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Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO

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I. INTRODUCTION

Throughout the latter half of the twentieth century, the General Agreement on Tariffs and Trade (GATT) has facilitated the resolution of international trade

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disputes among and between states.[1] Often, however, states handle international trade disputes on behalf of private entities which are the real parties in interest to a dispute. In an increasingly interdependent global economy, companies and individuals, not states, are the primary vehicles for conducting international trade.[2] Therefore, what protections, if any, does the GATT provide to insure that the real parties in interest to international trade disputes have the right to seek a remedy? Strictly speaking, the GATT is not open to non-state individuals for the purpose of seeking resolution of international trade disputes. In practice, however, states have generally been willing to bring disputes under the GATT on behalf of their private national entities.[3] Nevertheless, the ultimate decision to bring, litigate and settle a trade dispute lies with the state rather than the individual.

Recently, two issues in private party access, outlined in World Trade Organization (WTO) decisions, suggest that dispute resolution in the WTO may be moving away from a solely governmental focus. First, the WTO asserted the right of member states to include private, non-governmental employees in their trade delegations before the WTO,[4] an historically forbidden practice. Second, the WTO has also acknowledged the right of private individuals or organizations to submit amicus briefs in support of their positions in international trade disputes to which they are not a party.[5]

Increased liberalization of private party access to international trade dispute settlement proceedings has the potential to bestow several benefits on global international trade. Most importantly, private access to the WTO could acknowledge the inherently private nature of international trade as it is conducted in the modern era. In turn, such acknowledgment could potentially reduce the problems of political capture and democracy deficit, which are only left unchecked in the absence of private participation in trade dispute settlement. Likewise, private access to the WTO stands to improve the legal transparency of international trade and dispute settlement.

Private party access to international trade organizations is also important because of the need for state accountability. State accountability to individuals in

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1. "States" herein refers to the member nations that are "Contracting Parties" to the GATT, now members of the WTO.

2. *See* Susan Strange, *States, Firms, and Diplomacy*, INT'L AFFAIRS, London, Vol. 68, no.1, (1992).

3. *See, e.g.*, United States–Anti-Dumping Duty on DRAMs of One Megabit or Above From Korea, WT/DS99/R [hereinafter United States Anti-Dumping Duty]. South Korea brought an action before the WTO on behalf of South Korean producers of DRAMS (Dynamic Random Access Memory chips) including Hyundai Electronics Industries and LG Semicon; European Communities-Regime for the Importation, Sale and Distribution of Bananas, *infra* note 4, where the United States brought an action before the WTO on behalf of U.S. banana growers including Chiquita Brands Int'l, Inc.

4. *See* European Communities–Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WTO doc. WT/DS27/ARB (Apr. 9, 1999) [hereinafter European Communities–Regime for Importation].

5. *See* United States–Import Prohibition of Certain Shrimp and Shrimp Products, *infra* note 66, at 15–22 (holding that amicus briefs may now be sent directly to the WTO without attachment to members' submissions).

international trade disputes is important in that substantive and procedural rights in international law are not mutually exclusive. For example, even if individuals are accorded substantive rights under a system of dispute settlement, a lack of procedural access to the dispute settlement system obviates the significance and effectiveness of those rights. Thus, the ability of private parties to receive both substantive and procedural rights in international trade dispute settlement is indispensable in insuring state accountability for state actions in the arena of international trade.

This paper will begin with a discussion of the background of the GATT in the context of its state-centric foundation. The background discussion will also include several political theories that contributed to the establishment of the GATT and that make its implementation more difficult. Following the background discussion, this paper will discuss recent WTO decisions addressing private access to international dispute resolution forums. It will then analyze whether these decisions represent endemic changes to the WTO system in the form of increasingly liberalized access for private parties. Integral to this analysis is the discussion of other systems of international dispute resolution that provide open venues for private party disputes and the relationship between their structures to that of the WTO.

In conclusion, this paper will acknowledge the structural hindrances within the WTO that ultimately prevent full private access to dispute settlement proceedings. However, this is not to diminish the significance of the progress cited herein. These decisions provide small contributions to an ultimate goal of unencumbered private party representation at the WTO. The greater question to be answered in this paper is whether, in light of the recent WTO holdings, future concessions permitting further private party access to the WTO can be expected. Above all else, it remains doubtful that WTO case law can fully establish the right of private parties to bring trade disputes before the WTO. The WTO system that truly reflects the liberal nature of global international trade, not bound by national borders, can only be established through sweeping structural changes.

II. BACKGROUND

A. History of the GATT

The structure of the GATT is a reflection of the circumstances which surrounded its inception. The International Trade Organization (ITO) was created when the Bretton Woods Agreements were signed following World War II for the purpose of regulating international trade.[6] The United States refused to join the ITO because of "perceived threats to national sovereignty and the danger of too much

6. *See* Rubens Ricupero, Secretary–General of UNCTAD. Statement at the Second Ministerial Conference of the WTO, May 18–19, 1998.

ITO intervention in markets."[7] Without U.S. participation, the ITO never came into existence.[8] International trade has operated since that time, by default, under the GATT. The GATT was also signed at Bretton Woods and was designed to act as a temporary substitute in lieu of the ITO system.[9] Although the GATT lacked a formal institutional structure because of its temporary nature, the GATT has nevertheless promoted and enhanced the liberalization of worldwide international trade for more than fifty years.[10] Perhaps an additional result of its "interim" nature, the GATT, by design, has operated under the, albeit faulty, premise that international trade disputes are solely between states.

The GATT framework is a reflection of the prevailing theories of international trade that predominated at the time of the Bretton Woods Agreements. The traditional structure of international trade, that is, the degree of openness for the movement of goods as opposed to the other factors of production, can be explained by realist state-power theory. The realist state-power theory assumes that the interests and powers of states acting to maximize national goals determines the structure of international trade.[11] In contrast, following World War II, the international trade system that emerged at Bretton Woods had a broader conception of the traditional international economic order. This order of international economic relations facilitated the creation of international institutional and regulatory frameworks.

> In the early years of the GATT, the contracting parties handled disputes by acting jointly or by setting up working groups of diplomatic representatives to investigate complaints. In 1955 . . . the GATT Secretariat established dispute resolution panels of three to five experts to act as independent arbitrators to facilitate dispute resolution. [From] 1955 until 1995, the GATT system gradually grew more 'legalistic' and professional, but it remained formally nonbinding.[12]

While Bretton Woods stepped away from the state-power theory through the establishment of an international trade rule of law, the GATT remained devoid of appropriate enforcement mechanisms.

