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## WTO COSMOPOLITICS

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### I. INTRODUCTION

The inspiration for this Article comes from a speech by European Commissioner for Trade Pascal Lamy in February 2001 entitled *Harnessing Globalisation: Do We Need Cosmopolitics?*<sup>1</sup> Noting that the globalization debate lacks questions of politics, Lamy says that “conventional politics” does not capture the essence of the problem. Instead, Lamy proposes a better word—“cosmopolitics.” Referencing Immanuel Kant among other writers, Lamy avers that cosmopolitics is needed today to “organise and mediate between different interests” and to reflect public opinion. Improved global governance, he maintains, should be found in different international institutions “pulling on cosmopolitical constituencies for support.”

Lamy has hit upon the right word and the right concept to describe and reorient decisionmaking in the World Trade Organization (WTO) as well as in other international organizations. In his short speech, Lamy could not elaborate on this theme. So what follows is my own attempt to build on Lamy’s insight.

The thesis of this Article is that the WTO needs more “cosmopolitics,” which I define as global political action transcending a strict state-to-state, or multilateral, basis.<sup>2</sup> While

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1. Pascal Lamy, Speech at London School of Economics (Feb. 1, 2000) (transcript available at [http://europa.eu.int/comm/trade/speeches\\_articles/spla86\\_en.htm](http://europa.eu.int/comm/trade/speeches_articles/spla86_en.htm)). Lamy returned to this theme in a speech in November 2001, when he suggested the need for “*Weltordnungspolitik*,” or a world public order, regarding cosmopolitics. Pascal Lamy, Speech at German Council on Foreign Relations (Nov. 27, 2001) (transcript available at [http://europa.eu.int/comm/trade/speeches\\_articles/spla86\\_en.htm](http://europa.eu.int/comm/trade/speeches_articles/spla86_en.htm)).

2. For a different definition, see Bruce Robbins, *Introduction Part I: Actually Existing Cosmopolitanism*, in *COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION* 1, 12-13 (Pheng Cheah & Bruce Robbins eds., 1998) (calling cosmopolitics “the genuine striving toward common norms and mutual translatability that is also part of multiculturalism”); see also Pippa Morris, *Global Governance and Cosmopolitan Citizens*, in *GOVERNANCE IN A GLOBALIZING*

cosmopolitics is already present to some extent in the WTO, far greater effort will be required to respond to public opinion and draw support from pluralist constituencies. WTO cosmopolitics is a departure from the tradition under the pre-WTO trading system, the General Agreement on Tariffs and Trade (GATT). In 1970, Kenneth Dam wrote that even when addressing major issues of policy, the “informal rules” of the GATT “club” called for resolving problems “without undue recourse to international public opinion.”<sup>3</sup> Thirty years later, the GATT’s successor, the WTO, operates with more formal rules, is less club-like, and is influenced by a vocal, public politics.

Like any politics today, cosmopolitics has to be tested against democratic norms. So calling for the infusion of cosmopolitics into the WTO is another way of saying that WTO decisionmaking processes need to become more democratic vis-à-vis the public. Whether and how to do so is one of the most vexing issues in international policy.

The conclusion of this Article is that the public debate on trade should be moved upward as much as possible, from the national to the international plane. Obviously, WTO cosmopolitics cannot replace national trade politics because the national level is where voters elect politicians. But the debate leading up to decisionmaking in the WTO can become more cosmopolitical and less de-centered in 144 member-nation polities. Such a reformation especially is needed because the advent of new trade negotiations—approved by the WTO at Doha, Qatar, in November 2001—will lead to crucial decisionmaking by the WTO during the next few years.

This Article is divided into four parts. Part I is this introduction. Part II sketches some of the philosophical origins of the usage of the term “cosmopolitics.” Part III explains why cosmopolitics generally is desirable in international organizations, and particularly vital in the WTO. Part IV discusses the

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WORLD 155, 159 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) (defining cosmopolitans as individuals who identify more broadly with their continents or with the world as a whole and who have greater faith in the institutions of global governance).

3. KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 385 (1970); *see also* GERARD CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY* 51 (1965) (calling the GATT a club rather than an international organization or commercial parliament).

attributes of cosmopolitics and looks briefly at the WTO controversy over amicus curiae briefs. Part V concludes the article.

## II. THE COSMOPOLITICAL TRADITION IN THE WEST

The intellectual history of “cosmopolitics” deserves more scholarship than it has received. Since no synthesis has come to the author’s attention, I briefly will discuss a few currents of thinking, including the views of Kant (1795), Friedrich List (1841), Norman Hill (1929), and Herbert Shenton (1933).<sup>4</sup> I then will note the contribution of one contemporary analyst, political scientist David Held.

In his celebrated essay “Perpetual Peace,” Kant introduces the idea of “cosmopolitan law,” which reflects the way that “men and nations” stand in “mutually influential relations.”<sup>5</sup> Kant sees a distinction between cosmopolitan law and two other types of “just constitution,” civil law and the Law of Nations.<sup>6</sup> Kant points out that all three are necessary to achieving perpetual peace.<sup>7</sup> One principle common to the constitutional trichotomy is publicity. Kant posits that “[a]ll actions that affect the rights of other men are wrong if their maxim is not consistent with publicity.”<sup>8</sup>

4. The roots of cosmopolitanism go back to Stoic philosophy of the 4th century B.C. Thus, much is left out in starting Part II with Kant. For background information on cosmopolitanism and Stoic philosophy, see Edward Spence, Address to the Second International Conference of the Australian Institute of Computer Ethics (Nov. 2000) (transcript available at <http://www.geocities.com/stoicvoice/journal/0202/es0202a1.htm>) (“Cosmopolitanism is a central belief in Stoic philosophy.”).

5. IMMANUEL KANT, *To Perpetual Peace: A Philosophical Sketch*, in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107, 111-12 note (Ted Humphrey trans., 1983). I have substituted “law” for “right” in some places following the suggestion of some Kant scholars. See James Bohman & Matthias Lutz-Bachmann, *Introduction to PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL* 1, 20 n.2 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

6. KANT, *supra* note 5, at 112 note.

7. *Id.* Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT’L L. & POL. 753, 764 (1999) (explaining Kant’s view that peace requires an interlocking system of national and international constitutional restraints).

8. KANT, *supra* note 5, at 135.

In addition to endorsing publicity, Kant calls for governments to consult with the public. Specifically, he says that “[t]he maxims of philosophers concerning the conditions under which public peace is possible shall be consulted by nations armed for war.”<sup>9</sup> Admitting that it may seem “humiliating for the legislative authority of a nation . . . to seek instruction from *subjects* (the philosophers) concerning the principles on which it should act toward other nations,” Kant nonetheless insists that it is “very advisable to do so.”<sup>10</sup> Governments need not give precedence to such advice from philosophers, Kant concedes. The important point is “only that they be *heard*.”<sup>11</sup> With piercing precognition, Kant asserts no “special agreement” among nations is needed to effectuate such consultation because the offering of advice is “already present as an obligation in universal (morally legislative) human reason.”<sup>12</sup>

What Kant means by cosmopolitan law is illuminated in his discussion of international trade. Kant hypothesizes that “[t]he *spirit of trade* cannot coexist with war, and sooner or later this spirit dominates every people.”<sup>13</sup> Nevertheless, Kant condemns some of the colonization practices that were associated with international trade, such as the subjugation of the natives.<sup>14</sup> He finds these practices offensive because in cosmopolitan law, a “community widely prevails among the Earth’s peoples,” and thus “a transgression of rights in *one* place in the world is felt *everywhere*.”<sup>15</sup> As Charles Covell has pointed out, Kant believed that the full realization of cosmopolitan law “would serve to afford a basic minimum of judicial recognition to each individual as member, or citizen, of a world community.”<sup>16</sup>

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9. *Id.* at 126. See James Bohman, *The Public Spheres of the World Citizen*, in PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL, *supra* note 5, at 179, 181 (noting that in Kant’s cosmopolitan public sphere, “the public opinions of world citizens can be . . . recognized in such a way that even the supreme political authorities of the state cannot avoid acknowledging them”).

10. KANT, *supra* note 5, at 126.

11. *Id.*

12. *Id.*

13. *Id.* at 125.

14. *Id.* at 119.

15. *Id.* at 119.

16. CHARLES COVELL, KANT AND THE LAW OF PEACE 161 (1998).

Kant's essay defines the normative basis for cosmopolitics.<sup>17</sup> First, Kant's essay imagines new cosmopolitan law that provides legal space for men and nations to influence each other.<sup>18</sup> Second, he underlines the importance of publicity, or what today is termed "transparency." Third, he calls for governments to consult philosophers regarding international relations. Fourth, he points out that governments need not agree in advance to seek public input because the philosopher has a moral obligation to speak out. As Kant observes, philosophers "do it of their own accord already, if only one does not forbid it."<sup>19</sup>

In *The National System of Political Economy*, Friedrich List addresses the differences between the political economy of a nation and a "cosmopolitical economy" of the earth.<sup>20</sup> List rejects the earth-wide approach as impractical. While agreeing that in a confederation of all nations, the principle of international free trade would be justified, List points out that such a confederation does not yet exist.<sup>21</sup> Given contemporary conditions in the world, he fears that free trade in manufactured products would lead to "a universal subjection of the less advanced nations to the supremacy of the predominant manufacturing, commercial, and naval power" (i.e., Great Britain).<sup>22</sup> Thus, List condones the use of protection to develop the na-

17. See Daniele Archibugi, *Immanuel Kant, Cosmopolitan Law and Peace*, 1 EUROPEAN J. INT'L REL. 429, 432 (1995) (stating that Kant's cosmopolitan law provides a foundation "for projects for the transformation of international organizations"); Pheng Cheah, *Introduction Part II: The Cosmopolitical—Today*, in COSMOPOLITICS, *supra* note 2, at 23 (Kant's "vision remains the single most important philosophical source for contemporary normative theories of international relations, including accounts of global civil society and the international public sphere."). For a contrary view on Kant's cosmopolitan credentials, see Thomas C. Walker, *The Forgotten Prophet: Tom Paine's Cosmopolitanism and International Relations*, 44 INT'L STUD. Q. 51 (2000) (suggesting that Paine was more of a cosmopolitan than Kant).

18. Archibugi, *supra* note 17, at 430 ("cosmopolitan law opens a channel which allows international society, including individuals, to interfere in the internal affairs of each state in order to protect certain basic rights").

19. KANT, *supra* note 5, at 126.

20. FRIEDRICH LIST, *THE NATIONAL SYSTEM OF POLITICAL ECONOMY* 119 (Sampson S. Lloyd trans., Longmans, Green & Co. 1966) (1841). See DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 124-28 (1996) (discussing and critiquing List).

21. LIST, *supra* note 20, at 122-23, 126.

22. *Id.* at 126.

tional economy until all nations reach the same stage of industrial development.<sup>23</sup> Then, a union of nations would be positioned to promote “true freedom of trade,” he posits.<sup>24</sup>

List does not actually address the “politics” of cosmopolitanism; he examines the political economy of trade from a historical perspective. Yet his work is important to the cosmopolitan idea because he utilizes the term, and also because he presents a philosophy of protection that resonates strongly in WTO discourse. The WTO endorses “special and differential treatment,” which allows developing countries to retain import barriers for an extended period.<sup>25</sup> List would find intelligible the contemporary debate about trade and globalization because he was one of the earliest publicists to argue that the theoretical benefits of free trade might not accrue in reality to some countries because of asymmetries in economic and political power. Unlike many of the current critics of globalization, however, List was optimistic regarding the benefits of technology.<sup>26</sup>

Norman Hill was a political scientist and early analyst of international organizations. His scholarship takes note of the relationship between private and public international conferences. In doing so, Hill distinguishes the public governmental conference, which he views as “internationalism,” from the private international conference, which he views as “cosmopolitanism.”<sup>27</sup> Hill sees cosmopolitanism as “an attempt of peoples to co-operate on the basis of interests apart from nationality.”<sup>28</sup>

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23. *Id.* at 127, 131-32.

24. *Id.* at 127.

25. Americo Beviglia Zampetti, *A Rough Map of Challenges to the Multilateral Trading System at the Millennium*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 34, 38 (Roger B. Porter et al. eds., 2001) (calling special and differential treatment a main basis of the WTO approach to economic development).

26. *See* LIST, *supra* note 20, at 128-29 (noting advances in, and potential benefits from, agricultural chemistry and potential new energy discoveries).

27. NORMAN L. HILL, *THE PUBLIC INTERNATIONAL CONFERENCE: ITS FUNCTION, ORGANIZATION AND PROCEDURE* 164-65 (Graham H. Stuart ed., Stanford University Press 1929).

28. *Id.* at 165.

Herbert Shenton was a sociologist and author of the little-known volume *Cosmopolitan Conversation*.<sup>29</sup> The principal topic of the book is how people speaking different languages communicate in international conferences. This study provides an empirical analysis of public and private international conferences. In the opening chapter, Shenton distinguishes between “International Conversations” among governments and “Cosmopolitan Conversations” among private individuals. Shenton characterizes cosmopolitan conversation as “a new social phenomenon that may lead to world-wide understanding and world-wide programs of cooperation.”<sup>30</sup>

Shenton recognizes the implications of this new phenomenon for the development of legal norms. Taking note of how common law and governmental regulation are rooted in “folkways,” Shenton explains that the “new habit of cosmopolitan conversation is in a sense a new folkway . . . .”<sup>31</sup> He predicts that as these conversations become institutionalized, “they may in time develop new inter-state ways.”<sup>32</sup> In other words, Shenton foresees how cosmopolitan conversation could mature into customary practice by states.

Of contemporary theorists, David Held is the most prolific advocate of a “cosmopolitan model of democracy.”<sup>33</sup> Held insists that “democratic public law within a political community requires democratic law in the international sphere.”<sup>34</sup> In his view, the “institutional solution to the problems of democracy in the global order” requires the “opening of international governmental organizations to public scrutiny and the democratization of international *functional* bodies . . . .”<sup>35</sup>

In summary, Part II provides some historical context for appreciating Lamy’s effort to promote “cosmopolitics” as an orienting concept for improving global governance. With its

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29. HERBERT NEWHARD SHENTON, *COSMOPOLITAN CONVERSATION: THE LANGUAGE PROBLEMS OF INTERNATIONAL CONFERENCES* (Columbia University Press 1933).

30. *Id.* at 12. Shenton cites Hill’s usage of cosmopolitanism.

