

Hauser Colloquium on Globalization and its Discontents
Workshop on Accountability in Global Governance
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Faculty Library, Third Floor, Vanderbilt Hall
New York University School of Law

CASE STUDIES AND ISSUES FOR DISCUSSION

Summary of Case Studies on Accountability, Voice and Exit in Decision Structures of Global Regulatory Governance

Five case studies, exemplifying different structures of global regulation, illustrate the immense variety of relations between legal accountability (and associated Rule of Law norms), domestic political accountability, more diffuse forms of accountability or responsiveness (based on transparency, participation and reason giving) to collective social interests, and the traditional international practices of flexible, negotiated decision making.. These case studies will help to provide specific reference points for more conceptual discussion of the issues discussed in the background readings. What follows is a summary; more detailed information is provided below.

1. The Hassan Case: Security Council Listing of Individuals for Asset Freezes

In Security Council Sanctions Committee antiterrorism regulation, the flexible, confidential process for listing terrorist financiers and freezing their assets operates in stark conflict with strong domestic norms of legal accountability (hearing and judicial review) in individual adjudicatory decisions triggering a deprivation of property. The European Court of First Instance refuses to require European authorities that implement listing decisions to provide listed individuals with a hearing, but affords them a legally enforceable right to petition the government of their state of nationality or residence to submit their case to the Committee's opaque delisting procedures. The legal and practical contours of this attempted accommodation await future development and clarification. The underlying strategy --to deal with accountability problems in global decision-making by giving domestic individuals or groups legal mean to influence national officials participating in such decisions -- finds parallels in US notice and comment procedures for US officials' negotiating agendas in certain global regulatory decisions, for example on food safety standards.

2. Delegation and Accountability in the Montreal Protocol: NRDC v.EPA

The NRDC v. EPA decision regarding Montreal Protocol implementation illustrates a different aspect of the relation between negotiated global decision making and domestic accountability mechanisms. NRDC sought to make the US government legally accountable for compliance with global regulatory standards adopted by a meeting of the Protocol Parties. But the court was concerned that enforcing legal accountability would

undermine political accountability to Congress, and through it to the electorate, for regulatory decisions made by the Executive and other states in global negotiations. At the same time, the decision potentially threatens the viability of flexible, dynamic regulatory decision-making – by global administrative bodies as well as negotiation among governments – to address global environmental and other problems. Note also that the Montreal Protocol decision process provides considerable if unstructured opportunity for scrutiny and input by industry and environmental NGOs.

3. Standard Setting by the International Organization for Standardization (ISO)

The ISO example involves global standard setting by a private body that has significant power because both private firms and states have powerful incentives to follow or adopt ISO standards. Yet it, like private national standard setting organizations, is largely free of the political and legal accountability mechanisms that would apply to domestic regulatory agency decisions, although the possibility of review in domestic courts under tort, antitrust, or administrative law can not be excluded. It is also largely free of the accountability mechanisms, domestic and international, that apply to the decisions of treaty-based global regulatory bodies. ISO, in order to boost its legitimacy and perhaps improve its decisions, has sought to promote transparency, participation opportunities, and reason-giving in connection with its standard-setting decisions. Also, the WTO has (ironically from some perspectives) has been a force promoting greater transparency and participation in ISO and other international standards bodies. Yet participation by consumers, environmental and social groups is largely restricted to the level of national standards bodies, which generally follow a corporatist approach to interest representation. NGO participation at the global level has been limited.

4. The World Bank: Yacyreta Dam Case (Argentina-Paraguay)

The Yacyreta Dam case juxtaposes a negotiated project decision between an international organization, the World Bank, and Argentina (and Paraguay), and review by a special-purpose global tribunal, the Bank's Inspection Panel, rather than a domestic court. The case illustrates the limitations as well as the contributions of the Panel's remedial authority and influence, and of participation, transparency, and reason-giving procedures for promoting consideration of collective environmental and social interests. It also illustrates how project sponsors (states and/or private firms) may be able to "exit" environmental and social regulatory conditions by securing alternative sources of funding, a possibility expanded by China's recent initiatives in the aid field. Lurking in the background is the possibility of litigation in domestic courts.

5. The World Trade Organization: Exit, Voice and Accountability

The WTO materials show how the Rule of Law disciplines of a (relatively) highly legalized international treaty-based regulatory body have been softened by providing for various forms of retail "exit" for individual states on specific issues, responding to domestic political pressures or perceived imperatives of national interest. For example, governments enjoy flexibility in compliance with adverse Dispute Settlement Body decisions by limitations in enforcement mechanisms and the refusal of domestic courts to give legally binding effect to such decisions. At the same time, it shows that, in a regime

that lacks significant subsidiary lawmaking capability (in contrast to the Montreal Protocol for example), the opportunities for effective NGO access and participation are limited. The limits on amicus briefs before the Dispute Settlement Body illustrate this. On the other hand, the AIDS/generic drug controversy shows how public pressures and general reputational incentives can on occasion trigger accommodation of wider social interests.

Issues for Discussion

The case studies will provide a concrete focus for discussion of the following questions:

What role can the concept of accountability usefully play in analyzing issues of global administrative and regulatory governance? In positive analysis? In normative analysis? What other conceptual tools are available -- such as negotiation/exit, the Rule of Law, or democratic governance -- and what are the implications of using one or the other?

Why has the concept of accountability become such a powerful and widespread rhetorical tool for critics of current arrangements of global administrative and regulatory governance? Why do social and environmental groups generally demand greater accountability rather than a role in decision making (contrast the position of developing countries, which generally demand the latter?)

Should the concept of accountability have a limited definition, as proposed by Stewart, or a broader definition, as proposed by Grant and Keohane and Mashaw? Is Keohane's proposal to recognize accountability mechanisms as lying on a continuum from specific to diffuse superior?

Does an accountability mechanism entail and depend for its successful functioning on widely shared standards for evaluating performance? Or do standards emerge from the process of holding power holders to account? If we follow Keohane's terminology, is the answer to this question the same for specific and diffuse mechanisms?

What standards for decision making by power holders implicitly underlie the demands for greater accountability in specialized global regulatory administrative and regulatory bodies by environmental and social groups? Would such groups be better advised first to articulate clear standards, and then propose accountability or other mechanism most suited to implementing those standards?

What is the relation between accountability and democracy in global regulatory governance? How is the relation different than in the domestic context?

Does the two-level political game (domestic/global) generated by the rise of global regulatory governance afford well-organized economic or other interests greater power to influence governance decisions in their favor at the expense of less organized interests and reduce the accountability disciplines to which they are subject, relatively to a purely

domestic game. If so, what legal or institutional steps can be undertaken to address this fact and what, under a public choice analysis, are their chances for being adopted?

What role can the legal system, domestic or global, play in promoting greater accountability to disregarded interests in global a regulatory and administrative government? Accountability of what type, through what mechanisms, to whom and under what standards?

How can legal accountability mechanisms function successfully given the absence of global courts of general jurisdiction that are open to non-state parties and the paucity of specialized tribunals with such jurisdiction, most of which are open only to business interests? What role can and should domestic courts play?

Case Study Materials

1. The Hassan Case: Security Council Listing of Individuals for Asset Freezes

Prepared by Andrej Lang

Legal Context and Proceedings:

- On 15 October 1999, the Security Council adopted Resolution 1267 (1999) to counteract the support of Al-Qaeda by the reigning Taliban regime on Afghan territory.
- Paragraph 4 (b) of the Resolution provided that all the States must “freeze funds and other financial resources ... controlled directly or indirectly by the Taliban ... as designated by the Committee (the so-called Sanctions Committee) established by paragraph 6 of the Resolution”. On 19 December 2000, Security Council Resolution 1333 (2000) (its paragraph 8 (c)) extended this provision “to funds and other financial assets of Usama bin Laden and *individuals ... associated with him* as designated by the (Sanctions Committee)”.
- The Sanctions Committee established a process for listing of persons believed to be financing international terrorist activities on the basis of submissions by member states, most often the US. The process does not provide a right for the persons concerned to be heard by the Sanctions Committee before their inclusion in the list. Following controversy, including the filing of litigation in several countries challenging the failure to afford a hearing prior to listing, the Council adopted a procedure that enables a UN member state to afford diplomatic protection to a listed individual who is a citizen or resident of that state by seeking to persuade the Committee to remove the individual’s name from the list as unwarranted. In addition, the Council exempted from the freeze assets needed to meet a listed individual’s basic needs.
- On 27 May 2002, the Council of the European Union adopted Regulation No. 881/2002 providing in its Article 2 that “all funds and economic resources belonging to ... a natural or legal person ... designated by the Sanctions Committee and listed in Annex I shall be frozen”. A right to be heard in the context of the adoption and implementation of this regulation was not provided.

