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## TRANSPARENCY AND PUBLIC PARTICIPATION IN THE WTO: A REPORT CARD ON WTO TRANSPARENCY MECHANISMS

**GABRIELLE MARCEAU\* AND MIKELLA HURLEY\*\***

*In contemporary society where transparency has become a widely shared and recognized value, international organizations are increasingly being called upon to open their internal decision-making processes to greater public participation and scrutiny. The World Trade Organization [WTO], and its predecessor, the GATT, like many other institutions in the field of international economic law, have commonly been perceived as lacking sufficient transparency. However, since its inception in 1994, the WTO has systematically worked to increase public access to information, both in the context of rulemaking and dispute settlement, and has set an early example for other institutions. This article reviews the WTO's efforts in this area, including recent developments on issues such as open hearings and amicus curiae briefs. Comparisons are drawn with other fora, particularly regional trade agreements and investor-State dispute settlement mechanisms. This transparency "report card" finds that, on the whole, the WTO's track record compares favourably with that of other similar institutions. Nonetheless, some suggest that further work is warranted, particularly in the context of dispute settlement. The article concludes recalling practical suggestions that could help make the WTO even more transparent, and further increase the public's trust in its mission.*

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\* Professor Gabrielle Marceau is Counsellor in the Legal Affairs Division of the WTO, and Associate Professor at the Faculty of Law in the University of Geneva. E-mail: Gabrielle.Marceau[at]unige.ch.

\*\* Mikella Hurley is undertaking a Masters in International Law at the Graduate Institute of International and Development Studies in Geneva, and also serves as the Research Assistant to Professor Marceau. E-mail: mikella.hurley[at]graduateinstitute.ch.

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## I. INTRODUCTION

In the present age of the “International Community”,<sup>1</sup> transparency has become a globally established value. Every single day, new innovations in electronic media bring us closer to a moment where it will be extremely difficult, if not impossible, to keep a secret or to conduct business in private. The World Trade Organization [WTO] is no more immune than any other regime to this rising tide of transparency, and contrary to the opinions of some,<sup>2</sup> the WTO is

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<sup>1</sup> The concept of the “international community” has long been employed in international relations and international legal scholarship. Writing just before the Second World War, Sir Hersch Lauterpacht restricted his definition of this term to the community of nations, composed of individual sovereign States. (See SIR HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (2d ed., Oxford Univ. Press 2011) (1933)) Since that time, the term has taken on a multiplicity of meanings that can be expanded and contracted to suit each author’s purposes. In this article, we employ the term as used by Simma in his celebrated Hague Academy Lectures, where he traced its evolution from a State-based system toward a “more socially conscious legal order” reflective of genuine “community interests” that transcend the State. See Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994).

<sup>2</sup> Criticisms have recently been voiced by authors such as Puig and Al-Haddab. See Gonzalo V. Puig & Bader Al-Haddab, *The Transparency Deficit of Dispute Settlement in the World Trade Organization*, 8(1) MANCHESTER J. INT’L ECON. L. 2 (2011).

now truly coming into its own as an organization that embraces openness, rather than trying to hide from it. However, the WTO – particularly its Dispute Settlement Body – is still frequently characterized as a veritable “star-chamber”<sup>3</sup> whose “rules and procedures are undemocratic, un-transparent and non-accountable, and have operated to marginalize the majority of the world’s people”.<sup>4</sup> In this article, we set out to examine the old “star-chamber” myth, and offer a frank and honest assessment of the WTO’s ongoing efforts to increase transparency and public participation. We also offer some comparisons to other fora at the international level, particularly in the realm of international economic law, in order to place WTO transparency efforts in context. To a large extent, we maintain that the WTO is a leader in many regards; however, other organizations and international dispute settlement fora may still offer the WTO a number of best-practice examples.

This article addresses a number of key issues for both the WTO dispute settlement system, and its functioning as a negotiation and rule-making forum. It is divided as follows: (1) transparency in the publication of information, particularly in the context of ongoing litigation; (2) the submission of *amicus curiae* briefs in disputes; and (3) public participation in various WTO mechanisms and events. While this WTO transparency “report card” generally presents a laudable picture, it also examines the areas in which gaps remain, and considers a series of recommendations that have been offered by observers of the WTO system. As a former member of the WTO Appellate Body [AB] expressed, if the WTO is to reflect the spirit of a “democratic and open society, the governmental action taken by a member state within the WTO should be known to the constituency as much as possible. This candor would, in turn, enhance the legitimacy of the WTO and its dispute settlement system.”<sup>5</sup> Nonetheless, some developing country Members still feel uncomfortable with the increased presence of non-State and non-Member actors within what is perceived as a closed-door WTO system. In order to strike a balance between the needs of its Members and those of the International

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<sup>3</sup> This term originated with an English court of law established at the Palace of Westminster and in operation until 1641. Set up to address the transgressions of powerful members of the nobility, the English Star Chamber was characterized by secret proceedings and very limited due process. It eventually became a tool for the pursuit of political agendas. The term “star chamber” is now often used to describe defunct and corrupt legal institutions. See Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1 (1961). For application in the WTO context, see Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999).

<sup>4</sup> Quoted from the non-profit group the Public Citizen, in its description of the 3<sup>rd</sup> WTO Ministerial at Seattle. See *3<sup>rd</sup> WTO Ministerial: Seattle, USA: The Battle of Seattle*, PUB. CITIZEN, [http://www.citizen.org/trade/wto/Qatar/seattle\\_mini/](http://www.citizen.org/trade/wto/Qatar/seattle_mini/).

<sup>5</sup> Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42(1) CORNELL INT’L L.J. 1, 18 (2009).

Community, the WTO may wish to consider the experiences and innovations of other fora, which are discussed in turn, below.

## II. THE EMERGENCE OF THE TRANSPARENCY DEBATE – FROM THE GATT TO THE WTO

Although the WTO may only have been formally in operation since 1995, its predecessor, the General Agreement on Tariffs and Trade [GATT], very strongly influenced the development of the WTO as an institution. The GATT was negotiated at a time when the International Community, as we know it now, did not really exist. If there was an International Community, it comprised *States*. The interests of the world writ large were represented by sovereign governments, for better or for worse. Consequently, recognition as a GATT Contracting Party, with all of its incumbent privileges, was reserved for governments.

The GATT dispute settlement system was largely adapted from international commercial arbitration, a model that remains largely un-transparent to this day. Although GATT “working party” and later GATT Panel reports were always made public following the conclusion of a case, dispute settlement proceedings and negotiations remained completely closed to citizens and NGOs alike. This practice only became contentious in the later years of the GATT, when in the context of the famous *Tuna* cases, GATT panels were tasked with evaluating the legitimacy of national environmental policies such as the United States’ restrictions on fish caught with driftnets.<sup>6</sup> Public concerns intensified when the WTO, with its expanded set of rules, new institutional architecture, and dispute settlement system with the authority to issue binding awards, was first inaugurated. Critics worried that legal disciplines of the WTO increasingly encroached upon non-commercial issues, and that the WTO dispute settlement system – particularly the newly created Appellate Body – would be able to push its own agendas on issues from the environment to human rights, meting out binding judgments under the cloak of secrecy.<sup>7</sup> Public interest groups and NGOs cried foul, and began an intense

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<sup>6</sup> See Unadopted Panel Report, *US – Restrictions on Imports of Tuna*, DS29/R, (circulated June 16, 1994) [hereinafter *Tuna I*], and Unadopted Panel Report, *US – Restrictions on Imports of Tuna*, DS21/R - 39S/155 (circulated Sept. 3, 1991).

<sup>7</sup> Scholars such as Bernstein have expressed open criticism of the WTO’s approach to non-commercial matters, suggesting that:

[T]he WTO...which nonetheless play[s] a significant role in international environmental governance, pay[s] insufficient attention to environmental concerns or subordinate[s] them to the goals of open markets, corporate freedom, efficiency and economic growth. Environmental protection and sustainable development thus join human rights, labour rights, and poverty reduction, as unmet goals driving the broader legitimacy

effort to discredit the so-called WTO “star-chamber”. These efforts reached a fever pitch at the Seattle Ministerial of 1999.

