

Welfare and Democracy on a Global Level: The WTO as a Case Study

Eyal Benvenisti*

I. Introduction

One aspect of globalization is the shift of the venue of policy-making from the national to the regional and the international arenas. Willingly or grudgingly, national legislatures agree to share policy-making and monitoring powers with regional or international institutions. This has resulted in a process of “legalization of world politics,”^[1] as outcomes at the supranational level are shaped less by the informal and opaque bargaining among governments that characterized inter-governmental dealings so far, but increasingly more by structured decision-making processes at the supranational prescriptive, monitoring and dispute-resolution levels. US laws aimed at protecting endangered species,^[2] Canadian laws aimed at protecting Canadian air quality,^[3] or French laws restricting trade in products containing asbestos fibers,^[4] are being challenged, reviewed and sometimes rejected as violations of supranational norms by international or regional institutions such as the World Trade Organization (WTO) or the North American Free Trade Agreement (NAFTA).

Welfare-related policy-making and enforcement has for many years been an important area for national political branches. Because the welfare state hinges on norms and institutions that intervene in domestic markets to ensure labor rights and provide a safety net to citizens, the waning power of national decision-makers to shape those norms and institutions may threaten the sustainability of welfare policies. The risk is that unilateral welfare-enhancing measures that would impose limits on unhindered trade would be found illegal under supranational norms, as constituting anti-trade measures. This risk meets domestic societies in transition both in developed and developing countries, transitions that require the adjustments of existing welfare policies or setting up of new ones.^[5]

The national-supranational power-sharing phenomenon also holds, however, a promise to governments seeking improvements to existing welfare standards. Such governments may try to work through the relevant supranational institutions to impose their standards, such as better labor standards or more inclusive social rights, on other states, including less welfare-oriented or less developed competitors. In other words, they use supranational institutions as new venues for welfare-related policy-making.

There are two main stumbling blocks to this route. First, there are governments who do not wish to adopt high welfare standards. Some developed states are less keen on high welfare standards for their citizens. For developing economies, high labor standards and social safety nets imply higher labor costs that limit their relative advantage vis-à-vis developed economies.

The second problem involves the waning power of the individual voters as a direct result of the delegation of domestic powers to supranational institutions. Welfare considerations are usually the concern of the larger and politically weak groups within society, namely the employees, the relatively poor, the uneducated or unhealthy citizens. The delegation of political power to supranational institutions is more likely to affect adversely those larger and looser groups of voters, those who are less likely to form narrow interest groups and carry their demands beyond their country’s borders, where organization costs are sometimes exorbitantly high. The smaller, usually more politically effective groups of employers and investors, who have lesser, if any, interest in maintaining welfare standards, who can pose a credible threat of exit, are those likely to increase their relative political power the further away from

the voter the decision-making is made.[\[6\]](#)

The first stumbling block requires inter-governmental negotiations. As it happens, there is room for such negotiation. Developed countries can trade higher welfare standards for the elimination of tariffs and quotas imposed by developed states on agriculture and textile products, and for the reduction of the length and scope of patent protection. The recent WTO Ministerial Declaration, adopted at the WTO Ministerial Conference in Doha on 14 November 2001, [\[7\]](#) attests to an acknowledgement of a possible give-and-take, and presents a commitment to explore this possibility.[\[8\]](#)

These negotiations, however, will be orchestrated by governments. Articles 48 and 49 of the WTO Work Programme ensure that the negotiations would be open to governments only. It is here that the second stumbling block, concerning the dilution of the general voters' power and hence the pro-welfare voices, comes into play.

The aim of this chapter is to examine these internationalized decision-making processes in which only governments have voice, in an effort to assess potential mechanisms to ensure ample voice to the general public. This effort is motivated by the view that the future of the welfare state – both in developed and developing societies – hinges on the question of whether supranational decision-making procedures would aim at leveling the political playing field and ensure effective opportunities for public participation.

This chapter is devoted to an examination of the challenge of democratic participation in supranational institutions in general (Part II), and in the WTO in particular (Part III). Part IV concludes with an analysis of the prospects for maintaining welfare standards through supranational institutions.

