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Beyond the Proposals: Public Participation in International Economic Law

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BEYOND THE PROPOSALS: PUBLIC PARTICIPATION IN INTERNATIONAL ECONOMIC LAW

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I. INTRODUCTION

The 1990s saw a flurry of proposals to enhance public participation in international economic law. There were numerous calls to make the Bretton Woods institutions – the World Bank, the International Monetary Fund (“IMF” or “Fund”), and the World Trade Organization (“WTO”) – more transparent and publicly accountable.¹ In

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1. The Bretton Woods Conference of July 1944 foresaw the creation of three international organizations to oversee international economic affairs after World War II. These eventually took shape in the form of the International Bank for Reconstruction and Development (“World Bank”), the International Monetary Fund

part, this was due to new awareness of globalization and the importance of these institutions. It was also due to diminished faith in the ability of governments to represent all points of view, a sentiment which made the traditionally state-centered structure of many organizations, including those of Bretton Woods, appear underinclusive and inadequate.

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

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

On the informal side, the absolute number of activities is impressive. Each of the Bretton Woods institutions conducts a staggering number of missions, visits to headquarters, conferences, and other

(“IMF” or “Fund”), and the *General Agreement on Tariffs and Trade* (“GATT”). GATT came into being in 1948 and is not traditionally considered a Bretton Woods institution, but it is so referred to for ease of reference. In April 1994, the World Trade Organization (“WTO”) succeeded the GATT. See J.H. JACKSON, *THE WORLD TRADING SYSTEM* 27-30 (1989). For a criticism of, and proposals for enhanced participation in, the Bretton Woods institutions see Steve Charnovitz, *Participation of Non-governmental Organizations in the World Trade Organization*, 17 U. PA. J. INT’L ECON. L. 331 (1996) (asserting that the WTO should provide systematic participation rights for NGOs) and G. Richard Shell, *The Trade Stakeholders: Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT’L ECON. L. 359 (1996) (stating that “global economic integration” will force the WTO to become more transparent).

activities designed to promote each institution's agenda.² While in some instances these are mandated,³ in others they are spontaneous. What the numbers do not reveal, however, is the *quality* of these contacts and the degree to which they are able to penetrate deeply into civil society. Anecdotal evidence suggests that, time and again, representatives of these institutions continue to have contact with the same people, principally government and NGO figures.⁴ Hence, the process of consultation often becomes a kind of managed dialogue among elites rather than a forum for authentic popular expression. Some changes are now evident, but in large part the Bretton Woods institutions continue to maintain contact with opinion leaders.

On the formal side, this tendency towards managed conversation appears even more pronounced. The number of public submissions have been small, particularly when measured against the membership of each institution covering most of the world's population. The World Bank Inspection Panel ("Inspection Panel"), the most com-

2. The IMF now estimates that it provides approximately 300 person years of technical assistance to IMF member countries, up from 70 in 1970. The Fund also conducts training courses at centers in Washington, Vienna, Singapore, and other regional and subregional locations. In June 1998, the Fund's Executive Board reviewed its approach to external communications, and in 1999 the Fund opened a new public outreach center and hired external consultants "to offer recommendations for improving ways in which it communicates information about its work to the public." See WORLD BANK, 1998 ANNUAL REPORT 154-55; WORLD BANK, 1999 ANNUAL REPORT 177-79 [hereinafter WORLD BANK 1999]. The 1999 annual report notes that NGO/civil society collaboration on Bank-sponsored projects has increased from 28% during the 1987-1996 period to 52% in 1999. See *id.* at 139.

3. See, e.g., Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Apr. 15 1994, Annex 2, art. V(2); 33 I.L.M. 1144 (stating that the WTO's General Council may consult and work in cooperation with NGOs on matter relating to the WTO's activities); WTO General Council, Guidelines for Arrangements on Relations with Non-governmental Organizations, WT/L/162 (July 23, 1996); Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], WTO Agreement, Apr. 15, 1994, Annex 2, art. 27(3); 33 I.L.M. 1226 (explaining the WTO Secretariat's role in conducting voluntary training courses for Members concerning the WTO's dispute settlement procedures and practices to better inform Members' experts in this regard); see also Articles of Agreement of the International Monetary Fund, art. VIII:5(c) (noting that by acting as a focal point for the compilation and exchange of information, the Fund will help to lay the groundwork for studies designed to assist members in forming policies to further the Fund's purposes).

4. Discussion of author with Sabine Schlemmer-Schulte, Senior Counsel, World Bank, Washington (Feb. 17, 2000).

prehensive system of formal participation examined here, has registered only eighteen complaints against Bank-financed projects to February 2000; in only six instances has the Inspection Panel conducted investigations or quasi-investigations, or kept a matter under review.⁵ The record among the Bank's regional affiliates is even more limited.

The WTO Appellate Body has received only two submissions since its landmark decision on public participation in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*,⁶ rendered in October 1998.⁷ The WTO has yet to adopt a standard oper-

5. See *The Inspection Panel Register* (visited June 9, 2000) <<http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WRegister?openview>> (listing the formal requests and investigations of World Bank financial projects).

6. See *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Appellate Body Ruling*] (holding that that an individual or body could ask a WTO dispute settlement panel for permission to file a statement or a brief). See *id.* para. 107. The Appellate Body also held that a WTO member country could decide to append materials from non-governmental sources in their WTO submissions. See *id.* para. 109.