31. *Id.* at 12-13.

32. *Id.* at 13.

33. For a concise summary of the model, see DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* 271-72 tbl.12.1 (1995).

34. *Id.* at 227.

35. *Id.* at 272-73.

roots in philosophy, law, economics, political science, and sociology, the cosmopolitan idea will invite more interdisciplinary commentary in the years ahead.

### III. THE NEED FOR COSMOPOLITICS

The conventional concept of international politics might be called “ortho-politics” to signify a straight, correct relationship. Each state is perceived as a hierarchy, and individuals participate in international policymaking upward through their own governments. The unitary states then touch only at the top. The same idea is reflected in older concepts of international law. As Philip Jessup explained in 1928, the traditional view was that states are a “series of detached pyramids having contact only at the apex of each, that is, solely through their governments.”<sup>36</sup> This hoary idea continues to exert influence on governmental thinking: In 2001, U.S. President George W. Bush told business leaders “[I]n order for me to be effective on trade, I need trade promotion authority. I need the ability to speak with a single voice for our country.”<sup>37</sup>

Ortho-politics is inadequate for two reasons: One, it is a poor description of reality. Two, it is normatively flawed.

Hardly anyone would assert today that contemporary international politics and international law remain exclusively state-centric. The importance of international organizations, the expansion of transgovernmental regulatory coordination,<sup>38</sup> and the enormous contributions of nongovernmental organizations (NGOs) to international organizations (and particularly human rights law) all demonstrate that the traditional pyramid idea is outdated.<sup>39</sup>

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36. Philip C. Jessup, *The Functional Approach as Applied to International Law*, in PROCEEDINGS OF THE THIRD CONFERENCE OF TEACHERS OF INTERNATIONAL LAW, 1928, at 134, 137 (1928).

37. Remarks by the President to the Business Roundtable, 37 WKLY. COMP. PRES. DOC. 946, 949 (June 25, 2001).

38. An example is the new Global Forum of Food Safety Regulators. For the reasons behind the establishment of a Global Forum of Food Safety Regulators, see [http://www.foodsafetyforum.org/global/intro\\_en.htm](http://www.foodsafetyforum.org/global/intro_en.htm).

39. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 450 (2000) (reporting that in many issue-areas, individuals and private groups are the actors most responsible for new international agreements and for resisting new agreements); Dinah L. Shelton, *Human Rights*, in MANAGING GLOBAL ISSUES: LESSONS LEARNED



Actually, its relevance began to erode decades ago. Even as he devised the pyramid image in 1928, Jessup was quick to criticize it. It is necessary to realize, he said, "that our State pyramids have been drawn together so that contacts now exist, not only at the apex but throughout the length and breadth of every side."<sup>40</sup> It is one thing for analysts to stand by the realism that states made international policy and authored international law during the 19th and 20th centuries. It is quite another to make the untenable assertion that this was purely a pyramidal process for officialdom that excluded the business and civic sectors.

A brief look at the early development of the world trading system demonstrates the practice of cosmopolitics. The first major multilateral trade treaty was the Convention of 1927 for the Abolition of Import and Export Prohibitions and Restrictions.<sup>41</sup> During the conference that wrote this Convention, the International Chamber of Commerce (ICC) was permitted to send a four-person delegation.<sup>42</sup> Such participation was not an anomaly because throughout the 1920s, the ICC played a significant role in many economic policy activities of the League of Nations.<sup>43</sup> In 1940, Huston Thompson developed a proposal for an International Trade Tribunal.<sup>44</sup> Thompson's plan provided for the "international public" to "become articulate" before the Tribunal, and he proposed that groups such as fabricators or consumers should have standing to initiate hearings.<sup>45</sup> During the mid-1940s, many NGOs supported the

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424, 442 (P.J. Simmons & Chantal de Jonge Oudraat eds., 2001) ("Nonstate actors have been observers/participants in intergovernmental bodies since the beginning of the modern human rights movement and have often had an impact on the outcome.").

40. Jessup, *supra* note 36, at 137.

41. International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 97 L.N.T.S. 393 (not in force).

42. International Conference for the Abolition of Import and Export Prohibitions and Restrictions, League of Nations Doc. D.559 M.201 1927 at 45 (1927).

43. *See generally* GEORGE L. RIDGEWAY, *MERCHANTS OF PEACE: TWENTY YEARS OF BUSINESS DIPLOMACY THROUGH THE INTERNATIONAL CHAMBER OF COMMERCE* (Columbia University Press 1938).

44. Huston Thompson, *An International Trade Tribunal*, 34 ASIL PROC. 1, 6 (1940). Thompson had been Chairman of the U.S. Federal Trade Commission.

45. *Id.*

establishment of a better trading system. For example, the Catholic Association for International Justice condemned "isolationist protective tariff barriers" and called for "international economic agreements of world-wide scope."<sup>46</sup> At the United Nations Conference on Trade and Employment (of 1946-48) that drafted the Charter of the International Trade Organization (ITO), several NGOs (e.g., the ICC, the International Co-operative Alliance, and the World Federation of Trade Unions) were invited to send observers, and did so.<sup>47</sup> The ITO Charter contained a provision providing for "consultation and co-operation" with NGOs, and in 1948 and 1949, the Interim ITO took steps to implement this provision.<sup>48</sup> A draft report suggested that the ITO take "full advantage" of the knowledge and experience of NGOs.<sup>49</sup> (The ITO failed to come to fruition, however.)<sup>50</sup> Although the GATT contained no provision regarding NGO participation, the Contracting Parties initially continued the pre-war practice of close intergovernmental collaboration with the ICC.<sup>51</sup> In 1955, the GATT governments sought to establish an Organization for Trade Cooperation.<sup>52</sup> The draft international agreement for the Organization included a provision for consultation and cooperation with NGOs.<sup>53</sup> (As with the ITO, however, the governments failed to

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46. ELIOT GRINNELL MEARS, A TRADE AGENCY FOR ONE WORLD 50 (Citizens Conference on International Economic Union 1945) (quoting statement of the Catholic Association for International Justice).

47. Steve Charnovitz & John Wickham, *Non-Governmental Organizations and the Original International Trade Regime*, J. WORLD TRADE, Oct. 1995, at 111, 113.

48. *Id.* at 115-20.

49. *Id.* at 120-21.

50. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 7 (Butterworth Legal Publishers 1993) (1991).

51. See WILLIAM ADAMS BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 297 (The Brookings Institution 1950) (noting cooperation with ICC on transport); CURZON, *supra* note 3, at 41 (noting that the ICC could submit memoranda to the GATT); World Trade Organization, 1 GUIDE TO GATT LAW AND PRACTICE at 280 (1995) (discussing 1951 ICC proposal on commercial samples and noting that it led to a convention adopted by GATT Contracting Parties).

52. DAM, *supra* note 3, at 337.

53. *Organization for Trade Cooperation: Hearing on H.R. 5550 Before the House Comm. on Ways and Means*, 84th Cong. 1356-1357 (1956) (text of the

consummate this Organization.)<sup>54</sup> Thus, the institutional history from 1927 to 1955 cannot be reconciled with the myth that the trading system always has been conceived as purely intergovernmental with no participatory space for non-state actors.

This historical practice of cosmopolitics implies that there is a strong normative basis for it, and yet the democratic dimension of international organizations remains underdeveloped in political theory. Robert Dahl has written, "I believe we should openly recognize that international decision-making will not be democratic."<sup>55</sup> Dahl reaches this conclusion by arguing that the distance of delegation required makes it impractical to apply the ideas and practices of democratic government to international organizations, institutions, and processes.<sup>56</sup> In Dahl's view, international organizations are "bureaucratic bargaining systems" that have a "highly attenuated kind of responsiveness" to the governed and are too attenuated to be democratic.<sup>57</sup>

With due respect to one's former professor, Dahl's democratic minimalism seems overly pessimistic. One can lament that international organizations are too attenuated from the people to be democratic. Or, as other analysts do, one can try to refute the complaint about a democratic deficit by denying the existence of a global demos, or community, to which an international organization could be responsive. Yet neither response is constructive. The fact is that international organizations are essential and, for as long as such organizations have existed, activist individuals and NGOs have worked to lessen the attenuation of responsiveness to public interests.<sup>58</sup> They

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agreement on the Organization for Trade Cooperation and article-by-article analysis).

54. DAM, *supra* note 3, at 338.

55. Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in DEMOCRACY'S EDGES 19, 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); *cf.* Martin Wolf, *Of Tuna, Turtles and Red Herrings*, FIN. TIMES, Nov. 17, 1999, at 27 ("As an agreement among states, the WTO cannot itself be democratic.").

56. Dahl, *supra* note 55, at 30-32. He says that the extent of delegation to international organizations goes beyond any acceptable threshold of democracy. *Id.* at 32.

57. *Id.* at 33-34.

58. See generally Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997) (tracing the history

have devised methods for connecting international organizations more directly to citizens. Several decades ago, David Mitrany already had taken note of the role of NGOs and the valuable part they could play in canalizing democratic initiative and control in specialized international agencies.<sup>59</sup> Today, the notion that international organizations can operate as islands of non-democracy is no longer acceptable, particularly as the responsibilities of these organizations grow. As Robert Keohane and Joseph Nye have explained, today, “democratic norms are increasingly applied to international institutions as a test of their legitimacy.”<sup>60</sup>

Skeptics of cosmopolitics typically start with the state as the fundamental unit of analysis. That is not done in analyzing domestic politics, where the unit is typically the individual, public opinion, or “the people.” Yet, for various reasons, international analysis has proceeded in a top-down fashion. To understand cosmopolitics, one should start with the most basic unit—the individual person.<sup>61</sup> Individuals are in constant tension with the other key unit of international analysis—the rulers.<sup>62</sup>

The individual wants legitimate, democratic governance at all levels, be it the local school board, the city, the province,

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of NGO involvement in international organizations from 1775 to the present).

59. DAVID MITRANY, *A WORKING PEACE SYSTEM* 125-26 (1966).

60. Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY, AND LEGITIMACY*, *supra* note 25, at 264, 281.

61. Derk Bienen, Volker Rittberger & Wolfgang Wagner, *Democracy in the United Nations System: Cosmopolitan and Communitarian Principles*, in *RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 287, 299 (Daniele Archibugi et al. eds., 1998) (explaining that the cosmopolitan principle of democracy at the international level is that the subject of international governance is the individual); Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 *J. WORLD TRADE* 167, 181 (2001) (“National or international constitutional theory should be developed from a strict perspective of the rights and needs of the individual.”); Fernando R. Téson, *The Kantian Theory of International Law*, 92 *COLUM. L. REV.* 53, 71 (1992) (“Kant maintains that the fundamental unit and, at the same time, fundamental end of both domestic and international law is the individual human being.”).

62. *See* STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 7 (1999) (stating that, in his study, the ontological givens are rulers, not states or the international system).

the nation, or the WTO.<sup>63</sup> An individual may believe that she is too powerless to have any influence on the WTO; she also may feel that way about the school board. Yet the urge to use voice and to act publicly on an issue of concern is the same for any level of governance. The impetus to do so springs from “universal human reason,” as Kant explained.<sup>64</sup> Individuals do not wait for authoritative decisionmakers to invite their opinion; individuals act to promote their own concepts of human progress.

Since individuals want their input to be effective, they will direct it rationally at the level of government where the decision is being taken. For many issues, there may be multiple levels. But the idea, seemingly endorsed by the critics of NGOs, that individuals will want to limit their lobbying to persons they have elected within national borders makes no sense at all if the decision is being made outside those borders.<sup>65</sup> If someone is concerned about an adjudication in the WTO, then a natural place to direct that concern will be the WTO.<sup>66</sup> Individuals and NGOs also will act at the international level as

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63. See Krajewski, *supra* note 61, at 171 (“If governance is shifting in the process of globalization from national to supranational levels, supranational governance must meet the standards of legitimacy according to national constitutional principles.”).

64. See *supra* text accompanying note 12.

65. See Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 416 (2000) (“As the locus of political decision-making increasingly shifts upwards, away from the state and toward the international level, rules and processes should be adjusted to permit interest groups to follow suit.”).

66. Martin Wolf espouses a contrary view. He says, “The WTO is merely a secretariat servicing a structure of intergovernmental agreements. It is not a government. It follows that the place for democratic accountability is the legislatures of each of its members.” Martin Wolf, *What the World Needs from the Multilateral Trading System*, in *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* 183, 197 (Gary P. Sampson ed., 2001). Wolf is wrong on one point and partly right on another. The WTO is not just a secretariat; it is an international organization with the capacity to make binding decisions on governmental members. Naturally, NGOs want input into those decisions. If Wolf means to say that many of the key decisions of the WTO actually are made in national capitals rather than in Geneva, then he is right. But he goes too far to contend that the WTO government delegates in Geneva and the WTO Director-General lack any delegated authority and therefore are irrelevant targets for NGO lobbying.

a strategy for promoting legal and policy change at the national level.<sup>67</sup>

When analysts consider domestic government, the role of citizen activism is well understood and sometimes glorified.<sup>68</sup> No one today seriously would argue that the quintessential democratic act is what the individual does alone in the voting booth. Voting is central, but it is not the only way in which individuals communicate with elected officials.<sup>69</sup> Students of democracy recognize that some of its most important manifestations (and preconditions) are popular discourse, social action, and lobbying.<sup>70</sup>

So if individual participation is an essential part of democracy at the national level, why do rational individuals forego it at the international level? The answer is that they do not, and should not. As Philippe Sands points out, "If participatory democracy is relevant to the national levels of governance then it is equally applicable at the international level, particularly since so many important decisions now are being taken outside national jurisdictions."<sup>71</sup> WTO Director-General Mike Moore put it well when he said that "[h]ealthy, democratic

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67. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 900 (1998).

68. CIVIL SOCIETY AT THE MILLENNIUM (Kumi Naidoo ed., 1999); TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY (Michael Novak ed., 2d ed. 1996); JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* (1999).

69. See James N. Rosenau, *Citizenship in a Changing Global Order*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 272, 285 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) ("Equipped with greater capacities to fashion scenarios that link them to distant developments, and thus more acutely aware of how micro actions might aggregate to collective outcomes, citizens now have many more avenues along which to pursue their interests.")