- The lists of the Sanctions Committee and Annex I to Regulation No. 881/2002 were amended several times by subsequent Security Council Resolutions and European Union Regulations.
- Several individuals (Hassan, Kadi, Yusuf, Ayadi) listed by the Sanctions Committee and by corresponding EC regulations brought legal action under Article 230 para. 4 EC before the European Court of First Instance challenging Regulation No. 881/2002 in its amended version. Their assets had been frozen by member state authorities implementing the regulation. These authorities had not provided them with a hearing prior to such action.
- They argued that Regulation No. 881/2002 violated several fundamental rights, in particular the right to be heard prior to deprivation of their property and the right to effective judicial review. Moreover, they denied that the EU was bound by resolutions of the UN Security Council because the EU is not a member of the United Nations.

Holding of the Court:

- The European Court of First Instance rejected the arguments of the plaintiffs.
- It held that from the standpoint of international law resolutions of the Security Council prevail over every other international treaty including the EC Treaty. Even though the European Union is not a member of the United Nations it is nevertheless bound by the resolutions in the same way as its Member States. As Regulation No. 881/2002 constitutes the implementation at Community level of the obligation placed on the Member States as Members of the United Nations, the Community institutions had no autonomous discretion in adopting Regulation No. 881/2002.
- Consequently, the Court of First Instance decided that it could not – not even indirectly – exercise judicial review over Security Council resolutions of the regulation for conformance with European *standards of protection of fundamental rights*. However, the Court imposed, as a matter of European law based on European fundamental rights, a legal obligation on EU Member States to provide a listed citizen or resident individual the legally enforceable right to present a request to the Member State for review of their case and diplomatic protection before the Sanctions Committee.

- Moreover, the Court decided that it is empowered to review, indirectly, the lawfulness of the EC regulation implementing the asset freeze for compliance with the norms of *jus cogens* (a narrow category of peremptory international law norms binding on all states, such as prohibitions on slavery, genocide and torture). However, it found in jus cogens no mandatory rule of public international law that requires a prior hearing for the persons concerned in circumstances as those of this case, considering the importance of combating international terrorism and the fact that any hardship to a listed individual had been alleviated by the provision for basic needs.

Relevance for the issue of accountability of the Sanctions Committee:

- There exists no independent Court on the level of the United Nations that could judicially review acts adopted by the Security Council and its Sanctions Committee.
- The limitation of judicial review of the European Court of First Instance to *jus cogens* leaves a very high margin of discretion to the Security Council. Most of the fundamental personal rights recognized in liberal democracies generally do not fall in the ambit of *jus cogens*.
- In a structurally similar case the German Federal Constitutional Court stated that it would only abstain from the review of EC law by the standards of German constitutional law so long as the ECJ guaranteed the protection of basic rights to a degree essentially equivalent to the level of protection prescribed by the German Constitution. Partly as a reaction to this ruling, the protection of basic rights at the European level as elaborated by the ECJ improved significantly. The decision of the FCC thus spurred the development of the protection of basic rights at the European level in enhancing the accountability of the ECJ.
- The European Court of First Instance here took a different path. On the one hand, it basically denied the judicial accountability of the Security Council with regard to resolutions affecting fundamental rights of individuals. On the other hand, it strengthened the prevalence of UN Security Council resolutions over other international treaties.
- The cases have been appealed to the European Court of Justice, which may well reach a different result.

- It will be interesting to see future legal development of the legal right, recognized by the Court of First Instance, to diplomatic protection by a Member State before the Sanctions Committee. For example, what review would be available of the UK government's handling of the claims of Mr. Hassan, who is currently in Brixton prison awaiting extradition? From an American perspective, recognition of such a right is far more radical than a ruling which held that domestic legislation implementing a listing would be read to include a hearing requirement so as to save its constitutionality.

2. Delegation and Accountability in the Montreal Protocol: NRDC v. EPA

Prepared by Jessica Green

This note proceeds in four parts. It briefly reviews the facts of the NRDC v. EPA case, and the basis for the Court's ruling. It then presents the provisions in the Montreal Protocol (MP) for adjustments and amendments. Next, it discusses the non-compliance provisions, and conclude with a brief discussion of the issues raised by the case.

Background: NRDC v. EPA

In 1997, the 189 states that were Parties to the Montreal Protocol unanimously agreed to “adjust” the agreement by adding Art. 2H.5 to the Protocol. This provision sped up the phase-out of methyl bromide, an ozone-depleting substance (ODS) used as a pesticide, requiring that all production and consumption—save for “critical uses”—cease by 2005.¹ Each developed country was bound by the adjustment and was then required to adopt rules to ensure its implementation. Thereafter, Congress amended the Clean Air Act—which already directed that the EPA implement the Montreal Protocol—to promulgate rules for reductions in methyl bromide production, importation and consumption under a schedule “in accordance with, but no more stringent than, the phase out schedule of the Montreal Protocol Treaty as in effect on October 21, 1988.” As of that date, the Treaty includes Art 2.5H. These amendments to the Clean Air Act defined the “Protocol” to include “adjustments adopted by the Parties.” Article 2H.5 of the Protocol, however, authorizes an exception from a phase-out schedule for “critical uses,” providing that “[specified reduction requirements, including those for methyl bromide] will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.” These critical use exemptions are granted by “decisions” of the parties, which are distinct from “adjustments.” The methyl bromide provisions of the Clean Air Act authorized EPA to exempt critical uses of methyl bromide from phase out requirements “[t]o the extent consistent with the Montreal Protocol.”

In 2004, the Protocol Parties unanimously agreed, by Decision Ex.I/3 on the basis of general guidelines for critical-use decisions previously adopted in Decision IX/6, to give the US specified critical use exemptions for methyl bromide. EPA issued a regulation implementing the exemption provisions in Decisions IX/6 and Ex.I/3. The EPA regulations were challenged by NRDC on the ground that they permitted more production and use of methyl bromide than that authorized by the Decisions. The court rejected NRDC's challenge, holding that Decisions are not binding “law” in the US, are not enforceable in federal court, and accordingly, could not be a basis for challenging the EPA's rule. It stated that NRDC's position--that the Clean Air Act methyl bromide provisions must be revised to abide by the Decisions --“raises significant constitutional problems. It stated:

¹ The adjustment process will be outlined in greater detail in the following section.

If the “decisions” are “law” – enforceable in federal court like statutes or legislative rules – then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution (p.13).

In order to avoid these problems, the court concluded that the provisions of the Protocol and the Clean Air Act relating to adjustments and critical use exemptions should be read “as creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties.” It added: “nowhere does the Protocol suggest that the Parties’ post ratification consensus agreements about how to implement the critical-use exemption are binding in domestic courts.” The court, however, conspicuously failed to discuss the provisions in the 1997 Clean Air Act methyl bromide amendments which authorized EPA to exempt critical uses of methyl bromide from phase out requirements “[t]o the extent consistent with the Montreal Protocol.” The Clean Air Act also explicitly defined the Protocol to include “adjustments adopted by the Parties.” As noted above, Art 2.5H, adopted by adjustments in 1997, and provides for subsequent adoption of critical use exemptions by decisions of the Parties.

The court thus applied a very strong form of clear statement technique to avoid what it saw as a substantial constitutional problem. The decision not only rejects enforceability in US law of future decisions of the Protocol Parties but casts a cloud on the status of future adjustments to the Protocol. . As a result of this finding, Congress must be extraordinarily clear if it wishes to give binding effect in US law to future actions by the Parties to the Protocol.

Protocol provisions for amendment adjustment of the Protocol and for decisions to grant critical-use exemptions

One of the main innovations of the Montreal Protocol was its “adjustment” procedure. Like other treaties, the Protocol can be amended; this process is governed by the rules set forth in the Vienna Convention, requiring agreement on whether the treaty should be amended and allowing states to choose whether to be bound to the treaty as amended by ratifying. (Article 40). The adjustment process is far more flexible, allowing the Members to adopt changes to the schedule of reductions, or the quantity of allowable ozone-depleting substances without the need for time-consuming ratifications by the Parties. Given that scientific understanding of ozone depletion was still developing rapidly at the time that the Protocol was adopted, the adjustments procedure allowed states to change the requirements in response to emerging scientific knowledge. Indeed, shortly after the adoption of the Montreal Protocol, more dire news about the status of the ozone layer was emerging, which helped spur the ambitious targets set forth to begin the first adjustment process. In addition, as one expert notes, the adjustment process was also a middle ground between those states pushing for strong controls, and those that were more reluctant to make sizable commitments.²

The process for adjustments is set forth in Article 2 (“Control Measures”) of the Protocol, which allows any state to propose an adjustment to be considered by the Meeting of the

² Richard Benedick, *Ozone Diplomacy* (Cambridge: Harvard University Press, 1991): 99.