The non-legally binding nature of the GATT, which assumes states will comply only when it is in their self-interest to do so, results from the realist theory and a

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7. Michael R. Czinkita, *Executive Insights: The World Trade Organization–Perspectives and Prospects*, 3 J. INT'L MARKETING 85 (1995).

8. *See id.*

9. *See* R. Bruno, *Access of Private Parties to International Dispute Settlement: A Comparative Analysis*, 155 (1995) (unpublished L.L.M. thesis, Harvard University) (on file with the author).

10. *See id.*

11. *See id.*

12. *See id.*

reluctance to shed state-power.[13] The GATT framework is thus a reflection of state power and the belief that it is states, not individuals, who are subject to international law.[14] As a result, the GATT has been subject to the politically-based considerations of state self-interest, rather than rule-of-law enforcement.

The creation of the WTO through the 1994 Uruguay Round Agreements successfully altered the GATT system into a more rule-based structure. In particular, the transparency of trade dispute resolution was greatly enhanced by the establishment of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).[15] Nevertheless, the WTO dispute resolution system, as embodied by the DSU, has retained much of the state-oriented focus of the GATT.[16] As discussed below, there are many dangers to a state-oriented international trade dispute resolution system that does not proportionately give access to individuals who conduct international trade. The following is a discussion of the theoretical background behind those dangers.

B. Political Capture

One of the excesses that private party access to the WTO can prevent is the problem of political capture. Capture theory posits an organization run by individuals who try to maximize their own interests.[17] In the context of a domestic organization, the members attempt to maximize a private, rather than public, utility function.[18] In the context of the international system, and in the case of the WTO, the organization is instead "run" by states who are seeking to maximize their own interests. Capture theory asserts a cyclical relationship between the states that are members of the WTO and the interests promoted by that organization.[19] In other words, so long as it is only states that are parties to the WTO, the only interests that can be adequately represented and reflected are those of states. On the other hand, private participation in international organizations can help break the cycle of state

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13. *Id.*

14. *Id.*

15. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 834 (1995).

16. General Agreement on Tariffs and Trade–Multinational Trade Negotiations (The Uruguay Rounds Agreement Establishing the Multinational Trade Organization [World Trade Organization]), Dec. 15, 1993, art. II ¶ 1, 33 I.L.M. 13, 15 [hereinafter WTO Agreement]. The WTO Agreement states, in pertinent part, "[t]he [WTO] shall provide the common institutional framework for the conduct of trade relations *among its Members.*" (emphasis added); *see id.* art. XII ¶ 1. Membership in the WTO is limited to either states or separate customs territories; *see id.* art XI ¶ 1. The contracting parties to the GATT when the WTO Agreement entered into force are considered original members of the WTO. *Id.*

17. Take, for example, the hazardous waste industry. High-level EPA regulators and other officials leave government positions and find high-level jobs in the same industry that they had been responsible for regulating.

18. *See* HORWITZ, THE IRONY OF REGULATORY REFORM, 36 (1989).

19. For example, one may argue that WTO Panels and Appellate Bodies consist of individuals formerly employed by member states in the area of international trade and who may have represented their respective states' interests in that capacity.

interest perpetuated by political capture. In her article addressing individual rights in international trade organizations, Andrea Schneider discusses the link between domestic politics and international trade:

> The involvement of private actors in the dispute resolution mechanisms of trade organizations has the ability to reduce the linkage between trade and domestic political interests. While theoretically this link allows governments to be more responsive to their citizens, in reality, the link between trade and politics keeps governments tethered to special and well-organized interest groups. Once a state has determined that it is in its national interest to join a trade organization and once rules are adopted under that organization, the link to domestic political interests can be reduced by giving private actors standing to enforce the agreement. In that way governments will be responsible for following the rules across the board rather than selectively.[20]

Thus, private party access to the WTO can help improve state accountability to the companies and individuals who conduct international trade. In contrast, the lack of private access to the WTO leads to political capture at the international level.

C. Democracy Deficit

The theory of democracy deficit argues that as power is centralized in an organization or government, and as increasing numbers of laws are passed, individuals have less ability to influence the actions of the organization or government.[21] At the WTO, the lack of access for private parties to dispute resolution mechanisms may be more appropriately termed, "democracy absence." Indeed, the lack of any legitimate participation in the WTO holds corporations, NGO's and public interest groups at a great disadvantage with respect to states' ability to influence trade policies. This problem is compounded at the WTO because it is precisely those mentioned private entities who are most affected by trade policy.

Thus, democracy deficit is exacerbated at the WTO in the absence of private party participation. Most of the time, and in most states, member governments of the WTO make a concerted effort to adequately represent private parties before the WTO, much in the same way a benevolent king "chooses" to heed the needs of his subjects. In the same way, however, that a king may choose not to cooperate with

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20. Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 594 (1998) (citations omitted).

21. *Id.* at 591.

his subjects' desires, so too may a member government to the WTO choose not to represent any interests other than its own.

Democracy deficit is problematic both with respect to state accountability and to the conduct of international trade among private parties. A state's capacity to act at will and subject its trade policies to political, rather than economic, environmental and other concerns, lessens the effectiveness or applicability of the WTO. More importantly, however, it is the lack of transparency in international trade policy that contributes most to the problem of democracy deficit.

D. Transparency

Transparency is an important aspect of any international system. It is important because "clear rules set forth how the system is going to work and create confidence on the part of users of the system."[22] A low level of transparency exists if rules and procedures are not well-established in advance of a dispute. In that case, "resolution is left up to the parties, and no system is set forth."[23] On the other hand, a high level of transparency is achieved when procedures and decisions of a system are published regularly to create a high level of predictability.[24]

Initially, transparency in the WTO was mainly concerned with the right to be informed. Thus, NGOs long complained that they could not examine written submissions to panels and could not see panel reports until adoption. Transparency, however, is also about the right to inform and otherwise participate in the adjudicative process. NGOs now want to make written submissions to panels and to attend their meetings. "Clearly, both the right to inform and to be informed (and thus to participate in the adjudicative process) are both important aspects of transparency."[25]

The European Union (EU) is, perhaps, the most transparent of international systems,[26] and although the WTO has made great progress towards achieving predictability and transparency through the establishment of the DSU and regularly published decisions, there is nevertheless an inherent problem in its transparency potential.[27] Unlike the EU, there is no direct effect of the WTO which gives rise to private access to dispute resolution systems. Instead, the WTO is accountable to individual interests in a merely precatory fashion. The WTO lacks transparency because private parties in the form of individuals, corporations and NGOs can never be sure of a position that a state will endorse before the WTO. Notwithstanding the

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22. Schneider, *supra* note 20, at 614.
23. *Id.* at 615.
24. *Id.* at 616.
25. P. Clark & P. Morrison, *Key Procedural Issues: Transparency*, 32 INT'L LAW. 851, 857 (1998).
26. *See* discussion *infra* Part IV.B.
27. *See id.*

influential benefits of lobbying, private parties are otherwise helpless in affecting trade policy under the WTO rules.

