EXPANDING DEMOCRACY: WHY AUSTRALIA SHOULD NEGOTIATE FOR OPEN AND TRANSPARENT DISPUTE SETTLEMENT IN ITS FREE TRADE AGREEMENTS

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[State-to-state dispute settlement mechanisms are included in all bilateral free trade agreements ('FTAs'). A large percentage of these mechanisms are very closely modelled on the World Trade Organization's dispute settlement system, in which dispute settlement procedures remain largely insulated from public scrutiny. In this sense, the WTO model of dispute settlement is a 'closed' model. By contrast, some countries, such as the United States, endorse an 'open' model of dispute settlement that promotes transparency and non-governmental involvement in trade disputes. Australia is presently negotiating FTAs with the Association of Southeast Asian Nations, China, Malaysia and the United Arab Emirates, but has yet to formulate a policy on the important issue of whether to favour open or closed dispute settlement — it endorses the closed model in its FTA with Singapore, while endorsing the open model in its FTA with the US. This commentary argues that Australia should, as a matter of policy, negotiate for an open model of dispute settlement in its future FTAs. Firstly, even though the WTO relies on a closed model of dispute settlement, WTO Appellate Body interpretations have slowly changed the nature of the system to embrace greater openness, and recent WTO activities indicate that amendments will further open the system in the near future. Secondly, the 'open' model of dispute settlement is consistent with both Australia's foreign policy and its national interest. Even if ASEAN and other potential FTA partners oppose the open model, that barrier does not appear to be insurmountable: Singapore, a leading member of ASEAN, has recently endorsed the open model in its FTA with the US, indicating that it does not have an intractable objection to public proceedings or non-governmental involvement. Other ASEAN states may also be willing to consider an open model and to discuss the issue in their dealings with Australia. If they are not, it is still in Australia's policy interests to promote, even if only symbolically, a commitment to democratic and open dispute settlement systems in all of its FTAs.]

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I INTRODUCTION

Australia is presently negotiating, as a bloc with New Zealand, a free trade agreement ('FTA')[1] with the Association of Southeast Asian Nations ('ASEAN').[2] Australia has also begun FTA negotiations with China, Malaysia and the United Arab Emirates, and is conducting a feasibility study on the possibility of a future FTA with Japan.[3] This is against the background of recently concluded FTAs with the United States,[4] Singapore[5] and Thailand,[6] as well as the longstanding *Australia–New Zealand Closer Economic Relations Trade Agreement* ('*ANZCERTA*').[7] The Australian Government is thus, by its

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[1] Bryan Mercurio has defined the term FTA as

> an agreement between two nations, or amongst groups of nations, aimed at a policy of non-intervention by the state in trade between their nations. Tariffs and non-tariff barriers to trade are removed or lowered, whilst each country maintains its own commercial policy towards countries that are not part of the FTA. The key feature of an FTA is its discrimination in favour of the interests of the members of the agreement resulting in businesses in the member countries securing preferred access to the markets of other members over business from non-members. … [M]odern FTAs rarely lower or remove barriers on all goods and services, and members can often still use protections, such as anti-dumping actions, against the other members. In contrast, a customs union is an FTA in which members apply a common external tariff on goods imported from non-member countries. However, even members of the European Union customs union can use competition policies to restrict trade from other members, and certain sectors, most notably agriculture, are excluded from its ambit.

Bryan Mercurio, 'Should Australia Continue Negotiating Bilateral Free Trade Agreements? A Practical Analysis' (2004) 27 *University of New South Wales Law Journal* 667, 667 (fn 2).

[2] ASEAN is comprised of Brunei Darussalam, Burma, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam. For information on the Australia–ASEAN–New Zealand FTA, see Department of Foreign Affairs and Trade ('DFAT'), *The Australia–ASEAN–New Zealand Free Trade Agreement: Background* (2005) <http://www.dfat.gov.au/trade/fta/asean/index.html> at 1 October 2005.

[3] For information on the FTA negotiations with China, Malaysia and the United Arab Emirates, see DFAT, *Australia–China Free Trade Agreement Negotiations* (2005) <http://www.dfat.gov.au/geo/china/fta> at 1 October 2005; DFAT, *Australia–Malaysia Free Trade Agreement Negotiations* (2005) <http://www.dfat.gov.au/geo/malaysia/fta/index.html> at 1 October 2005; DFAT, *Australia–United Arab Emirates Free Trade Agreement* (2005) <http://www.dfat.gov.au/geo/uae/fta/index.html> at 1 October 2005. For information on the 'Australia–Japan Feasibility Study into an Australia–Japan FTA', see DFAT, *Japan* (2005) <http://www.dfat.gov.au/geo/japan/fta/index.html> at 1 October 2005.

[4] *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('*AUSFTA*'). For more information on the *AUSFTA*, see DFAT, *Australia–United States Free Trade Agreement* (2005) <http://www.dfat.gov.au/trade/negotiations/us.html> at 1 October 2005; Office of the US Trade Representative, *Australia FTA* (2005) <http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Section_Index.html> at 1 October 2005.

[5] *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) ('*SAFTA*'). For more information on the *SAFTA*, see DFAT, *Singapore–Australia Free Trade Agreement* (2005) <http://www.dfat.gov.au/trade/negotiations/australia_singapore_agreement.html> at 1 October 2005.

[6] *Australia–Thailand Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) ('*ATFTA*'). For more information on the *ATFTA*, see DFAT, *Thailand–Australia Free Trade Agreement* (2005) <http://www.dfat.gov.au/trade/negotiations/aust-thai/> at 1 October 2005.

[7] Signed 28 March 1983, [1983] ATS 2 (entered into force 1 January 1983). For more information on *ANZCERTA*, see DFAT, *Closer Economic Relations* (2005) <http://www.dfat.gov.au/geo/new_zealand/anz_cer/anz_cer.html> at 1 October 2005.

own admission, committed to a dual-stream approach of using both multilateral and bilateral or regional agreements to further its international trade policy.[8]

The Government's approach is not without merit. Bryan Mercurio has argued elsewhere that bilateral FTAs are capable of

> further[ing] the agenda beyond what can be accomplished multilaterally (whether in the form of increased trade liberalisation, market access or environmental protection, etc) and, perhaps more importantly, … avoid[ing] [Australian] exports being outpriced and effectively excluded from markets.[9]

Until recently, however, Australia has focused its attention on multilateral trade negotiations. Thus, while more than 200 FTAs have become operational globally over the past 50 years, Australia's participation in these agreements has been minimal. In fact, prior to 2003, Australia had signed only one agreement — the *ANZCERTA*. As a result of this relative inactivity on the bilateral front, Australia is now facing discrimination in many key markets and the benefits of new and proposed agreements will be both economically and politically significant.[10]

While debate has raged in the media and among commentators over whether Australia should negotiate FTAs at all,[11] the larger, more important question of what to include within the FTAs Australia is choosing to pursue has been largely ignored. This commentary reminds readers that significant policy decisions regarding what to include or intentionally exclude from FTAs have obvious long-term effects and outcomes. There are, for example, questions as to whether to include investor–state dispute mechanisms[12] or labour and environmental provisions.[13] This article is concerned with only one of the policy choices that

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8 DFAT, *Australia–ASEAN–New Zealand Free Trade Agreement: Background*, above n 2. In the section of this document entitled 'FTAs and Australia's Trade Policy Priorities', DFAT states that 'Australia is committed to negotiating FTAs which are consistent with WTO rules': at 5.

9 Mercurio, 'Should Australia Continue Negotiating Bilateral Free Trade Agreements?', above n 1, 670.

10 However, as Mercurio notes,

> the promise of FTAs must be tempered with a degree of caution. There is little doubt that multilateral agreements negotiated in the WTO should be the preferred instruments for liberalising international trade. Such agreements ensure a non-discriminatory approach with mutual benefits for all members, reduce trade distortions worldwide and simplify the administration of international business transactions. Therefore, FTAs are used to complement, rather than replace, the multilateral trading system: ibid 676.

11 See, eg, Mark Davis, 'Bilateral Thinking's Rise from the Ashes of WTO Firefights', *Australian Financial Review* (Sydney, Australia), 6 January 2005, 44; Stephen Grenville, 'More to FTA than Meets the Eye', *Australian Financial Review* (Sydney, Australia), 8 November 2004, 23; Tim Colebatch, 'All Talk, No Action at FTA Meeting', *The Age* (Melbourne, Australia), 19 August 2005, 3.

12 Chiam notes that *SAFTA* ch 8 creates an investor–state dispute mechanism and contrasts this with *AUSFTA* ch 11, which contains no right of direct investor action: see Madelaine Chiam, 'That's Freedom: Australia and Free Trade Agreements' (Law and Policy Paper No 25, Centre for International and Public Law, The Australian National University, 2004) 13.