Parties. The substance of the adjustments is primarily meant to focus on the type, amount and phase-out schedule of the ODS listed in the MP; other aspects of the treaty are not “adjustable” in the same way. The Protocol provides that “every effort” should be made to adopt adjustments by consensus, but if consensus can not be achieved the can be decided by a 2/3 majority of the Parties present and voting (Article 2.9(c)). The decisions made through the adjustment process “shall be binding on Parties” and automatically enter into force six months after official notification to the Depositary (Article 2.9(d)). The Parties to the Protocol further commit themselves to reviewing the allowable levels of ozone depleting substances at least every four years (Article 6). Thus, the Protocol has a built in mechanism both for relatively quick review and revision of Party obligations, as well as a requirement that this review take place. To date, there have been five adjustments, in 1990, 1992, 1995, 1997, and 1999.

The Protocol also authorizes grants by decisions of the Parties of critical-use exemptions from phase-down schedules. This provides a further element of flexibility to accommodate transition problems faced by states in complying with schedules. The availability of this “safety-valve” facilitates agreement on more ambitious phase-down schedules than would otherwise be the case.

Non-Compliance procedure of the Protocol

The Protocol’s non-compliance procedures were not agreed to at the initial signing. The text of the Protocol simply states that Parties will consider a non-compliance procedure at the first meeting of the Parties (Article 8). However, Article 4 of the Protocol provides that trade in ODS with non-Parties is not permitted (either immediately, or eventually, depending on the classification of the chemical). Moreover, Parties that are unable to meet their phaseout requirements are banned from exporting ODS, except for the purpose of their destruction (Article 4A.1). These provisions controlling the trade in ODS serve as a basis for the non-compliance procedures.

Although the foundations for dealing with non-compliance were evident in the initial agreement, it was not until 1992, at MOP-4, that Parties decided how non-compliance would be addressed.³ Given the ruling of the Court, it bears emphasizing that the compliance procedure was not adopted as an amendment to the Protocol, but rather, as a decision of the members.

The non-compliance procedure creates a standing implementation committee charged with reviewing allegations of treaty violation (brought either by the violator itself, or by other Parties). The committee and violator are encouraged to find means for an “amicable solution” to the violation; however, the Meeting of the Parties is the ultimate arbiter of the issue. Whenever possible, the preferred response to non-compliance is technical assistance to help repair any shortcomings in state capacity. The Protocol has designated funds for developing countries to aid them in the implementation of the treaty (Article 10); these funds are in addition to other financial transfers, and are to cover the incremental costs of developing country efforts to comply. As one observer has noted, the overwhelming focus of the implementation committee is managerial in its approach to

³ See UNEP/OzL.Pro.4/15, Annex IV and Annex V.

compliance, using tools such as discussion, recommendations and transparency to help parties remedy any non-compliant activities.⁴

In cases where managerial measures are not sufficient or possible, the MOP may choose to “issue warnings” or suspend the Party, stripping it of “specific rights and privileges under the Protocol...including those concerned with...trade.”⁵ In tandem with the trade provisions of Article 4, the non-compliance procedure effectively imposes trade sanctions on treaty violators. When suspended, the (ex-) Party is now in the “out” group, unable to trade in ODS with other Parties to the Protocol. These trade sanctions may take one of three forms: banning import or export of ODS (Article 4.1 & 4.2); banning the import of products containing ODS (Article 4.3); banning the import of products produced with (but not containing) ODS (Article 4.4).

It should be noted however, that neither the implementation committee nor the MOP has ever implemented sanctions against a violator. In practice, the implementation committee has worked with the Global Environment Facility and the Multilateral Fund to exert more leverage through the threat of interrupting funding.⁶ Yet, as Victor points out, this possibility for wielding influence is in practice, quite weak.⁷

Issues for further consideration

What is the appropriate scope of delegation? The primary legal issue raised by the court in the NRDC v. EPA case is whether Protocol adjustments and critical use exemptions adopted by Parties without the need for ratification and, potentially, by a two-thirds vote, should be considered legally binding on the agencies and in the courts of states that are party to the agreement. The court rules that they should not be binding unless, at a minimum, Congress has explicitly made them so, and even then there may be a constitutional issue of Congress’s authority to effectively delegate lawmaking authority to global bodies. In essence, the court is ruling on the acceptable length of the chain of delegation in implementing the Protocol. The counterargument—that the length of the chain is immaterial as long as the Parties agreed to be bound to the adjustment process when they ratified the treaty—is not taken up in the decision. It is not clear, then, which decisions taken by the MOP after the initial agreement are binding on the Parties, and to what extent. For example, the Parties did not explicitly agree to a non-compliance procedure in Montreal. Does the Court’s finding then mean that states are not subject to sanction by the implementation committee? More importantly, would the same logic apply to all subsequent decisions taken by the MOP?

⁴ David G. Victor, “The Montreal Protocol’s Non-Compliance Procedure”. In David G. Victor, Kal Raustiala and Eugene B. Skolnikoff, eds. *The Implementation and Effectiveness of International Environmental Commitments*. (Cambridge, MA: Cambridge University Press, 1998), 149. On the “managerial approach” see Abram Chayes and Antonia Handler Chayes. “On Compliance.” *International Organization* 47, no. 2 (1993): 175-205.

⁵ Ibid, Annex V.

⁶ Victor, 166.

⁷ Victor, 165.

What is the relation between global authority and domestic legal and political accountability? The NRDC v. EPA decision regarding Montreal Protocol implementation illustrates a different aspect of the relation between negotiated global decision making and domestic accountability mechanisms. NRDC sought to make the US government legally accountable for compliance with global regulatory standards adopted by a meeting of the Protocol Parties. But the court was concerned that enforcing legal accountability would undermine political accountability to Congress and, through it, the electorate for regulatory decisions made by the Executive and other states in global negotiations. At the same time, the decision potentially threatens the viability of flexible, dynamic regulatory decision-making by global administrative bodies, as well as the utility of multilateral negotiations to address global environmental and other problems.

Independent of the court decision, the MP also provides opportunities for accountability by non-state actors, in particular, industry and environmental NGOs. Both groups have been instrumental in the negotiations process. Dupont, which accounted for nearly a quarter of the production of CFCs before the MP, was instrumental in creating alternatives to CFCs, validating the scientific findings of the Ozone Trends Panel, providing leadership to the chemical industry in reaching the agreement and expressing their commitment to funding for developing countries.⁸ Similarly, environmental NGOs had a large role in keeping the ozone negotiations on the media's agenda, and as the NRDC case illustrates, continuing to push for more stringent measures. The Protocol itself only makes minimal provisions for non-state participation, allowing non-governmental bodies "qualified in fields relating to the protection of the ozone layer" to observe the Meetings of the Parties (Article 11.5). Yet it is clear that non-state actors have other informal means at their disposal to influence both the positions of individual governments and the Meeting of the Parties.

What are the consequences of non-compliance? As noted earlier, the methyl bromide amendments to the Clean Air Act (12,997 in total!) require EPA to promulgate regulations for reductions in methyl bromide in accordance with the schedule set forth in the MP. It would therefore appear that, under the court's decision, the Protocol phase-out schedule for methyl bromide is binding "law" in the US, but the subsequent critical use adjustment adopted by the Parties is not. Thus, EPA would appear to lack legal authority to adopt the critical use exemption, threatening to bring the US into non-compliance. Clean Air Act. Despite the advanced non-compliance procedure, and the two large sanctions available to the MOP (trade sanctions and conditionality of funding), countries in violation of the MP have not been sanctioned. Even repeat violators such as Russia have escaped punishment. Although many scholars are concerned that international agreements have "teeth", less carefully considered is the reality that the teeth may never bite. Thus, it appears unlikely that the US would have suffered any adverse outcomes from failing to meet the methyl bromide targets.