II. The Right to Democratic Participation in the Supranational Context

“Democratization” in this context clearly cannot mean holding general elections among the citizens of all the countries participating in the supranational body.[\[9\]](#) “Democratization” in a legal environment composed of sovereign states that wish to retain effective national legislatures should mean something more nuanced but hopefully no less meaningful than the right to vote directly for representatives to the supranational institution. Participatory rights can still center on the national democratic processes. But such participatory rights must be augmented by measures that would ensure the ability to form opinions based on sufficient information, as well as to ensure the ability to provide input for decision-makers at the supranational level.

History shows that the right to democratic participation is not easily won. Enfranchisement within states has always meant the dilution of the decision-making power of those holding power who obviously had to be convinced to share the power and dilute their own influence. Often this conviction was achieved using force and not only reason. Now history seems to repeat itself in the global context. Governments who have enjoyed almost complete freedom from accountability provided by the opaque shield of the supranational institution resist the demands of individuals and groups to more transparency and voice. They fear the supranational body would become dysfunctional. They are also concerned with the change of policy such an opening might entail. The more “legalized” and hence more transparent trade

negotiations under the WTO system, for example, call, according to Judith Goldstein and Lisa L. Martin, to “a cautionary note.”^[10] Caution is advised to pro-trade forces, because the legalization of trade means more openness, and more openness yields more knowledge about the distributional implications of trade agreements. Such knowledge, Goldstein and Martin caution, “enhances the mobilization of anti-trade forces relative to the already well-organized pro-trade groups.”^[11] Hence, “legalization could undermine liberalization.”^[12] Barred from entry into the locus of decision-making process, “pro-environment,” “pro-welfare,” and other groups (all dubbed “anti-trade” by participating governments and some scholars) take to the streets and resort to violence. Increasingly foot-dragging, some governments and institutions yield ground by allowing more transparency. The fact that some governments are more attuned to such pressures than others complicates this delicate balancing of interests even further.

In the global context we speak about “voice without a vote,” or more accurately, “voice without a *direct* vote.” This is because the decision-making structure does not allow for direct representation of voters. From the perspective of voters we speak not of direct democracy, or even of indirect democracy, but of a doubly-indirect democracy: voters vote in national elections, and then their representatives appoint and direct their representatives to the supranational forum. Should supranational institutions offer to the general public – citizens of the states’ parties to the institutions – the opportunity to take part in shaping the institutions’ policies? If so, how could they take part? Can they have a meaningful opportunity of exercising their democratic right to shape the decisions affecting their lives without the right to vote in supranational institutions?

A. Supranational Institutions and the Democratic Imperative

Why should supranational institutions provide the constituencies of the member states with the opportunity to influence their policies? There are two responses to this question: one instrumental and one normative.

The instrumental response highlights the quality of policies that are informed by input of the general public. Similar to the case of national bureaucratic systems,^[13] open deliberations among the decision-makers at the supranational institution reduce the slack that otherwise enables officials to cater to the demands of narrow, often short-term, interests.^[14] Open deliberations level the playing field where conflicting considerations compete and need to be balanced. This is especially the case in decisions related to the welfare state idea: a more transparent decision-making process is better able to check the influence of the narrow interest groups and care for the interests of the larger constituencies, including the employed and unemployed sectors of society. Moreover, independent information yields better-informed decisions that also take into consideration facts and assessments that the narrow interest groups did not wish to present to the decision-makers. Finally, apparently because of the legitimacy assigned to such policies, the relevant actors are more likely to honor them. As the literature on the emergence of cooperation in the management of common-pool resources suggests, institutions that provide for equal voice are more likely to resolve the collective-action problems that they face.^[15]

Beyond the instrumental benefits that accrue from an inclusive decision-making process, there is a normative argument: parties to supranational institutions are required to respect and ensure the individual right of their citizens to democratic decision-making, namely the right to participate in decisions

affecting their lives. This right suggests that individuals must enjoy opportunities that influence such decisions at the appropriate level, whether this is a national, sub-national, or supranational level. Many state parties to supranational institutions, whose domestic legal order is democratic, are subject to this duty by their domestic legal order.[\[16\]](#) Even without suggesting that such a duty is also a duty under the international law on human rights that every state and institution should respect,[\[17\]](#) this normative consideration implies that at least some state parties have no authority under their domestic law to revoke their citizens' right of democratic participation. Hence, supranational institutions of which democratic states are parties must ensure opportunities for individuals to get involved in the decision-making process.