13 Cf the clear position of the US — as a result of legislation giving the President the power to negotiate trade agreements, these agreements must include sections on certain subjects, including labour standards and environmental protection: see *Bipartisan Trade Promotion Authority Act of 2002*, 19 USC § 3802(b)(11) (2004).

Australia will have to make in relation to FTAs — the type of state-to-state dispute mechanism Australia should endorse.

This commentary will first explain the two policy choices on offer for state-to-state dispute settlement — the prevailing 'closed' model, and the 'open' model advocated principally by the US. To illustrate the differences between the two models, Part II highlights the differing policy options contained in the *Australia–United States Free Trade Agreement* ('*AUSFTA*') and the *Singapore–Australia Free Trade Agreement* ('*SAFTA*'). Part III then notes that the FTA negotiations with ASEAN provide an opportunity to settle this policy issue, before suggesting the two most persuasive reasons why Australia should choose to promote the open model of dispute settlement in its trade negotiations: firstly, developments in the nature of dispute settlement in the World Trade Organization; and secondly, Australia's national interest and consistency with foreign policy goals.

It must be recognised at the outset that Australia, as a middle-tier trading nation, may not always have the economic and political clout needed to *demand* the inclusion of an open dispute settlement mechanism in its FTAs. As realists, we understand that it may well not be possible to secure open dispute settlement mechanisms in all cases.[14] However, it is nevertheless important for Australia to formulate a policy on the issue and negotiate accordingly.

II MODELS OF DISPUTE SETTLEMENT

State-to-state dispute settlement mechanisms are included in all FTAs as the final method of dealing with a dispute between the parties. The standard state-to-state dispute settlement mechanism involves incremental stages. First, there is normally an initial period of consultations lasting between 30–60 days (depending on the particular FTA). If this consultation is unsuccessful, the states are then given the option of presenting their grievance to a panel to rule on the matter.[15] In most FTAs, recourse to the panel is obligatory, and the decision of the panel is binding on the parties. Some FTAs allow for an appeal in certain cases or on limited grounds,[16] however the majority do not. In most cases, the language of the FTA requires compliance with the recommendations and rulings of the panel within a reasonable period of time, and failure to comply with the recommendations and rulings of the panel may result in retaliatory measures,

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[14] For example, Australia will simply not have the economic or bargaining strength to lever the issue against a defiant ASEAN or China. In such an instance, Australia has two choices: (1) abandon the agreement and end negotiations; or (2) conclude that the benefits of the agreement to Australia are too great to pass up, and relinquish the demand for an open dispute settlement mechanism.

[15] Using *AUSFTA*, above n 4, as an example, art 21.5 provides for a period of consultation between the parties. Article 21.6 establishes the right to refer the matter to a Joint Committee if the dispute is not resolved within 60 days, and art 21.7 establishes the right to appeal to a panel if the dispute is not resolved within a further 60 days. Article 21.10 deals with implementation of the panel's report.

[16] See, eg, the *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (1993) (entered into force 1 January 1994) ('*NAFTA*'), which contains several safeguard clauses allowing for effective appellate review of panel decisions through recourse to domestic appeal courts, including 'Extraordinary Challenge Procedures' (annex 1904.13) and 'Safeguarding the Panel Review System' (art 1905).

sanctions or a fine being levied on the infringing party (depending upon the FTA).[17]

A *The Prevailing Closed Model*

A large percentage of the dispute settlement processes included in FTAs are very closely based on the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('*DSU*').[18] The WTO model is itself shaped by the origins and evolution of the *General Agreement on Tariffs and Trade* ('*GATT 1947*'),[19] so in order to fully understand and analyse the dispute settlement mechanisms contained in FTAs, it is first necessary to understand the history of dispute settlement in the multilateral trading system.

1 *Dispute Settlement in the GATT*

The *GATT 1947* contained limited procedural rules because the Contracting Parties anticipated that detailed provisions for dispute settlement under the International Trade Organization ('ITO') would soon apply.[20] In fact, the entire foundation of the GATT dispute settlement system can be found in arts XXII[21] and XXIII of *GATT 1947*.[22] However, the US Congress' refusal to ratify the ITO prevented this organisation from coming into existence.[23] As a result, the only global body with oversight of international trade issues was the GATT, which lacked any real constitutional or institutional apparatus. The inevitable weaknesses of the GATT system meant that Contracting Parties continuously sought revisions and improvements to its operation, generating ongoing uncertainty.

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17 See, eg, *NAFTA*, which also allows for an aggrieved party to suspend the application of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute: ibid art 2019.

18 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401.

19 Opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).

20 For a more detailed account of the formation of the GATT and failure of the ITO, see Terence Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986–1992)* (1993) 2670–2; Mitsuo Matsushita, Thomas Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2003) 1–3.

21 Article XXII:1 merely requires a party to afford other parties adequate opportunity for consultation with respect to any matter affecting the operation of *GATT 1947*. Article XXII:2 authorises the Contracting Parties, as a whole and acting jointly, at the request of a party to *GATT 1947*, to consult with another party on matters not resolved through art XXII:1 consultations.

22 Article XXIII:1 provides that a party can make a written representation or proposal to another party when it believes that a benefit directly or indirectly emerging from *GATT 1947* is being nullified or impaired by that other party. If a satisfactory conclusion is not reached, art XXIII:2 authorises the complaining party to refer the matter to the Contracting Parties (as a whole), who are required to investigate and make appropriate recommendations. In addition, art XXIII:2 permits the Contracting Parties to authorise the complaining party to suspend tariff concessions or other *GATT 1947* obligations to the party found to be acting inconsistently with its *GATT 1947* obligations.

23 The ITO required significant changes to the law (such as implementation of, and compliance with, rules regarding trade barriers, restrictive trade practices, international commodity arrangements and international labour policies), and many signatories were not ready to abandon domestic laws in favour of implementing ITO-consistent provisions: see Stewart, above n 20, 2670.

The *GATT 1947* did, however, express a clear preference for negotiated settlements, originally even referring to the dispute settlement process as 'conciliation', and requiring Contracting Parties to enter into consultation and negotiation.[24] Notably lacking, however, were any guidelines or procedures to guide the consultation and negotiation processes. In the event of a failure to agree on a mutually acceptable solution, the dispute would be submitted to a panel to take evidence, hear arguments, rule on the legal issues and merits of the complaint and submit its decision to the GATT Council.[25] Again, *GATT 1947* failed to provide any operational guidance or procedures for panel operations.[26]

After receiving the written decision of the panel, a unanimous vote of the GATT Council was needed to adopt the panel decision.[27] In other words, a defendant could block, or essentially veto, an adverse panel decision. Therefore, the very nature of the GATT's quasi-voluntary procedure decreased its ability to effectively adjudicate international trade disputes.

For all its shortcomings, the GATT successfully resolved many trade disputes during its early years of existence. The late Robert Hudec, a leading GATT scholar, accounts for the early success of the GATT in the following way:

> Governments understood the legal rulings implicit in its vaguely worded decisions, and once these rulings were approved by the GATT Contracting Parties, defendant governments almost always felt it necessary to comply. The reason these impressionistic half-decisions were successful was that the early GATT of the 1950s was essentially a small 'club' of likeminded trade policy officials who had been working together since the 1946–1948 ITO negotiations. Thus they did not need a very elaborate decision-making procedure to generate an effective consensus about what particular governments were expected to do.[28]

Eventually the challenges of the changing conditions of international trade, which brought not only more complex cases but also a larger, more diverse group of nations, caught up with the dispute settlement process contained in *GATT 1947*. Textual and procedural weaknesses continued to reveal themselves in the difficulties and failures of the GATT dispute resolution system and increasingly led to a large number of disputes which it could not effectively resolve.

The most glaring shortcoming of the GATT dispute resolution system stemmed from the voluntary nature of the process: every organisational decision required complete consensus, meaning a party complained against essentially

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24 Alan Wolff and John Ragosta, *How the Uruguay Round Will Change the Practice of International Trade Law in the United States* (1996) <http://www.dbtrade.com/publications/uruguay.htm> at 1 October 2005.

25 Ibid.

26 The GATT experimented with panel composition. The panel first consisted solely of the GATT Chairman, and eventually evolved to working parties consisting of the complainant, respondent and any other interested party to solve the dispute, before finally settling on a neutral panel: see, eg, *Summary Record of the Fifth Meeting*, GATT Doc SR.7/5 (1952).

27 Article XXIII requires that all matters be decided by the Contracting Parties, meaning that *GATT 1947* was a multi-party contract to be amended, interpreted or modified only by consent of all the parties. This interpretation is consistent with art 40 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

28 Robert Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade* 1, 5–6.

had a veto right at every step of the process. As a result, many smaller and developing nations found it impossible to obtain a successful resolution to a dispute.

