

# **Civil Society and the World Trade Organization**

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## **Introduction**<sup>1</sup>

The World Trade Organization is made up of 148 Member States.<sup>2</sup> It is the prototype of an interstate institution with each Member State having one vote. Although there are obvious inequities in such a democratic system, where economic power renders disproportionate influence, decisions are still required to be made by consensus. As such, even the smallest developing country can play a significant role even as an obstructionist State in negotiating new trading rules. Perhaps due to this power, it is the last bastion of sovereignty for certain States.<sup>3</sup> Since decision making is totally within the realm of the Member States, the Secretariat has little autonomy to alter their working procedures substantively, limiting how far it can engage civil society.<sup>4</sup>

The ethos of the international trade system is to liberalize the trade in goods and services. Ironically, the sovereignty of the State is withered away in the interests of opening up market access and breaking down trade barriers. The rules of international trade aim to open up such barriers therefore impacting the availability and quality of goods in the marketplace. Moreover, it can impact the ability of States to regulate in the public interest where such governance leads to a violation of trade rules.<sup>5</sup> Such encroachment provides evidence for citizens that the international trading system has directly tangible effects at the level of individuals. It can easily be

seen as the agent if not the progenitor of globalization, mobilizing citizens to focus their disenchantment on an international institution such as the WTO.

What has fostered this perception is the evolution of the WTO from the *GATT* system. Under the *GATT*, only a few organizations were invited to *GATT* meetings, such as the International Chamber of Commerce (ICC), with the only route to channel civil society concerns about trade liberalization being through national mechanisms.<sup>6</sup> Some non-state organizations did participate in the conference that drafted the *ITO Charter*. In fact, the ICC has been working with international institutions for several years before the *ITO Charter* discussions, working with bodies in the League of Nations.<sup>7</sup> Some specific agreements in the *GATT* system also allowed for the establishment of councils that provided for cooperation and consultation between governments and NGOs.<sup>8</sup>

The advent of the Uruguay Negotiating Round broadened the international trade mandate and thereby provoked wider NGO interest in the areas such as agriculture, development and food safety.<sup>9</sup> Academics joined such special interest organizations in calling for a greater democratization of the *GATT* decision making process.<sup>10</sup> In addition, *GATT* panel decisions were under increasing scrutiny. The *Tuna-Dolphin* rulings, holding that trade bans pursuant to US conservation laws aimed at preventing dolphin by-catches in tuna fishing nets could not be justified under *GATT* rules, were the subject of strong criticism by environmentalists.<sup>11</sup>

The number of agreements under the WTO umbrella now touches upon several areas of domestic regulation. The *GATT* was essentially a system of consensual reduction of tariffs. Now the WTO Agreements cover areas such as intellectual property, agricultural reform, government procurement and environmental regulation. Moreover, the rules based system enforced by a strong dispute settlement

body, has placed the concerns of individuals before a mechanism far abstracted from democratic systems within each Member State. As the WTO broadens its mandate, it concurrently becomes more vulnerable to attacks.

### The Civil Society International Trade Community

Awareness in civil society about the WTO can be somewhat traced to how trade rules began to encroach upon non-trade areas. Lessons can be drawn from civil society engagement in other areas of international affairs. NGO participation in international policy is entrenched in areas such as human rights<sup>12</sup> and the environment.<sup>13</sup> Many international organizations have included NGOs into their decision-making process, even allowing for NGOs to become “part of their international legal personality”.<sup>14</sup> In relation to the environment, this is affirmed in international declarations such as the *Johannesburg Declaration* and the *Rio Declaration*.<sup>15</sup> Many Multilateral Environmental Agreements’ Secretariats have accredited many NGOs to participate in Conference of the Parties proceedings that provides for open access to all formal sessions and sometimes informal meetings, even being allowed to intervene in discussions upon the invitation of the Chair.<sup>16</sup> Civil society can even unite to thwart off the dominance of some States who aim to confound, if not undermine the negotiations altogether.<sup>17</sup> In fact, the impetus behind MEAs has been the efforts undertaken in widespread civil society campaigns.

Parallel to these developments, environmental NGOs (ENGOs) serve as an example of civil society actors that have been at the forefront of non-trade movements challenging the international trading system.<sup>18</sup> Trade and environment is one of the various “trade and” concerns that have undermined the legitimacy of the WTO in the eyes of civil society. A common perception is that the WTO robs State legislatures of

the necessary policy space in areas such as environmental or health regulation.<sup>19</sup> The *Tuna-Dolphin* dispute certainly motivated the environmental community into action, seeing the linkages *et al* between trade and environment as a realistic problem rather than rooted in abstract predilections. Developments in other areas such as labour rights, intellectual property and investment also generated momentum for civil society to find practical cause in their opposition, thereby stimulating new groups into action that had not previously registered their opposition to trade liberalization.<sup>20</sup>

Civil society can appear to be harmonized in questioning the direction of the WTO or the positions by its Member States. United in this challenge, the common thread disguises the wider plurality in the civil society community. Some organizations are supportive of the institution and even engage in dialogue in order to advance their agenda. Others chose tactics including civil disobedience to show an oppositional front to the WTO. The distinction has been categorized by John Foster in his chapter as being “insider” or “outsider” groups.<sup>21</sup> In addition, messages can be entirely different on particular issues or represent either south or northern interests.<sup>22</sup> The historical origins of NGOs are essentially western in orientation, revealing a “missionary character”.<sup>23</sup> Having such origins, northern NGOs may be advocating for greater regulatory space, which can be pitted against the concerns of market access to developed countries, increasingly voiced by numerous civil society organizations from all parts of the globe. Such polarity can even exist within some issue or sector specific civil society groups.<sup>24</sup>

Civil society represents a wider plurality of interests or what has been referred to as WTO cosmopolitanism.<sup>25</sup> Such interests can shape strategies and advocacy, establishing different roles engaging with the WTO from providing information, monitoring state activity and consulting on various committees, to lobbying public

opinion and street protests. Civil society input has been seen by some to be critical to advancing trade negotiations and therefore lending it public legitimacy.<sup>26</sup> Within the civil society family, there may even be situations where certain groups may be uniting despite having conflicting agendas. For instance, it was common in the United States for environmental groups and industry associations to join together in “green and greedy” coalitions in order to seek protectionist measures from their governments.<sup>27</sup> One does not have to search hard to see the irony of the Korean farmer, Lee Kyung-Hae, who unfortunately took his own life on the streets of Cancun. Many civil society representatives lamented the tragedy and championed his cause despite understanding that he was protesting the potential withdrawal of protectionist government support by the Korean government in the face of further agricultural liberalization.