B. Open Communication Channels as Essential Components of Democracy

The democratic process is based on votes, but not only on votes. Voting is a precondition for a functioning democracy, but for democracy to function, voting must be complemented with other safeguards that can supply information to voters about their choices and ensure accountability of elected representatives to them.[\[18\]](#) We do know that, voting itself is a poor way of shaping political outcomes even in the national context. As suggested by Rokkan, "votes count in the choice of governing personnel, but other resources decide the actual policies pursued by authorities."[\[19\]](#) Public choice scholarship supports this observation, emphasizing the role of small interest groups in shaping national policies, based on the anti-intuitive observation that smaller groups obtain more political power than larger groups.[\[20\]](#) We can therefore, following Anthony Down's observations,[\[21\]](#) view the challenge of democracy as the challenge of reducing information asymmetries: accurate and sufficient information will hold the representative accountable and will provide voters with an effective opportunity to shape policies.

To reduce information asymmetries, democracy must also take into account the failure of representatives to obtain information from the voters about their preferences. Indeed, information asymmetries result from failures on both channels of communication lines between voters and their representatives. Hence, a functioning democracy must provide mechanisms not only for supplying information to the voters, but also for allowing voters' preference to reach representatives, government officials and bureaucrats.

We therefore speak of open channels of communications between the voters and their representatives. One channel of communication concerns the voters' voice, namely the opportunity of domestic constituencies to voice their wishes and concerns to their representatives. The other channel concerns the flow of information from the representatives or their delegates to the public.

Essentially the same institutions that maintain open channels of communication between voters, representatives and bureaucrats at the national sphere can be reproduced in the supranational one. In the national sphere there are three types of agents that supply information to voters. First, there are the national legislatures, especially opposition members of the national legislatures. Second, there are interest groups, domestic and international, that inform the general public or their relevant constituencies about their representatives' performance. Third, there is the media and other actors whose business is the provision of information. The same agents inform officials about voters' preferences. Usually cooperation between opposition legislators, interest groups and the media is beneficial for all, as legislators depend on information collected by the interest groups and the media, while interest groups

seek political support and the media seeks information from the other two.

To gain and impart information, these agents make use of several devices. There are devices that ensure the flow of information to the public, such as the duty to provide information, or the duty to offer reasons for decisions. There are also devices that provide the public with the opportunity to impart information, such as the right to be heard before making decisions at the administrative level, or the ability to challenge policies through adjudication. In principle, these three agents can operate in the supranational sphere, provided similar devices are adopted at the supranational level.

This analysis suggests that voters may be able to shape decisions affecting their life despite the fact that those decisions are taken at the supranational level. While direct elections are not a must, open channels of communications are. This conclusion conforms to the response of the German Constitutional Court that approved Germany's ratification of the Maastricht Treaty.^[22] In an integrated European Union, reasoned the Court, the demand for democracy will be satisfied if the union will provide an "ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion moulds political policy."^[23] To preserve democracy, in the Court's view, "it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject."^[24]

C. The Democratic Imperative of Supranational Institutions

This Part outlined a case for introducing mechanisms that ensure open channels of communications in supranational institutions between the different constituencies and their representatives. It argues that instrumental and normative considerations require such open channels, namely that these are *necessary* elements in a functioning supranational institution. At the same time, this Part argues that such open channels are also *sufficient* from the perspective of democracy. The question that remains is what mechanisms are available at the level of the supranational institution to ensure open channels of communications.

Debates in recent years concerning institutional design do not revolve as much around the recognition of these participatory rights. There is wide agreement that participatory rights are necessary, especially in the context of environmental institutions.^[25] Rather, the heated debate focuses on the ways and means of facilitating public participation without clogging the system with debilitating noise. Neither side has an interest in impeding the flow of information, but some governments and a few scholars express concern that anti-cooperation groups seek to abuse the participatory rights to bring institutions to a standstill. Hence the debate concentrates on the "how" question: how to ensure transparency and facilitate communications without congesting the decision-making processes within the institutions.