Treaty enforcement, or lack thereof, stands as another bar to a system's transparency. The Uruguay Round Negotiations made great strides toward advancing the enforcement of WTO decisions and rulings.[28] The Uruguay Round did little, however, to improve the access of private parties to international trade disputes.[29] In this way, the Uruguay Round failed to dissolve the final bar to adequate transparency in the WTO.

III. THE RIGHT TO PRIVATE COUNSEL: THE BANANAS CASE

In September, 1997, the WTO Appellate Body handed down its decision in *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, (EU–Bananas).[30] That case addressed the issue of the legality, under WTO rules, of the EU's preferential treatment of bananas imported from ACP States.[31] The EU regime, replacing the former national market organizations established by individual member states to ensure the development of the banana industry in ACP countries, recognized that banana production was vital for the economic stability of these countries because it provided up to seventy percent of total export earnings.[32] The parties complaining against the EU regime were Ecuador, Guatemala, Honduras, Mexico and the United States (the "Complaining Parties").[33] United States participation in this case was strongly urged by Ohio-based Chiquita, who, like Ecuador, Guatemala, Honduras, and Mexico, stood to lose market share and profits due to the EU-ACP arrangement.[34]

The Appellate Body ruled in favor of the Complaining Parties, determining that the EU's practices governing the banana trade were inconsistent with its obligations under the GATT 1994.[35] More specifically, the EU practices cited as inconsistent with WTO rules included assigning import licenses for ACP origin bananas to French and British companies and imposing "more burdensome" licensing requirements for imports from the Latin American co-complainants than for other

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28. *See generally* Shell, *supra* note 15.

29. *See* WTO Agreement, *supra* note 16, art. II ¶ 1, 33 I.L.M. at 15.

30. WT/DS27/AB/R Sept. 9, 1997.

31. The "ACP States" are the African, Caribbean, and Pacific States which are signatories to the Lomé Convention of 1989 with the EC. According to EC Regulation 404/93, twelve states have traditionally exported bananas to the European Union: Côte D'Ivoire, Cameroon, Suriname, Somalia, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Dominica, Belize, Cape Verde, Grenada, and Madagascar.

32. Hallam & Peston, *The Political Economy of Europe's Banana Trade*, Occasional Paper No. 5, Department of Agriculture and Food Economics, University of Redding, Jan. 1997.

33. WT/DS27/AB/R, *supra* note 30, at ¶ 1.

34. R. Sekhri, *Chiquita's Battle Over EU Practices May Hurt Retailers*, BUS. COURIER, Nov. 30, 1998; *see generally* United States–Anti-Dumping Duty, *supra* note 3.

35. WT/DS27/AB/R, *supra* note 30, at ¶ 255.

countries' bananas.[36] Under the DSU of the WTO, the EU was given a "reasonable" period of time within which to bring its practices into compliance with the decision.[37] Whether the EU properly implemented the appellate body decision remains in dispute.[38]

A. Private Counsel Representation

As a procedural matter in the *EU-Bananas* case, the Panel report denied Saint Lucia's request for representation by two private legal advisers who were not full-time employees of the government of Saint Lucia.[39] In its first substantive meeting with the parties on September 10, 1996, the Panel ruled that the private counsel seeking to represent Saint Lucia was not entitled to attend the Panel's meetings in the case.[40]

The Panel ruling with respect to denying representation by private counsel was not specifically appealed to the Appellate Body.[41] Nevertheless, in July 1997, the government of Saint Lucia submitted a letter to the Appellate Body, again requesting the participation of its two non-governmental legal advisers.[42] In support of its request, Saint Lucia submitted that, as a matter of customary international law, a sovereign's right to decide whom it may accredit as officials and members of its delegation cannot be limited.[43] "Furthermore, Saint Lucia noted that neither the DSU nor the *Working Procedures*[44] deals with the issue of a sovereign state's entitlement to appoint its delegation or accredit persons as full and proper representatives of its government.[45] Canada and Jamaica supported Saint Lucia's

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36. *Id.*

37. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter DSU], Annex 2. (Article 21(3)(c) of the DSU provides that, "if it is impracticable to comply immediately with the recommendations and rulings, . . . [t]he reasonable period of time [for implementation] shall . . . not exceed fifteen months from the date of adoption of a panel or Appellate Body report." The fifteen month period can be extended under certain circumstances).

38. *See The Economy Trade War Exposes Old Trade Divisions*, (BBC News Online Network, Mar. 5, 1999); *see also* European Communities–Regime for the Importation, *supra* note 4 (finding injury to the U.S. in the amount of $191.4 million per year).

39. *See European Communities–Regime for Importation*, *supra* note 4. Saint Lucia is an ACP state and a third party participant to the case.

40. *Id.*

41. *Id.*; *see also* DSU, *supra* note 37. Note that Saint Lucia is a third party to the case and that pursuant to Articles 16.4 and 17.4 of the DSU, only parties to a dispute, and not third parties, may appeal a Panel Report.

42. *See* WT/DS27/AB/R, *supra* note 30, at ¶ 5.

43. *See id.*

44. "Working Procedures" refers to the Working Procedures for Appellate Review under the DSU, Appendix 3 to the DSU. *See* DSU, *supra* note 37, at sec. 3.