7. See *Australia – Measures Concerning Importation of Salmon*, WT/DS18/R (June 12, 1998). Two Tasmanian salmon farmers made the submission in compliance proceedings brought by Canada. See *id.* Canada alleged, pursuant to Article 21(5) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, that Australia has failed to comply with findings made by the WTO panel and Appellate Body. See *id.* In *Australia – Measures Concerning Exportation of Salmon* (WT/DS18/RW) (Feb. 18, 2000), the reconvened panel examining Australian compliance under DSU Art.21.5 received a communication from two salmon farmers. The report describes the submission as follows:

On 25 November 1999, the Panel received a letter from “Concerned Fishermen and Processors” in South Australia. The letter addresses the treatment by Australia of, on the one hand, imports of pilchards for use as bait or fish feed and, on the other hand, imports of salmon. The Panel considered the information submitted in the letter as relevant to its procedures and has accepted this information as part of the record. It did so pursuant to the authority granted to the Panel under Article 13.1 of the DSU.

In particular, the Panel observed that the information submitted had a direct bearing on a claim that was already raised by Canada, namely inconsistency in the sense of Art. 5.5 of the WTO *Sanitary and Phytosanitary Agreement* in the treatment by Australia of pilchard versus salmon imports.

In addition, the Appellate Body received submissions from the American Iron and Steel Institute and the Specialty Steel Industry of North America in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*

ating procedure for dealing with submissions of this type. Moreover, if we look at the persons making those submissions, they often comprise well-established NGOs or entities working with them. This implies that there are significant barriers to direct participation by other members of the public in terms of resources, time, and talent.

Obviously, the way in which the foregoing is presented suggests that something is wrong. Maybe it isn't. In the past decade, however, each of the three Bretton Woods institutions have been the subject of what David Ronfeldt and John Arquilla refer to as an "NGO swarm"—the pursuit by "amorphous groups of NGOs, linked online, descending on a target."⁸ The "Fifty Years is Enough" campaign of 1994 first targeted the World Bank. A similar phenomenon took place during the IMF Annual Meeting in April 1998. This "NGO swarm" affected the WTO at its Seattle Ministerial Conference in December 1999. In each instance, NGOs' public criticisms led to institutional soul-searching.

What appears wrong, paradoxically, is that much about these institutions seemed right. In the 1990s two of the three institutions adopted binding systems of dispute settlement; all had committed themselves to decision-making with a "human face;"⁹ and all had embarked on outreach programs, including an electronic presence. Somehow, though, these plans and changes were not enough. I would ascribe this to the fact that the mechanisms of public participation were, and in some important aspects remain, remote. They have forged important links with NGOs, but they have not gone be-

(WT/DS138/AB/R – May 10, 2000). It is observed, however, that "we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision." (para. 42). A brief was submitted by the American Society of Composers, Authors and Publishers (ASCAP) in panel proceedings in *United States—Section 110(5) of the U.S. Copyright Act* (WT/DS160/R – June 15, 2000). However, none of the parties involved decided to appeal the case, so the submission will not be considered by the Appellate Body.

8. See *The Non-governmental Order*, THE ECONOMIST, Dec. 11, 1999, at 21 (mentioning the Rand Corporation study in which Arquilla and Ronfeldt coined the phrase "NGO swarm").

9. See J.H. Weaver & K.M. O'Keefe, *Whither Development Economics?*, 11 SAIS REV. 113, 128-29 (1991) (setting forth the elements of "laissez-faire with a human face," which include (1) orthodox macroeconomic policies, (2) more emphasis on human development and poverty reduction, (3) rural and agricultural transformation, and (4) promoting urban and industrial restructuring).

yond. They have focused on educating public officials, but not the public itself. In short, the Bretton Woods institutions have not appealed to the grassroots of civil society. For example, we do not see the World Bank in television commercials, the WTO on milk cartons, or the IMF in textbooks. We should. Instead, these institutions continue to possess an aura of elitism, one that makes an easy target when the going gets tough.

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

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

This paper reviews efforts to enhance public participation in the three Bretton Woods institutions. The paper makes some recommendations as to how public participation can be enhanced based on common experience and that of other international economic law systems. This is a particularly important task given that the 1990s were an extremely fertile decade for the creation of international economic law institutions, and that many of these new institutions are looking to already established institutions for precedent.¹⁰ For in-

10. See generally *The Proliferation of International Tribunals: Piecing To-*

stance, the new Court of Justice for the Common Market for Eastern and Southern Africa ("COMESA") in Lusaka is self-consciously modeled on the European Court of Justice ("ECJ") in Luxembourg.¹¹ The Court of Justice of the Andean Community in Quito has made similar references in its jurisprudence. Notwithstanding the considerable differences in role and approach, logic would suggest that if we are committed to enhancing public participation, better examples might serve to guide future developments.

II. THE EXPERIENCE OF PUBLIC PARTICIPATION IN INTERNATIONAL ECONOMIC LAW

A. THE WORLD BANK

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

The establishment of the World Bank Inspection Panel in November 1993 is its most notable effort. Ibrahim Shihata has commented that the World Bank created the Inspection Panel "driven by a broader concern that international organizations were not adequately accountable for their activities and by the perception that the Bank, as an important instrument of public policy in areas of international

gether the Puzzle, 31 N.Y.U. J. INT'L L. & POL. 679 (1999) (addressing whether the proliferation of international courts and tribunals is a systemic problem). At least a half-dozen international judicial institutions were established, including the Central American Court of Justice, the dispute settlement system of the WTO, the Courts of the European Free Trade Association and the Common Market for Eastern and Southern Africa, and the Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa. *See id.* In addition, a variety of quasi-judicial bodies came into being including the inspection panels of the World Bank, Inter-American Development Bank, and the Asian Development Bank; the dispute settlement system of the *North American Free Trade Agreement* ("NAFTA") and its side codes; and the United Nations Compensation Commission. *See id.*

