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## Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations

*William M. Reichert*

The World Trade Organization (WTO),<sup>1</sup> as successor to the General Agreement on Tariffs and Trade (GATT),<sup>2</sup> recognized the need for environmentally responsible free trade.<sup>3</sup> Achieving this will be difficult, however, as there are many obstacles to overcome, both in international law, as well as in the WTO itself. Fortunately the WTO has also allowed for the establishment of consultative relations with non-governmental organizations (NGOs).<sup>4</sup> NGOs have made important contributions to other intergovernmental organizations (IGOs) through consultative relations and have been especially effective in the environmental field.

This Note argues that the WTO can best pursue free trade in accordance with principles of sustainable development through consultative relations with NGOs. Part I discusses the obstacles facing the WTO in its pursuit of sustainable development. Part II considers the nature and contributions of NGOs and the various models of consultative relations. Part III explains why the WTO is the best international forum to address sustainable development, and why NGO consultative status is crucial for the pursuit of sustainable development. Part III also addresses specific ways NGOs can effectively contribute to the

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1. The WTO is a creation of the Uruguay Round negotiations, becoming the new framework to conduct trade relations. See General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the World Trade Organization, Document MTN/FA, Part II, pages 1-14, of December 15, 1993; *reprinted in* WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 5 (1995); 33 I.L.M. 13 [hereinafter WTO Charter].

2. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

3. WTO Charter, *supra* note 1, at pmbl. The WTO recognized the need for free trade that is in accordance with the principles of sustainable development.

4. Article V.2 of the Charter reads: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." WTO Charter, *supra* note 1, at art. V.2.

process. This note concludes that NGOs are invaluable in reconciling the trade and environment conflict.

## I. OBSTACLES TO SUSTAINABLE DEVELOPMENT

The 1992 U.N. Conference on Environment and Development in Rio de Janeiro<sup>5</sup> connected environmental protection and economic growth by emphasizing sustainable development.<sup>6</sup> Recognizing this trend, the WTO has noted the importance of the conference's Declaration on Environment and Development<sup>7</sup> and has pledged to pursue a course of liberalized trade that allows for sustainable development.<sup>8</sup> The WTO must overcome several obstacles, however, to achieve this goal.

### A. OBSTACLES INHERENT IN THE INTERNATIONAL SYSTEM

#### 1. Divergent Perspectives

Advocates of free trade and advocates of the environment often view one another with suspicion and hostility.<sup>9</sup> The con-

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5. For a brief description of the documents that came out of the conference, see Edith Brown Weiss, *Introductory Note*, 31 I.L.M. 814, 814-17 (1992). The texts of the documents may be found at 31 I.L.M. 874.

6. Sustainable development has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 43 (1991). "At a minimum, sustainable development discourages the use of nonrenewable resources and activities that adversely affect the quality of life for future generations." Kyle E. McSlarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 ENVTL L. REP. 10,589, 10,590 (1991).

7. Decision on Trade and Environment, Document MTN.TNC/MIN(94)/1/REV.1, reprinted in World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations* 469 (1995), noting Declaration of the United Nations Conference on Environment and Development, June 13, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992).

8. In the preamble to the WTO Charter, the parties to the agreement recognize:

[T]hat their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

WTO Charter, *supra* note 1, at pmbl (emphasis added).

9. Environmentalists took an early stance that the GATT and the environment were fundamentally opposed to one another. See Michael B. Smith,

flict appears to be rooted in the opposing philosophies behind each side's policies.<sup>10</sup> International trade advocates seek to free commerce from any type of barrier that might restrict the free flow of goods. Environmentalists seek to conserve the earth's natural resources and prevent exploitation of the ecosystem,<sup>11</sup> often through restrictions that free traders condemn. The differences between these outlooks are made greater by the fact that free trade and environmental advocates are generally specialists in their respective fields, and may not have an adequate understanding of each other's agenda.<sup>12</sup>

Another cause of the conflict is that the two sides' "emphasis on domestic versus international issues is inverted. The trade perspective, while international in context, focuses primarily on the effect of *domestic* legislation. The environmental perspective, by contrast, has primarily a domestic agenda, but focuses on the effects of *international* agreements among nations."<sup>13</sup>

## 2. International Law

Because environmental hazards do not respect artificial political boundaries, domestic legislation often cannot effectively address them.<sup>14</sup> Unfortunately, the international legal system is also inadequately suited to solve environmental problems.<sup>15</sup> Many critics feel that this is due to the emphasis on state sovereignty in international law, which guarantees states the right to develop their natural resources<sup>16</sup> and often allows a state to in-

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*GATT, Trade and the Environment*, 23 ENVTL. L. 533 (1993). "Many environmental organizations have been critical of the GATT as an agreement and as an institution. They believe that the GATT views ecosystem protection as a netlesome non-tariff barrier instead of an overriding goal." Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. WORLD TRADE, Oct. 1991, at 37, 37.

10. McSlarrow, *supra* note 6, at 10,590.

11. Kurt C. Hofgard, *Is This Land Really Our Land?: Impacts of Free Trade Agreements on U.S. Environmental Protection*, 23 ENVTL L. 635, 669 (1993).

12. Kyle E. McSlarrow, *It's a Matter of Perspective*, in, *Making the GATT Environmentally Correct*, ENVTL. F., July/Aug. 1992, at 22, 27.

13. McSlarrow, *supra* note 6, at 10,590.

14. Maria Garner, *Transnational Alignment of Nongovernmental Organizations for Global Environmental Action*, 23 VAND. J. TRANSNAT'L L. 1057, 1061 (1991).

15. David Scott Rubinton, *Toward a Recognition of the Rights of Non-States in International Environmental Law*, 9 PACE ENVTL L. REV. 475, 478 (1992).

16. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 193, U.N. Doc. A/Conf.62/122 (1982), reprinted in 21 I.L.M. 1245 (recognizing the right of every state to develop its natural water resources); Interna-

flict injury upon the environment with virtually no fear of reprisal.<sup>17</sup>

The 1986 disaster at the Chernobyl nuclear power plant in the Soviet Union dramatically illustrated this gap in international law. The accident had a profound effect on millions of people and affected the citizens, property and environment of at least twenty countries.<sup>18</sup> Despite the fact that customary international law provides for strict liability for ultrahazardous activities,<sup>19</sup> "not a single successful claim [was] brought against the USSR, and this despite the USSR's implied acceptance of its own negligence in the incident."<sup>20</sup> Even if it were easier to

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tional Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2, para. 1, 993 U.N.T.S. 3, 5 (encouraging nations to maximize the use of their resources to increase the quality of life); Declaration on the Right to Development, Feb. 23, 1987, G.A. Res. 41/128, U.N. GAOR, 41st Sess., U.N. No. 53, art. 1, para. 1, U.N. Doc. A/41/925 (1986) (declaring the right to development inalienable); General Assembly Resolution on Permanent Sovereignty Over Natural Resources, Dec. 14, 1962, G.A. Res. 1803, U.N. GAOR, 17th Sess., para. 1(1), U.N. Doc. A/9030 (1963).

17. Garner, *supra* note 14, at 1062. The principles of national sovereignty and freedom of the seas permit a state to "degrade its own territory . . . [and] to inflict injury on areas of the planet lying outside national territory virtually without limit" subject only to fragmented and primitive rules of international responsibility. *Post-Stockholm: Influencing National Environmental Law and Practice Through International Law and Policy*, 66 AM. SOC'Y INT'L L. PROC. 1, 9 (1972) (statement of John Lawrence Hargrove).

18. Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L. J. 393, 402 (1989).

19. See Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources, Dec. 17, 1976, art. 3, 16 I.L.M. 1450 (1977); Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, art. 2, 961 U.N.T.S. 187, 189; International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. 3, 973 U.N.T.S. 3, 5; Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, art. IV, 1063 U.N.T.S. 265; Claims Against the U.S.S.R. for Damage Caused by Soviet Cosmos 954 (Canada v. U.S.S.R.), Jan. 23, 1979, 18 I.L.M. 899, 907 (stating that the principle of strict liability applies to activities sharing a high degree of risk); see also Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 525, 558 (1980) (concluding that state liability for transboundary pollution derives from the presumption of state control over the injurious activity).