### **External vs. Internal Tensions**

Since some WTO Members symbolically view the institution as a pantheon for sovereign decision making, inversely this fuels resistance to open the body to outside interests. The one vote system serves to empower certain members that may not have such weight in other venues concerning international affairs. According to this view, civil society participation should not be facilitated to the point where the sovereign inter-state basis is eroded.<sup>28</sup> However, WTO Member obstinacy to such participation places strain on the WTO that is attempting to build institutional links with civil society in order to quell criticism about its exclusivity. By making such inroads, the WTO gains legitimacy. In attempting to open up the institution in order to develop better public relations with world citizenry, it is doing this at the risk of estranging itself from the Member States.

A commonly held view is that the proper arena for NGO consultation is at the national level, where the implementation of the WTO obligations, a product of national law making, directly affects the citizenry. There is certainly an important role for opening up civil society-member state dialogue precisely for this reason in addition to fostering greater democracy and participatory decision-making. However, diverting all civil society participation to the national level discounts the varying levels of acceptance for such participation inside the WTO Member States' polities. Moreover, it is premised on the transparency of the international institution, which informs positions advanced at the national level. Most WTO negotiations are conducted *in camera*, with public exposure coming well after the meetings have taken place. A focus on national level participation also leaves little room for transnational NGOs, whose platform is comprised of the international and non state-specific concerns of the international population.<sup>29</sup> Moreover, it also overlooks that although national decision making on trade originates in the national capitals, they can be easily modified to suit the negotiating dynamic where trade-offs on national positions are common. This can go unchecked absent involvement at the international level. The high number of parties to the WTO intensify the trade offs made during the process, opening up proportionately a higher number of decisions being made in vacuum bereft of civil society involvement.<sup>30</sup> It is here where the democratic deficit emerges, since the reliance upon States, as an ample substitute to WTO-civil society dialogue, to ensure that all goals reflected in the Preamble of the WTO Agreement will be guaranteed in a negotiated outcome is misplaced.<sup>31</sup>

There is also a sequential basis supporting arguments against opening up the WTO processes to civil society. Many WTO members highlight the problems inherent in the WTO itself regarding a lack of transparency and the equality of arms

of Members. A “club” atmosphere still remains where only a small number of influential governments play any significant role.<sup>32</sup> Since the internal mechanisms are in need of improvement, the time may not be appropriate to allow civil society have greater access to documents and deeper participation in WTO affairs when WTO members do not have such benefits. This external-internal tension played out in the arena of dispute settlement. In 2000, the Secretariat had issued some rules of procedure<sup>33</sup> facilitating the receipt of *amicus curae* briefs, in advance of the consideration by the Appellate Body of the *Asbestos* panel decision.<sup>34</sup> As party submissions were being prepared and exchanged, the Appellate Body established a procedure for considering briefs by private individuals or groups.<sup>35</sup> This procedure required the applicants to respond to a series of questions and to establish how the brief would make a contribution to the dispute not raised by the government parties themselves.

Although this did not prejudice the merit of the submissions, or whether they would be deemed relevant in the dispute by the Appellate Body, it was seen by many members as being outside the authority of the Secretariat. The acceptance of *amicus* briefs was seen to be a political decision that could only be made by the Member States. An emergency meeting of the General Council was called where several Member States expressed their concern. Although the procedures were not annulled, the Appellate Body did not accept any of the *amicus* briefs with no reasons for this decision given.

The general concern was that civil society should be given greater rights than the Member States. Many developing countries are unable, unwilling or simply lack the capacity to bring disputes to the WTO. Considering that the NGOs having the resources and capacity to submit *amicus* briefs would be predominately from the

north, this would only tip the balance further against developing countries who perceptively suffer from a institutionalized bias in dispute settlement. The procedural rules in the *Dispute Settlement Understanding* make it difficult for third party States to participate. In fact, Morocco successfully submitted an *amicus* brief in the *EC-Sardines* dispute instead of submitting a third party submission.<sup>36</sup>

### **WTO Institutional Mechanisms – Modalities of Participation**

The early days of the WTO saw the institution promoting the use of domestic mechanisms to channel the concerns of civil society, seeing this as the more appropriate forum considering that Member States are the prime drivers of the WTO system. This was based on a premise that effective avenues for this form of communication were available in all Member States. However, the WTO has begun to open up its processes and procedures to civil society. Many documents are available to the public, enhancing the institution's transparency. Overall, the WTO has shown a slow "cautious but steady movement toward more consultation with civil society."<sup>37</sup> This has even had a knock off effect, opening up decision-making at the national level to processes such as impact assessments<sup>38</sup> and public consultation. Civil society engagement is also formalized under the *NAFTA* under the Commission on Environmental Cooperation,<sup>39</sup> as well as Mercosur through the Economic and Social Advisory Council. CARICOM also has a *Civil Society Charter* that allows for public participation including a CARICOM Forum. Several bilateral trade agreements allow for public participation in the development of national environmental laws and policies.<sup>40</sup> Newly forming trade regimes are also providing for civil society engagement in the formation of such regimes. For instance, the *Free*

*Trade Agreement of the Americas (FTAA)* negotiations include a Committee of Government Representatives for the Participation of Civil Society. The *FTAA* draft texts have been made available and opened up for public comment.<sup>41</sup>

The WTO is not subject to any prescribed rules regarding its relationship with civil society. The *Marrakech Agreement* did call for “suitable arrangements for consultation and cooperation with NGOs concerned with matters within the scope of the WTO” although no details were added. This provision was based on a similar one from the *Charter of the International Trade Organization*.<sup>42</sup> Further formalization of such rules may have a minimal if not counterproductive contribution to effective participation.<sup>43</sup> This would impose specific rules and guidelines that can keep such participation within limited parameters that can be narrowly construed.