70. See, e.g., CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 22-44 (1970); see also Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, in THE CHANGING NATURE OF DEMOCRACY 48 (Takashi Inoguchi et al. eds., 1998) (stating that a free and lively civil society is necessary for a consolidated democracy); Organization for Economic Co-operation and Development (OECD), *Engaging Citizens in Policy-making: Information, Consultation and Public Participation*, OECD Public Management Policy Brief No. 10 (2001), at <http://www.oecd.org/pdf/M00007000/M00007815.pdf>.

71. Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 540 (2001). For a similar view, see Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1, 41 (2000) ("Just as domestic legislative processes are open

and accountable international agencies are now as important as democracy at home.”<sup>72</sup>

The activist does not stay his passions at the border. The international level may lack the demos that exists at the national level.<sup>73</sup> The international level also lacks elected decisionmakers. Yet these omissions do not make the individual uninterested in participating in international organizations, institutions, and processes that affect her.

Individuals will create their own cosmopolitan communities of common concern. These groups then will undertake conversations with official participants in international organizations.<sup>74</sup> The quality of these cosmopolitan conversations will be one factor that can enhance the legitimacy of an international organization and reduce its democratic deficit.<sup>75</sup> (Of course, some critics deny that private involvement can make official processes more legitimate.<sup>76</sup>)

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to public input, the processes of international rulemaking, currently closed to the public, should also become more transparent.”).

72. Mike Moore, Address to the International Union of Socialist Youth Festival in Praise of the Future (Jul. 26, 2000) (transcript available at the WTO website at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm33\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm33_e.htm)).

73. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 615-16 (1999) (finding that a demos, or shared sense of community, is absent at the global level).

74. See MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 2 (1998) (“Transnational advocacy networks are proliferating, and their goal is to change the behavior of states and of international organizations.”); WOLFGANG REINICKE & FRANCIS DENG, CRITICAL CHOICES: THE UNITED NATIONS, NETWORKS, AND THE FUTURE OF GLOBAL GOVERNANCE (2000) (discussing the role of global public policy networks).

75. See Pascal Lamy, Speech at Conference on the Participation and Interface of Parliamentarians and Civil Societies for Global Policy (Nov. 26, 2001) (transcript available at [http://europa.eu.int/comm/trade/speeches\\_articles/spla85.en.htm](http://europa.eu.int/comm/trade/speeches_articles/spla85.en.htm)) (stating that NGOs and civil society can contribute directly to the legitimacy of global governance); Jean-François Rischard, *High Noon: We Need New Approaches to Global Problem-Solving, Fast*, 4 J. INT'L ECON. L. 507, 522-23 (2001) (explaining how diverse public-private networks can provide a new source of legitimacy to global governance that is complementary to traditional representation processes).

76. See, e.g., Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations With International Nongovernmental Organizations*, 2 CHI. J. INT'L L. 371, 382-83 (2001) (arguing that cooperation with NGOs cannot enhance the democratic legiti-

A democracy at home may help individuals achieve their goals in the world arena, but that alone will not be sufficient for them.<sup>77</sup> This can be seen in the following hypothetical. Suppose that within each country, the elected government perfectly represents the range of domestic public opinion. While that ideal would be sufficient to achieve the desired domestic governance, it would be insufficient to achieve the aggregately desired global governance because, in a world of interdependence, cooperation among countries often will be necessary. An individual may be able to help determine his national government's policy through his vote, but he will lack the same electoral influence on other countries whose decisions affect him.<sup>78</sup> In view of the policy differences and collective action problems that may keep governments from agreeing to needed cooperation, "the people" in a country may fail to get the government outputs they want, *even if that government is perfectly representative* of them. Given that restrictions often exist on influencing elections in foreign countries<sup>79</sup> and recognizing that no governments are perfectly representative, the individual who wants to promote peace or free trade, or who wants to combat problems like global warming or AIDS, often will join transnational associations to campaign for such interests.

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macy of an international organization because NGO participation is antidemocratic); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191, 214 (2000) (stating that opening up international regulatory bodies to participation by NGOs cannot solve the problem of the democratic deficit); John Micklethwait & Adrian Wooldridge, *The Globalization Backlash*, FOREIGN POL'Y, Sept.-Oct. 2001, at 16, 24 (arguing that "the real democratic deficit in global institutions is to be found not in the IMF [International Monetary Fund] and the WTO but in the NGOs that protest against them").

77. Cf. Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 532 (2001) ("Despite their usefulness, national procedures alone can hardly be expected to meet the democracy-legitimacy requirement appropriate to the integration level of an IGO [intergovernmental organization].").

78. The same problem exists within a federal system. An individual in Texas might have voted for the person who got elected to be a U.S. congressman, senator, or president. Yet the individual may still see a need to lobby the senators from New York even though he has no direct electoral ties to them.

79. Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 21-28 (1989).



The political theory of international democracy is reflected in progressive legal doctrine. International law had a prolonged state-centric phase, but throughout the 20th century, there was a steady stream of legal scholarship taking account of the individual in the international sphere.<sup>80</sup> For example, in 1907, Simeon Baldwin pointed out how the “unofficial congress” works “to promote the solidarity of the world” and to help prevent controversies.<sup>81</sup> In 1916, Henri La Fontaine explained that “the international needs of men have induced them to come into closer relations despite frontiers” and that the ensuing “numerous free organizations” will want to transit their wishes to a Conference of States.<sup>82</sup> La Fontaine called for the official conference to admit such petitions and suggested that this opportunity be limited to “International Associations legally constituted.”<sup>83</sup>

In 1927, Georges Scelle examined the quest for “democratization” of the League of Nations. Scelle opposed the idea of establishing a chamber of popularly elected representatives because “there is not yet an *international people* . . . .”<sup>84</sup> Instead, he proposed “another form of democratization” based on what was already occurring at the League.<sup>85</sup> Examining the practices of the International Labour Organization (ILO), where employers and workers were represented, and the practices of the communications and transport organizations of the League, where private organizations participated, Scelle

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80. It began even earlier. For example, in his introductory lecture at Cambridge in 1888, John Westlake described international law as the body of rules prevailing among states, but he also saw it in broader terms as encompassing “human action not internal to a political body.” James Crawford, *Democracy and the Body of International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 91, 113 (Gregory H. Fox & Brad R. Roth eds., 2000).

81. Simeon E. Baldwin, *The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World*, 1 *AM. J. INT’L L.* 565, 573 (1907).

82. HENRI LA FONTAINE, *THE GREAT SOLUTION: MAGNISSIMA CHARTA* 65 (1916).

83. *Id.*

84. GEORGES SCELLE, *UNE CRISE DE LA SOCIÉTÉ DES NATIONS* 137-40 (1927). The quotations are my own translation. For background on the Scellian system of international law, see generally Hubert Thierry, *The European Tradition in International Law: Georges Scelle*, *The Thoughts of Georges Scelle*, 1 *EUR. J. INT’L L.* 193 (1990).

85. SCELLE, *supra* note 84, at 141.

saw the League moving toward the gradual creation of an international democracy.<sup>86</sup>

In the latter half of the 20th century, Myres McDougal took note of the diverse participants in international law processes. For example, in 1959, he observed that with the emergence of new states, the establishment of new intergovernmental organizations, and the “accelerating multiplication of private associations and groups of all kinds,” participation in decisionmaking “exhibits a very definite trend toward greater democracy.”<sup>87</sup> In McDougal’s view, international law, like national law, is “most usefully regarded not as a mere body of rules but as the whole of a specialized process of authoritative decision.”<sup>88</sup> The world social process is and should be inclusionary. According to McDougal, “it is a commonplace that individuals, private associations, parties, and pressure groups bring their base values to bear upon all levels of authority, and with little respect for state boundaries.”<sup>89</sup> In a later work co-authored with Harold Lasswell, they criticize the frame of “power politics” as paying “little attention to authority conceived in terms of community expectations as a variable affecting decision” and as excluding “the perception of individual human beings, cooperating through many associations, including the nation-state, to clarify and secure their common interests.”<sup>90</sup>

At the end of the century, Thomas M. Franck authored *The Empowered Self*, a study of individualism in international law and politics. Franck concludes that:

Absent a global parliament, people’s interests in intergovernmental operations are represented primarily by diplomats, most of whom, at best, inadequately represent the diverse interests of their citizenry. To address this “legitimacy deficit” . . . , many non-governmental organizations (NGOs) have sprung up

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86. *Id.* at 142-46. Furthermore, he predicted that this would occur in the economic and professional realm before the political realm. *Id.* at 146.

87. Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy Oriented Perspective* (1959), reprinted in INTERNATIONAL LAW ESSAYS 437, 449 (Myres S. McDougal & W. Michael Reisman eds., 1981).

88. *Id.* at 446.

89. *Id.* at 447.

90. 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY 181 (1997) (footnote omitted).

across state boundaries. These appear to be becoming purposeful and expert participants in the inter-governmental diplomatic process by which new policies are formulated, implemented and enforced.<sup>91</sup>

Having sketched out a normative framework for cosmopolitics—in both political theory and international law—the Article will briefly note five pragmatic reasons in favor of cosmopolitics.

First, the ability to use one's voice outside the channels of domestic government is particularly important for individuals in countries that are not democracies.<sup>92</sup> Although the WTO Secretariat has declared that “[c]itizens are expected to be represented at the WTO through their governments,”<sup>93</sup> the WTO has no rules to fulfil that expectation at the domestic level. Some international soft law does exist, however. Agenda 21 calls on governments to “[e]nsure public input in the formation, negotiation and implementation of trade policies . . . .”<sup>94</sup> This is one example of how the environment regime tries to inculcate more democratic norms into the trade regime.

Second, the ability to use one's voice outside the channels of domestic government is particularly important for individuals and NGOs from small or weak countries. Ortho-politics can make it harder to communicate a grass roots perspective because transmission is limited by the bandwidth of the weak government. Of course, NGOs from poor countries may not have the resources to participate effectively in the WTO.

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91. THOMAS M. FRANCK, *THE EMPOWERED SELF* 87-88 (1999).

92. Michael Edwards, *Introduction to GLOBAL CITIZEN ACTION* 1, 4 (Michael Edwards & John Gaventa eds., 2001) (“For citizens of nondemocratic regimes, transnational civil society may provide the only meaningful avenue for voice and participation in decisionmaking.”); Daniel C. Thomas, *International NGOs, State Sovereignty, and Democratic Values*, 2 *CHI. J. INT’L L.* 389, 392 (2001) (“The emergence of non-governmental organizations has thus opened international diplomacy to voices and interests that once would have been stifled by repressive or non-responsive states.”).

93. See *THE WTO . . . WHY IT MATTERS: A GUIDE FOR OFFICIALS, LEGISLATORS, CIVIL SOCIETY AND ALL THOSE INTERESTED IN INTERNATIONAL TRADE AND GLOBAL GOVERNANCE* 22 (2001), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/wto\\_matters\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/wto_matters_e.pdf).

94. United Nations, *Earth Summit Agenda 21*, para. 2.22(k), available at <http://www.un.org/esa/sustdev/agenda21chapter2.htm>.

Third, elected officials—who seek to avoid failure—sometimes are risk-averse in seeking agreements. This can skew policymaking toward inaction, even when cooperative solutions are potentially available. Given that potential dysfunction in global governance, international NGOs may serve as a catalyst for pushing policymakers toward agreement.

Fourth, national governments suffer the bias of nationalism. This is not necessarily bad, but nationalism often may not be the best lens for solving global challenges.<sup>95</sup> Indeed, Jacqueline Peel has hypothesized that NGOs may be better able than states “to conceptualize problems and solutions without borders.”<sup>96</sup>

Fifth, cosmopolitical opportunities are appropriate especially for transnational NGOs like Médecins sans Frontières or WWF (formerly World Wildlife Fund). Ortho-politics would reduce the utility of such organizations by demanding that their advocacy be compartmentalized within political borders.

A theory of cosmopolitics needs to explain not only why NGOs want to participate in global governance, but also why international organizations and governments permit them to do so. To paraphrase Kant, if it is humiliating for diplomats and international organizations to seek advice from private individuals, then why do they do so? The answer is that social and economic actors offer two important services to international organizations. One is expertise. For example, the League of Nations and the GATT invited the ICC to participate because that organization brought commercial expertise.<sup>97</sup> The other valuable service is political support. Since all international organizations are threatened to some extent by the centrifugal forces of nationalism, international officials often welcome public participation as a way of generating con-

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95. Allyn Young, *Economics and War*, 16 AM. ECON. REV. 1, 7 (1926) (noting that national states, each acting for itself, are inefficient guardians of joint interests).

96. Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and the World Trade Organization*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 47, 71 (2001) (footnote omitted).

97. See *supra* text accompanying notes 43 & 51.

sent for the activities of the institution.<sup>98</sup> For example, Director-General Moore has affirmed that “it is vitally important that we reconnect international organizations with the political grassroots.”<sup>99</sup> Although Moore has not used the term “cosmopolitics,” his speeches demonstrate an appreciation for that concept.

Moore’s predecessors at the WTO and GATT have not shown the same appreciation. Consider, for example, the *Joint Statement on the Multilateral Trading System* issued in February 2001 (at Davos) by Arthur Dunkel, Peter Sutherland, and Renato Ruggiero. The former Directors-General state that there is public and political disenchantment with international institutions tied in part to the

view that powerful international bodies are less accountable to the ordinary citizen than should be the case. It is a view we cannot share. It is governments which negotiate in institutions like the WTO, and governments are accountable to their citizens.<sup>100</sup>

Basically, the three men are espousing the orthodox view, or what I call ortho-politics. That is a respectable position to take (albeit an outdated one). Yet they seem to miss the self-contradictory nature of their expression. If international bodies are perfectly accountable transitively through Member governments to their citizens, then one wonders why the authors sought to do more than simply offer their views individually to Switzerland, Ireland, and Italy. Apparently, the three former Directors-General thought that the world would be interested in a group statement based on their experience in leading the trading system. And in that they were right; many observers took note of their thoughtful commentary on the trading system, which the WTO Secretariat quickly posted on the WTO’s website. So perhaps without realizing it, the three men were

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98. See Anderson, *supra* note 76, at 379-81 (discussing the symbiosis between international NGOs and international organizations and how these organizations engage in mutual legitimation).

99. Director-General Mike Moore, Address to Liberal International on the Backlash Against Globalization (Oct. 26, 2000) (transcript available at the WTO website at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm39\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm39_e.htm)).

100. Arthur Dunkel et al., Joint Statement on the Multilateral Trading System (Feb. 1, 2001) (transcript available at the WTO website at [http://www.wto.org/english/news\\_e/news01\\_e/jointstatdavos\\_jan01\\_e.htm](http://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm)).

engaging in cosmopolitics—seeking to influence the WTO from the outside and circumventing the political channels of their home governments.

