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Beyond the Proposals: Public Participation in International Economic Law

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Beyond the Proposals: Public Participation in International Economic Law

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Beyond the Proposals: Public Participation in International Economic Law

I. Introduction

The 1990s saw a flurry of proposals to enhance public participation in international economic law. There were numerous calls to make the Bretton Woods institutions – the World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO) – more transparent and publicly accountable.¹ In part, this was due to new awareness of globalization and the importance of these institutions. It was also due to diminished faith in the ability of governments to represent all points of view, a sentiment which made the traditionally state-centered structure of many organizations, including those of Bretton Woods, appear underinclusive and inadequate.

Enough time has passed for these proposals to be put into practice and it is useful, both for purposes of immediate comparison and longer term assessment, to examine what has happened. Have the initiatives truly made meaningful change? Are the actors any different than they were in the past? Have they really enhanced voice, and if so, whose voice? What are the pitfalls they present, particularly in terms of liability, conflict of interest, and the prosecution of frivolous claims? What is it that can be said about this trend that is unique to the economic nature of the institutions involved?

It is too early to offer a definitive answer, but if a tentative one is to be offered it is that *informal public participation* – that is, meetings, symposia, and other types of consultative dialogue – have been moderately successful, while *formal public participation* – that is, on submissions made in the context of systems of dispute settlement – has been disappointing. The Bretton Woods institutions have done a reasonable job of building links with governments and non-governmental organizations (NGOs). Until recently, however, they have been less successful in going beyond these traditional constituencies and in making contact with a wider audience in civil society.

Evidence on these points is hard to obtain. On the informal side, the absolute number of activities is impressive. Each of the Bretton Woods institutions conducts a staggering number of missions, visits to headquarters, conferences and other activities designed to promote the institutions' agenda.² In some instances these are mandated³; in others they are spontaneous. What the numbers

¹ The Bretton Woods Conference of July 1944 foresaw the creation of three international organizations to oversee international economic affairs after World War II. These eventually took shape in the form of the International Bank for Reconstruction and Development (World Bank), the International Monetary Fund and the *General Agreement on Tariffs and Trade*. In April 1994 GATT was succeeded by the World Trade Organization. See J.H. Jackson, *The World Trading System* __ (1997). For criticism of, and proposals for enhanced participation in, the Bretton Woods institutions see D. Bradlow, Why World Bank Needs an Ombudsman, *The Fin. Times* 13 (July 14, 1993); S. Charnovitz, "Participation of Non-governmental Organizations in the World Trade Organization", 17 *U. Pa. J. Int'l Econ. L.* 331 (1996); G. Richard Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization" 17 *U. Pa. J. Int'l Econ. L.* 359 (1996).

² The IMF now estimates that it provides approximately 300 person years of technical assistance to IMF member countries, up from 70 in 1970. The Fund also conducts training courses at centers in Washington, Vienna, Singapore and other regional and subregional locations. In June 1998 the Fund's Executive Board reviewed the IMF's approach to external communications, and in 1999 opened a new public outreach center and hired external consultants "to offer recommendations for improving ways in which it communicates information about its work to the public." Summaries on the Fund's external contacts are contained in its *Annual Reports*, 1998, pp. 154-155; 1999, pp. 177-179. The World Bank Annual Report for 1999 notes that whereas 28% of Bank-sponsored projects were undertaken with NGO/civil society collaboration in the 1987-96 period, this has increased to 52% in 1999. See *World Bank Annual Report 1999* p. 139.

do not reveal, however, is the *quality* of these contacts and the degree to which they are able to penetrate deeply into civil society. Anecdotal evidence suggests that representatives of these institutions continue to have contact with the same people, principally government and NGO figures, time and again, so that the process of consultation often becomes a kind of managed dialogue among elites rather than a forum for authentic popular expression.⁴ Some changes are now evident, but in large part the Bretton Woods institutions continue to maintain contact with “opinion leaders”.

On the formal side, this tendency towards managed conversation appears even more pronounced. The numbers of public submissions have been small, particularly when measured against membership of over 100 countries covering most of the world’s population. The most comprehensive system of formal participation examined here, that of the World Bank Inspection Panel, has registered only 17 complaints against Bank projects and has proceeded with investigation or quasi-investigation, or kept a matter under review, in only six.⁵ The record among the Bank’s regional affiliates is even more limited. Another example, that of WTO dispute settlement, has received only one submission since the WTO Appellate Body’s landmark decision on public participation in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*⁶ in October 1998.⁷ The WTO has yet to adopt a standard operating procedure for dealing with submissions of this type. Moreover, if we look at who it is that is making submissions, it is often well established non-governmental organizations (NGOs), or entities working with them, which implies that there are significant barriers to direct participation by other members of the public in terms of resources, time, and talent.⁸