Article V(2) of the *Marrakech Agreement* states that “the General Council may make appropriate arrangements for consultation and cooperation with NGOs concerned with matters related to those of the WTO”. In 1996, the General Council approved the *Guidelines for Arrangements on Relations with Non-Governmental Organizations*.<sup>44</sup> This provided limited authority to establish more direct contact with NGOs through various means such as symposia and briefings.<sup>45</sup> Chairpersons of WTO Councils and Committees were permitted to meet with NGOs although they would have to meet in their “personal capacity unless the council or committee decided otherwise”.<sup>46</sup> However, the same Guidelines noted that NGOs cannot be directly involved in negotiations and that the national level is where the “primary responsibility is for taking into account the different elements of public interest which are brought to bear on trade policy-making.”<sup>47</sup>

In 1996, the General Council allowed NGOs to attend the WTO Ministerial Conference. Approximately 108 NGOs were accredited to attend.<sup>48</sup> Attendance was

limited to “attending” rather than “observing. Civil society groups were not permitted to make a statement at the Ministerial although there were educational seminars set up outside of the Ministerial. Accreditation is normally given only for Ministerial Conferences that take place every two to three years rather than councils, committees and other bodies that serve as the ongoing intergovernmental negotiating fora.<sup>49</sup>

When an international institution uses an accreditation process, there may be some selectivity about who is accredited based on the level of expertise of the organization or the legitimate interest it has in the substantive issues.<sup>50</sup> The three minimum criteria applied generally to international institutions for the purpose of accreditation are: NGOs must be distinguished from organizations established by intergovernmental agreement; NGOs must be able to establish an expertise or other interest in the subject matter of the institution; and, the accredited organization must demonstrate that it is not part of any government and is free to express independent views.<sup>51</sup> When accreditation is received, such organizations may soften their criticism of the WTO since the process has opened up channels of communication to the benefit of their advocated positions.<sup>52</sup> Having a demonstrated interest in international trade issues also favours the better resourced organizations that can afford sending representatives to international meetings and/or produce an amount of information material. This could even distort the trade agenda, where certain special interests dominate the decision processes.<sup>53</sup> The presence of civil society at the ministerial meetings appears to be increasing, despite the Secretariat not providing any funding to assist NGOs in attending meetings<sup>54</sup>

Another mode of interaction with civil society is the use of public symposia. These first were introduced in 1998, with one focusing on trade facilitation and the other on trade, environment and sustainable development. A high level symposium

on environment and development was hosted by the WTO the following year. At that event, a Joint Civil Society Statement called on the WTO to be accountable to parliaments and civil society.<sup>55</sup> Since then, public symposia have been organized by the WTO Secretariat although the Secretariat has given more control to civil society to structure the agenda. There is relatively little participation by the WTO Members States although this could be attributed to being in a listening mode or the inability to devote resources to ensure that a Member is present at the Symposium. How the symposia actually impact negotiated outcomes is undetermined.

There are several additional ways in which civil society can engage in the development of the WTO system. These modalities of participation can range from participation in negotiations, observership at WTO Committee and Council meetings, transparency of WTO documents that may allow for opportunities to comment, and dispute settlement. Civil society groups can also provide expertise to the WTO in addition to informing Member States of the issues and possible strategies prior to and during the negotiations. However, documents in the WTO that are under negotiation or discussion are not publicly accessible.<sup>56</sup>

The most effective way for the WTO to maintain its transparency is through its website. Here, viewers can see WTO documents, dispute settlement rulings, calendars of meetings and other pertinent information indicating current activities at the WTO. There is also a specific website devoted to NGO issues. However, despite greater openness by the WTO through such ways as derestricting documents, there has had little direct impact on changes to individual member's positions.<sup>57</sup>

Another conduit for civil society participation is being asked to sit on delegations at WTO Ministerial meeting. In some cases, this can even include total representation at a WTO meeting.<sup>58</sup> Some states are uncomfortable with the presence

of non-state actors in a negotiating setting, disrupting the “sociology” of the discussions.<sup>59</sup> This can facilitate a possible transformation of non-State views into government positions although it is more likely that the civil society members chosen will not deviate too much from the government positions. Failing to tow the party line can result in self-marginalization from the rest of the delegation. However, the recent breakdown of talks in Cancun can be traced to stronger developing country engagement, possibly associated with the provision of advice by NGOs to national delegations.

However, there has been an emergence of coalition building of developing countries in the WTO, catalyzed by civil society initiatives. For instance, organizations like the WWF have been pivotal in getting the fisheries subsidies issue on the negotiating agenda, recruiting numerous countries representing a variety of levels of economic development to push the issues. Similarly, the efforts of Oxfam International can be seen as providing the necessary stimulus for West African countries to call for a sector specific solution to the problems from agricultural subsidies that their cotton farmers face in the international marketplace. Finally, the successful campaigns of securing greater access to medicines under the compulsory licensing provisions of the *TRIPs Agreement* is a product primarily of a partnership between northern NGOs and developing countries.

There are very few provisions allowing for direct civil society participation in WTO operations including monitoring implementation. One of these is provided in the *Agreement on Preshipment Inspection*<sup>60</sup> – its Independent Entity oversees binding arbitration between exporters and inspection entities. The Independent Entity was established through an agreement with the ICC and the International Federations Inspection Agencies. Both of these organizations have assisted the WTO in its

operational work on pre-shipment inspection. Despite the limited formal role, civil society advocacy performs an unofficial check on implementation.

In the future, there may be a larger role for civil society in monitoring implementation. Considering the depth of civil society expertise, their increasing legitimacy as well as the WTO, as an institution, having an interest in being more inclusive, there may be some role in assisting in compliance review. Canada has proposed that the trade policy review mechanisms be opened to accredited observers.<sup>61</sup> In addition to implementation, NGOs can also assist in facilitating the ratification processes in various member States and highlight situations where a country may not be acting consistently with their obligations.

NGOs may also have some impact through standard setting bodies that contribute to WTO rule-making. NGOs are mentioned in the WTO Agreements with relation to standard setting under the *TBT Agreement*. States are obligated to ensure that local government and NGO standardizing bodies within their territories accept and comply with the *Code of Good Practice*.<sup>62</sup> Members are also to take measures that have the effect, of directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code. This establishes an indirect obligation for such bodies although the State is exclusively responsible for its enforcement. NGOs may also sit on ISO standard setting bodies. For the Codex Alimentarius Commission, country delegations often include representatives of industry, consumers' organizations and academic institutes, in addition to representatives of government. A number of international non-governmental organizations also attend as observers.