In this context, particular emphasis is given to the question of participation of non-governmental organizations (NGOs). Such groups, who often serve as loudspeakers or tribunes that convey citizens' concerns, seek to influence decisions in the supranational sphere.^[26] They often serve as intermediaries between officials and the general public, but at the same time, their voluntary character raises concerns about their own accountability and commitment to transmit messages to and fro without distortion.^[27]

Some of them may seek protectionism in the disguise of caring for the plight of the poor workers who toil in sweatshops across the developing world. Clearly, the latter have yet to enjoy the impartial representation of international governmental and non-governmental organizations.

Responding to the “how” question requires attention to the specific character and goals of each institution. Mechanisms should be tailored to the different demands. The following Part examines the “how” question in the context of the WTO.

III. Open Channels of Communication in the WTO

In the WTO context, a body that both prescribes trade norms and monitors states’ compliance with its norms, we must look for the existence of our two channels of communication in both the prescriptive sphere and the dispute settlement sphere. The prescriptive process, that includes both interpretation of existing provisions and decisions to amend provisions, involves the General Council and the Ministerial Conferences. The dispute settlement process involves a Panel and may also include review by the Appellate Body, and is governed by the Dispute Settlement Body. This Part recounts the efforts to open up channels of communications in the WTO context, and the resistance to such efforts.

A. The Prescriptive-Interpretive Process

This norm-setting process involves all member states. The sheer number of states –140 at the time of writing – and their differing agendas, leads states to resort to informal, behind-the-scene negotiations and consultations. Such “informal consultations within the WTO – and even outside – play a vital role in bringing a vastly diverse membership round to an agreement.”^[28] This informal prescriptive process remains opaque to civil society. Indeed, NGOs representing diverse interests can sometimes use this opacity to present their views and gather information,^[29] but this influence remains a matter of discretion for states who find it opportune to support some NGOs on a certain matter under discussion.

Since the creation of the WTO, there has been growing NGO demand for more transparency in decision-making. The plenary sessions of the Ministerial Conferences were open to observers since the first Conference held in Singapore in 1996.^[30] In July 1996 the General Council adopted Guidelines for Arrangements on Relations with Non-Governmental Organizations.^[31] The guidelines recall Article V: 2 of the Marrakesh Agreement establishing the WTO, which provided that “the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.” The Council members “recognize the rôle NGOs can play to increase the awareness of the public in respect of WTO activities.” (Article 2) They further acknowledge that NGOs are “a valuable resource [that] can contribute to the accuracy and richness of the public debate.” (Article 4) The Members therefore agree to improve transparency and develop communication with NGOs.” (Article 2) For this purpose, the guidelines call upon members to “ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past.” The WTO Secretariat is requested to provide on-line computer access to such documents. (Article 3). The Secretariat is instructed further to “play a more

active rôle in its direct contacts with NGOs ... through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.” (Article 4).

At the same time, however, the guidelines reflect the concern many governments have with increased voice to NGOs. Article 6 emphasizes “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,” and points out the “broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.” The intergovernmental character of the WTO implies, according to the guidelines, that the appropriate level for NGOs’ direct participation is the national level: “Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.”

In other words, these guidelines recognize the need to ensure transparency in the decision-making process, or what is called in the WTO jargon “external transparency,” as distinct from “internal transparency” which relates to openness among members. In the years since 1996 impressive efforts have been made, particularly by the Secretariat, to provide accessible information including documents to the general public by posting it on the WTO website. A few “Northern” members have come up with suggestions for improved transparency. Canada, Norway and the United States suggested inter alia that General Council and other committee meetings be open to observers, including Trade Policy Review meetings, where members’ policies are reviewed for conformity with WTO rules.^[32] Other suggestions included the establishment of fora to enable open dialogue between WTO bodies and NGOs, the inclusion of advice of legislators from member states and of experts in specialized areas, and the creation of ad-hoc advisory boards to provide non-binding NGO advice on a variety of issues.^[33]