20. Sands, *supra* note 18, at 411. "The USSR is not a party to any of the international conventions relating to third party liability in nuclear energy, and is therefore not subject to any specific treaty obligation to compensate for damage caused outside its national boundaries." *Id.* at 407. See also Jillian Barron, *After Chernobyl: Liability for Nuclear Accidents Under International Law*, 25 COLUM. J. TRANSNAT'L L. 647, 648 (1987) (stating that the Soviet Union admitted error, but denied any legal obligation). Sweden and Switzerland publicly denied the existence of an international legal basis for securing damages from the U.S.S.R. Gunther Handl et al., *International Responsibility for Manmade Disasters*, 81 AM. SOC'Y INT'L L. PROC. 320, 331 (Apr. 8-11, 1987).

bring a claim under international law, states often do not litigate the international rights of their citizens.<sup>21</sup> A state's interest in not exposing itself to future retributive claims frequently prevails over the international community's interest in enforcing liability on the responsible state.<sup>22</sup>

Another reason the international system has difficulty responding to environmental concerns is that the negotiating process is not open to non-state actors. "[O]ur leaders negotiate treaties and participate in conventions while the rest of us are left with little more than the ability to watch the continuing deterioration of our environment from the sidelines."<sup>23</sup> In contrast, U.S. legislation such as the Administrative Procedure Act<sup>24</sup> and the Freedom of Information Act<sup>25</sup> ensures more accountability than the often intractable multilateral organizations.<sup>26</sup> "Disclosure and transparency are essential to promoting a better development process."<sup>27</sup> Limiting international legal standing to states is incompatible with the modern world. "The various developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law . . . . [T]here must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law."<sup>28</sup>

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21. Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 613 (1994).

22. Sands, *supra* note 18, at 407.

23. Rubinton, *supra* note 15, at 476 (citations omitted). This is due partly to the fact that non-state actors (people, corporations, non-governmental organizations and so on) are not recognized as legal persons, and thus have no standing at the international level. Sands, *supra* note 18, at 397.

24. 5 U.S.C. §§ 551-59, 701-06 (1989).

25. 5 U.S.C. § 552a (1989)

26. David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645, 2653 (1991).

27. Bruce Stokes, *Storming the Bank*, 1988 NAT'L J. 3250, 3253 (statement of Douglas Hellinger, co-director of the Development Group for Alternative Policies). The lack of transparency in the World Bank has prompted one commentator to describe the institution's decisionmaking procedures as highly secretive. Wirth, *supra* note 26, at 2653.

28. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 639 (Hersch Lauterpacht ed., 8th ed. 1955) (citations omitted). This idea is just as prevalent today as it was then:

To describe international society as comprising a community of states is to ignore reality. As a matter of political fact, the time is long past in which states alone acted as "subjects" of international law. New technologies have given non-state actors the virtually unrestricted power to transmit satellite broadcasting signals across the globe, to transfer within moments vast sums of capital between banks in different states,

## B. OBSTACLES INHERENT IN THE WTO

### 1. Article XX

The original GATT allowed some environmental protection measures, in Article XX, which allowed exceptions to GATT obligations if "necessary to protect human, animal, or plant life or health, or relating to the conservation of exhaustible natural resources."<sup>29</sup> Although Article XX was written in 1947, when environmental protection was not a major issue,<sup>30</sup> the history of Article XX indicates that it was intended to address environmental concerns.<sup>31</sup>

The history of Article XX's interpretation, however, reveals a considerable amount of confusion.<sup>32</sup> For example, there is confusion over whether Article XX can be used to protect foreign life or health. While most commentators have determined that Article XX is limited to domestic life or health, others have argued that the provision was intended to apply to foreign con-

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and to run industries and plants which pollute massively across international borders.

Sands, *supra* note 18, at 400.

29. The provisions of Article XX which are relevant to the environment are the following:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

GATT, *supra* note 2, at art. XX.

30. Charnovitz, *supra* note 9, at 38. This is partly illustrated by the fact that the word "environment" is not even mentioned in Article XX.

31. While there is no "legislative history" specifically for GATT Article XX, earlier international discussions on an environmental exception for free trade indicate that Article XX was intended to protect the environment. See Charnovitz, *supra* note 9, at 38-47. In fact there was a general recognition of an environmental exception to trade agreements as early as 1927. *Id.* at 42.

32. *Id.* at 49. See United States - Prohibition of Imports of Tuna and Tuna Products from Canada GATT, BISD, 29th U.N. 108 (panel report adopted Feb. 22, 1982); Canada, European Community, Mexico/United States - US taxes on petroleum and certain imported substances GATT, BISD, 34th U.N. 136 (panel report adopted on June 17, 1987); Canada - Measures Affecting Exports of Unprocessed Herring and Salmon GATT, BISD 35th U.N. 114 (panel report adopted March 22, 1988); Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes GATT, BISD, 37th U.N. 200 (report adopted on November 7, 1990), Mexico/United States - United States Restrictions on Imports of Tuna, GATT, BISD 39th U.N. 155 (report issued on September 3, 1991).

cerns as well.<sup>33</sup> All of this confusion has led to the danger that Article XX will become ineffective and make the WTO appear to be an obstacle to environmental progress.<sup>34</sup> Because of this, critics have charged that Article XX lacks relevance to current environmental problems<sup>35</sup> and offers scant support for resolving trade and environment conflicts.<sup>36</sup>

Another problem is that countries no longer have the ability to block an environmentally adverse panel ruling. Under the original GATT system, any member state could block an adverse panel ruling, since unanimity was required to adopt a panel report (and thus even the losing party had to vote for its adoption). Under the WTO, however, panel reports are automatically adopted and it takes a negative consensus<sup>37</sup> to choose not to adopt a panel report.<sup>38</sup> Environmentalists fear that this will put pressure on domestic environmental regulation and degrade the current level of global environmental standards.<sup>39</sup>

## 2. Transparency

The GATT suffered a same lack of transparency that has also been the subject of criticism in many other IGOs.<sup>40</sup> In fact, some critics described the GATT as having "secret" trade negoti-

33. Charnovitz, *supra* note 9, at 52.

34. *Id.* at 55.

35. Smith, *supra* note 9, at 538.

36. McSarrow, *supra* note 6, at 10,594. One suggestion to make Article XX more effective in protecting the environment is to change the phrase "necessary to protect human, animal, or plant life or health" to a less stringent requirement of "relating to protection of human, animal, or plant life or health." Eliza Patterson, *International Trade and the Environment: Institutional Solutions*, 21 ENVTL L. REP. 10,599, 10,602-03 (1991).

The requirement that a measure "relates to" protection of the environment should be met if the measure is consistent with, and a part of, the framework of environmental policies of the nation imposing the measure. Such a "standard of proof" is sufficient to guard against the imposition of protectionist measures under the guise of environmental protection and it preserves each country's right to decide its own environmental policies.

*Id.* at 10,603.

37. That is, the panel report is automatically adopted, unless there is a unanimous vote not to adopt the report.

38. Judith H. Bello and Alan F. Holmer, *Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095, 1099 (1994).

39. See *U.S. Seeks Review of Tuna-Dolphin Decision; Ruling Said to Undermine Environmental Laws*, Int'l Env'tl. Daily (BNA), May 25, 1994 (statement of David Schorr, trade policy specialist for the World Wildlife Fund) available in LEXIS, News Library, BNAIED file.

40. See *supra* text accompanying notes 23-28.



ations which constituted "a sneak attack on democracy."<sup>41</sup> Recently, many have had reason to believe that the WTO will follow the same course, despite the new provision allowing for NGO consultative relations. In an effort to promote transparency, the Clinton administration lobbied during the Fall of 1994 for observer status for environment, development, and business NGOs in the new WTO Trade and Environment Committee.<sup>42</sup> All other participating countries on the Committee rejected the proposal, saying that the WTO is a governmental organization and that NGOs have no place in it.<sup>43</sup> Similarly, applications for observer status by the Council of European and Japanese National Shipping Associations and the American Institute of Maritime Shipping were received by the Working Party on Maritime Transport of the WTO's Council on Services, with Chairman Christer Manhusen saying that non-governmental organizations should use other forums to express their views.<sup>44</sup> This stance is disturbingly at odds with the new provision allowing for consultative relations, as well as with recent GATT-NGO cooperation.<sup>45</sup>

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41. *Sabotage! of America's Health, Food Safety and Environmental Laws*, WASH. POST, Apr. 22, 1992, at A18.