Where is the balance between flexibility and accountability? The MP adjustment process has been lauded by many as a clever institutional design to deal with scientific uncertainty. However, this flexibility comes with a price. By bypassing Congressional

⁸ See Benedick, *Ozone Diplomacy*.

approval (which is granted through ratification) it greatly diminishes the accountability to the legislature of the Executive (in negotiating Protocol Party decisions) and EPA (in issuing implementing regulations). Once ratified, the sceptic would argue, Congress has signed a “blank check” for future Protocol Party decisions and EPA regulations. The counterargument, of course, is that a fixed agreement would soon become obsolete, and therefore, states would feel less compelled to comply.⁹

⁹ See Andrew T. Guzman. “Reputation and International Law” *Georgia Journal of International and Comparative Law* 34 (2006): 379-391

3. Standard Setting by the International Organization for Standardization (ISO)

Prepared by Eran Shamir-Borer

Objectives of ISO

The International Organization for Standardization (ISO) was established in 1947. Its objectives are to “promote the development of standardization and related activities in the world”, with a view to “facilitating international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity”. The primary means available to ISO to promote these objectives are the harmonization of standards and the development of international standards.

ISO Standards

ISO standards are formally voluntary, and constitute “recommendations” to ISO members. Nonetheless, many of ISO standards are widely adopted by national standardization bodies (as national standards), by governments (in their technical regulation and legislation), and by industry and businesses (in their manufacturing and supply practices, testing and analysis methods, etc.). Widespread adoption of international standards facilitates the access of businesses to global markets, by removing technical barriers to trade (in the form of national standards or technical regulation) and creating a “level playing field” for all competitors on those markets. International standards provide governments with technical and scientific bases for their health, safety and environmental legislation. For developing countries in

particular, international standards are also an important source of technological know-how.

In its first decades, ISO’s work focused on technical, product-related standards that served and affected primarily the industry sector. This has changed in the past two decades, with globalization and the expansion of international trade increasing the demand for internationally acceptable standards that would remove non-tariff barriers to trade. First, the volume of ISO standards has increased dramatically. For example, in 2005 only ISO published 1,240 standards and standard-type documents, with more than additional 4,000 items in various stages of work. Second, the scope of ISO standards has expanded to cover also non-technical types of product-related standards, service-related standards (e.g., standards for complaint handling), standards for quality management and quality assurance (known as ISO 9000 standards, including guidelines for the implementation of quality management in the education sector), standards for environmental management (known as ISO 14000 standards, among them the recently published standard on greenhouse gases), information technology (IT) standards, and, very recently, even standards for social responsibility of public and private organizations.

Because ISO standards are not legally binding of their own force, ISO standards as such and the procedures for adopting them have not been subject to judicial review in domestic courts. But, standards adopted by private domestic standard-setting bodies have likewise generally not been subject to such review, although they are occasionally challenged in antitrust in tort actions, and a few domestic courts have raised administrative law issues.

Membership

ISO members are national standardization bodies (NSBs), one NSB from each country. The composition and institutional features of such NSBs may vary from one country to another, ranging from private entities (usually industry associations) to governmental bodies. The vast majority of ISO members (over 70%, mostly coming from developing countries) are NSBs of governmental nature. There are currently 157 members in ISO, divided into three categories. The first and foremost is the category of Member Bodies (MBs), currently counting 102 NSBs. Member Bodies retain full voting rights and may take an active part in all ISO activities. Two other categories of ISO members, Correspondent Members and Subscriber Members, are intended for countries without fully-developed national standardization infrastructure and countries with very small economies, respectively. Such members, coming mainly from developing countries, have no voting rights and cannot take an active part in the standardization work and policy-making. Altogether, NSBs from developing countries represent approximately 75% of ISO membership.

Institutional Structure

ISO, whose seat is in Geneva, is comprised of several organs – a General Assembly (GA), a Council, a Technical Management Board (TMB), technical committees, and a Central Secretariat, and of several Officers of the Organization – a President, two Vice-Presidents, a Treasurer, and a Secretary-General (see figure in Annex 1).

The hub of the standardization work is the technical committees, a general name for hundreds of Technical Committees (TCs), Sub-committees (SCs) and Working Groups (WGs). Participation in the work of the technical committees is open to all Member Bodies, according to their national interests. Member Bodies' representatives to the technical committees are either NSB officials or professionals, primarily coming from the industry and the business sectors (but also from other sectors, such as consumer groups and governmental organizations), or both. Chairpersons and secretariats of technical committees are allocated to specific Member Bodies, and, again, may be staffed by either NSB officials or by representatives of stakeholder groups.

The overall management of the technical committees is vested in the Technical Management Board, which is responsible, *inter alia*, for setting the procedures for the standardization process. The Council is responsible for ISO's operations and policy-making. Both organs are dominated by NSBs from developed countries, as the criteria for membership in them reflects the financial strength of NSBs' home countries.

Financing

ISO's chief source of revenue is the membership dues collected from its

members, determined based on the respective country's Gross National Income and trade figures. Other sources of revenue are the sale of ISO standards, royalties on copyrights and income from services. These revenues finance the operation of ISO Central Secretariat only (30 million CHF in 2005). The cost of the rest of ISO's operations, namely the standardization work itself, which is four times larger, is directly borne by the Member Bodies (which provide chairpersonship and secretariatship services to technical committees) and by stakeholders, mainly the industry and business sectors (which subsidize the standardization work by furnishing and funding professionals to participate in it.

The Standardization Process

The development of ISO standards is generally market-driven, and usually originates in the needs expressed by the industry sector. To launch an ISO standardization process, such needs must be communicated to, and embraced by, the respective Member Body, or an appropriate ISO organ. Once this is achieved, the standardization process is advanced in six stages (see figure in Annex 2) (note that in some cases, such as IT standardization, different procedures apply). The *Proposal Stage* is aimed at confirming the necessity of the proposed standard before launching the standardization work. Proposals are reviewed by the relevant technical committee and may be approved by a simple majority, on condition that at least five participating members undertake to participate actively in the development of the standard, by nominating technical experts and commenting on working drafts. The next *Preparatory Stage* is dominated by

“experts” assigned to Working Groups by interested Member Bodies in order to specify the technical scope of the future standard. Once the experts reach an agreement, the working draft is transferred back to the technical committee (the *Committee Stage*) in order to obtain comments from the Member Bodies and build consensus around a draft standard. Consensus is obtained when “general agreement” among the participating members of the technical committee is reached, “characterized by the absence of sustained opposition to substantial issues” (i.e., no need for unanimity), or, in case of doubt, when two-thirds of the participating members vote affirmatively. The draft standard is then circulated in two rounds among *all* ISO Member Bodies, for comment and approval (the *Enquiry* and *Approval Stages*). The standard is approved if two-thirds of the participating members of the relevant technical committees are in favor and not more than one-quarter of the total number of votes cast are negative. Once approved, the standard is published as an International Standard.

Civil Society Participation

Organizations with interest in standardization that are not NSBs – either civil society-NGOs or organizations representing industry and business interests – are not eligible for membership in ISO. Nonetheless, they may influence the development of ISO standards at both the national and the transnational levels. At the national level, organizations with stake in a particular area of ISO's standardization work may participate in the “national mirror committees” that ISO Member Bodies are expected to establish in order to provide input from domestic stakeholders in all stages of ISO

standardization debates. At the transnational level, such organizations may take direct part in the standardization debates as members of their respective national delegation (although they are expected to represent the “national position” decided upon by the “national mirror committee” rather than their own). Another avenue for organizations to take part in the standardization work at the transnational level is to apply for “liaison organization” status to the relevant ISO technical committee.

However, despite the formal opportunities afforded to organizations with interest in standardization, the actual participation of civil society-NGOs in ISO standardization is far from being satisfactory, for various reasons. For example, NSBs vary in the effectiveness of their national consensus-building processes: “national mirror committees” are not always established and diverse opinions are not always taken into account or risk being overwhelmed by powerful (industry and business) stakeholders. National delegations to standardization debates are frequently imbalanced, comprised of delegates primarily from the industry and business sectors. ISO on its part, has traditionally shown great deference to Member Bodies and has not monitored their national consensus-building procedures, nor has it interfered in the Member Bodies’ discretion to determine the composition of their delegations to technical committees. In addition, civil society-NGOs often lack the resources and expertise necessary to participate in on-going, sometimes highly technical, meetings that take place all around the world (bearing in mind that participants in standardization debates are usually expected to bear the costs of their own

participation). Civil society-NGOs have further argued that the status of “liaison organizations”, although allowing for direct participation in ISO technical committees, was not sufficient to provide fair and effective opportunity to participate in the standardization process and influence its outcomes. “Liaison organizations” enjoy no voting rights, nor a right to appeal against decisions of technical committees. As a matter of fact, it seems that most organizations enjoying a “liaison organization” status are affiliated with the industry and businesses sectors (e.g., industry-oriented professional associations, that possess sufficient resources and high technical expertise), rather than civil society-NGOs.