Obviously, the way in which the foregoing is presented implies that something is wrong. Maybe it isn’t. In the past decade, however, each of the three Bretton Woods institutions have been the subject of what David Ronfeldt and John Arquilla have referred to an “NGO swarm”, that is, the pursuit by “amphorous groups of NGOs, linked online, descending on a target”⁹. The World Bank was

³ With respect to the WTO, see Art. V:2 of the *WTO Agreement* (“the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO”); “Guidelines for Arrangements on Relations with Non-governmental Organizations” WT/L/162 (July 23, 1996); DSU Art. 27(3) states that “The [WTO] Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members’ experts to be better informed in this regard.” See also IMF *Articles of Agreement* Art. VIII:5(c).

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⁵ For a listing see www.worldbank.org/html/ins-panel.

⁶ AB-1998-4 (Oct. 12, 1998). In the *Shrimp* case the Appellate Body held that an individual or body could ask a panel established under WTO dispute settlement for permission to file a statement or a brief. See para. 107. It also held that a WTO member country could decide to append materials from non-governmental sources in their WTO submissions. See para. 109.

⁷ The submission was made by two Tasmanian salmon farmers in compliance proceedings brought by Canada in *Australia – Measures Concerning the Importation of Salmon*, WT/DS18. Canada has alleged, pursuant to Art. 21.5 of the *WTO Dispute Settlement Understanding*, 33 I.L.M. 1226 (1994), that Australia has failed to comply with findings made by the WTO panel and Appellate Body. As of mid-February 2000 the decision on Australian compliance had yet to be released.

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⁹ “The Non-governmental Order” *The Economist* 20, 21 (Dec. 11, 1999).

the first target in the Fifty Years is Enough campaign of 1994. A similar phenomenon took place during the IMF Annual Meeting in April 1998. Finally it was the turn of the WTO at the Seattle Ministerial Conference in December 1999. In each instance, the target was publicly criticized and left to soul-search about what was wrong.

What appears wrong, paradoxically, is that much about these institutions seemed right. In the 1990s two of the three institutions adopted binding systems of dispute settlement; all had committed themselves to decision-making with a "human face"¹⁰; all had embarked on programs of outreach, including an electronic presence. Somehow, though, these plans and changes were not enough. I would ascribe this to the fact that the mechanisms of public participation were - and in some important aspects remain - remote. They have forged important links with NGOs, but they have not gone beyond. They have focused on educating public officials, but not the public itself. In short, there is not enough appeal to the grassroots of civil society. We don't see the World Bank in television commercials, the WTO on milk cartons, the IMF in textbooks. We should. Instead, these institutions continue to have an elite aura, one that makes an easy target when the going gets tough.

Perhaps the forms of public participation that we have now is all that could have reasonably hoped for in the beginning. It is public officials and NGOs that are most likely to be well-informed about the issues. But it would also appear that in this intensely popular age, an age when so much international activity appears to be increasingly democratized, we must become more concerned with broadening participation and with rededicating the institutions of international economic law to openness, transparency and fairness. In this regard we have to look to what has worked and think about what can be usefully adapted to other circumstances. That is the purpose of this paper.

Together with enhancing participation it is clear that the Bretton Woods institutions must become better advocates for their own cause. At a time of increasing competition for human attention, these institutions must find ways to penetrate global public consciousness and convince it of the vital and indispensable roles they play. This is important if they are to remain at the forefront of concern and are not to be regarded as disposable when the political wind changes. The Bretton Woods institutions must therefore make an effort to become more visible in daily life, an effort that can only be allied with the effort toward more openness, transparency and fairness.

This paper reviews the effort to enhance public participation in the three Bretton Woods institutions – World Bank, IMF and WTO. It goes on to make some recommendations as to how public participation can be enhanced based on common experience and that of other systems of international economic law. This is a particularly important task given that the 1990s were an extremely fertile decade for the creation of institutions of international economic law and that many of these new institutions are looking for precedent to those already established.¹¹ The new Court of Justice for the Common Market for Eastern and Southern Africa (COMESA) in Lusaka, for instance, is

¹⁰ J.H. Weaver & K.M. O'Keefe, "Whither Development Economics?", 11 *SAIS Rev.* 113, 128-29 (1991).

¹¹ At least a half-dozen international judicial institutions were established, including the Central American Court of Justice, the dispute settlement system of the World Trade Organization (WTO), the Courts of the European Free Trade Association and the Common Market for Eastern and Southern Africa, and the Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa. In addition there were a variety of quasi-judicial bodies which came into being including the inspection panels of the World, Inter-American and Asian Development Banks, the dispute settlement system of the *North American Free Trade Agreement* and its side codes, and the United Nations Compensation Commission. For a comprehensive list and discussion see "Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle" 31:4 *N.Y.U. J. Int'l Law & Politics* (1999).

self-consciously modelled on the European Court of Justice (ECJ) in Luxemburg.¹² The Court of Justice of the Andean Community in Quito has made similar references in its jurisprudence.¹³ Notwithstanding the considerable differences in role and approach, logic would suggest that if we are committed to enhancing public participation, then better examples may serve to motivate future developments.