42. *U.S. Fails to Bring NGOs Into Talks With WTO's Environmental Committee*, 17 Int'l Env'tl. Rep. (BNA) 762 (Sept. 21, 1994). "NGOs have much expertise to offer in the field of the environment, and their voice can help the committee in its exploration of the link between trade and the environment," U.S. delegate Chris Marcich told the committee.

Marcich told the meeting the United States believes co-opting NGOs into the work of the committee would make its work more transparent. "Non-transparent proceedings perpetuate a fortress image of the (General Agreement on Tariffs and Trade) and diminish public confidence in and support for the work of the WTO." *Id.*

43. *Id.* Interestingly, in 1971, the General Council of the GATT established the Group on Environmental Measures and International Trade, whose mission was similar to the WTO Trade and Environment Committee. The group never met until 1991, and its failure is often cited by environmentalists as a sign of the GATT's lack of resolve to deal with environmental issues. See *GATT to Focus on Trade and Environmental Link*, GATT FOCUS, Oct. 1991, at 1 [hereinafter GATT FOCUS].

44. *U.S. Urges Broad Representation on Investigative Dispute Panels*, 12 Int'l Trade Rep. (BNA) 295 (Feb. 15, 1995).

45. In June of 1994, the GATT organized a symposium of more than 500 representatives of industry, governments, and non-governmental organizations to exchange views on how to wipe out the anomalies inherent in the relationship between trade and the environment. *Symposium Addresses Ways New WTO Could Erase Trade, Environment Anomalies*, 17 Int'l Env'tl Rep. (BNA) 503 (June 15, 1994).

## II. NGOs

NGOs have existed since the nineteenth century.<sup>46</sup> Because they are extremely varied in their makeup, however, there is no consensus as to what an NGO is. The United Nations has broadly defined an NGO as, "any international organization which is not established by inter-governmental agreement."<sup>47</sup> In its definition, however, the United Nations erroneously assumes that NGOs are exclusively international groups.<sup>48</sup> When speaking only of *international* nongovernmental organizations, the acronym INGO is more accurate, and avoids possible exclusion of *domestic* groups from NGO status. The acronym NGO is broader than INGO, and can include both domestic and international groups.<sup>49</sup>

While some have argued for an even broader definition of an NGO,<sup>50</sup> the Union of International Associations (UIA), with whom NGOs are registered for the United Nations, has set out a much narrower definition. The UIA has established criteria for an organization to be defined as an NGO: (1) it must have aims which are truly international in character and manifest the intention to engage in activities in at least three states; (2) the membership must be drawn from individuals or collective entities of at least three states and must be open to any appropriately qualified individual or entity in the organization's area of operations; (3) the constitution must provide for the members to periodically elect the governing body and officers; (4) the headquarters and the officers should be rotated among the various member states at designated intervals; the voting procedure must be structured in such a way as to prevent control of the organization by any one national group; and substantial finan-

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46. The first NGO is considered to be the World's Evangelical Alliance, founded in 1846. WERNER J. FELD & ROBERT S. JORDAN, *INTERNATIONAL ORGANIZATIONS* 25 (1994). For an excellent account of the history of NGOs, see DOUGLAS WILLIAMS, *THE SPECIALIZED AGENCIES AND THE UNITED NATIONS* 259-69 (1987).

47. E. OSMANCZYK, *THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS* 565 (1990).

48. This is a common mistake when discussing NGOs. See, e.g. Kjell Skjelsbaeck, *The Growth of International Nongovernmental Organization in the Twentieth Century*, 25 *INT'L ORGANIZATION* 420, 422 (1971) (abbreviating international nongovernmental organizations with the acronym NGO); see also *infra* text accompanying notes 50-52.

49. See FELD & JORDAN, *supra* note 46, at xvii-xviii.

50. One scholar has expanded the definition by considering the representation of members from only two states to be sufficient if at least one of the representatives is not a government official. Skjelsbaeck, *supra* note 48, at 422.

cial contributions to the budget must come from sources in at least three states.<sup>51</sup> This more specific definition, which also fails to consider domestic NGOs, would actually exclude many international societies in North America, "since their funds are usually derived wholly from U.S. members."<sup>52</sup>

A satisfactory definition of an NGO probably lies somewhere between the broad U.N. definition and the stricter UIA one. There are likely to be some exceptions, however, due to the wide variety of NGOs and the broad range of purposes that they serve.<sup>53</sup> Although there are great differences among the various definitions of an NGO, there seems to be general agreement among scholars that most NGOs are private, voluntary, non-profit organizations which may be local, national, or international in nature.<sup>54</sup> Some NGOs are basically international professional bodies; some have exclusively educational or research purposes. Others have more philanthropic interests such as the resolution of social problems, development in poor countries, human rights, and the environment.<sup>55</sup> NGOs often act by fulfilling a number of duties, such as: advocacy of special interests of public importance; providing expert advice in areas in which governments have an interest, but in which their own resources of information are inadequate; acting as executing agents for a number of U.N. Agencies operating in developing countries; and publicizing the work of the United Nations and its specialized agencies.<sup>56</sup>

#### A. NGO PARTICIPATION THROUGH CONSULTATIVE RELATIONS

NGO participation has been most prominent in the United Nations, particularly through its specialized agencies. NGOs

51. 3 UNION OF INTERNATIONAL ASSOCIATIONS, YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1733-34 (12th ed. 1994-1995).

52. FELD & JORDAN, *supra* note 46, at 22.

53. Some NGOs for example, even have government-related memberships, such as the International Criminal Police Organization (INTERPOL) and the International Union of Official Travel Organizations. FELD & JORDAN, *supra* note 46, at 24.

54. Farouk Mawlawi, *New Conflicts, New Challenges: The Evolving Role for Non-Governmental Actors*, 46 J. INT'L AFF. 391, 392 (1993). See also Karen J. Jason, *The Role of Non-Governmental Organizations in International Election Observing*, 24 N.Y.U. J. INT'L L. & POL. 1795, 1798 (1992); David Weissbrodt, *The Contribution of International Nongovernmental Organizations to the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 403, 406-408 (Theodor Merton ed., 1984).

55. PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 76 (1992); WILLIAMS, *supra* note 46, at 263.

56. WILLIAMS, *supra* note 46, at 265.

participate in the United Nations under Article 71 of the U.N. Charter which allows for consultative relations between the U.N. Economic and Social Committee (ECOSOC)<sup>57</sup> and NGOs.<sup>58</sup> The main purposes for the consultative arrangements within the U.N. system are to: (1) secure advice and technical cooperation from competent NGOs, (2) enable organizations that represent important elements of public opinion in many states to express their views, and (3) advance the objectives of the U.N. system through promotional activities and projects of NGOs.<sup>59</sup> Because of its extensive experience with NGOs, the U.N. model of consultative relations is enlightening.<sup>60</sup>

In implementing Article 71, the United Nations divided NGOs into three categories according to the interest of the organization in the work of ECOSOC.<sup>61</sup> NGOs placed into Category I are deemed to "[be] concerned with most of the activities of the Council, . . . have marked and sustained contributions to make to the achievement of the objectives of the United Nations" and have considerable membership that is "representative of major segments of population in a large number of countries."<sup>62</sup> NGOs in Category I may attend meetings of ECOSOC, submit written statements, be granted hearings before ECOSOC, and propose agenda items for consideration. Category II NGOs are those whose competence lies in only a few of the fields of activity covered by ECOSOC. These NGOs have all of the privileges of those in Category I, except the right to propose agenda items. The third category is the Roster, intended for NGOs that can

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57. While ECOSOC was originally supposed to handle economic and social matters within the United Nations, its influence has not been as great as many had expected. Since all NGO activity is channeled through ECOSOC, NGOs have suffered from ECOSOC's failure. Res. FELD & JORDAN, *supra* note 46, at 223.

58. Article 71 of the U.N. Charter reads: The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned. U.N. Charter art. 71. For a history of NGO consultative relations with the United Nations, see Michael M. Gunter, *Toward a Consultative Relationship Between the United Nations and Non-Governmental Organizations?* 10 VAND. J. TRANSNAT'L L. 557 (1977).

59. FELD & JORDAN, *supra* note 46, at 224.

60. Moreover, the language providing for consultative relations in Article V.2 of the WTO Charter, is quite similar to that of Article 71 of the U.N. Charter. See *supra* notes 4 and 58.