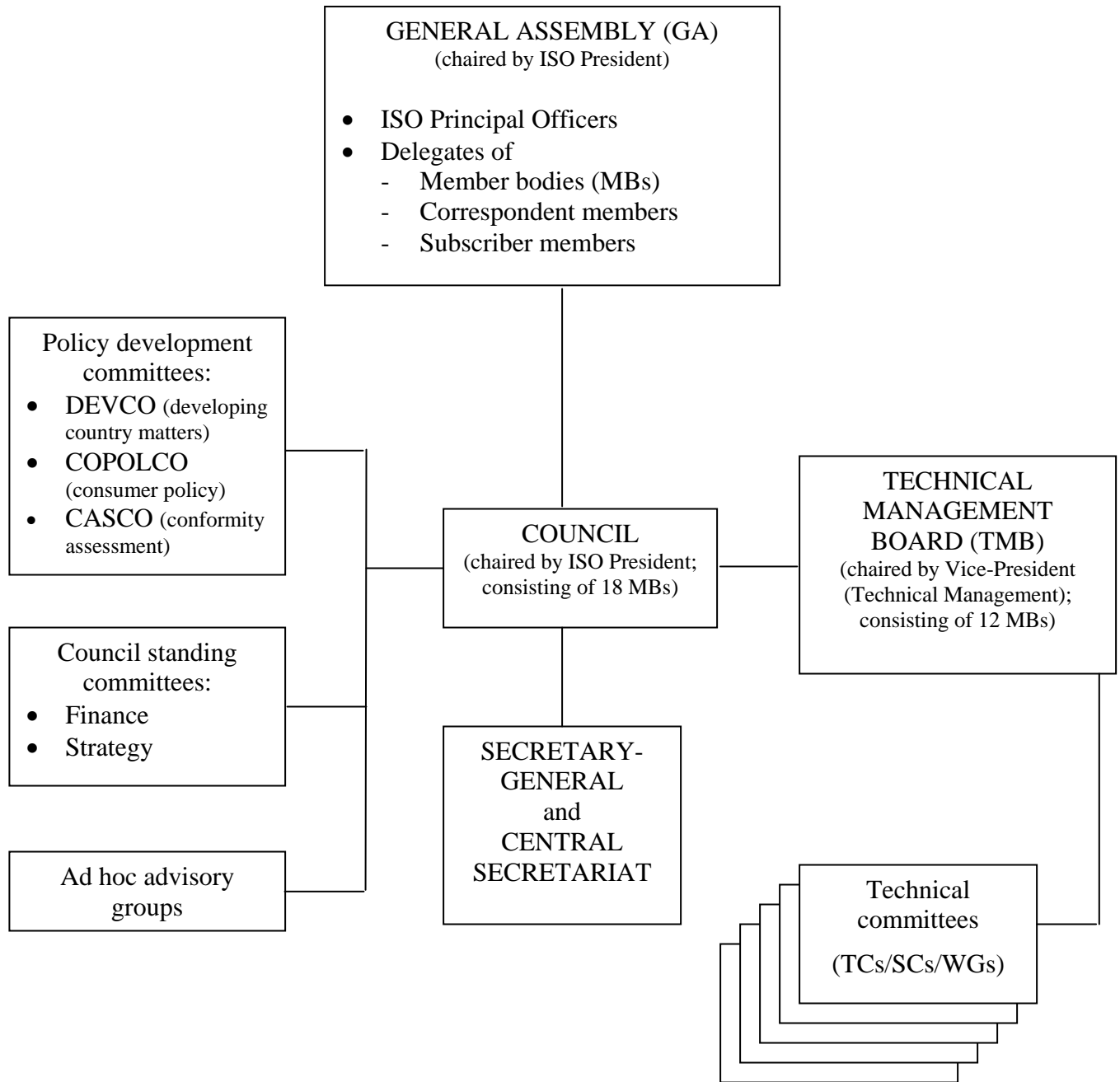
ISO and the WTO

ISO standards, which constitute only “recommendations” to ISO members within the ISO regimes, have become somewhat less voluntary for states member of the WTO and their respective NSBs by virtue of the WTO Agreement on Technical Barriers to Trade (TBT). This Agreement obliges states to use “international standards” – the vast majority of ISO standards falling within the ambit of this term – or draft “international standards” whose completion is imminent, “as a basis” for their technical regulation and national standards, related to products or their processes and production methods (PPMs).

The WTO TBT Committee has more than once expressed its concern about the under-representation of developing countries in the standardization process. In 2000 it adopted a decision containing a set of principles that it considered important for international standard development, dealing, *inter alia*, with

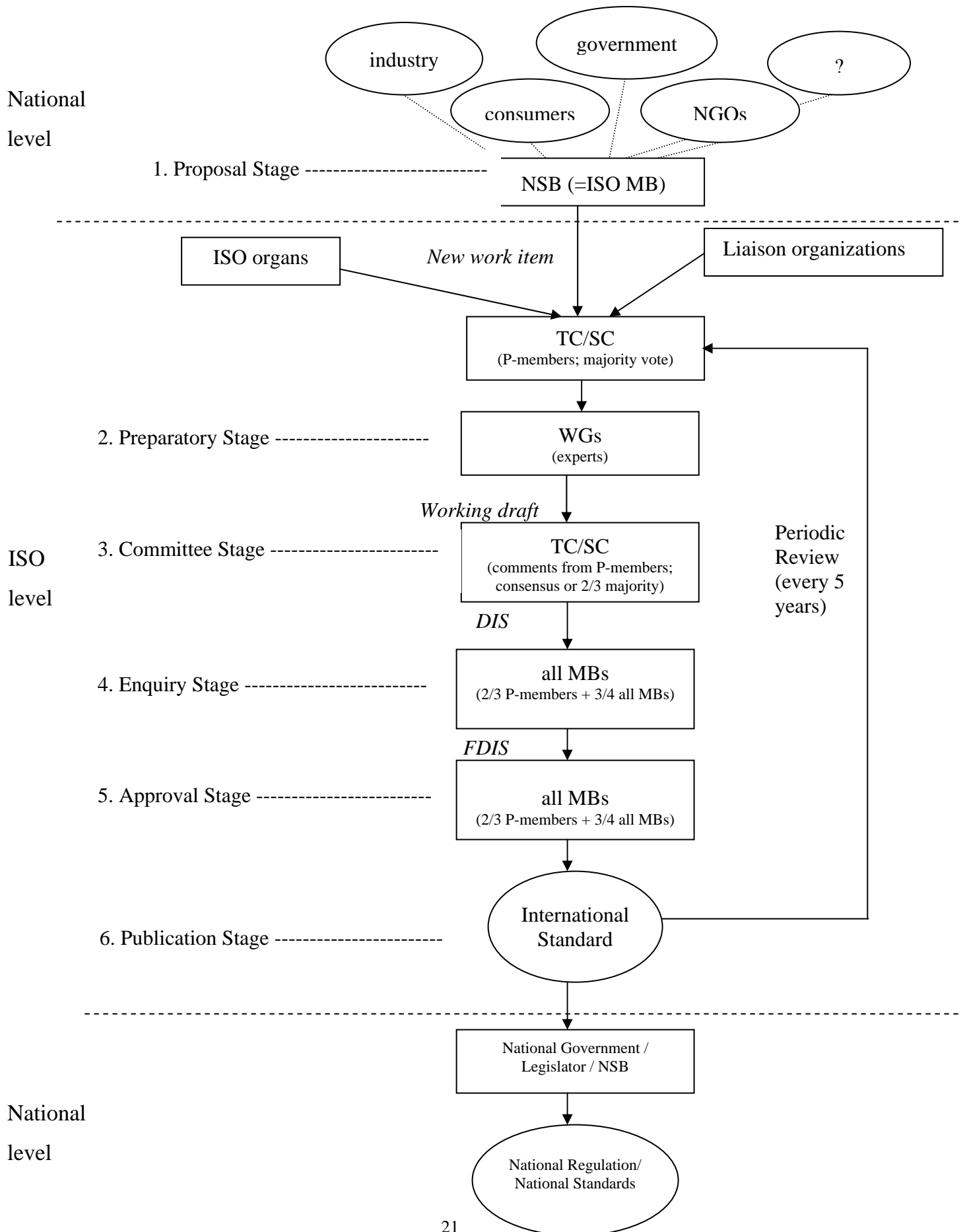
the transparency, openness, impartiality, and the development dimension of the standardization process (see excerpts in Annex 3). The declared aim of this decision was to “improve the quality of international standards” and to “clarify and strengthen the concept of international standards under the Agreement”. Time will tell whether national standards or technical regulation, that were based on an ISO standard, could be successfully challenged before the WTO as constituting technical barriers to trade, where the standardization process of the ISO standard relied upon had not followed the principles prescribed by the WTO TBT Committee in the above-mentioned decision.