2. The Experience of Public Participation in International Economic Law

a. The World Bank

The World Bank was the first of the Bretton Woods institutions to be the target of an “NGO swarm” and the one that has responded, in the view of several critics, best to the challenge.¹⁴ It has done so largely by creating formal and informal mechanisms of participation, in the process forging strong links with the NGO community.

The most notable of its effort has been the establishment of the World Bank Inspection Panel in November 1993. Ibrahim Shihata has commented that the creation of the Inspection Panel was “driven by a broader concern that international organizations were not adequately accountable for their activities and by the perception that the Bank, as an important instrument of public policy in areas of international concern, needed to be more open and responsive.”¹⁵ The Inspection Panel inspired the creation of similar mechanisms in the Inter-American Development Bank in August 1994 and Asian Development Bank in December 1995.¹⁶ To date it has been the most successful of these initiatives, registering complaints against 17 Bank-sponsored projects, six of which have gone ahead with an investigation, quasi-investigation, or are under review. The receptiveness and transparency of its operation could well serve as a model for other institutions.

The purpose of the Bank’s inspection procedure is to provide an independent forum to private citizens who believe that their rights or interests have been or could be harmed by a Bank-sponsored project. Although it is often said that “[t]he Panel is not charged with reviewing the appropriateness of the policies or procedures of the Bank, but merely with ensuring that the Bank observes them”¹⁷, there has been a gradual trend away from a focus on strict compliance with policies and towards harm caused by Bank-financed projects.¹⁸ This suggests a purposive approach by the Panel to its work which is, at base, an attempt to resolve problems caused by Bank operations. The Panel has no power to declare a Bank policy or procedure invalid.

¹² “The COMESA Court of Justice is modelled along the lines of the European Court of Justice”. See “Introduction” available at www.comesa.int/court/courintr.htm.

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¹⁵ I.F.I. Shihata, *The World Bank Inspection Panel* (2nd ed.) (1999).

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There are three aspects to the Panel's jurisdiction: personal (*ratione personae*), subject (*ratione materiae*) and temporal (*ratione temporis*). The Panel is to receive requests for inspection from an affected party in the territory of the borrowing state. A request is to be made by a "community of persons", in other words by a group, association or other collectivity. A clarification to Panel procedures in 1996 explains that the term "community of persons" means any two or more persons who shared some common interests or concerns.¹⁹ The request must allege (a) that the rights or interests of the requesting party have been, or are likely to be, seriously affected by an act or omission on the part of the Bank, and; (b) the act or omission resulted from a failure on the part of the Bank to follow operation policies or procedures pertaining to the design, appraisal or implementation of a project financed by the Bank. Finally, the request must meet two temporal requirements. First, it may not be presented before the requesting party has taken measures to bring the issue to the attention of the Bank's management, and the management's response has proved to be unsatisfactory. This is the equivalent of an "exhaustion of remedies" rule. Second, the request must not be presented after the loan has been fully or substantially disbursed, being where 95% of the loan has been released.

Despite their apparent formality, the procedure's jurisdictional requirements have been liberally interpreted. A number of reports express the Bank Executive Directors' "hope that the Panel process will not focus on "narrow technical grounds" with regard to eligibility."²⁰ Thus in *Argentina/Paraguay – Yacyretá Hydroelectric Project*, a case involving the construction of a power dam and the displacement of inhabitants living in the dam's wake, a signature campaign had been undertaken in the affected area. The Panel observed with respect to personal jurisdiction that:

The Panel is satisfied that the Request meets the eligibility criteria set out in paragraph 12 of the Resolution and that those signing the Request (i) represent communities that feel negatively affected by the design and implementation of the Yacyretá Project; and (ii) properly authorize Sobrevivencia as their legitimate representative.²¹

The jurisdiction *ratione temporis* requirement has not been applied stringently either. Thus in *Brazil – Itaparica Resettlement and Irrigation Project* the fact that 95% of one loan had already been disbursed did not prohibit further consideration of the request. The panel reasoned that there was another loan to be completed and that this sum only represented "the Executive Directors intended the 95% disbursement figure to be an indicator of completion of the project financed by the loan. In this case all parties agreed that the project is far from complete. Indeed, less than 50% of the irrigation works are complete."²²

The Panel's procedure is straightforward. It consists of a preliminary review on admissibility of the Request for Inspection made by an affected constituency. Requests that fail to indicate prior contact with the Bank on the issue of the complaint, requests submitted by individuals or unauthorized representatives, correspondence not constituting a request, or frivolous, absurd or anonymous requests, are rejected. Where the request is likely admissible, Bank management should be notified

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²¹ While not meeting this in every aspect, "The fact that 3,000 signed the Request cannot go unnoticed. These people have been left uninformed and out of the design and appraisal stages of the project, including the environmental and re-settlement plans aimed at mitigating adverse effects on people and nature."