These concerns did not fall on deaf ears, and have largely proved to be unfounded. Although its Members have not always been in perfect agreement about how to open the WTO to outside participation and scrutiny, the WTO has distanced itself from its origins in commercial arbitration, has become increasingly transparent, particularly in three key areas.

### III. MAIN AREAS OF WTO TRANSPARENCY

#### A. Public Access to Documentation

##### 1. Summary of Existing Practices in the WTO

Despite its origins in commercial arbitration, the former GATT system consistently encouraged transparency in several key areas. For instance, following disputes, final Working Party and GATT reports have always been circulated and made available to the general public. The GATT made early efforts to ensure transparency in the publication of Members’ trade regulations – both at home, and internationally. Article X of the GATT 1947, which has been retained in the existing GATT 1994, obliges all WTO Members to “publish [regulations] promptly in such a manner as to enable governments and traders to become acquainted with them”. This was supplemented by the 1979 decision requiring Contracting Parties “to notify ... their adoption of trade measures affecting the operation of the General Agreement”.<sup>8</sup> As a rule, this notification was to be circulated to other Contracting Parties *prior* to the implementation of a measure.<sup>9</sup>

##### 2. The Innovations brought about by the WTO Website

In recent years, the WTO has broadened its efforts in this area, and has very successfully made use of web-based tools to offer public access to a variety of

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challenge to international liberalism and the global governance institutions established to promote and maintain it.

*See* Steven Bernstein, *Legitimacy in Global Environmental Governance*, 1 J. INT’L L. & INT’L REL. 139 (2005). In 2003, Esserman and Howse called on the WTO, and in particular its Appellate Body, to make its proceedings more transparent, stating: “The rulings of WTO judges affect the public interest in the broadest sense, as is especially evident in cases related to health and the environment. Yet the WTO’s hearings and submissions remain secret, an unacceptable vestige of the old days of cloak-and-dagger diplomacy.” *See* Susan Esserman & Robert Howse, *The WTO On Trial*, 82 FOREIGN AFF. 130 (2003).

<sup>8</sup> Decision of the Contracting Parties, L/4907, (*adopted* Nov. 28, 1979).

<sup>9</sup> *Id.*

documents. In terms of notification of domestic regulations, the Marrakesh Decision on Notification Procedures affirmed pre-existing obligations, and established a central registry for notification, managed by the Secretariat.<sup>10</sup> GATT obligations on notification strongly influenced the development of similar requirements within later legal texts.<sup>11</sup> As it stands, the goods agreements of Annex 1A contain a total of 175 notification requirements,<sup>12</sup> a figure that does not include the various notification obligations found in the agreements on services and intellectual property. The WTO General Council's historic "transparency decision" of 2002,<sup>13</sup> which established that "all official WTO documents shall be unrestricted", also deserves some note here. Practically speaking, this means that all decisions, meeting minutes, protocols of accession, all laws and regulations notified to the WTO, Members' schedules and numerous Secretariat documents are made public on the WTO website, after having been translated into the WTO's three official languages.

In terms of dispute settlement, the availability of documentation varies depending on the particular stage of the process. The WTO promptly posts updates on the status of each dispute and maintains a registry of all cases – both past and present – allowing the public to remain informed. Again thanks to the transparency decision of 2002, when a Member places a formal request for consultations,<sup>14</sup> the WTO issues a summary of the request, including a description of the contested measure(s), as well as the legal basis for the complaint.<sup>15</sup> Actual consultations, however, are held *in camera* and discussions are not documented or released to the public. While some have called for consultations to be opened to

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<sup>10</sup> Notifications are managed on the Central Registry of Notifications (CRN), accessible through *Documents Online* on the WTO website. For an explanation of this tool, see [http://www.wto.org/english/tratop\\_e/agric\\_e/wkshop\\_sep09\\_e/session2b\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/wkshop_sep09_e/session2b_e.pdf).

<sup>11</sup> Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 Rutgers L. Rev. 927, 935 (2004).

<sup>12</sup> Gabrielle Marceau & Peter N. Pedersen, *Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-Governmental Organizations and Civil Society's Claims for more Transparency and Public Participation*, 33 J. WORLD TRADE 20 (1999) [hereinafter Marceau & Pedersen].

<sup>13</sup> See Procedures for the Circulation and De-restriction of WTO Documents (Decision of May 14, 2002), [http://members.wto.org/WTO\\_resources/documentation/derestriction\\_e.htm](http://members.wto.org/WTO_resources/documentation/derestriction_e.htm).

<sup>14</sup> Consultations comprise one of the earliest stages in any dispute, and also are the preferred method of settlement. Consultations are governed by Art. 4 of the WTO DSU, and provide a formal opportunity for Members to discuss the legality and effects of a particular trade barrier, with the hope of early resolution. According to the WTO Secretariat, the majority of trade disputes are settled in the consultation stage. See [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c6s2p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s2p1_e.htm).

<sup>15</sup> See Current status of Disputes, World Trade Organization, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm).



the public, demands for greater transparency in this area must be weighed against the likely pitfalls as such a practice could actually stymie the early and amicable resolution of disputes, and result in needlessly increased costs for parties and for the WTO Secretariat.<sup>16</sup>

Should consultations prove unfruitful, a Member may request the establishment of a panel for the settlement of a dispute,<sup>17</sup> and the content of the request is published on the WTO website. Panel and Appellate Body reports are also available after their adoption by the DSB. However, there is usually a lag of three to four months between the issuance of the final panel report to the parties and its publication on the website, drawing criticism from public interest groups.<sup>18</sup> Such complaints, however, are misdirected. The delay in publication is largely a result of the time required to translate the reports – most of which contain hundreds of pages – into all three official languages.

It should be noted that the majority of dispute-related documents are not automatically made public. Most importantly, the submissions of the complainant, respondent and third parties to a dispute are kept confidential, and can only be released at the discretion of individual Members.<sup>19</sup> While this may permit Members to protect confidential and sensitive commercial information, it has been criticized,

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<sup>16</sup> Empirical research indicates that democratic states make the most use of the closed consultation phase to resolve differences, and are less easily able to do so once a dispute reaches a greater level of visibility. See Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 *FORDHAM INT'L L.J.* 158, 167 (2000). See also Marc L. Busch, *Democracy, Consultation, and the Paneling of Disputes Under GATT*, 44 *J. CONFLICT RESOL.* 425 (2000).

<sup>17</sup> Art. 6 of the DSU provides the legal basis for Members to request the establishment of a panel.

<sup>18</sup> See Daniel Magraw, Sofia Plagakis & Jessica Schifano, *Ways and Means of Citizens' Participation in Trade and Investment Dispute Settlement Procedures* (SIEL Online Proceedings, Working Paper No. 53/08, 2008) [hereinafter Magraw et al.].

<sup>19</sup> Art. 18(2) of the DSU holds that:

Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Some Members, such as the United States, the European Union and Canada make their submissions public as a matter of policy. Other Members, such as Brazil, publish submissions on a case-by-case basis.

especially by those who wish to provide input in the form of an *amicus curiae* brief.<sup>20</sup> Without consistent access to submissions, prospective *amici* are unable to supplement the factual and legal arguments, or respond to party particular positions, thus often limiting the overall usefulness of *amicus* briefs in dispute proceedings.<sup>21</sup>

### 3. Comparison with Other Fora

In the field of international economic law, the WTO is unique in that it serves both as a negotiating forum as well as a dispute settlement resolution system. When examining the practices of fora dealing with international investment and commercial arbitration, it is only possible to make partial comparisons. When it comes to the publication and maintenance of easily accessible and up-to-date information on disputes, the WTO continues to be a leader in the field of international economic law. Investor-State arbitration proceedings, on the other hand, as a rule, remain grounded in the closed-door model of commercial arbitration. While this feature may make arbitration highly attractive to investors as compared with national courts, it has resulted in a general scarcity of public information on ongoing disputes. The majority of arbitration rules feature default provisions on confidentiality that ensure awards remain undisclosed, unless the parties agree otherwise.<sup>22</sup> Some fora have taken steps to increase public access to information on disputes and awards. However with the diversity of rules and procedures available, parties “are free to choose the least transparent among them”.<sup>23</sup> For purposes of comparison, we highlight only a few of the most notable examples here.