11. *See Introduction* (visited June 11, 2000) <<http://www.comesa.int/court/courintr.htm>> (stating that the COMESA Treaty established the Court of Justice of the Common Market for Eastern and Southern Africa modeled along the lines of the European Court of Justice).

concern, needed to be more open and responsive.”¹² The Inspection Panel inspired the creation of similar mechanisms in the Inter-American Development Bank (“IADB”) in August 1994 and the Asian Development Bank (“ADB”) in December 1995. To early 2000, the World Bank Inspection Panel has been the most active, registering complaints against eighteen Bank-sponsored projects, six of which have resulted in an investigation, quasi-investigation, or are under review.¹³ The receptiveness and transparency of its operation could well serve as a model for other institutions.

The purpose of the Bank’s inspection procedure is to provide an independent forum for private citizens who believe that a Bank-sponsored project has harmed or could harm their rights or interests.¹⁴ Although the Inspection Panel is not charged with reviewing the appropriateness of the policies or procedures of the Bank, but merely with ensuring that the Bank observes them, there has been a movement away from focusing on strict compliance with policies and toward harm caused by Bank-financed projects.¹⁵ This suggests a pur-

12. IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL* 9 (2nd ed. 1999).

13. See *Inspection Panel Register*, *supra* note 5 and accompanying text.

14. See *The Inspection Panel for the International Bank for Reconstruction and Development, International Development Association: Operating Procedures as adopted by the Panel on August 19, 1994* [hereinafter *Operating Procedures*], reprinted in SHIHATA, *supra* note 12, at 377 (explaining that the Inspection Panel is available to persons directly and adversely affected by the Bank’s failure, or its failure to require others, to comply with its internal policies after it has been determined that Bank management has failed to address such failure).

15. See *Inspection Panel Operating Procedures* (visited July 18, 2000) <<http://wbIn0018.worldbank.org/IPN/ipnweb.nsf/Wrequest/6FEE885D263E3B518525687E00798832>> (discussing the Inspection Panel’s desire to act as an independent moderator between those “directly and adversely affected” by Bank endeavors); see also *Request for Inspection – Argentina/Paraguay: Yacyretá Hydroelectric Project* (visited July 18, 2000) <<http://wbIn0018.worldbank.org/IPN/ipnweb.nsf/WRequest/6FEE885D263E3B518525687E00798832>> (citing decreased standards of living, health, and economic-well being as the adverse effects suffered by the residents surrounding the Yacyretá reservoir). According to the Request, the Bank allegedly violated the following internal policies and procedures: Environmental Policy for Dam and Reservoir Projects, Environmental Assessment, Involuntary Resettlement, Indigenous Peoples, Wildlands, Supervision, Project Monitoring and Evaluation, Suspension of Disbursements, Cultural Property, Environmental Aspects of Bank Work. See *id.* See also Shihata, *supra* note 12, at 32, n.16.

positive approach by the Inspection Panel to its work that is, at best, an attempt to resolve problems caused by Bank operations. However, the Inspection Panel has no power to declare a Bank policy or procedure invalid.

There are three aspects to the Inspection Panel's jurisdiction: personal (*ratione personae*), subject (*ratione materiae*) and temporal (*ratione temporis*).¹⁶ The Inspection Panel receives inspection requests from an affected party in the territory of the borrowing state, such party's representative, or by an Executive Director of the Bank.¹⁷ Each request must be made by a "community of persons" – a group, association, or other collectivity.¹⁸ A 1996 clarification to Inspection Panel procedures explains that the term "community of persons" means any two or more persons who share some common interests or concerns.¹⁹ Specifically, a request must first allege that the rights or interests of the requesting party have been, or are likely to be, seriously affected by an act or omission on the part of the Bank. Second, a request must allege that the act or omission resulted from the Bank's failure to follow operational policies or procedures pertaining to the design, appraisal, or implementation of a Bank-financed project. Furthermore, a request must meet two temporal requirements. First, it may not be presented before the requesting party has taken measures to bring the issue to the attention of the Bank's management, and the management's response proves unsatisfactory.²⁰ This is the equivalent of an exhaustion of remedies rule. Second, a request may not be presented to the Bank after the loan's closing date or when the Bank has disbursed ninety-five percent or more of the loan.²¹

16. See SHIHATA, *supra* note 12, at 53 (outlining the jurisdictional requirements as set forth in the Resolution establishing the Inspection Panel).

17. See *id.* (discussing the eligibility requirements for inspection requests).

18. See *id.* at 56 (defining "community of persons" as either of an "organization, association, society or other group of individuals").

19. See *Review of the Resolution Establishing the Inspection Panel Clarifications of Certain Aspects of the Resolution* (visited July 18, 2000) <<http://wbln0018.worldbank.org/IPN/ipnweb.nsf/WRelease:ABD7787B03330B66852568D9004CC72E>> (clarifying the definition "community of persons").

20. See SHIHATA, *supra* note 12, at 47-48 (laying out the conditions that must be met before the Inspection Panel reviews a request).