²² *Brazil – Itaparica Resettlement and Irrigation Project*, para. 19 (June 24, 1997).

and is allowed 21 days to state whether it has complied or intends to comply with applicable policies and procedures. The Panel can request further clarification from management or the requester.

Where the Panel is not satisfied that management is in compliance (or intends to bring itself into compliance) with Bank policies and procedures, it will decide whether to recommend inspection, after presumptively establishing the following:

- i) failure on the part of management to comply has caused or threatens to cause, a material adverse effect;
- ii) the alleged violations are of a serious character; and,
- iii) the remedial action proposed by management is inadequate.

The Panel then proceeds on the basis of the request, management reaction, and its own conclusions to decide whether it will recommend to the Bank's Executive Directors to pursue an inspection. The range of actual recommendations has covered the spectrum of possibilities, from no action to abandonment of the particular project.

During the Panel process there are a number of ways in which the public can participate, and here the record has been particularly strong. Articles 50-51 of the Panel's operating procedures indicate that "any member of the public may provide the Inspector(s), either directly or through the Executive Secretary, with supplemental information that they believe is relevant to evaluating the request."²³ The panel can also ask affected persons, government officials or NGO representatives to attend meetings and make submissions. Any member of the public can provide a Panel or inspector with a written document not exceeding ten pages (including summaries and appended supporting documents). Consultations are mandated with all interested parties.

The World Bank Inspection Panel process also benefits by maintaining an accurate electronic register so that there is a transparent record of what is taking place, step-by-step, in a given case. This is important. The global public is therefore not only treated to the final result but to the process as it evolves. The Bank has also posted suggested format for Inspection Requests on its website, together with a considerable amount of background documentation such as press releases, past inspection requests, panel reports, and comments by the Bank's Executive Directors. All of these sources serve a "channelling function" in that they help to ensure that public input is received in a useful form. In a real sense, the public is encouraged to become participant.

Even with this admirably inclusive system, however, there remain some surprising oversights. The oldest reports are apparently no longer available, at least not on the internet. Moreover there is no overt access. Information about the Inspection Panel remains buried in the World Bank website. Someone would have to know about the Inspection Panel in order to be able to access it, and the degree to which, to use a Bank-inspired terminology, Project Affected Persons (PAPs) are informed of their recourse beyond this - at the outset of a Bank-sponsored project, for instance - is difficult to determine. This presents the possibility of a "chicken-and-egg" scenario in which one is obliged to know about the Inspection Panel before accessing it. It would be interesting to study how first knowledge of the Panel came up in the 17 Requests made to date. The involvement of the same NGOs in several different Requests suggests that the Inspection Panel process has evolved into the preserve of NGOs working closely with the Bank.²⁴ Again, this is not meant to imply that anything

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illegal is happening, only that the range of real participants is very small and runs the risk of leading to a kind of “group think” about the process. Moreover, it is difficult to tell if public groups actually spend a long time trying to get the institution’s attention before “stumbling upon” the Inspection Panel. Details in one case suggest that this may occasionally happen,²⁵ correcting the impression that Inspection Panel is truly accessible. It would be interesting to examine which frivolous or irrelevant claims have been turned away under the Bank’s screening procedures.

The other cause for concern is the small number of Inspection Requests seen to date. In any given year the World Bank has hundreds of projects underway and disburses billions of dollars in related financing.²⁶ At the risk of appearing to look for trouble where there may be none, one would expect more problems and more responses in a system that is truly transparent and functioning. The current situation suggests that, at a minimum, there is a substantial need for better knowledge of the system.

As mentioned, parallel systems of inspection have been established by the Inter-American and Asian Development Banks. While these are broadly similar to the World Bank Inspection process, they are comparatively little used.²⁷ In the case of the Inter-American Development Bank (IADB) there has only been one complaint to date, a companion case to one launched in the World Bank.²⁸ It remains to be seen how this will be used. Information indicates that the IADB management is considering the introduction of modifications to the mechanism.²⁹ There have been no complaints and no reports under the Asian Development Bank’s scheme thus far.³⁰ The low usage, again, in the context of institutions operating in dozens of countries and disbursing billions of dollars in project-related financing, suggests that these mechanisms are even less known and understood.

b. The International Monetary Fund

The IMF is an organization of 182 member countries established in 1946 to promote international monetary cooperation. Its main activities are the maintenance of exchange rate stability, promotion of economic growth, and temporary financial assistance for countries facing balance of payments problems. Over time there has been criticism of the Fund’s operations, particularly with respect to Fund “conditionality” and lack of transparency.³¹ The Fund does not

²⁵ The Desk Report done in *India – Ecodevelopment Project (Nagarahole)*.

