proceedings. This extension, however, is only available when the developing country is the respondent.\textsuperscript{239} Article 3.12 similarly provides alternative panel procedures under the Decision of 1966 of the GATT,\textsuperscript{240} including special and differential treatment in panel proceedings,\textsuperscript{241} but developing countries have little incentive to resort to the alternative procedures because the present DSU provisions apparently offer similar or even better procedural benefits.\textsuperscript{242}

Southern sovereigns' inactivity by itself creates additional difficulties because if Southern sovereigns fail to invoke a preferential rule, they can neither effectuate their rights under the provision nor develop the relevant practices and guidance regarding the rule. For example, Article 12.11 requires that the panel's reports highlight the special and differential treatment provisions considered in proceedings.\textsuperscript{243} If, over time, panel reports reflected years of Southern sovereign use of differential treatment, jurisprudence clarifying the evolution would exist. However, Article 12.11 was idle until 1998 when India triggered this provision in India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, where India requested additional time for its first submission under Article 12.4 to take into account the recent administrative reform in the Indian government.\textsuperscript{244} In addition, no developing country has ever invoked Article 3.12 to access alternative procedures pursuant to the special and differential treatment provisions under the old GATT, not only because of lack of incentives but also

\textsuperscript{238} See WTO, supra note 220, para. 7 (recording Cuba's statement on behalf of G-77 that they feel the special and differential treatment provisions “mostly in form and not in substance”).

\textsuperscript{239} See DSU, supra note 176, art. 12.10 (dealing with a complaint against a developing country member in which the developing country is entitled to “sufficient time” in preparing and presenting its arguments).


\textsuperscript{241} See DSU, supra note 176, art. 3.12.

\textsuperscript{242} See Mary E. Footer, Developing Country Practice in the Matter of WTO Dispute Settlement, 35 J. World Trade 55, 63 (2001).

\textsuperscript{243} See DSU, supra note 176, art. 12.11 (requiring that “[w]here one or more of the parties is a developing country Member, the panel’s report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members”).

because of uncertainties in application without useful guidance from prior GATT practices.  

Recognizing the need for additional legal advice and assistance for developing countries, Article 27.2 requires the WTO Secretariat to provide any developing country member with necessary assistance by a qualified legal expert.  

The same provision, however, requires the legal expert to “assist the developing country member in a manner ensuring the continued impartiality of the Secretariat.”  

Developing country members believe that this impartiality requirement hinders extensive legal assistance necessary to facilitate their effective use of dispute settlement proceedings.  

To improve the situation, some developing and developed countries voluntarily opened the Advisory Centre on the WTO Law on October 5, 2001 as an institution independent from the WTO.  

The Advisory Centre provides legal advice on WTO law to its developing country and least-developed country members.  

More importantly, such members can obtain counsel from the Advisory Centre at substantially discounted hourly rates.  

For example, recently in European Communities—Trade Description of Sardines, the Centre represented Peru and won favorable decisions in the panel and appellate proceedings regarding EC’s sardine labeling rules.

245. See Beatrice Chaytor, Dispute Settlement Under the GATT/WTO: The Experience of Developing Nations, in Dispute Resolution in the World Trade Organisation, 250, 258 (James Cameron & Karen Campbell eds., 1998) (explaining that the alternative procedures under the 1966 Decision were triggered only in three incomplete GATT panels).

246. DSU, supra note 176, art. 27.2.

247. Id.

248. See WTO, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/77, at 73 (Oct. 25, 2000), available at http://docsonline.wto.org/ddfdocuments/t/WT/COMTD/W77.doc; see also Van der Borght, supra note 100, at 1230-31 (stating that legal assistance under Article 27.2 has been insufficient in practice with only two part time consultants).


250. See Agreement on the Advisory Centre, supra note 249, art. 6.1. 

251. Id. Annex IV. The Advisory Centre charges least-developed countries $25 and its developing country members from $100 to $200 per hour depending on their ability to pay. Id. Currently, the Centre retains seven lawyers to provide legal counseling to its members. See Williams, supra note 226, at 6.

The Advisory Centre is by no means without its limitations. As of June 2002, the Advisory Centre's service does not extend to more than fifty developing country members of the WTO.\textsuperscript{253} Although least-developed countries need not pay for membership in the Advisory Centre,\textsuperscript{254} developing countries must pay a lump sum minimum contribution that ranges from $50,000 to $300,000.\textsuperscript{255} Considering their trade interests and the balance between the cost and benefit of the Centre's service, only a quarter of the developing country members of the WTO have agreed to pay the contribution to the Advisory Centre.\textsuperscript{256}

Moreover, to avoid a conflict of interest, if two countries qualified for the Centre's service are parties to the same dispute, the Advisory Centre grants assistance to the user who has priority in accordance with a priority list based on needs and the membership.\textsuperscript{257} Thus, although the Advisory Centre represents a significant improvement, it does not offer a complete solution to promote effective participation of developing countries in WTO dispute settlements.\textsuperscript{258}

As a result, third-party rights are relatively important for many Southern sovereigns to make input in dispute settlements and thereby to shape multilateral trade policy. In the original panel proceeding in \textit{Shrimp-Turtle}, for instance, Southern sovereigns constituted eight of eleven third parties.\textsuperscript{259} Of those, El Salvador and Nigeria had never participated in dispute settlements as principal parties.\textsuperscript{260} When the case was appealed, Nigeria exercised the right to intervene and make a submission to the Appellate Body as a "third participant."\textsuperscript{261}

The most extensive third-party involvement took place in \textit{European Communities—Regime for the Importation of Bananas ("EC—Bananas (III)")}, where eighteen Southern sovereigns were engaged in the dispute

\begin{itemize}
\item \textsuperscript{253} \textit{Advisory Centre on WTO Law ("ACWL"). Report on the Operations 5–6 (2002) (stating that 22 developing countries of the WTO members have become signatories to the Centre), available at http://www.acwl.ch/WhatIs/Report%20on%20Operations%20July%202002.pdf. About eighty countries constitute the developing country members of the WTO. See Agreement on the Advisory Centre, \textit{supra} note 249, Annex II.}
\item \textsuperscript{254} \textit{Id. art. 7, annex III (providing for least-developed countries' rights without requiring a lump sum contribution). Accordingly, 37 least-developed country members of the WTO and 7 least-developed countries in the process of acceding to the WTO are entitled to the Centre's services. See ACWL, \textit{supra} note 253, at 6.}
\item \textsuperscript{255} \textit{See Agreement on the Advisory Centre, \textit{supra} note 249, art. 6.2, annex. II, annex. IV.}
\item \textsuperscript{256} \textit{See ACWL, \textit{supra} note 253, at 5–6.}
\item \textsuperscript{257} \textit{See Agreement on the Advisory Centre, \textit{supra} note 250, art. 8.}
\item \textsuperscript{258} \textit{See WTO's Dispute Settlement System, \textit{supra} note 235.}
\item \textsuperscript{259} \textit{See Panel Report on Shrimp-Turtle, \textit{supra} note 9, paras. 4.1–4.73 (reviewing third-party submissions by Australia, Ecuador, El Salvador, European Communities, Guatemala, Hong Kong, Japan, Nigeria, the Philippines, Singapore, and Venezuela).}
\item \textsuperscript{260} \textit{See WTO DSB, \textit{supra} note 225, at 47–65 (listing principal parties in previous WTO dispute settlements as of October 31, 2002).}
\item \textsuperscript{261} \textit{Appellate Report on Shrimp-Turtle, \textit{supra} note 9, para. 78.}
\end{itemize}
as third parties. The European Communities maintained preferential treatment of bananas imported from African, Caribbean, and Pacific ("ACP") countries based on the Lomé Convention. The United States and major banana exporting countries including Ecuador, Guatemala, Honduras, and Mexico challenged the preferential treatment to open the world's second largest banana market, while ACP countries collectively intervened to defend the differential treatment historically given by the European Communities. Unlike the complainants, the ACP third parties were small banana exporters that only constituted about three percent of banana trade in the world and around nine percent in the European Union. For the ACP third parties, however, banana exports to the European Communities accounted for a substantial part of their overall banana exports.

In this case, the third parties requested authorization from the panel to attend the second meeting, the rights to make written submissions and oral presentations, and the right to receive principal parties' rebuttal submissions including all attachments. The European Communities also requested that the panel to authorize third-party participation in the subsequent meeting. Accordingly, the panel disregarded the restriction imposed by Article 10.2 of the DSU and Article 6 of the Panel Working Procedures that authorize third parties' participation only in a special session at the first panel meeting and it provisionally enhanced third-party procedures at its discretion.

The panel made flexible arrangements of third-party rights that eased participation of developing countries while carefully minimizing burdens on the principal parties and the panel itself. Pursuant to the prior arrangements:


263. Id. para. 3.3.

264. Id.


266. Panel Report on EC—Bananas (III), supra note 262, para. 3.3.

267. Id. para. 7.4.

268. Id. para. 7.7.

269. See id. para. 7.8.

270. See id.
GATT panels, this panel did not question the third parties’ right to receive all documents submitted for rebuttals in the second meeting. The panel allowed the third parties to be present at the second substantive meeting to “make a brief statement at a suitable moment” while making no requirement of written submissions. The full access to information enabled third parties to participate meaningfully, and the elimination of written submissions apparently reduced time pressure and costs in preparation for the meeting. The panel noted that the third parties were allowed to submit additional written submissions if they wished, however, only to respond to questions that were asked during the first meeting. This practice reduced the burden on the principal parties in responding to third parties’ additional submissions and the burden on the panel in processing information, but preserved the third parties’ rights to file written submissions.

This same panel, however, imposed significant restrictions on the enhanced third-party rights. After the second meeting, several third parties petitioned the panel to authorize participation in the interim review process. Pursuant to customary practice, the panel allowed the third parties to review their arguments summarized in the panel’s interim report. The panel refused to grant further participatory rights in the interim review meeting because there was no agreement between the parties regarding the further extension of third-party rights. The panel also emphasized the distinction between principal parties’ rights and third parties’ rights. Because the panel granted the enhanced third-party rights in the second meeting despite the divergent views among the parties, the panel’s reasoning is inconsistent.

271. _Id._

272. The importance of third parties’ access to information was highlighted in the WTO Appellate Body Report on United States—Tax Treatment for “Foreign Sales Corporations”: Recourse to Article 21 of the DSU by the European Communities. WT/DS/108/AB/RW, paras. 249, 251 (Jan. 14, 2002), available at http://docsonline.wto.org/ddfdocuments/t/WT/DS/108ABRW.doc. The Appellate Body held that third parties are entitled to receive “all of the submissions made by the parties up to the time of the first panel meeting” to ensure full and meaningful participation by the third parties. _Id._ para. 251; _see also id._ para 256(g). In this case, the Appellate Body reversed the panel’s decision to deny the third parties access to the respondent’s rebuttal submission despite the fact that it was prepared for the first meeting. _See id._ para. 251. In ordinary panel proceedings, the parties prepare initial submissions for the first meeting and rebuttal submissions for the second meeting while recourse panels customarily hold a single meeting that consists of “the first stage” dealing with initial submissions and “the second stage” dealing with rebuttal submissions. _See id._ paras. 239–40.