45. *See* WT/DS27/AB/R, *supra* note 30, at ¶ 5.

arguments.[46] Both countries argued that "it is the Member's right to authorize those individuals it considers necessary or appropriate to represent its interests."[47]

The Complaining Parties supported the Panel's ruling before the Appellate Body.[48] The Complaining Parties argued that, historically, "presentations by governments in dispute settlement proceedings [under the GATT] have been made exclusively by government lawyers or government trade experts."[49] In recognition of developing-country member needs for representation by competent counsel, the Complaining Parties cited Article 27.2 of the DSU which entitles such states to legal assistance from the WTO Secretariat.[50] Lastly, the Complaining Parties cited policy reasons, including ethics, conflicts of interest, and confidentiality, in favor of denying private counsel representation.[51]

On July 15, 1997, a mere six days after Saint Lucia's letter submission, the Appellate Body granted Saint Lucia's request. The Appellate Body stated that there was nothing in the WTO agreement, the DSU, the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals which (1) prevents a WTO member from composing its own delegation to an Appellate Body proceeding, and (2) specifies who can represent a government in making its representations before the Appellate Body.[52] The Appellate Body also noted that, in the interest of member governments' representation by qualified counsel in Appellate Body proceedings, "representation by counsel of a government's own choice may well be a matter of particular significance—especially for developing-country Members—to enable them to participate fully in dispute settlement proceedings."[53]

The Appellate Body ruling in the *EU-Bananas* case expressly permits governmental representation by private counsel in oral hearings before the Appellate Body. However, the Appellate Body noted that the peculiar legal nature of its own proceedings, which permit the participation of private counsel, do not apply as fully at the panel level.[54] Nevertheless, at least two panel decisions since the *EU-Bananas* case have reportedly allowed private counsel to participate in oral hearings.[55]

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46. *See id.* at ¶ 6.

47. *See id.*

48. *See id.* at ¶ 9.

49. *See id.*

50. *See id.*; *see also* DSU, *supra* note 37, art. 27.2 ("While the Secretariat assists members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. . . .").

51. *See* WT/DS27/AB/R, *supra* note 30, at ¶ 9.

52. *See id.* at ¶¶ 10, 12.

53. *See id.* at ¶ 12.

54. Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1205 (1998).

55. *See* notes 58–59, *infra* notes and accompanying text (referring to Indonesia-Autos and the Bananas III Panels).

Most recently, in *Indonesia-Certain Measures Affecting the Automobile Industry* (*Indonesia–Autos*), the government of Indonesia declared that its delegation included two private lawyers not permanently employed by the Indonesian government.[56] The United States argued that Indonesia's private counsel should be barred from the Panel meetings. In a preliminary ruling on this issue, the Panel rejected the U.S. request and stated:

> We conclude it is for the Government of Indonesia to nominate the members of its delegation to meetings of this panel, and we find no provision in the WTO Agreement or the DSU, including the standard rules of procedure included therein, which prevents a WTO member from determining the composition of its delegation to WTO panel meetings. Nor does past practice in GATT and WTO dispute settlement point us to a different conclusion in this case. In particular, we note that unlike in this present case, the working procedures of the Bananas III panel contained a specific provision requiring the presence only of government officials.[57]

Following the *Indonesia-Autos* and *EU-Bananas* decisions, the Office of the United States Trade Representative (USTR) advocated for the disallowance of private counsel representation at Panel hearings.[58] The USTR argued that the dangers of permitting participation of private counsel may be that arguments in trade disputes will be taken to extremes because private counsel will not appreciate both sides of a dispute.[59] Whereas a government may be reluctant to take a certain position if it knows that such a position could be adverse to its interests in another or future dispute, private counsel would not be subject to the same constraints.

In an attempt to persuade the U.S. government to change its position (as articulated by the USTR) the American Bar Association (ABA) recommended that WTO dispute resolution procedures permit all parties to be represented by counsel of their selection, including non-government personnel.[60] The ABA supports its recommendation with three main arguments: (1) absent rules to the contrary, under international law, sovereign states are free to choose their representatives to international organizations, (2) no international dispute settlement tribunals, except for Chapter Twenty of the North American Free Trade Agreement (NAFTA), limit a member country's choice of counsel, and (3) the policy concerns surrounding

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56. Report of the Panel Indonesia-Certain Measures Affecting the Automobile Industry, WTO doc. WT/DS54/R (July 2, 1998) at ¶ 4.1.

57. *See id.* at ¶ 14.1, *cited in* Lichtebaum, *supra* note 54, at 1205–06.

58. *Id.* at 1206 (citing the statements of a USTR official at an International Law Association Conference, New York, N.Y., Nov. 1997).

59. *Id.*

60. ABA Recommendation 118A (Feb. 2, 1998).

private counsel participation can be curtailed without excluding such individuals from proceedings. [61]

Notwithstanding the U.S. aversion to state representation by private counsel at the WTO, recent case law upholds the right of member governments to choose the composition of their trade dispute settlement delegations. WTO Panels and the Appellate Body have both recognized the futility, in the resolution of modern international trade disputes, of maintaining strictly government-employed delegations. The legacy of the procedural holding in the *EU-Bananas* case allows a government to choose its own representatives.

B. Is There a Need for Private Counsel Representation?

Although a WTO (or GATT) member "has always been free to seek private legal counsel in a dispute settlement case for its own internal matters," confusion exists as to what duties such counsel may perform as a representative of a government before the WTO.[62] Historically, GATT and WTO proceedings primarily have consisted of recitations of written material prepared in advance.[63] "Typically, no brilliant oral exchanges between top legal minds on the finer points of WTO law take place . . . the possibility of having specialized legal counsel in the panel room has not, up to now, been seen as a great advantage."[64] If private counsel can complete most of the important work in a WTO case before the case goes before a tribunal, why is the issue of private counsel representation important?

Unlike the larger members of the WTO, small member states require extensive legal support from private, non-governmental attorneys in WTO proceedings. Unlike larger members, smaller members were, in the past, unable to rely on such representation before a WTO panel or Appellate Body.[65] On the one hand, the procedural decision in the *EU-Bananas* case makes a statement in support of the national sovereignty of WTO members to determine, on their own, their delegations to WTO proceedings. On the other hand, the decision recognizes the distinctly international (rather than national) character of trade disputes. If, as described above, private counsel have historically made important contributions to WTO delegations absent the ability to participate in tribunal proceedings, their bar from Panel and Appellate Body proceedings is unnecessary. In permitting WTO members to include private counsel in their delegations, the WTO has acknowledged that international trade disputes are not strictly state-to-state battles.

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61. *See id.* Report accompanying Recommendation 118A ("Private Counsel in WTO Dispute Settlement Proceedings.").

62. Clark & Morrison, *supra* note 25, at 859.

63. *Id.*

64. *Id.*

65. This refers to the pre- *EU-Bananas* case atmosphere that restricted non-governmental attorneys from panel and appellate body proceedings.