Overall, there appears to be a divergence between the official mechanisms available to civil society and what in turn has been more effective in practice to get its

message across. The existing modalities of such participation present limitations to effecting any concrete changes in member state positions. Symposia do not engage WTO Members in a critical fashion. Greater transparency perhaps contribute to a more informed civil society but the timing of the release of official documents perhaps comes too late to change previously made, and now entrenched, decisions. Although these institutional pathways to the WTO are widening, it is more challenging to discern any real impacts where decision-making is influenced by civil society.

Despite the limited role of formal participation of civil society, there are less tangible (or non-institutional) but equally effective influences that civil society can generate in the WTO. Overall, civil society has heightened the awareness of the concerns by highlighting the wider application of trade rules and its impact on the ability of States to regulate. Through political activity, States have responded. In fact, many States are using the data and expertise from civil society to inform their negotiating positions. Readily apparent in Cancún, this has filled in the capacity gaps for some Member States who lack the analytical ability and knowledge to match the prowess of the more developed economies in negotiations. The overall results of the Doha Round are perhaps the most opportune time to reflect on civil society's contribution to the outcome. In the interim, dispute settlement provides a high-profile arena to manifest civil society concerns, offering a venue to critique particular aspects of the international trading system.

## **Dispute Settlement**

Dispute settlement is singled out as a particular modality of interest in light of its rapid evolution in the WTO system. The adjudication of disputes at the WTO forms one of the three functions of the WTO: with the others being its executive and legislative powers.<sup>63</sup> In contrast to the closed nature of WTO legislative proceedings, dispute settlement provides an avenue for openness and transparency arguably rendering it, and perhaps the WTO as a whole, more legitimate and acceptable in the eyes of civil society.<sup>64</sup> In turn, some WTO Members have been amenable to posting their submissions on a publicly accessible website.<sup>65</sup>

Civil society has used amicus briefs to channel their advocacy efforts, innovatively borrowed largely from public interest litigation tools employed in domestic jurisdictions.<sup>66</sup> These efforts have been duplicated in international legal proceedings.<sup>67</sup> Although the use of *amicus* briefs is not explicitly permitted under the rules of the *Dispute Settlement Understanding*, therefore constituting a non-institutionalized pathway for civil society, its acceptance by dispute settlement panels and the Appellate Body, has transformed the conduit to the WTO, giving it a more institutionalized nature.

Attempting to participate in dispute settlement proceedings mirrors the lobbying efforts of civil society approaching international institutions to launch litigation proceedings.<sup>68</sup> In fact, several claimants in WTO cases can be traced back to efforts by affected groups urging, if not legally forcing, governments to bring cases to the WTO. The use of *amicus* briefs may be effective where the WTO Member State is not adequately reflecting the interests of civil society in their submissions.<sup>69</sup> These views may even have direct relevance to the legal questions before the panel such as consumer tastes and preferences when interpreting the *Technical Barriers to Trade Agreement*.<sup>70</sup> The civil society groups that engage the dispute settlement

process through instruments such as *amicus* briefs are seen to reflect a broad array of interests, dispelling myths that this practice is predominated by northern based NGOs.<sup>71</sup> Moreover, NGOs may strategically see *amicus* briefs as a way to influence the institutional changes in the WTO through the adjudicative process, especially where the negotiating outcomes may fall short of civil society aspirations.<sup>72</sup>

There is no prescribed role for civil society under the *Dispute Settlement Understanding*.<sup>73</sup> Cases are heard in closed proceedings with the availability of submissions resting solely at the discretion of the parties to the dispute. Despite the formal state-to-state model of dispute settlement however, panels and the Appellate Body have broadened the role of public participation by recognizing their discretion to “seek information and technical advice from any body which it deems appropriate.”<sup>74</sup> This includes the admittance of unsolicited *amicus* briefs,<sup>75</sup> as well as correspondence.<sup>76</sup> NGOs have even submitted *amicus* briefs with content relating to their eligibility to submit them.<sup>77</sup> Although the panels and the Appellate Body have the authority to consider the NGO briefs, they are not obliged to accept such submissions. In practice, such briefs are assumed to be reviewed by the Appellate Body judges. The Appellate Body, in the *Shrimp-Turtle* dispute, even raised such points therein in their comments to the parties to the dispute.<sup>78</sup>

As demonstrated in several WTO disputes, *amicus* briefs have been appended to WTO member submissions.<sup>79</sup> Information in such briefs can complement the country claims by providing additional technical, scientific or even policy analysis. Although such opportunities will be limited to civil society organizations that carry a significant amount of influence and corresponding resources, as well as advocating a position akin to the WTO member, this does open up an avenue of participation that could be pursued more often in the future. Even where no *amicus* briefs are

submitted, civil society can still be instrumental in the preparation of country positions elevating their chances for success in WTO litigation.<sup>80</sup>

Many WTO members have manifest concerns regarding the judicial interpretation of Appellate Body's authority to receive *amicus* briefs. Primarily, many WTO members representing mainly developing countries, felt that the WTO, as an institution, still had inherent barriers concerning their internal transparency, which needed to be resolved before questions regarding external transparency could be considered. Giving civil society rights to submit information in the dispute settlement process, could result in members having lesser rights in the process. The recent *EU-Sugar* dispute aggravates this concern since dispute settlement rules regarding confidentiality were applied to an NGO who submitted an *amicus* brief, placing obligations on the NGO corresponding with their rights to participate in dispute settlement.<sup>81</sup> Moreover, many countries in the developing world feared an influx of northern driven NGO submissions that would bias the partiality of the adjudicators, guaranteed in a closed inter-state proceeding. As discussed above, the disconnect between Member States' positions and the institutional need to have a more inclusive dispute settlement system reached a zenith in the *Asbestos* dispute. Since then, *amicus* briefs have been received although the decision to admit them rests solely with the panels and the Appellate Body rather than being directed by the WTO Secretariat.