Revised rules of both the International Centre for the Settlement of Investment Disputes [ICSID or Centre] and the United National Commission for International Trade Law [UNCITRAL] offer some exceptions, however they still lag behind the WTO standard. Although parties to ICSID disputes are permitted to publish awards at their discretion, the ICSID itself is unable to do so unless

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<sup>20</sup> *Amicus* briefs are discussed in further detail in Part III.B, *infra*.

<sup>21</sup> See Magraw et al., *supra* note 18, at 24. As discussed below, past panels and the Appellate Body have historically made little use of *amicus* submissions, often noting that they do not offer information beyond that which is included in the litigant’s own submissions.

<sup>22</sup> Peter Malanczuk, *Confidentiality and Third-Party Participation in Arbitration Proceedings under Bilateral Investment Treaties*, 1(2) CONTEMP. ASIA ARB. J. 183, 187 (2008) [hereinafter Malanczuk]. See also Julian D.M. Lew et al., *Comparative International Commercial Arbitration*, and Christopher To, *Confidentiality in Arbitrations*, in LEGAL DISCOURSE ACROSS CULTURES AND SYSTEMS 75 (Vijay K. Bhatia, Christopher N. Candlin & Jan Engberg eds., Hong Kong Univ. Press 2008).

<sup>23</sup> See Magraw et al., *supra* note 18.

both parties agree.<sup>24</sup> However, the revised Additional Facility Rules now give the Centre the authority to publish excerpts containing a tribunal's legal reasoning, with or without party consent.<sup>25</sup> The ICSID Secretariat also maintains a registry of pending and completed arbitrations on its website. However, the entries neither go into detail about the legal issues involved, nor do they provide a detailed description of the complaints. In terms of submissions, ICSID generally follows the same approach as the WTO. The Centre is not authorized to publish them, but the parties may choose to do so if they wish. However, a party may also actually request the tribunal to issue a total confidentiality order, effectively preventing the other party from disseminating any information about the dispute. This occurred in the *Biwater v. Tanzania* case, in which the Government of Tanzania was formally prohibited from communicating with the public about the proceedings, despite strong objections.<sup>26</sup>

UNCITRAL arbitration rules make no provision for a registry of disputes. Prior to 2010, litigants were blocked from publishing awards unless they received express approval from the other party. Under UNCITRAL's revised rules, both parties must still consent before an award can be made public, however exceptions are granted "where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority".<sup>27</sup>

NAFTA Chapter 11 rules offer somewhat of a different approach. In 2001, the NAFTA Free Trade Commission clarified Chapter 11 provisions on confidentiality which, *inter alia*, set out the following obligation: "Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 tribunal", subject to the redaction of sensitive or privileged information.<sup>28</sup> While specific procedures may depend on the particular arbitration rules used in a given case, currently, "all three NAFTA parties now maintain detailed websites, making available documents relating to NAFTA arbitrations, including awards".<sup>29</sup>

To summarize, while a handful of other fora have made significant efforts to increase transparency in publication of awards and other information,<sup>30</sup> there

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<sup>24</sup> ICSID Convention art. 48(5).

<sup>25</sup> ICSID Additional Facility Rules art. 53(3).

<sup>26</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. See Magraw et al., *supra* note 18, at 10.

<sup>27</sup> UNCITRAL Convention art. 45(3).

<sup>28</sup> NAFTA FTC Note of Interpretation, dated 31 July 2001.

<sup>29</sup> Malanczuk, *supra* note 22, at 193.

<sup>30</sup> In general, free trade agreements in which the United States is a member (*e.g.* NAFTA, CAFTA-DR, the US-Chile FTA, and others) tend to offer significant public

remains a (pervasive) transparency “deficit” in investor-state arbitration.<sup>31</sup> Not only does the public often lack access to final awards, it generally has no way of ascertaining whether a case exists; what the allegations and legal issues are; the litigation schedule; or, the outcome of the dispute.<sup>32</sup>

## B. *Amicus Curiae* Briefs

### 1. Summary of Existing Practice in the WTO

The WTO has been accepting *amicus curiae*, or “friend of the court” briefs in both panel and Appellate Body proceedings since 1998. As a rule, these briefs are unsolicited, and absent any specific guidance from the DSU on how to address them, the Appellate Body has had to respond to this question by way of more general provisions. The history and legal basis for this practice has been explored at length by a number of authors,<sup>33</sup> and so it suffices to only provide a very brief summary here.

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access to information on pending and completed disputes. See Magraw et al., *supra* note 18, for an extended discussion of US FTA practices. Article 38(3) of the Canadian Model FIPA provides that “all documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information”. COMESA rules also establish that documentation in investment disputes is to be open by default (*see* art. 27(3) of the Investment Agreement for the COMESA Common Investment Area). However, other fora have not been as successful in increasing the transparency in their proceedings. For instance, Norway sought to make documentation publicly available under the aegis of a new model bilateral investment treaty (BIT), however this effort was abandoned in the face of strong criticism from groups that felt the changes would undermine the ability to protect the rights of investors. For more details, See Damon Vis-Dunbar, *Norway Shelves its draft model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS (June 8, 2009), available at: <http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/>.

<sup>31</sup> Daniel B. Magraw & Niranjali M. Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT’L & COMP. L. 337 (2009) [hereinafter Magraw & Amerasinghe].

<sup>32</sup> This “transparency deficit” was recently brought to light in the United Kingdom, after the revelation that the Government was subject to its first *known* investment dispute under any of its more than 100 bilateral investment treaties. The case, which involved the UK-India BIT, was lodged by an Indian investor in 2006, and was only brought to the public’s attention in 2008. Despite criticism and calls for greater transparency, the Foreign & Commonwealth Office has insisted that arbitrations initiated under the UNCITRAL procedural rules must remain confidential, and have not revealed whether any other such cases exist. See, for further details, The Investment Arbitration Reporter (IA Reporter), [http://www.iareporter.com/downloads/20100107\\_13/download](http://www.iareporter.com/downloads/20100107_13/download).

<sup>33</sup> See Gabrielle Marceau & Matthew Stilwell, *Practical Suggestions for Amicus Curiae Briefs*

When it first came to the fore, the *amicus* issue fueled a great deal of disagreement and contention between those Members who favoured a more transparent approach, and others who worried that *amicus* briefs might actually serve to threaten the rights of some, particularly developing country Members with reduced resources.<sup>34</sup> There was a general concern that, “not knowing what briefs will be read by the panel or Appellate Body, [Members] [could not] properly defend their interests without responding to every such submission adverse to their position”.<sup>35</sup> The WTO did not receive its first unsolicited *amicus* submissions until the moment that the WTO DSB found itself seized of two cases,<sup>36</sup> both of which dealt with Members’ rights to protect health, safety and the environment in their territories. The panels chose to ignore the submissions on both occasions. The third instance occurred only shortly thereafter, in the now famous *US – Shrimp* case,<sup>37</sup> when two environmental NGOs<sup>38</sup> submitted briefs in support of the US restrictions on shrimp from countries known to sanction the use of fishing practices that negatively impacted a certain species of turtle. The Panel refused the submissions on the basis that “accepting non-requested information from non-governmental sources, would be...incompatible with the provisions of the DSU”, particularly Article 13.<sup>39</sup> According to this reasoning, information would only be admissible where it had been either presented by the parties, or actively solicited by the panel itself. However, the Appellate Body reversed this finding, and determined that Article 13 of the DSU was broad enough to cover situations where a Panel had not actually requested information from an NGO.<sup>40</sup> Thus,

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*Before WTO Adjudicating Bodies*, 4(1) J. INT’L ECON. L. 155 (2001) [hereinafter Marceau & Stilwell]; see also Andrea K. Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER L. SYMP. J. 87 (2001); 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 (2000) [hereinafter Ala’i].