²⁶ The Bank’s Annual Report for 1999 indicates that 241 projects were approved by the Board in 1997, 286 in 1998 and 299 in 1999. See *World Bank Annual Report 1999*, p. 139.

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²⁸ The IADB created an Independent Investigation Mechanism on terms similar to those of the World Bank, the principal difference being that the IADB Mechanism does not have a standing panel. Instead, a roster of panellists is maintained. See “Independent Investigation Mechanism” at www.iadb.org/cont/poli/indep.htm. In September 1996 a request for investigation was made with respect to the Yacyretá Hydroelectric project and accompanying environmental and resettlement programs. See Notice of Board of Executive Directors’ Decision (Nov. 13, 1997), available at site cited.

²⁹ P. Sands (ed.), *Manual on International Courts and Tribunals* 313 (1999).

³⁰ See www.adb.org.

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maintain any system of formal dispute settlement. Instead, the IMF's 24 Executive Directors determine the course of Fund operations.

Criticism came to a head following the Asian financial crisis of late 1997 and resulting financial contagion in other parts of the world. The Fund's Annual Meeting in April 1998 was a stormy one and the Fund has since undertaken a number of reforms, collectively referred to as the New Global Financial Architecture (NGFA). Despite the fact that ultimately it may not be as far reaching as originally foreseen, the NGFA continues to move along five parallel tracks.³² These are:

- i) transparency, standards and surveillance,
- ii) strengthening financial systems,
- iii) orderly integration of international financial markets,
- iv) involving the private sector in the prevention and resolution of financial crises and,
- v) systemic improvements.

All involve some degree of opening and public engagement, but it is efforts at greater transparency and private sector involvement that are most relevant here.

Improving transparency within the Fund takes several forms. The Fund has, for example, undertaken to make available more information on IMF surveillance of countries through the release of Public Information Notices (PINS) following consultations. These occur pursuant to Art. IV of the Fund's *Articles of Agreement*³³ whereby member countries are required to provide information necessary for exchange rate surveillance and to "consult with [the Fund] on the Member's exchange rate policies." In addition, the Fund has given countries the option of permitting the voluntary release of Art. IV staff reports. The Fund is also to make available more information on countries' IMF-supported programs of economic reform. This involves actively encouraging members to publicly release the all-important Letters of Intent (LOIs) and Policy Framework Papers (PFPs) that they conclude with the Fund.³⁴ In March/April 1999 the IMF Board agreed on a "strong presumption" that LOIs and PFPs would be made public, and to proceed with the release of the IMF Chairman's periodic comments on the use of Fund Resources (UFRs).³⁵ Finally, the Fund is to make available more information about IMF analyses of policy issues.

With respect to private sector involvement, two programs should be mentioned. The first is the Fund's effort to increase public participation in the Heavily Indebted Poor Countries Initiative (HIPC). This has involved the World Bank and other international institutions, as well as the interested public, in attempting to strengthen the current framework for debt relief and exploring the relationship between debt relief, social policies and poverty reduction. An enhancement of the consultative process was begun in February 1999. The second is a proposal to make available more information from the private sector in cooperation with the Basle Committee on Banking Supervision and several related international groups dealing with banking, financial regulation and insurance.

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Much of the motivation for these initiatives comes from a realization that the private sector constitutes a potentially valuable source of indirect information on what is happening in international financial markets. If government information supplied to the Fund is not always accurate, the market can be another source of intelligence. At the time of Asian and Russian financial crises, in particular, there was the distinct impression that some of the problem could have been averted had private markets been tracked more closely.³⁶ Under the objective of better surveillance, therefore, Fund staff has strengthened high frequency contacts with the private sector to monitor developments in capital flows and market positions, and an Inter-Agency Task Force on Finance Statistics (IATF) has developed an electronic presentation of creditor-side data in conjunction with the World Bank, IMF, BIS and OECD.

Because of its close association with the sensitive area of sovereign debt, the Fund faces a unique challenge in enhancing public participation in its work. On the one hand, it is seeking to extend the involvement of the private sector in providing information that may help to prevent and resolve financial crises. On the other, it must remain conscious of its role as a lender to governments, with often privileged information and access to government borrowers. In this sense, the flow of information foreseen may often be unidirectional, with little benefit for market players and therefore little incentive for them to cooperate.³⁷

c. The World Trade Organization

The WTO was created in April 1994 as a successor to the *General Agreement on Tariffs and Trade* (GATT). It came into being at a time of rapidly emerging aspirations for public participation in international law. The fact that NGOs could not be directly involved in the work of the WTO or its meetings was contentious from the beginning.