A. *WTO Exceptionalism and the Response*

Commentators sometimes suggest that even if NGO participation is suitable for the United Nations or other international organizations, it ill fits the WTO.<sup>101</sup> This idea can be called “WTO Exceptionalism.” It is reflected in the *Guidelines for Arrangements on Relations with Non-Governmental Organizations* adopted by the WTO General Council in 1996, which states, in part:

Members have pointed to the *special character* of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be *directly* involved in the work of the WTO or its meetings.<sup>102</sup>

It was a missed opportunity for the General Council to illuminate why the U.N. system—which contains many treaties with rights and obligations and many fora for negotiations—can allow NGOs to participate in its work and some of its meetings, and yet the WTO cannot.

The leading explanation is that interest groups are anathema to the trading system. As the WTO website explains: “The system shields governments from narrow interests.”<sup>103</sup> In other words, given that the WTO was set up to help governments “ward off powerful lobbies”<sup>104</sup> at home, it would be self-defeating for the WTO to be exposed to those lobbies in Ge-

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101. See, e.g., CLAUDE BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 81, 102, 106 (2001).

102. *Guidelines for Arrangements on Relations with Non-governmental Organizations*, WTO Doc. WT/L/162 (July 23, 1996) (emphasis added), at [http://www.wto.org/english/forums\\_e/ngo\\_e/guide\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/guide_e.htm).

103. World Trade Organization, 10 Benefits of the WTO Trading System, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b09\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b09_e.htm) (“The system shields governments from narrow interests.”).

104. See *id.*

neva. From this perspective, the ideal WTO would be impenetrable or, even better, invisible.

In a recent commentary on the “World Trade Constitution,” John O. McGinnis and Mark L. Movsesian offer a “blueprint for the proper structure of the WTO.”<sup>105</sup> They contend that the principal task of the WTO “should be to restrain protectionist interest groups and thereby promote both free trade and representative democracy.”<sup>106</sup> Positing that “protectionist interest groups are, in fact, a particular bane of democracy,” they claim that “[i]t is hardly undemocratic for the majority to create institutions that will muffle the predictably powerful cries of special interests.”<sup>107</sup> Based on their framework, the authors assert that “providing NGOs with special access would undermine the key benefits of a properly constructed international trade regime—mechanisms that reduce the power of interest groups in order to permit trade and democracy to flourish.”<sup>108</sup> McGinnis and Movsesian make an important point about the WTO’s *raison d’être*, but draw an unjustified conclusion.

Even assuming that WTO rules are intended to help governments ward off lobbies and muffle special interests, the performance of that function is separable from the process of *setting* world trade rules. Within national polities, the WTO does not restrict debate on trade questions such as whether a new round should be launched. Thus, normal domestic politics reigns with interest groups, including protectionist groups, having a voice in such decisions. So, if the WTO does not seek to prevent public debate on trade policy at the national level, why should it do so at the international level? In my view, it should not. The fact that WTO rules place limits on the use of national trade measures provides no justification to limit pluralist participation in the WTO. On the contrary, because NGOs lose some opportunities for influence at the national

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105. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514 (2000).

106. *Id.* at 536.

107. *Id.* at 527, 542.

108. *Id.* at 571-72. In another passage, the authors say that their jurisprudence only is designed to raise hurdles for protectionist groups, not “value-driven groups.” *Id.* at 529. Unfortunately, the authors do not explain how to distinguish one from the other in an objective manner.

level, they may need to expand their influence at the international level.

The current WTO constitution would permit greater participation than WTO governments have been willing to allow so far. Article V, Section 2 of the Marrakesh Agreement Establishing the World Trade Organization states: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters relating to those of the WTO."<sup>109</sup> Because this provision is merely permissive, one cannot say that it has gone unimplemented. Yet, similar provisions in other international treaties have led to much greater NGO participation than occurs in the WTO.<sup>110</sup>

Although opponents of NGO participation claim that the WTO is based on different principles from other international organizations, the most salient difference undermines the argument for exclusive WTO intergovernmentalism. In his Hague Academy lecture, Donald McRae postulates that international trade law differs from traditional international law because trade law is "individual and welfare-based," while international law is "State and security-based."<sup>111</sup> Noting that international law has rested on "sovereignty" and "States surrounded by national boundaries," McRae contends that world trade law "views national boundaries as an impediment" and "is not based on a model of State sovereignty."<sup>112</sup> McRae does not speculate on the implications of his thesis for the WTO debate on private participation. In my view, however, a trading system based on the individual lacks any theoretical reason to preclude persons from participating as individuals.

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109. Marrakesh Agreement Establishing the World Trade Organization art. V, § 2, Apr. 15, 1994, 33 I.L.M. 1125, 1146 (1994).

110. John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited*, 4 J. INT'L ECON. L. 67, 77 (2001) ("It is surprising how far behind the WTO is, compared to most of the international organizations in Geneva and other cities, with respect to how it handles NGOs."). See generally WHOSE WORLD IS IT ANYWAY: CIVIL SOCIETY, THE UNITED NATIONS AND THE MULTILATERAL FUTURE (John W. Foster & Anita Anand eds., 1999) (discussing NGO participation in the U.N. system).

111. Donald M. McRae, *The Contribution of International Trade Law to the Development of International Law*, 260 RECUEIL DES COURS 109, 215 (1996).

112. *Id.* at 215, 219.



Even if it were true that in the GATT era (1947-94) the trading system operated effectively by keeping interest groups at bay, the failed Seattle Ministerial Conference of 1999 shattered any illusion about the continuing viability of that closed style of politics.<sup>113</sup> Although some protestors came to Seattle to engage in disruption and violence, many protestors came to debate the future direction of the WTO and to show by their presence in the streets that the WTO lacks opportunities for indoor participation by civic society organizations.

A trading system recognizing and promoting the benefits of economic competition should be eager to promote intellectual competition on the key issues before it.<sup>114</sup> If the WTO were willing to institutionalize NGO-government discourse, that would demonstrate self-confidence and over time the WTO might gain better ideas for how to address the challenges of economic globalization.<sup>115</sup> The official WTO position—that NGOs participate only through the channels of their national governments<sup>116</sup>—is counterproductive because it dilutes the quality of debate within the WTO by excluding divergent views that WTO Member governments may not be willing to express. The WTO mindset continues to see each WTO Member as a pyramid.

Critics of expanded NGO participation counter that NGOs are constituted to promote only a single interest, while democratic governments are elected to represent the general or national interest. While that is true formalistically, one can-

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113. Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. 979, 982-83 (2001); Rorden Wilkinson, *The WTO in Crisis: Exploring the Dimensions of Institutional Inertia*, 35 J. WORLD TRADE 397 (2001).

114. Daniel C. Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 135-37 (1998).

115. Jan Aart Scholte (with Robert O'Brien & Marc Williams), *The WTO and Civil Society*, J. WORLD TRADE, Feb. 1999, at 107, 111 (stating that civil society groups can push the WTO to clarify, explain, justify, and perhaps rethink its positions).

116. World Trade Organization, 10 Common Misunderstandings About the WTO 9 (1999), at [http://www.wto.org/english/res\\_e/doload\\_e/10mis\\_e.pdf](http://www.wto.org/english/res_e/doload_e/10mis_e.pdf) ("The private sector, non-governmental organizations and other lobbying groups do not participate in WTO activities except in special events such as seminars and symposiums. They can only exert their influence on WTO decisions through their governments.").

not always depend on government officials to promote a national interest, or a planetary interest. As Antoine-Augustin Cournot perceptively noted 125 years ago, the legislator must entrust execution “to a large number of agents of undistinguished capacity and morality . . . .”<sup>117</sup> In other words, the pristine representation of the national interest can be distorted by the bureaucrats in power. I am not contending that NGO spokesmen have greater insight into the public interest than government bureaucrats do. Rather, my point is that a well functioning trading system requires vigorous debate in which all ideas—and especially ideas from trade bureaucrats—are contestable.

Another argument against NGO participation is that trade politics should be cabined at the national level and screened out of the WTO. This view is puzzling because the WTO is solely about politics. In contrast to many other international organizations that address market failure, the WTO addresses mainly government failure. So the idea of preserving an unpolitical WTO is fantasy.

The mission of the WTO is not to enable trade between individuals.<sup>118</sup> Rather, its mission is to put controls on the way governments use discriminatory and protectionist trade measures. That is an additional reason why the WTO should not insist that NGOs filter their ideas through national governments. A consumer NGO may advocate an idea like free trade that its government will be unwilling to relay to the WTO.

Instead of taking politics out of the WTO, it is time to put more politics in. Keohane and Nye make this recommendation in a recent study where they point to the problem of “insufficient politicization” of the WTO.<sup>119</sup> They explain that “[t]he lack of intermediating politicians is the most serious democratic deficit of international organizations in general and the WTO in particular.”<sup>120</sup> The prescription they offer is

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117. FROM REVUE SOMMAIRE DES DOCTRINES ECONOMIQUES (1877), quoted in 8 WORLD ECON. 298 (1985).

118. See Pierre Lemieux, *Free Trade Doesn't Require Treaties*, WALL ST. J., Apr. 24, 2001, at A24.

119. Keohane & Nye, *supra* note 60, at 264-65.

120. *Id.* at 280. See also Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 25, at 227, 229 (stating that the WTO needs more politics, not less).

that “[a]ny sustainable pattern of governance will have to institutionalize channels of contact between international organizations and constituencies within civil society. The international regimes, broadly conceived, must be political rather than technocratic.”<sup>121</sup>

Director-General Moore also has called attention to the need for more politics in international organizations, observing that “[a]s Governments have gradually contracted out certain limited functions to international institutions, treaties and agreements, there has not been a corresponding evolution and focus of political oversight.”<sup>122</sup>

### B. *What Kind of Politics?*

Ortho-politics is one approach for applying political supervision to the WTO. Elected presidents and prime ministers could begin regular attendance of WTO sessions.<sup>123</sup> That seems impractical. Another approach is to provide for parliamentary participation in the WTO. A group of parliamentarians met informally in Seattle in 1999, and did so again at Doha. Yet such parliamentary participation is not strictly ortho-politics because the elected legislators are not representing a government.

The other way to provide a firmer political base for the WTO is through cosmopolitics. This path does not require the consolidation of a global demos. The only precondition is that there are publics in different countries that have common interests. As Keohane and Nye explain, “In this sense of shared externalities and a degree of shared understanding, there may be some global publics even if there is no global community.”<sup>124</sup>

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121. Keohane & Nye, *supra* note 60, at 290.

122. Mike Moore, Speech at the European Parliament Seminar on Trade, Development, and Democracy: The Need for Reform of the WTO (Apr. 10, 2001) (transcript available at the WTO website at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm57\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm57_e.htm)).

123. In some governments, the trade minister may be an elected member of parliament. Thus, some of the trade ministers at the Doha conference could have been elected officials. At present, no country has national elections for the trade minister.

124. Keohane & Nye, *supra* note 60, at 284. For an extended discussion of how NGOs are reconstructing global civil society, see generally CRAIG

Over the past several years, many government officials and analysts have postulated that the WTO needs to rely on cosmopolitical constituencies for guidance and support.<sup>125</sup> No one other than Lamy has used that term, yet the ideas are similar. During the Seattle Ministerial, then-U.S. President Bill Clinton remarked: “If the WTO expects to have public support grow for our endeavors, the public must see and hear and in a very real sense actually join in the deliberations. That’s the only way that they can know the process is fair and know their concerns were at least considered.”<sup>126</sup> Keohane and Nye state that “some form of NGO representation in the institutions involved in multilateral governance, and in particular the WTO, could help to maintain their legitimacy.”<sup>127</sup> Antonio Perez writes that “[c]reating real channels of representation for communities and interest groups is critical to sustaining the WTO’s legitimacy.”<sup>128</sup> Esty contends that “[a]ccordingly, the WTO needs to develop a higher degree of connectedness to the peoples of the world. This kind of relationship can be achieved—in the absence of global politicians—through the non-governmental organizations (NGOs) that represent civil society.”<sup>129</sup>

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WARKENTIN, *RESHAPING WORLD POLITICS: NGOs, THE INTERNET, AND GLOBAL CIVIL SOCIETY* (2001).

125. See, e.g., Frank Loy, *Public Participation in the World Trade Organization*, in *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE*, *supra* note 66, at 113, 119 (“Clearly, the way to develop a free trade constituency is to engage the opposition and address their legitimate concerns. Intergovernmental institutions such as the WTO . . . must make an effort to satisfy and address the principal concerns of NGO groups by inviting them in from outside the closed doors.”); BRUCE STOKES & PAT CHOATE, *DEMOCRATIZING U.S. TRADE POLICY*, COUNCIL ON FOREIGN RELATIONS PAPER 60 (2001) (“The lack of public accessibility, transparency, and due process in the functioning of the WTO is the source of mounting public criticism of that organization, its decisions, and, most important, the trade that it regulates.”).

126. Remarks at a World Trade Organization Luncheon in Seattle, *PUB. PAPERS* 2192 (Dec. 1, 1999).

127. Keohane & Nye, *supra* note 60, at 289-90.

128. Antonio F. Perez, *International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 *BERKELEY J. INT’L L.* 44, 85 (2001).

129. Daniel C. Esty, *We the People: Civil Society and the World Trade Organization*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 87, 91 (Marco Bronckers & Reinhard Quick eds., 2000).

In a recent article, Markus Krajewski analyzes the legitimacy of WTO processes.<sup>130</sup> In his view, the democratic legitimacy of international trade law is based on a “legitimacy chain” in which national elections choose governments that negotiate in the WTO.<sup>131</sup> When the chain is lengthy, as it is for the WTO, then international processes suffer from “intransparency,” and the result is a democratic deficit.<sup>132</sup> Krajewski discusses some approaches for increasing the “supply” of legitimacy, including opening the WTO to NGOs, enhancing the role of national parliaments, and establishing a parliamentary assembly at the WTO.<sup>133</sup> He concludes that these supply measures will not succeed, and therefore he calls for reducing the “demand” for WTO legitimacy by resisting a broader WTO mandate.<sup>134</sup> I agree with Krajewski’s analytical framework, but not his pessimistic conclusion.<sup>135</sup> The WTO can become more accountable and effective through cosmopolitics.