As dispute settlement plays a vital role in the development of the WTO regime, coupled with the protracted nature of negotiations, it is inevitable that civil society will further their causes through *amicus* briefs. In fact, the frustration associated with the slow pace of the Doha Round and lack of access some groups have in attracting the attention at the national level, could be manifest in a larger

number of submissions. More members states should begin to embrace the benefits of having civil society including business groups contribute their expertise, buttressing their claims in some cases. This may stem the obstinate position of some members who would like to keep dispute settlement an exclusive inter-state affair.

### The Cancún Ministerial

It is difficult to provide any qualitative evaluation of success flowing from the Cancún outcome. The lack of any agreement reached in the talks can be viewed with mixed feelings. Many countries both developed and developing saw a valuable opportunity lost for further international trade talks in the direction of achieving a good result for its citizens. The popular support for a non-outcome at Cancún was not unanimous. Members of the business community were concerned about the failure although this had less to do with the institutional fallout and more to do with the predictability of the international trading system and ensuring market access.<sup>82</sup> However, the absence of any result was also seen as a template for some countries to assert their sovereign muscle, refusing to fall back from their negotiating positions in the face of pressure from other WTO members. Developing countries have previously been marginalized as a whole in WTO negotiations, based mainly on their limited economic and political power in international affairs. In accordance with their formal equality, their political clout augmented affording a venue to elevate their demands as entrenched positions.

Parallel to the development of stronger presence of developing countries in negotiations, NGO empowerment, measured by the impact that civil society had on developing country negotiators, was also evident.<sup>83</sup> Civil society certainly featured

the highest in numbers at the Cancún Ministerial that were accredited (although many non-accredited NGO representatives were on the outside of the compound).<sup>84</sup> Many NGOs provided free advice to developing countries and opened up a dialogue with WTO Members. Many WTO Members, in turn, adopted positions that did not differ too much from the claims of civil society.

It is difficult however to directly link civil society participation with the lack of result or consensus at Cancún. Entrenched developing country positions were at least informed, if not strongly influenced, by voices of civil society. However, this may overstate civil society's contribution to the collapsed talks. The WTO system is already starting to uncover its weaknesses in trying to cover a broad agenda, with many States continually calling for a minimization of the Doha Round agenda. Two if not three of the Singapore issues (competiton, investment, and government procurement) were effectively taken off the table in the face of a mandate of the WTO members to agree to the modalities for negotiations in these areas.<sup>85</sup> Adopting a bad deal appeared to be a worse option to not agreeing to anything at Cancún – a sentiment shared by many civil society members. Although any causal relationship between civil society participation and the negotiating outcome is tentative at best, what emerged at the Fifth Ministerial is that both civil society and developing countries emerged as considerable constituencies that had to be accounted for by the stronger economies represented at the WTO.

## Conclusions

In order to gain a better understanding of how civil society has in fact transformed the international trading system, and the underlying sovereign based

system, it is important to look at this dichotomy in the overall shifting paradigm in international law and relations. The role of non-state actors has flourished in many areas of multilateral decision-making, each having unique roles in relation to the international system that affords their participation. In turn, this has altered the role of States not so much in their normative significance but in terms of their function and the extent of the power they render.<sup>86</sup> This is consistent with the general “federalization” in the international order with a wider plurality of participants.<sup>87</sup>

However, the rooted inter-state system in the WTO imposes an artificial barrier to any real and effective role for civil society. Although some progress has been made in making the WTO more transparent and inclusive in terms of process, the question remains whether such cosmetic changes can ultimately overcome the “disenfranchisement” of civil society.<sup>88</sup> If States remain to be the dominant actors in the system, it will be hard pressed to remedy the “democracy deficit”.<sup>89</sup> The institutional mechanisms within the WTO that are available to civil society may secure piecemeal gains. This complements the mainstream techniques of civil society activities aimed to publicize issues, name and shame governments and generally raise the public profile of issues that normally reside behind closed doors. Efforts at the national level can parallel the use of such techniques in Geneva, bringing forth changes in members negotiating positions.<sup>90</sup>

As the institutional response by international organizations to civil society participation may accord with the transformation of international relations, including its horizontal and vertical growth in the number of actors engaged in its development, civil society will continue to play an essential role. Incidentally, the institutions themselves become more transparent.<sup>91</sup> The concerns of civil society are already addressed by Member States through consultations at the national level. *Amicus*

briefs will be seen as a viable way to influence the judicial development of WTO law and therefore more civil society actors will take advantage of the opportunity.

Ultimately, such evolution can be viewed as an agent for eroding the sovereignty based WTO system. However, sovereignty is already under threat by international trading rules that have tangible effects on the ability to govern in the public interest. Policy space is never more important than in the current contemporary climate. Where civil society can be co-opted to assist in defence of this, this may strengthen State efforts in this regard. Reflexively, civil society can have legitimacy justifying its presence at the negotiating table.

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<sup>2</sup> As of October 13, 2004; See [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>3</sup> Some critics in the academic world have questioned the idea of sovereignty as being an outdated concept in the contemporary reality of international relations. See John H. Jackson, "Sovereignty Modern-A New Approach to an Outdated Concept" *American Journal of International Law*, Vol. 97, No. 4, 2003, 782-802.

<sup>4</sup> For the purpose of this paper, the term civil society is intended to refer to the conglomerate of diverse interests and organizations that are not States. This can include NGOs, business groups, religious institutions and industry associations. However, a majority of the literature on the topic does examine the civil society-WTO relationship from the perspective of NGOs who arguably, due to lesser financial resources and access to decision-makers, have less influence over WTO member state positions to their business and industry counterparts. This could be offset however by the powers civil society wields over public opinion. See G.C. Shaffer, "The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters", *Harvard Environmental Law Review* Vol. 25, 2001, pp 1-93.

<sup>5</sup> This not only applies to direct violations but also measures that nullify or impair the benefits of the international trading rules. See Article XXIII of the *General Agreement on Tariffs and Trade* (hereinafter *GATT*).

<sup>6</sup> In 1969, Professor John John Jackson wrote about the "Private Citizen and GATT Obligations" in J. Jackson ed., *World Trade and the Law of the GATT* Indianapolis, Bobbs-Merrill Company, 1969. For a general historical account of NGO participation in the GATT system, see S. Charnovitz & J. Wickham, "Non-Governmental Organizations and the Original International Trade Regime", 29 *Journal of World Trade* Vol. 29, no.5, 1995, pp. 111-122.