<sup>34</sup> See generally, Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in Festschrift für Claus-Dieter Ehlermann (Armin von Bogdandy, Petros C. Mavroidis & Yves Meny eds., Kluwer Int’l 2002) [hereinafter Mavroidis].

<sup>35</sup> Robert E. Hudec, *New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 49 (1999).

<sup>36</sup> These were Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) [hereinafter *US–Gasoline*], and Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS48/AB/R (Feb. 13, 1998) [hereinafter *EC–Hormones*].

<sup>37</sup> See Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter *US – Shrimp* Panel Report]; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US – Shrimp* AB Report].

<sup>38</sup> The Center for Marine Conservation and the Center for International Environmental Law (CIEL).

<sup>39</sup> *US – Shrimp* AB Report, *supra* note 37, § 7.8.

<sup>40</sup> *US – Shrimp* AB Report, *supra* note 37, § 106-108.

panels have the discretion to “look at or ignore any information, including submissions by NGOs, irrespective of whether such information was requested”.<sup>41</sup> The Appellate Body did not address the question of whether the DSU also afforded similar authority to accept *amicus* submissions to the Appellate Body itself.<sup>42</sup> This question was left to be decided in a subsequent case.

Unlike panels, which are asked to decide on factual as well as legal matters, the mandate of the Appellate Body extends only to questions of law. In the *US – British Steel* case,<sup>43</sup> the Appellate Body had to consider whether it was permitted to receive an *amicus* brief that was not attached as part of either party’s submission. The European Communities argued that DSU Article 13 only extended to “factual information and technical advice”, and excluded any legal arguments.<sup>44</sup> It further maintained that the DSU offered no other basis upon which the Appellate Body could receive unsolicited *amicus* briefs. The Appellate Body disagreed, finding that the DSU did not explicitly *prohibit* such a practice, and that Article 17.9 allows the Appellate Body to “adopt procedural rules which do not conflict with any rules and procedures of the DSU or the covered agreements”.<sup>45</sup>

The issue of *amicus curiae* briefs before the WTO is no longer as contentious as it once was, but this does not mean that further reflection is not warranted. Although the Appellate Body’s early and proactive decision to interpret the vagaries of the DSU in a pro-transparency way was certainly welcomed by some, an examination of the treatment of *amicus* briefs over the past decade illuminates some interesting patterns, and also shows that the Appellate Body’s approach has not in fact led to much change thus far.

To date, *amicus* briefs have been submitted for a total of 20 panel proceedings<sup>46</sup> and 15 Appellate Body proceedings, with multiple *amicus* submissions in certain

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<sup>41</sup> Ala’i, *supra* note 33, at 70.

<sup>42</sup> In the appeal, the United States attached the two *amicus* briefs with its own documents, thus making them “an integral part of [its] submission”. See *US–Shrimp* AB Report, *supra* note 37, § 89.

<sup>43</sup> See Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R (Dec. 23, 1999), and Appellate Body Report, *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 (May, 10, 2000) [hereinafter *US–British Steel*].

<sup>44</sup> *Id.* ¶ 36.

<sup>45</sup> *Id.* ¶ 39.

<sup>46</sup> *US – Shrimp* Panel Report, *supra* note 37; *US – Shrimp* AB Report, *supra* note 37, (Article 21.5 – Malaysia) (WT/DS58/RW); *US – Lead and Bismuth II* (WT/DS138/R); *Australia – Salmon* (Article 21.5 – Canada) (WT/DS18/RW); *US – Section 110(5) Copyright Act* (WT/DS160/R); *EC – Asbestos* (WT/DS135/R); *EC – Bed Linen* (WT/DS141/R); *US – Softwood Lumber III* (WT/DS236/R); *US – Softwood Lumber IV* (WT/DS257/R); *US –*

cases.<sup>47</sup> 15 of these proceedings have dealt with issues having implications beyond strictly commercial matters (e.g. environmental and public health issues).<sup>48</sup> *Amici* are not always identified by name in the reports. Based upon the reports that mention *amici* by name, it is possible to identify a total of 22 past *amici* that have represented NGOs or other public interest groups, and a total of 16 have that have represented industry associations.<sup>49</sup>

Panels and the Appellate Body now tend to accept unsolicited *amicus* briefs, provided that they are submitted within a reasonable timeframe. If they are presented once the first substantive meeting has started, they risk being disregarded. For past panel proceedings, a total of 34 briefs have been submitted, of which 17 have been accepted for consideration. Of this total, only six of the

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*Softwood Lumber (ITC)* (WT/DS277/R); *EC – Export Subsidies on Sugar* (WT/DS265/R, WT/DS266/R, WT/DS283/R); *US – Zeroing (EC)* (WT/DS294/R); *EC – Selected Customs Matters* (WT/DS315/R); *EC – Marketing and Approval of Biotech Products* (WT/DS291/R, WT/DS292/R, WT/DS293/R); *Brazil – Retreaded Tyres* (WT/DS332/R); *Australia – Apples* (WT/DS367/R); *Thailand – Cigarettes* (WT/DS371/R); *EC – Large Civil Aircraft* (WT/DS316/R); *US – COOL* (WT/DS384/R, WT/DS386/R); *US – Tuna II* (WT/DS381/R).

<sup>47</sup> *US – Shrimp* Panel Report, *supra* note 37; *US – Shrimp* AB Report, *supra* note 37, (Article 21.5 – Malaysia) (WT/DS58/AB/RW); *US – Lead and Bismuth II* (WT/DS138/AB/R); *Thailand – H-Beams* (WT/DS122/AB/R); *EC – Asbestos* (WT/DS135/AB/R); *EC – Sardines* (WT/DS231/AB/R); *US – Countervailing Measures on Certain EC Products* (WT/DS212/AB/R); *US – Softwood Lumber IV* (WT/DS257/AB/R); *US – Steel Safeguards* (WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R); *EC – Export Subsidies on Sugar* (WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R); *EC – Chicken Cuts* (WT/DS269/AB/R, WT/DS286/AB/R); *Mexico – Taxes on Soft Drinks* (WT/DS308/AB/R); *Brazil – Retreaded Tyres* (WT/DS332/AB/R); *China – Auto Parts* (WT/DS339/AB/R); *US – AD and CVDs on products from China* (WT/DS379/AB/R).

<sup>48</sup> *US – Shrimp* Panel Report, *supra* note 37; *US – Shrimp* AB Report, *supra* note 37; *US – Shrimp*, *supra* note 37 (Article 21.5 – Malaysia); Report of the Panel, *Australia – Salmon* (Article 21.5 – Canada) (WT/DS18/RW); Report of the Panel, *EC – Asbestos*, (WT/DS135/R); Report of the Appellate Body, *EC – Asbestos*, (WT/DS135/AB/R); Report of the Appellate Body, *EC – Sardines* (WT/DS231/AB/R); Report of the Panel, *US – Softwood Lumber IV* (WT/DS257/R); Report of the Appellate Body, *US – Softwood Lumber IV* (WT/DS257/AB/R); Report of the Panel, *EC – Marketing and Approval of Biotech Products* (WT/DS291/R, WT/DS292/R, WT/DS293/R); Report of the Panel, *Brazil – Retreaded Tyres* (WT/DS332/R); Report of the Appellate Body, *Brazil – Retreaded Tyres* (WT/DS332/AB/R); Report of the Panel, *Australia – Apples* (WT/DS367/R); *US – Tuna II* (WT/DS381/R).