21. See *id.* at 49-50 (quoting paragraph 14(c) of the Resolution establishing the

Despite their apparent formality, the procedure's jurisdictional requirements have been liberally interpreted. A number of reports express the Bank Executive Directors' "hope that the Inspection Panel process will not focus on 'narrow technical grounds' with regard to eligibility."²² Thus in *Argentina/Paraguay-Yacyretá Hydroelectric Project*, a case involving the construction of a power dam and the displacement of inhabitants living in the dam's wake, a signature campaign had been undertaken in the affected area.²³ The Inspection Panel observed with respect to personal jurisdiction that:

The Panel is satisfied that the Request meets the eligibility criteria set out in paragraph 12 of the Resolution and that those signing the Request (i) represent communities that feel negatively affected by the design and implementation of the Yacyretá Project; and (ii) properly authorize Sobrevivencia as their legitimate representative.²⁴

The *ratione temporis* jurisdictional requirement has not been applied stringently either. Thus in *Brazil-Itaparica Resettlement and Irrigation Project*, the fact that the Bank had already disbursed ninety-five percent of the loan should have prohibited the Inspection Panel from considering the request further.²⁵ The Inspection Panel

Inspection Panel).

22. *Argentina/Paraguay Yacyretá Hydroelectric Project (Loan 2883-1 BR)* (November 26, 1996), para. 14 (visited Aug. 11, 2000) <<http://www.worldbank.org/html/ins-panel/Yacyretal22696.htm>>; *Brazil: Itaparica Resettlement and Irrigation Project (Loan 2883-1 BR)* (June 24, 1997), para. 12 (visited Aug. 11, 2000) <<http://www.worldbank.org/html/ins-panel/ITAPARIC.htm>>.

23. See *Request for Inspection – Argentina/Paraguay: Yacyretá Hydroelectric Project*, *supra* note 15 (documenting the request of SOBREVIVENCIA Friends of the Earth – Paraguay for inspection of the Yacyretá project on behalf of individuals living in the affected area).

24. *Bangladesh: Jamuna Bridge Project (Credit 2569-BD)* (November 26, 1996), para. 54 (visited Aug. 11, 2000) <<http://www.worldbank.org/html/ins-panel/ITAPARIC.htm>>. While not meeting this in every aspect, "[t]he fact that 3,000 signed the Request cannot go unnoticed. These people have been left uninformed and out of the design and appraisal stages of the project, including the environmental and re-settlement plans aimed at mitigating adverse effects on people and nature." See *id.*

25. See *Report and Recommendation – Brazil: Itaparica Resettlement and Irrigation Project* (visited July 10, 2000) <<http://www.worldbank.org/html/ins-panel/ITAPARIC.htm>> (disagreeing with Bank management's claim that Requesters lacked eligibility because more than ninety-five percent of the loan proceeds

reasoned, however, that the ninety-five percent threshold was not applicable to the case. A loan supplementing the initial loan existed and, according to the Inspection Panel, "the Executive Directors intended the 95% disbursement figure to be an indicator of completion of the project financed by the loan. In this case, all parties agreed that the project is far from complete. Indeed, less than 50% of the irrigation works are complete."²⁶

The Inspection Panel's procedure is straightforward. It consists of a preliminary review regarding the admissibility of an affected constituency's Request for Inspection.²⁷ The Inspection Panel rejects requests that fail to indicate prior contact with the Bank concerning the issues underlying the complaint; requests submitted by individuals or unauthorized representatives; correspondence not constituting a request; and frivolous, absurd, or anonymous requests.²⁸ Where the request is likely admissible, the Inspection Panel should notify the Bank's management and allow it twenty-one days to state whether it has complied or intends to comply with applicable policies and procedures.²⁹ In addition, the Inspection Panel can request further clarification from the Bank's management or the requester.³⁰

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

(1) failure on the part of management to comply has caused or threatens to cause, a material adverse effect;

had already been disbursed).

26. *Id.*

27. *See* Operating Procedures, *supra* note 14, at 378 (explaining the Inspection Panel's first procedure pursuant to receiving a request for inspection).

28. *See id.* at 379 (limiting the types of requests that are within the Inspection Panel's mandate).

29. *See id.* at 385 (setting forth the procedures for notifying Bank management and providing it an opportunity to respond).

30. *See id.* at 383 (stating, "if the [Inspection Panel] finds the contents of the Request or documentation on representation insufficient, he/she may ask the Requester to supply further information."). The Inspection Panel may request additional information from either the requester or management for the purposes of making a more informed recommendation. *See id.* at 385.

- (2) the alleged violations are of a serious character; and,
- (3) the remedial action proposed by management is inadequate."³¹

The Inspection Panel then proceeds on the basis of the request, management reaction, and its own conclusions to decide whether it will recommend an investigation to the Bank's Board of Executive Directors.³² Actual recommendations issuing from investigations have ranged from no action to abandonment of the particular project.

During the Inspection Panel process, there are a number of ways in which the public can participate, and here the record is particularly strong. Articles 50 and 51 of the Inspection Panel's operating procedures indicate that "any member of the public may provide the Inspector(s), either directly or through the Executive Secretary, with supplemental information that they believe is relevant to evaluating the request."³³ The Inspection Panel can also ask affected persons, government officials, or NGO representatives to attend meetings and make submissions. Any member of the public can provide the Inspection Panel or inspector with a written document not exceeding ten pages (including summaries and appended supporting documents).³⁴ The Inspection Panel mandates consultations with all interested parties.

The World Bank Inspection Panel process also benefits from the maintenance of an accurate electronic register, which provides a transparent record of each event in a given case. This is important. The global public is therefore not only treated to the final result but to the process as it evolves. The Bank has also posted suggested formats for Inspection Requests on its website, together with a considerable amount of background documentation such as press releases, past inspection requests, panel reports, and comments by the Bank's Executive Directors. All of these sources serve a "channeling function" in that they help to ensure that public input is received in a use-

31. *See id.* at 387 (determining whether management's conduct meets the specified criteria for initiating an investigation).