61. *Arrangements for Consultation with Non-Governmental Organizations*, U.N. ECOSOC Res. 1296(XLIV), 44th Sess., U.N. No. 1, at 21, U.N. Doc. E/4548 (1968).

62. *Id.*

make occasional and useful contributions. Those on the Roster have extremely limited privileges, including the right to attend meetings and the right to submit (substantially shorter) written statements. Many U.N. specialized agencies have also established consultative relations with NGOs. While some have followed the ECOSOC classification scheme,<sup>63</sup> many others simply maintain one single list of NGOs.<sup>64</sup>

NGO consultative relations in the United Nations have been severely criticized as weak and ineffective,<sup>65</sup> and the ECOSOC classification system has been described as artificial and impractical.<sup>66</sup> Moreover, in the past, consultative relations have suffered from a lack of communication between NGOs and the various branches of the United Nations, which is exacerbated by the vast number of NGOs that often clog the channels of communication.<sup>67</sup> The fact that NGOs have no access to the General Assembly, which often deals with the substantive matters of concern to NGOs, further compounds the communication problem.<sup>68</sup> Finally, there have long been complaints that NGOs from wealthy, western countries dominate activities, and that there is a lack of geographical balance.<sup>69</sup> Despite the shortcomings of consultative relations, overall NGO involvement in the U.N. system has been highly successful. "I have seen countless examples of the practical contribution which NGOs can and do make to our work. . . . Indeed, wherever one looks at the work of the United Nations, one sees how valuable is the contribution which is being made by NGOs."<sup>70</sup> The same success is true of

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63. These agencies follow the ECOSOC classification scheme: The United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO), the United Nations High Commissioner for Refugees (UNHCR), and the International Labor Organization (ILO). FELD & JORDAN, *supra* note 46, at 224-25.

64. These agencies simply classify all NGOs together: the World Health Organization (WHO), the International Civil Aviation Organizations (ICAO), the International Telecommunication Union (ITU), the World Meteorological Organization (WMO), the Intergovernmental Maritime Consultative Organization (IMCO), the International Atomic Energy Agency (IAEA), the United Nations Children's Fund (UNICEF), the United Nations Industrial Development Organization (UNIDO), the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Environment Program (UNEP). Gunter, *supra* note 58, at 570-71.

65. FELD & JORDAN, *supra* note 46, at 222.

66. Gunter, *supra* note 58, at 579.

67. *Id.* at 580-81.

68. *Id.* at 581.

69. Jason, *supra* note 53, at 1830; Gunter, *supra* note 58, at 582.

70. Gunter, *supra* note 58, at 572 (quoting *Message from the Secretary-General to the Regional Conference of NGO's Organized by the Office of Public Infor-*

NGO relations with other international organizations, "in fact, in some instances, the work of [IGOs] could not go forward without the participation of [NGOs]."<sup>71</sup>

## B. NGO CONTRIBUTIONS TO IGOs

One of the most important NGO functions is to act as a link to the public. Originally, the United Nations envisioned that NGOs "would bring to the deliberations of the U.N. a cross section of world public opinion."<sup>72</sup> This connection to the public also works conversely: "The United Nations needs the support of public opinion in all its efforts . . . The United Nations cannot enter the public relations business, but that is a role which the non-governmental organizations can assume."<sup>73</sup> Perhaps the most important NGO function, however, is the gathering, evaluation, and dissemination of information.<sup>74</sup> In fact, many NGOs base their credibility on information that is often more detailed, and available for longer periods of time, than that accumulated by states and IGOs.<sup>75</sup> Consequently, NGO reports often become the basis of official discussion.<sup>76</sup> NGOs are very effective in using this information to lobby the media and influence public opinion, especially at international conferences.<sup>77</sup> In recent years, this has been a significant factor in raising public awareness about the major issues at conferences such as the U.N. Con-

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*mation of the United Nations in Cooperation with the Economic and Social Commission for Asia and the Pacific, Bangkok, Thailand* (May 27-29, 1975), reprinted in 28 INT'L AFF. 282 (1976).

71. FELD & JORDAN, *supra* note 46, at 217.

72. EDWIN A. BOCK, REPRESENTATION OF NON-GOVERNMENTAL ORGANIZATIONS AT THE UNITED NATIONS 15 (1955).

73. Statement of former Secretary-General Kurt Waldheim, quoted in Edward J. Lacey, *The Role of Non-Governmental Organizations in World Affairs*, TRANSNAT'L ASS'NS, May-June 1988, at 138, 139 (citing *Report of Annual Conference of the Non-Governmental Organizations Listed with the United Nations Office of Public Information* 10 (1972)).

74. FELD & JORDAN, *supra* note 46, at 229. NGOs use many methods to gather information: reading relevant laws, reviewing periodicals, studying documents, contacting individuals, and pursuing on-site investigations. Weissbrodt, *supra* note 53, at 404. NGOs can serve as information brokers to delegates at international conferences, and have a major impact on the decision making process. A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Law*, 68 CHI.-KENT L. REV. 61, 68 (1993).

75. "[I]f such organizations [i.e. NGOs] are to be successful, their research must be perceived as independent, credible, and accessible." Note, *Developments in the Law — International Environmental Law*, 104 HARV. L. REV. 1484, 1533 (1991) [hereinafter *Developments*].

76. Jason, *supra* note 53, at 1800.

77. FELD & JORDAN, *supra* note 46, at 234.

ference on Environment and Development in 1992,<sup>78</sup> and the recent U.N. Conference on Women in Beijing.<sup>79</sup>

NGOs also make more direct contributions to IGOs, offering valuable advice and technical assistance based on the experience of their members.<sup>80</sup> NGO members were recruited by the International Atomic Energy Agency (IAEA) to monitor Iraq's compliance with U.N. Security Council resolutions, and have worked with IGOs and individual states to ameliorate starvation in Somalia.<sup>81</sup> It is often easier for NGOs to monitor compliance with international standards and rules since unlike IGOs, they do not need an invitation to enter a country and observe.<sup>82</sup> Moreover, because they possess no formal ties to any government, NGOs are often more vocal in their opinions, whereas IGOs usually try to remain as apolitical as possible.<sup>83</sup> Such scrutiny can be very effective, because governments are sensitive to criticism of their policies, especially in an international forum.<sup>84</sup> Because they can make so many contributions to

78. Hazel Henderson, *At Rio, NGOs Were Again Out in Front*, CHRISTIAN SCI. MONITOR, June 25, 1992, at 19.

79. Abigail Abrash & Laurel Fletcher, . . . *And an Unhelpful U.N.*, WASH. POST, Oct. 1, 1995 at C7. NGOs have been involved, however, in U.N. conferences for a number of years. "[T]hree recent examples, the United Nations Conference on the Human Environment, the World Population Conference, and the World Food Conference, have demonstrated that positive contributions can result from the closer involvement of non-governmental organizations in the work of the United Nations." *Report of the Secretary-General In Response to Recommendations of the Committee and of Economic and Social Council Resolutions 1739 (LIV) and 1740 (LIV)*, U.N. Doc. E/C.2/768, at 3-4 (1975) (Statement of Secretary-General Kurt Waldheim).

80. Jason, *supra* note 53, at 1817-18. This technical assistance can be quite significant. According to a survey, the external assistance provided by NGOs to low-income states in 1973 was estimated to be over \$1 billion. FELD & JORDAN, *supra* note 46, at 226.

81. FELD & JORDAN, *supra* note 46, at 218. NGOs often provide direct relief in the form of food, blankets, medicine, and education. Weissbrodt, *supra* note 53, at 425.

82. Jason, *supra* note 53, at 1819. They can be somewhat limited in this respect, however, depending on their financial resources, which are usually much smaller than that of IGOs.

83. *Id.* at 1818-19.

84. This seems to hold true for every kind of government, from open democracies to dictatorships, from the United States to the former Soviet Union to Guatemala. Weissbrodt, *supra* note 53, at 410-12. For example, in response to criticism over human rights abuses from the International Commission of Jurists, the Chilean government responded through a series of half-page advertisements in the New York Times and Washington Post. *Id.* at 411 n. 42.