<sup>49</sup> It should be noted that several NGOs and industry groups have offered submissions for multiple different proceedings, and have occasionally submitted *amicus* briefs in consortium with other groups and individuals.

briefs have been taken into account by the panels in their findings, primarily because they were also incorporated into litigant submissions.<sup>50</sup> In two of the cases, panels have failed to clearly indicate whether they relied upon information submitted in the briefs or not.<sup>51</sup>

For past Appellate Body proceedings, *amici* have submitted a total of 39 briefs, of which 21 were accepted for consideration. The Appellate Body has not expressly stated that it has relied upon any of these submissions for its findings, however, this is not entirely clear for five of the briefs, which were submitted as part of the *US – Shrimp* dispute.<sup>52</sup>

Once a brief has been accepted for consideration, what is actually done with it remains shrouded in ambiguity. There are no general rules for the treatment of these *amicus* submission, although the Appellate Body did endeavour to establish particular procedures for the *EC – Asbestos* case.<sup>53</sup> Some reports identify the *amici* and provide details on which litigant's position they favoured, while some others do not.<sup>54</sup> There tends to be scant information on the content of the briefs, and as a common rule, the reports offer no explanation as to why a brief may or may not be taken into account. Typically, the reports recount the legal basis upon which

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<sup>50</sup> Panel Report, *Australia – Salmon* (Article 21.5 – Canada); Panel Report, *EC – Asbestos* (WT/DS135/R); Panel Report, *Brazil – Retreaded Tyres* (WT/DS332/R).

<sup>51</sup> See Panel Report, *US – Softwood Lumber III* (WT/DS236/R); Panel Report, *Australia – Apples* (WT/DS367/R).

<sup>52</sup> See *US – Shrimp* Panel Report, *supra* note 37; *US – Shrimp* AB Report, *supra* note 37, (Article 21.5 – Malaysia).

<sup>53</sup> The Appellate Body attempted to set out particular criteria to be used only in the *EC – Asbestos* case, but this plan was aborted due to intense criticism, mostly from developing country Members. Relying upon DSU Art. 16(1), the Appellate Body promulgated detailed rules to be used for potential *amici* to “request leave” to submit *amicus* briefs. Following a special meeting of the General Council convened to address just this issue, the Appellate Body rejected all 17 of the requests it had received. While six of the requests were rejected on the grounds that they had not been submitted prior to the deadline, the Appellate Body offered no justification or explanation for the remaining 11 requests. See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R (Mar. 12, 2001), § 51-56 [hereinafter *EC – Asbestos*]; see also Ala'i, *supra* note 33, and Mavroidis, *supra* note 34.

<sup>54</sup> For example, the Appellate Body report from the *China – Auto Parts* case notes that an unnamed group or individual submitted an *amicus* brief, but it remains silent on the brief's author and says practically nothing about why the brief was not used. The report states: “On 10 October 2008, the Appellate Body received an unsolicited *amicus curiae* brief. After giving the participants and the third participants an opportunity to express their views, the Division hearing the appeal did not find it necessary to rely on this *amicus curiae* brief in rendering its decision.” See Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R (Dec. 15, 2008), § 11.



unsolicited *amicus* briefs can be accepted, followed by the blunt statement that the panel or Appellate Body did not find it “necessary” to rely on the brief when rendering a decision.<sup>55</sup>

The recent Panel Report in *US – Tuna II* offers a notable exception to this practice, and provides a substantial account of where and how the Panel relied upon the single *amicus* submission received during the proceedings. In addition to documenting its due processes efforts to ensure that both parties to the dispute had ample opportunity to respond to arguments and factual matters raised in the brief,<sup>56</sup> the report provides an indication of where the submission offered factual information that was used to buttress party arguments.<sup>57</sup> The titles and contents of factual exhibits annexed to the *amicus* submission are also provided in the report.<sup>58</sup>

Although the recent report in the *Tuna II* case provides a best-practice example, *amicus curiae* briefs, as a general rule, continue to be treated with substantial opacity,<sup>59</sup> which could have an impact on some WTO Members’ efforts

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<sup>55</sup> The Appellate Body report from the *US – Softwood Lumber IV* case provides a classic example. After listing the *amicus*, the report states:

These briefs dealt with some questions not addressed in the submissions of the participants or third participants. No participant or third participant adopted the arguments made in these briefs. Ultimately, in this appeal, the Division did not find it necessary to take the two *amicus curiae* briefs into account in rendering its decision. (*See* § 9 of the report)

The Appellate Body provides no indication of why it “did not find it necessary” to take the two briefs into account. *See also* Maria Perez Esteve, *WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations* 16 (Working Paper prepared for the IISD – Entwined Workshop, 2011) [hereinafter Esteve].

<sup>56</sup> *See* Panel Report, *US – Tuna II*, ¶ 7.2-7.9 (WT/DS381/R) (Sept. 15, 2011).

<sup>57</sup> *Id.* For example, at ¶ 7.288, the Panel states:

We further note that it is undisputed that US consumers are sensitive to the dolphin-safe issue. This is acknowledged by both Mexico and the United States, and is *also confirmed by the evidence presented with the amicus curiae brief* to which the United States has referred to in its answers to questions. This evidence suggests that, following public campaigning by the environmental organization “Earth Island Institute” in the late 1980s (including through film footage shot in 1987-88 showing the capture and killing of dolphins during a fishing trip where setting on dolphins was used), tuna processors were under pressure to stop purchasing tuna caught in conditions that were harmful to dolphins... (*emphasis added*)

*See also* ¶ 7.363. An attached Separate Opinion also offers useful insights into areas where the brief was used to confirm party arguments. *See* ¶ 7.182.

<sup>58</sup> *Id.* *See* p. xxvi.

<sup>59</sup> Indeed, the Panel Report in *US – COOL* (WT/DS384/R, WT/DS386/R) which was released in November of 2011, several months after the *Tuna II* report, seems to revert to the practice of providing very little information on *amicus* briefs. The author of the brief is not named, and the Panel merely notes that it “considered the information contained in

to increase transparency in its dispute settlement proceedings. At this point in time, neither the *amici* nor WTO Members themselves are able to get a clear view as to how *amicus* submissions may actually be influencing the outcome of disputes. The Appellate Body has made it clear that panels do not have to rely solely on the arguments and information presented by parties to a dispute,<sup>60</sup> and so it is possible that a panel might borrow the reasoning from an *amicus* brief, and use it as the basis for a decision. The same goes for the Appellate Body. As noted above, some Members have expressed major concerns that, in the absence of clear guidance on how these submissions will be used, parties to a dispute may have to go to great lengths to respond to every argument raised in an *amicus* submission, resulting in increased costs for disputing parties, particularly developing countries.<sup>61</sup> On the other side of the coin, if the Appellate Body's approach to *amicus curiae* briefs is to have an impact on the dispute settlement process, rather than just being regarded as a symbolic nod toward the NGO community, *amici* will have to know what kind of information and assistance will actually be of use to the DSB in its task. Unless *amici* are aware of the particular issues for which their contributions are needed, their submissions may be largely duplicative of party arguments. Furthermore, *amici* will be unable to access the value of their contributions unless panels and the Appellate Body communicate precise reasons for the treatment of a given brief.

## 2. Comparison with Other Fora

In the realm of international economic law, the WTO still manages to be more transparent than many other fora, despite the problems mentioned above. Here again, the question of *amicus* briefs in investment or commercial disputes depends on the set of rules used for a given arbitration. The ICSID procedure is similar to that of the WTO, providing explicitly in its revised rules that a tribunal *may* accept *amicus* briefs, although there is no right to file. *Amici* face some of the same limitations in ICSID cases that are apparent in WTO cases. For instance, they have no right to obtain party submissions, making it difficult for *amici* to supplement litigant submissions or offer any counterpoints to particular arguments and evidence. UNCITRAL rules make no provision for *amicus* briefs, and the use of

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the brief as necessary and to the extent that it was reflected in the written submissions and evidence submitted by the parties”, without providing any further details. (*See* ¶ 2.10).