By insisting that the debate on trade policy take place within national borders, the WTO forgoes the learning that can emerge from cosmopolitan conversation.<sup>136</sup> Domestic trade debates are held in the desolate sands of nationalism, isolationism, and protectionism. Given that the trading system was set up to overcome economic nationalism, it is perverse to rely on communication channels owned by national governments. By elevating the debate to the WTO level, civil society and political leaders can seek to replace economic nationalism with interdependence, isolation with engagement, and trade

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130. See Krajewski, *supra* note 61.

131. *Id.* at 175-76.

132. *Id.* at 176.

133. *Id.* at 183.

134. *Id.* at 186; cf. B. K. Zutshi, *Comment*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 25, at 387 (stating that as an intergovernmental institution, the WTO “is as democratic as it can ever get”).

135. Cf. Daniel C. Esty, *Comment* (on the paper by Robert Keohane and Joseph Nye), in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 25, at 301, 304-05 (“I find their suggestion that the best answer to the WTO’s legitimacy crisis lies in a step back from full-scale globalization based on the presumed dominance of nation-states to be both descriptively incomplete and normatively unsatisfactory.”).

136. See MICHAEL EDWARDS, *FUTURE POSITIVE: INTERNATIONAL CO-OPERATION IN THE 21ST CENTURY* 209 (2000) (“Learning requires an active conversation between institutions and their clients.”).

barriers with human freedom. Cosmopolitical debate will provide fertile soil for an open trade policy.

In conclusion, Part III lays out the normative basis for WTO cosmopolitics and suggests that it can boost public support for the trading system. The transparency and participatory practices of other international organizations are relevant models for the WTO.<sup>137</sup> Indeed, the pervasiveness of international economic law may necessitate more cosmopolitics than other branches of international law have.<sup>138</sup>

#### IV. COSMOPOLITICS IN ACTION

Part IV of this Article seeks to clarify the concept of cosmopolitics, with particular reference to the WTO. The first section discusses eight types of cosmopolitical process. All of these processes grow out of traditional international politics (ortho-politics) and can be reconciled with it to some extent. Nevertheless, they are classified here as cosmopolitics because they prefigure a more deliberative and participatory world public sphere. The second section looks briefly at what has been the biggest controversy in the WTO about NGOs: whether private groups should be able to file amicus curiae briefs in WTO dispute settlement.

##### A. *Eight Faces of Cosmopolitics*

Cosmopolitics is practiced in the following ways.

###### 1. *Market Orientation*

Markets are often the target of government policy, yet they also provide a guidepost for the use of market-like policy instruments. Private actors use the market to influence other

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137. Wolfgang Benedek, *Developing the Constitutional Order of the WTO: The Role of NGOs*, in DEVELOPMENT AND DEVELOPING INTERNATIONAL AND EUROPEAN LAW: ESSAYS IN HONOUR OF KONRAD GINTHER ON THE OCCASION OF HIS 65TH BIRTHDAY 228, 245-48 (Wolfgang Benedek et al. eds., 1999).

138. ROBERT O'BRIEN ET AL., CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS 226 (2000) (stating that compared to the U.N. system, opening up the IMF, World Bank, and WTO to non-state influence may be more important because of their institutional power). Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT'L L. REV. 1321 (2000) (calling for genuine public participation in the institutions of international economic law).

private actors and governments.<sup>139</sup> Such activities are a central feature in the domestic political arena and now are becoming more common on a global scale.

Cosmopolitics can manifest considerable market orientation and attention to transborder economic activity. This is not surprising, since cosmopolitics is a response to economic interdependence. Consider the following: Seeing the benefits of working directly with the private sector, U.N. Secretary-General Kofi Annan launched the Global Compact, in which subscribing corporations commit to follow human rights, labor, and environmental principles.<sup>140</sup> The emerging Climate Change Protocol will make extensive use of market-based instruments, such as the clean development mechanism and emissions trading.<sup>141</sup> In July 2000, the U.N. Security Council enacted a resolution regarding Sierra Leone in which the Council made recommendations to states, international organizations, and various diamond industry associations.<sup>142</sup>

The controversy regarding the impact of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on public health has wrought a significant change in trade politics.<sup>143</sup> It has brought new actors (e.g., health NGOs) into the WTO arena and has led to public protests against drug companies and trade officials who have been accused of making medicine for AIDS too costly.<sup>144</sup> In April

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139. See generally Sylvia Ostry, *World Trade Organization: Institutional Design for Better Governance*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 25, at 361, 377 (discussing the example of Social Accountability 8000); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999).

140. The nine principles of the Global Compact can be found at the Global Compact's website at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/thenine.htm>.

141. See Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 *ECOLOGY L.Q.* 1295 (2001).

142. S. Res. 1306, U.N. SCOR, 4168th mtg. (2000), available at <http://www.un.org/Docs/scres/2000/res1306e.pdf>.

143. See J.H. Reichman, *Taking the Medicine, with "Angst": An Economist's View of the TRIPS Agreement*, 4 *J. INT'L ECON. L.* 795, 795 (2001) (reviewing KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000)).

144. LORI WALLACH & MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY: AN ASSESSMENT OF THE WORLD TRADE ORGANIZATION 100-29* (1999). See also Geeta Anand, *Why Rapid HIV Tests, Widely Sold Overseas, Have Eluded the U.S.*, WALL

2001, several entities—including the WTO, the World Health Organization, the Norwegian government, and the Global Health Council—teamed up to sponsor a Workshop on Drug Pricing and Financing.<sup>145</sup> The Workshop had broad participation, including pharmaceutical companies and associations, NGOs, academics, and foundations, as well as governments and international organizations. Although some WTO governments may deny that the WTO has any responsibility for health care, the WTO has become part of global health policymaking because the WTO is prescribing patentability—and hence prolonged monopoly pricing—for medicine.<sup>146</sup> Enhancing both public health and medical innovation may require a reexamination of the incentive structure embedded in TRIPS rules. It is hard to imagine this occurring through exclusively state-to-state conversation because the needed expertise and stakeholders would not be at the table.

At Doha, the WTO Ministerial Conference issued a “Declaration on the TRIPS Agreement and Public Health” in which the ministers stressed the need for the TRIPS Agreement “to be part of the wider national and international action” to address public health problems.<sup>147</sup> The Declaration also affirmed that TRIPS “can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.”<sup>148</sup> Some pharmaceutical associations and

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Sr. J., Dec. 20, 2001, at A1 (discussing how patents prevent access to medical technology).

145. Further illumination on the workshop on affordable drugs held by the WTO and World Health Organization’s Secretariats can be found at the WTO website at [http://www.wto.org/english/tratop\\_e/trips\\_e/tn\\_hosbjor\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/tn_hosbjor_e.htm).

146. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 [hereinafter TRIPS or TRIPS Agreement], art. 27 (1994). Technically, TRIPS requires protection of intellectual property for only foreign inventors. *Id.* art. 1:3. In practice, however, governments are backed into granting equivalent protection to domestic inventors.

147. Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, paras. 1-2 (Nov. 14, 2001), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm).

148. *Id.* para. 4.



health-related NGOs went to the Doha conference to assist governments in the negotiation of this Declaration.<sup>149</sup>

## 2. *Publicity and Transparency*

Democratic control over international policy requires information about what governments are doing. Kant advocated “publicity” in an era when treaties themselves often were kept secret. The Covenant of the League of Nations established the principle that all treaties should be registered and published.<sup>150</sup> When the League was constituted in 1920, the League Council approved a memorandum on treaty registration that contained a strong (and unduly optimistic) statement about the value of publicity:

Publicity has for a long time been considered a source of moral strength in the administration of National Law. It should equally strengthen the laws and engagements which exist *between nations*. It will promote public control. It will awaken public interest. It will remove causes for distrust and conflict. Publicity alone will enable the League of Nations to extend a moral sanction to the contractual obligations of its Members. It will, moreover, contribute to the formation of a clear and indisputable system of International Law.<sup>151</sup>

The principle of publicity commonly is called “transparency” now. This term has been employed to describe the informational openness of treaty systems and international organizations. In one usage, transparency refers to informational flows among the parties to a treaty that are essential for monitoring implementation.<sup>152</sup> In another usage, which ap-

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149. See Paul Blustein, *Getting WTO's Attention: Activists, Developing Nations Make Gains*, WASH. POST, Nov. 16, 2001, at E1; Geoff Winestock & Helene Cooper, *Activists Outmaneuver Drug Makers at WTO*, WALL ST. J., Nov. 14, 2001, at A2. See also Daniel Pruzin, *Global Drug Industry Association Blasts 'Nutty' WTO Text on TRIPS, Public Health*, BNA DAILY REP. FOR EXECUTIVES, Nov. 2, 2001, at A-26.

150. See LEAGUE OF NATIONS COVENANT art. 18.

151. The Registration and Publication of Treaties as Prescribed Under Article 18 of the Covenant of the League of Nations, 4 LEAGUE OF NATIONS O.J. 154 (1920).

152. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22-23 (1995).

parently began in trade policy discourse, transparency refers to informational flows from a treaty system or international organization down to the interested public.

In the early 1990s, NGOs (particularly environmental groups) started complaining about the closed processes of the GATT.<sup>153</sup> These critiques elicited sympathy from some GATT experts. For example, John Jackson wrote that the environmentalists “have several legitimate complaints about the GATT dispute settlement procedures, among others . . . and note appropriately that the GATT lacks a certain amount of transparency.”<sup>154</sup> Jackson urged that “[f]or purposes of gaining a broader constituency among the various policy interested communities in the world, . . . the GATT could go much further in providing ‘transparency’ of its processes.”<sup>155</sup>

In the ensuing years, the WTO has achieved much greater transparency. In a recent study, Gregory Shaffer concludes that U.S. and European environmental groups were successful in their persistent critiques of WTO and its Committee on Trade and Environment. According to Shaffer, the NGOs “have opened up the WTO decision-making process and initiated a trend toward greater transparency in WTO operations that is unlikely to change.”<sup>156</sup> Shaffer’s study is valuable in demonstrating the positive contributions of nongovernmental pressure to the trading system.

Nevertheless, with the exception of ceremonial sessions at ministerial conferences, NGOs today are not permitted to be observers at any WTO meetings. Many governments resist further openness. Writing in a law journal, one of Argentina’s longtime delegates to the WTO asks: “Can anyone imagine a trade negotiator agreeing to reasonable trade and environment disciplines while the representatives of the business sector and the local branch of Greenpeace or the World Wildlife

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153. See, e.g., Ralph Nader, *Introduction, THE CASE AGAINST FREE TRADE: GATT, NAFTA AND THE GLOBALIZATION OF CORPORATE POWER* 1, 3 (1993) (suggesting that secrecy, abstruseness, and unaccountability are the watchwords of global trade policymaking).

154. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1255 (1992).

155. *Id.* at 1255.

156. Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environmental Matters*, 25 HARV. ENVTL. L. REV. 1, 84 (2001).

Fund for Nature (“WWF”) are seated next to each other and him or her at the WTO?”<sup>157</sup> The delegate gave no answer to his question. In view of how little the Committee on Trade and Environment has accomplished in seven years, one might pose the inverse question: Can anyone imagine WTO governments achieving any fruitful outcome *without* environmental and business experts being part of the process? I cannot. Recently, *The Economist* magazine wrote that proponents of liberal trade no longer can expect trade policymaking and WTO dispute settlement to be sheltered from the demands for honest, open, and accountable governance.<sup>158</sup>

In announcing that the WTO Secretariat had given tentative approval to over six hundred NGOs to attend the Doha Ministerial conference, Moore stated that “[t]he input and involvement of NGOs is important to our shared objective of a successful meeting. I welcome scrutiny from civil society, it is healthy and makes us more accountable.”<sup>159</sup>

Because of concerns about insecurity at Doha, and the difficulty of traveling there, only 365 NGOs actually went to the conference. Unlike the Seattle Conference, NGOs did not have the opportunity to hold panel sessions for the government delegates and the press. Unfortunately, the Doha Ministerial Conference took no action to expand the opportunities for NGO cooperation and consultation in the forthcoming WTO negotiations. But the Doha Declaration states a commitment of the trade ministers to “improve dialogue with the public.”<sup>160</sup>

### 3. *Persuasion and Debate*

The conception of cosmopolitics presented here emphasizes decisionmaking through persuasion rather than power,

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157. Jorge B. Riaboi, *Trade Liberalization and Dangerous Political Games*, 24 *FORDHAM INT’L L.J.* 572, 593 (2000).

158. *Who Elected the WTO?*, *ECONOMIST*, Sept. 27, 2001, at 26, 28.

159. Press Release, World Trade Organization, 647 Non-governmental Organizations Eligible to Attend the Doha Ministerial (Aug. 13, 2001) (on file at WTO website as Press/240 at [http://www.wto.org/english/news\\_e/pr240\\_e.htm](http://www.wto.org/english/news_e/pr240_e.htm)). The WTO insisted that each NGO delegation be limited to one person.

160. Ministerial Conference, Ministerial Declaration, WT/MIN(01)/DEC/1, para. 10 (Nov. 14, 2001), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

and borrows from Thomas Risse's work on "communicative action in world politics."<sup>161</sup> Risse contends that under certain conditions, multilateral negotiating processes will exhibit "arguing and communication geared toward a reasoned consensus . . ."<sup>162</sup> Risse further points out that world politics occurs not just in secret negotiations, but also in the "international public sphere," where debates "touch on normative issues that are directly linked to the social identities of actors."<sup>163</sup> For both contexts, Risse explains that "arguing is likely to increase the influence of the materially less powerful, be it small states or nonstate actors such as INGOs [international nongovernmental organizations]."<sup>164</sup>

As many analysts have noted, the trading system is characterized by dealmaking and bargaining rather than deliberation and argument. Krajewski explains:

Besides its intransparency, the WTO decision-making process does not meet the conditions of deliberation on a more fundamental level. As mentioned above, deliberation is defined as a process of exchanging arguments in order to convince each other. The WTO decision-making process, however, is dominated by bargaining instead of arguing. . . . Different interests are combined, but are not integrated into a common framework.<sup>165</sup>

Kenneth Abbott lodges a similar critique in observing that the WTO "remains mired in the obsessive quid pro quo thinking that has always dominated tariff negotiations . . ."<sup>166</sup> He points out that the WTO needs to engage in rulemaking to produce mutual benefits for countries, but cannot do so because some parties demand linkage to market access.<sup>167</sup>

A good example of the obsession with linkage came in the commitment in the Doha Declaration to negotiate on "procedures for regular information exchange between MEA [multi-

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161. Thomas Risse, "Let's Argue!": *Communicative Action in World Politics*, 54 INT'L ORG. 1, 1 (2000).