<sup>7</sup> See G. L. Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce, 1919-1938*, New York: ICC, 1938.

<sup>8</sup> See *Arrangement Regarding Bovine Meat* (1979), GATT B.I.S.D. (26<sup>th</sup> Supp.) at 84 and *International Dairy Arrangement* (1979) GATT B.I.S.D. (26<sup>th</sup> supp.) at 96.

<sup>9</sup> Steve Charnovitz, "Opening the WTO to Non-Governmental Interests" *Fordham International Law Journal*, Vol. 24, 2000, 173-216.

<sup>10</sup> See N. Roth-Arriaza, "Precaution, Participation, and the "Greening" of International Trade Law, 7 *Journal of Environmental Law & Litigation* Vol. 7, No. 57, 1992, 92-98; R. F. Housman, "Democratizing International Trade Decision-Making", *Cornell International Law Journal*, Vol. 27, No. 3, 1994, 699-749. Such calls were also echoed after the advent of the WTO. See G. R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, *Duke Law Journal* Vol. 44, 1995, 829-907; Steve Charnovitz, "Participation of Non-governmental Organizations in the World Trade Organization, *University of Pennsylvania Journal of Economic Law*, Vol. 7, 1996, 331-357. For an opposing view, see P. M. Nichols, "Realism, Liberalism, Values, and the World Trade Organization, *University of Pennsylvania Journal of Economic Law*, Vol. 17, 1996, 295; P. M. Nichols, "Extension of Standing in World Trade Organization Disputes to Non-government Parties," *University of Pennsylvania Journal of Economic Law* Vol. 17, 1996.

<sup>11</sup> *United States – Restrictions on Imports of Tuna*, GATT B.I.S.D. 39S/155 (Sept. 3, 1991). See John H. Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *Washington & Lee Law Review*, Vol. 49, 1992, 1227-1278.

<sup>12</sup> NGOs are given an opportunity to consult with the UN Economic and Social Council pursuant to Article 71 of the *UN Charter*. See resolution 1996/31, (49<sup>th</sup> plenary meeting 27 July 1996). For general information regarding civil society participation in the human rights sphere, see D. Otto, "Non-Governmental Organizations in the United Nations System: The Emerging Role of International Civil Society", *Human Rights Quarterly*, Vol 18, 1996, 107-141.

<sup>13</sup> See Sebastian Oberthür, "Participation of Non-Governmental Organisations in International Environmental Governance", in R. A. Kraemer & S. Müller-Kraenner, eds., *Ecologic: Ecologic Briefs on International Relations and Sustainable Development*, Berlin: Ecologic, 2003; Kal Raustiala, "The Participatory Revolution in International Environmental Law" *Harvard Environmental Law Review* Vol. 21, 1997, 537-586; Philippe Sands, "The Role of Environmental NGOs in International Environmental Law", *Development Journal of the Society for International Development* Vol. 2, 1992 28-32.

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<sup>14</sup> See Steve Charnovitz, “Two Centuries of Participation: NGOs and International Governance” 18 *University of Michigan Journal of International Law* Vol. 18, No. 2, 1997, 183-286.

<sup>15</sup> See points 26 and 31 of the *Johannesburg Declaration*, Chapter XI of the *WSSD Plan of Implementation*, Principle 10 of the *Rio Declaration* and chapter 27 of *Agenda 21*. See also Organization of American States, *Inter-American Strategy for the Promotion of Public Participation in decision-making for Sustainable Development*, Washington: OAS, 2001, <http://www.ispnet.org.ISPpubl/EngPolicyFramew.pdf>

<sup>16</sup> See Oberthür et al., 2003, at 13. For instance, Article 15 of the *Basel Convention* grants direct access with observer status to negotiating sessions and Conferences of the Parties, for any national or international organization, governmental or non-governmental, with competence in the field of hazardous wastes. The *Convention on Biological Diversity* (1992) has created the clearinghouse that facilitates public access to information.

<sup>17</sup> See Foster *infra* at 13 discussing the role of civil society organizations that showed great effort to unite other States and disseminate information in the face of mounting opposition by the United States during the negotiations to the *Cartagena Protocol on Biosafety*. See also, T. Egziabher (2000), “Civil Society and the Cartagena Protocol on Biosafety”, in P. Brown and A. Simard, eds., *Promoting Human Security: Civil Society Influence*, Montreal: FIM, 2000.

<sup>18</sup> This certainly does not negate the importance of other issues the civil society organizations rally around. As the Doha Development Round has moved onto the agricultural and developmental agenda, newer organizations are emerging that focus primarily, and quite effectively, on these concerns.

<sup>19</sup> See Shaffer 2001.

<sup>20</sup> See Dan Esty, *Greening the GATT: Trade, Environment and the Future*, Washington, D.C.; Institute for International Economics, 1994.

<sup>21</sup> See John W. Foster, this volume.

<sup>22</sup> Although north-south interests will not be so easily divisible, there are certain key trade issues that will be more likely to drive geo-political divisions such as trade and environment or even NGO participation in dispute settlement. See Shaffer (2001).

<sup>23</sup> Daniel Thürer, “The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State”, in R. Hoffman, ed., *Non-State Actors as New Subjects of International Law: International Law – From the Traditional State Order Towards the Law of the Global Community*, (Proceedings of an International Symposium of the Kiel Wlather-Schücking-Institute of International Law, March 25-28, 1998, p. 41.

<sup>24</sup> For instance, business interests can include advocates for both greater liberalization or stronger protectionism.

<sup>25</sup> Steve Charnovitz, “WTO Cosmopolitics”, *NYU Journal of International Law and Politics*, Vol. 34, 2001, 299-354.

<sup>26</sup> See Dan Esty, “Non-governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion”, 1 *Journal of International Economic Law* Vol. 1, 1998, 123-148.

<sup>27</sup> See Elizabeth. DeSombre, “Baptists and Bootleggers for the Environment: The Origins of United States Unilateral Sanctions”, *Journal of Environment and Development* Vol 4, 1995, 53-75.

<sup>28</sup> For a conflicting view, see Anne Marie Slaughter, *A New World Order* Princeton: Princeton University Press, 2004.

<sup>29</sup> Esty (1998), *supra* at 141; See also Charnovitz (2000) at 17.