273. _Panel Report on EC—Bananas (III), supra note 262, para. 7.8._

274. _Id._ para. 7.9.

275. _Id._

276. _Id._

277. _Id._

278. _See id._ para. 7.8.
the narrowly tailored participatory rights of the third parties adopted in the second meeting.  

In the interim review, the principal parties made final attempts to shape the panel's findings and reasoning concerning ACP third parties' vital economic interests. The panel included "more detail" in the reasoning regarding the applicability of waiver to licensing procedures under the Lomé Convention. The panel accepted "adjustments" regarding the findings on the application of the Lomé waiver to the tariff treatment of non-traditional imports of ACP bananas. The panel "significantly revised" paragraphs that evaluated the recent trend of market shares between the complaining parties and the EC/ACP. Without participation of the ACP third parties, the panel made these changes in its report, which could potentially have implications for the appellate review and compliance by the European Communities. Accordingly, the ACP third parties were denied of an important opportunity to make final input in the panel report to accentuate their concerns.

In summary, third-party rights have created unique avenues for Southern sovereigns to participate in dispute settlements. In particular, enhanced third-party rights with flexible arrangements have facilitated Southern sovereigns' ability to highlight their concerns. Nevertheless, restrictions remain, especially regarding participation in the interim review meeting, and third parties cannot rely on such enhancement if it is granted only at the discretion of a particular panel.

B. NGOs' Amicus Brief Submissions Based on the Participatory Principle of the Rio Declaration

WTO's new mandate not only strengthened the dispute settlement system but also incorporated a new objective of sustainable development and the traditional objective of international trade liberalization. However, although WTO members crafted rules to

279. See supra notes 271–273 and accompanying text.
280. Panel Report on EC—Bananas (III), supra note 262, para. 5.3.
281. Id. para. 5.5.
282. Id. para. 5.9.
283. Although the Appellate Body has authority to modify and reverse the panel's legal findings and conclusions, the DSU does not authorize the Appellate Body to modify and reverse factual findings. See DSU, supra note 176, art. 17.13. Moreover, the Appellate Body cannot remand the case for supplementary findings of fact to the original panel, which will not be reconvened except for recourse or arbitral proceedings between the parties who disagree with the issues of compliance with the recommendations and rulings by the panel and the Appellate Body. See DSU, supra note 176, arts. 21.5, 22.6.
284. See supra note 92.
285. GATT 1947, supra note 87, pmbl. (providing for trade liberalization with open market access and non-discriminatory treatment for economic development).
carefully balance institutional decisional power and broad participation of interested states in dispute settlement proceedings, they failed to consider the expanded mandate fully and provided little public access to dispute settlements. As a result, amicus brief submissions currently depend on ad hoc rules and practices developed through the Appellate Body's decisions.

1. Sustainable Development as a Basis of Public Participation in WTO Dispute Settlements

Sustainable development is closely associated with public participation. Principle 10 of the Rio Declaration crystallizes the participatory principle, which includes involvement of all stakeholders at the relevant levels and effective public access to judicial proceedings. Agenda 21, an action plan of the Rio Declaration, makes clear that Principle 10 applies to international institutions and encourages public input in trade policy. In addition, WTO's Director General proclaimed that the institutions' objectives were "fully compatible with Agenda 21." Accordingly, the WTO dispute settlement system is arguably covered under the principle of public participation to attain its objective of sustainable development through resolution of trade-environment disputes.

In 1994, the WTO included sustainable development in the preamble of its constitutional agreement without considering effective public participation. Although the WTO Agreement authorizes the General Council to make "appropriate arrangements" for nongovernmental participation, the Council has failed to do so in dispute settlement proceedings. In 1996, the General Council adopted the Guideline for Arrangements on Relations with Non-Governmental Organizations, in which the WTO members recognized NGOs as "valuable resources" in

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286. See Johannesburg Declaration, supra note 92, para. 26 ("We recognize sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.").

287. Rio Declaration, supra note 25, princ. 10.


289. Id. para. 2.22(k).


291. See supra note 173 and accompanying text.

292. WTO Agreement, supra note 6, art. V:2.

293. WTO, supra note 212.
promoting public awareness about trade issues. Nevertheless, the WTO members ultimately rejected NGOs' direct participation because of the special character of the WTO as an intergovernmental forum with extensive negotiations on rights and obligations among the members. The existing procedural rules do not contain provisions that create nongovernmental actors' right to submit unsolicited legal and factual contentions in dispute settlement proceedings.

2. Evolution of Ad Hoc Amicus Brief Procedures Through Appellate Body's Rulings

Lacking formal procedural rules expressly governing direct public participation, NGOs have relied on ad hoc procedures developed through rulings and practices upheld by the Appellate Body in order to submit amicus briefs. In Shrimp-Turtle, the Appellate Body held that the panel could accept environmental NGOs' unsolicited amicus briefs at its discretion under Article 13.1 of the DSU, because the provision

294. Id. paras. 2, 4.
295. Id. para. 6; supra note 103.
296. See Appellate Report on Shrimp-Turtle, supra note 9, para. 101 (stressing that the WTO Agreement and Multilateral Trade Agreements neither provide public access to dispute panel proceedings nor legal right to make findings); Appellate Report on U.S.—British Steel, supra note 206, paras. 40–41 (emphasizing that the DSU provides only for participatory rights of the WTO members as principal and third parties while conferring no legal right to individuals and nongovernmental entities to be heard in dispute settlement proceedings). Currently, the DSU only includes two provisions that allow limited public access to dispute settlements. See DSU, supra note 176, art. 18.2 (permitting a principal or third party to disclose its submissions to the public and a WTO member to request that a party disclose a non-confidential summary of its submission); id. art. 13.1 (providing for panels' authority to "seek" information from any individual or entity if appropriate).
297. For an overview of the evolution of amicus procedures in the WTO, see, e.g., Ala'i, supra note 20, at 68–72, 77–84; Andrea Kupfer Schneider, Unfriendly Actions: The Amicus Brief Battle at the WTO, 7 WIDENER L. SYMP. J. 87 (2001); Charnovitz, supra note 124, at 183–90. Before the original Shrimp-Turtle panel accepted amicus submissions, two panels rejected and returned amicus briefs submitted by environmental groups in United States—Standards for Reformulated and Conventional Gasoline and in EC—Measures Concerning Meat and Meat Products. See Schneider, supra, at 96; Ala'i, supra, at 68–69.
authorizes the panel's authority not only to "seek" outside information actively, but also "to decide not to seek information" and "to accept or reject any information." In reaching this conclusion, the Appellate Body recognized that broad input from NGOs could advance the purposes and objectives expressed in Article 11 and Article 12.1, which respectively provide for objective legal and factual assessments of the disputed matter and flexible panel procedures to produce "high-quality panel reports." The Appellate Body also found that the panel appropriately authorized the respondent to attach NGOs' amicus briefs to its second submission and allowed the complainants two weeks to make counterarguments. Formally, these Appellate Body's rulings have no binding effects in subsequent cases because the WTO dispute settlement system does not adhere to stare decisis. In reality, however, these Appellate Body's rulings were decisive concerning the admissibility of nongovernmental amicus submissions to panels in subsequent cases.

Article 13. See WTO Panel Report on Australia—Measures Affecting Importation of Salmon, WT/DS18/R, paras. 6.1-6.5 (June 12, 1998) (involving Australia's ban on imports of salmon products from Canada); see also Ala'i, supra note 20, at 73-74.

299. Appellate Report on Shrimp-Turtle, supra note 9, para. 104.

300. Id. paras. 105-7; see also DSU, supra note 176, art. 12.2 ("Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports."); id. art. 11 (stating that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" and make other findings necessary to support DSB in making the rulings and recommendations).

301. See Appellate Report on Shrimp-Turtle, supra note 9, paras. 109-10.

302. See supra notes 214, 216 and accompanying text (noting that the principal parties must comply with rulings and recommendations by panels and Appellate Body, and the DSB may not affect or modify the existing rights and obligations of the remaining WTO members).

303. See WTO Panel Report on United States—Section 110(f) of the U.S. Copyright Act, WT/DS160/R, paras. 6.3-6.8 (June 15, 2000) [hereinafter Panel Report on U.S.—Copyright] (involving a letter from a law firm on behalf of the American Society for Composers, Authors, and Publishers, which was forwarded to the panel by the U.S. Trade Representative); WTO Panel Report on European Communities—Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India, WT/DS/41/R, para. 6.1 (Oct. 30, 2000) (dealing with an amicus brief submitted on behalf of the Foreign Trade Association); Panel Report on EC—Asbestos, supra note 105, para. 6.1 (accepting amicus briefs from Collegium Ramazzini, Ban Asbestos Network, Instituto Mexicano de Fibro-Industrias A.C., and American Federation of Labor and Congress of Industrial Organizations); WTO Panel Report on United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, WT/DS236/R, para. 7.2 (Sept. 27, 2002) [hereinafter Panel Report on U.S.—Canadian Softwood Lumber] (accepting an amicus brief from Interior Alliance, a Canadian organization). The adopted GATT decisions and the WTO Appellate Body decisions virtually serve as binding precedents that preserve continuity and consistency in the international trade regime. See Appellate Report on Japan—Alcoholic Beverages, supra note 215, at 13 (stating that the adopted GATT reports create legitimate expectations among the WTO members and are often considered by the subsequent panels); Raj Bhala, The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy), 14 AM. U. INT'L L. REV. 845, 849, 853 (1999) (contending that absence of the stare decisis principle in the WTO is a myth and that "[a]ll precedent now in the WTO dispute settlement system is binding").
As to appellate proceedings, the Appellate Body in *Shrimp-Turtle* decided that amicus briefs attached to the appellant's submission were admissible at least as "prima facie an integral part" of the submission.\(^{304}\) Although an NGO coalition found errors in its original amicus brief already incorporated into the appellant's submission and filed a revised amicus brief directly to the Appellate Body in an untimely manner, the Appellate Body did not question its admissibility.\(^{305}\) Accordingly, this Appellate Body's decision offered little guidance in actual procedures, especially regarding timelines for amicus submissions.

The Appellate Body's authority to accept amicus briefs in appellate proceedings was first considered in *United States—Importation of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*.\(^{306}\) Here, despite opposition by the European Communities as appellant and by Brazil and Mexico as third participants, the Appellate Body found that it had authority to accept industrial associations' amicus briefs because neither the DSU nor the Appellate Working Procedure expressly prohibited the Appellate Body from accepting nongovernmental submissions.\(^{307}\) The Appellate Body justified its legal authority to accept and consider amicus submissions based on its "authority to adopt procedural rules" under Article 17.9 of the DSU.\(^{308}\)

Although it is provisional, a written procedural rule expressly covering nongovernmental submissions was, for the first time, used in *European Communities—Measures Affecting Asbestos and Asbestos-

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\(^{304}\) *Appellate Report on Shrimp-Turtle*, supra note 9, paras. 88-89. In the recourse proceeding, the Appellate Body received a joint submission from the American Humane Society and Humane Society International and a separate amicus brief from Professor Robert L. Howse of the University of Michigan Law School. *Appellate Report on Shrimp-Turtle: Recourse by Malaysia*, supra note 15, paras. 75-78. Because the United States attached the Humane Society brief to its submission, the Appellate Body also found this amicus submission "prima facie an integral part" of the U.S. submission and admissible, but it disregarded Professor Howse's unattached brief. *See id.* paras. 76-78.