C. Submission of Briefs by NGOs: The Shrimp-Turtle Decision

In *United States-Import Prohibition of Certain Shrimp and Shrimp Products* in 1998, the WTO Appellate Body addressed the procedural issue of private or non-member organizations' submission of briefs in WTO proceedings.[66] This issue arose in the context of the environmental ramifications of international trade. In the *Shrimp-Turtles* decision, the WTO Appellate Body upheld an earlier WTO Panel decision requiring the U.S. to bring its import practices with respect to shrimp into conformity with WTO obligations.[67] The dispute arose out of the efforts by the United States to prevent the importation of shrimp caught in nets that endanger sea turtles. In 1989, the U.S. enacted Public Law 101–162, Section 609, which states that the U.S. will not permit the importation of shrimp caught in nets that do not employ turtle-excluder devices, or TED's.[68] In 1996, the U.S. began enforcing the provisions of Section 609 against all imported shrimp on a shipment-by-shipment basis to determine whether the shrimp were caught in nets containing TED's.[69]

Four Asian countries[70] sought assistance from the WTO. They asserted that Section 609 was a discriminatory law and that the U.S. had no right to mandate its own domestic policy on other member states.[71] At issue in both the Panel and Appellate Body decisions in the *Shrimp-Turtles* was whether the enactment of Section 609, a violation of Article XI of the GATT, was justified under Article XX of the GATT.[72] In the end, the Appellate Body determined that, although Section 609 may fit an appropriate exception under Article XX(g), as a measure relating to the conservation of exhaustible natural resources, it was applied in an "arbitrary and discriminatory" manner. As such, it is a violation of the introduction, or chapeau, of Article XX.[73]

On the face of the Appellate Body decision, it appears as though GATT interpretation favors the interests of free trade over environmental interests, such as the protection of endangered species. The decision leaves certain species of sea turtles in grave danger of extinction. In deciding that the U.S. was in violation of GATT rules, however, the WTO Appellate Body carefully explained what it was *not* deciding:

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66. WTO Appellate Body, United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Shrimp-Turtles].

67. *Id.* at 76.

68. 16 U.S.C.A. § 1537 (1989). TED's sit in the necks of shrimpers' nets and divert large creatures out, while keeping smaller crustaceans.

69. *See* Shrimp-Turtles, *supra* note 66, at ¶ 6.

70. India, Malaysia, Pakistan, and Thailand.

71. *See* Shrimp-Turtles, *supra* note 66, at ¶ 1.

72. Article XX(b) provides an exception to GATT Article XI's General Elimination of Quantitative Restrictions, in the case that restrictive measures are "necessary to protect human, animal or plant life or health."

73. The chapeau of Article XX provides, in relevant part, that exceptions are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . ."

> We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[74]

Nevertheless, the WTO decision in *Shrimp-Turtles* does little to protect certain endangered species of sea turtles from extinction, and as such, it is strongly opposed by countless private and NGO groups.[75] Notwithstanding the decision, these groups continue to fight worldwide for the protection of sea turtles. Because of the *Shrimp-Turtles* decision, however, these same parties now have the right to bring their fight, in the form of amicus briefs, *directly* to the WTO.

D. Private Party Submission of Briefs to the WTO

In the *Shrimp-Turtles* decision, and for the first time in the history of the GATT, private party voices were officially given an ear at the WTO. NGO's, especially those interested in environmental issues, historically argued for improved access to the dispute settlement proceedings of the WTO, "knowing that governments rarely capture their interests when representing the state's interest in settling a trade dispute."[76] Thus, prior to *Shrimp-Turtles*, an NGO with an interest in protecting an area of the environment, such as marine life, from the potentially destructive consequences of a trade dispute, could only exercise the option of persuading a WTO member involved in a dispute to include its arguments in the member's submissions to the WTO tribunal.[77]

Despite the absence of mechanisms for private party submission of briefs to the WTO, three groups of NGOs submitted briefs to the Panel in the *Shrimp-Turtle* decision in the hopes that their positions would influence the Panel.[78] The Panel found that the acceptance of non-requested information from non-governmental

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74. Shrimp-Turtles, *supra* note 66, at ¶ 185.

75. *See, e.g.*, National Wildlife Federation, WTO Panel Strikes Down U.S. Turtle Protection Law for the Last Time (visited Nov. 15, 1999) <http://www.backstage.nwf.org>.

76. James Cameron, *WTO Opens Disputes to Private Voices*, NAT'L L.J., Dec. 7, 1998, at B5.

77. *Id.*

78. The three NGO groups were: (1) The World Wide Fund for Nature, and the Foundation for International Environmental Law and Development, (2) the Center for International Environmental Law, the Center for Marine Conservation, the Environmental Foundation Ltd., the Mangrove Action Project, the Philippine Ecological Network, Red Nacional de Accion Ecologica, and Sobrevivencia and (3) the Earth Island Institute, the Humane Society, and the Sierra Club. Shrimp-Turtles, *supra* note 66, at ¶ 79.

sources were incompatible with the provisions of the DSU.[79] Article 13(1) of the DSU provides, in relevant part:

> Each panel shall have the right to *seek* information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information *as the panel considers necessary and appropriate.*[80]

The Panel in *Shrimp-Turtles* interpreted Article 13.2 to mean that additional information (i.e., briefs) is appropriately submitted to a Panel only if the Panel expressly solicits it.[81]

The Appellate Body rejected the Panel's interpretation.[82] It held that attaching a brief or other material to the submission of either an appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* valid and an integral part of that participant's submission.[83] The Appellate Body admitted the amicus briefs submitted by the three groups of NGOs as an appendix to the United States' submission, notwithstanding the fact that the appended briefs contained legal arguments differing from those submitted by the United States.

Under the Appellate Body holding, a Panel still retains the right to disregard or reject an amicus brief filed by a private organization. The Panel does not, however, have the right to disregard the brief solely on the grounds that it was not submitted by a member. Thus, WTO Panels and Appellate Bodies retain the right, under the decision in the *Shrimp-Turtles* case, to accept or reject information provided by private parties. Information, in the form of amicus briefs from a private party, may still be submitted to a WTO Panel or Appellate Body as an appendix to a member's submission. *Shrimp-Turtles* also held that private parties may submit amicus briefs directly to a Panel or Appellate Body.[84] If a private party's amicus brief is expressly adopted by a member to be part of that members' submission, however, a panel would be under an obligation to consider its arguments.[85] Otherwise, private party

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79. Shrimp-Turtles, *supra* note 66, at ¶ 8.

80. DSU, art. 13(1) (emphasis added).

81. Shrimp-Turtles, *supra* note 66, at ¶ 9.

82. *See id.* at ¶ 89.