IGOs, "for many issue areas . . . [NGOs] are now essential adjuncts of IGOs."<sup>85</sup>

Although NGOs have traditionally lacked standing in international judicial proceedings,<sup>86</sup> more and more courts are beginning to recognize NGOs as amicus participants in international cases.<sup>87</sup> While amicus briefs add to a court's workload, they accept them because of their benefits. Amicus briefs offer a more detailed analysis of law and legislative history than that offered by the parties; arguments that the parties may be unwilling to make due to political considerations; and knowledge of the broader implications of decisions than the parties may have considered, as well as other expert knowledge.<sup>88</sup> Consequently, many international courts now recognize the legitimacy of non-state actors in their cases.<sup>89</sup>

NGOs also possess diplomatic skills that governments and IGOs often lack. In many situations, bilateral or multilateral negotiations may be ineffective or impossible due to hostility between the parties or because of the bias of government representatives in presenting their own views. In these cases, unofficial mediation<sup>90</sup> by an NGO can be a more effective solu-

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85. FELD & JORDAN, *supra* note 46, at 246. NGOs have become important in electoral monitoring, *see generally* Jason, *supra* note 53, and have made a significant contribution to conflict mediation. *See* Mawlawi, *supra* note 53, at 392. This is especially true of the American Friends Service Committee and the British Friends — best known as the Quakers. They have been active in many areas, including: the Middle East in 1955 and 1967; between the two Germanys from 1962 to 1973; during the 1965 India-Pakistan war; and the Nigeria-Biafra war from 1968-69. *Id.* at 395.

86. "The ability of a nongovernmental organization to initiate an international case or intervene as a party is limited because in many international courts only states may be parties to proceedings." Shelton, *supra* note 21, at 612.

87. *Id.* at 616.

88. *Id.* at 618. Amicus filings at the United States Supreme Court in the late 1960s and early 1970s were present in 63.8 percent of noncommercial cases. *Id.*

89. The regional "international" legal systems of the European Community and the Nordic Community have both recognized the legal personality of NGOs. Sands, *supra* note 18, at 413. The North American Free Trade Agreement, the Iran-United States Claims Tribunal, and the United Nations Compensation Commission, established after the 1990-91 Persian Gulf crisis, have all recognized non-state participants. Shelton, *supra* note 21, at 612 n.2. The European Court of Justice accepts amicus curiae, as does the European Court of Human Rights. The Inter-American Court of Human Rights has extensive amicus participation, and has even begun to accept NGO oral participation. *Id.* at 628-640.

90. Unofficial mediation is defined as "mediation in international disputes by persons who are not employed by or responsible to a national government or



tion.<sup>91</sup> An NGO's role as a mediator often stems from its involvement in related activities and a comprehensive knowledge and understanding of the issues.<sup>92</sup> Moreover, they may be able to offer a more politically neutral assessment of the dispute, as well as a unique perspective toward its resolution.<sup>93</sup>

### C. NGO CONTRIBUTIONS TO HUMAN RIGHTS AND THE ENVIRONMENT

NGOs have achieved remarkable results in the area of human rights.<sup>94</sup> Since World War II, a great proliferation of NGOs has been partly responsible for the emergence of human rights as a major international issue.<sup>95</sup> In fact, according to the former Director of the U.N. Division of Human Rights, the inclusion of human rights in the U.N. Charter was the "result of the insistence of nongovernmental organizations and individuals at the San Francisco Conference. It is a matter of record that had it not been for the determined role played by these organizations and individuals, the place assigned to human rights in the Charter might have been less pronounced."<sup>96</sup> Others have stated that they were partly responsible for the fall of authoritarian regimes in Eastern Europe.<sup>97</sup> The activities of a number of NGOs have been at the forefront in monitoring the status of human rights.<sup>98</sup> They have caused executions to be stayed, torture to be stopped, prisoners to be released, and have raised the general awareness of the fundamental rights of citizens.<sup>99</sup>

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an inter-governmental organization." Sydney D. Bailey, *Non-official Mediation in Disputes: Reflections on Quaker Experience*, 61 INT'L AFF. 205 (1985).

91. Mawlawi, *supra* note 53, at 396-97.

92. *Id.* at 401. Moreover, as a mediator, their political status is less likely to be of concern, since they will not have the same bias as that of the conflicting parties, nor will they have to worry about political tradeoffs in finding a solution. See Tarlock, *supra* note 74, at 65.

93. See Mawlawi, *supra* note 53, at 398-99.

94. See Weissbrodt, *supra* note 53, for a general discussion of NGO activity in the field of human rights. NGOs have also been very active in the related field of disarmament. See FELD & JORDAN, *supra* note 46, at 231-33.

95. FELD & JORDAN, *supra* note 46, at 227.

96. *Id.* (quoting Theo van Boven, opening of the 36th session of the Commission on Human Rights (1980)).

97. Symposium, *Transitions to Democracy and the Rule of Law*, 5 AM. U.J. INT'L L. & POL'Y 965, 979 (1990) (remarks of Hugo Fruhling).

98. FELD & JORDAN, *supra* note 46, at 228.

99. Weissbrodt, *supra* note 53, at 411. For example, Chile released several hundred political prisoners in 1976 in response to U.N. and NGO criticism. *Id.* at 419 n.79. In fact, the NGO, Amnesty International, has been responsible for helping to release thousands of political prisoners and raise overall consciousness regarding human rights abuses. *Id.* at 427-28.

Some of the larger and more prominent human rights NGOs, such as Amnesty International<sup>100</sup> and the International Committee of the Red Cross, have been instrumental in drafting human rights law.<sup>101</sup>

NGOs have also been very successful in working to protect the environment.<sup>102</sup> "In many respects, [NGOs] have come to be the primary source of expression for the international desire to protect the environment, and number among its most effective guardians."<sup>103</sup> They have been vital to the development of domestic environmental law,<sup>104</sup> and have made major accomplishments internationally as well. For example, the NGO Friends of the Earth convinced the Commission of the European Communities to investigate the United Kingdom's proposal for privatization of the water industry.<sup>105</sup> Similarly, Greenpeace of Luxembourg helped get a judgment by the European Court of Justice to temporarily shut down a nuclear power plant that failed to comply with European Community procedures.<sup>106</sup>

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100. Amnesty International's contribution to human rights earned it the 1977 Nobel Peace Prize.

101. Amnesty International played a major role in the elaboration of the U.N. Declaration of the Protection of All Persons Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (1979), and the Red Cross was instrumental in developing the 1977 Protocols to the Geneva Conventions. FELD & JORDAN, *supra* note 46, at 228.

102. Interestingly, the environment and human rights share some commonalities with regard to international law:

Although rights and obligations at international law have traditionally run to states and not directly to individuals, commentators have documented the recognition of limited international legal personality for individuals — particularly in the context of human rights — as well as the emergence of a 'new human right to a healthful and decent environment.' Intergovernmental agreements proclaim the principle that environmental rights and obligations run to individuals, and clearly it is 'human beings and not legal constructions, such as States, [that] suffer from the degradation of the environment.'

*Developments, supra* note 75, at 1600 (footnotes omitted) (quoting W. GORMLEY, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION 2 (1976), and Hull & Koers, *Introduction to a Convention on the International Environmental Protection Agency*, 1971 LAW OF THE SEA INST. I, IX (Occasional Paper No. 12)).

103. Sands, *supra* note 18, at 394.

104. See 135 Cong. Rec. S1392 (daily ed. Feb. 8, 1989) (statement of Sen. Chafee, stating that non-governmental organizations' ability to bring suit in the United States are vital to ensure that Congress properly implements and courts fully enforce environmental laws). "Recent studies indicate that amici have had a significant impact on the development of constitutional and environmental law within the United States." Shelton, *supra* note 21, at 616.

105. *EC Warning on Future Standards of UK Water*, FIN. TIMES, Apr. 7, 1989, at 2.