Such “Northern” suggestions are not very well-received by the developing “Southern” countries. The latter are less constrained domestically by democratic considerations. They apparently also realize that they stand to lose from a more active role for NGOs that represent the interests of the relatively well-off societies seeking to maintain high levels of welfare and environment protection. The effort of the developing members is to restrict public participation to the passive role of receiving information from WTO bodies rather than communicating it to the WTO. Note the position of Hong-Kong, China on this matter, elaborating on the distinction between external transparency and direct participation:

8. In our view, enhancing "external transparency" of the WTO means keeping the public informed and educated of the WTO's work, enriching their understanding and awareness of the Organization and the multilateral trading system, and thereby improving the ability of the public to reflect views to their governments. On the other hand, "participation" in the WTO by non-Members implies a right to take part in the decision-making process of WTO, a right to make representations of interest in the formal WTO setting and in the process prejudice the outcome of discussions.

9. While we are prepared to consider those proposals aiming at improving transparency, we are not

convinced of the desirability of adopting proposals which seek to make provisions for direct participation of the civil society in the Organization in this exercise. Such proposals go against the inter-governmental nature of the WTO, risk politicising the operations of the Organization due to sectoral and electoral interests, and undermine the rights and obligations of individual WTO Members.[\[34\]](#)

A similar North-South tension exists in the context of the dispute settlement mechanisms, to which we now turn.

B. The Dispute-Settlement Process

In contrast to most other international adjudication procedures, the WTO procedures maintain secrecy. Litigation before the Panels and the Appellate Body are closed to WTO members that are not parties to the litigation and to the general public. Calls for transparency focus therefore on making all parties' submissions available to the public and on enabling the general public to observe the proceedings using various tools, including webcasting.[\[35\]](#) Moreover, suggestions for enabling the flow of communication from the public to the adjudicators concentrate on the possibility of submitting amicus briefs to the panel and the appellate bodies.

Here again one can trace a north-south tension, northern members strongly supporting open and accessible proceedings to the dismay of southern states. The United States is the most ardent supporter of transparency and communication in the dispute settlement process.[\[36\]](#) It, apparently, has most to gain from such openness. In fact, it was the first and so far the only state that presented NGO briefs as integral part of its brief while defending its environment-friendly unilateral restrictions on trade against the complaint of India, Malaysia, Pakistan and Thailand.[\[37\]](#)

The Appellate Body has shown at least initial inclination to consider amicus briefs.[\[38\]](#) In 1998 it decided it had authority to accept NGO briefs in the Shrimp/Turtles dispute which one litigant – the United States – incorporated into its briefs.[\[39\]](#) In a more recent case, the Asbestos case, the Appellate Body went even further. In the midst of hearings, it invited “any person” to file applications for leave to file briefs concerning the dispute at hand.[\[40\]](#) The invitation, setting highly rigorous conditions for eligibility to file briefs, was posted on the WTO website on 8 November 2000.

In the recently published decision, the Appellate Body describes the unfolding events and decisions subsequent to the issuance of this invitation (footnotes omitted):

53. The Appellate Body received 13 written submissions from non-governmental organizations relating to this appeal that were not submitted in accordance with the Additional Procedure. Several of these were received while we were considering the possible adoption of an additional procedure. After the adoption of the Additional Procedure, each of these 13 submissions was returned to its sender, along with a letter informing the sender of the procedure adopted by the Division hearing this appeal and a copy of the Additional Procedure. Only one of these associations, the Korea Asbestos Association, subsequently submitted a request for leave in accordance with the Additional Procedure.

54. By letter dated 15 November 2000, Canada and the European Communities jointly requested that they be provided with copies of all applications filed pursuant to the Additional Procedure, and of the decision taken by the Appellate Body in respect of each such application. All such documents were subsequently provided to the parties and third parties in this dispute.

55. Pursuant to the Additional Procedure, the Appellate Body received 17 applications requesting leave to file a written brief in this appeal. Six of these 17 applications were received after the deadline specified in paragraph 2 of the Additional Procedure and, for this reason, leave to file a written brief was denied to these six applicants. Each such applicant was sent a copy of our decision denying its application for leave because the application was not filed in a timely manner.