Other procedural shortcomings of the GATT further undermined the coherence of the system and many Contracting Parties grew increasingly frustrated and disenchanted with the lack of coordination, guidance, and stability.[29] Increased GATT membership introduced differing views on international trade and thus, international trade law. This resulted in inconsistent panel decisions, an unsound body of case law and an increase in the number of Contracting Parties failing to comply with panel decisions.[30] Perhaps more importantly, many Contracting Parties began abandoning or withdrawing cases from the GATT dispute resolution panel in the growing belief that the system was ineffective. Despite six rounds of negotiation to improve the system, it became obvious that a larger, more comprehensive effort, incorporating wholesale changes, was needed.

2 *Dispute Settlement in the WTO*

In 1995, the WTO replaced the GATT as the institution governing international trade relations and dispute resolution. Although the WTO's procedures are guided by and continue to draw on past GATT decisions and practices,[31] there are differences between the two regimes, some of the most significant being in the area of rules governing trade disputes.

The WTO entrusts the Dispute Settlement Body ('DSB') with handling disputes in accordance with the *DSU*. The DSB meets regularly and has the authority to establish dispute settlement panels, adopt panel and Appellate Body reports, maintain surveillance of implementation rulings and suspend concessions and other obligations covered under any WTO agreement if its recommendations and rulings are not implemented by an infringing member. The importance of the *DSU* is stated in art 3.2, which reads: 'the dispute settlement

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[29] Competing codes, alternative dispute settlement arrangements, 'forum shopping', panel delays and transparency problems all contributed to the growing ineffectiveness of the GATT's dispute settlement procedures. So too did the fact that most GATT judges were diplomats, not lawyers, and their decisions were often vague, diplomatic and elusive: see Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993) 12.

[30] Between 1948–89, compliance with GATT panel decisions steadily declined; and in the 1960s to 1980s, cases where the legal claim was fully vindicated constituted less than 60 per cent of cases with known results: ibid 293. Forty complaints were filed between 1952–58, only 10 were filed between 1960–69 and only three were filed between 1963–70: see Stewart, above n 20, 2679. Between 1979–86, only 29 disputes were filed, resulting in 21 panel reports (with five decisions not adopted due to the losing party's refusal to accept the decision). Parties simply thought the GATT rules were outdated, easy to evade through other trade measures, unbalanced and eventually led to unilateral retaliation: at 2732.

[31] The first 13 agreements of the WTO included the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1994), annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190 ('*GATT 1994*'). The *GATT 1994* incorporates by reference the provisions of *GATT 1947*, above n 19. A condition of accession to the WTO is that nations must accept the entire package of substantive agreements; therefore, unlike under the GATT system, a nation cannot choose to abide by some rules or agreements and disregard or not be bound by others.

system of the WTO is a central element in providing security and predictability to a multilateral trading system'.[32]

Unlike the informal dispute settlement procedure of the GATT, the DSB adjudicates international legal disputes according to formal procedures. The *DSU* and its appendices set out not only the basic institutional and jurisdictional scope of WTO dispute settlement, but also the rules and procedures for panels. The *DSU* continues to rely on arts XXII and XXIII of *GATT 1947*, but extensively expands the legal aspects of the procedures.[33]

Additionally, and unlike in the GATT system, the *DSU* creates a standing Appellate Body to review panels' legal decisions. Moreover, the DSB automatically adopts panel and Appellate Body reports unless the DSB decides by consensus otherwise. This eliminates the ability of one member, namely the losing party, to block a panel decision using its veto power. Similarly, the *DSU* seeks to eliminate much of the delay and lack of compliance associated with the GATT's dispute settlement mechanism by making panel decisions valid from the moment of inception.[34]

In its 10 years of existence, the *DSU* has been successful in transforming the multilateral trading system and in bringing certainty to the dispute settlement process.[35] However, the *DSU* is a closed system, in that it has several features that prevent or hamper public scrutiny of, or participation in, dispute settlement. Under the *DSU*, consultations and panel proceedings are confidential, opinions expressed by panelists remain anonymous, and parties are bound to respect the

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[32] Furthermore, the former Director-General of the WTO, Peter Sutherland, called the *DSU* 'the greatest advance in multilateral governance since Bretton Woods': as quoted in Guy de Jonquieres, 'Rules to Fight By', *Financial Times* (London, UK), 25 March 2002, 22.

[33] See *DSU*, above n 18, art 3.1. For analysis of art 3, see Yang Guohua, Bryan Mercurio and Li Yongjie, *WTO* Dispute Settlement Understanding*: A Detailed Interpretation* (2005) 13–35.

[34] For more on the comparison of the nature of dispute settlement in the GATT and the WTO, see Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System* (1997); Debra Steger and Susan Hainsworth, 'World Trade Organization Dispute Settlement: The First Three Years' (1998) 1 *Journal of International Economic Law* 199.

[35] See, eg, John H Jackson, 'The Role and Effectiveness of the WTO Dispute Settlement System' (2000) *Brookings Trade Forum* 179, 185, 208 <http://muse.jhu.edu/journals/brookings_trade_forum/toc/btf2000.1.html> at 1 October 2005. *Contra* the compliance measures of the ICJ, where the *Charter of the United Nations* art 94(2) provides that the failure of a party to comply with a decision of the ICJ merely entitles the complaining party to have recourse to the Security Council, which may (or may not) deem it necessary to recommend or decide upon measures to give effect to the judgment. The certainty provided by WTO procedures is, in large part, why the WTO has received 329 disputes and 189 panel requests, and adopted over 150 panel and Appellate Body reports during its 10 year existence, while the ICJ, by contrast, has presented only 61 judgments and provided only 23 advisory opinions in nearly 50 years of operation: see WTO, *Chronological List of Disputes Cases* (2005) <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> at 1 October 2005; ICJ, *International Court of Justice 1946–1996* (2005) <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm> at 1 October 2005.

confidentiality of any document so marked.[36] Moreover, individuals who are not participants or third parties to a dispute are excluded from panel proceedings, and transcripts of these proceedings are not publicly available. Only a very small range of the information available to the parties is required to be made public: the final panel reports and requested non-confidential versions of party submissions.[37] Even these versions are often not available promptly enough to provide a meaningful opportunity for public engagement with the issues under discussion.

It should come as no surprise that the WTO model of dispute settlement is a closed one — the GATT was, and the WTO is, a member-driven organisation requiring complete consensus on almost every organisational decision.[38] Moreover, as the dispute settlement process in the GATT began as conciliation, not adjudication, the process may have been correct in keeping the proceedings closed to encourage full and frank discussion, negotiation and eventually the successful resolution of the dispute. However, as the system moved towards an adjudicatory model, the reasons for keeping the process closed became less persuasive.

While the wording of the *DSU* insists upon a closed system of dispute settlement, it must be noted that the WTO is taking steps to open up the system in terms of transparency and participation of non-governmental organisations ('NGOs'). These developments are discussed in Part III.

B *Australia's Unsettled Past Practice*

The FTAs entered into by Australia have by and large followed the WTO model of dispute settlement (involving initial consultation followed by a panel hearing), but have adopted conflicting approaches to the final panel that considers the dispute. The contrast between the *AUSFTA* and the *SAFTA* illustrates the unsettled nature of Australia's position on the issue of state-to-state dispute resolution. Both agreements provide for an adjudicative method of settling disputes which makes use of impartial panelists issuing binding decisions on the parties. There are, however, two key differences between the *AUSFTA* and the *SAFTA*: first, public accessibility to the dispute settlement proceedings; and second, non-governmental involvement in, and access to, the dispute settlement mechanism.

The language used in the *SAFTA* closely resembles the language of the WTO *DSU*, explicitly providing that dispute settlement proceedings are to remain

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36 See *DSU*, above n 18, arts 4, 14, 18.

37 Ibid arts 15, 18.2.

38 For more on consensus decision-making in the WTO, see Jeffrey Schott and Jayashree Watal, Institute for International Economics, *Decision-Making in the WTO*, Policy Brief No 00-2 (2000) <http://www.iie.com/publications/pb/pb.cfm?ResearchID=63> at 1 October 2005; Mary Footer, 'The Role of Consensus in GATT/WTO Decision-Making' (1996–97) 17 *Northwestern Journal of International Law and Business* 661.

confidential:

> 1. *An arbitral tribunal shall meet in closed session*. The Parties shall be present at the meetings only when invited by the arbitral tribunal to appear before it.
>
> 2. *The deliberations of an arbitral tribunal and the documents submitted to it shall be kept confidential*. Nothing in this Article shall preclude a Party from disclosing statements of its own positions or its submissions to the public; provided that a Party shall treat as confidential information submitted by the other Party to the arbitral tribunal which that Party has designated as confidential. Where a Party submits a confidential version of its written submissions to the arbitral tribunal, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.
>
> 3. Before the first substantive meeting of the arbitral tribunal with the Parties, the Parties shall transmit to the arbitral tribunal written submissions in which they present the facts of their case and their arguments.[39]

On the other hand, the *AUSFTA* breaks from the WTO *DSU* model on the question of how state-to-state dispute settlement should be conducted, instead requiring all written and oral submissions and proceedings to be available to the public. Specifically, art 21.8 provides:

> 1. The Parties shall establish by the date of entry into force of this Agreement model rules of procedure, which shall ensure:
>
> (a) a right to at least one hearing before the panel and that, subject to subparagraph (f), *any such hearings shall be open to the public*;
>
> (b) an opportunity for each Party to provide initial and rebuttal submissions;
>
> (c) *that each Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel shall be made public within ten days after they are submitted*, subject to subparagraph (f) …[40]

The *SAFTA* and the *AUSFTA* also have differing rules regarding access by NGOs and individuals. The *SAFTA* does not provide for access of NGOs and individuals in any manner, such as through the submission of amicus curiae briefs.[41] In contrast, the *AUSFTA* allows for potential access by NGOs and individuals and provides an opportunity for the Parties to respond to their views.