106. See Case 187/87, Saarland v. Ministry of Industry 1988 E.C.R. 5013.

NGOs also play an increasingly important role in the negotiation, ratification, implementation and enforcement of international environmental agreements; their presence at these agreements has become routine.<sup>107</sup> They have been present at the Framework Convention on Climate Change,<sup>108</sup> as well as the Environmental Protocol to the Antarctic Treaty.<sup>109</sup> More recently, NGOs were very influential at the U.N. Conference on Environment and Development in Rio De Janeiro. More than 7,000 NGOs gathered at the Global Forum, an NGO-organized counterconference.<sup>110</sup> NGOs had a great effect on the international press corps and worked hard to influence legislators, many of whom attended the Global Forum.<sup>111</sup>

One NGO which merits special attention is the International Union for the Conservation of Nature (IUCN), also known as the World Conservation Union. By its fortieth anniversary in 1988, its remarkably diverse membership included sixty-one states and 128 government bodies, 383 national and thirty-three international NGOs, and a few affiliated members.<sup>112</sup> The IUCN has an Environmental Law Centre in Bonn and convenes a triennial General Assembly of its members, where it passes resolutions which are then presented to governments and other relevant bodies.<sup>113</sup> Early on, the IUCN perceived the need to link the environment and development, and provide knowledge and leadership for sustainable development.<sup>114</sup> It helps governments develop international declarations and conventions, sometimes providing first drafts through its Environmental Law Centre, and has been an important player in several international environmental conferences and conventions.<sup>115</sup>

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107. Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 693 (1993).

108. *Id.* (citing Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849).

109. See Protocol on Environmental Protection to the Treaty Regarding the Antarctic, June 21, 1991, S. TREATY DOC. No. 22, 102d Cong., 2d Sess. (1992), 30 I.L.M. 1455, 1460 (stating that representatives of "international governmental and non-governmental organizations attended the Meeting as observers").

110. FELD & JORDAN, *supra* note 46, at 236-40.

111. *Id.*

112. BIRNIE & BOYLE, *supra* note 55, at 77-78.

113. *Id.*

114. The IUCN prepared the "IUCN/WWF/UNEP World Conservation Strategy, published in 1980, in which FAO and Unesco also collaborated. This lays down principles for conservation of living resources and for legal developments which will enable their sustainable utilization." *Id.* at 78.

115. "[The IUCN] has worked on a Convention on Preservation of Biological Diversity and an Earth Charter or Declaration for adoption by the UNCED, and

NGOs successfully lobbied the World Bank to improve their environmental record.<sup>116</sup> The Bank admits making serious errors in the past by funding projects that severely damaged the environment. For example, a \$112 million irrigation and resettlement project in Kenya resulted in tropical forest destruction, contamination of drinking water, and rampant disease. The Bank's own evaluation of the project declared it an environmental disaster.<sup>117</sup> Similarly, a colonization project in northwest Brazil had disastrous consequences, and prompted the Bank's president to admit error.<sup>118</sup> Bank senior vice president, Moeen Qureshi, has said, "Our progress against poverty, after 40 years of effort, has been disappointing. The Bank and NGOs can and must work together."<sup>119</sup> In response, NGOs have lobbied against the Bank's environmentally risky ventures and have encouraged the Bank to take a more environmentally conscious approach to development.<sup>120</sup> Despite initial hostility, the Bank has expressed an appreciation for working with NGOs. According to vice president Qureshi, "We can not achieve quality results without the active, creative and critical involvement of many NGOs."<sup>121</sup> Another Bank official has stated, "The Bank's renewed emphasis on [combating] poverty is partly in response to NGO concerns . . . [and] [t]he Bank's increased emphasis on environment is, even more clearly, in response to NGO concerns."<sup>122</sup>

### III. PURSUING SUSTAINABLE DEVELOPMENT THROUGH NGO CONSULTATIVE RELATIONS

Environmental problems have serious implications for individuals within an immediate region, and in other parts of the

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has previously contributed to the 1972 World Heritage Convention, the 1973 Convention on Trade in Endangered Species, the 1971 Convention on Wetlands of International Importance, and the 1979 Convention on Conservation of Migratory Species of Wild Animals." *Id.*

116. See also *infra* notes 178-79 and accompanying text.

117. Wirth, *supra* note 26, at 2649 n.17.

118. *Id.*

119. Stokes, *supra* note 27, at 3253.

120. For example, the Washington-based NGO Results rallied pressure on the Bank to conduct a poverty impact assessment before lending money. In response, the Bank created an antipoverity task force. *Id.* at 3251. Concerned about a loan for a Brazil nuclear power development, German NGOs pressured the West German government to ask that the loan be postponed. *Id.*

121. *Id.* at 3250 (statement of Bank senior vice president Moeen Qureshi).

122. *Id.* (according to an internal Bank document on Bank-NGO cooperation).

world. Consequently, "we are in a situation that calls not only for implementation of existing principles but also for a new approach, through the development of new principles of international law."<sup>123</sup> Sustainable development is vital to prosperity in the next century, but unfortunately, "[t]he few mechanisms that purport to address both trade and environmental policies are woefully inadequate to that task."<sup>124</sup> There has recently been support in the GATT to take up environmental concerns,<sup>125</sup> and the new WTO may be the best vehicle to address trade and the environment together.<sup>126</sup> As one commentator has put it:

In the next two decades, the joining of environmental protection and economic development will grow. The burgeoning new field of environment and trade reflects this linkage. While trade law has operated under the relatively unified and broad framework of the General Agreement on Tariffs and Trade for more than forty years, fledgling international environmental law still consists only of many separate and disparate legal instruments. It is not surprising then that most environment and trade issues are discussed almost exclusively within the GATT context.<sup>127</sup>

In seeking to achieve sustainable development, however, the WTO needs to consult with NGOs.

The Rio Declaration on Environment and Development states that "[e]nvironmental issues are best handled with the

123. Declaration of the Hague (March 11, 1989), *reprinted in* Sands, *supra* note 18, at 418. Some have even gone so far as to suggest giving legal rights to the environment itself. See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Supreme Court Justice Douglas has reiterated this view: "The critical question of 'standing' would be simplified and also put neatly in focus if we . . . allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced or invaded . . ." *Sierra Club v. Morton*, 405 U.S. 727, 741 (1971) (Douglas, J., dissenting).

124. McSarrow, *supra* note 6, at 10,589. "[T]he international system, in which states are the primary actors, has been criticized as being 'unecological' and unprepared to handle global environmental problems. The need to restructure international institutions to provide an effective response to global environmental problems has long been recognized and is still being championed today." Rubinton, *supra* note 15, at 478 (citations omitted).

125. The United States, Mexico, and the European Community all expressed support in 1991 for the revival of the Group on Environmental Measures and International Trade. See GATT Focus, *supra* note 43, at 2.

126. See, e.g., McSarrow, *supra* note 6, at 10,593, "An international regime that provides principles that squarely address both environmental protection and growth is necessary in order to ensure that both goals are maximized. . . [GATT] offers the best available vehicle for a resolution of their tensions." *Id.* See also Smith, *supra* note 9, at 544 (suggesting that the GATT is a logical forum to address rules on trade and the environment).

127. Weiss, *supra* note 104, at 707-08 (citation omitted).

participation of all concerned citizens."<sup>128</sup> Since individuals are excluded from international participation, IGOs commonly turn to NGOs to reflect the interests of the people.<sup>129</sup> In this role, NGOs have become "the environment's moral, if not legal, guardians."<sup>130</sup> Because of this, "[t]he political role of non-governmental organizations. . . should be expressly recognized by governments, and these groups should then be given an increased legal role."<sup>131</sup> Unless NGOs assume an expanded role, we risk the same kind of political inaction that followed the disaster at Chernobyl.<sup>132</sup>

#### A. IMPROVING UPON THE U.N. MODEL

The NGO classification systems employed by the U.N. and its specialized agencies can be used as models for NGO classification in the WTO.<sup>133</sup> These systems, however, do suffer certain shortcomings<sup>134</sup> which can be improved upon. To avoid clogging the system with too many NGOs,<sup>135</sup> there should be a grant of temporary consultative status to NGOs that only have

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128. Declaration of the United Nations Conference on Environment and Development, *supra* note 7, at princ. 10. This idea was reaffirmed at the London Conference on Saving the Ozone Layer, March 5-7, 1989, by British Prime Minister Margaret Thatcher. She stated that environmental problems are not "for governments alone. It would require co-operation with science and industry and the understanding and participation of individuals." *Thatcher Calls for Stricter Targets*, FIN. TIMES., Mar. 6, 1989, at 12.

129. Sands, *supra* note 18, at 401.

130. *Id.* at 412.

While four decades ago we could speak of an international system focused almost exclusively on nation-states and their subunits, today the system includes national governments (and local governments), inter-governmental organizations, and nongovernmental organizations as essential components constantly interacting. NGOs are likely to continue to expand their influence. . . . The information revolution should greatly facilitate this increased role of NGOs in international environmental decisionmaking.