\(^{305}\) *See Appellate Report on Shrimp-Turtle*, supra note 9, para. 79 (noting that CIEL, on behalf of several NGOs, filed an amicus briefs to be attached to the submission by the United States on July 23, 1998 and then filed a revised brief directly to the Appellate Body on August 3). The Appellate Body accepted the revised brief to be considered with other briefs attached to the U.S. submission. *Id.*

\(^{306}\) *See Appellate Report on U.S.—British Steel*, supra note 206, para. 36 (reporting that the Appellate Body received two amicus briefs from the American Iron and Steel Institute and the Special Steel Industry of North America).

\(^{307}\) *Id.* paras. 37, 39.

\(^{308}\) *Id.* paras. 39, 42; *see also* DSU, supra note 176, art. 17.9 ("Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information."). The Appellate Body reiterated its authority to accept amicus submissions under Article 17.9 in *EC—Sardines* decided in September 2002. *See Appellate Report on EC—Sardines*, supra note 253, paras. 166-67, 315(b).
In this highly publicized case, initially, thirteen unsolicited amicus briefs were submitted to the Appellate Body. After it declined to accept all the amicus briefs, the Appellate Body published an ad hoc "Additional Procedure" on November 8, 2000, considering "fairness and orderly procedure" under Rule 16(1) of its Working Procedure. According to the Additional Procedure, any natural or legal person other than the principal or third parties must apply for leave from the Appellate Body to file an amicus brief. The Additional Procedure, which was disseminated online, specified that an applicant must make a request for leave within eight days, which in this case was by November 16, 2000. The Appellate Body received eleven applications that complied with this stringent deadline. In this case, the Appellate Body appeared to show the increasing recognition of public participation through its decisions concerning amicus brief issues, although the DSU has no provision to authorize direct public participation in WTO dispute settlements.

C. Procedural Deficiencies that Reinforce the Existing Tensions Between Northern NGOs and Southern Sovereigns

I. Northern NGOs' Pressure to Ensure Participation Without Formal Rules Governing Amicus Briefs

Northern environmental NGOs opened direct access to dispute settlement proceedings by submitting amicus briefs to the Shrimp-Turtle panel. Subsequent panel and appellate findings accepting


310. Id. para. 53 (stating that the Appellate Body returned all the thirteen nongovernmental briefs to the senders).

311. European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Additional Procedure Adopted under Rule 16(1) of the Working Procedure for Appellate Review, WT/DS135/9, para. 1 (Nov. 8, 2001) [hereinafter Additional Procedure]; see also Appellate WP, supra note 181, R.16(1) ("In the interests of fairness and orderly procedure... where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU... and these Rules.").

312. See Additional Procedure, supra note 311, para. 2.

313. Id.

314. Appellate Report on EC—Asbestos, supra note 309, para. 56 & n.32.

315. See Van der Borght, supra note 100, at 1229; see also CIEL, AN INTRODUCTION, THE SHRIMP-TURTLE DISPUTE AND CIEL'S AMICUS BRIEF (describing the Appellate Body's ruling to recognize NGOs' amicus submissions in panel proceedings as "a victory for civil society participation in the WTO" and an important step to make the WTO more open to the public), at http://www.ciel.org/Tae/shrimpturtle.html (last visited Oct. 17, 2002).
nongovernmental amicus submissions facilitated NGOs' further participation.\textsuperscript{316} In \textit{EC–Asbestos}, although NGOs' first amicus submissions were rejected, environmental NGOs favored the Appellate Body's adoption of the Additional Procedure and met the stringent deadline for filing a request for leave to submit amicus briefs.\textsuperscript{317} They expected that the written Additional Procedure would serve to formalize NGOs' amicus brief submissions and to ensure fair public participation.\textsuperscript{318}

The Appellate Body, however, ultimately denied all requests by sending a standard form letter to applicants without clearly explaining the reasons for the rejection.\textsuperscript{319} The letter merely stated that the NGOs failed to meet "all of the requirement of the Additional Procedure."\textsuperscript{320} As a result, Northern environmental NGOs perceived that the Appellate Body unexpectedly closed the avenue of their "constructive participation" without due process under ad hoc procedures.\textsuperscript{321} Although environmental
NGOs welcomed the Appellate Body's substantive rulings effectively upholding the precautionary principle in *EC—Asbestos*. NGOs remain dissatisfied with the Appellate Body's complete refusal of their opportunities to file amicus briefs. As a result, Northern NGOs strongly demanded the formalization of amicus brief procedures to avoid the Appellate Body's undue treatment in the future.

2. *Southern Sovereigns' Reaction to Secure Balanced National Representation Under Procedural Uncertainty*

In the Uruguay Round, although generally marginalized in key negotiations, Southern sovereigns bargained a package of the Multilateral Trade Agreements with the expectation of fair trade relations. In negotiations of dispute settlement procedures, Southern sovereigns succeeded in including some special and differential treatment provisions to file a request for leave had legitimate expectation of fair treatment and due process. See id. at iv.

322. See GREENPEACE, supra note 319 (stating that an NGO coalition welcomed the Appellate Body's ruling that supports the precautionary principle); see also *Appellate Report on EC—Asbestos*, supra note 309, paras. 19, 115, 163 (upholding the panel's rulings to authorize the French ban on chrysotile-cement products despite some discrepancies in the scientific evidence); see also supra note 81 (quoting Rio Principle 15, known as a precautionary principle, which provides that scientific uncertainty should not prevent states from taking cost-effective measures to prevent serious or irreparable environmental damage).

323. After the Appellate Body rejected 13 amicus briefs and subsequently declined all requests for leave to file such briefs, FIELD, leading an NGO coalition, submitted an amicus brief. The Appellate Body rejected this brief under the Additional Procedure. See *Appellate Report on EC—Asbestos*, supra note 309, para. 57. As a result, no nongovernmental submissions were accepted at the appellate level in *EC—Asbestos*.

324. JAMES CAMERON & JACOB WERKSMAN, *SUPPLEMENTARY AMICUS BRIEF SUBMITTED BY WFN/FIELD*, para. 2.5 (2001) (demanding that the WTO treat NGO's amicus briefs under clear procedural rules), available at http://www.field.org.uk/papers/pdf/asbestosamicus.pdf; FIELD, supra note 104, at ii (recognizing the validity of the Additional Procedure itself while questioning the way in which the Appellate Body applied the Procedure). The Appellate Body's arbitrary rejection inadvertently stimulated their demand. See GREENPEACE, supra note 319 (explaining that the NGO coalition dared to submit an amicus brief to the Appellate Body because NGOs were not satisfied with the Appellate Body's treatment of their request for leave). Although Northern developmental NGOs are not major participants in dispute settlement procedures, they also support the environmental NGOs' position. See OXFAM GB, supra note 173, at 19 (urging that the WTO members offer guidance to panels and the Appellate Body with regard to how to treat NGOs' amicus submissions); ACTION AID ET AL., supra note 165, at 8 (calling for the development of "[o]perating procedures for Panels and the Appellate Body" regarding nongovernmental amicus submissions).

325. See *Appellate Report on Japan—Alcoholic Beverages*, supra note 215, at 15 (explaining that the WTO members have expectation interests in benefits from the WTO Agreement and the Multilateral Trade Agreements, which were the results of extensive bargaining among them). WTO members pursued their national interests while accepting obligations that would curtail their sovereign authority when they negotiated the WTO Agreement and the Multilateral Trade Agreements including the DSU. See id.
to address their structural disadvantages while explicitly rejecting NGOs’ amicus brief submissions. Southern sovereigns expected that the representational balance would be protected under the DSU to preserve existing rights and obligations. Moreover, anything affecting Southern sovereigns’ rights could be blocked at the General Council, where developing countries have equal voting rights and amount to more than three quarters of all members. In particular, the General Council has exclusive decisional authority regarding WTO’s relations with nongovernmental actors.

However, the Southern sovereigns’ expectation interest has been virtually nullified through incremental rulings by the Appellate Body accepting Northern NGOs’ submissions, while Southern sovereigns have struggled with other remaining practical difficulties in dispute settlement proceedings. In particular, Southern sovereigns consider that their third-party rights have been disadvantaged when compared to Northern NGOs’ amicus submissions. Southern sovereigns are required to follow stringent timelines under the DSU and the Working

326. See supra notes 239, 240, 244, 246 and accompanying text (discussing special and differential treatment provisions in the DSU).

327. See WTO General Council, supra note 103, paras. 7, 38, 60 (recording the statement made by Uruguay, India, and Singapore that the issue of nongovernmental amicus submissions was considered during the Uruguay Round negotiations but not included in the DSU). Norway also remembers that “a vast majority of participants” firmly refused the incorporation of amicus procedures during the Uruguay Round. See id. at 67.

328. See supra notes 211–219; see also Chaytor, supra note 245, ch. 12, at 1 (explaining that the enhanced dispute settlement mechanism is considered to reduce the influences of political and economic pressures).

329. See supra note 218 and accompanying text (explaining that only the General Council and the Ministerial Conference have decisional authority in the WTO regarding “interpretation” of the WTO Agreement and the Multilateral Trade Agreements). When it is in session, the Ministerial Conference has authority to adopt amendments to those agreements. WTO Agreement, supra note 6, art. X. Because the Ministerial Conference is convened only about every two years, the General Council serves the function of the Ministerial Conference when it is not in session. Id. art. IV:2; WTO, Wto GENERAL COUNCIL, at http://www.wto.org/english/thewto_e/gcounce_e/gcounce_e.htm (last visited Jan. 10, 2003).

330. See supra notes 218, 224 and accompanying text. The equal vote provision in the WTO technically provides the developing country members at large with the unprecedented veto power in international economic relations. Compare WTO Agreement, supra note 6, art. IX:1 (providing for decision-making by majority with one-state one-vote formula), with Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, art. V § 3, 60 Stat. 1440 (providing for a weighted vote to take into account differences in financial contributions to the World Bank); Articles of Agreement of International Monetary Fund, July 22, 1944, art. XII § 3, 60 Stat. 1401 (using weighted votes proportional to the share of financial contributions to the IMF).