32. *See* Operating Procedures, *supra* note 14, at 388 (discussing the means by which the Inspection undertakes an investigation).

33. *Id.* at 390-91.

34. *See id.* (permitting requesters and the public to provide information used by the Inspection Panel to make its finding).

ful form. In a real sense, the public is encouraged to participate.

Even with this admirably inclusive system, however, there remain some surprising oversights. The oldest reports are apparently no longer available, at least not on the Internet. Moreover, there is no overt access. Information about the Inspection Panel remains buried in the World Bank website. Someone would have to know about the Inspection Panel in order to be able to access it. The degree to which—to use a Bank-inspired terminology—Project Affected Persons are informed of their recourse beyond this is difficult to determine. This situation presents the possibility of a “chicken-and-egg” scenario in which one is obliged to know about the Inspection Panel before accessing it.

It would be interesting to study how first knowledge of the Inspection Panel came up in the eighteen requests registered to date. The involvement of the same NGOs in several different requests suggests that the Inspection Panel process has evolved into the preserve of NGOs working closely with the Bank. Again, this is not meant to imply that anything negative is happening, only that the range of real participants is small and runs the risk of leading to a kind of “group think” about the process. Moreover, it is difficult to tell if public groups actually spend a long time trying to get the institution’s attention before “stumbling upon” the Inspection Panel. Details in one case suggest that this may occasionally happen,³⁵ correcting the impression that Inspection Panel is truly accessible. It would be interesting to examine which frivolous or irrelevant claims have been turned away under the Bank’s screening procedures.

The other cause for concern is the small number of Inspection Requests seen to date. In any given year, the World Bank has hundreds of projects underway and disburses billions of dollars in related financing.³⁶ At the risk of appearing to look for trouble where there

35. See *Report and Recommendation on Request for Inspection: India Ecodevelopment Project Rajiv Gandhi (Nagarahole) National Park* (visited July 18, 2000) <http://www.worldbank.org/html/inspanel/Ecodevelopment_Report_recom.html> (stating that the Requesters brought their claim to the World Bank’s attention for the first time in 1994, and again in 1996, and were essentially ignored until this report in 1998).

36. See WORLD BANK 1999, *supra* note 2, at 139 (indicating that 241 projects were approved by the Board in 1997, 286 in 1998, and 299 in 1999).

may be none, one would expect more problems and more responses in a system that is truly transparent and functioning. The current situation suggests that, at a minimum, there is a substantial need for better knowledge of the Inspection Panel system.

As previously mentioned, the IADB and ADB have established parallel systems of inspection. While these are broadly similar to the World Bank Inspection process, they are comparatively little used. In the case of the IADB, only one complaint has been registered to date, a companion case to one launched in the World Bank.³⁷ It remains to be seen how this mechanism will be used. Information indicates that the IADB's management is considering the introduction of modifications to the Mechanism.³⁸ There have been no complaints and no reports registered under the ADB's scheme thus far.³⁹ Again, the low usage, in the context of two institutions operating in dozens of countries and disbursing billions of dollars in project-related financing, suggests that affected persons know and understand little about these mechanisms.

B. THE INTERNATIONAL MONETARY FUND

The IMF is an organization of 182 member countries established in 1946 to promote international monetary cooperation.⁴⁰ Its main activities are the maintenance of exchange rate stability, promotion of economic growth, and temporary financial assistance for countries facing balance of payments problems.⁴¹ Over time, there has been

37. See *Independent Investigation Mechanism* (visited July 18, 2000) <<http://www.iadb.org/cont/poli/indep.htm>> (providing an overview of the IADB's Independent Investigation Mechanism ("IADB Mechanism"), which the IADB established on terms similar to that of the World Bank). The principal difference between the two is that the IADB Mechanism lacks a standing panel. See *id.* Instead, the IADB maintains a roster of panelists. See *id.*

38. See MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 313 (P. Sands ed., 1999) (on file with the author).

39. See *ADB's Inspection Policy: A Guidebook* (visited July 18, 2000) <<http://www.adb.org/documents/guidelines/inspection/default.asp>> (outlining the procedures for filing a complaint with the ADB's inspection committee).

40. See David D. Driscoll, *What is the International Monetary Fund?* (visited July 19, 2000) <<http://www.imf.org/external/pubs/ft/exrp/what.htm>> (discussing the Fund's origin, structure, and function).

41. See *id.*

criticism of the Fund's operations, particularly with respect to the Fund's conditionality and lack of transparency.⁴² The Fund does not maintain any system of formal dispute settlement. Instead, the IMF's twenty-four Executive Directors determine the course of Fund operations.⁴³

Criticism came to a head following the Asian financial crisis of late 1997 and the resulting financial contagion in other parts of the world. The Fund's Annual Meeting in April 1998 was a stormy one and the Fund has since undertaken a number of reforms, collectively referred to as the New Global Financial Architecture ("NGFA"). Despite the fact that it may not be as far-reaching as originally foreseen, the NGFA continues to move along the following five parallel tracks.⁴⁴

- (1) transparency, standards, and surveillance,
- (2) strengthening financial systems,
- (3) orderly integration of international financial markets,
- (4) involving the private sector in the prevention and resolution of financial crises and,
- (5) systemic improvements.⁴⁵

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

Improving transparency within the Fund takes several forms. The Fund has, for example, undertaken to make available more information on IMF surveillance of countries through the release of Public Information Notices ("PINS") following consultations. The release

42. See Martin Crutsinger, *IMF Plans New Debt Relief, Reforms*, CHATTANOOGA TIMES AND FREE PRESS, Sept. 27, 1999, available in LEXIS, News Library, News Group File (noting that the IMF's pledge to quicken reforms is due in part to growing criticism of its operations following the Russian corruption scandal).