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39 *SAFTA*, above n 5, ch 16, art 7 (emphasis added).

40 *AUSFTA*, above n 4, art 21.8 (emphasis added). Subparagraph (f) requires the parties to ensure 'the protection of confidential information'.

41 Note that, in language taken verbatim from the WTO (art 13 of the *DSU*), the panel may invite submissions from experts or outside bodies: *SAFTA*, above n 5, ch 16, art 7(9). However, there is no right for such a body to petition the panel.

Specifically, art 21.8(d) of the *AUSFTA* states that

> the panel shall consider requests from non-governmental persons or entities in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties and provide the Parties an opportunity to respond to such written views.

Thus, the relevant provisions of the *AUSFTA* reveal two possible strategies to achieve openness in the context of FTAs: through the public and transparent nature of proceedings, and through the right of NGOs to submit amicus curiae briefs.

III WHY AUSTRALIA SHOULD CHOOSE THE OPEN MODEL OF DISPUTE SETTLEMENT

Both the evolution of dispute settlement mechanisms within the WTO and considerations of Australia's national interest and foreign policy indicate that Australia should pursue the open model of dispute settlement in its FTA negotiations.

A *WTO Developments on Transparency and NGO Participation*

While the wording of the *DSU* insists upon a closed system of dispute settlement, it must be noted that the WTO is taking steps to open the system in terms of both transparency of the process and NGO participation. This is being accomplished through parties' own conduct, the recent jurisprudence of the panels and Appellate Body, and as part of the current review of the *DSU*.[42]

1 *The Move towards Internal Transparency*

(a) Developments under Current Provisions

The *DSU* already provides for some limited openness. For instance, while art 18.2 of the *DSU* (from which the language of the *SAFTA* dispute settlement provisions was directly taken) states that submissions of the parties to panels or Appellate Body proceedings are confidential, Members are not prohibited from making their submissions public if they so desire. In this regard, the US sets a positive example by making its own submissions to the DSB public. In fact, US legislation actually mandates that US submissions shall be public.[43] Other developed countries — including Australia, Canada and the European

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[42] See *Decision on the Application and Review of the* Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc LT/UR/D-1/6 (1994). For detailed information on the *DSU* Review, see generally Bryan Mercurio, 'Improving Dispute Settlement in the World Trade Organization: The *DSU* Review — Making It Work?' (2004) 38 *Journal of World Trade* 795.

[43] *Uruguay Round Trade Agreements Act*, 19 USC § 3537(c)(1) (2004). Submissions of the US to the DSB can be found at the Office of the United States Trade Representative, *US Papers on Dispute Settlement* (2005) <http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/U.S._Papers_on_Dispute_Settlement/Section_Index.htm> at 1 October 2005.

Communities — likewise make their submissions public and support US proposals for increasing transparency in the *DSU*.[44]

Moreover, under present practice, art 18.3 and appendix 3 of the *DSU* are deemed to provide that, while the parties' submissions are confidential, the possibility of making public summaries remains. Appendix 3 enables a Member to request from another party to the dispute a 'non-confidential summary of information contained in its submissions that could be disclosed to the public',[45] although the rules have not been read to establish a deadline for such submissions.[46] The US is required, by domestic legislation, to request such non-confidential summaries in all cases in which they are a party, third party or third participant.[47] However, common practice is generally not to make such summaries available until very late in the process or only after the case has been decided.[48]

The Appellate Body has recently weighed into the debate and, in a truly landmark decision, ruled that nothing in the *DSU* specifically prohibits Members from opening up panel and Appellate Body hearings to interested observers. Thus, the Appellate Body will allow observers to view proceedings upon the joint request of the parties. Such a request was made by the US, Canada and the EC in a recent compliance hearing in the *EC — Hormones* dispute.[49] In a decision dated 1 August 2005, the Appellate Body gave 'careful consideration [to] the existing provisions of the *DSU*' and found that nothing in the rules prohibits the parties from agreeing to open the hearings to observers.[50] In the dispute, the parties agreed to allow 'observation by the public through a closed-circuit TV broadcast'.[51] This decision provides further evidence that not only is the WTO moving away from the closed system, but that FTAs that narrowly

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44 See, eg, DFAT, *Best Practice for RTAs/FTAs in APEC* (2004) 2 <http://www.dfat.gov.au/apec/meetings/apec2004/2004_apec_ftas.pdf> at 1 October 2005; International Trade Canada, *Canada and the WTO: WTO Transparency* (2003) <http://www.dfait-maeci.gc.ca/tna-nac/WTO-Trans-en.asp> at 1 October 2005; EC, *WTO Dispute Settlement* <http://europa.eu.int/comm/trade/issues/respectrules/dispute/index_en.htm> (2003) at 1 October 2005. The EC submissions state that the transparency of panel and Appellate Body proceedings should be brought into line with public international law, but that sufficient flexibility should be built into the system for parties to decide whether or not parts of the proceedings could be open to the public: see *Contribution of the European Communities and Its Member States to the Improvement of the WTO* Dispute Settlement Understanding, WTO Doc TN/DS/W/1 (2002) 6–7 (Communication from the EC) ('*EC Contribution*').

45 *DSU*, above n 18, app 3, [3].

46 Dewey Ballantine LLP International Trade Law Group, *Dewey Ballantine LLP Comments on WTO Dispute Settlement* (1998) 7 <http://www.dbtrade.com/publications/wto_comments.pdf> at 1 October 2005.

47 *Uruguay Round Trade Agreements Act of 1994*, 19 USC § 3537(d) (2004).

48 Dewey Ballantine LLP International Trade Law Group, above n 46, 7.

49 *United States and Canada — Continued Suspension of Obligations in the* EC — Hormones *Dispute*, WTO Doc WT/DS320/8, WT/DS321/8 (2005) (Communication from the Chairman of the Panels).

50 Ibid.

51 Ibid. The hearing took place on 12 September 2005.

interpret mechanisms based on WTO provisions may now contradict the very system they copied.

(b) Further Developments Proposed in the DSU *Review*

DSU Review proposals from several democratic developed nations recognise the fact that the current model operates in a manner contrary to their own domestic judicial systems in that it excludes members of the public from participating in or witnessing the proceedings. Collectively, their proposals can be said to recognise the right of all stakeholders, including workers, firms, industry and NGOs, to observe and participate in a more open and transparent dispute settlement system.[52]

For example, US proposals specifically call for all substantive meetings of the panels and Appellate Body and all arbitration to be open to the public; for all submissions to panels, the Appellate Body and arbitrators to be public, except those portions dealing with confidential information; and for the WTO to make a final panel report available to WTO Members and the public once it has been issued to the parties.[53]

The US summarised the arguments of the developed countries advocating for increased transparency in the *DSU* by stating that both the public at large and governments of Member States would benefit by increasing the transparency of the process. More specifically, the US proposal stated that '[t]he public has a legitimate interest in the proceedings',[54] that non-party WTO Members would also 'benefit from being able to observe the arguments and proceedings of WTO disputes' and that open hearings would

> assist Members, including developing countries, in understanding the issues involved as well as gaining greater familiarity and experience with dispute settlement. Being better informed about disputes generally could aid Members in deciding whether to assert third party rights in a particular dispute.[55]

Moreover, the proposal stated that the

> implementation of the DSB recommendations and rulings may be facilitated if those being asked to assist in the task of implementation, such as the constituencies of legislators, have confidence that the recommendations and rulings are the result of a fair and adequate process.[56]

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52 See Mercurio, 'Improving Dispute Settlement', above n 42, 804.

53 See *Contribution of the United States to the Improvement of the* Dispute Settlement Understanding *of the WTO Related to Transparency*, WTO Doc TN/DS/W/13 (2002) 2 (Communication from the US) ('*US Contribution*'). The US has long championed a more open and inclusive *DSU*; for instance, in his opening address at the May 1998 WTO Ministerial meeting, former President Bill Clinton emphasised the determination of the US to 'modernize the WTO by opening its doors to the scrutiny and participation of the public': William Clinton, 'Remarks by President Clinton at the Commemoration of the 50th Anniversary of the World Trade Organization' (Speech delivered at the WTO, Geneva, Switzerland, 18 May 1998).