56. The Appellate Body received 11 applications for leave to file a written brief in this appeal within the time limits specified in paragraph 2 of the Additional Procedure. We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.

57. We received a written brief from the Foundation for International Environmental Law and Development, on its behalf and on behalf of Ban Asbestos (International and Virtual) Network, Greenpeace International, International Ban Asbestos Secretariat, and World Wide Fund for Nature, International, dated 6 February 2001. As we had already denied, in accordance with the Additional Procedure, an application from these organizations for leave to file a written brief in this appeal, we did not accept this brief.[\[41\]](#)

What the Appellate Body does not recount is that its invitation sparked angry protests by a number of member states that questioned its authority to do so. A few members – reportedly Pakistan and Egypt, supported by India and Malaysia[\[42\]](#) -- immediately reacted by requesting the Chair of the General Council to convene a special meeting to discuss this issue. In the meeting, which took place on 22 November 2000, several members expressed criticism, arguing that the Appellate Body exceeded its authority.[\[43\]](#) The Appellate Body's ultimately unexplained decision to deny the requests to file briefs may very well reflect the furious reactions to its invitation.

It is interesting to compare the WTO developments with a parallel development in the context of NAFTA. A NAFTA tribunal decided on 16 January 2001 that it had authority to consider an amicus brief submitted by the International Institute for Sustainable Development (IISD), a Canada-based NGO, in a dispute between a Canadian producer of a gasoline additive and the United States that had banned its use. In support of its request to submit a brief, IISD argued that only amicus briefs will present environmental concerns, and that the tribunal should take these concerns into consideration.[\[44\]](#) In this case, no angry protests were recorded.

IV. Concluding Observations: Welfare and Democracy Disputed

Opening up the channels of communication at the WTO's and other international institutions' prescriptive and enforcement spheres is not free of difficulties. There is a concern that "anti-trade" "pro-human rights" or other "anti-government" interests will clog up the system with excessive noise. The role of NGOs – a term that could include established, serious and respectable organizations but also unaccountable ones whose funding and motivation are unclear – is of particular worry. These concerns must be addressed, and can be addressed through accreditation or other processes adopted by domestic systems and other international institutions.^[45] There is no reason to assume that supranational institutions are more prone to capture by NGOs than domestic institutions. If national courts have managed to cope with the amicus briefs challenge and made the best out of it, there is no reason to believe that supranational tribunals will fail to accommodate them properly.

A particularly troubling aspect of current debates and negotiations is the lack of voice of the majorities in the developing world. Their governments resist transparency and enhanced labor standards invoking those majorities' interest in access to jobs. Demand for low paying jobs is indeed prevalent among those innumerable workers who have no alternative but to spend their lives in sweatshops. But this second-best preference is no more credible and acceptable than the similar one raised by capital owners in the dark days of the Industrial Revolution. It is certainly less costly for governments (both developed and developing) to sell this argument rather than invest in schools, health and welfare institutions. A genuine voice of the world's poor will certainly dispute that argument and call for redistribution of the economic gains of globalization among the developed and the developing countries. As part of the democratization of this debate, it is necessary to invest institutional efforts to enhance the capacities of existing and new southern NGOs and provide a genuine and effective voice for the poor.^[46] The UNDP and the World Bank are among the institutions that have begun this process of southern empowerment.^[47] It is hoped that more attention and resources will be devoted to this task.

The current standoff at the WTO is not a result of technical or legal difficulties concerning institutional authority to receive or impart information. It is a result of a lack of widespread commitment of the WTO members to democracy and to welfare standards. Opening the WTO processes for the larger groups within democratic countries is viewed as a threat not only by the smaller groups of investors and employers, but also by the representatives of the developing countries who wish to maintain the low levels of welfare that constitute their relative edge. Democratic participation thus becomes one of the items on the agenda of the North-South conflict, and hence liable to be negotiated away. The potential toll on welfare-enhancing opportunities is thus significant.

* Hersch Lauterpacht Professor of International Law, The Hebrew University Faculty of Law. I thank Orit Dubrovsky for excellent research assistance.

[1] See the special issue of 54 *International Organization*, Summer 2000.

[2] See the Shrimp-Turtles dispute, *infra*, note 37.