43. See Driscoll, *supra* note 40.

44. See *id.*

45. *A Guide to Progress in Strengthening the Architecture of the International Financial System* (modified Apr. 28, 1999) <<http://www.imf.org/external/np/exr/facts/arch.htm>> (on file with *American University International Law Review*) [hereinafter *Guide to Progress*].

of such notices takes place pursuant to Article IV of the Fund's Articles of Agreement.⁴⁶ Article IV requires member countries to provide information necessary for exchange rate surveillance and to "consult with [the Fund] on the Member's exchange rate policies."⁴⁷ In addition, the Fund has given countries the option of permitting the voluntary release of Article IV staff reports. The Fund is also attempting to make available more information on countries' IMF-supported economic reform programs. This involves actively encouraging members to publicly release the all-important Letters of Intent ("LOI"s) and Policy Framework Papers ("PFP"s) that they conclude with the Fund. In March/April 1999, the IMF Board agreed on a "strong presumption" that LOIs and PFPs would be made public, and to proceed with the release of the IMF Chairman's periodic comments on the Use of Fund Resources ("UFR"s).⁴⁸ Finally, the Fund is to make available more information about IMF analyses of policy issues.

With respect to private sector involvement, two programs should be mentioned. The first is the Fund's effort to increase public participation in the Heavily Indebted Poor Countries Initiative ("HIPC"). The initiative has involved the World Bank and other international institutions, as well as the interested public, in attempting to strengthen the current framework for debt relief and in exploring the relationship between debt relief, social policies, and poverty reduction.⁴⁹ An enhancement of the consultative process began in February 1999. The second initiative is a proposal to make available more information from the private sector in cooperation with the Basle

46. See *Articles of Agreement of the International Monetary Fund* (visited July 19, 2000) <<http://www.imf.org/external/pubs/ft/aa/aa04.htm>> (setting forth the obligations of IMF members with respect to exchange agreements and surveillance over them, par values, and separate currencies for member states).

47. *Id.*

48. See *Report of the External Evaluators on the IMF's Research Activities* (visited July 19, 2000) <<http://www.imf.org/external/pubs/ft/extev/res/part3.pdf>> (stating that one benefit of the "strong presumption" in favor of the IMF's publication of policy papers is that "the staff's work benefits from being subject to public scrutiny").

49. See *The HIPC Debt Initiative* <<http://www.worldbank.org/hipc/about/hipcbr/hipcbr.htm>> (commenting that the HIPC's aim is to reduce the external debt of the poorest nations, and discussing the role of bilateral and multilateral creditors in this initiative).

Committee on Banking Supervision and several related international groups dealing with banking, financial regulation, and insurance.⁵⁰

Much of the motivation for these initiatives comes from a realization that the private sector constitutes a potentially valuable source of indirect information on what is happening in international financial markets. If government information supplied to the Fund is not always accurate, the market can be another source of intelligence. At the time of Asian and Russian financial crises, in particular, there was the distinct impression that some of the problem could have been averted had private markets been tracked more closely.⁵¹ Therefore, in order to improve market surveillance, the Fund's staff has strengthened high frequency contacts with the private sector to monitor developments in capital flows and market positions. Furthermore, the Inter-Agency Task Force on Finance Statistics ("IATF") has developed an electronic presentation of creditor-side data in conjunction with the World Bank, IMF, BIS, and the OECD.⁵²

Because of its close association with the sensitive area of sovereign debt, the Fund faces a unique challenge in enhancing public participation in its work. On the one hand, the IMF is seeking to expand the private sector's involvement in providing information that may help to prevent and resolve financial crises. On the other, it must remain conscious of its role as a lender to governments, with often-privileged information and access to government borrowers. In this sense, the flow of information foreseen may often be uni-directional, with little benefit for market players and, therefore, little incentive for them to cooperate.⁵³

50. See *Guide to Progress*, *supra* note 45.

51. See *id.*

52. See *OECD News Release: Joint BIS-IMF-OECD-World Bank Statistics on External Debt* (visited July 22, 2000) <<http://www.oecdwash.org/PRESS/PRESRELS/1999/news99025.htm>> (commenting that the objective of the Inter-Agency Task Force on Finance Statistics "is to facilitate access to a single set of data bringing together information on components of countries' external debt that is currently compiled and published separately by the contributing institutions")

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

C. THE WORLD TRADE ORGANIZATION

The WTO was created in April 1994 as a successor to the *General Agreement on Tariffs and Trade* ("GATT") at a time of rapidly emerging aspirations for public participation in international law. The fact that NGOs could not be directly involved in the work of the WTO or its meetings was contentious from the beginning. The fact that the new organization featured a system of binding dispute settlement and sanctions for non-compliance made NGOs and other members of the public anxious to become more involved. The sense of exclusion was sharpened by the fact that WTO dispute settlement can involve many issues apart from trade. NGOs often considered that they could play a useful role in informing the process on these points.