<sup>60</sup>*See* *US – Shrimp* AB Report, *supra* note 37, ¶ 106-07.

<sup>61</sup> Several developing country Members have actually advocated major changes to the current flexibilities accorded panels and the Appellate Body with regard to *amicus* submissions, proposing that the DSU be formally amended to prevent them from soliciting or receiving such briefs. *See* Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, TN/DS/W/47 (Feb. 11, 2003); *see also* Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, TN/DS/W/92 (Mar. 5, 2008).

*amicus* submissions remains uncommon in private institutional fora.<sup>62</sup> As there are many fora for the settlement of investment disputes, parties that wish to avoid public participation can simply choose a less transparent option.

Once again, NAFTA Chapter 11 seems to be the most transparent amongst investment arbitration fora. Initially, Chapter 11 rules were silent on the question of *amicus* briefs, and the Tribunal in the *Methanex* case<sup>63</sup> first opened the door to these submissions, with reference to UNCITRAL rules. In 2003, the Free Trade Commission weighed in, issuing an official Statement on “Non-Disputing Party Participation”.<sup>64</sup> The Statement clarified questions about a NAFTA tribunal’s discretion to accept briefs, and set out a clear series of rules – both procedural and substantive – on the requirements to request leave to file a brief. This step has been billed as a major success, and even influenced the development of ICSID rules implemented in 2006.<sup>65</sup>

In the future, the WTO may wish to fine-tune its approach to *amicus* briefs, drawing upon lessons learned from certain fora outside the realm of pure international economic law. Certain human rights tribunals, notably the European Court of Human Rights [ECHR], as well as national courts, such as the US Supreme Court, have had a longer track record with *amici* and may offer valuable lessons learned for the WTO.<sup>66</sup> Although extensive comparisons remain beyond the scope of this article, it should be noted that these experiences have been considered to be positive, and the presence of *amici* seem to have generally assisted other fora in dealing with complex issues that may test the expertise of judicial decision makers.<sup>67</sup> A majority of these courts and tribunals have benefited from the presence of clear procedures enabling NGOs to submit briefs, and judicial decision makers to respond.<sup>68</sup> While it is important to remain mindful of the bias that could

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<sup>62</sup> See Magraw & Amerasinghe, *supra* note 31.

<sup>63</sup> See *Methanex Corp. v. the United States of America*, Final Award (Aug. 9, 2005).

<sup>64</sup> See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf> for details.

<sup>65</sup> Malanczuk, *supra* note 22, at 200.

<sup>66</sup> Caution may be warranted here, given the dramatically different natures and roles of these fora, as compared with the WTO. On the whole, however, we still feel that these older and more experienced dispute settlement bodies can offer helpful examples for the WTO DSB and other international tribunals.

<sup>67</sup> See generally, Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L L. 611 (1994); Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S.*, 38(4) LAW & SOC’Y REV. 807 (2004); and Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148(3) U. PA. L. REV. 743 (2000) [hereinafter Kearney & Merrill].

<sup>68</sup> Steve Charnovitz, *Nongovernmental Organizations in International Law*, 100(2) AM. J. INT’L L. 353 (2006).

potentially be created by over-reliance on *amicus* briefs, the experiences of other fora demonstrate that concerns in this regard have been somewhat exaggerated.<sup>69</sup> In the WTO itself, the initial “deluge” fears expressed by some Members have not been borne out thus far, and seem unlikely to materialize even if the DSB adopts a more structured and transparent approach in its engagement with *amicus*.

### C. *Public Participation in the WTO Adjudicating Bodies, Committees and Councils*

At the time of the WTO’s creation, working procedures for meetings, negotiations and the settlement of disputes were still steeped in a culture of diplomacy, meaning that the doors remained closed to the public at large. The informal, consensus-based decision-making and exclusive “green room” meetings that helped to make Uruguay-round negotiations a success also sparked tremendous controversy and public criticism.<sup>70</sup> Following the Seattle Ministerial, the WTO recognized that if it was to maintain legitimacy, it needed to open its doors to public observation and participation. The WTO’s response to this challenge has not just been another “charm offensive”; it has resulted in real and meaningful changes to the way the Secretariat, Members and the Dispute Settlement Body deal with an increasingly active body of stakeholders. However, this does not mean that the WTO has completely opened its doors to NGO and public participation. While a full discussion of all such efforts warrants its own separate work,<sup>71</sup> it is valuable to highlight two primary themes here: (1) the practice of conducting open hearings in certain disputes; and, (2) events and consultations organized for NGOs and other interested parties, particularly the WTO’s annual Open Forum.

#### 1. Public Participation in WTO Panels and Appellate Body hearings

##### (i) Existing Practices within the WTO

Open hearings are a relatively new practice in WTO dispute settlement, and still remain the exception, not the rule. The first such hearing was initiated in 2005 at the request of the main parties in the *US – Continued Suspension of Obligations*<sup>72</sup> and *Canada – Continued Suspension of Obligations*<sup>73</sup> cases. Notwithstanding the criticisms

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<sup>69</sup> Kearny & Merrill, *supra* note 67, at 743.

<sup>70</sup> See generally, Marceau & Pedersen, *supra* note 12, and Esteve, *supra* note 55.

<sup>71</sup> A detailed and up-to-date discussion of many of these practices can be found in Esteve, *supra* note 55, at 7-15.

<sup>72</sup> Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (US – Continued Suspension of Obligations)*, WT/DS320/R (adopted Mar. 31, 2008).

<sup>73</sup> Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (Canada – Continued Suspension of Obligations)*, WT/DS321/R (adopted Mar. 31, 2008).

and concerns voiced by several third parties to the dispute,<sup>74</sup> and in spite of the fact that the DSU Working Procedures states that panels shall meet in closed sessions,<sup>75</sup> the Panel justified the new procedure on the basis of DSU Article 12.1, which provides that “panels shall follow the Working Procedures in Appendix 3, *unless the panel decides otherwise after consulting parties to the dispute*” (emphasis added). This provision, paired with DSU Article 18.2, which states “nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public”, furnished the Panel with the legal basis for this new innovation.<sup>76</sup>

The Appellate Body took similar steps, also in the *US – Continued Suspension* case, although it was faced with a tougher interpretive challenge. DSU Article 17.10 holds that “the proceedings of the Appellate Body shall be confidential”.<sup>77</sup> The Appellate Body worked around this by stressing the parties’ right to make statements and positions available to the public, as established in DSU Article 18.2. The Appellate Body emphasized that “Article 18.2 provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute”.<sup>78</sup> Accordingly, the parties possess the discretion to forego confidentiality with regard to their statements, including those made in the course of a hearing. The Appellate

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<sup>74</sup> See Gabrielle Marceau, *Open hearings in the WTO Dispute Settlement Mechanism...the Current State of Play*, in DIREITO DO COMÉRCIO INTERNACIONAL: CAMINHOS E TENDÊNCIAS (Umberto Celli Jr. eds., Elsevier Editora Ltda., forthcoming 2011) [hereinafter Marceau (forthcoming 2011)].

<sup>75</sup> See DSU Appendix 3, ¶ 2.

<sup>76</sup> See Panel Report, *US/Canada – Continued Suspension of Obligations*, § 7.43-7.45, WT/DS320/AB/R [hereinafter *US/Canada*]. It should also be noted that DSU Article 14.1 states “panel deliberations shall be confidential”. The Panel side-stepped this issue by interpreting the term “deliberations” as a reference to the internal discussions of the panel and not the actual hearings or panel proceedings. As is noted in Marceau (forthcoming 2011), *supra* note 74:

[B]oth the French and Spanish versions of the DSU support this reading, with the respective translations “deliberations” and “deliberaciones” coinciding with this definition of “deliberations”. Further contextual support is found in the remainder of Article 14, which relates to the independent work of the panel, indicative of the drafters’ intention to exclude panel hearings from the scope of this provision. Additionally, the drafters’ use of the term “proceedings” in DSU Article 17.10 is further indication of the distinction between the meaning of the term “deliberations” and the broader interpretation of the term ‘proceedings’.