[3] See the litigation under NAFTA concerning Canada's law banning a fuel additive manufactured by a US firm: *Ethyl Corp. v. Canada, Jurisdiction, Award* (NAFTA Ch. 11 Arb. Trib., June 24, 1999), *reprinted in* 38 *ILM* 708 (1999); *see* Alan C. Swan, *Case Report: Ethyl Corporation v. Canada*, 94 *AJIL*

159 (2000). Subsequently Canada rescinded the law and paid compensation. Other firms have used the NAFTA procedure to sue the US and Mexico. See Chris Tollefson, “Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime” 27 *Yale J. Int’l L.* 141 (2002).

[4] European Communities – Measures Affecting Asbestos and Asbestos-Containing Products AB-2000-11, WT/DS135/AB/R 12 March 2001. *infra*, note 40.

[5] See the introduction to this book.

[6] Eyal Benvenisti, “Exit and Voice in the Age of Globalization” 98 *Mich. L. Rev.* 167 (1999), based on Mancour Olson, *The Logic of Collective Action* (1965). See also the contributions of Rosenhek and Barak-Erez in this volume.

[7] See WTO Doc. **WT/MIN(01)/DEC/1**, of 20 November 2001 rep. in http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

[8] See, e.g., the Ministerial Declaration, Work Programme, with respect to agricultural products (Article 13: “...we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development...”); and the Declaration on the TRIPS Agreement and Public Health (**WT/MIN(01)/DEC/2** 20 November 2001), concerning intellectual property (“4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. [...] we affirm that the Agreement 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.”), and Article 6(c) of this Declaration.

[9] Cf. David Held, *Democracy and the Global Order* (1995).

[10] Judith Goldstein and Lisa L. Martin, “Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note” (2000) 54 *International Organization* 603.

[11] *Id* at 607.

[12] *Id.*, *id.*

[13] McNollGast, “Administrative Procedures as Instruments of Political Control” 3 *J. Law Econ. & Org.* 243 (1987).

[14] Eyal Benvenisti, “Exit and Voice in the Age of Globalization” 98 *Mich. L. Rev.* 167 (1999). For a similar claim with respect to NGO participation in the World Trade Organization procedures see Daniel C. Esty, “Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion” 1 *J of int’l Econ. L.* 123 (1998), *id.*, “Linkages and Governance: NGOs at the World Trade Organization” 19 *U Pa. J Int’l Econ. L.* 709 (1998). For the opposite view see, e.g., John O. McGinnis

and Mark L. Movsesian, “The World Trade Constitution” 114 Harv. L. Rev. 511 (2000).

[15] See Elinor Ostrom, *Governing the Commons* (1990), Chapter 6.

[16] See, for example, the discussion in the German Constitutional Court, *infra* note 22.

[17] See Article 25 of the Covenant on Civil and Political Rights.

[18] Anthony Downs, *An Economic Theory of Democracy* (1957).

[19] S. Rokkan, “Norway, Numerical Democracy and Corporate Pluralism,” in *Political Opposition in Western Democracies*, 70, 106 (Robert Dahl ed., 1966).

[20] Mancur Olson, *The Logic of Collective Action* (1965).

[21] *Supra* note 18.

[22] Federal Constitutional Court Decision concerning the Maastricht Treaty, of October 12, 1993 (trans. in 33 I.L.M. 388 (1994)), at p. 420.

[23] *Id.*, *id.*

[24] *Id.* *id.*

[25] The preamble to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted in Aarhus, Denmark on June 25, 1998 by member states of the Economic Commission for Europe and other European states, emphasizes these points: “*Recognizing* that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns, *aiming* thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, ...” (The text appears in <http://www.un.org/Depts/Treaty/collection/notpubl/27-13eng.htm>).

[26] Steve Charnovitz, “Two Centuries of Participation: NGOs and International Governance” (1997) 18 Mich. J. Int’l. L. 183.

[27] See, e.g., McGinnis and Movsesian, *supra* note 14, at 570-71.

[28] From the WTO official website < http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm>

[29] See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO* (1998) J. of Int’l Econ. Law 433. For a recent appraisal of the debate see Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 489, 504-09 (2001).