WTO dispute settlement normally consists of a sequence of consultations between member countries, hearings before panels, and appeals before the WTO Appellate Body. The process is conducted according to rules set out in the *WTO Dispute Settlement Understanding* ("DSU"), part of the *WTO Agreement*.⁵⁴ If a panel or the Appellate Body concludes that an infringement has occurred, DSU Article 19 requires that the Appellate Body recommend the country concerned brings its laws "into conformity" with the *WTO Agreement*.⁵⁵ Most often the WTO has interpreted this to require offending countries to withdraw or modify the infringing measure. Alternatively, countries may agree to voluntary compensation in the form of tariff concessions or, as a last resort, they may seek permission to suspend trade concessions in retaliation.⁵⁶ As of January 2000, the great majority of cases had been satisfactorily resolved. The WTO

54. See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, arts. 3(2), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 404 (1994), 33 I.L.M. 1125 (setting forth the procedures for adjudicating and administering remedies within the WTO system).

55. See *id.* art. 19(1) (recommending compliance with a WTO panel or Appellate Body decision).

56. See *id.* art. 22(1) (providing that although countries may voluntarily request compensation or suspension of concessions, the dispute settlement body prefers full implementation of their recommendations in order to bring measures into conformity with the covered agreements).

has only authorized retaliation three times in two matters.”

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

Some change came about in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.⁵⁸ This dispute between the United States, India, Malaysia, Pakistan, and Thailand centered around a provision of the U.S. *Endangered Species Act*,⁵⁹ which prohibited the United States’ importation of shrimp from countries not certified “turtle-friendly” by the U.S. State Department.⁶⁰ In the course of proceedings before the panel in July 1997, two U.S.-based NGOs, the Center for Marine Conservation and the Center for International Environmental Law, submitted a brief to the dispute resolution panel detailing significant information related to the six turtle species in issue. The panel rejected consideration of the information, ruling that “accepting non-requested information from non-governmental sources would be . . . incompatible with the DSU as

57. See *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) (upholding a prior panel’s ruling that the European Union’s import restrictions on bananas violated provisions of the GATT and the General Agreement on Trade in Services); *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R (Jan. 16, 1998) (concluding that the European Union’s import restrictions on meat and meat products derived from cattle to which hormones had been administered violated provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures).

58. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter *Shrimp Panel Decision*].

59. See Act of Nov. 21, 1989, P.L. 101-162, Title IV, § 609, 103 Stat. 1037 (to be codified at 16 U.S.C. § 1537).

60. Non-governmental organizations attempted to independently participate in the *Shrimp Panel Decision* at the panel level, but this was rejected and the point was not appealed.

currently applied.”⁶¹ It indicated, however, that the United States was free to append the brief to its own submission.

The United States did so and appealed the point before the Appellate Body. The Appellate Body then faced two issues:

(1) the admissibility of non-governmental materials submitted independently to panels; and

(2) the inclusion of non-governmental materials in government submissions.⁶²

The Appellate Body's interpretation turned on three considerations. First, there was the language of DSU Article 13(1), which states that a panel has “the right to seek information and technical advice from any individual or body which it deems appropriate.”⁶³ Likewise, the Appellate Body stated, “a panel has the discretionary authority either to accept and consider or reject information and advice submitted to it, whether requested by a panel or not.”⁶⁴ Second, the Appellate Body observed that DSU Article 12.1 authorizes departures from DSU procedures and that both the Article 12 and 13 powers allow a panel to discharge its duties under DSU Article 11 to make “an objective assessment of the matter.”⁶⁵ The Appellate Body therefore concluded that the word “seek” in Article 13(1) should be read liberally, allowing NGOs to submit briefs with prior permission, and indicated that where material is received, consultation with the parties should take place.⁶⁶

The reaction to this decision was mixed. NGOs and a number of supportive Western governments hailed it. Other countries, including the plaintiffs in the *Shrimp* case opposed the decision, arguing that it impermissibly altered their rights and obligations under the *WTO*

61. *Shrimp Panel Decision*, *supra* note 58, para. 7.8.

62. *See Shrimp Appellate Body Ruling*, *supra* note 6, para. 187(a) (addressing the issue of whether “accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied”).

63. *Id.*, para. 102.

64. *Id.*, para. 108.

65. *Id.*, para. 106.

66. *See id.*, para. 187(a) (finding that accepting unsolicited information from NGOs is not incompatible with the DSU).

Agreement. They have sought a review of the ruling's propriety in the context of ongoing DSU review.

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

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

III. CONCLUSIONS AND RECOMMENDATIONS

The conclusion must be that in this new era of enhanced participation there remain significant barriers to genuine public participation in the institutions of international economic law. These threaten their

legitimacy. What follows are a series of conclusions and recommendations to further enhance informal and formal participation, and to assist these institutions in building support among a broader global constituency.

1. With respect to *informal participation*:

Each of these institutions must constantly be on the lookout for opportunities to build new constituencies while maintaining existing ones. This will be difficult due to resource constraints, but each of these institutions must begin to reach beyond traditional networks of NGOs and build support at the grassroots level.

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

2. With respect to *formal participation*:

The central problem appears to be a clash between what the legalization of international relations suggests to the public, with its broad notions of openness, access to proceedings, and the ability to meaningfully participate by way of intervention, versus the reality of the system so far developed, which is limited, hard to learn about, and provides no real possibility to challenge the central tenets of the system. International dispute settlement is very different from comparable domestic models, legal though it may be. It is this dissonance of perception that is the most frustrating for members of the public and is undoubtedly the optic through which they see efforts at public participation thus far, halting, slow and fundamentally inadequate. For this reason, I would recommend a number of improvements:

(a) At the *pre-hearing stage*, there is limited – and in many cases no – access to pleadings. Consciousness of what disputes are really about remains almost exclusively a state-to-state affair, supplemented in a few cases by a few, well-connected NGOs who may have some involvement in initiating the claims or access to bureaucratic channels. Members of the public are forced to rely on press releases and whatever is made available electronically, which is often interstitial and coherent only to insiders. Certain proceedings,

such as those under the North American Free Trade Agreement, Ch. 11, are *de facto* entirely secret.⁶⁷ It is impossible to find out anything about them unless, again, one has access to the relevant channels or is a direct participant.