The WTO has organized visits to headquarters, field missions, and symposia to educate the public about its role.³⁸ Nevertheless, from the outset the fact that the new organization featured a system of binding dispute settlement and sanctions for non-compliance made NGOs and other members of the public anxious to become more involved. The sense of exclusion was sharpened by the fact that WTO dispute settlement can involve many issues apart from trade. NGOs often considered that they could play a useful role in informing the process on these points.

WTO dispute settlement consists of a sequence of consultations between member countries, hearings before panels, and appeals before the WTO Appellate Body. The process is conducted according to rules set out in the *WTO Dispute Settlement Understanding* (DSU), part of the *WTO Agreement*.³⁹ If an infringement is found, DSU Art. 19 requires the WTO to request that the country concerned bring its laws "into conformity" with the *WTO Agreement*. This has been interpreted as requiring the country to withdraw the infringing measure.⁴⁰ Alternately, countries may agree to

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³⁷ Part of these very specific proposals has been to expand the IMF's dialogue with the private sector. The IMF Executive Committee has considered the need to balance improved flow over international financial markets with the risks related to inside information. In April 1999 the Fund's Interim Committee endorsed effective communications with private capital markets.

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³⁹ 33 I.L.M. 1226 (1994).

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voluntary compensation or, as a last resort, the injured country can seek permission to suspend trade concessions.⁴¹ As of January 2000 the great majority of cases had been satisfactorily resolved. The WTO has only authorized retaliation three times in two matters.⁴²

At present, however, the process of dispute settlement takes place almost entirely out of public view. Countries will occasionally announce the decision to begin consultations, but there are few opportunities to learn what provisions are in issue and what arguments are being made.⁴³ Members of the public are not allowed to attend hearings. The WTO maintains no on-line registry, has an internally generated index – the State of Play - that has been known to be inaccurate, and does not indicate the continuing progress of cases. On the whole the *process* of the system, as opposed to its results, remains surprisingly opaque.

Some change came about in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, a dispute between the United States and India, Malaysia, Pakistan and Thailand over a provision of the U.S. *Endangered Species Act*⁴⁴ which prohibited the importation of shrimp from countries not certified “turtle-friendly” by the U.S. State Department.⁴⁵ In the course of proceedings before the panel in July 1997 two U.S.-based NGOs, the Center for Marine Conservation and the Center for International Environmental Law, submitted a brief to the panel detailing significant information related to the six turtle species in issue. The panel rejected consideration of the information, ruling that “accepting non-requested information from non-governmental sources would be ... incompatible with the DSU as currently applied.”⁴⁶ It indicated, however, that the United States was free to append the brief to its own submission. The United States did this and appealed the point before the Appellate Body. The Appellate Body then faced two issues:

- i) the admissibility of non-governmental materials submitted independently to panels;
- ii) the inclusion of non-governmental materials in government submissions.

The Appellate Body’s interpretation turned on three considerations. First, there was the language of DSU Art. 13(1), which states that a panel has “the right to seek information and technical advice from any individual or body which it deems appropriate”. Likewise, “a panel has the discretionary authority either to accept and consider or reject information and advice submitted to it, whether requested by a panel or not”. Second, the Appellate Body observed that DSU Art. 12.1 authorizes departures from DSU procedures and that both the Art. 12 and 13 powers allow a panel to discharge its duties under DSU Art. 11 to make “an objective assessment of the matter”. The Appellate Body therefore concluded that the word “seek” in Art. 13(1) should be read liberally, allowing NGOs to submit briefs

⁴¹ DSU Art. 22.2.

⁴² See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, (retaliation by the United States); *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26, WT/DS48 (retaliation by Canada and the United States).

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⁴⁵ Non-governmental organizations attempted to participate in the *Bananas* case at the panel level, but this was rejected and the point was not appealed.

⁴⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, para. 7.8 (May 15, 1998).

with prior permission, and indicated that where material is received consultation with the parties should take place.