162. *Id.* at 19 (listing conditions), 20.

163. *Id.* at 21-22.

164. *Id.* at 33.

165. Krajewski, *supra* note 61, at 177.

166. Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT'L ECON. L. 275, 293 (2001).

167. *Id.* at 293.

lateral environmental agreement] Secretariats and the relevant WTO committees, and the criteria for the granting of observer status.”<sup>168</sup> In view of the importance of securing closer cooperation between the WTO and the MEAs, one could have imagined the Doha Ministerial legislating a decision in favor of regular information exchange with simple criteria for granting observer status. Instead, the trade ministers launched a three-year negotiation on this and other environmental issues, and made clear that they were not prejudging the outcome of such negotiations.<sup>169</sup>

#### 4. *Issue-Based Alliances*

The formation of leagues among governments is an ancient practice, but the establishment of transparent, issue-based alliances in international negotiations is a relatively new phenomenon. For example, during the Uruguay Round, the Cairns Group of agricultural export nations was launched to carry out joint advocacy.<sup>170</sup> Developing countries that export textiles and clothing used a similar approach through the International Textiles and Clothing Bureau.<sup>171</sup> In recent years in the WTO, we have seen the creation of “Friends of Fish,” “Friends of a New Round,” and various “like-minded” groups of WTO governments.<sup>172</sup> This same phenomenon occurs in other regimes too—for example, the Umbrella Group in climate change negotiations that promotes emissions trading.

Why is this cosmopolitics? It is because a particular issue catalyzes a unique constellation of governments to work to-

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168. Ministerial Declaration, *supra* note 160, para. 31(ii).

169. *Id.* paras. 31, 45.

170. JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 30-31, *passim* (1995). The Cairns Group boasts that the Group “has effectively put agriculture on the multilateral trade agenda and kept it there.” See <http://www.cairnsgroup.org>. The Uruguay Round of trade negotiations occurred between 1986 and 1994.

171. CROOME, *supra* note 170, at 109, *passim*. Information on the International Textiles and Clothing Bureau can be found on its website at <http://www.itcb.org/About.htm>.

172. Rufus Yerxa takes note of the importance of the informal groups that promoted a successful conclusion of the Uruguay Round in 1993. Rufus H. Yerxa, *Comment*, in *EFFICIENCY, EQUITY, AND LEGITIMACY*, *supra* note 25, at 381, 383. It is not clear from his description whether all of the groups he lists were brought together for a particular policy purpose, or were back-channel groups seeking to promote mutual understanding.

gether as a unit so as to promote shared interests. When such efforts are purely intergovernmental, then they could still be ortho-politics, although distinguishable in seeking group goals other than power. But when such groups cooperate with similarly motivated private actors, then the ensuing efforts are cosmopolitics. For example, Australia has circulated within the WTO a position paper of “farm leaders” in Cairns Group countries.<sup>173</sup>

##### 5. *International Organizations*

Because the influence of international organizations is so pervasive, it is easy to forget that such organizations are themselves non-state actors. The WTO has legal personality and defined functions.<sup>174</sup> The treaty establishing the WTO contains multilateral trade agreements that are “binding on all Members.”<sup>175</sup>

The WTO Secretariat is headed by a Director-General (DG) whose responsibilities are “exclusively international in character.”<sup>176</sup> In carrying out his independent role, the DG has a license to persuade, but he always will have to be careful not to get too far out on a limb. An active DG exemplifies cosmopolitics because the DG can have conversations with governments without being a government. To better prepare himself, Moore recently set up an advisory panel consisting of seven individuals from academia, three from NGOs, and two former government officials.<sup>177</sup> Moore met with the panel for the first time in January 2002.

In early 2001, Moore came under criticism from a coalition of southern and northern NGOs for his efforts to launch a new trade round. According to the NGOs, “Since many WTO members are not in favour of a new Round, or are against it, it is unacceptable for a staff member of an international organisation to take sides with some Members against

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173. Cairns Group Farm Leaders Presentation to Cairns Group Ministers, WT/L/368 (Oct. 11, 2000).

174. See Marrakesh Agreement Establishing the World Trade Organization, arts. III, VIII:1.

175. *Id.* art. II:2.

176. *Id.* art. VI.

177. Press Release, World Trade Organization, Moore Appoints Advisory Panel on WTO Affairs (July 5, 2001) (available at the WTO website as Press/236 at [http://www.wto.org/english/news\\_e/pres01\\_e/pr236\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr236_e.htm)).

other members.”<sup>178</sup> This ill-considered attack is noteworthy because the NGOs—who are themselves engaging in cosmopolitics—apparently seek to take away the voice of the independent DG on the grounds that he is not a government and should stay neutral in trade affairs.

The WTO Secretariat has become more activist in recent years and is entering the cosmopolitical fray. Before the Seattle Ministerial, the Secretariat began using the WTO website to respond to criticisms from anti-WTO activists.<sup>179</sup> In March 2001, the Secretariat released *GATS—Fact and Fiction*, which illustrates complaints about the WTO (for example, from Ralph Nader) and then debunks them.<sup>180</sup>

International organizations also engage in cosmopolitics via their relationships with other international organizations. For example, in February 2002, top officials of the six core agencies in the Integrated Framework held a final plenary meeting. The participants were the heads or deputies of the International Monetary Fund, the International Trade Centre, the U.N. Conference on Trade and Development, the U.N. Development Programme, the World Bank, and the WTO. Following the meeting, the agency officials issued a joint communiqué reaffirming their “collective commitment to assist the meaningful integration of developing and least-developed countries into the multilateral trading system and the global economy.”<sup>181</sup> Meetings of governments—for example, the G-7—routinely issue similar communiqués following summits.

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178. Joint NGO Statement, NGOs Urge Governments to Call Off “New Round” Proposal (Mar. 19, 2001) (available at Third World Network’s website at <http://www.twinside.org.sg/title/joint3.htm>).

179. World Trade Organization, Criticism, Yes . . . Misinformation, No!, at [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/misinf\\_e/10tide\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/10tide_e.htm).

180. World Trade Organization, *GATS—Fact and Fiction 7* (2001), at [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsfacts1004\\_e.pdf](http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf).

181. See WTO News, Final Joint Communique by the Six Core Agencies of the Integrated Framework—IMF, ITC, UNCTAD, UNDP, World Bank and WTO (Feb. 26, 2002), at [http://www.wto.org/english/news\\_e/news02\\_e/ifjointm\\_washington\\_feb02\\_e.htm](http://www.wto.org/english/news_e/news02_e/ifjointm_washington_feb02_e.htm). Information on the Integrated Framework can be found at the WTO website at [http://www.wto.org/english/tratop\\_e/devel\\_e/teccop\\_e/if\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm). The IMF also has tried to be a “good neighbor” in Washington D.C. See IMF, Community Relations—Helping Achieve a Better Tomorrow, at <http://www.imf.org/external/np/cpac/index.htm>.

But for a group of U.N. and non-U.N. civil servants to make such a public commitment is unusual and demonstrates how international agencies can join together to make political statements.

#### 6. *Parliamentary Participation*

Elected parliamentarians have no official role in the WTO, but since 1999, they have begun to work together transnationally to influence WTO processes. Director General Moore addressed the Legislators Assembly in Seattle and since then has invited legislators to take a greater interest in the WTO.<sup>182</sup> Addressing a European Parliament seminar in April 2001, he reported that “more might be done to involve Parliamentarians in the WTO’s work. I believe Parliamentarians could, if given the opportunity, assist governments to bridge the gap between the WTO and voters by holding public hearings and better engaging the public at home in the creation and implementation of policy.”<sup>183</sup>

In June 2001, the Inter-Parliamentary Union (IPU) sponsored a world parliamentary meeting on international trade in which elected officials from seventy-one parliaments participated.<sup>184</sup> Speaking to that meeting, Moore said: “I would like to see a regular week put aside in Geneva with parliamentarians and NGOs to work with all the agencies and institutions.”<sup>185</sup>

At Doha, over one hundred parliamentarians from different countries convened to discuss the trade negotiations and the possibilities for more systematic involvement of parliamentarians in the work of the WTO.<sup>186</sup> The parliamentarians is-

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182. Director-General Mike Moore, Speech Notes to Legislators Assembly (Dec. 2, 1999) (transcript available at the WTO website at [http://www.wto.org/english/news\\_e/pres99\\_e/pr159\\_e.htm](http://www.wto.org/english/news_e/pres99_e/pr159_e.htm)).

183. Moore, *supra* note 122.

184. Press Release, Inter-Parliamentary Union, WTO Director General Dialogues with MPs at IPU Meeting on International Trade (June 9, 2001) (on file with the Inter-Parliamentary Union’s website at <http://www.ipu.org/press-e/gen119.htm>).

185. Mike Moore, Address to Inter-Parliamentary Union Meeting on International Trade on Promoting Openness, Fairness and Predictability in International Trade for the Benefit of Humanity (June 8, 2001) (transcript available at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm64\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm64_e.htm)).

186. Press Release, Inter-Parliamentary Union, Parliamentarians for More Transparency and Accountability of World Trade Negotiations (Nov. 12,



sued a Final Declaration calling for “a parliamentary dimension to the WTO.”<sup>187</sup>

Inter-parliamentary meetings began in the 19th century and so are hardly a new practice. By contrast, holding parliamentary meetings alongside global negotiations is a late 20th-century development with important potential. The Global Legislators Organization for a Balanced Environment (GLOBE) and Parliamentarians for Global Action have done this for several years.<sup>188</sup> Such parliamentary meetings likely will play a heightened role in the cosmopolitics of the future.

### 7. *Broadening Official Delegations*

The practice of putting nongovernment individuals on a government delegation to an international negotiation began in the 19th century, driven by the need for expertise and the hope for public support. In 1930, William Rappard observed that government delegations entrusted with commercial negotiations sometimes included the heads or permanent secretaries of associations set up to defend interests of industries, crafts, and agriculture.<sup>189</sup> He lamented that this factor “tended to favor a protective and restrictive trade policy.”<sup>190</sup>

This problem points to the questionable value of having governments select private individuals to put on an official delegation. Rather than selecting persons with a broad range of views for the purpose of improving dialogue, a government may add private individuals to its delegation simply to reinforce the policy preferences of the officials doing the selecting. As Jagdish Bhagwati explains, “[I]t is evident that it is up to the governments that negotiate to give their preferred NGOs, business and union lobbies a place on their negotiating teams.”<sup>191</sup>

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2001) (on file with the Inter-Parliamentary Union at <http://www.ipu.org/press-e/gen124.htm>).

187. A copy of the declaration by the Inter-Parliamentary Union on Nov. 11, 2001, is available at its website at <http://www.ipu.org/splz-e/doha.htm>.

188. See HILARY FRENCH, VANISHING BORDERS 171-72 (2000) (discussing GLOBE).

189. WILLIAM E. RAPPARD, UNITING EUROPE 141 (1930).

190. *Id.*

191. Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT'L AFF. 15, 29 (2001).

Several governments put NGOs on their delegations to the Seattle and Doha ministerial conferences. No overall study as to what those NGOs did in Seattle or Doha has come to the attention of this author. A recent paper by Hilary Coulby analyzes the experiences of the British and Kenyan NGOs in Seattle, and concludes that it was positive.<sup>192</sup>

#### 8. *NGOs Speaking for Themselves*

The defining feature of cosmopolitics is broad participation in governance. Actors participate as individuals or as representatives of groups. Keen observers recognize the heterogeneous nature of participation, and learn to be skeptical of anyone's self-description of for whom they speak. Thus, if a delegate from a development NGO asserts that she speaks for poor people, no one should assume that this claim is literally true. Similarly, when an elected official asserts that he is the "single voice" of an entire country on trade, that claim should be met with skepticism.

An individual may, in his mind, delegate to several actors the responsibility of speaking for him in world cosmopolitics. These delegations may occur simultaneously—for example, to a government, a professional association, a religion, and an environmental NGO.<sup>193</sup> The individual knows that in domestic law, his government speaks for him whether or not he agrees to such delegation. But he may view other institutions as better champions of his views, on a particular issue, than the elected government of his country of citizenship.<sup>194</sup>

Broad participation does not mean that all players have identical rights and roles. Some tasks—like signing treaties—

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192. Hilary Coulby, *Going to Qatar: How to Get an NGO Representative on Your Government Delegation*, CATHOLIC AGENCY FOR OVERSEAS DEVELOPMENT POLICY REPORT (2001), at <http://www.cafod.org.uk/policy/qatarngorep.shtml>.

193. Cf. LASSWELL & MCDUGAL, *supra* note 90, at 188 (noting that individuals "identify and affiliate with, and make demands on behalf of, many different groups—including not merely nation-states, but lesser territorial communities, international governmental organizations, political parties, pressure groups, tribes, families, and private associations of all kinds").

194. Cf. David Held, *The Transformation of Political Community: Rethinking Democracy in the Context of Globalization*, in *DEMOCRACY'S EDGES*, *supra* note 55, at 84, 107 ("In this system of cosmopolitan governance, people would come to enjoy multiple citizenships—political membership in the diverse political communities which significantly affect them.").

generally are reserved only to governments, while other tasks—like proposing treaties—can be engaged in by individuals and NGOs. For example, Jody Williams and the International Campaign to Ban Landmines had key roles in the treaty-making process.<sup>195</sup>

The mantras that the WTO is strictly “government-to-government” and “member-driven” may have some descriptive validity, but are useless guides for determining how the WTO should interact with NGOs.<sup>196</sup> As noted above, the Agreement Establishing the WTO gave the intergovernmental General Council the responsibility to make “appropriate arrangements for consultation and cooperation” with NGOs.<sup>197</sup> Yet so far, the Council has avoided the hard work of thinking through these potential relationships.

It might be said in response that the General Council carried out its responsibility by approving the NGO Guidelines of 1996,<sup>198</sup> and ruling out, as inappropriate, any direct involvement by NGOs in the work of the WTO or its meetings. But that gives the Council too much credit for policy consistency because the WTO permits involvement by some business NGOs. For example, the WTO has cooperated with the ICC and the International Federation of Inspection Agencies (IFIA) to carry out the Agreement on Preshipment Inspection.<sup>199</sup> The ICC also attends on a regular basis the Technical Committees established under the WTO Agreements on Rules of Origin and Customs Valuation.<sup>200</sup>

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195. See Motoko Makata, *Building Partnerships Toward a Common Goal: Experiences of the International Campaign to Ban Landmines*, in *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* 143 (Ann M. Florini ed., 2000); Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 *INT'L ORG.* 613 (1998).