54 *US Contribution*, above n 53, 2.

55 Ibid.

56 Ibid.

The US concluded by stating:

> A more open and transparent process would be a significant improvement to the *DSU*, in keeping with the commitment by Ministers 'to promote a better public understanding of the WTO', and 'to making the WTO's operations more transparent, including through more effective and prompt dissemination of information'. Such a more open and transparent process could be achieved by providing an opportunity to observe the arguments and evidence submitted in proceedings as well as observing those proceedings, subject to appropriate safeguards such as for confidential information and security. In addition, the final results of those proceedings should be made available to the public as soon as possible.[57]

Of particular importance to the arguments for greater transparency in the bilateral context, the US pointed out that many other international dispute settlement fora and tribunals were open to the public, and noted specifically that the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the European Court of Human Rights and the African Court on Human and Peoples' Rights all conduct open hearings and allow for submissions to be distributed to interested observers.[58] The US further observed that those fora dealt with issues that were intergovernmental in nature and were 'at least as sensitive as those involved in WTO disputes', and questioned why the WTO should be different in this respect.[59]

It must be noted that some delegations explicitly disagreed with the proposals of the EC and of the US.[60] Those Members argued that the WTO was an intergovernmental organisation, where Members discussed and kept the balance of rights and obligations among Members, and that openness would undermine this intergovernmental character and severely erode the Member governments' authority and ability to participate effectively in the dispute settlement process. Some specifically stated that allowing observers at hearings would 'lead to trials by media'.[61] For that reason, the above proposals have not as of yet been included in the *Proposed Amendments to the* DSU.[62]

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57 *US Contribution*, above n 53, 2 (citation omitted), quoting *Draft Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/W/1 (2001) [10] ('*Doha Declaration*').

58 *US Contribution*, above n 53, 1.

59 The proposal notes that these fora 'have addressed boundary disputes, use of force, nuclear weapons, human rights violations, and genocide': ibid.

60 International Centre for Trade and Sustainable Development, '*DSU* Review: Developing Countries Reject US Proposals on Transparency, Suggest Other Options' (2002) 6(31) *Bridges Weekly Trade News Digest* <http://www.ictsd.org/weekly/02-09-18/story2.htm> at 1 October 2005.

61 Ibid.

62 *Special Session of the Dispute Settlement Body — Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, WTO Doc TN/DS/9 (2003) annex ('*Proposed Amendments*'). For the most part, the *Proposed Amendments* attract a high level of support from Members. However, the *Proposed Amendments* have been criticised for failing to adequately address the most important and contentious issues and, far from resolving the controversies and debate, may have in fact done the opposite, creating more animosity between Members: see generally Mercurio, 'Improving Dispute Settlement', above n 42.

Throughout the course of the *DSU* Review, the US, the EC and others have also repeatedly submitted that art 18.2 of the *DSU* should be amended so as to require the timely preparation and submission of public versions of all DSB submissions and exhibits (with an appropriate exception for business confidential information). More specifically, the proposals recommended that, in order to maintain the spirit of the provision, art 18.2 be amended to require parties to submit a public version of their submissions within a fixed deadline (a majority of the proposals recommended a period of 10 days after the submission to the panel or Appellate Body).[63]

The *Proposed Amendments* recognise the usefulness of the above proposal and include stricter rules on the submission of public versions in the course of the *DSU* Review.[64] If the amendments remain part of the final text, the resulting simple change would increase the transparency of the WTO by keeping the public informed of developments and support Members that currently operate a more transparent system of domestic regulation.[65]

2 *Participation of NGOs*

(a) Developments under Current Provisions

The issue of participation by non-state actors has also become contentious at the multilateral level in recent years. Frustrated by the system's lack of accessibility, NGOs and interested individuals began submitting unsolicited amicus curiae briefs to WTO panels and the Appellate Body in the hope of enabling their views to be heard.[66] WTO panels searched the *DSU* and other relevant agreements in vain for any guidance and, in accordance with the *Vienna Convention on the Law of Treaties*,[67] followed GATT precedent and refused to accept the submissions. The issue came to the fore in the high-profile *US —*

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63 For instance, Canada proposes immediate public access to submissions (with appropriate safeguards for business confidential information): *Contribution of Canada to the Improvement of the WTO* Dispute Settlement Understanding, WTO Doc TN/DS/W/41 (2003) 1, 3 (Communication from Canada). See also *US Contribution*, above n 53, 2; *EC Contribution*, above n 44, [17].

64 *Proposed Amendments,* above n 62.

65 An unfortunate by-product of the current system is that countries which operate their domestic proceedings in an open and transparent manner are disadvantaged in comparison to countries which operate their domestic proceedings in a closed manner. This can be demonstrated by the petitions and proceedings under the *US Trade Act of 1974*, 19 USC § 301 (2004). In the § 301 process, any interested observer, including a foreign government, has complete access to the submissions, arguments, evidence and supporting rationale invoked by the domestic industry or the company at issue prior to the filing of a case in the WTO. In contrast, countries with non-transparent domestic proceedings deny interested parties (both governmental and non-governmental) access to information regarding the evidence, arguments and rationale of the case. In this regard, countries with open domestic systems allow any observer access to information which may later be relevant in a WTO dispute, while countries with closed systems shelter such information from the public (and pertinent foreign governments and industries) until a WTO dispute has been filed. Such a system can be said to unfairly favour the Member which employs a closed domestic system.

66 For analysis of the treatment of amicus curiae submissions in the GATT and WTO, see Gabrielle Marceau and Matthew Stillwell, 'Amicus Curiae Briefs before WTO Adjudicating Bodies' (2001) 4 *Journal of International Economic Law* 155.

67 Above n 27.

Shrimp case,[68] where the panel refused to consider two unsolicited briefs, holding that although the *DSU* provided for a panel to seek information from 'any relevant source', it would be 'incompatible' with the *DSU* to accept unsolicited information from a non-governmental source.[69] The panel did permit the parties to the dispute to attach the NGOs' briefs as appendices to their own submissions.[70]

The Appellate Body reversed not only the controversial substantive decision of the panel, but also the panel's decision to reject unsolicited amicus submissions. In so holding, the Appellate Body determined that '[a] panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*'.[71]

Subsequently, in both *US — British Steel* and *EC — Asbestos*, the Appellate Body held that it too could accept unsolicited amicus submissions at its discretion.[72] In *US — British Steel*, the Appellate Body set out the framework for its decision by reasoning that

> nothing in the *DSU* or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the *DSU* nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs.[73]

The Appellate Body substantiated its decision by stating that art 17.9 'makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures of the *DSU* or the covered agreements'.[74] In addition, the Appellate Body noted that r 16(1) of the *Working Procedures for Appellate Review*[75] 'authorizes a division to create an appropriate procedure when a question arises that is not covered by the Working Procedures'.[76] Therefore, while the Appellate Body found that it does not have a 'legal duty' to accept submissions from non-state actors, it does have 'the legal

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68 *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (1998) (Report of the Panel) ('*US — Shrimp Panel Report*'); *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/RW, AB–2001–4 (2001) (Report of the Appellate Body) ('*US — Shrimp Appellate Body Report*').

69 *US — Shrimp Panel Report*, WTO Doc WT/DS58/R (1998) [7.8].

70 Ibid.

71 *US — Shrimp Appellate Body Report*, WT/DS58/AB/R, AB–2001–4 (2001) [108] (emphasis in original).

72 *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R, AB–2000–1 (2000) (Report of the Appellate Body) ('*US — British Steel Appellate Body Report*'); *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB–2000–11 (2001) (Report of the Appellate Body) ('*EC — Asbestos Appellate Body Report*'). In both disputes, the Appellate Body accepted a right to submit both unsolicited briefs submitted directly by private actors and NGO-drafted briefs included as part of the disputing parties' submissions: at [38]–[42]; [50]–[57] respectively.

73 *US — British Steel Appellate Body Report*, WTO Doc WT/DS138/AB/R, AB–2000–1 (2000) [39].