The reaction to this decision was mixed. NGOs and a number of supportive Western governments hailed it.⁴⁷ Other countries, including the plaintiffs in the *Shrimp* case, were opposed, arguing that it impermissibly altered their rights and obligations under the *WTO Agreement*.⁴⁸ They have sought a review of the ruling's propriety in the context of ongoing DSU review.⁴⁹

There are several mechanical problems with the *Shrimp* ruling on public participation. To begin with, the existing lack of transparency in the process makes it difficult to determine when a case is actually before a panel. It is thus hard to know when a submission should be prepared. The Appellate Body in the *Shrimp* case also suggested that requests to submit could be sent to the panel. The WTO does not publish a list of panel chairs, so that one cannot know with any certainty to whom one is to send a submission to. It would be useful, for instance, for the WTO Director-General designated one person – perhaps the WTO's Director of External Relations – to act as a contact point for these documents and make this known on its website. More generally, it appears that the WTO needs to formulate a standard procedure for dealing with submissions the way that the World Bank has for the Inspection Panel. This could include guidelines, a suggested format, and copies of past public submissions. Again, all of these could be included on the WTO website. As things now stand, most members of the public do not know about the *Shrimp* ruling which, with passing time and limited use, recedes from view.

This observation leads to comment on actual use of public submissions in WTO dispute settlement. As mentioned, since October 1998 there has been one submission – by two Tasmanian salmon farmers. Given recent events at Seattle and the abiding interest they demonstrate, one would have expected a deluge of interest. Instead, the contrast between public interest and formal participation could hardly be more stark. The record in fact suggests that the public is very poorly informed and that this possibility for formal public participation is illusory. Moreover, the WTO has done little to publicize it. The possibility of making a submission is not mentioned on the WTO website nor is it referred to in WTO promotional material.

3. Conclusions and Recommendations

The conclusion must be that in this new era of enhanced participation there remain significant barriers to genuine public participation in the institutions of international economic law. These threaten their legitimacy. What follows are a series of conclusions and recommendations to further enhance informal and formal participation, and to assist them in building support among a broader global constituency.

With respect to *informal participation*:

- a. Each of these institutions must constantly be on the lookout for opportunities to build new constituencies while maintaining existing ones. This will be difficult due to resource constraints, but

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each of these institutions must begin to reach beyond traditional networks of NGOs and build support at the grassroots level.

- b. There must be more considered use of informal contacts. Missions, visits to headquarters and symposia should be opportunities to meet with individuals and groups who have not been met in the past. The same bureaucrats and NGO officials should *not* be the ones automatically included in annual training sessions.

With respect to *formal participation* the central problem appears to be a clash between what the legalization of international relations suggests to the public, with its broad notions of openness, access to proceedings, and the ability to meaningfully participate by way of intervention, versus the reality of the system we have so far developed, which is limited, hard to learn about, and unable to challenge the central tenets of the system. International dispute settlement is very different, legal though it may be. It is this dissonance of perception that is the most frustrating for members of the public and I think is the optic from which they approach this, and it is undoubtedly the optic through which they see efforts at public participation thus far, halting, slow and fundamentally inadequate. For this reason, I would recommend a number of improvements:

- a. At the *pre-hearing stage*, there is limited – and in many cases no – access to pleadings. Consciousness about what disputes are really about remains almost exclusively a state-to-state affair, supplemented in a few cases by a few, well-connected NGOs who may have some involvement in initiating the claims or access to bureaucratic channels. Members of the public are forced to rely on press releases and whatever is made available electronically, which is often interstitial and coherent only to insiders. Certain proceedings, such as those under NAFTA Ch. 11, are *de facto* entirely secret.⁵⁰ It is impossible to find out anything about them unless, again, one has access to the relevant channels or is a direct participant.
- b. At the *hearing stage*, there is rarely public access to the hearings. The proceedings take place behind closed doors, well away from public scrutiny. We do not know what is said. We do not know how the panellists reacted. In short, this does not improve confidence in this new international judiciary, leaving the impression of Star Chamber-type proceedings;
- c. At the *hearing stage* as well, no transcripts are made available, and there is therefore no accountability. No questions can be asked. No errors can be pointed out. The systems that have been created do not instil faith that true justice is being done.
- d. Among those systems with dispute settlement on mandated timelines, such as the WTO, there is no indication of where a case is in the *post-hearing stage*. The public is left entirely uninformed of progress of a case or when a final decision can be expected, reinforcing the public's sense that they are merely bystanders in the process.

It would also be appropriate to begin identifying a set of necessary criteria for greater participation in international economic law. To use a popular metaphor, what would the “toolbox” consist of? At a minimum, in order to instil public confidence in these mechanisms the following appear necessary:

⁵⁰ This is pursuant to Art. 15 of the *ICSID Rules*, which state that “The deliberations of the Tribunals shall take place in private and shall remain secret.” Closed proceedings have occurred in several cases, including Ethyl. The NAFTA countries have agreed to varying rules for each with respect to the publication of awards. To date, no NAFTA country has made awards public. See NAFTA Annex 1137.4. See D.S. MacDonald, “Chapter 11 of NAFTA: What are the Implications for Sovereignty?” 24 *Can.-U.S. L.J.* 281 (1998).