331. See supra note 292 and accompanying text.

332. See WTO General Council, supra note 327, para. 16 (reporting that Egypt, on behalf of the Informal Group of Developing Countries (“IGDC”), pointed out that a broad range of members “criticized the Appellate Body for encroaching and infringing upon the rights of members to decide” on issues of amicus briefs when the panel and appellate reports on Shrimp-Turtle and U.S. British Steel were adopted).
Procedures, whereas experienced Northern NGOs submitted amicus briefs in dispute settlement proceedings without worrying about specific deadlines. With no formal rules providing for timetables of nongovernmental submissions, an NGO even submitted a revised brief well after the filing of the original brief as an attachment to the appellant’s submission. Moreover, Southern sovereigns find that the Appellate Body has authorized NGOs to file written submissions at the appellate stage, although the DSU authorizes only those members who are the third parties in panel proceedings to make submissions to the Appellate Body as third participants.

Moreover, Northern NGOs’ attempts subsequently paved the way for amicus submissions by powerful Northern industrial associations and ultimately produced written amicus procedures, while the extremely stringent Additional Procedure apparently created bias against many Southern NGOs, as they record a lower success rate in filing timely applications. Under the Additional Procedure, which required application within eight days, the Appellate Body received only three

333. See supra notes 191, 208, 207–210 and accompanying text.

334. Appellate Report on Shrimp-Turtle, supra note 14, paras. 8, 83 (recording that CIEL submitted the revised brief on August 3, 1998, eleven days after the United States’ submission to the Appellate Body and only four days before the submission by the four appellees).

335. See WTO General Council, supra note 327, para. 18 (reporting that Egypt, as the representative of the IGDC, maintained that “[i]ndividuals, NGOs, the business community and other interest groups would have the right to communicate their views in a case known to the appeal stage, while that very particular right was not even available to WTO members who were not a third party at the panel stage.”); Raghavan, supra note 166 (stating that many developing countries accused the Appellate Body and some went on to say that it gave “rights exceeding those possessed by WTO members who are not participants in the disputes”).

336. India recalled that when the Panel Report on U.S.—Copyright was adopted at the DSB, in the Shrimp case, the non-profit organisations had sought to intervene in the panel proceedings. In the UK Lead Bar case, a powerful business association had sought to intervene as well. Now a legal firm representing a business establishment directly interested in the outcome of the Panel’s proceeding had submitted its brief. WTO DSB, supra note 210, para. 73; see also supra notes 303, 306–308 (discussing the U.S.—Copyright, India—Cotton, U.S.—British Steel, and U.S.—Canadian Softwood Lumber cases that involve amicus briefs submitted from industrial groups). In addition, the Consuming Industries Trade Action Coalition (“CITAC”) also attempted to file an amicus brief to the Appellate Body in the steel trade dispute between Poland and Thailand. See WTO Appellate Report on Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R, para. 62 (Mar. 12, 2001). However, the Appellate Body ultimately decided to return the CITAC’s amicus brief because of the strong intuition that CITAC obtained confidential information included in the Thailand’s submission through the law firm retained by Poland, although the Appellate Body refrained from making a definitive finding on this issue. See id. paras. 64–65, 74–78. On the other hand, only one Southern industrial NGO thus far has had its independent amicus submission to a panel proceeding accepted in EC—Asbestos. See supra note 105. Although eight Southern industrial entities filed amicus briefs in the appellate proceeding, the Appellate Body declined to accept their submissions together with five submissions by Northern entities, preferring to deal with amicus briefs under the Additional Procedure. See Appellate Report on EC—Asbestos, supra note 309, para. 53 & n.30.

337. See supra note 309 and accompanying text.
timely applications from the South including Argentina, Korea, and India and eight from Northern NGOs, academics, and industrial associations. The Appellate Body also received six untimely applications including three from India and one each from Belgium, the United Kingdom, and the United States. Moreover, the WTO Secretariat circulated the Additional Procedure online among NGOs registered on its email list, which virtually extinguished opportunities of many Southern NGOs without computer access. As a result, Southern sovereigns expressed a strong concern about the apparent prejudice imposed on Southern NGOs by the Additional Procedure.

Furthermore, Southern sovereigns perceived that the Appellate Body attempted to confer formal participatory rights to NGOs with the written Additional Procedure despite its repeated expression to the contrary in previous cases. This apparent shift created greater uncertainty among Southern sovereigns regarding the security of their rights because the Appellate Body filled a significant vacuum in the procedural rules without an “interpretation” or amendment adopted by the General Council. Thus, Southern sovereigns became a central force that called for a special meeting at the General Council, where they accused the Appellate Body of overreaching decisions and fiercely rejected NGOs’ amicus brief submissions.

III. RECOMMENDATION: HOW CAN THE WTO INCREASE PARTICIPATION OF BOTH SOUTHERN SOVEREIGNS AND NORTHERN NGOS IN DISPUTE SETTLEMENTS?

To resolve the current impasse, procedural rules should be revised to include both the formalization of amicus procedures and the enhancement of third parties’ rights. The balance between Southern

338. See Appellate Report on EC—Asbestos, supra note 309, para. 56 & n.32.
339. See id. para. 55 & n.31.
340. See WTO General Council, supra note 327, paras. 21, 27, 66 (reporting that Egypt, Hong-Kong, and Pakistan expressed concerns about disadvantages created by uneven computer access in NGOs’ amicus submissions); id. para. 91 (including Jamaica’s statement that “very few non-Members from developing countries would have become aware of this additional procedure”); id. para. 21 (recording India’s statement that the Appellate Body’s approach would add an even greater disadvantage to developing countries considering “the relative unpreparedness of their NGOs who had much less resources”).
341. See id.
342. See supra notes 311, 335.
343. See supra note 299.
344. Southern sovereigns worry that the Additional Procedure in EC—Asbestos would virtually set a precedent for future cases. See WTO General Council, supra note 327, para. 20 (Egypt’s statement on behalf of the IGDC); id. para. 26 (Hong Kong’s statement); see also supra note 329 and accompanying text (explaining the General Council’s decisional authority regarding WTO Agreement and the Multilateral Trade Agreements including the DSU).
345. WTO General Council, supra note 327, para. 14 (recording that Egypt, on behalf of the IGDC, stated that the issue of amicus briefs “was not a transparency issue but was about the Appellate Body crossing its limit”).
sovereigns' participatory rights as third parties and Northern NGOs' participatory opportunities through amicus submissions should be carefully considered in order to promote representational fairness in WTO dispute settlements. The Rio principles of "common but differentiated responsibilities" and public participation provide useful guidance to accommodate competing demands of the two sides.

A. Rio Declaration as Guiding Principles in Restoring the WTO Dispute Settlement Mechanism

As discussed, Northern environmental NGOs and Southern sovereigns purport to represent different public values and interests in international trade-environment disputes. The Rio Declaration and Agenda 21 offer useful guidance in reconciling the competing demands of Northern NGOs and Southern sovereigns in the WTO dispute settlement mechanism. The Rio principles incorporate environmental and developmental concerns into a concept of sustainable development. The Rio instruments also attempt to make international trade and environmental protection mutually supportive. Moreover, the WTO has endorsed full implementation of Agenda 21 in attaining its institutional objective of sustainable development.

346. See WTO DSB, India's Questions, supra note 8, para. 30 (implying that amicus procedures should not confer legal rights to nongovernmental entities, which do not have standing in panel and appellate proceedings). India asked the European Communities to clarify the issue of distinction between amicus briefs and submissions from third parties. See id. para. 39. In reply, the European Communities generally agreed with India on this issue. See WTO DSB, EC's Replies, supra note 8, at 7 (emphasizing that NGOs' amicus briefs and third-party rights are qualitatively different because NGOs merely enjoy "the possibility to submit a brief" without standing before the panel or the Appellate Body); see also Jose E. Alvarez & Robert Howse, From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime, 96 AM. J. INT'L L. 94, 116 (2002) (cautioning that participatory opportunities through amicus submissions "should not be viewed as the first step toward private rights of action" while advocating greater nongovernmental involvement in dispute settlement proceedings).

347. See supra note 25.

348. See supra note 26.

349. See supra notes 29-99 and accompanying text.

350. See, e.g., Rio Declaration, supra note 25, pricn. 3 ("The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."); id. pricn. 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."); see also Johannesburg Declaration, supra note 92, para. 5 (recognizing "economic development, social development, and environmental protection" as "interdependent and mutually reinforcing pillars of sustainable development"); WSSD Plan of Implementation, supra note 42, paras. 1-5 (emphasizing international cooperation to integrate the above three pillars of sustainable development).

351. See supra note 91 and accompanying text; see also Agenda 21, supra note 288, paras. 2.1-2.22 (outlining strategies for sustainable development through mutually supportive trade and environmental measures).

352. Report on the Eighth Session, supra note 290, ch. 3, para. 6 (reporting that WTO's Director General proclaimed that the institution's objectives were "fully compatible with
First, Southern sovereigns’ concerns about relative disadvantages in their participatory rights should be addressed to recover a fair balance of representation between the North and the South. The Rio Declaration emphasizes common but differentiated responsibilities and takes account of the special needs of developing countries by emphasizing that the North has contributed greater environmental burdens to the world.

Agenda 21 refers to an equitable multilateral trade regime that assists sustainable development. Accordingly, special and differential treatment of Southern sovereigns should be reiterated in making procedural revisions to WTO dispute settlements. To make the international trade regime more participatory and equitable and to facilitate sustainable development of the South through fair and efficient adjudication of trade disputes, the North should bear a greater burden.

Second, NGOs’ participation should be encouraged in accordance with Principle 10 of the Rio Declaration, which supports public participation not only at the local and national levels, but also at the international level, including judicial proceedings. Public policy acquires legitimacy through participatory policymaking processes as well as fair decision-making processes. If NGOs were continuously denied constructive participation in dispute settlements without due process, this denial would seriously undermine the legitimacy of the WTO and trigger powerful campaigns by mainstream NGOs to abolish this apparently undemocratic trade institution.

\[353. See WSSD Plan of Implementation, supra note 42, para. 133(a) (emphasizing the need for international organizations including the WTO to “promote effective and collective support to the implementation of Agenda 21 at all levels.”).
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\[354. See supra notes 25–89.
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\[355. See Agenda 21, supra note 288, para. 2.5; see also WSSD Plan of Implementation, supra note 42, para. 45 (stating that “[g]lobalization should be fully inclusive and equitable” and seeking to promote equitable and non-discriminatory multilateral trading systems that “benefit all countries in the pursuit of sustainable development”).
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\[356. See supra notes 87–93, 99 and accompanying text (discussing the need of equitable international trade relations for the South to promote its sustainable development and highlighting the importance of special and differential treatment to attain this goal).
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\[357. See supra notes 26, 287–289 (discussing Rio Principle 10 and support for public participation in international trade policymaking based on Principle 10).
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\[358. See id.
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\[359. See supra note 101 and accompanying text.
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\[360. See supra note 102 (explaining the difference between mainstream NGOs, which mostly seek to reform the WTO, and radical NGOs, which would prefer to abolish the WTO).
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\[361. See CIEL, supra note 317 (reporting that Remi Parmentier, Greenpeace Political Director, stated that the WTO failed to learn “the lesson from Seattle” and “fuel[ed] concerns about the secretive way in which it makes decisions that impact on human lives and the
As WTO members themselves have recognized, NGOs are vital actors in promoting public awareness and national debate in trade and the environment.\textsuperscript{362} At the international level, public preferences can be aggregated through various channels, most importantly through national representatives\textsuperscript{363} and NGOs' transnational coalitions.\textsuperscript{364} In WTO dispute settlement proceedings, national representatives participate as principal and third parties while NGOs' transnational coalitions submit amicus briefs as means for direct public participation. Southern NGOs can either support national governments as representatives of Southern public constituencies or enter into coalitions with Northern NGOs if they share priorities and strategic positions with each other. Southern NGOs that acquire capacity to represent their constituencies independently can submit their own amicus briefs. In this way, diversifying public values and interests in Southern societies can be channeled at the international level.