196. See Jackson, *supra* note 110, at 67, 71-72, 76-77 (questioning the mantras).

197. See *supra* text accompanying note 109.

198. See *supra* text accompanying note 102.

199. Richard Blackhurst, *The Capacity of the WTO to Fulfill Its Mandate*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 31, 43-44 (Anne O. Krueger ed., 1998). The IFIA is a trade association for inspection agencies, laboratories, and allied businesses. Further information on the IFIA can be found at its website at [www.ifia-federation.org](http://www.ifia-federation.org).

200. Agreement on Rules of Origin, art. 4:2 & Annex 1:6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, at [http://www.wto.org/english/docs\\_e/legal\\_e/22-roo.pdf](http://www.wto.org/english/docs_e/legal_e/22-roo.pdf); E-mail from

In his recent speech to the WTO's 2001 symposium for NGOs, Director-General Moore pointed out the need to recognize that appropriate NGO participation varies according to the WTO task at issue.<sup>201</sup> Specifically, he called for an NGO "code of conduct" and then suggested that governments and their institutions give those who follow such rules "a stake in the process."<sup>202</sup> Then he said, "And we need to accept that there is a fundamental difference between transparency and participation on the one hand and negotiations on the other—which in the end only Governments can do."<sup>203</sup> Moore seems to be suggesting that NGO "participation" is appropriate for some WTO processes yet not for negotiations.<sup>204</sup> In making that point, Moore is a few steps ahead of most WTO Member governments who see no role for NGOs, so his dis-

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Fred Wong, WTO Secretariat, to Steve Charnovitz (Apr. 25, 2001) (on file with author); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, art. 18:2, Apr. 15, 1994 [Customs Valuation], at [http://www.wto.org/english/docs\\_e/legal\\_e/20-val.pdf](http://www.wto.org/english/docs_e/legal_e/20-val.pdf); E-mail from Aziz El Kassimy, Deputy Director Valuation Sub-Directorate World Customs Organization, to Steve Charnovitz (Apr. 25, 2001) (on file with author).

201. Mike Moore, Address to WTO Symposium on Issues Confronting the World Trading System on Open Societies, Freedom, Development and Trade (July 6, 2001) (transcript available at the WTO website at [www.wto.org/english/news\\_e/spmm\\_e/spmm67\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm67_e.htm)).

202. *Id.*

203. *Id.* For further analysis along these lines, see José E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 8 (2001) ("The question of NGO participation within the WTO is not one policy question but many, probably requiring distinct responses depending on the type of participation envisioned, the entity seeking access, and the level of WTO action under discussion.").

204. *Cf.* Keohane & Nye, *supra* note 60, at 289 ("It would be problematic, however, to give NGOs the right to participate in trade bargaining sessions, since consummating deals often requires a certain degree of obfuscation of the trade-offs being made."); David Robertson, *Australia's Relationship with the World Trade Organization* 5 (Aug. 23, 2000) (submission to Joint Standing Committee on Treaties, on file with author) ("Since trade negotiations are about bargaining which depends on confidentiality, there is a philosophical conflict between the craft of trade negotiations and the art of propaganda used by lobby groups."); WTO General Council, *WTO: External Transparency—General Principles, Communication from Hong Kong, China*, WT/GC/W/418 at 3 (Oct. 31, 2000) ("It will be impossible for the WTO to function as a negotiation forum on international trade should it be required to reconcile the interests and positions of different political factions and domestic constituencies of individual Members.").

inction can suffice for now. Eventually however, governments will need to divide the broad function of “negotiations” into those tasks that would benefit from NGO participation and those that need to be performed solely by diplomats and bureaucrats. For instance, the ongoing discussions in the WTO’s Working Group on Transparency in Government Procurement might benefit from the participation of Transparency International (TI) and other NGOs.<sup>205</sup> What is needed is a matrix listing the discursive processes in the WTO, and then designating the appropriate form of NGO consultation and cooperation for each of them.

Two main strategies exist for how the WTO can involve NGOs. The WTO can *marginalize* the NGOs or can *mainstream* them. So far, the WTO has marginalized most NGOs by not allowing them to do anything more than attend symposia. A better strategy would be to mainstream NGOs into the regular work sessions of WTO councils, committees, and bodies. As former GATT and WTO legal adviser Ernst-Ulrich Petersmann explains, “[The symposia are] no substitute for institutionalizing civil society representatives as an advisory body with access to WTO documents and the right to submit recommendations to all WTO bodies subject to procedures which ensure more accountability of NGOs and check their democratic legitimacy.”<sup>206</sup> Other trade experts also have endorsed an NGO consultative body. For example, Americo Beviglia Zampetti suggests that a WTO advisory body would give civil society groups “a microphone to replace the megaphone.”<sup>207</sup> Some

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205. Abbott, *supra* note 166, at 294. He notes that the OECD received input from NGOs in preparing its Convention on Bribery of Foreign Government Officials.

206. Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships*, 4 J. INT’L ECON. L. 3, 37 (2001) (footnote omitted). In quoting Petersmann, I am not endorsing his use of the word “representative.” In my view, the rationale for NGO participation in the WTO is that they can present ideas overlooked or undervalued by governments. I do not see NGOs as performing the same representative function that elected officials do, and hence I am not as concerned as Petersmann is about the accountability and democratic legitimacy of NGOs.

207. Zampetti, *supra* note 25, at 45-46.

analysts have suggested that the WTO hold public hearings on specific issues and give NGOs an opportunity to testify.<sup>208</sup>

If organized consultation and cooperation with NGOs is too bold a step for WTO governments, then the General Council could start by authorizing NGO input into the WTO subsidiary bodies that study and debate issues, rather than negotiate them. Two such bodies are the Committee on Trade and Development and the Committee on Trade and Environment. The Doha Declaration gives these Committees a new mandate for the new trade round to “act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.”<sup>209</sup> Such a forum could become useful if the participation were more diverse than the trade bureaucrats who typically attend WTO committee meetings.

As of March 2002, the WTO has engaged in only a few instances of mainstreaming NGOs. The main arena of progress is in WTO dispute settlement where a courageous Appellate Body has held out a possibility for an NGO to submit an amicus brief in WTO adversary proceedings. This experience will be discussed in the next section.

### B. *The Controversy Over Amicus Briefs*

This article will provide only a very brief summary of the WTO jurisprudence on amicus briefs.<sup>210</sup> The WTO Under-

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208. See, e.g., Bernhard May, *Globalisation, Democracy and Trade Policy, in THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND: FREER TRADE IN THE TWENTY-FIRST CENTURY* 72 (Klaus Günter Deutsch & Bernhard Speyer eds., 2001).

209. Ministerial Declaration, *supra* note 160, para. 51.

210. For greater detail, readers may consult the growing legal literature on this topic. See, e.g., 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); Arthur E. Appleton, *Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?*, 3 *J. INT'L ECON. L.* 691 (2000); Ernesto Hernández-López, *Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes*, 35 *J. WORLD TRADE* 469 (2001); Gabrielle Marceau & Matthew Stilwell, *Practical Suggestions for "Amicus Curiae" Briefs Before WTO Adjudicating Bodies*, 4 *J. INT'L ECON. L.* 155, 156-64 (2001); Petros C. Mavroidis, *"Amicus Curiae" Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Working Paper (Feb. 2001), at <http://www.jeanmonnetprogram.org/papers/01/010201.html>; Denise Prévost, *WTO*

standing on Rules and Procedures Governing the Settlement of Disputes does not specifically open the door to amicus curiae briefs.<sup>211</sup> In its Shrimp-Turtle decision in 1998, the Appellate Body ruled that panels may solicit an NGO brief and may consider an unsolicited brief.<sup>212</sup> In its Carbon Steel decision in May 2000, the Appellate Body ruled that it had the legal authority to accept and consider an NGO brief in an appeal in which “we find it pertinent and useful to do so.”<sup>213</sup>

The Carbon Steel decision provoked consternation among governments. During a June 2000 session of the Dispute Settlement Body, several government delegates complained that the Appellate Body had not provided sufficient guidance as to when it would accept an NGO brief.<sup>214</sup> In view

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*Subsidies Agreement and Privatised Companies: Appellate Body “Amicus Curiae” Briefs*, 27 LEGAL ISSUES OF ECON. INTEGRATION 279 (2000); Andrea Kupfer Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER L. SYMP. J. 87 (2001); Georg C. Umbricht, *An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO*, 4 J. INT’L ECON. L. 773 (2001); *Issues of “Amicus Curiae” Submissions: Note by the Editors*, 4 J. INT’L ECON. L. 701 (2000); Geert A. Zonnekeyn, *The Appellate Body’s Communication on “Amicus Curiae” Briefs in the “Asbestos” Case. An Echternach Procession?*, 35 J. WORLD TRADE 553 (2001); August Reinisch & Christina Irgel, *The Participation of Non-governmental Organisations (NGOs) in the WTO Dispute Settlement System*, 1 NON-STATE ACTORS & INT’L L. 127 (2001), at <http://www.kluweronline.com/issn/1567-7125/current>.

211. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 [hereinafter DSU]. The lack of a specific provision may not be surprising. U.S. federal law has no such provision either. Courts have filled in this lacuna with their own rules. See Ala’i, *supra* note 210, at 86-93 (discussing U.S. Supreme Court rules); Nat’l Org. for Women, Inc. v. Scheidler, 223 F.3d 615 (7th Cir. 2000) (clarifying the policy in the Seventh Circuit on consideration of amicus briefs).

212. WTO Appellate Body Report, United States—Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, paras. 104, 110 (Oct. 12, 1998) [hereinafter Shrimp and Shrimp Products].

213. WTO 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, para. 42 (May 10, 2000).

214. WTO Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/83, para. 5 (quoting the EC as saying that the Appellate Body (AB) did not provide any guidance), para. 12 (quoting Canada as saying that the AB had provided no guidance), para. 15 (quoting Hong Kong as saying that the AB decision was practically problematic and not a model of clarity), para. 16 (quoting Hungary as saying that the AB had not elaborated on criteria for

of the short time frames in an appeal,<sup>215</sup> the litigant governments and the third parties need to know immediately if “useful” NGO views are being considered in order to be able to respond to them. Yet the imprecise Appellate Body decision left open the possibility that an NGO brief might be accepted and read without transparency.

The next opportunity for the Appellate Body to provide greater clarity occurred in the appeal of the Asbestos dispute, and the jurists acted to do so.<sup>216</sup> On November 7, 2000, the division of the Appellate Body considering the appeal adopted an “Additional Procedure” to govern non-party briefs in the Asbestos dispute.<sup>217</sup> The Appellate Body notified the Dispute Settlement Body of this procedure the following day on November 8th and the WTO Secretariat posted the communication on the WTO website that evening.<sup>218</sup> The new Procedure was adopted pursuant to the Working Procedures for Appellate Review, which provide:

In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a divi-

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future decisions) (July 7, 2000), WT/DSB/M83. It should also be noted that many of these governments and other governments stated that the Appellate Body’s decision was incorrect as to the legality of an amicus submission in the WTO system. Nevertheless, the Dispute Settlement Body adopted the Appellate Body decision. *Id.* para. 35. The Dispute Settlement Body is composed of representatives of all WTO Member governments.

215. DSU, *supra* note 211, art. 17:5 establishes a normal time limit of sixty days that can be extended up to ninety days.

216. This was a dispute between Canada (plaintiff) and the European Communities (defendant) about a French ban on the importation of asbestos fiber. Laura Yavitz, *The World Trade Organization Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Mar. 12, 2001, WT/DS135/AB/R*, 11 MINN. J. GLOBAL TRADE 43, 56-57 (2002).

217. Communication from the Appellate Body, European Communities—Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/9 (Nov. 8, 2000) [hereinafter Communication on Measures Affecting Asbestos]. The division are the three members of the Appellate Body hearing that particular case.

218. *See* WTO Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, paras. 50-51 (March 12, 2001) [hereinafter Report on Measures Affecting Asbestos]. This report was adopted by the Dispute Settlement Body on April 5, 2001.



sion may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the *DSU* [Dispute Settlement Understanding], the other covered agreements and these Rules.<sup>219</sup>

According to the Procedure, any person, whether legal or natural, would have until noon on November 16, 2000, to file an application for leave to submit a written brief in the case.<sup>220</sup> The Procedure made clear that the governmental parties to the case would be given a “full and adequate opportunity” to respond to any amicus brief accepted by the Appellate Body.<sup>221</sup> The Appellate Body probably was proud of this effort to provide for an orderly consideration of NGO briefs and to address the procedural concerns voiced by governments a few months earlier. The use of the WTO website was apposite, given the need to alert NGOs around the world to the immediate window of fewer than eight days.

The Appellate Body’s action evoked conflicting reactions. Some social and economic actors around the world were enthusiastic. Eleven applications were made within the time deadline, but six arrived too late and were denied.<sup>222</sup> In addition, about thirteen briefs came in before the announcement of the Procedure or without awareness of it, and were all rejected.<sup>223</sup> Together, private submissions came from nineteen countries.<sup>224</sup> The attitude of most governments, however, was

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219. WTO Appellate Body—Working Procedures for Appellate Review, WT/AB/WP/3, para. 16(1) (Feb. 28, 1997).

220. Communication on Measures Affecting Asbestos, *supra* note 217, para. 2.

221. *Id.* para. 9.

222. Report on Measures Affecting Asbestos, *supra* note 218, para. 55.

223. *Id.* para. 53 & n.30. Nine briefs had already arrived at the Appellate Body before the Additional Procedure was finalized. WTO, Special General Council Meeting on 22 November 2000, Factual Background Note Relating to the Issue Raised by Certain Members (undated WTO document not in the public domain).