74 Ibid.

75 WTO Doc WT/AB/WP/2 (1997) ('*Working Procedures*').

76 *US — British Steel Appellate Body Report*, WTO Doc WT/DS138/AB/R, AB–2000–1 (2000) [38].

authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal'.[77]

The Appellate Body went on in *EC — Asbestos* to craft *Additional Procedures* (issued under r 16(1) of the *Working Procedures*) setting out guidelines for the submission of unsolicited briefs from non-state actors, in the 'interest of fairness and orderly procedure'.[78]

These *Additional Procedures* were communicated to the Chair of the DSB and all participants and third participants on 8 November 2000. They provided that 'any person, whether natural or legal, other than a party or a third party to this dispute, must apply for leave to file such a brief from the Appellate Body' by 16 November 2000.[79] Section 3 of the *Additional Procedures* gave potential organisations and individuals guidance on what information should be provided in an application for leave, including: 'a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant';[80] information on 'the nature of the interest the applicant has in [the] appeal';[81] information on 'whether the applicant has any relationship, direct or indirect, with any party or any third party to [the] dispute' and 'whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to [the] dispute in the preparation of its application for leave or its written brief';[82] and identification of 'the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of [the] appeal'.[83]

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77 Ibid [39]. The Appellate Body, however, concluded that it was not necessary to take the two amicus curiae briefs into account in rendering its decision: at [41].

78 *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/9 (2000) [1] (Communication from the Appellate Body) ('*Additional Procedures*'). See also *General Council — Minutes of Meeting Held in the Centre William Rappard on 22 November 2000*, WTO Doc WT/GC/M/60 (2001) [1].

79 *Additional Procedures*, above n 78, [2].

80 Ibid [3(c)].

81 Ibid [3(d)].

82 Ibid [3(g)].

83 Ibid [3(e)]. The most onerous requirement was contained in [3(f)], which required the applicant to 'indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute'. The *Additional Procedures* also stated in [3(b)] that the application for leave could not exceed three pages, and in [5] that 'the grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief'. The Appellate Body in *EC — Asbestos* actually rejected all 18 amicus submissions: *EC — Asbestos Appellate Report*, WTO Doc WT/DS135/AB/R, AB–2000–11 (2001) [53]. Although a complete list is not available, there have been public statements from the following NGOs and individual to the effect that they had filed applications, and had them rejected: the American Public Health Association; the Society for Occupational and Environmental Health; the Occupational and Environmental Diseases Association; the International Confederation of Free Trade Unions; the European Trade Union Confederation; the Australian Centre for Environmental Law; the International Ban Asbestos Secretariat; the Ban Asbestos International and Virtual Network; Greenpeace International; the World Wide Fund for Nature; the Foundation for International Environmental Law and Development; the Center for International Environmental Law and Robert Howse, Professor of International Law at the University of Michigan Law School: Ricardo Beltramino, Universidad Abierta Interamericana, *Medio ambiente y comercio en la OMC* (2004) <http://www.vaneduc.edu.ar/uai/comuni/pulso/numero-04/pi04_08.htm> at 1 October 2005.

In what had to be an attempt to quell any dissent from Members, the Appellate Body explicitly stated in its report that the rules were adopted 'for the purposes of this appeal only', and that the rules were not additions to the *Working Procedures* of the Appellate Body.[84] As could have been expected, the Appellate Body's attempt at suppressing an outcry failed, with several Members claiming the Appellate Body had overstepped its authority and misinterpreted the *DSU* provisions concerning third participants and outside experts.[85] Some of the Members who condemned the decision also felt that the Appellate Body's broad interpretation of the term 'working procedures', and its interpretative approach of permitting conduct not explicitly forbidden to the Appellate Body, could have undesirable consequences if applied to other WTO provisions, such as the treatment of non-governmental actors during negotiations. Finally, Members argued that the issue of the admissibility of amicus curiae submissions was substantive, rather than merely procedural, and as such could only be amended by changing the text of the *DSU* following Member negotiations.[86]

Only one Member, the US, unequivocally supported the decision of the Appellate Body at the time. However, as no less than 10 separate disputes have now decided the matter in a similar fashion, other developed nations also now support the measures.[87] In contrast, most developing countries remain opposed to both the reasoning and the outcome of the decisions. However, due to consensus decision-making in the WTO, the line of cases allowing both panels and the Appellate Body to accept unsolicited amicus curiae briefs from non-state actors remains 'good law', and thus non-state actors are able to be heard and to submit their views to both panels and the Appellate Body. Barring this principle being altered in a successfully completed *DSU* Review, the situation will not change.

International trade scholar Steve Charnovitz states:

> [T]he new WTO jurisprudence on amicus briefs is significant. At the very least, it demonstrates how NGO activism can promote a new opportunity for formal participation in governance. The *DSU* has no provision for the submission of

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84 *Additional Procedures*, above n 78, 1.

85 For instance, the Egyptian Ambassador, speaking for the Informal Group of Developing Countries ('IGDC'), requested a Special Session of the WTO General Council regarding the *Additional Procedures* adopted by the Appellate Body, which took place on 22 November 2000: see Gustavo Capdevila, 'Trade: Civil Society Groups Spark Power Battle within WTO', *Inter Press Service Newsfeed*, 24 November 2000.

86 See Padideh Ala'i, 'Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the US Experience' (2000) 24 *Fordham International Law Journal* 62, 79. The IGDC issued a statement declaring that while the Appellate Body was entitled to adopt its own *Working Procedures*, their decision was not mandated by the *DSU*. The representative from Pakistan even called for the resignation of the Appellate Body Chairman: Ala'i, above this note, 65. The argument that the Appellate Body decision was substantive as opposed to merely procedural has the support of a number of trade lawyers and scholars: see, eg, Chakravarthi Raghavan, 'Will WTO-AB Listen to "Strong Signal" from Members?' (2000) 4790 *South–North Development Monitor* <http://www.sunsonline.org> at 1 October 2005.

87 Rita Hayes, the US Ambassador to the WTO, stated that the Appellate Body 'did the only thing it could do', given the number of persons that had already filed or expressed their intent to file amicus curiae briefs. The US also stated that the Appellate Body had simply responded to ' a situation that already existed in the specific context of the asbestos dispute': see International Centre for Trade and Sustainable Development, 'Amicus Brief Storm Highlights WTO's Unease with External Transparency' (2000) 4(9) *Bridges Weekly Trade News Digest* <http://www.ictsd.org/English/BRIDGES4–9.pdf> at 1 October 2005.

> amicus briefs. Yet even in the absence of such procedures, NGOs decided to go ahead and submit amicus briefs anyway. This episode shows how NGOs can catalyze changes in the practices of international organizations through transnational public law litigation. In other words, the NGOs decided to act as though the WTO had open procedures as a strategy for securing such procedures. While such activist strategies have been used in municipal public law litigation for some time, they are unusual in an international court. To be sure, the key factor was the willingness of the Appellate Body to be accommodating. But so long as an independent tribunal exists, advocates can use litigation to promote the progressive development of law.[88]

(b) Further Developments Proposed in the DSU *Review*

As part of the *DSU* Review, the US and other Members have proposed that it would be helpful to establish guideline procedures for handling amicus curiae submissions to address the procedural concerns raised by Members, panels and the Appellate Body, and in light of the experience to date with amicus curiae submissions.[89] Other Members, however, have proposed to outlaw unsolicited submissions from non-state actors, while others still have expressed the belief that the issue of amicus curiae is broader than the issue of transparency and beyond the mandate of the negotiation given by the *Doha Declaration*.[90] As consensus could not be reached on the issue, the Chairman did not include any provisions relating to the submission of unsolicited amicus curiae issues in the *Proposed Amendments* negotiating document.[91]

3 *Assessing the Positions*

Despite over seven years of negotiations and, in some cases, numerous Appellate Body decisions, Members cannot agree to resolve the contentious issues of public hearings, public and timely availability of submissions and the handling of unsolicited submissions by non-state actors to panels and the Appellate Body. There is a perception among developing country Members that open hearings, and the participation of non-state actors, would politicise dispute

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88 Steve Charnovitz, 'Opening the WTO to Nongovernmental Interests' (2000) 24 *Fordham International Law Journal* 173, 189–90.

89 See, eg, *US Contribution*, above n 53, 3.

90 The African Group, India and others submitted proposals which would explicitly prohibit panels and the Appellate Body from considering unsolicited information and advice. For instance, Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe objected to amicus curiae briefs by stating that there was no need for making any provision for accepting amicus curiae briefs. After recalling the negotiation and practical background of the amicus curiae issue, those Members, in order to clarify the meaning of the word 'seek' in art 13 of the *DSU* and to clear the uncertainty and controversy surrounding this issue, proposed to add two footnotes to art 13: *Negotiations on the* Dispute Settlement Understanding — *Proposals on* DSU *by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, WTO Doc TN/DS/W/18 (2002) 2–4.