For the full Panel reasoning, see *US/Canada – Continued Suspension of Obligations*, § 7.47.

<sup>77</sup> The full text of Article 17.10 of the DSU: “The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.”

<sup>78</sup> *US/Canada*, *supra* note 76, at Annex IV, ¶ 4.

Body has revisited and reaffirmed this reasoning in a number of subsequent cases.<sup>79</sup> It should be stressed that open hearings remain essentially dependent on the will of the parties to a dispute.

To date, there have been 19 open hearings and arbitrations at the WTO,<sup>80</sup> with extremely favourable reviews. Early concerns that this practice would turn every proceeding into a “media circus”, and threaten Members’ ability to protect sensitive information, have proved unsubstantiated. The Secretariat has been able to protect third party statements and confidential information by facilitating public viewing via closed circuit television or delayed screening. In addition, non-Member attendance at the hearings has been surprisingly limited. The number of registrants at each hearing rarely breaches the 100-person mark, and the majority of attendees are students and academics. The number of NGOs in attendance usually remains in the single digits, with the exception of the *US/Canada – Continued Suspension* hearings, which were important not only because of the novelty of the open hearing practice, but also because they dealt with public health issues.<sup>81</sup> One of the important, if under-reported side-impacts of the open hearing procedure is that Members themselves are able to attend, which is traditionally not possible unless they are the litigants or third parties in the particular dispute. The WTO has yet to make the leap toward making these open hearings available via a delayed video feed on the Internet. Some suggest that to do so would contribute to the WTO’s reputation as a transparent organization. It would certainly facilitate participation by representatives from developing country WTO Members who are otherwise unable to attend in person.

As James Bacchus once rather drolly noted, WTO dispute settlement “is a tedious, boring, exhausting process, and if the world saw it, they would be bored”.<sup>82</sup> Experience with open hearings seems to confirm this view. Unfortunately, the WTO website does not provide any statistics on the number of

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<sup>79</sup> See *Australia – Apples*, WT/DS367/AB/R, Annex III, ¶ 4(a); *US – Zeroing* (Article 21.5 – Japan), WT/DS322/AB/RW, Annex II, ¶ 4(a); *US – Zeroing* (Article 21.5 – EC), WT/DS294/AB/RW, Annex III, ¶ 3; *US – Continued Zeroing*, WT/DS350/AB/R, Annex III, ¶ 3; *EC – Bananas*, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, Annex IV, ¶ 4; and *US/Canada*, *supra* note 76, at Annex IV, ¶ 4.

<sup>80</sup> Esteve, *supra* note 55, at 15, *citing* WTO data from 2010.

<sup>81</sup> Public data on the WTO website indicates that 27 NGOs registered to attend the first hearing on 12<sup>th</sup> September 2005, and 10 registered to attend the second, on 2<sup>nd</sup> October.

<sup>82</sup> James Bacchus, *WTO Appellate Body Roundtable*, in *NEW WORLD ORDER OR A NEW WORLD DISORDER? TESTING THE LIMITS OF INTERNATIONAL LAW: PROCEEDINGS OF THE NINETY-NINTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 182, 183 (Laurence R. Helfer & Rae Lindsay eds., Am. Soc’y Int’l L. 2005) [hereinafter Bacchus].

participants that remain throughout the entirety of each hearing, but if it were available, this data would likely show that attendance dwindles significantly after the first day. By way of a personal anecdote, one of the authors attended the delayed broadcast of the opening statements made at the oral hearing in the *EC – Large Civil Aircraft* dispute,<sup>83</sup> held on November 18, 2010. Nearly 100 people were in attendance at the start of the meeting, but after only a few hours, most had departed, and the broadcast was playing to an empty house. However, this should not dissuade interested Members from taking this initiative in the future; boring or not, this openness – according to Bacchus and many others – will continue to demonstrate that WTO dispute settlement is “an objective, thorough and fair process in which jurists consider every argument that's made however silly it may be, at considerable length”.<sup>84</sup>

(ii) Comparisons with Other Fora

In the field of international economic law, the WTO was an early trendsetter in its practices with open hearings. Although NAFTA made similar advances around the same time,<sup>85</sup> the WTO was possibly the earliest forum dealing with economic disputes to offer public access to hearings. In recent years, several fora have also begun conducting open hearings, and some have surpassed the WTO's transparency practices in this area. In all new US free trade agreements, hearings are open to the public by default.<sup>86</sup> Live web-casts have been facilitated in two recent ICSID proceedings, brought under the auspices of the Dominican Republic-Central America Trade Agreement (DR-CAFTA) investment chapter.<sup>87</sup> In other public international legal fora, open hearings have been the standard for many years. The ECHR and the ICJ both allow for public access, and both provide options for viewers to have access to an online webcast of proceedings. While

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<sup>83</sup> Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (June 30, 2010).

<sup>84</sup> Bacchus, *supra* note 82.

<sup>85</sup> Open hearings have been initiated under NAFTA Chapter 11, starting with the *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, which took place in December 2005.

<sup>86</sup> This policy was established as part of the US Trade Act of 2002. See US PUBLIC LAW 107–210 (Aug. 6, 2002), 116 STAT. 996, Div. B, § 2102. *Foreign Investment*, TRADE NEGOTIATING OBJECTIVES, at Part B(3).

<sup>87</sup> *Pac Rim Cayman LLC v. Republic of El Salvador* case (ICSID Case No. ARB/09/12), and *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23). In addition to these live webcasts, the proceedings in *Pac Rim Cayman LLC* remain available to the public on the ICSID website, available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement60>

most WTO Members are not likely to favour open hearings for the foreseeable future, perhaps the experiences of other courts and tribunals can help assuage any remaining fears that Members may have about the abuse of such a privilege.

## 2. Public Participation in WTO Negotiation Bodies and other Committees

### (i) Existing Practices within the WTO

The issue of NGO participation in substantive discussions and negotiations has long been a focus of attention in the international trading system, dating back to initial (failed) attempts to create an International Trade Organization [ITO]. In fact, Article 87:2 of the Havana Charter provided that “the Organization may make suitable arrangements for consultation and co-operation with non-governmental organisations concerned with matters within the scope of this Charter”.<sup>88</sup> Initially, some hoped that the ITO would follow the example set by the United Nations and its Economic and Social Council [ECOSOC], which established clear rules for NGO consultation and attendance at meetings and negotiations.<sup>89</sup> Although a variety of proposals were put forward, they did not materialize into concrete action, and throughout the GATT years, NGOs were left to pursue ad-hoc opportunities to contribute to GATT negotiations.<sup>90</sup> However, what is most notable from this experience is “the genuine belief that the ITO needed the expertise and experience of specific NGOs to advance and implement the trading agenda”,<sup>91</sup> a consideration that remains just as relevant for today’s WTO. In the GATT and still today in the WTO, there are no WTO meetings that are open to NGOs and other public participation. The Secretariat regularly holds briefing sessions with NGOs to inform them of the state-of-play on various topics, but NGOs never physically participate in any day-to-day working meetings of the WTO.

In recognition of the critical role that NGOs can and do play, the WTO Secretariat and Members now host innumerable public information sessions, consultations and discussions with representatives of the NGO community and academia.<sup>92</sup> Ever since the Singapore Ministerial conference, NGO attendance has

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<sup>88</sup> Havana Charter art. 87, ¶ 2.

<sup>89</sup> The basis for this is Article 71 of the UN Charter, which states: “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations, which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”

<sup>90</sup> Marceau & Pedersen, *supra* note 12, at 4.