83. *Id.*

84. The language of the Appellate Body decision has been interpreted to imply that any individual or interest group can now submit an amicus brief directly to a WTO panel, although the panel would have the discretion to disregard it. *See* Shrimp-Turtles, *supra* note 66; *see also* Cameron, *supra* note 76, at B5.

85. *See* Shrimp-Turtles, *supra* note 66, at ¶ 89; *see also* Cameron, *supra* note 76, at B5.

access to the WTO, in the absence of a member's endorsement, remains discretionary with the Panel or Appellate Body receiving the information.

E. The Consequences of NGO Access

There are many potential advantages inherent in the right of unsolicited NGO amicus brief submissions to the WTO. Discussed above, democracy deficit is perpetuated by a WTO system that strictly adheres to government-to-government dispute resolution. One of the advantages to NGO brief submissions, therefore, is the potential to reduce the amount of democracy deficit in the resolution of international trade disputes. Private interests that may not be represented by the interests of the private entity's state, may now be heard by the WTO. Greater access to the governing body makes the WTO more accountable to private interests, thereby reducing democracy deficit. Member states have represented the interests of NGOs and multinational corporations throughout the history of GATT. Generally, member states' willingness to bring or voice disputes on behalf of corporations and NGOs has provided adequate representation of private interests.[86] Take, for example, the *EU-Bananas* case. In that case, the United States agreed to enter the dispute as a complaining party at the insistence of Chiquita Corporation, a powerful, multinational company.[87] The United States also represented the interests of several other U.S. banana-industry corporations who, likewise, were injured by the EU-ACP arrangement.[88] Thus, WTO member states often act as agents for multinational corporation and NGO interests. A second potential advantage to NGO brief submission, therefore, is that states may stop acting as agents for private interests. This system is potentially more efficient and certainly more democratic.

Frequently, however, the interests of states are concomitant with those of NGOs or corporations. In this case, the availability of private party brief submission to the WTO is of little consequence. As outlined in *Shrimp-Turtles*, a WTO Panel or Appellate Body is obligated to receive private party amicus briefs that are attached to a member's submission.[89] Where the *Shrimp-Turtles* holding may be invaluable, however, is in the case of member state reluctance to make an argument on behalf of the private entity. NGO submission of briefs directly to the WTO, therefore, ultimately improves the accountability and transparency of international trade dispute settlement. Transparency in dispute settlement is promoted by insuring that all arguments in a dispute are considered. Transparency can be improved if corporations and NGOs know that their arguments and positions have a chance to be considered during trade disputes. Increased transparency is thus promoted by a

86. *See generally* United States–Anti-Dumping Duty, *supra* note 3.
87. *See generally* Sekhri, *supra* note 34.
88. *Id.*
89. *See* Shrimp-Turtles, *supra* note 66.

direct avenue for NGO brief submission to the WTO. This can improve the efficiency of international trade for states, individuals, organizations and even the environment.

Notwithstanding the "benefits" of direct brief submission by private parties, there are also arguments to be made against such procedures. In his article discussing private party participation at the WTO, James Cameron lists several potential negative consequences to the right of private party access as determined in the *Shrimp-Turtles* decision.[90] First, Cameron explains that the United States considers, on a case-by-case basis, whether to attach amicus briefs to its submissions. He warns, however, that the effect of the Appellate Body's ruling in the U.S. and probably other member countries will be to increase pressure on member governments to attach NGO and corporate amicus briefs to its own WTO submissions.[91]

Second, the decision leaves WTO Panels and the Appellate Body with the discretion to accept or reject the arguments contained in amicus briefs unless such information is expressly adopted by the member attaching the brief. This discretion, however, could lead to aggressive lobbying efforts by private organizations to influence a member embroiled in a trade dispute to expressly adopt the organization's arguments.[92] Moreover, private organizations may also turn their energies toward lobbying other WTO members to join in a trade dispute as a third-party participant. As a third-party participant, a member could effectively represent the legal arguments of an organization. Lobbying efforts conducted by private organizations could become burdensome and counterproductive to the point of "clogging" a member's ability to represent national interests before the WTO. On the other hand, although not to minimize its significance, the *Shrimp-Turtles* decision itself does little to affect a private organization's *ability* to lobby either its own national government or that of another member. Cameron simply warns that the *Shrimp-Turtles* decision could accelerate the lobbying process.

Cameron's final warning further points out the dangers of excessive lobbying, not to member governments, but to the WTO panels themselves. The *Shrimp-Turtles* decision permits the direct submission of amicus briefs by an individual or organization to a WTO panel. Even though the panel has the discretion to disregard such arguments, the danger nevertheless exists that WTO panelists could be unduly influenced by these lobbying efforts. Private organizations could, in this way, influence a panel's decision by openly urging a panel to accept its arguments. Although WTO panelists are otherwise shielded from lobbying efforts and are strictly prohibited from ex parte communications, Cameron explains that the "experience in Washington, D.C. suggests . . . that creative and powerful NGOs and

90. *See* Cameron, *supra* note 76, at B5.
91. *Id.*
92. *Id.*

other interest groups could pressure panelists or party and non-party WTO Members by using a variety of tactics, such as public relations campaigns."[93] If the *Shrimp-Turtles* decision leads to excessive lobbying and public relations campaigns on the part of private organizations, the efficiency, transparency and reliability of the WTO system could be compromised.

IV. PRIVATE PARTY ACCESS TO OTHER INTERNATIONAL DISPUTE SETTLEMENT FORA

Since the inception of the GATT, trade dispute settlement between members has reflected the state-to-state nature of the treaty. Liberal theorists of international relations will argue, however, that globalization undermines the utility of state-to-state conflict resolution because the state's interests are increasingly a reflection of the interests of individuals.[94] Both procedural holdings in the *E.U-Bananas* case and the *Shrimp-Turtles* case support these liberal arguments. Specifically, the right of WTO members to seek the representation of private counsel and the right of private organizations to have their voices directly heard by a panel or Appellate Body are convincing examples that international trade dispute settlement mechanisms in the WTO are gravitating away from a historically state-to-state process.

Other international dispute settlement procedures do not hold the same restrictions against individual and private participation. Indeed, other international dispute settlement mechanisms, like those protecting international human rights, were designed for the express purpose of providing access and remedy for individuals and private entities. The International Centre for the Settlement of Investment Disputes (ICSID) and the EU are two international systems that, unlike the WTO, recognize the right of private parties to bring suit against a state or other national entity. Although, for comparative purposes, the structures and procedures of the ICSID and the EU are quite different from those of the WTO, the important consideration in this paper is the degree to which an international system accomplishes its goals. Both the ICSID and the EU are designed to directly apply to the actors operating within their systems. One may argue that the WTO's lack of private access is a non-recognition of important actors operating in its system.