- a. a visible contact point. With respect to formal participation, for instance, no institution surveyed here has any mention at its Internet portal. This leads to a chicken-and-egg situation: you need to know about the mechanism to search for it. There should be mention of opportunities for involvement on the first page of its internet home page, and a specific office, project or person should be given this responsibility. Instructions to send a submission to “the chair of the panel” are insufficient when one does not know whether a panel has been established.
- b. an accessible register. This should contain more than a skeletal outline of the case. Ideally, it should be set in a chronological order, and updated ever time a principal step takes place, as now appears to be the case with the World Bank Inspection Panel. Those responsible for information design should consider posting institutionally mandated deadlines as an external reference point as an added discipline on the system. Thus for example, where a WTO panel has 41/2 months to complete its deliberations and render a report in a case involving prohibited subsidies, that date should be posted *ex ante* completion of the report and visible for all to see whether the panel has met its mandate.⁵¹ Where it has not, an explanation should be available.
- c. a public dossier. As in domestic procedures, documents should be presumptively public, available *prior* to the process.
- d. public hearings. The very center of the proceedings must be public and in all but exceptional circumstances should be publicized. This now happens with in the ICJ. Consideration should be given to other means of making these available, through transcripts of the proceedings.

We begin to move towards a system of “open development”, that is participation by all those potentially affected by a case.⁵² This is true for computer software. There is no reason why it should not become possible here. There is always a fear of floodgates, but if past participation rates are prelude then it appears that we should not be concerned. This would do much to instil confidence in the system.

In summary, what we appear to have in many instances is a system of participation that has become a conversation between epistemic communities rather than a truly public exercise. It is the preserve of a group of non-governmental organizations, often with close links to the bureaucracy, instead of a wider forum for dialogue. This is not to suggest that any of this is inherently bad, but that the institutions of international economic law must recognize what has happened and look beyond for genuine popular support. One might fear that more “spontaneous expression” could degenerate into a torrent of irrelevancy, but it is important to see what actually happens. Appropriate screens can be put in place.

Finally, with respect to building greater *public support*:

- a. Each of these institutions must review opportunities to build new links with civil society. For instance, regular “Town Hall” type meetings could be organized akin to the Joint Public Advisory

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⁵² “Open development” refers to a process of creation involving individual contributions by independent volunteers. It is most often found in the technology context. The Economist notes that Harvard law professor, Laurence Lessig, has started “Open Law”, an experiment that uses online forum to draft a brief or other legal documents. See “The Internet: Hacker journalism” *The Economist* (Dec. 4, 1999).

Committee scheme in place under the *North American Agreement on Environmental Cooperation*⁵³. Employees of these institutions could combine official work with opportunities to explain programs and receive input in civil society. Consideration could even be given to accepting private donations, akin to that received by the U.N. from Ted Turner, in order to build an independent financial base for certain activities. More internships could be offered.

- b. Each of these institutions must seek greater public visibility. Often, visibility is considered negatively by these institutions. This has to change. The institutions must realize that it is with visibility that they become relevant and indispensable to the broader public. One means of doing this would be to advertise more.
- c. Each of these institutions must review past work, collection and disseminate follow-up. This is important, and perhaps more important than is often realized. What has happened in a case after the formal close of proceedings is rarely tracked and publicized. All institutions of international law should be doing a better job of this. In the case of the WTO, for instance, national reports made to the DSB on compliance should be made available and under WTO de-restriction procedures are⁵⁴, but the opaqueness of the existing WTO internet search engine makes follow-up very difficult to determine. There is no central repository for the achievements of these institutions. In certain instances results can be determined by examining annual reports, but even this information is interstitial. One has to have the time and patience to go back and assemble it. Hence, no idea remains of the considerable work that has been achieved, and ultimately, of the value of these institutions in context.

This last suggestion is perhaps symptomatic of a larger problem in modern society, that we are intensely forward-looking. When a problem occurs, there is nothing to fall back on. Those who speak for these institutions are poorly equipped to defend them, and so we have the awkward situation of international organizations that are scorned, without appreciation for what they have accomplished. This leads to a second point, and that is that we live in an age of accountability which is also an age of intense competition for our attention. We must be vigilant to constantly remind the global public of the importance of these institutions, both through possibilities for their participation and through campaigns of heightened visibility. I would suggest outreach, advertising and the need for dialogue, not only with well-informed NGOs but with wider constituencies of the global general public.⁵⁵ These would help to “establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained.”⁵⁶

⁵³ 32 I.L.M. 1480 (1993).

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⁵⁵ R.D. Hayton, “The Matter of Public Participation” 33 *Natural Resources J.* 275 (Spring 1993).

⁵⁶ U.N. Charter preamble.