91 *Special Session of the Dispute Settlement Body — Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, WTO Doc TN/DS/9 (2003) 6.

settlement and unsettle the fundamental nature of the WTO as an intergovernmental institution.[92]

However, when analysed, these arguments against openness and transparency are fundamentally flawed. While the Appellate Body decisions and the US *DSU* Review submission regarding increased openness and transparency in *DSU* proceedings have proven controversial, they do not, by their nature, conceptually challenge the role of the state as the main actor in the proceedings, but simply require that state actions be open and public. As argued by the US, numerous international organisations conduct hearings in an open and transparent manner without sacrificing the benefits of an intergovernmental forum.[93]

Developing country Members such as Brazil, Chile, India, Mexico and Uruguay have all criticised attempts to increase transparency in the *DSU* by arguing that it will lead to 'trials by media',[94] and that this perceived media spotlight will result in undue public pressure upon their government policies.[95] However, as Mercurio has argued elsewhere:

> As the *DSU* proceedings are conducted in an adjudicatory fashion, it is highly doubtful that any of these concerns will eventuate. First and foremost, lawyers representing parties are going to put forward legal arguments in an attempt to get a favourable ruling. Grandstanding does not occur in any of the open national judicial systems nor does it occur in any of the supranational bodies that allow the public to be present during the hearings.[96]

While it is admitted that the type of grandstanding seen in the United Nations would likely occur if the public were allowed to sit in on the Doha negotiating process, published submissions and open WTO hearings will not lead to trials by the media or undue public pressure so long as the dispute settlement (as opposed to the negotiation) process remains adjudicatory in nature.[97] Decisions will

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92 'ASEAN Rejects US Call for NGO Access to WTO Dispute Process: Move Will Undermine Body's Inter-Governmental Framework, Say Envoys', *The Business Times Singapore* (Singapore), 17 September 2002. Developing countries are similarly opposed to increasing openness and participation of non-state actors in the related context of WTO Council and Committee meetings: see Daniel Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 *World Trade Review* 7; Ernesto Hernandez-Lopez, 'Recent Trends and Perspectives for Non-State Actor Participation in WTO Disputes' (2001) 35 *Journal of World Trade* 469.

93 See above n 58 and accompanying text.

94 See Daniel Pruzin, *US Proposals on Dispute Transparency Get Cool Reception with WTO Members* (2002) <http://freedominfo.org/ifti/wto.htm#1> at 3 September 2005.

95 International Centre for Trade and Sustainable Development, 'DSU Review: Developing Countries Reject US Proposals on Transparency, Suggest Other Options' (2002) 6(31) *Bridges Weekly Trade News Digest* <http://www.ictsd.org/weekly/02-09-18/story2.htm> at 1 October 2005.

96 Mercurio, 'Improving Dispute Settlement', above n 42, 806–7.

97 Ibid 807. This is not to say that the media does not already attempt to sway public opinion and polarise views during high-profile cases. Examples can be seen in the WTO context during several disputes, most prominently *European Communities — Measures concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB–1997–4 (1998) (Report of the Appellate Body). The *NAFTA* dispute of *The Loewen Group, Inc v United States* (2003) ICSID Case No ARB(AF)/98/3 ('*Loewen*') provided similar media reports due to the odd circumstances of the dispute. For more on *Loewen*, see John Echeverria, 'Loewen, Mondev and Review of US Judicial Rulings by International Arbitration Panels' (Georgetown Environmental Law and Policy Institute, 2003) available at <http://www.law.georgetown.edu/gelpi/papers/loewen.pdf> at 1 October 2005.

continue to be made on legal grounds by a panel of well-qualified individuals.[98] With the recent decision of the Appellate Body to allow observers to view the proceedings in the *EC — Hormones* case, Members will see that the addition of cameras and/or observers in the 'courtroom' will not change the adjudicatory or intergovernmental nature of the process.

It is not only developed country Members such as the US and western NGOs who support increased transparency in the WTO dispute settlement process. Renowned international trade scholar Professor John H Jackson argues that greater transparency will provide the public with information in a timely manner and thus allow them to more fully participate in the system. Increased transparency will heighten public awareness of the actual processes of the system and correspondingly increase its legitimacy.[99]

NGOs and critics of the WTO often argue that 'faceless foreign' judges decide matters of national policy in a manner dismissive of factors such as labour standards or the environment.[100] The riots and mass demonstrations at every recent large gathering of world leaders reflect concerns that the WTO may be affecting national sovereignty by masking bias or incompetence.[101] Even a cursory internet search reveals countless web pages devoted to 'exposing' the secretive dispute settlement panels of both the WTO and *NAFTA*. And while phrases such as '[t]he negotiators that set *NAFTA* up made it so secret that the average person on the street has never heard about Chapter 11' may be simplistic and uninformed, they do reveal the real problems an uninformed electorate has with an intergovernmental dispute settlement process lacking transparency.[102] The WTO Secretariat itself admits this fact in some of its own publications.[103] An open and transparent dispute settlement mechanism in an FTA will allow the public to view the institutional workings of the agreement and, in contrast to creating animosity by perceived secrecy, will work to educate the public about its role. Allowing the limited use of amicus submissions will further empower participation rights and foster a sense of community among the public and NGOs.

Canadian academic Chi Carmody, writing on practical measures to increase openness and transparency in international economic institutions, considers that

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98 Of course, the presence of the public and media might also influence individuals' decisions to serve as panelists. On the basis of informal discussions with some former panelists, it seems unlikely that it would cause current government officials and high profile academics to decline invitations to serve or change the manner in which a panel operates. This issue is also linked to the question of permanent panelists. A permanent panelist, holding a long-term appointment that ensures their independence and insulates them, to some degree, from debate, is more likely to be receptive to the idea of open hearings. For more on the issue of permanent panelists, see Guohua, Mercurio and Yongjie, above n 33, 517–22.

99 See, eg, John H Jackson, 'Due Process in the WTO Dispute Settlement Body' (Paper presented at the Second Annual Conference of the World Trade Law Association: Liberalisation and Protectionism in the World Trading System, London, UK, 15 May 1998).

100 See James Bacchus, 'Open Doors for Open Trade: Shining Light on WTO Dispute Settlement' (Paper presented at the National Foreign Trade Council, Washington DC, US, 29 January 2004).

101 Mercurio, 'Improving Dispute Settlement', above n 42, 806.

102 Jim Callaghan, *See* NAFTA *in Action* (2002) <http://www.misterc.ca/nafta_in_action_!.htm> at 1 October 2005.

103 See, eg, World Trade Organization, *10 Common Misunderstandings about the WTO* <http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm> at 1 October 2005.

without public access to observe hearings there is limited accountability: '[n]o questions can be asked. No errors can be pointed out. The systems that have been created do not instil faith that true justice is being done'.[104] Professor Carmody recommends that all institutions have public hearings, stating '[t]he very center of the proceedings must be public and, in all the exceptional circumstances, publicized. This now happens within the ICJ'.[105] Eric Stein, who has extensively studied the 'democratic deficit' within international institutions, also considers transparency and openness as a precondition to accountability and democracy. Professor Stein states:

> Transparency entails openness of proceedings and access to official documents. It supports democracy by facilitating access to information that enables citizens to participate in public life, hold public authority accountable to public opinion … and improve the performance of public officials.[106]

Indeed these arguments linking accountability to openness and transparency are familiar in the Australian domestic setting. Justice Gibbs of the Australian High Court has reflected that it was

> the ordinary rule of the … courts of the nation that their proceedings shall be conducted publicly and in open view. This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism without which abuses may flourish undetected.[107]

Professor Michael Coper has also commented, in relation to the Australian High Court, that the reason that

> the Court is accountable for its work resides in the simple but sometimes overlooked fact that, except in rare cases, it conducts its work in open court and publishes its reasons for decision. Those reasons are then open for public scrutiny, appraisal and criticism.[108]

The reference by Professor Coper to the 'simple' nature of this accountability measure is revealing. It suggests that openness is a modest request with obvious practical advantages. This statement is no less true in the international setting. Open proceedings are 'simple' in the sense that they do not disrupt or challenge the central position of the state as the actor in the proceedings. Despite maintaining the status quo, open proceedings achieve a degree of accountability and transparency for the public.

The right to submit amicus briefs remains a contested area of policy development because it asserts a right of participation by non-state entities to

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104 Chi Carmody, 'Beyond the Proposals: Public Participation in International Economic Law' (1999–2000) 15 *American University International Law Review* 1321, 1343.

105 Ibid 1344.

106 Eric Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 *American Journal of International Law* 489, 493–4 (emphasis omitted). See also Ronald Mitchell, 'Sources of Transparency: Information Systems in International Regimes' (1998) 42 *International Studies Quarterly* 109

107 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

108 Michael Coper, 'Accountability' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 3, 4.

proceedings.[109] Frequent WTO panelist and Swiss academic Thomas Cottier supports this position when frankly stating: '[the] publicity of hearings of panels and amicus curiae briefs from non-governmental organisations could further enhance the legitimacy, and acceptance, of the WTO dispute settlement process'.[110] The principle that openness and inclusiveness equals greater legitimacy can be seen in the internal government workings of democratic nations. The Australian Government, like the governments of many other nations, operates in a relatively transparent manner. It allows participatory rights in such ways as having committees and inquiries accept public submissions, and even goes so far as to hold hearings to interview members of the public wishing to be heard. Australia, as an advanced democratic society, has an obligation to promote at the international level the participatory processes we so value in the domestic context.