A. The International Centre for the Settlement of Investment Disputes

The availability of dispute settlement procedures for international investment disputes stands in stark contrast to the lack of private access to international trade dispute settlement methods at the WTO. The ICSID, established through the 1965

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93. *Id.*

94. *See* G. Richard Shell, *The Trade Stakeholders Model and Participation by Non-State Parties in the WTO*, 17 U. PA. J. INT'L ECON. L. 359, 367 (1996).

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, is a legal framework that protects and promotes the flow of foreign investment between developed and developing countries.[95] The ICSID also permits private parties to participate with states in settling disputes and making policy. "The ICSID permits private parties, mainly banks, to sue states and obtain binding arbitration awards that the domestic courts of the defendant states are obligated by treaty to enforce."[96] The ICSID's function is best summarized in Bruno's article:

> ICSID is an organization closely associated with the World Bank . . . Like the World Bank, *the paramount objective of ICSID is to promote a climate of mutual confidence between states and investors* . . . [ICSID arbitration] is intended to maintain a careful balance between the interests of investors and those of Contracting States. The Washington Convention gives investors direct access to an international forum and enables investors to provide in an investment agreement that disputes will be decided under rules of international law. In exchange, the Washington Convention protects Contracting States from other forms of foreign international litigation . . . the investor cannot bring suit in a non-ICSID forum whether in the investor's state or elsewhere.[97]

Unlike the WTO, the ICSID is accessible to states and private entities alike. The ICSID's jurisdiction extends to "disputes between a Contracting State and a national of another Contracting State arising directly out of an investment-related agreement, provided both parties have consented in writing to submit such a dispute to the Centre."[98] In requiring consent to achieve jurisdiction, the ICSID does not settle disputes directly; rather, it relies on Conciliation Commissions and arbitration empowered under the Convention.[99]

> In an effort to balance the interests of all parties involved in a dispute settlement procedure and thus to "depoliticize" the settlement of investment disputes, [ICSID] Article 27 suspends the right of Contracting States to exercise diplomatic protection of nationals who have consented to an ICSID arbitration hearing. In addition, ICSID's governing body is an Administrative Council comprised of one representative from each

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95. Bruno, *supra* note 9, at 79.

96. Shell, *supra* note 94, at 372.

97. *See* Bruno, *supra* note 9, at 79–80 (citing Delaume, "ICSID Arbitration," in Lew, Contemporary Problems in International Arbitration, (1986)) (emphasis supplied) (citations omitted).

98. Malcolm Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 103, 109 (1992). "Investment" in the ICSID context has rendered "jurisdiction over a wide range of activities, including construction contracts, licensing, and concession agreements, as well as purely manufacturing activities." *Id.*

99. *Id.* at 107.

> participating state, with each representative entitled to cast one vote on behalf of the state. Because of these equitable safeguards, ICSID has been viewed as a more neutral body than . . . [other dispute settlement entities].[100]

With direct access for individual investors, the ICSID maintains an acceptable middle ground between the conflicting interests of host states and foreign investors, as well as between those of capital exporting and capital importing countries.[101] The ICSID effectively prevents some of the shortcomings of other, more traditional and "outdated" international dispute settlement mechanisms; namely, it prevents diplomatic protection, determination of nationality, and exclusive resort to local remedies.[102] Despite relatively limited utilization, as compared to other dispute resolution systems, the ICSID is considered a tremendous success in the field of improving the flow of international investments as a vehicle for economic development.

Although the ICSID is an autonomous organization, it has close ties with the World Bank.[103] Staffing for the ICSID Secretariat is provided by the World Bank's Legal Department, expenses of the Secretariat are financed out of the World Bank's budget, and the Vice President and General Counsel of the World Bank have consistently been elected to serve as ICSID's Secretary General.[104] "The [World] Bank's overriding consideration in creat[ing] ICSID was the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help to promote increased flows of international investment."[105] Once parties consent to arbitration under the ICSID Convention, neither may unilaterally withdraw its consent.[106] All members of the ICSID Convention must recognize and enforce ICSID arbitral awards.[107]

Thus, the ICSID, with the backing and endorsement of the World Bank, is accessible to private parties and governments alike. As the World Bank has acknowledged, the ICSID was specifically conceived to promote increased flows of international investment to both private foreign investors and governments. Indeed, private investors in the form of individuals and corporations are responsible for a considerable amount of foreign investment. As a forum of international dispute resolution, the ICSID, unlike the WTO, acknowledges all actors operating

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100. *Id.*

101. Bruno, *supra note* 9, at 99.

102. *Id.*

103. *See* The World Bank Group, *About ICSID* (visited Nov. 15, 1999) <http://www.worldbank.org/icsid/about/about.htm>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* To date, the ICSID Convention has been signed by 147 States. *See* The World Bank Group, *ICSID List of Contracting States* (visited Nov. 15, 1999) <http://www.worldbank.org/icsid/constate/c-states-en.htm>.

within its system. The ICSID applies equally to "all parties" who participate in the field of international investment.[108]

B. The European Union

One commentator has noted that "[o]f the existing models of international dispute resolution, clearly the EU's system provides for the most individual involvement."[109] Through the exercise of direct effect, individuals are granted the rights and standing to protect their interests.[110] Another commentator has stated that:

> "The legal order created in the European Treaties established the EU court system, which has significantly influenced the development of European law."[111] "This court system deals with disputes between Member States, between Member States and EU institutions, between the institutions themselves, between individuals and Member States, and between individuals and institutions."[112]

In the EU, private actors have the opportunity to bring their cause of action to an international tribunal, in this case, the European Court of Justice (ECJ). In limited instances, the individual may bring a case directly to the ECJ.[113] Private parties may access the ECJ through the Court of First Instance (CFI) under Article 173(4) of the EU Treaty: "any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision, which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."[114] Direct CFI access for private individuals is limited to actions regarding the implementation of EU regulations and decisions.[115]

A more common route for a case to be brought before the ECJ is by reference from a European national court.[116] "Article 169 of the EU Treaty gives the Commission the sole right to file proceedings regarding the non-, or deficient,

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108. "All parties" refers to the distinction between private and governmental actors. Of course, the ICSID is limited to States and nationals of States that are members of the ICSID Convention.