Third, the multilateral quasi-judicial proceedings should be maintained under the DSU and the Working Procedures as tools to promote sustainable development. Both Agenda 21 and the DSU value a secure and predictable multilateral trade regime, in which the dispute environment” by arbitrarily denying nongovernmental amicus submissions); see also supra note 321 and accompanying text (noting environmental NGOs' criticisms regarding the Appellate Body's apparently baseless rejection of their request for leave to submit amicus briefs); cf. O'BRIEN ET AL., supra note 102, at 149–50, 222–23 (explaining that some influential NGOs are now considering abolishing the Committee on Trade and Environment, which has failed to yield tangible results in coordination of trade and environmental policy while preventing NGOs from acquiring the observer status they need in order to participate in the Committee).

362. See supra note 294. Indeed, in the heated national debate regarding the NAFTA, U.S. mainstream environmental NGOs not only identified potential environmental problems but also articulated acceptable options through public pronouncements and grassroots networks, leading to the creation of the North American Agreement on Environmental Cooperation as a side agreement to the NAFTA. See Mayer, supra note 102, ch. 6.

363. See Edwards, supra note 101, at 7 (recognizing democratic governments, whose positions are shaped by electorates and various interest groups, as the best representatives in international policymaking). In international tribunals, States have represented environmental interests as the parties to the dispute. See, e.g., Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 1 (Sept. 25) (involving conflicts between Hungarian ecological interests and Slovakian developmental interests where Hungary brought a suit against Slovakia seeking to halt Slovakia's unilateral construction and operation of Gabčíkovo-Nagymaros Dam, which significantly reduced downstream water flow to Hungary); Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1941) (dealing with a transboundary air pollution dispute in which the United States sought damages and an injunctive relief against Canada on behalf of U.S. citizens affected by sulfur dioxide emissions from a smelter operating in Canada).

364. See Daniel C. Esty, Linkages and Governance: NGOs at the World Trade Organization, 19 U. PA. J. INT'L ECON. L. 709, 718 (1998) (stating that NGOs represent rich and diverse perspectives of civil society in a manner different from their governments); Goodman, supra note 1 (noting that NGOs have mostly addressed transnational issues in the trade-environment debate); PORTER, ET AL., supra note 146, at 65 (explaining that NGOs seek to effect international negotiations by lobbying and campaigns through transnational coalitions). For examples of successful transnational coalitions of NGOs, see supra note 152.
settlement system is regarded as a "central element." Moreover, the WTO dispute settlement mechanism could serve as a forum to facilitate cooperation and coordination in international trade and environmental policies. For example, in the implementation stage of the Shrimp-Turtle rulings, as discussed, a regional sea turtle conservation framework has emerged through negotiations between the United States and shrimp harvesting countries in Southeast Asia. Accordingly, the WTO should maintain the following major features in the current dispute settlement system: stringent timetables, confidentiality, preservation of existing rights and obligations, and the distinction between panel and appellate proceedings.

Fourth, to maintain predictability and security, the subtle balance of decisional power between the DSB and the General Council should be strictly respected. Any ambiguity regarding amicus brief submissions and other matters pertinent to the members' participatory rights should be addressed at the General Council, not in the DSB through ad hoc measures and rulings. As discussed, the DSB has no authority to "interpret" WTO rules to change the existing rights and obligations of the WTO members. Because nongovernmental amicus submissions and extended third-party participation affect and modify the existing participatory rights of WTO members, the DSB should decline to consider these issues until the General Council introduces formal

365. DSU, supra note 176, art. 3.2; Agenda 21, supra note 288, para. 2.5; WSSD Plan of Implementation, supra note 42, para. 45(a) (recommending that states "[c]ontinue to promote open, equitable, rules-based, predictable and non-discriminatory multilateral trading and financial systems.").

366. See Andrew L. Strauss, From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization, 19 U. PA. INT'L ECON. L. 769, 800–18 (1998) (arguing that environmentalists can use the WTO as a tool to facilitate the international harmonization of environmental standards by using the dispute settlement mechanism as an effective adjudicatory mechanism for policy coordination and by securing participation of developing countries).

367. See supra note 223 and accompanying text. While the original rulings in Shrimp-Turtle have enabled Pakistan to continue harvesting shrimps by obtaining technical assistance from the United States, the recourse rulings in Shrimp-Turtle have ultimately allowed the United States to maintain an import ban on shrimp products from a country that refused to obtain certification. See Panel Report on Shrimp-Turtle: Recourse by Malaysia, supra note 15, para. 3.159; Appellate Report on Shrimp-Turtle: Recourse by Malaysia, supra note 15, paras. 153–54.

368. See supra notes 187, 190, 193, 196–197, 207–216 and accompanying text.

369. Barfield, supra note 21, at 413 (stating that the Appellate Body should not introduce amicus procedures "through the back door"); Charnovitz, supra note 124, at 214–15 (recognizing the belief of WTO members that it is the members themselves, not the Appellate Body, who should make a decision on the issue of amicus procedures and urging them to act promptly to create needed procedures); see also Duncan B. Hollis, Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty, 25 B.C. INT'L & COMP. L. REV. 235, 243 (2002) (arguing that although various international tribunals have accepted amicus submissions, amicus submissions are contingent on the explicit consent of the member states in each tribunal).

370. See supra notes 218–219 and accompanying text.
procedural rules. On the other hand, both Southern sovereigns and NGOs should be encouraged to utilize the existing provisions that explicitly address their concerns at every stage in dispute settlement proceedings.

B. Enhanced Third-Party Rights to Promote Active Intervention by Southern Sovereigns

Article 6 of the Panel Working Procedures should be amended to allow participation of third parties throughout panel proceedings. This amendment would increase input from Southern sovereigns, particularly from smaller developing countries, which have difficulty participating as principal parties.

The enhanced third-party rights should include the right to participate in the second meeting and the interim review meeting. The current provision authorizes input from third parties only during a session specifically allocated for hearings from third parties. This restriction limits input from third parties in panel proceedings. According to Shrimp-Turtle, however, panel proceedings are designed to produce a “high-quality panel report” with objective factual and legal findings, rulings, and recommendations, which require broad legal and factual information from stakeholders. Thus, the provision should be amended to eliminate the restriction on third party input.

Actually, in the post-Doha negotiations, the European Communities have supported “the substantial enhancement” of third-party rights to allow participation by third parties at “any substantive meetings” in panel processes.

371. See Barfield, supra note 21, at 413 (considering that the issue of amicus briefs is more than a question of procedure as NGOs with expertise and resources may overwhelm smaller developing countries).


373. See WTO DSB, Taiwan’s Contribution, supra note 8, at 2, para. II:2 (supporting proposals for enhanced third-party rights “[g]iven that resource and monetary constraints often preclude small and developing Member countries from making full use of the system”); ACTION AID ET AL., supra note 165, at 7 (urging WTO members to develop more inclusive rules and practices particularly with regard to developing countries).

374. See WTO DSB, Jamaica’s Contribution, supra note 372, para. 5 (recording that Jamaica advocated for third-parties’ participation in “all panel hearings” once enhanced third-party rights are granted); WTO DSB, Taiwan’s Contribution, supra note 8, at 3, para. II:2(c) (proposing enhanced third-party rights including “presence at all meetings”).

375. See supra note 199 and accompanying text.

376. See supra note 300 and accompanying text; see also OXFAM GB, supra note 173, at 19.
proceedings, but this formulation fails to extend enhanced third-party rights to the interim review stage. Third parties should be invited to the interim review process to express their concerns because, as discussed, the interim review is a vital step in shaping the panels' findings and reasonings, which might potentially affect third parties' interests in appellate proceedings and at the compliance stage. Accordingly, a third party should be able to submit a written request for extended third-party rights in the interim review as well as the second meeting.

The enhanced third-party rights should be qualified by requiring principal parties' consent. Increased third party participation might put a burden on principal parties who need to consider third parties' submissions and respond to them. Moreover, active third party involvement might hinder the extensive discussion between the principal parties because of reduced confidentiality.

To address these issues, a principal party should be allowed to file an objection. Then, the panel should have discretion in deciding whether to grant the enhanced third-party rights. The Appellate Body has actually dealt with this issue in European Communities—Measures Concerning Meat and Meat Products ("EC—Hormone") and United States—Anti-


378. See WTO DSB, EC's Proposals, supra note 8, at 7 n.2, Annex, para. 9 (denying third parties' right to access "any submission following the interim panel report"). The proposal purports to maintain the restrictive provision that allows only the principal parties to submit written comments after the issuance of the interim report while eliminating the provision for the interim review meeting from Article 15(2). See id. paras. 11, 12. The 1999 proposal includes an identical proposal. See Proposed Amendment, supra note 377, paras. 13, 14.

379. See supra notes 280-284 and accompanying text.

380. See WTO DSB, Jamaica's Contribution, supra note 372, para. 5 (recording Jamaica's proposal that a third party should submit a written request to obtain enhanced rights in accordance with guideline composed of a set of factors such as trade share of third parties, contribution to the economy, and existing legally binding agreements).

381. See generally supra notes 212-213 and accompanying text (explaining that the WTO dispute settlement rules are designed to maintain the subtle balance between the protection of confidentiality and broad participation in the dispute settlement). This section discusses confidentiality in a general sense, as panels could protect specific business confidential information by applying the Business Confidential Information ("BCI") Procedures adopted in the WTO Panel Report on Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70/R, Annexes I, II (Apr. 14, 1999) (providing for the BCI Procedure and "the Declaration of Non-Disclosure"); WTO Appellate Body Report on Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, para. 142 (Aug. 2, 1999) (upholding the use of the BCI Procedures in the panel although rejecting their adoption in the appellate proceedings).

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Dumping Act of 1996 ("U.S.—Anti-Dumping Act"). In EC—Hormone, the Appellate Body upheld the panel’s discretion to authorize the United States to participate in the second meeting in which scientific experts testified regarding the EC measures. The United States was a complaining party in a separate panel proceeding that dealt with the same EC measures. The European Communities objected that enhanced third-party rights would affect their rights of defense. The panel justified its decision based on due process because the United States needed to have opportunities similar to Canada in order to access to and comment on scientific experts’ opinion. Moreover, having a single scientific expert session was desirable to prevent unnecessary delay in dispute settlement proceedings. In U.S.—Anti-Dumping Act, the Appellate Body upheld the panel’s rejection of enhanced third-party rights to the European Communities and Japan. The European Communities and Japan were complainants in separate panel proceedings that involved the same U.S. measures. The United States strongly argued against enhanced third-party rights. Unlike EC—Hormone, the panel found no due process concerns because the case did not involve detailed examination by experts and none of the parties agreed to hold proceedings concurrently. Applying the rationale in these cases, a panel should have discretion to grant enhanced rights to a third party based on due process even upon a principal party’s objection. If principal parties make no objections, their silence should be interpreted as an implicit consent to the extended participation of the requesting third party.