<sup>30</sup> Professor Kal Raustiala notes that rules and processes should be adjusted to allow for interest groups to get involved in decision-making as the locus of such decision-making is increasingly shifting upwards. See K. Raustiala, “Sovereignty and Multilateralism” *Chicago Journal of International Law* Vol. 1, 2000, p. 416.

<sup>31</sup> Charnovitz (2000) at 18.

<sup>32</sup> See R. Keohane & J.S. Nye Jr., *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, John F. Kennedy School of Government Faculty Research Working Paper Series, Kennedy School of Government Working Paper No. -1-004, 2001. Accessed at [http://papers.ssrn.com/paper.taf?abstract\\_id=262175](http://papers.ssrn.com/paper.taf?abstract_id=262175).

<sup>33</sup> The Procedure allowed for “any person, whether natural or legal, other than a party or a third party to the dispute, wishing to file a written brief” was invited to apply.

<sup>34</sup> Civil society has also been given the opportunity to submit *amicus curae* briefs in other judicial forum such as in the areas of investment disputes pursuant to Chapter 11 of the *NAFTA*. See *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amicus Curiae’, 15 January 2001.

- <sup>35</sup> See *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, Communication from the Appellate Body, WT/DS135/9 (Nov. 20, 2000).
- <sup>36</sup> Some commentators have claimed that the Appellate Body was required to accept the submission from Morocco since, by not, it would be accrediting private parties who had submitted *amicus* briefs greater participatory rights. See Shaffer & Mosotti (2003), *infra*.
- <sup>37</sup> M. C. Cordonnier Segger & J. Caberra, "Sustainability Smoke Signals? Strengthening Public Participation, Access to Information and Access to Justice in Americas Regimes", 2004 (unpublished paper on file with the author).
- <sup>38</sup> See Government of Canada, *Canada's Environmental Assessment Framework for Trade Negotiations*, 2004. Accessed at <http://www.dfait-maeci.gc.ca/tna-nac/backgrounder-en.asp>.
- <sup>39</sup> The North American Agreement on Environmental Cooperation provides for an access to information process including specific reports about the state of the environment that have to be made public. The Council must also hold public meetings in all of its ordinary sessions and consult with NGOs in decision-making processes. See Arts. 2, 9. In addition, the Commission may compile a fact finding record that can be requested by civil society groups.
- <sup>40</sup> See *Canada-Costa Rica Environmental Cooperation Agreement*, Art. 1(d). The bilateral trade agreement between Chile and the United States establishes an Environmental Affairs Council pursuant to chapter 19 on the Environment.
- <sup>41</sup> The FTAA Committee of Government Representatives on Civil Society has created an open and permanent invitation to civil society to provide written submissions on issues of relevance to the FTAA. Ironically, the current text does not allow for NGO participation in the dispute settlement system. For a good analysis of civil society in the FTAA negotiations process, see Segger & Caberra (2004).
- <sup>42</sup> See *Havana Charter for the International Trade Organization*.
- <sup>43</sup> Oberthür et al. (2003) at 10.
- <sup>44</sup> Decision adopted by the General Council on 18 July 1996, WT/L/162 (July 23, 1996).
- <sup>45</sup> Para. 4.
- <sup>46</sup> Para. 5.
- <sup>47</sup> Para. 6.
- <sup>48</sup> These groups were made of (in descending order of overall numbers) businesses, development, environment, labour and other assorted interest groups. See (1996) *Final Statistics of the 1<sup>st</sup> WTO Ministerial Conference in Singapore: Non Governmental Organizations (NGOs)*, [http://www.wto.org/english/forums\\_e/ngo\\_e/stats\\_.htm](http://www.wto.org/english/forums_e/ngo_e/stats_.htm).
- <sup>49</sup> See ICTSD, *Accreditation Schemes and Other Arrangements for Public Participation in International Forum: A Contribution to the Debate on WTO and Transparency*, ICTSD: Geneva, 1999.
- <sup>50</sup> See ICTSD (1999). The controversial nature of the accreditation system is seen in other international institutions such as the UN ECOSOC. See J. D. Alston, "The United Nations Committee on Non-Governmental Organizations: Guarding the Entrance to a Politically Divided House", *European Journal of International Law* Vol. 12, No. 5, 2001.
- <sup>51</sup> See Oberthür et al. (2003).
- <sup>52</sup> See R. O. Keohane & J. S. Nye, "The Club Model of Multilateral Cooperation and the WTO: Problems of Democratic Legitimacy, 2000 at <http://www.ksg.harvard.edu/cbg/trade/papers>.
- <sup>53</sup> See Dan Esty, *Why the World Trade Organization Needs Environmental NGOs*, ICTSD: Geneva, 1999.
- <sup>54</sup> By contrast, the Secretariat of the *UN Convention to Combat Desertification (CCD)* and the Global Environmental Facility has granted money for participation in the *CCD* negotiations. See Oberthür et al, 2003, p.12.
- <sup>55</sup> *Joint Civil Society Statement on the WTO High-Level Symposia*, March 1999. Accessed at <http://www.globalpolicy.org/cosecon/bwi-wto/wto99-2.htm>.
- <sup>56</sup> By contrast, the FTAA trade ministers devoted six paragraphs to the topic of transparency and civil society participation. The Committee on Government representatives on the Participation of Civil Society is to make recommendation to the Trade Negotiations Committee "on the means to broaden the mechanism for disseminating information on the discussions, drawing upon the experiences of countries for distributing information to their civil societies".
- <sup>57</sup> Shaffer, 2001.
- <sup>58</sup> A representative of the Foundation of International Environmental Law and Development, a London based NGO, represented the government of Sierra Leone at a meeting of the Committee on Trade and Environment. For an account of the experiences of FIELD lawyer Beatrice Chaytor, see B. Chaytor,

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“Cooperation between Governments and NGOs: The Case of Sierra Leone in the CTE”, in P. Konz, ed. *Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America: A Reader*, Tokyo: UNU/IAS, 2000.

<sup>59</sup> See Foster, this volume, p. 5.

<sup>60</sup> *Agreement on Preshipment Inspection*, WTO Agreement, Annex 1A, art. 4, 1994.

<sup>61</sup> See *External Transparency*, Informal Paper by Canada, WT/GC/W/415 (Oct. 17, 2000).

<sup>62</sup> Art. 4.1.