(b) At the *hearing stage*, there is rarely public access to the hearings. The proceedings take place behind closed doors, well away from public scrutiny. We do not know what is said. We do not know how the panelists reacted. In short, this does not improve confidence in this new international judiciary, leaving the impression of Star Chamber-type proceedings;

(c) At the *hearing stage* as well, no transcripts are made available, and there is therefore no accountability. No questions can be asked. No errors can be pointed out. The systems that have been created do not instill faith that true justice is being done.

Among those systems with dispute settlement on mandated timelines, such as the WTO, there is no indication of a case's progress in the *post-hearing stage*. The public is left entirely uninformed of the progress of a case, or when a final decision can be expected, reinforcing the public's sense that they are merely bystanders in the process.

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

67. See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., Annex 1137.4, 32 I.L.M. 605 (stating, "[w]here Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public"). The NAFTA countries have agreed to varying rules for each with respect to the publication of awards; no NAFTA country has yet made awards public. See *id.* Cf. International Centre for the Settlement of Investment Disputes Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Ch. 1, Rule 15, available at <<http://www.epms.nl/arbit/icsid.htm>> (noting, "[t]he deliberations of the Tribunals shall take place in private and remain secret."). See generally Donald S. Macdonald, *Chapter 11 of NAFTA: What Are the Implications for Sovereignty?* 24 CAN.-U.S. L.J. 281, 287, n.16 (1998) (discussing the secrecy element of NAFTA proceedings in the context of the *Ethyl* case).

(i) A visible contact point. With respect to formal participation, for instance, no institution surveyed here has any mention of this at its Internet portal. This situation leads to a “chicken-and-egg” scenario: you need to know about the mechanism to search for it. There should be mention of opportunities for involvement on the first page of its website, and a specific office, project or person should be made the contact point. Instructions to send a request or submission to “the chair of the panel” are insufficient when one does not know whether a panel has been established.

(ii) An accessible register. This should contain more than a skeletal outline of the case. Ideally, it should be set in a chronological order, and updated every time a principal step takes place, as now appears to be the case with the World Bank Inspection Panel. Those responsible for information design should consider posting institutionally mandated deadlines as an external reference point as an added discipline on the system. Thus, for example, where a WTO panel has four and a half months to complete its deliberations and render a report in a case involving prohibited subsidies, that date should be posted *ex ante* completion of the report and visible for all to see whether the panel has met its mandate. Where it has not, an explanation should be available.

(iii) A public dossier. As in domestic procedures, documents should be presumptively public, available *prior* to the process.

(d) *Public hearings*. The very center of the proceedings must be public and, in all but exceptional circumstances, publicized. This now happens within the ICJ. Consideration should be given to other means of making access to hearings available, through transcripts of the proceedings.

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

(a) Each of these institutions must review opportunities to build new links with civil society. For instance, regular town hall-type meetings could be organized akin to the Joint Public Advisory Committee scheme in place under the *North American Agreement on Environmental Cooperation*.⁶⁸ Employees of these institutions could

68. See North American Agreement on Environmental Cooperation, Sep. 9, 1993, U.S.-Can.-Mex., art. 16, 32 I.L.M. 1480 (providing advice on matters within the scope of the agreement as well as providing relevant technical, scientific, or

combine official work with opportunities to explain programs and receive input in civil society. Consideration could even be given to accepting private donations, akin to those contributed by Ted Turner to the United Nations, in order to build an independent financial base for certain activities. For instance, more internships could be offered.

(b) Each of these institutions must seek greater public visibility. Often, visibility is considered negatively by these institutions. This has to change. The institutions must realize that it is with visibility that they become relevant and indispensable to the broader public. One means of doing this would be to advertise more.

(c) Each of these institutions must review past work, collection, and disseminate follow-up. This is important, and perhaps more important than is often realized. What has happened in a case after the formal close of proceedings is rarely tracked and publicized. All institutions of international law should be doing a better job of this. In the case of the WTO, for instance, national reports made to the DSB on compliance should be made available and under WTO de-restriction procedures are, but the opaqueness of the existing WTO Internet search engine makes follow-up very difficult to determine. There is no central repository for the achievements of these institutions. In certain instances results can be determined by examining annual reports, but even this information is interstitial. One has to have the time and patience to go back and assemble it. Hence, no idea remains of the considerable work performed to date, and ultimately, the value of these institutions in context.

This last suggestion is perhaps symptomatic of a larger problem in modern society, that we are intensely forward-looking. When a problem occurs, there is nothing to fall back on. Those who speak for these institutions are poorly equipped to defend them, and we therefore have the awkward situation of international organizations that are scorned, without appreciation for what they have accomplished. This leads to a second point, and that is that we live in an age of accountability which is also an age of intense competition for our attention. We must be vigilant to constantly remind the global public of the importance of these institutions, both through possibilities for

their participation and through campaigns of heightened visibility.⁶⁹ I would suggest outreach, advertising and the need for dialogue, not only with well-informed NGO's, but with wider constituencies of the global general public.

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

69. See Robert D. Hayton, *The Matter of Public Participation*, 33 NAT. RESOURCES J. 275, 275-281 (1993) (discussing whether the public participation process is adequate between two North American bi-national water resources commissions).