Weiss, *supra* note 107, at 709.

131. Sands, *supra* note 18, at 395 n.12.

132. See *supra* notes 18-22 and accompanying text.

133. See *supra* text accompanying notes 61-64. In fact, NGOs wishing to participate in WTO matters could be classified according to their classification with ECOSOC. This has been suggested as well for the International Court of Justice, since "such status provides some evidence of the broad representation and interests of the organization, as well as indicates a degree of familiarity with the international system. In addition, it provides a straightforward criterion to limit the potential pool of [participants]. . . ." Shelton, *supra* note 21, at 642.

134. See *supra* text accompanying notes 65-69.

135. Similar concerns have caused the ICJ to refuse NGO participation. The Registrar of the Court stated that it was "unwilling to open the floodgates

peripheral relations with the WTO, but are concerned with one particular item.<sup>136</sup> A system of periodic review of consultative status could serve to demote or remove those NGOs whose involvement has declined, and promote those NGOs whose involvement has increased.<sup>137</sup> Moreover, the WTO should encourage NGOs to work together in preparing and submitting joint statements, to avoid repetition and reduce volume.<sup>138</sup> The U.N. suffers from a lack of communication with NGOs<sup>139</sup> which the WTO needs to guard against in its consultative relations. One way to do this is to designate officials in the Secretariat, each of the four Councils, the various Committees and other sub-units, to act as contacts with NGOs.<sup>140</sup> Additionally, each party to the WTO could appoint an NGO ambassador, allowing for direct input with each national delegation.<sup>141</sup>

The WTO needs to ensure that NGOs are politically and financially independent from governmental influence. "[A]n NGO should be in a position to constructively criticize governmental policy and should not feel inhibited in doing so by danger of losing its financial basis. . . . [It] should assure its autonomous existence before turning to government assistance."<sup>142</sup> In 1967, this problem was illustrated by accusations of undue governmental influence over NGOs in the United Nations. These accusations forced ECOSOC to tighten the requirements for consultative status and expel any NGOs that were not totally independent from their home governments.<sup>143</sup>

The WTO must strike a delicate geographical balance in NGO representation to avoid the usual domination by Western NGOs.<sup>144</sup> There must also be a representational balance between competing interests, to avoid accusations of unequal influence.<sup>145</sup>

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to what might be a vast amount of proffered assistance." Correspondence of the Registrar to Prof. Reisman, 1970 ICJ Pleadings (2 Legal Consequences) 638-39.

136. See Gunter, *supra* note 58, at 583.

137. See *id.* at 584.

138. See *id.* at 585.

139. See *supra* text accompanying notes 67-68.

140. See Gunter, *supra* note 58, at 584.

141. See *id.*

142. JAMES E. KNOTT JR., *FREEDOM OF ASSOCIATION: A STUDY OF THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE DEVELOPMENT OF EMERGING COUNTRIES* 68 (1962).

143. Gunter, *supra* note 58, at 564-65.

144. *Id.* at 585-86; Jason, *supra* note 53, at 1830-32.

145. See generally Lewis Rosman, *Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?*, 12 VA. ENVTL L.J. 329 (1993) (discussing the dominance of industry group partici-

Most importantly, the WTO must use caution when granting consultative status, since some NGOs can hinder the process in pursuit of their own agendas. "[O]fficials . . . are in a state of more or less perpetual irritation with the environmentalists for what is often seen as their demand for absolutes, their unwillingness or inability to comprehend the reality of international politics, and the processes of negotiation among sovereign states."<sup>146</sup> The WTO must be careful to limit the participation of those NGOs that do not respect the political realities of international relations.

WTO officials who oppose NGO involvement are correct in saying that the WTO is a governmental organization.<sup>147</sup> As a former U.N. Secretary-General said regarding NGOs, "It should be emphasized that the consultative relationship does not imply the intervention of non-governmental organizations in the decision-making process that is the proper domain of Governments."<sup>148</sup> WTO officials are mistaken, however, if they believe that NGOs cannot make valuable contributions to the WTO.

## B. WORKING WITH NGOS

"Environmental policy-making is only as good as its primary information system."<sup>149</sup> To harmonize trade policy decisions with principles of sustainable development, the WTO should turn to NGOs as reliable sources of information.<sup>150</sup> Governments and IGOs often do not have sufficient resources to gather the information that is essential to a sound environmental decision. This, however, is often the primary work product of environmental NGOs. For example, concerning a recent case in the International Court of Justice, one commentator stated:

[I]t is not clear that the parties have the resources or information from long-term monitoring that would provide a full assessment of the potential environmental harm from the project. Such information is essential to the case . . . [and] is available, from nongovernmental organizations that have been monitoring the [area] for years.<sup>151</sup>

NGOs can serve as valuable information brokers to the WTO. Such information can be useful in determining ecological stan-

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pation to the detriment of consumer participation in the Codex Alimentarius negotiations).

146. PHILIP W. QUIGG, *A POLE APART* 179 (1983).

147. See *supra* text accompanying notes 43-44.

148. U.N. Doc. E/C.2/768, at 3 (1975).

149. ROBERT A. SHINN, *THE INTERNATIONAL POLITICS OF MARINE POLLUTION CONTROL* 124 (1974).

150. See *supra* notes 74-77 and accompanying text.

151. Shelton, *supra* note 21, at 626.



dards for sustainable development.<sup>152</sup> Moreover, the WTO could turn to NGOs (such as the IUCN and its Environmental Law Centre) to formulate policies on sustainable development.<sup>153</sup> It could also encourage these NGOs to offer assistance to states and government officials who wish to harmonize their trade and environment policies.<sup>154</sup>

The WTO can ask NGOs to develop environmental impact assessments of proposed trade measures which may impact the environment, or conversely, on environmental measures which may impact free trade.<sup>155</sup> Environmental impact assessments allow the public to access information concerning how proposed measures will effect the environment before such measures are adopted. This would facilitate public discussion outside of the WTO before measures are implemented, permitting the WTO to more accurately measure public opinion. This could also improve the public's opinion of the WTO<sup>156</sup> and avoid much of the controversy over environmental matters that plagued the GATT.<sup>157</sup>

The WTO can also improve its global image by using NGOs as a link to the public.<sup>158</sup> "Because their activities implicate the interests of thousands of local, national, and international non-governmental organizations (NGOs) environmental IGOs consider the public's views primarily by granting nonvoting observer or consultative status to NGOs."<sup>159</sup> The WTO can im-

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152. Garner, *supra* note 14, at 1080.

153. See *supra* notes 112-115 and accompanying text.

154. See Garner, *supra* note 14, at 1079.

155. For a general discussion of environmental impact assessment, see Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591 (1992). The U.S. National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4321-4370c (1988) contains an environmental impact assessment provision at § 4332(2)(C).

156. "Greater involvement of non-State actors can bring useful information to the decision making process and thus improve the scientific credibility and, in turn, the effectiveness of the resulting rules." *Developments, supra* note 75, at 1602.

157. See *supra* text accompanying notes 40-41. Etienne Vernet of the Paris-based Collective for Environment has stated that the WTO is not the proper forum to discuss environmental concerns. He feels that environmental concerns are not being woven into the process and that government representatives are neither competent nor authorized to raise environmental concerns. He stated, "As long as liberalization of trade will rhyme with de-regulation or the protection of some economic interests, all initiatives to protect the environment and achieve social equity will be undermined." Inter Press Service, Dec. 10, 1993 available in LEXIS, News library, INPRES file.