109. Schneider, *supra* note 20, at 631.

110. "Direct effect" refers to those treaties that give private actors immediate rights and under which no further domestic legislative action is necessary. *Id.* at 595–96 (noting that the rights under the Treaty of Rome are "directly applicable," but that this phrase is the same as "direct effect"). *Id.*

111. The "EU Treaty," affectionately termed the Maastrict Treaty, is the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992); *see also* N. Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT'L & COMP. 1, 10 (1998).

112. *See* Gal-Or, *supra* note 111, at 10 L.R.

113. Schneider, *supra* note 20,at 606–07.

114. EU Treaty, Article 173(4); *see also* Gal-Or, *supra* note 111, at 35.

115. *Id.*

116. Schneider, *supra* note 20, at 607.

implementation of Community law by Member States."[117] "Under Article 170, Member States also have the right to file such proceedings."[118] Both Articles 169 and 170 exclude the private party for purposes of direct litigation and intervention.[119] Under Article 177, however, the private party may be represented by the member State that files a preliminary reference, from its national court, with the ECJ.[120] Parties to an action before a national court, and the member State in which it is situated, *both* have the right to submit written and oral observations to the ECJ independently.[121] Thus, both EU States and individuals participate in the proceedings.

More specific to foreign trade claims, the EU dispute resolution system has been described as a hybrid decision-making process:

> The decision-making process in the EU for the bringing of foreign trade claims is thus not a purely "intergovernmental" negotiation among the respective member states and the European Commission over potentially divergent national and EU interests. Rather, it is a dynamic, ad hoc, hybrid, multi-tiered process in which private interests are deeply implicated. It is multi-tiered because private interests work behind the scenes simultaneously at the national and supranational levels with member state and Commission representatives in order to profit from the removal of foreign trade barriers. It is ad hoc because private businesses coordinate their positions among themselves within, through and between trade associations, and form partnerships with EU public officials, on an ad hoc basis. It is a hybrid because the process is neither purely intergovernmental nor purely private.[122]

Regardless of the particular avenue for private party access, the EU's direct effect enables a private individual to have its case heard by an international tribunal without the aid of national legislation. The EU must provide access for its citizens to challenge EU policies because of its function and aspirations as a European "government." This helps prevent a denial of democracy. In this way, and unlike the WTO, the EU is designed not only to accomplish the goals of its founders, but also to listen to the complaints and interests of the most important actors within any system of governance: private parties and individuals.

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117. N. Gal-Or, *supra* note 111, at 34.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. G. Shaffer, *Mechanisms for the Negotiation of International Trade Claims by Public Authorities on Behalf of Private Enterprises in the European Union*, 92 AM. SOC'Y INT'L L. PROC. 212, 223 (1998).

V. CONCLUSION

In theory, an international system that includes state, corporate, organizational and individual actors and that relies solely on states to bring and enforce the laws of the treaty is an incomplete system. Especially in the context of international trade, where private individuals rather than states are the primary actors, one may recognize the importance of individual access and the irony of WTO dispute resolution. On the whole, however, it is argued that despite its shortcomings, the GATT has been immensely successful in liberalizing international trade since its inception.[123]

Nevertheless, there are many "improvements" that can be made to the GATT/WTO framework so that dispute resolution adequately accomplishes the goals set forth for the treaty. The system is imperfect because of the large gap between state and private interests, as discussed in this paper. The lack of standing for private individuals to bring suit before the WTO means that either there are many potential international trade dispute claims that are never resolved, or private interests in matters already before the WTO are not heard.

Private counsel representation and NGO brief submission acknowledge that WTO Panels and Appellate Bodies are realizing the efficacy of private interests in international trade matters. In the context of private counsel representation, the WTO acknowledges both the sovereignty of member states and the importance of stretching trade representation beyond national boundaries. In the context of NGO brief submissions, the WTO has recognized the value of non-state arguments in trade disputes. The WTO has even permitted NGO brief submission directly to a WTO Panel or Appellate Body. WTO tribunals nevertheless retain the power to accept or reject any or all NGO arguments that are not expressly adopted by a member state.

The WTO changes, with regard to these two issues, hardly improve the ability of private individuals to bring their own international trade disputes before the WTO without the aid of a member State. The resolutions of the two issues in this paper, while significant, do not foretell further changes (other than superficial ones) to private party access to the WTO. Indeed, in their procedural analyses, the tribunals in both the *EU-Bananas* case and the *Shrimp-Turtles* case returned to the force and effect of the GATT. The GATT is expressly a treaty between the Contracting Parties, who are restricted to "governments."[124]

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123. *See* Bruno, *supra* note 9, at 155.

124. *See* GATT, Article XXXII & XXXIII.

Proponents of a liberal trading order[125] maintain that[:]

> [T]he WTO system should be viewed less as an international treaty than as a new world trade "constitution." Under this trade "constitution," these proponents assert that private parties should be granted trading rights so that enterprises may act as "private attorneys general" in order to assure the effectiveness of the WTO rules, just as is the case under the "dormant" commerce clause of the U.S. Constitution and Article 30 of the Treaty of Rome. These commentators contend that WTO rules should have direct legal effect within the national jurisdictions of the WTO's contracting parties so that businesses may enforce them.[126]

Thus, if private parties are to have a voice at the WTO, there must be structural changes to the GATT itself. Perhaps the WTO could permit private parties to litigate trade disputes with other member states in member states' national tribunals. The resolution of such disputes could be appealed directly to a WTO Panel. Such a procedure would not be out of line with the goals of the GATT. This procedure would also not be without many difficult logistical, procedural, and jurisdictional problems. The structure and procedures of ICSID and the EU, while different from the WTO, reflect a pattern that adheres to the purposes and needs of their principal actors. The ICSID, designed to promote the flow of international investment between governments and individuals, directly applies to all states who consent to its jurisdiction and to the individuals governed by those states. Likewise, the EU's system of dispute resolution, designed to enhance the accountability of member states and EU institutions to private individuals, gives states, individuals and institutions a venue for litigation. The WTO/GATT Charter does not, similarly, reflect the interests of its principal actors. Perhaps it should. Although the GATT/WTO has clearly progressed toward departing from a solely state-to-state international dispute resolution mechanism, more structural changes are required before case law can guarantee the right of private parties to have a voice at the WTO.

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125. This is an individual that acknowledges the importance of private individual involvement.
126. Shaffer, *supra* note 122, at 223–24.