<sup>91</sup> *Id.*

<sup>92</sup> For a detailed summary of these various events, see Esteve, *supra* note 55, as well as Marceau & Pedersen, *supra* note 12. The Secretariat-initiated symposia on Trade and the



now become a regular feature at Ministerial Conferences, although this extends only to the main plenary sessions, and not to any other meetings. WTO Committee and Working Group sessions remain closed to outside observers, and this practice continues to draw criticism from the NGO community. At present, the most important opportunity for NGO participation and consultation is the WTO Public Forum,<sup>93</sup> an event that is held annually. This event warrants a few additional remarks.

The Public Forum provides a platform for all stakeholders to participate in a frank exchange of views on key topics. Attendees include Member representatives, NGOs, industry associations, academics and students. Information and feedback sessions serve to dispel the myth that the WTO is a closed box, and add to the Organization's growing "culture of openness". Perhaps most importantly, NGO participants are able to take the lead in the discussions, and organize their own information sessions, which are aimed to educate Members on issues of importance for the international community. During the 2010 Public Forum, NGO representatives comprised the biggest attendance block, with over 300 participants.<sup>94</sup> Other substantial groups included students, business representatives, and academics.<sup>95</sup> While representatives from WTO Member governments also make up a substantial participant bloc,<sup>96</sup> there is some concern that Member turnout is still inadequate.<sup>97</sup> Another significant concern is that the program of the Public Forum does not necessarily reflect ongoing negotiations and priority issues under discussion in various committees and working groups. Thus, a disconnect remains between the NGO agenda and that of the WTO membership.

#### (ii) Comparison with Other Fora

In terms of public outreach, the WTO goes quite a bit further than other fora in the realm of international economic law. It supports a dedicated section its

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Environment have proved particularly beneficial in this regard.

<sup>93</sup> See [http://www.wto.org/english/forums\\_e/public\\_forum11\\_e/forum11\\_background\\_e.htm](http://www.wto.org/english/forums_e/public_forum11_e/forum11_background_e.htm).

<sup>94</sup> WTO 2010 Annual Report.

<sup>95</sup> *Id.* Listed by size of participating group.

<sup>96</sup> According to the Report of the 2010 Public Forum, 135 government representatives were in attendance, at least for a portion of the event. The WTO does not provide precise data on the total number of Members in attendance, and some may send multiple representatives to the event. See The Report of the 2010 Public Forum, at 4, *available at*: [http://www.wto.org/english/res\\_e/booksp\\_e/public\\_forum10\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/public_forum10_e.pdf) [hereinafter Report].

<sup>97</sup> Data published by the WTO suggests that not all of the WTO's 157 Members are represented at the Public Forum. Indeed, participation may actually be declining. In 2010, only 135 government representatives attended the Public forum (*see* Report, *supra* note 96). This is down from well over 150 government representatives in attendance in 2006 (*see* [http://www.wto.org/english/forums\\_e/public\\_forum\\_e/forum06\\_e.htm](http://www.wto.org/english/forums_e/public_forum_e/forum06_e.htm)).

website, addressing issues that are or special relevance for NGOs.<sup>98</sup> But as noted above, this is a bit like comparing apples with oranges; the WTO is more than just a forum for the settlement of disputes, and also engages in rule making. If we expand the comparison to other international government organizations (chiefly UN agencies), the WTO compares less favourably. As noted above, UN organizations have had a long history of collaboration with NGOs thanks, in large part, to the ECOSOC facilitation of NGO “consultative status”.<sup>99</sup> This trend only accelerated in 1992 with the UN Conference on Environment and Development, which, according to one scholar, ushered in a new period of NGO “empowerment” at the negotiating table.<sup>100</sup> Currently, NGOs can participate in policy-making at a range of UN institutions. Other organizations have set up advisory groups offering NGOs with a formal opportunity to take part in regular consultations.<sup>101</sup> While this does not mean that NGOs and governments are always equal partners in the negotiations at other international organizations,<sup>102</sup> it does highlight the fact that the WTO may be lagging behind, and should consider alternatives that would allow for greater NGO consultation and participation.

#### IV. CONCLUSION AND RECOMMENDATIONS FOR THE FUTURE

The efforts taken by the WTO to increase transparency over the past decade are far too numerous to fully discuss in such a short article. However, it should be apparent from the above examples that the WTO is by no means a secretive organization, bent on excluding the public from taking part in the debate about trade issues that impact the interests of the international community at large. Quite the contrary, the WTO has gone to great lengths to adapt its traditional Member-focused structure and rules to be as transparent and open as possible. As Lothar Ehring puts it: “justice is not only done at the WTO, but it can also be seen to be done.”<sup>103</sup> In the field of international economic law, the WTO remains a transparency leader, and hopefully, other fora can learn from the WTO’s

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<sup>98</sup> See [http://www.wto.org/english/forums\\_e/ngo\\_e/ngo\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm).

<sup>99</sup> At the time of publication of this article, approximately 3,400 NGOs enjoy ECOSOC status. A full list can be found at: <http://csonet.org/content/documents/E2010INF4.pdf>.

<sup>100</sup> Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 265 (1997).

<sup>101</sup> For further description of NGO consultative and participatory opportunities, see *Accreditation Schemes and Other Arrangements for Public Participation in International Fora* (ICTSD 1999), available at: <http://ictsd.org/downloads/2008/04/accreditation.pdf>

<sup>102</sup> It is conceivable that, in some circumstances where NGOs have full access to a majority of formal meetings and negotiations, this may push governments to negotiate on the sidelines, and in less-than-transparent, informal settings.

<sup>103</sup> Lothar Ehring, *Public Access to Dispute Settlement Hearings in the World Trade Organization*, J. INT’L ECON L. 1, 1-14 (2008).

experience, but also share best-practices as well.

Despite the WTO's success in increasing transparency in some areas of its work, much of its activity, especially in the dispute settlement area, remains confidential. In that regard, observers of the system have offered several key recommendations for the future.

In the area of dispute settlement, some have pressed for the following:

1. WTO Members should take the initiative to make their submissions available to the public, sanitizing any confidential or proprietary information. The United States is already taking this initiative as a matter of policy. Increased Member willingness to do so is thus encouraged so as to help prospective *amici* provide more useful information to panels and the Appellate body. Such initiative would also do a great deal to dispel the remaining public concerns about the WTO dispute settlement process.
2. There is a need to negotiate clear rules regarding the acceptance of *amicus curiae* briefs. Members have not done so, despite repeated calls for such guidelines,<sup>104</sup> leaving prospective *amici* and litigants alike in a state of continuing uncertainty. The WTO Appellate Body began to consider such rules in the context of the *Asbestos* dispute,<sup>105</sup> and this early initiative could serve as a basis for further work. Such rules would include both procedural guidelines (for instance, rules pertaining to the timeline for the submission of briefs) as well as substantive requirements. Such an effort would not only benefit the NGOs who wish to play a valuable role in a dispute, it would ensure that WTO Members – particularly those from developing countries – are prepared to respond to the arguments raised in briefs, and can better understand how they impact judicial decision making.
3. Panels and the Appellate Body should take a predictable and uniform approach in the treatment and discussion of *amicus* briefs, both in terms of why they are accepted for consideration (or not), and how they are used. In order to ensure maximum transparency, reports should address the main arguments put forward in *amicus* briefs, which will allow Members and the public to understand how they may influence the outcome of a case.
4. All open hearings should now be made available to the public by webcast. This technology is now established, and is already in use in other fora. In

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<sup>104</sup> See, *inter alia*: Marceau & Stilwell, *supra* note 33; Mavroidis, *supra* note 34; Magraw & Amerasinghe; *supra* note 31; Magraw et al., *supra* note 18, and Ala'i, *supra* note 33.

<sup>105</sup> See *EC – Asbestos*, *supra* note 53.

addition to furthering the WTO's reputation as a transparent organization, this practice would also ensure that developing country interests are not left out.

For the working committees of the WTO:

5. WTO Members should consider additional, systematic avenues for the participation of and consultation with NGOs. If the membership is not prepared to open committee and working group meetings to NGO participation at this time, the WTO should make certain that the agendas of other meetings – particularly the Public Forum – reflect the important issues under consideration in Member-only discussions.