When a developing country requests the enhanced third-party rights, preferential treatment should be given. The panel should take account of the special needs of developing countries to obtain access to

385. See id. para. 1.
386. Id. para. 150.
387. See id. para. 154; Panel Report on EC—Hormone, supra note 298, para. 8.20 (Complaint by Canada).
388. See id. para. 153.
390. See id. para. 1.
391. See Panel Report on U.S.—Anti-Dumping Act, supra note 383, para. 6.30 (Complaint by Canada), para. 6.30 (Complaint by Japan).
393. See supra note 356 and accompanying text.
information and to have efficient dispute settlements because of their limited resources and expertise. Accordingly, the panel should presume the necessity of due process to grant the enhanced third-party rights to the requesting developing country. The objecting party may rebut this presumption if it can introduce the evidence to negate the necessity of due process.

Exactly how far the extended participation by third parties in panel proceedings reaches should be determined from the rulings and practices in EC—Bananas (III). With the enhanced rights, a third party should be entitled to receive principal parties' written submissions for the second meeting, while the third party should not be required to file written submissions. At the second meeting, the third party should be allowed to "make a brief statement at a suitable moment" to highlight its concerns. The third party should also be able to submit additional written submissions. However, the third party's additional submissions should be limited to the questions that were already posed during the first meeting to reduce the burden of information processing on the panel and on the principal parties. Statements and additional written submissions made by the third party, if any, should be included in the interim report together with the principal parties' statements and submissions.

Similar rules should be applied in the interim review process to allow the effective participation of third parties while maintaining the distinction between the principal parties' rights and the enhanced third-

394. See supra notes 227–234 and accompanying text.
395. Regardless of the preferential treatment, the BCI Procedures that protect specific business confidential information should cover the requesting developing-country third party throughout the panel procedures to prevent procedural abuses and loopholes. See WTO DSB, Taiwan's Contribution, supra note 8, at 3, para. II(c) (proposing that third parties with enhanced rights have "entitlement to receive all information and documents, except certain confidential business information designated as such by the disputing parties"); see also supra note 381 (discussing the BCI Procedures adopted in Canada—Civilian Air Craft).
396. See supra notes 262–273 and accompanying text. For the sake of clarification, the amended procedural rule should provide for the scope of the enhanced third-party rights as articulated below, although the adopted panel ruling in EC—Bananas (III) should guide subsequent decisions according to the Appellate Body's opinion in Japan—Alcohol Beverages. See supra note 303 and accompanying text.
397. See supra note 272 and accompanying text.
398. See supra note 271 and accompanying text; WTO DSB, supra note 372, para. 5.
399. Panel Report on EC—Bananas (III), supra note 262, para. 7.8. Jamaica's proposal apparently neglected this limited scope of the enhanced third-party rights allowed in EC—Bananas (III). See WTO DSB, Jamaica's Contribution, supra note 372, para. 5. On the other hand, Taiwan favors enhanced third-party participation completely without rights to make oral and written submission to avoid complexity and preserve judicial economy in the dispute settlement process. WTO DSB, Taiwan's Contribution, supra note 8, at 3–4, para. II:2(d). This Comment attempts to balance concerns underlying in these extreme positions.
400. See id.
401. See supra note 273 and accompanying text.
party rights. Thus, the panel should issue the interim report to a third party with the enhanced rights to allow meaningful input. On the other hand, the third party should be able to submit a written comment only with regard to the questions raised by it at the first and second meetings. At the interim review meeting, the third party should be allowed to "make a brief statement at a suitable moment" to further accentuate its concerns. In addition, all third parties should be authorized to review their arguments recorded in the interim report pursuant to the customary practice. In the final report, the panel should be required to include written comments and statements made by the third party, as well as by the principal parties, at the interim review meeting.

Throughout panel proceedings, Southern sovereigns, not only as principal parties but also as third parties, should be encouraged to utilize Article 12.11 of the DSU to highlight their rights to special and differential treatment in disputed matters. The continuous emphasis of special and differential treatment by many Southern sovereigns would, over time, promote the realization of those special and differential treatment provisions.

To clarify the timetable for third-party participation, the customary ten-day period for notification should be codified in the Panel Working Procedures. In the post-Doha negotiations, the European Communities proposed to provide for the ten-day period in the Article 10.2 of the DSU. Because the DSU is a Multilateral Trade Agreement that cannot

402. See supra note 277 and accompanying text.
404. See supra note 275 and accompanying text.
405. See supra note 190 and accompanying text. In addition, Jamaica proposes that the third party with the enhanced rights should receive the decision concurrently with the principal parties. See WTO DSIB, supra note 372, para. 5.
406. See DSU, supra note 176, art. 12.11.

Where one or more of the parties is a developing county Member, the panel’s report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members . . . which have been raised by the developing country Member in the course of the dispute settlement procedures.

Id.

407. See WTO, supra note 220, para. 7 (reporting Cuba’s statement on behalf of G-77 that the special and differential provisions “need to be legally binding and must be operationalised and made enforceable”); Footer, supra note 242, at 97 (encouraging developing country members to use applicable DSU provisions in the course of dispute settlement proceedings to ensure the actual implementation of special and differential treatment provisions); see also Das, supra note 237 (stating that “developing countries have to take some actions on their own to utilize the system in a more effective way.”).

408. See WTO DSIB, Taiwan’s Contribution, supra note 8, at 3, para. II:2(b); see also supra notes 208, 210 and accompanying text (explaining that although the ten-day period for the third-party notification is not formally provided, it is strictly enforced).
409. WTO DSIB, EC’s Proposals, supra note 8, at 10, para. 8.
be modified by a particular panel, the European Communities' proposal would completely eliminate the possibility of extension if a developing country member has difficulty with the stringent deadline. Instead, the ten-day period should be codified in the Working Procedures, which a panel could modify after it consulted with the principal parties. This arrangement could offer flexibility to allow broad participation by third parties while protecting the principal parties' rights to efficient dispute settlement.

Additionally, the existing provision could better facilitate preparation of Southern sovereigns' submissions by providing extra time to make submissions. In fixing the timetable, Southern sovereigns should be encouraged to use Article 12.4 of the DSU to secure "sufficient time" in preparing their presentations at each stage of panel proceedings. Flexibility in "sufficient time" provisions should allow a panel to balance the need of efficiency and equity in dispute settlements. In particular, a panel should use the India—Quantitative Restrictions case as a guideline to consider the scope of "sufficient time." In that case, the Appellate Body authorized the panel to balance India's difficulties resulting from administrative reforms and the stringent timeline under Article 12.10 of the DSU.

At the appellate level, on the other hand, relatively restricted intervention should be maintained to allow only third parties in the panel process to participate in appellate proceedings. The Appellate Body

410. See WTO Agreement, supra note 6, art. X:1 (providing for the amendment procedure for the Multilateral Trade Agreements in the Ministerial Conference).

411. See DSU, supra note 176, art. 12.1.

412. See DSU, supra note 176, art. 12.4 ("In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.").

413. See Panel Report on India—Quantitative Restrictions, supra note 244, para. 5.10 (upholding the panel's grant of an extra period of ten days to India for preparation of the first submission as the respondent, considering the recent administrative reorganization in the Indian government). The Appellate Body stressed the balance between the need of developing country members and the respect of the stringent schedule in the panel proceedings. See id.

414. See supra note 207 and accompanying text. Although the European Communities propose no modification regarding the rights of third participants in appellate proceedings, its proposal allows amicus submissions by non-party members in appellate proceedings. See WTO DSB, EC's Proposals, supra note 8, Annex, para. 10 (addressing amicus brief submissions by any natural or legal persons other than a principal or third party); WTO DSB, EC's Replies, supra note 8, at 7 (considering "minimal right for a Member or natural or legal person to file an amicus brief"). Moreover, the Appellate Body recently upheld its authority to receive an amicus brief from Morocco, which attempted to express its opinion at the appellate level without participating in the panel process despite objections from Peru as the appellee and Chile, Ecuador, and Canada as third participants. See Appellate Report on EC—Sardines, supra note 253, paras. 153–55, 157. Nevertheless, this Comment rejects amicus submissions by a member, as well as liberalization of intervention at the appellate level, on the same grounds as discussed below. See infra notes 415–418 and accompanying text. For more details of amicus submissions by a non-party member, see infra note 444.
has the narrow task of reviewing legal issues.\textsuperscript{415} This limited task does not require outside information.\textsuperscript{416} The principal parties and third parties, who researched disputed matters and submitted their contentions, could highlight significant legal issues, which would efficiently assist the Appellate Body's legal rulings and recommendations. Moreover, if appellate proceedings were opened to any interested members without regard to participation in panel proceedings, many new parties might join at the appellate level to make new rules and "interpretations" through Appellate Body's decisions.\textsuperscript{417} This intervention would seriously undermine the General Council's authority as the exclusive decision-making body.\textsuperscript{418}

In appellate proceedings, Southern sovereigns, not only as principal parties but also as third parties, should not hesitate to take advantage of Rule 16(2) of the Appellate Working Procedure to request adjustment of the timetable in filing a submission or in preparing an oral presentation.\textsuperscript{419} This provision could accommodate their structural difficulties if the stringent timetable "would result in a manifest unfairness" \textquotedblright[i]n exceptional circumstances.\textsuperscript{420} What constitutes such extreme circumstances for developing countries would evolve through invocation of the rule.

In summary, these recommendations propose extended third-party rights in panel proceedings to effectuate the preferential rights of Southern sovereigns throughout the proceedings. In addition, Southern sovereigns should be encouraged to use existing provisions to obtain a flexible timetable, which would allow them to address their structural disadvantages while more fully participating in dispute settlements.
C. **Formal Amicus Brief Procedures to Facilitate Broader Public Input by NGOs**

To promote public input in dispute settlements, formal amicus procedures should be adopted to authorize NGOs\(^4\) to submit amicus briefs in panel and appellate proceedings.\(^4\) The European Communities have expressed their support for a better framework for nongovernmental amicus submissions.\(^4\) For this purpose, however, the European Communities have attempted to introduce the contentious "two-stage approach"\(^4\) adopted in the Additional Procedure in the **EC—Asbestos case**\(^4\) in both panel and appellate proceedings. According to the proposal they submitted during the post-Doha negotiations, NGOs must (1) file a request for leave to submit amicus briefs within fifteen days to the panel and within five days to the Appellate Body and (2) make effective amicus submissions within fifteen days to the panel and within three days to the Appellate Body after receipt of the notification by the DSB to grant leave.\(^4\)

The two-step approach is apparently unacceptable to the majority of the WTO members as evidenced in the bitter criticisms against the Additional Procedure.\(^4\) In the post-Doha negotiations, India has explicitly questioned the effectiveness of the two-step approach.\(^4\) More importantly, the European Communities' proposal would reinforce the current underrepresentation of Southern constituencies because, as evidenced in the **EC—Asbestos case**,\(^4\) Southern NGOs would face

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\(^{421}\) In this section, NGOs encompass a broad range of actors in accordance with the definition of NGOs adopted in the WTO. *See supra* note 3 (explaining the WTO's definition of NGOs, which includes economic interest groups as well as environmental, developmental, and consumer groups). This is because sustainable development envisions wide participation of stakeholders including business interests. *See OXFAM GB, supra* note 173, at 16; *see also supra note 287 and accompanying text (explaining that Rio Principle 10 encourage participation of all stakeholders in environmental policymaking at the relevant level); Raustiala, *supra* note 101, at 567 (stating that the business community has a legitimate interest in the results of international rulemaking, including environmental treaty negotiations, that directly affect it).