158. See *supra* text accompanying notes 72-73.

159. *Developments, supra* note 75, at 1588 (citation omitted).

prove its transparency by using NGOs to inform and influence the public, and by encouraging them to disseminate information concerning its policies and proceedings.<sup>160</sup> The WTO could allow NGOs to have observer status at sessions of the Ministerial Conference, the various councils and committees, and the Dispute Settlement Body.<sup>161</sup> Those NGOs attending will then be able to relay their observations to the general public, making the WTO more transparent than the GATT.<sup>162</sup>

The Dispute Settlement Body could utilize NGO input, not only for information on environmental matters, but also in the case of proving damage to the environment, or a loss in trade benefits due to an allegedly protectionist environmental trade measure.<sup>163</sup>

Conflicting estimates of environmental damage result not only from scientific uncertainty, but also from politics. . . . One way to narrow the range of estimates is to entrust research to scientists perceived to be neutral and objective. . . . [N]on-governmental organizations (NGOs) can play an important role in this respect.<sup>164</sup>

After coming to a decision, the Dispute Settlement Body can use NGOs to monitor compliance. "NGOs are often quite effective in investigating and publicizing transgressions."<sup>165</sup> Finally, the Dispute Settlement Body might consider allowing NGOs to submit amicus briefs in cases that have environmental implications.<sup>166</sup>

160. Garner, *supra* note 14, at 1080.

161. For details on the various councils and committees of the WTO, see WTO Charter, *supra* note 1.

162. See *supra* text accompanying notes 40-41.

163. International law generally will provide compensation for environmental damage upon the presentation of precise evidence of loss. See Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 3, 203-04 (July 25) (stating that the Court will award compensation only upon a concrete submission regarding the existence and amount of each damage). See generally Trail Smelter Arbitration (U.S. v. Canada), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1941) (states must prove damages by documenting an actual difference in the value of its property before and after the harm).

164. *Developments*, *supra* note 75, at 1532 (citation omitted).

165. *Id.* at 1606.

166. See *supra* notes 86-89 and accompanying text. Professor Shelton discussed some of the advantages that amici have over full participation:

[An amicus] is generally less costly and time consuming than mounting a full case, allowing the organization to share the litigation burden with the parties; amici are not bound by the decision and not prevented from relitigating issues in the case should the holding be unfavorable; unlike experts or witnesses, they generally may raise any issue the court could raise on its own motion and are not limited by questions presented to them or to matters pleaded by the parties. . . .

Shelton, *supra* note 21 at 611.

### C. CONFRONTING RESISTANCE TO NGOs THROUGH NGO PARTNERSHIPS

The greatest opposition addressing both trade and the environment in the same context will most likely come from developing countries.<sup>167</sup> This is partly because environmental issues are not of the same importance to developing countries as they are to wealthier ones.<sup>168</sup> But the issues are inextricably linked, since a higher standard of living enables greater care for the environment.<sup>169</sup> The approach that needs to be taken toward the environment is one that recognizes the divergent needs and priorities between nations at different stages of development.<sup>170</sup>

Developing countries tend to resist international participation by NGOs. This is based on an incorrect assumption that NGOs only reflect the concerns and interests of developed countries.<sup>171</sup> This may be due to the fact that "monolithic" states have genuine difficulties in understanding the operations of more pluralistic societies, and the fact that many NGOs grew up in an age of imperialism and mainly in 'imperialist' countries taints them in the eyes of some elements in countries which formerly were dependent territories."<sup>172</sup> Contrary to this notion, NGOs often expose the problems created by the governments of developed countries.<sup>173</sup> In fact, many NGOs are devoted to lobbying the governments of developed countries and educating them about the problems of developing countries.<sup>174</sup> A more likely reason that some governments are opposed to NGO participation (but one that is harder for them to admit) is that NGOs generally represent minority views. These views are otherwise

167. Developing countries were strongly opposed to the Group on Environmental Measures and International Trade. *See supra* note 43.

168. *See* Patrick Low, *Trade and the Environment: What Worries The Developing Countries?*, 23 ENVTL. L. 705 (1993).

169. *Id.* at 706. This is not to say, however, that if societies attain economic growth, all will be well with the environment. *Id.*

170. *Id.* at 706-07.

171. WILLIAMS, *supra* note 46, at 259. This idea is especially misguided concerning the environment. Since environmental hazards are not limited to national boundaries, NGOs that are concerned with the environment necessarily have an interest in environmental problems worldwide.

172. *Id.* at 263.

173. *Id.* In fact, more and more NGOs from developing countries are participating on the international level. For example, the 1986 FAO Development Education Exchange Papers contain contributions from NGOs in Canada, France, Peru, India, Zaire, the Philippines, Australia and Columbia. *Id.* at 264.

174. Stokes, *supra* note 27, at 3251. *See also* WILLIAMS, *supra* note 46, at 263.

not heard on the international level, and all governments tend to find them unwelcome at one time or another.<sup>175</sup>

In order to be most effective on the international level, developed and developing country NGOs need to be mutually dependent on one another.<sup>176</sup> This mutual dependency manifests itself in a form of partnership that has been quite effective internationally. One example of this is the partnership between the Sri Lankan NGO, Environmental Foundation, Ltd. (EFL) and the U.S. NGO, the Natural Resources Defense Council (NRDC).<sup>177</sup> In response to a much criticized proposal for a forestry loan to Sri Lanka, EFL and NRDC formed a partnership to encourage the World Bank to reconsider the loan. Drawing on the political connections of NRDC and the local knowledge and expertise of EFL, the two groups were able to persuade the World Bank to delay formal consideration of the loan, and permit further investigation. They were successful in getting both the United States and Sri Lankan governments to express serious reservations about the proposed loan, and finally were able to condition the loan on public scrutiny of its implementation.<sup>178</sup> Ironically, despite initial hostility to the two NGOs, the World Bank later cited this loan as one of its best.<sup>179</sup>

The partnership model is effective because NGOs complement each other's strengths and weaknesses. Because of their experience and financial backing, developed country NGOs tend to be stronger lobbyists at the international level.<sup>180</sup> On the other hand, because they have a direct stake in the outcome of policy decisions, developing country NGOs have a better per-

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175. WILLIAMS, *supra* note 46, at 264. This phenomenon was noted at the World Bank, "NGOs often are part of the political opposition in Third World countries, and many governments balk at involving rival elements in their economic planning." Stokes, *supra* note 27, at 3252.

176. See Wirth, *supra* note 26, at 2645 (1991).

177. See *id.* at 2655-56.

178. Based on their success, EFL and NRDC have entered into a formal relationship to examine in broad terms Sri Lanka's national energy needs and policies, as well energy alternatives in the Third World generally. *Id.* at 2656.

179. There have been many successful examples of the partnership model. A similar coalition, for example, was able to achieve passage of legislation requiring U.S. representatives to the World Bank to seek greater participation by NGOs in Bank activities. Stokes, *supra* note 27, at 3251.

180. "Ironically, American environmental organizations often have far greater leverage than the real stakeholders, members of the public in developing countries. Wirth, *supra* note 26, at 2652.

spective on local environmental problems,<sup>181</sup> and have an appearance of legitimacy when lobbying multinational organizations.<sup>182</sup> The WTO should encourage such partnerships, since this indirect form of participation “is often a more effective mechanism for developing country activists to achieve their goals than dialogue with their own governments.”<sup>183</sup>

#### IV. CONCLUSION

“While it appears that most nations recognize that [e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level,’ the law of international environmental protection does not yet recognize that, increasingly, the relevant level is a global one.”<sup>184</sup> NGOs can provide a voice for citizens, who are otherwise excluded from most international participation, and help to overcome the differences between environmental and free trade advocates. Furthermore, by allowing for NGO observation of WTO deliberations, the problem of transparency will be overcome.

NGOs have proven their effectiveness in IGOs, particularly with regard to the environment. Whether the WTO utilizes some form of the U.N. three-tiered model for NGO participation, or whether it adopts its own system, there are many ways in which NGOs can make valuable contributions to the work of the WTO. The creation of the WTO has ushered in a new era for world trade in the twenty-first century. By taking advantage of the new provision which allows for NGO participation, this new era can be a green one.

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181. “[J]udging the merits of a particular advocacy goal or strategy in its own legal, social, political, and economic context requires the perspective provided by a foreign counterpart.” *Id.* at 2659.

182. “A close relationship with those who hold a direct stake in policy decisions gives the United States-based organization stature and credibility that it would not have if it were representing purely American interests.” *Id.*

183. *Id.* Moreover, NGO partnerships can significantly increase the economic strength of developing countries both through improvements in efficiency, and direct financial assistance. “Through improvements in efficiency and conservation, developing countries could avoid at least \$1.4 trillion in power supply expansion costs between now and the year 2008.” *Id.* at 2657. Moreover, as of 1988, Western NGOs were donating more than \$4.4 billion annually to developing countries. Stokes, *supra* note 27, at 3251.

184. Rubinton, *supra* note 15, at 485 (citing *Draft of Environmental Rules: ‘Global Partnership’*, N.Y. TIMES, Apr. 5, 1992, at 10).