Annex 1: **ISO Organizational Structure**¹⁰



¹⁰ The figure, which is based on ISO, *ISO's Structure*, <http://www.iso.org/iso/en/aboutiso/isostructure/isostr.html>, does not present a complete picture of ISO structure, but only of its main organs and office-holders.

Annex 2: **Development of ISO standards (the “Normal” procedure)**



Annex 3: TBT Committee Decision – Excerpts

DECISION OF THE COMMITTEE ON PRINCIPLES FOR THE DEVELOPMENT OF INTERNATIONAL STANDARDS, GUIDES AND RECOMMENDATIONS WITH RELATION TO ARTICLES 2, 5 AND ANNEX 3 OF THE AGREEMENT

Background and purpose

...in order for international standards to make a maximum contribution to the achievement of the trade facilitating objectives of the Agreement, it was important that all Members had the opportunity to participate in the elaboration and adoption of international standards. ... Bodies operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all Members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent unnecessary obstacles to trade. In order to improve the quality of international standards and to ensure the effective application of the Agreement, the Committee agreed that there was a need to develop principles... that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives. ...

Decision

1. The following principles and procedures should be observed, when international standards, guides and recommendations ... are elaborated, to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries.

2. The same principles should also be observed when technical work or a part of the international standard development is delegated... by international standardizing bodies to other relevant organizations, including regional bodies.

A. TRANSPARENCY

3. All essential information regarding current work programmes, as well as on proposals for standards... under consideration and on the final results should be made easily accessible to at least all interested parties in the territories of at least all WTO Members. Procedures should be established so that adequate time and opportunities are provided for written comments. ...

4. In providing the essential information, the transparency procedures should, at a minimum, include:

- ... publication of a notice at an early appropriate stage ... that the international standardizing body proposes to develop a particular standard;

- ... notification ... to members of the international standardizing body, providing a brief description of the scope of the draft standard, including its objective and rationale ..., when amendments can still be introduced and comments taken into account;
- upon request, the prompt provision ... of the text of the draft standard;
- ... provision of an adequate period of time for interested parties ... to make comments in writing and take these written comments into account in the further consideration of the standard;
- ... prompt publication of a standard upon adoption; and
- to publish periodically a work programme containing information on the standards currently being prepared and adopted.

5. It is recognized that the publication and communication ... via the Internet, where feasible, can provide a useful means of ensuring the timely provision of information. At the same time, it is also recognized that the requisite technical means may not be available in some cases, particularly with regard to developing countries. Accordingly, it is important that procedures are in place to enable hard copies of such documents to be made available upon request.

B. OPENNESS

6. Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would include openness without discrimination with respect to the participation at the policy development level and at every stage of standards development ...

7. Any interested member of the international standardizing body, including especially developing country members, with an interest in a specific standardization activity should be provided with meaningful opportunities to participate at all stages of standard development. ...

C. IMPARTIALITY AND CONSENSUS

8. All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s. Consensus procedures should be established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments.

9. Impartiality should be accorded throughout all the standards development process ...

D. EFFECTIVENESS AND RELEVANCE

10. In order to serve the interests of the WTO membership in facilitating international trade and preventing unnecessary trade barriers, international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries. ... [T]hey should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions. ...

11. ...

E. COHERENCE

12. ...

F. DEVELOPMENT DIMENSION

13. Constraints on developing countries, in particular, to effectively participate in standards development, should be taken into consideration in the standards development process. Tangible ways of facilitating developing countries' participation in international standards development should be sought. The impartiality and openness of any international standardization process requires that developing countries are not excluded *de facto* from the process. ...

4. The World Bank: Yacyreta Dam Case (Argentina-Paraguay)

Prepared by Gisela Paris

The World Bank funded the Yacyretá Hydroelectric dam on the Paraguay-Argentina border, lending funds to a project run by a special purpose binational entity established to build and operate the dam. The Yacyretá Dam project was negotiated between the Bank (which as an international organization has immunity from most types of suits in national courts), and the Governments of Argentina and Paraguay, with input from private contractors, other funders, and over time from the binational entity which came to assume something of a life of its own. NGOs were not much involved in the project design. Some steps were taken to consult with families likely to be adversely affected by the project, but the harm to the lives of about 4,000 families, as well as environmental hazards were not fully mitigated, and more problems developed as the project progressed.

The World Bank had created an Inspection Panel in 1993, in response to similar problems (on a vast scale) with the Narmada River dam project in western India as well as strong complaints about other projects. The Inspection Panel is an independent entity within the World Bank that reports directly to the Board of Executive Directors. Its mandate is to ascertain, in response to requests related to specific projects, whether the Bank has complied with all applicable policies and procedures with respect to project design, appraisal and supervision. The Panel was established by the Bank's Board to ensure the Bank management (staff) complies with the environmental and social standards for bank-funded projects that were adopted by the Bank in response to pressures from NGOs, the US Congress, and others. The Panel is composed of independent members who are authorized to hear complaints of non-compliance with Bank standards from persons adversely affected by projects approved for funding by Bank staff. It gathers information about the effects of the project, considers alternatives, and makes findings and recommendations that are submitted to the Bank's top management and Board, but has no direct enforcement power. Even where the Bank follows the Board's recommendations for modifying or even dropping a project, the recipient country may decide to proceed with the original project by obtaining other funds. In the Narmada Dam case, India proceeded with the project without the Bank's further involvement. China decided to do the same in relation to the Western Poverty Reduction Project. Governments of large states such as China and India may thus have an exit option; also the Bank needs them because they are such a large part of the market for receipt of development financing and pursuit of the Bank's development mission.¹¹ These governments, and their Executive Directors in the Bank, also exercise considerable voice within the Bank. By contrast, Paraguay, and, to a large extent, Argentina, are often more dependent on Bank funding

¹¹ (Note that China has recently begun major funding for development projects in other developing countries without the environmental, social, anti-corruption and other conditions imposed by the Bank and many other international donors.)

and therefore have limited “exit” options, and also have little voice within the Bank or representation on its top staff.

The Bank’s Inspection Panel faces limitations that are legal, political, and practical. The Panel does have authority and influence, including in the negotiated construction of remedies. Its processes do bring in participation, transparency, and reason-giving procedures for promoting consideration of collective environmental and social interests. However, the range of remedial measures that may realistically be taken, and that the borrowing state is willing to accept and pay for, is often limited by the time the Panel, when considerable momentum to proceed with it has already gathered.¹²

The details of the Yacyretá Dam project are as follows:

In response to a request from the Federación de Afectados por Yacyretá de Itapúa y Misiones (FEDAYIM)¹³, the Inspection Panel¹⁴ reviewed the Yacyretá project in 2004. This group claimed the Bank violated its own policies and procedures in relation to the design and implementation of the Yacyretá project, which received World Bank loans totaling \$878 million between 1979 and 2002. The Bank’s Executive Directors commended the Inspection Panel’s report, and approved the action plan put forward by management as a first step toward addressing the problems identified by the Panel.

Edith Brown Weiss, a Georgetown Law Professor who chairs the Inspection Panel, stated that “it is essential for affected people to have an impartial forum to address their concerns.” Brown Weiss went on to highlight the Panel’s findings, which concluded that the Bank complied with its policies and procedures in some areas of concern, but not in many others. The Panel found that the Yacyretá project reservoir did not cause flooding of urban creeks, contaminate the Parana River, or spread diseases. The Panel found, however, that the dam was at times being operated at a higher level than provided for in the project’s legal agreements. While the Panel found that the biophysical impacts from the major dam and reservoir were being managed competently, the Panel stated that a number of important environmental problems remain at the resettlement sites. In particular, there was inadequate evaluation of the environmental impacts of roads, water, sewerage and drainage facilities at the resettlement sites.

On social issues, the Panel said that the Bank fell short on implementing its policy on the resettlement of families and businesses affected by the Yacyretá project. In particular, the Panel found that: a number of people were omitted from a 1990 census used to establish compensation and resettlement benefits; alternative resettlement sites were not considered; there was no transparent and independent procedure for hearing grievances; and the impacts of resettlement sites on adjacent areas were not fully

¹² In addition, the Board has used the Panel to investigate potentially problematic projects before decisions are made to fund them, as happened with a project involving resettlement of impoverished farmers into Tibetan-populated areas in Western China

¹³ FEDAYIM is a Paraguayan non-governmental organization representing around 4,000 families who claimed their lives and environment were being harmed by the project.

¹⁴

assessed. The report also highlighted a need for improved project supervision, better census and survey data, wider public disclosure of information, and more effective consultations with affected groups.