\(^{422}\) *See Charnovitz, supra* note 124, at 214–15 (recommending the WTO establish amicus procedures for nongovernmental groups and individuals); Alvarez & Howse, *supra* note 346, at 115 (calling for amendments to the procedural rules to attain greater inclusiveness in WTO dispute settlements); ACTION AID ET AL., *supra* note 165, at 8 (requesting that WTO members create procedural rules governing amicus brief submissions as means of public participation).

\(^{423}\) *See WTO DSB, EC's Proposals, supra* note 8, at 7.

\(^{424}\) *WTO DSB, EC's Replies, supra* note 8, at 6.

\(^{425}\) *See supra* notes 311–313 and accompanying text.

\(^{426}\) *WTO, Proposal, supra* note 8, Annex, paras. 10.2, 10.5; *see also* WTO DSB, EC's Replies, *supra* note 8, at 6.

\(^{427}\) *See supra* notes 342–345 and accompanying text (explaining the strong negative opinions of Southern sovereigns regarding the Additional Procedure).

\(^{428}\) *See WTO DSB, India's Questions, supra* note 8, paras. 33, 37 (questioning the effectiveness of the European Communities' proposal in terms of criteria for and administration of the screening process).

\(^{429}\) *See supra* notes 338–341 and accompanying text.
tremendous hurdles in complying with the extremely tight schedule of the two-stage process due to their difficulties in effective access to communication technologies and translation. The overwhelming procedural hurdle is also repugnant to the purpose of the panel proceeding because, as discussed, broad factual and legal input is required to produce the "high-quality panel report" with objective factual and legal assessments.

Instead, WTO members should adopt an "interpretation" of Article 13.1 that would explicitly allow NGOs to submit amicus briefs in panel proceedings pursuant to the current practice developed through Shrimp-Turtle. In addition, the schedule for amicus submissions should be incorporated into paragraph 12(b) of the Panel Working Procedures, together with the timeline for third parties, to avoid disadvantageous treatment of third parties. Article 12.5 of the DSU should be amended to require NGOs to respect the schedule that permits responses and comments by the principal and third parties, while the fixed schedule for

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430. See supra note 168 and accompanying text. Actually, the digital divide is one of the reasons that Southern sovereigns gave for refusing amicus submissions under the Additional Procedure. See supra note 340 and accompanying text. Taiwan strongly opposed to the European Communities' proposal as follows:

Our concern here is that only those Members that have well developed social resources such as think tanks, academic institutions and non-governmental agencies are likely to be called upon for information and technical advice... To allow unsolicited amicus curiae submissions, and to systematize this in a new Article as proposed by the EU, would create a situation where those Members with the least social resources could be put at a disadvantage.

WTO DSB, Taiwan's Contribution, supra note 8, at 2, para. 1:2(a) (citation omitted). However, Taiwan's generalized concern about nongovernmental amicus submissions seems exaggerated, as quite a few Southern NGOs attempted to submit amicus briefs in EC—Asbestos. See supra notes 336, 338 and accompanying text.

431. See supra notes 300, 376 and accompanying text.

432. See ACTION AID ET AL., supra note 165, at 8 (recommending that WTO members negotiate an interpretation or amendment to Article 13 of the DSU to authorize panels to accept unsolicited amicus briefs); see also supra notes 298-301 and accompanying text (discussing the Appellate Body's authorization of amicus submissions under Article 13.1 of the DSU in Shrimp-Turtle). Amicus submissions under Shrimp-Turtle should be more acceptable than the Additional Procedure. See Panel Report on EC—Asbestos, supra note 105, para. 6.1 (reporting that the panel in the same case apparently had no controversies about amicus submissions pursuant to Shrimp-Turtle, unlike amicus submissions in the appellate proceeding under the Additional Procedure); Appellate Report on EC—Sardines, supra note 252, para. 154 (recording that Peru expressly "welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings," which has been the case since Shrimp-Turtle).

433. See Panel WP, supra note 181, para. 12(b); see, e.g., WTO DSB, EC's Proposals, supra note 8, at 12, para. 10.7 (allowing the principal and third parties ten days to respond to the accepted amicus submissions).
each panel and other relevant information should be published promptly to help NGOs' timely and effective amicus submissions. 434

The WTO should clarify the treatment of nongovernmental amicus briefs. 435 Panels and the Appellate Body should be able to reject amicus briefs, provided that they unequivocally disclose the specific reason for their rejection. 436 This qualification would ensure fair treatment, a matter questioned in the appellate proceeding in the EC—Asbestos case. 437 The panel and the Appellate Body should decline to address new issues raised by amicus submissions, but they should be able to consider NGOs' arguments that are not raised by the parties so long as such new arguments are found to be directly relevant to the covered issues. 438 This arrangement is necessary to prohibit NGOs from enjoying greater participatory opportunities than third parties while permitting valuable input from the stakeholders. 439 The DSB should also ensure that amicus briefs accepted by the panel are transferred to the Appellate Body in accordance with Rule 25 of the Appellate Working Procedure. 440 First, pursuant to the existing practice, if a principal party attaches an amicus brief to its submission, it should be transferred to the Appellate Body in entirety. 441 Second, accepted, unattached amicus briefs also should be transferred to the Appellate Body as "any other documentation submitted to the panel." 442

The Appellate Body should accept amicus submissions only from those who already submitted briefs to the panel, applying the same

434. See supra note 197 (quoting Article 12.5 of the DSU that require parties to adhere to the deadlines set by the panel); see also WTO DSB, EC's Proposals, supra note 8, Annex, para. 7 (providing that the principal and third parties may take ten days to make comments on and respond to the filed amicus submissions).

435. See ACTION AID ET AL., supra note 165, at 8 (calling for formal amicus procedures that also precisely address the treatment of amicus submissions in panels and appellate proceedings).

436. See, e.g., Panel Report on U.S.—Canadian Softwood Lumber, supra note 303, para. 7.2 (reporting that the panel rejected three additional amicus briefs because they were submitted after the preliminary meeting to consider the admissibility of the amicus brief filed timely by the Interior Alliance); Panel Report on EC—Asbestos, supra note 105, para. 6.4 (recording that the panel declined to accept an amicus brief submitted by the Only Nature Endures ("ONE") because it was filed "at a stage in the procedure when it could be no longer be taken into account."). ONE submitted its amicus brief seven months after the panel made a decision to consider the two amicus briefs that were incorporated into the EC's rebuttal submissions. See id.

437. See supra notes 319-321 and accompanying text.

438. See WTO DSB, EC's Replies, supra note 8, at 7.

439. See supra note 193 and accompanying text.

440. See Appellate WP, supra note 181, R.25 (providing for the transfer of the complete panel record to the Appellate Body for an appellate review).

441. See id. R.25(2)(i) (codifying the transfer of "written submissions, rebuttal submissions, and supporting evidence attached thereto" filed by the principal and third parties); see also supra note 299 and accompanying text (explaining that the Appellate Body recognized an attached amicus brief as "prima facie an integral part" of the party's submission).

442. Appellate WP, supra note 181, R.25(2)(iv).
rationale regarding "third participants" in appellate proceedings. Understandably, NGOs might be surprised by unexpected panel rulings and thus seek to make amicus submissions at the appellate level. Nevertheless, this practice is unacceptable because the Appellate Body should not offer greater participatory opportunities to NGOs than to third parties, which may not participate in appellate proceedings without being part of the panel proceedings. On the other hand, so long as an NGO is named as a participant in the initial amicus submissions to the panel, the NGO should be allowed to submit an amicus brief to the Appellate Body with different coalition partners, as in Shrimp-Turtle.

For appellate review, amicus procedures should be incorporated in Rule 24 of the Appellate Working Procedure. To file amicus briefs, NGOs should be required to follow the strict deadline that allows the principal and third parties to have sufficient time for comments and response, while the Appellate Body should immediately circulate the timetable to facilitate NGOs' timely submission. Moreover, the new rule should also require that NGOs make their submissions public because

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443. See supra notes 414-417 and accompanying text (explaining that the Appellate Body does not need additional information from those who did not participate in the panel proceedings because the Appellate Body only reviews the issues of law raised at the panel level and the Appellate Body consists of authorities who can make a decision in international trade law and policy without help from additional legal arguments).

444. See supra notes 346, 413 and accompanying text. The Appellate Body recently reiterated its authority to accept amicus briefs from NGOs under Article 17.9 in accordance with U.S.—British Steel. See Appellate Report on EC—Sardines, supra note 252, para. 162. Moreover, the Appellate Body held that it has "legal authority to accept amicus briefs" from a WTO member because it "did not distinguish" between nongovernmental and governmental amicus submissions under Article 17.9. See id. The Appellate Body rejected Peru's argument regarding relative disadvantages to third participants because it differentiated its duty to accept and consider third participants' submissions from its discretion to deal with amicus submissions. See id. paras. 157, 162, 166, 168. In so doing, however, the Appellate Body neglected prejudicial effects on third participants who must observe stringent requirements under the DSU. See id. para. 154 (recording Peru's strong concern that the Appellate Body's acceptance of a WTO member's amicus brief would allow the member "to circumvent the DSU").

445. See Appellate Report on Shrimp-Turtle, supra note 9, para. 79 (reporting that in the appellate proceeding, the CIEL-CMC coalition included five other NGOs that had not participated in the submission to the panel proceeding).

446. See supra note 203 and accompanying text (discussing the stringent timeline for third parties' submissions set forth in Rule 24 of the Appellate WP).

447. See Appellate WP, supra note 181, R.26(2) (providing for a schedule for appellate proceedings with "precise dates for the filing of documents"); see also WTO DSB, EC's Proposals, supra note 8, Annex, para. 7 (proposing the ten-day period for the principal and third parties to make comments on and respond to the submitted amicus briefs); WTO General Council, supra note 327, para. 27 (recording Hong Kong's concern that the Additional Procedure "could create an impossible burden on developing country Members" because they have limited time and resources to comment on and respond to amicus submissions within a few days).
Article 18.2 of the DSU provides for possible public access only to parties' submissions.  