[30] The number of NGOs attending the plenary sessions has grown from 108 at the Singapore Ministerial Conference in 1996 to 686 at the Seattle Ministerial Conference in 1999 (see *WTO: External Transparency*, Communication from Hong Kong, China, 31 October 2000, WT/GC/W/418).

[31] WORLD TRADE Doc No. WT/L/162.

[32] See *General Council Informal Consultations on External Transparency, October 2000*, Submission from the United States, 10 October 2000, WT/GC/W/413; *WTO External Transparency, Informal Paper* by Canada, 17 October 2000, WT/GC/W/415; *External Transparency, Communication from Norway*, 2 November 2000, WT/GC/W/419.

[33] See in particular the Canadian paper, *supra* note 32.

[34] See Communication from Hong Kong, China, *supra* note 30.

[35] See the US submission, *supra* note 32.

[36] See its proposals in the submission, *id.*

[37] The complaint criticized the US prohibition on the importation of certain shrimp and shrimp products caught in methods considered by the US to adversely affect the population of sea turtles: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*: Report of the WTO Appellate Body, WT/DS58/AB/R (1998).

[38] For a detailed analysis of the Panels' and Appellate Body's authority to consult amicus briefs see Petros C. Mavroidis, *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing*, Jean Monnet Paper No. 2/01 (available at <http://www.jeanmonnetprogram.org/papers/papers01.html>).

[39] See *supra* note 37.

[40] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Communication from the Appellate Body 8 November 2000, WT/DS135/9.

[41] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11, WT/DS135/AB/R, 12 March 2001.

[42] BRIDGES Weekly Trade News Digest – Vol. 4 No. 44, 21 November 2000.

[43] See e.g. Statement by Uruguay at the General Council on 22 November 2000, WT/GC/38.

[44] http://www.iisd.org/trade/investment_regime/htm

[45] See for example Hirsch, (infra, Chapter #) on the working relations between ECOSOC and NGOs. The World Bank's practice that so far has yielded very good results: The World Bank Operational Manual "Good Practices Involving Nongovernmental Organizations in Bank-Supported Activities" GP 14.70 February 2000 (available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc1/>), Article 15: "*Establishing Relevant Selection Criteria*. NGO partners should be selected according to the specific skills and expertise required for the task at hand as it relates to the development goals being pursued. The following are some of the qualities that should be considered in selecting individual NGO partners (depending on the nature and purpose of a particular task):

(a) credibility: acceptability to both stakeholders and government;

- (b) competence: relevant skills and experience, proven track record;
- (c) local knowledge;
- (d) representation: community ties, accountability to members/beneficiaries, gender sensitivity;
- (e) governance: sound internal management, transparency, financial accountability, efficiency;
- (f) legal status; and
- (g) institutional capacity: sufficient scale of operations, facilities, and equipment.”

[46] On the insufficient resources of southern NGOs see Gregory C. Shaffer, “The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters” 25 Harv. Envtl. L. Rev. 1, 28-30 (2001). Care should be given to prevent northern interests from cloning themselves as local, southern, branches of themselves (see the concern of a southern NGO activist in this regard, in Shaffer, *id.*, at note 240).

[47] The World Bank in particular has been quite successful in strengthening the capacities of southern NGOs: see World Bank, “Capacity Building of Southern NGOs - The Experience of the World Bank” (available in <http://wbln0018.worldbank.org/essd/essd.nsf/>); World Bank, “The World Bank and Chinese NGOs” (available at www.worldbank.org.cn/English/Partnership/NGOOverview1.shtml) (reporting that according to official Chinese statistics, the number of Chinese NGOs reached 165,600 by the end of 1998). For a general discussion of this issue see Olena P. Maslyukivska, “Role of Nongovernmental Organizations in Development Cooperation Research Paper,” UNDP/Yale Collaborative Programme, 1999 Research Clinic, New Haven 1999 (available at <http://www.undp.org/ppp/library/files/maslyu01.html>); Michael Edwards, David Hulme and Tina Wallace, “NGOs in a Global Future: Marrying Local Delivery to Worldwide Leverage” (Conference Background Paper, Birmingham 1999) (available at www.gdrc.org/ngo).