The Bank management stated that some of the project's problems stemmed from a series of extended economic and political crises in Argentina and Paraguay, and resulting delays and uncertainties that have significantly increased the cost of the project

The Action Plan proposed by management to respond to the criticisms of the project had three key themes:

1. Support of EBY's (Yacyretá Binational Entity) social communication program aimed specifically at clarifying what compensation schemes are available to affected communities, reducing uncertainty of those awaiting resettlement, and providing a forum for people to get information and express opinions.

2. Assist in development of a dispute resolution mechanism that would provide a suitable means of addressing concerns, without undermining the appropriate role of the judiciary as the last resort for dispute settlement.

3. An improved supervision and monitoring framework that would include twice-yearly Bank supervision missions to Yacyretá, expanded documentation of subjects raised by affected communities, suitable budget capacity for high levels of supervision, and the addition of a civil society specialist and an urban planner to the project team.

The Bank Executive Directors approved the management action plan in 2004, and welcomed management's decision to provide them with a progress report that would detail what further measures would be taken to address problems identified by the Panel. It provided that the Inspection Panel would review management's Action Plan and implementation measures for the Board, and report on the following issues:

- Progress made in the implementation of the Bank's action plan and additional measures identified, including social and economic impacts of the project and measures taken with respect to the 2,416 families already relocated and the 6,000 families waiting to be relocated in Paraguay;
- Progress on grievance procedures;
- What the Inter-American Development Bank (IDB) is doing with respect to Yacyretá, and how the IDB and the Bank have been collaborating on issues identified during the Inspection;
- What decisions have been taken with respect to the reservoir's water level, and their potential impacts.

Meanwhile, in the spring of 2005 a group of various Paraguayan and Argentine NGOs¹⁵ issued strong denunciations of the project implementation. Despite the fact that

¹⁵ SOBREVIVENCIA, Amigos de la Tierra, Paraguay; Bank Information Center, United States; International Rivers Network, Brazil; Asociación Ecologista Cuñá Pirú, Argentina; Asociación Ambientalista EcoLa Paz, Argentina; Federación Amigos de la Tierra Argentina, Argentina; Foro

additional construction works required for raising the reservoir level are even further behind schedule, and most social and environmental mitigation measures have yet to be undertaken, it was announced in the press in April that the Yacyretá Binational Entity (EBY) would be raising the reservoir level. NGOs claim the reservoir level has been arbitrarily raised for prolonged periods above the level of 76 meters above sea level at which EBY had agreed it would operate the dam at.

The NGOs stated that this development had been corroborated by Parliamentarians who are part of the Special Commission to Monitor the Yacyretá Completion Plan (PTY). The Commission confirmed that EBY has raised the reservoir level in a totally irregular way, violated environmental regulations and agreements between Paraguay and the government of Argentina. On May 15th, about 500 demonstrators blocked the bridge which links Posadas, Argentina and Encarnación, Paraguay, to demand that the EBY provide compensation for their removal from their homes and for their loss of employment. Former inhabitants of Yacyretá Island, who were relocated in Atinguy continue to complain about inadequate conditions, affirming that the resettlement lacks arable land, and that EBY provided housing of poor quality, without a foundation, and with very thin walls and little cement.

The NGOs concerns mounted since the Andean Development Corporation (“CAF”) recently provided financing for the project, apparently with no knowledge of the history of this project, and at a time when the World Bank and the IDB, which are supposed to be well-aware of the problems the dam has caused, maintain a passive attitude regarding it. On December 6th, 2005, the CAF approved a US\$ 210 million loan for the partial financing of the “Yacyretá Completion Plan”. The document entitled “Social and Environmental Aspects of the Completion of the Yacyretá Binational Hydroelectric Project with CAF Financing”, contains various statements:

CAF says that Yacyretá and EBY have successful experiences and have learned social and environmental lessons, as well as a great effectiveness which will permit the reaching of its goals at the dam’s design level of 83 meters. NGOs claim that Yacyretá’s history demonstrates exactly the opposite, and that even the World Bank’s most recent follow-up report on the recommendations of its Inspection Panel in November, 2005 confirm various failures on EBY’s part to meet its obligations and agreements. CAF says the reference cost is US\$ 812 million, of which CAF provided US\$ 210 million. The governments and EBY reported that US\$ 653 million would be needed (30% for expropriations alone), of which US\$ 90 million would come from the remaining resources in the IDB’s loan 760-OC-RC, with the rest being provided by Argentina. The funds would be made available through the energy which the company EBISA would purchase for Argentina’s interconnected electricity grid. The government’s funds would be administered through a trust fund which would have as its exclusive beneficiary the Yacyretá Completion Plan (PTY).

This case demonstrates that even small states facing economic difficulties, or private firms, may as project sponsors t “exit” environmental and social regulatory conditions imposed by the Bank and some other international funders by securing alternative sources of funding. (China’s recent initiatives in the aid field, especially in Africa, offer another possible path of exit for some states.)

While the structure of the remedial process for a specific project is apparent, it is not clear whether the Inspection Panel, Management Response, and Board discussion, together establish a maximally effective learning process that spills over into Bank consideration of future projects in other regions. NGOs try to draw links between past problems and future projects, as do consultants – but this process may be haphazard. A question arises as to whether Argentina, Paraguay, and their parliaments, NGOs etc should have input into a wider Bank learning process, rather than being confined to discussion of their own project’s problems.

Lurking in the background in the Yacyreta case is the possibility of litigation in domestic courts. It is reported that the World Bank was sued in Argentina, and that a judge initially declined to accept its claim to immunity, but that after urgent representations by the Bank, its immunity was restored. Whether this immunity will survive – and should survive - on a blanket basis in all countries in the future, is a question to be considered. The existence of the Inspection Panel and of remedial measures arrangements helps the Bank to buttress its immunity claims, on the basis that other effective (perhaps more effective) remedies are available.

5. The World Trade Organization: Exit, Voice and Accountability

Prepared by Michael Livermore

I. Accountability among states and the possibility of exit

While the WTO is relatively legalized compared to other international regimes, there are important “safety valves” that allow states some opportunity to negotiate the terms of their compliance. These safety valves in effect allow states the possibility of limited exit from the regime. This strategy maintains a strong Rule of Law (ROL) component within the WTO regime, without placing unbearable pressure on states to comply with all requirements all of the time.

There are several features of the WTO regime which orient it towards a ROL approach rather than a bargaining/negotiation arrangement. Disputes between members are governed by the Dispute Settlement Agreement and are channeled into a tribunal system where they are heard by Panels with a right of appeal to the WTO Appellate Body (AB). The decisions of the AB, which is akin to a standing court, are essentially final—without a consensus of the Member states, the Dispute Settlement Body (DSB) automatically adopts AB decisions. While there is some ethos of arriving at “mutually acceptable” resolution of disputes, the Panels and Appellate Body apply and interpret the treaties, rather than serve as mediators between the disputing parties. Furthermore, it is very difficult for Members to negotiate new agreements or revisions to old agreements, as illustrated by the collapse of the Doha Round. Unlike many other international treaty-based regimes, the WTO has no mechanism for the development of new or subsidiary norms by means other than treaty renegotiation and ratification, for example, through use of committees or decisions of a conference or meeting of the parties under a decision rule that does not require unanimity. This situation places significant power on the DSB and especially the AB to clarify the often general terms of the agreements as applied to new and changing circumstances.

But this situation also creates pressures on ROL. From time to time, Members, either in the face strong domestic pressure or for other reasons, feel a strong need to “exit” from generally applicable obligations or otherwise secure differential treatment—i.e. “retail” flexibility. There are a number of escape valves/exit mechanisms whereby states—at least wealthy and powerful states—can escape legal accountability:

- **Non-compliance with DSB rulings: exit at a price.** The ultimate enforcement mechanism in the WTO regime is for the DSB to authorize trade tariffs against non-compliant Members. These tariffs can result in significant losses, creating a real incentive for the recalcitrant Member to come back into compliance. There have, however, been instances when states have chosen not to comply and face retaliatory tariffs. One prominent example is the *EC-Hormones* case in which the DSB ordered European countries to accept US and Canadian beef from cattle treated with growth

hormones.¹⁶ The EU countries have failed to come into compliance, and continue to ban hormone treated beef. The US has implemented hundreds of millions of dollars worth of tariffs, including 100% tariffs on items like truffles and Roquefort cheese.

- Boycotts. States sometimes use trade in order to forward other foreign policy goals, such as destabilizing disfavored regimes or spreading normative values such as human rights. The United States periodically engages in trade boycotts as an instrument of foreign policy; the long-standing embargo against Cuba is a prime example. Other states use trade embargos as well—the Arab League boycott of Israel, for example, has been in place since 1948. These boycotts sit uncomfortably, to a certain extent, with the WTO regime of free trade.