The formalization of nongovernmental amicus submissions, as well as extended participation of third parties, would likely result in the proliferation of documents and statements to be processed and circulated among the parties and the panel. In fact, the DSB, a body without sufficient human and financial resources, is already overwhelmed by massive documents exchanged among parties. Under these conditions, translation alone can take several months in dispute settlement proceedings. To avoid overwhelming the dispute settlement system, there should be a limit on the maximum length of amicus submissions. However, to operate the dispute settlement system fairly in the long term, WTO members should agree to increase the administrative staff of the WTO Secretariat that supports information and translation in dispute settlement documents, especially aiming to assist developing countries in their submissions. Taking account of disparities in the burden and ability of information processing, the North should bear the increased costs of fair and informed dispute settlements.

Although some Northern NGOs demand to be present at panel hearings in addition to amicus brief submissions, NGOs should not be

448. See supra note 296 and accompanying text; see also Peel, supra note 6, at 70 (summarizing proposals for procedural reforms to allow NGOs' participation including the requirement of the publication of NGOs' submissions in dispute settlements).


450. Id. (stating that the date when the panel releases the final report to the parties and the date when the DSB circulates the report to the remaining WTO members can vary considerably due in part to the time needed for translation); see also Terence P. Stewart & Amy Ann Karpel, Part I: Review of the Dispute Settlement Understanding (DSU): Operation of Panels, 31 LAW & POL'Y INT'L BUS. 593, 599 (2000) (explaining that the DSB first releases the final report to the parties to the dispute, and then translates it into official WTO languages, namely English, French, and Spanish, to disclose to the remaining WTO members and the public).

451. See, e.g., WTO DSB, EC's Proposals, supra note 8, at 12, para. 10 (6)(b) (proposing that amicus briefs "be concise and in no case longer than 20 typed pages, including any appendices").

452. See supra notes 168, 227 and accompanying text (discussing the disparities in computer access and linguistic skills between the North and the South and Southern sovereigns' difficulty in collecting various data to support their claims in dispute settlements).

453. See WTO General Council, supra note 227, para. 17 (recording Pakistan's statement calling for "specific provisions in the WTO budget to assist developing countries meet the costs involved in the dispute settlement mechanism.").

454. See Peel, supra note 6, at 70. Environmentally-minded academics also criticize secrecy of the WTO dispute settlement and support open proceedings to allow NGOs' presence. See, e.g., Alvarez & Howse, supra note 346, at 115–16; Charnovitz, supra note 124, at 214–15; Esty, supra note 364, at 726–27. Apparently to appease the criticisms from their powerful constituencies, several Northern governments advocate for open hearings. See, e.g., WTO DSB, EC's Proposals, supra note 8, at 6 (contending that dispute settlement proceedings should be
allowed to attend panel proceedings, considering the existing overwhelming disadvantages of Southern nongovernmental actors.455 While Northern NGOs could be present at the proceedings in Geneva and have the ability to use the media extensively to advocate for their positions, Southern nongovernmental actors would have few comparable resources.456 This disparity would likely reinforce current tendencies regarding the penetration of Northern values and interests in international policymaking.457 Moreover, if Northern NGOs desire to have access to parties’ submissions, they should use the existing provisions.458 Article 18.2 of the DSU, although indirect and restrictive, still provides public access to parties’ submissions by allowing a WTO member to disclose its own submissions and to obtain a non-confidential summary of another member’s submissions.459 The WTO members should facilitate public access under this provision because it does not prejudice Southern NGOs, whose governments prefer to promote domestic public debate.460

open to the public at the discretion of the panel and the Appellate Body); WTO DSB, U.S. Contribution, supra note 8, at 2 ("The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration meetings with the parties except those portions dealing with confidential information . . . "). Although access to information is vital to meaningful public participation, it is important to make a distinction between participation issues including amicus submissions and transparency issues including open hearings and access to parties’ submissions, as improved transparency does not necessarily guarantee increased public participation. See WTO General Council, supra note 327, paras. 71-72 (Canada’s statement).

455. See supra notes 103, 340 (noting that Southern sovereigns are concerned that the current disadvantages faced by Southern NGOs would be amplified by formal amicus procedures).

456. See Shaffer, supra note 3, at 67 (stating that both Southern states and NGOs are skeptical about Northern NGOs’ demands for “transparency,” which would merely open opportunities for Northern groups to use the media to have influence on national representatives, the Secretariat, and dispute settlement panelists in the WTO); O’BRIEN ET AL, supra note 102, at 115 (explaining that environmental NGOs derive much of their influence from their extensive relationship with the media, using that relationship to disseminate information to the public and to humiliate states and international institutions).


458. See supra note 296 and accompanying text; see also WTO DSB. Taiwan’s Contribution, supra note 8, at 2, para. 1:1 (objecting to public access to dispute settlement proceedings because “the dispute settlement mechanism was originally designed as ‘government-to-government’ process” and “was never conceived as a public process”). Taiwan further manifest the concern that public access to dispute settlement would affect “the efficiency and the integrity of the system itself,” id. at 1, para. 1; see also supra notes 196-197, 207-212, 368 and accompanying text (identifying confidentiality and efficiency of dispute settlement as core features of the WTO dispute settlement system, to which the WTO members attach importance).

459. See supra note 296 and accompanying text.

460. Developing countries constitute an overwhelming majority of the WTO members who endorsed the General Council’s Guideline on NGOs, which provides the “closer consultation and cooperation with NGOs . . . at the national level where lies primary responsibility for taking into account the different elements of public interest . . . on trade policy-making.” See WTO, supra note 212, para. 6; see also WTO General Council, supra note 327, para. 38 (recording
Instead of seeking increased influence, Northern NGOs should cooperate with the WTO Secretariat to encourage Southern NGOs' greater involvement in dispute settlements. For example, Northern NGOs should work together with the WTO Secretariat to prepare and distribute toolkits at least in the three official languages with instructions on how to access information on dispute settlements and how to make amicus submissions in panel and appellate proceedings. To show their commitment to public participation and common but differentiated responsibilities, Northern governments should provide the funding and resources needed to carry out this project. On the other hand, Southern sovereigns should endeavor to promote actual input from Southern public constituencies through domestic trade policy processes, while Northern governments should offer necessary technical assistance to Southern state counterparts in instituting better public access to trade policymaking.

Lastly, amendments and interpretations regarding amicus briefs, together with enhancements in third-party rights, should be formally adopted at the decisional arena of the WTO. This formality is essential to make less precarious Southern sovereigns' interests and to promote balanced representation. To protect Southern sovereigns' interests, the Appellate Body should refrain from accepting NGOs' amicus briefs until

India's view that domestic consultations with all stakeholders should shape governmental positions in dispute settlements).

461. See Raghavan, supra note 237 (arguing that "some of the Northern environmental NGOs have focused on their right to present briefs to dispute settlement panels and 'observe' and 'participate' in the process" while "the WTO secretariat, and the US and EU governments, have sought 'cosmetic' changes to cater to these groups.").

462. See Charnovitz, supra note 124, at 215; WTO, supra note 212, para. 4 (providing that "[the Secretariat should play a more active role in its indirect contacts with NGOs"); see also WTO General Council, supra note 327, para. 27 (recording Egypt's statement that the Appellate Body's invitation under the Additional Procedure "has only drawn the attention of a restricted group of NGOs, which happened to be subscribers of the Secretariat's NGO bulletin"); id. para. 66 (reporting Pakistan's concern that "there was clearly an inherent discrimination" when the Secretariat sent the invitation to nongovernmental groups on the WTO e-mailing list, which does not include many Southern NGOs that have no computer access). Northern NGOs could also provide Southern counterparts with legal and technical assistance, as well as support for information and translation, provided that they were able to avoid conflict of interest issues. See Charnovitz, supra, at 215.

463. See supra note 171 and accompanying text. See generally WSSD Plan of Implementation, supra note 42, para. 146.bis ("All countries...should also foster full public participation in sustainable development policy formulation and implementation."); id. para. 148 (recommending that states support "efforts by all countries, particularly developing countries, as well as countries with economies in transition, to enhance national institutional arrangements for sustainable development" including the promotion of the participatory approach in the formulation of strategies and plans for sustainable development). Needless to say, Northern governments should also rectify their own trade policy processes often skewed toward dominant economic interests. See Torres, supra note 160, at 158-59 (recognizing that even Northern environmental NGOs have little or no effective channel to shape national policy options concerning international trade).
the formal adoption of the procedural revisions. On the other hand, both Northern and Southern governments should act promptly at the General Council to introduce formal amicus procedures with the recognition that prolonged inaction could potentially destabilize the international trade regime by alienating reform-minded NGOs. In short, everybody in the WTO should learn the lesson from Seattle.

CONCLUSION

In the WTO, Northern environmental NGOs seek to promote participatory democracy to represent transnational environmental interests while Southern sovereigns pursue representational fairness to address the developmental concerns of historically disadvantaged Southern public constituencies. The ad hoc amicus procedures that have evolved through dispute settlements have reinforced existing tensions between Northern NGOs and Southern sovereigns in trade-environment disputes. Due to procedural uncertainty, Northern NGOs have been ultimately denied participation through amicus submissions without due process. At the same time, the discretionary amicus procedures have prejudiced Southern sovereigns’ third-party rights by subjecting them to relatively stringent timelines and restrictions.

In order to reconcile the gap between the two sides, procedural revisions are necessary to increase participation of both Northern NGOs and Southern sovereigns in WTO dispute settlements and to improve representational fairness among the WTO members. Thus, the WTO should formally revise the present dispute settlement procedures to include enhancements in third-party rights and clarifications in amicus procedures. Through the new global trade round launched in Doha, the WTO members should make agreements on these procedural revisions to

464. See Barfield, supra note 21, at 413; WTO General Council, supra note 327, para. 85 (recording Korea’s statement that “acceptance of amicus briefs should be suspended pending further deliberations of the General Council” because amicus procedures “had important implications for the rights and obligations of Members.”).

465. See WTO General Council, supra note 327, paras. 103 (recording Australia’s recognition that the issue of formal amicus procedures “required early action” at the General Council which has power to adopt procedural guidelines on amicus briefs).

466. See supra note 361 and accompanying text (reporting harsh criticism from major Northern NGOs that the WTO has failed to learn a lesson from Seattle by suddenly foreclosing their participatory opportunity through amicus submissions and giving an example of the Committee on Trade and Environment, where some mainstream organizations are now campaigning to abolish the Committee that failed to allow their participation); Symposium, supra note 320, at 158 (recording Steven Charnovitz’s statement that inaction by the WTO on the issue of amicus briefs represents the “insularity of the WTO,” which “undermines popular support for trade and the WTO” in the United States and in other nations). See generally O’Brien et al., supra note 102, at 230 (pointing out the possibility that NGOs may give up their relationship with international financial institutions including the WTO when NGOs feel that the institutions no longer serve their goals or merely pay lip-service to real policy change).

promote fair accommodation of diverse public values and interests in international trade-environment disputes.