<sup>63</sup> Charnovitz, 2000, p. 9.

<sup>64</sup> T. Cottier, “The WTO and Environmental Law: Three Points for Discussion”, in A. Fijalkowski & J. Cameron, eds, *Trade and Environment: Bridging the Gap*, London: Cameron May, 1998.

<sup>65</sup> For instance, the United States regularly posts their submissions on the USTR website.

<sup>66</sup> Charnovitz (2000). See also Shaffer (2001); D. Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings”, *American Journal of International Law*, Vol. 88 2000, 611-642.

<sup>67</sup> In the ICJ Nuclear Test Case (ICJ Reports 288 (1995), NGOs prepared draft pleadings for New Zealand. Found in Sands at p. 199

<sup>68</sup> For instance, civil society strongly lobbied for the World Health Organization’s request for an advisory opinion on the legality of the use of nuclear weapons, before the International Court of Justice.

<sup>69</sup> One of the amicus briefs in the present GMO dispute at the WTO was partly motivated by dissatisfaction with the defence raised by the European Union.

<sup>70</sup> See the appended letter from UK Consumers’ Association to the Peruvian complaint in the *EU-Sardines* dispute. In that dispute, the panel explicitly noted that they considered the letter in determining what European consumers associate with the term “sardines”. At the Appellate Body, the letter was affirmed as an appropriate piece of evidence for the panel to consider.

<sup>71</sup> For instance, the GMO one of the amicus brief submitted in the *GMO* dispute was made by a consortium of both northern and southern based NGOs. In the *EU-Sardines* dispute, a northern NGO (UK Consumers’ Association) submitted a brief that was attached to the developing country complainant’s pleadings, arguing that the EU narrow classification of what are sardines acted against the economic and information interests of Europe’s consumers. See G. Shaffer & V. Mosoti, “EC Sardines: A New Model for Collaboration in Dispute Settlement?”, *BRIDGES* Vol. 6, No. 7, 2000, pps. 15-16, 22.

<sup>72</sup> See D. Robertson, “Civil Society and the WTO”, *World Economy* Vol. 23, 2000, p. 1127.

<sup>73</sup> See *WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 3, 1994.

<sup>74</sup> Article 13.1.

<sup>75</sup> Whereas in the *Shrimp-Turtle* dispute, the amicus briefs were attached to the US briefs qualifying them of being within the Appellate Body’s ambit of consideration, in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Carbon Steel)*, Report of the Appellate Body, WT/DS138/AB/R (May 10, 2000), the Appellate Body held that it had the authority to accept the NGOs briefs directly from the petitioner NGO, when the information is “pertinent and useful”. However, in that case, the Appellate Body concluded that it was not necessary to take the two briefs into account.

<sup>76</sup> In *Australia – Measures Affecting Importation of Salmon, Recourse to Article 21.5*, Report of the Panel, WT/DS18/RW, para 7.8, (Feb 18, 2000), the compliance review panel accepted a letter from the Concerned Fisherman and Processors in South Australia.

<sup>77</sup> See the *Shrimp-Turtle* Appellate Body proceedings, which included an American appeal of the panel decision regarding their lack of authority to consider NGO briefs. *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998).

<sup>78</sup> See Charnovitz (2000) at 6. Some of those arguments even appeared in the rulings themselves.

<sup>79</sup> For example, see the *Shrimp-Turtle* and *EU-Sardines* disputes.

<sup>80</sup> See G. Shaffer, *The Public and Private in WTO Law*, Brookings Institute Press, Washington, D.C., 2004 (forthcoming).

<sup>81</sup> See *EU-Sugar* (2004). In turn, the application of dispute settlement rules to non-state actors creates a horizontal relationship between States and civil society in terms of the dispute settlement process.

<sup>82</sup> P. Naray (2003), “Business Reacts to Cancún”, *International Trade Forum*, [http://www.tradeforum.org/news/printpage.php/aid/609/Business\\_React\\_to\\_Cancun.html](http://www.tradeforum.org/news/printpage.php/aid/609/Business_React_to_Cancun.html) Prior to

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Cancun, the International Trade centre hosted a series of regional “Business for Cancun” meetings for business leaders and trade negotiators.

<sup>83</sup> D. Primack & S. Bilal, “The Journey from Cotonou to Cancun , and Beyond: The Changing Dynamics of WTO and EPA Negotiations”, Vol. 3, No. 1 *Trade Negotiations Insights* 1-5, 2004 at 2.

<sup>84</sup> The number of accredited NGOs in Doha was limited, due to spatial concerns as well as concerns with security in the post September 11 environment. The Seattle Ministerial accredited 686 NGOs.

<sup>85</sup> This has been confirmed by the WTO Members in the July Package agreed to in July 2004. Despite this result, the contributions of civil society towards that outcome are difficult to gauge especially in light of the strict party-to-party discussions leading up to the July Package. See Public Citizen(2004), Public Citizen Condemns Process, Outcome of Geneva WTO Framework Talks.

<http://www.citizen.org/pressroom/release.cfm?ID=1759>

<sup>86</sup> Thürer (1998) at 39.

<sup>87</sup> C. Schreuer, “The Waning of the Sovereign State: Towards a New Paradigm for International Law”, *EJIL* Vol. 4, 447 (1993).

<sup>88</sup> Disenfranchisement is defined by J. F. Green as “being deprived of the capability to participate and to influence agenda-setting and decision-making in international regimes for sustainable development”. See J. F Green (2004), *Engaging the Disenfranchised: Developing Countries and Civil Society in International Governance for Sustainable Development – An Agenda for Research*, (UNU-IAS Report, United Nations University: Tokyo).

<sup>89</sup> Keohane & Nye (2000) at 13. Some argue that moving the WTO from an “intergovernmental model” to a “civil society/stakeholder model” is fraught with similar power imbalances between the diverse members of civil society. See Shaffer (2001) at 8.

<sup>90</sup> See Shaffer (2001) at 52.

<sup>91</sup> This has certainly been the case with Multilateral Environmental Agreements such as CITES. See Sands and Bedecarré, “Convention on International Trade in Endangered Species: the Role of Public Interest Non-Governmental Organizations in Ensuring the Enforcement of the Ivory Trade Ban”, (1990) 17 *Boston College Environmental Affairs Law Review* 799.