224. Americas (Argentina, Canada, Colombia, El Salvador, and the United States); Europe (Belgium, France, Portugal, Switzerland, the Netherlands, and the United Kingdom); Africa (Senegal and South Africa); and Asia (Australia, India, Japan, Korea, Sri Lanka, and Thailand). *Id.* paras. 53 n.30, 55 n.31, 56 n.32.

condemnatory.<sup>225</sup> Egypt, acting on behalf of the Informal Group of Developing Countries, immediately called a meeting of the WTO General Council to discuss this situation.<sup>226</sup> At the special meeting, twenty-four governments criticized the Appellate Body (with four of those governments speaking for a larger group of countries).<sup>227</sup> Four governments did not criticize the Appellate Body, and only one of those (the United States) endorsed the Appellate Body's action.<sup>228</sup>

The criticism by the governments went across the board. Some delegates called the Additional Procedure a substantive rather than a procedural matter and hence not justifiable under the Appellate Body Working Procedures.<sup>229</sup> Some governments objected to the posting of the notice on the WTO website because that would invite briefs from the public.<sup>230</sup> Many of the governments criticized the entire idea of panel or Appellate Body consideration of amicus briefs and asserted that WTO rules did not permit this practice. For example, Hong Kong China said that the issue of amicus briefs had been considered in the Uruguay Round but rejected.<sup>231</sup> Korea declared that acceptance of amicus briefs should be sus-

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225. Daniel Pruzin, *WTO Appellate Body Under Fire for Move on Acceptance of Amicus Briefs*, BNA INT'L TRADE DAILY REP. FOR EXECUTIVES, Nov. 27, 2000, at A1; International Centre for Trade & Sustainable Development, *Amicus Brief Storm Highlights WTO's Unease with External Transparency*, BRIDGES, Nov.-Dec. 2000, at 1, available at <http://www.ictsd.org/English/BRIDGES4-9.pdf>.

226. World Trade Organization General Council, Minutes of Meeting Held in the Centre William Rappard on 22 November 2000, WT/GC/M/60, para. 1 (Jan. 23, 2001) [hereinafter General Council Minutes].

227. These included: Argentina, Bolivia, Brazil, Canada, Chile, Colombia (on behalf of Andean countries), Costa Rica, Cuba, Egypt (on behalf of the Informal Group of Developing Countries), Hong Kong China, Hungary (on behalf of itself and six other Eastern European countries), India, Jamaica, Japan, Korea, Mexico, New Zealand, Pakistan, Singapore (on behalf of ASEAN countries), Switzerland, Tanzania, Turkey, Uruguay, and Zimbabwe. General Council Minutes, *supra* note 226.

228. These included: Australia, the European Communities, Norway, and the United States. *Id.*

229. *Id.* para. 12 (Egypt).

230. *Id.* para. 35 (India). Even though India's delegates to the WTO have argued against NGO participation in dispute settlement, an NGO in India—the CUTS Centre—has been one of the most articulate advocates for NGO access. *NGO Participation in the WTO Dispute Settlement*, ECONOMIQUITY (CUTS Centre for International Trade, Economics & Environment, Jaipur, India), July-Oct. 2000, at 1.

231. General Council Minutes, *supra* note 226, para. 23.

pending pending further deliberations of the General Council.<sup>232</sup> At the end of the meeting, the chair said that he would communicate to the Appellate Body the points raised at the meeting and suggest that it “exercise extreme caution.”<sup>233</sup>

By the time that the General Council met on November 22, 2000, the Appellate Body had already exercised such caution.<sup>234</sup> All eleven of the timely amicus applications were denied on, or shortly after, November 16th.<sup>235</sup> This has fed speculation as to how much of the previous Appellate Body holdings on the legality of amicus briefs survive. Subsequent to that General Council meeting, no WTO panel or Appellate Body division has indicated acceptance of an NGO brief.

The controversy over amicus briefs provides a case study of cosmopolitics in action. Beginning in the Hormones dispute in 1996, NGOs have drafted briefs for WTO panels and sent them in unbidden.<sup>236</sup> The WTO had no rule specifically permitting such briefs. Nevertheless, the NGOs acted on their own to change WTO practice regarding the admissibility of private briefs in dispute settlement.<sup>237</sup> As Kant would have understood, no special agreement among nations was needed for such NGO activism because the offering of advice to governments exists as an obligation of universal human reason.<sup>238</sup> In the Shrimp-Turtle litigation, some of the NGOs underlined

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232. *Id.* para. 85.

233. *Id.* paras. 123, 131.

234. Zonnekeyn, *supra* note 210, at 563 (suggesting that the U-turn by the Appellate Body arose because of opposition by WTO Members); Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 254 (2002) (suggesting that the General Council meeting motivated the Appellate Body to reject the amicus briefs).

235. Report on Measures Affecting Asbestos, *supra* note 218, at para. 56; Ala'i, *supra* note 210, at 82.

236. See Steve Charnovitz, *The World Trade Organization, Meat Hormones, and Food Safety*, 14 INT'L TRADE REP. 1781, 1786 (1997).

237. See Sir John Fischer Williams, *The Legal Character of the Bank for International Settlements*, 24 AM. J. INT'L L. 665, 665 (1930) (“The admission of the individual to the international world will perhaps result rather from the extension and development of current practice than from any formal act definitely opening to him the international doors.”).

238. See *supra* text accompanying note 12.

the cosmopolitical nature of their action by authoring briefs as a coalition of NGOs from both the south and north.<sup>239</sup>

At the vortex stands the Appellate Body. Unlike the legislative bodies of the WTO—which have a ready excuse (i.e., the WTO consensus rule<sup>240</sup>) for their inaction on a wide range of important trade issues<sup>241</sup>—the Appellate Body has to make difficult decisions regularly and on a tight timeframe.<sup>242</sup> The WTO treaty has no provision for an amicus brief and yet this silence is hardly dispositive, as the Appellate Body is charged with interpreting the treaty in accordance with the customary rules of interpretation of public international law.<sup>243</sup> Although the Appellate Body was pressing the limits of reasonable interpretation in perceiving opportunities for amicus briefs within the contours of WTO rules, its actions were justifiable in the absence of any specific WTO legislation on the issue.<sup>244</sup>

In Joseph Weiler's analysis, the Appellate Body was pulled between the challenges of internal and external legitimacy in deciding the issue of amicus briefs.<sup>245</sup> The challenge of internal legitimacy is to act as a trade court inside an organization

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239. WTO Appellate Body Report, United States—Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, para. 79 (Oct. 12, 1998), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm); WTO Panel Report, United States—Import Prohibitions of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/RW, para. 5.14 (June 15, 2001).

240. WTO Agreement, *supra* note 145, art. IX:1.

241. Writing a few weeks before the Doha conference, a former WTO Director-General did not soft-pedal his disappointment at the poor record of the WTO. Peter Sutherland, *Doha and the Crisis in Global Trade*, FIN. TIMES, Sept. 4, 2001, at 21 (“Yet in some ways the difference between the foolish activists on the streets who seek to destroy the institution and those supposedly responsible political leaders who are prepared to stand on the sidelines and allow the WTO to become moribund is slight.”).

242. See DSU, *supra* note 211, arts. 17.5, 17.12.

243. *Id.* art. 3.2. See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

244. Zonnekeyn, *supra* note 210, at 558, 62-63 (stating that the Additional Procedure was within the boundaries of WTO law and caselaw and was not *ultra vires*).

245. J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 204 (2001). Weiler suggests that the Appellate Body take measured steps: “Go too far in one direction and the Appellate Body will find itself under severe internal challenge. Go too far in the other direction and

with a diplomatic ethos and intergovernmental reflex.<sup>246</sup> The challenge of external legitimacy is to preserve the integrity of a legal process where the notion of excluding voices affected by one's decision runs counter to the very principles of natural justice.<sup>247</sup>

Even as the Appellate Body was being attacked within the WTO, its rulings on amicus briefs were having a progressive impact outside the WTO on the jurisprudence of the North American Free Trade Agreement (NAFTA). In the Methanex dispute brought under the NAFTA investment chapter, Chapter Eleven, the arbitral tribunal ruled that it had the power to accept amicus briefs from private actors even though NAFTA lacks any provision specifically permitting such briefs.<sup>248</sup> The tribunal reasoned such "WTO practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-party third persons, even in a judicial procedure affecting the rights and obligations of state parties . . . ."<sup>249</sup> Furthermore, the tribunal noted, as a public interest factor, that the Chapter Eleven arbitral process "could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive."<sup>250</sup> It is in-

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it will not only become a target of outside sharp attacks but open itself to attack as bowing to political pressure." *Id.* at 204.

246. *Id.* at 201, 203-04.

247. *Id.* at 204.

248. *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" [hereinafter *Methanex*], paras. 24, 47, 52 (Jan. 15, 2001), at [http://iisd1.iisd.ca/pdf/methanex Tribunal\\_first\\_amicus\\_decision.pdf](http://iisd1.iisd.ca/pdf/methanex Tribunal_first_amicus_decision.pdf). This dispute was brought by Methanex Corporation (a Canadian company) against the United States claiming that California's ban on a gasoline additive violated the NAFTA investment provisions on national treatment, a minimum international standard of treatment, and expropriation. Peter Menyasz, *NAFTA Panel Says NGOs Can Intervene in Cases Brought for Arbitration Purposes*, BNA DAILY REP. FOR EXECUTIVES, Jan. 30, 2001, at A-5. This phase of the case began when the International Institute for Sustainable Development submitted a petition to the tribunal requesting permission to submit an amicus curiae brief. Chapter 11 Decision, para. 1. The tribunal took note of the petition, which was the first procedural step to its decision that it was presently minded to receive such submissions. *Id.* para. 53. Methanex sought to keep out the amicus briefs. *Id.* para. 11. The U.S. government replied that the Tribunal should allow the amicus briefs. *Id.* para. 16.

249. *Methanex*, *supra* note 248, para. 33.

250. *Id.* para. 49.

teresting to note that the Government of Mexico submitted a brief (as a non-disputing State party to NAFTA) arguing that NAFTA did not permit consideration of amicus briefs.<sup>251</sup> One of Mexico's arguments was that there was no power under Mexican law for domestic courts to receive amicus briefs.<sup>252</sup> The tribunal apparently was not persuaded that its procedures needed to be a lowest common denominator of the parties to the treaty.

Writing many years ago about the law of international organizations, Louis B. Sohn explained that a "difficult balance" would need to be found, on the one hand, between the sanctity of the constitution and the rule of law, and on the other hand, "ensuring through imaginative interpretation the survival of the organization in the stress and strain of modern civilization."<sup>253</sup> In making its decisions regarding amicus briefs, the Appellate Body used imaginative interpretation to promote the survival of the WTO amid the stress and strains of cosmopolitics.

## V. CONCLUSION

Cosmopolitics is the new world order.<sup>254</sup> NGO activism does not reflect "disorder."<sup>255</sup> Rather, it is natural for individuals to want to participate in governance decisions that affect them, from the village to the international organization. Beginning with Kant, a cosmopolitical tradition has flowered as a challenge to state-centric authority.

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251. *Id.* para. 9.

252. *Id.* paras. 9, 15.

253. Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1423 (1964).

254. See FREDERICK CHARLES HICKS, THE NEW WORLD ORDER 280 (1920) ("Practically all public international unions owe their origin to private initiative; and when they are organized they prosper or are allowed to lapse according as they are suited to the needs of citizens of the various states.").

255. The terrorism of September 11, 2001, has altered NGO tactics away from physical demonstrations and violence. Alan Beattie, *Anti-globalization Warriors Shift Their Ground: The Appetite for Mass Confrontations at International Conferences Has Diminished*, FIN. TIMES, Nov. 9, 2001, at 10. This is a positive development. But governments also may be less tolerant of dissent. On September 11, the *Wall Street Journal* ran a little-noticed front page story about how governments were stepping up efforts to infiltrate NGOs. See Michael M. Phillips, *Police Go Undercover to Thwart Protesters Against Globalization*, WALL ST. J., Sept. 11, 2001, at A1.

Ironically, cosmopolitics is less advanced in the WTO than in other international organizations, and yet the WTO may need more of it than other organizations do. Since the main role of WTO rules is to supervise governmental trade restrictions, the voices of those hurt by such restrictions should be part of the policy conversation at the WTO. Concern about protectionism is a core theme of southern NGOs, but this problem has not yet become a priority of northern NGOs. Rather, many northern NGOs have focused their attention on the way that trade rules can restrict domestic regulation. With the initiation of a new trade round, NGOs are likely to step up their efforts to monitor and influence the WTO. Other inter-governmental organizations are likely also to watch WTO developments more closely than in the past. In future trade disputes, some intergovernmental organizations may consider the possibility of offering an *amicus curiae* submission to a WTO dispute panel.

In advocating that the WTO engage in more consultation and cooperation with civic society, I am not suggesting that the most vocal NGO criticism of the WTO is justified. In my view, many of the leading WTO critics are anti-trade, anti-development, anti-technology, and anti-international law. Rather than “think[ing] globally, but act[ing] locally” (to quote René Dubos<sup>256</sup>), or trying to think globally and act globally, many of the anti-globalization critics are “thinking locally and acting globally.”<sup>257</sup> That is a dangerous brew.

More WTO cosmopolitics could improve the WTO, but it also could improve the quality of debate by civil society groups. It is easy to chant nonsense slogans in the streets, yet harder to offer sensible criticism that can be challenged by countervailing views. The best way to promote more constructive NGO participation is by making the WTO a better marketplace of ideas.<sup>258</sup>

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256. RENÉ DUBOS, *CELEBRATIONS OF LIFE* 83 (1981).

257. SUSAN ARIEL AARONSON, *TAKING TRADE TO THE STREETS* 187 (2001). For an example, see COLIN HINES, *LOCALIZATION: A GLOBAL MANIFESTO* (2000).

258. *Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, 53d Sess., Agenda Item 4, para. 68, U.N. Doc. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (“Given the diverse points of view articulated by different groups in society, it is imperative that there be space

To return to Commissioner Lamy's question, the answer is yes: We need cosmopolitics in order to harness globalization. Nearly two hundred years ago, David Ricardo provided the vision of how "a system of perfectly free commerce" would bind together, "by one common tie of interest and intercourse, the universal society of nations throughout the civilized world."<sup>259</sup> Free commerce is certainly a step in the right direction, but the society of nations also needs a governance structure to supervise the ties of interest and intercourse in an interdependent world.

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both at the domestic and international levels for enhanced dialogue between civil society and local and global macroeconomic decision-makers . . . ."); Julie Mertus, *Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT'L L. & POL. 537, 554-55 (2000) (noting the new ideas, approaches, and solutions that spring forth from NGOs); see also JOHN KEANE, *CIVIL SOCIETY* 50 (1998) ("Modern civil society is a restless battlefield where interest meets interest").

259. DAVID RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 93 (Prometheus Books 1996) (1817).