There are several mechanisms within the WTO regime that have allowed states to persist with the use of trade boycotts. The United State has invoked the “non-application” provision¹⁷—allows a Member to withhold most-favored nation status from the new Member—in order to deny WTO benefits on the basis of its foreign policy concerns.¹⁸ In addition, there is a broad, self-judged national security exemption to the WTO regime which gives states broad latitude to conduct foreign policy affairs,¹⁹ some have argued that this provides a basis for trade embargos. Finally, states may simply ignore any restrictions on boycotts as an intrusion into sovereign prerogative.²⁰ Other states may be unwilling to challenge powerful nations undertaking embargos because they fear retribution, because it may be ineffective in the face of a non-compliance threat, or because they want to maintain the power to utilize trade embargoes themselves.

- TRIPS Waiver. Almost immediately after the TRIPS agreement was signed, developing countries began to chafe against its requirements regarding the manufacture of generic drugs. At the Doha Ministerial Conference (2001), the parties adopted a declaration on the TRIPS agreement, affirming Member’s “right to protect public health . . . and to promote access to medicines for all,” in which they stressed that Members had the right to determine “what constitutes a national emergency” with respect to provision allowing developing countries to develop generic drugs under compulsory licenses.²¹ Beginning in the late 1990s, the WTO and the TRIPS regime came under enormous pressure from international NGOs and some African countries, including South Africa, because of the high prices charged by multinational pharmaceutical companies for AIDS drugs. In 2003, the General Council (made up of every Member) issued a statement, clarifying the earlier declaration, which explicitly waived the provisions of TRIPS under

¹⁶ EC Measures Concerning Meat and Meat Products (Hormones) (1998)

¹⁷ Art. XIII.3.

¹⁸ As just one example, in the case of Mongolian accession in 1996, the US invoked Art. XIII.3 pursuant to the Jackson-Vanik amendment, which is related to the emigration policies of trading partners.

¹⁹ Art. XXI (b)(iii). See generally, Michael P. Malloy, *Ou est votre chapeau? Economic Sanctions and Trade Regulation*, 4 Chi. J. Int’l L. 371 (2003). It is worth noting that there is “no relevant jurisprudence” applying this provision, perhaps because no state is willing to make a challenge to a foreign policy boycott. See http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm.

²⁰ Saudi ambassador to the U.S. has characterized its boycott of Israel as “a matter of national sovereignty.” See *The New York Sun* (June 21, 2006), available at www.nysun.com/article/34829.

²¹ Declaration on the TRIPS Agreement and Public Health (November 2001).

certain conditions so that Members could manufacture generic drugs under compulsory licenses for themselves and other countries in order to counter public health threats. This scheme acts as an effective exit option for those developing countries that wish to avoid the strict requirements of TRIPS with respect to the manufacture of generic drugs to deal with AIDS and other illnesses.

- Direct Effect. Finally, DSB rulings generally are not accorded direct legal effect within Member states. Domestic courts could promote ROL by holding DSB rulings enforceable against members by domestic non-state actors, but ECJ has declined to do so, recognizing inter-state bargaining persists even after DSB rulings. In *Leon v. BIRB*,²² the court held that even when the WTO DSB has ruled that a EC regulation was incompatible with GATT obligations, as it had on the matter of European quotas on the import of bananas, that judgment will not be enforced by domestic courts at the instance of a banana importer challenging restrictions on his import quota that were based on the EC regulation in question. It reasoned that the a post-judgment system of interstate bargaining and compensation/punishment was put in place by the WTO regime, and allowing DSB judgments to serve as the basis for private parties to bring suit before national courts would interfere with the enforcement scheme designed by and agreed to by the Member states. The consequence of this and other decisions is that importers cannot serve as a proxy for plaintiff states, and the rules of the WTO order are not binding as internal domestic law—thereby giving states room to negotiate and bargain on the inter-state level, even after DSB judgments.

II. Limited accountability to non-state actors, especially environmental and social interests.

The opportunities for non-state actors to shape and participate in WTO decision-making are quite limited. The WTO lacks a robust deliberative body with subsidiary lawmaking power in which the interests and views of NGOs can be represented. This stands in contrast to regimes, such as the Codex and Montreal Protocol, where NGOs have been (to various degrees) effective. However, NGOs have found some more limited ways to participate:

- Pressuring Members during negotiation. NGOs are, naturally, free to pressure Member states during the negotiation of agreements. There are two mechanisms through which this happens. In the first, an NGO can act as any domestic interest in pressuring state representatives. In that case, the ability of NGOs to be effective depends heavily on their status within the domestic political order; those NGOs that carry clout will be effective; those that do not will not. Because trade agreements are generally carried out by executive officials without the strong participation or reason-giving requirements traditionally associated with domestic administrative processes, the ability of domestic NGOs to participate meaningfully is in question.

²² *Leon Van Parys NV v. Belgisch Inteventie-en Restitutiebureau (BIRB)*, Judgment of the Court (Grand Chamber) (2005).

The second mechanism is for NGOs to act on the international stage, using reputational pressures directed at Member states in public forums. International NGOs can provide support or opposition to Member state positions, and can attempt to influence both domestic audiences as well as the other negotiating Members. However, NGOs do not have any particular seat at the table during the negotiation of WTO trade agreements, access to participants and information is limited, and transparency is intentionally kept low in order to facilitate bargaining. All of this cuts against the ability of NGOs to participate effectively.

- Amicus Briefs. In the late 1990s, there was a debate over whether WTO tribunals were authorized to accept and consider amicus briefs. A WTO Panel had determined that, under the WTO treaties, it could not accept amicus briefs unless it specifically solicited those briefs.²³ The Appellate Body overruled, holding that non-parties were free to submit briefs to the tribunals, and that it was in the discretion of the tribunals whether to consider the briefs.²⁴

That decision caused some stir. Developing countries were especially concerned that allowing NGOs to submit amicus briefs would favor the viewpoints of developed countries. Because many of the most sophisticated NGOs are located in developed countries, amicus briefs give increased voice for interests in the most powerful states. Developing countries also evinced a belief that amicus briefs would lead to less predictability in DSB/AB rulings.²⁵ Significant criticism of AB rulings allowing for amicus briefs occurred in the DSB after those decisions, and amicus briefs have been put on the table as a subject for discussion in DSU reform.²⁶

The actual effect of amicus briefs on outcomes is unclear. While NGOs and other non-parties are free to submit briefs, Panels and the Appellate Body are free to ignore them. Recently, the Appellate Body and Panels have found occasion to reject or ignore amicus briefs as irrelevant, with a Panel arguing that only amicus briefs that relate to points raised by the parties are relevant to tribunal proceedings.²⁷ The role and importance of amicus briefs within the WTO tribunal structure remains uncertain.

Reputational Campaigns. NGOs can attempt to generate accountability within the WTO regime by generating reputational campaigns directed at WTO policy. Some of these campaigns have met with (limited) success; especially when NGOs have “teamed up” with states to forward their goals. There are several prominent examples. In the case of *EC-Hormones*, the significant domestic opposition to hormone treated beef may have been stoked to some extent by NGOs; in the case of European resistance to genetically

²³ Panel Report, United States: Import Prohibition of Certain Shrimp and Shrimp Products (*Turtle-Shrimp*)

²⁴ AB Report, *Turtle-Shrimp*

²⁵ C.L. Lim, *The Amicus Brief Issue at the WTO*, Chinese J. Int'l L. (2005).

²⁶ IISD, Doha Round Briefing Series, Vol. 2 No. 8 (2003), http://www.iisd.org/pdf/2003/wto_doha_review_dispute_2.pdf

²⁷ Report of the Panel, United States: Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (2003).

modified foods, several NGOs have been quite active.²⁸ In the case of the TRIPS waiver, for AIDS and other drugs in Africa and other developing countries, the hand of developing countries was strengthened by efforts of domestic and international health NGOs—both in providing normative and rhetorical support for the developing countries’ position,²⁹ but also in creating domestic pressure in developed countries in favor of changes to the TRIPS regime. Thus, while NGOs have limited accountability mechanisms within the WTO regime, they can “play an outside game” which include reputational campaigns to forward their goals.

²⁸ See e.g. Transatlantic Consumer Dialogue, The EU must resist U.S. pressure and protect consumer rights on GM foods, <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/press.cfg&id=43>.

²⁹ See e.g. AVERT, TRIPS, AIDS, & Generic Drugs, <http://www.avert.org/generic.htm>.