This position, while not expressly rejected by the WTO *DSU*, and now an acceptable part of practice through *DSU* jurisprudence, will be difficult for Australia to adopt as part of any foreseeable FTA negotiations due to the strong stance taken by the Asian nations against its inclusion throughout the *DSU* Review.[111] However, this is not to say that Australia should not attempt to negotiate for its inclusion in future FTAs.

At the same time, the interests of those Members opposed to increased transparency cannot be disregarded. The WTO and FTAs are fundamentally intergovernmental in nature and should remain as such. Negotiations leading up to panel hearings should remain private and if a matter concerns confidential information, then steps should be taken to ensure that the information remains confidential. But the hearings themselves should be conducted in a manner widely accepted in modern democracies — open to public attendance. While the practice of confidential hearings attended only by governmental officials could be justified in a conciliatory dispute settlement system — as was the case in the diplomatically based dispute settlement mechanism of the GATT, where the losing party could block adoption of a panel report — the rationale for holding all proceedings in camera does not hold under the adjudicative model of dispute resolution adopted with the advent of the WTO and followed by the vast majority of FTAs.[112]

B *Consistency with Australia's National Interest and Foreign Policy*

Another reason to promote an open dispute settlement mechanism is to promote Australia's national and foreign policy interests. According to

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109 See, eg, Richard Shell, 'The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 359; Philip Nichols, 'Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 295; Steve Charnovitz, 'Opening the WTO to Non-Governmental Interests', above n 88.

110 Thomas Cottier, 'The WTO and Environmental Law: Three Points for Discussion' in Agata Fijalkowski and James Cameron (eds), *Trade and the Environment: Bridging the Gap* (1998) 56, 58–9.

111 See Mercurio, 'Improving Dispute Settlement', above n 42.

112 For more on the nature of dispute settlement in the GATT, see John H Jackson, *World Trade and the Law of GATT* (1969); Robert Hudec, above n 29.

Advancing the National Interest: Australia's Foreign and Trade Policy White Paper, promoting institutions that are 'open, accountable and transparent' is both in Australia's national interest and a specific foreign policy objective.[113] Australia's promotion of openness and transparency would also be consistent with the Australian endorsed 'Best Practice Statement' drafted to guide FTA negotiations between Asia-Pacific Economic Cooperation ('APEC') nations.[114] Specifically, the 'Best Practice Statement' requires the promotion of 'structural reform among the parties through the implementation of transparent, open and non-discriminatory regulatory frameworks and decision-making processes'.[115] In addition, as part of the WTO *DSU* Review, Australia appears to support the efforts of the US and others to promote a more open and transparent dispute settlement process.[116] Moreover, Australia's promotion of such a process would be consistent with Department of Foreign Affairs and Trade's ('DFAT') specific guiding principles for negotiations on the FTA with ASEAN nations. DFAT has stated that negotiations will be designed to 'enhance and improve transparency in trade and investment relations between the parties'.[117] Therefore, it appears that Australia has a preferred commitment to openness and transparency.

Another key reason Australia should promote an open and transparent dispute settlement mechanism in its FTAs is that these values are consistent with its democratic ideals.[118] For instance, the *Foreign and Trade Policy White Paper* defines Australia as 'a liberal democracy with a proud commitment to political and economic freedom'.[119] In the later 2004 policy paper, *Transnational Terrorism: The Threat to Australia: White Paper*, the Government states that we 'advance our values through an active foreign policy. We energetically support democracy'.[120] It can only be presumed that if a democratic option is available in

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113 DFAT, *Advancing the National Interest: Australia's Foreign and Trade Policy White Paper* (2003) <http://www.dfat.gov.au/ani/index.html> at 1 October 2005 ('*Foreign and Trade Policy White Paper*').

114 APEC is comprised of Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei, Thailand, the US and Vietnam: APEC, *About APEC* (2005) <http://www.apec.org/apec/about_apec.html> at 1 October 2005.

115 DFAT, *Best Practice*, above n 44.

116 Although Australia's proposals to the *DSU* Review have not discussed the issue, see the minutes of meetings of the Dispute Settlement Body for the positions of Australia and other Members.

117 DFAT, *Guiding Principles for Negotiation on ASEAN–Australia and New Zealand Free Trade Area* (2004) <http://www.dfat.gov.au/trade/fta/asean/principles.html> at 1 October 2005.

118 See also Andrea Schneider, 'Democracy and Dispute Resolution: Individual Rights in International Trade Organizations' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 587, who argues that, in the context of international dispute mechanisms, '[i]ndividual participation can also be used as a measure for democracy and legitimacy of trade organizations': at 637.

119 Above n 113, 2.

120 DFAT, *Transnational Terrorism: The Threat to Australia: White Paper* (2004) 67 <http://www.dfat.gov.au/publications/terrorism/transnational_terrorism.pdf> at 1 October 2005.

the context of FTAs, that should be the preferred foreign policy choice.[121]

The concept of democracy is, however, a wide one and difficult to define. Professor James Crawford, writing on democracy in international law, notes that '[t]here can be different ideals or legitimate versions of democracy'.[122] Professor Crawford considers that one of the fundamental values of democracy as evidenced by international human rights treaties is 'the right of all citizens to participate in the political life of their societies'.[123] For Professor Crawford this includes, but is not limited to, the right to vote and take part in elections.[124] In the context of international trade it is, however, unhelpful to conceive of democracy as the right of the citizen to vote. As Robert Housman states in a well publicised and much heralded article:

> In the most simplistic sense, democracy means government by and for the people. However, because many of the elements of democratic governance at the national level (for example, the election of representatives in free and fair elections) are inapplicable in the statially oriented world of international trade decision making, … [it is more appropriate to focus] more narrowly on the element of democracy that is most applicable to international relations.[125]

Similarly, Professor Steve Charnovitz argues that 'the fixation on elections as a litmus test [for democracy] … overlooks the greater value of open continuous participatory decision-making processes'.[126] Professor Charnovitz characterises his approach as 'functional' as it centres on a practical approach to democracy.[127] Likewise, Molly Beutz pinpoints the 'functionality' of democracy as a concrete and useful term.[128] Beutz considers that

> [w]hile a number of conditions aid the proper functioning of democracy, transparency and the rule of law are preconditions of accountability … Transparency and access to information facilitate accountability because citizens need information to know when to hold which leaders accountable for what decisions.[129]

Housman further considers what promoting democracy in the context of international trade would mean. He contends that in the specific context of trade, democracy has two elements: the rights to 'have knowledge of and participate in

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121 Throughout the *Foreign and Trade Policy White Paper*, above n 113, there are references to the aim of promoting democracy. For example:

> We have been instrumental in establishing and funding the Asia-Pacific Forum for National Human Rights Institutions. The Government has established and funded the Centre for Democratic Institutions in Australia to assist human rights-related bodies in the region, such as parliaments and judiciaries, to function more effectively: at 115.

122 James Crawford, *International Law as an Open System: Selected Essays* (2002) 39.

123 Ibid.

124 Ibid 40.

125 Robert Housman, 'Democratizing International Trade Decision-Making' (1994) 27 *Cornell International Law Journal* 699, 703.

126 Steve Charnovitz, 'The Emergence of Democratic Participation in Global Governance (Paris 1919)' (2003) 10 *Indiana Journal of Global Legal Studies* 45, 58.

127 Ibid.

128 Molly Beutz, 'Functional Democracy: Responding to Failures of Accountability' (2003) 44 *Harvard International Law Journal* 387.

129 Ibid 428.

decisions that will effect [the individual's] interests'.[130] The emphasis is on participation, and is consistent with Professor Crawford's conception of democracy as broadly concerning the right to take part in the political life of the community.

The right to participation in the context of state-to-state dispute mechanisms is defined in concrete terms by Housman as having the following attributes: the right to attend all hearings, view supporting documentation and submit amicus briefs.[131] Again, these are the very rights which Australia supports in the context of the WTO dispute settlement mechanism.[132]

These attributes would, in the words of Housman, 'develop [a] more participatory trade dispute settlement mechanism'.[133] If participation is the key to democracy then we can conclude that an open state-to-state dispute mechanism, as in the *AUSFTA*, is a democratic model. The Australian Government is therefore faced with a well-defined policy choice between a closed model which denies the participatory attributes listed by Housman (such as the *SAFTA*), or an open model which is in accordance with the stated Australian value of promoting democracy (such as the *AUSFTA*). In other words, Australia has an opportunity to 'functionalise' the foreign policy aims of 'promoting democracy' through its FTAs by negotiating for the relatively modest policy position of making trade proceedings public and accessible.

Housman also considers that international trade offers the possibility of promoting open and democratic principles to countries that may not share those ideals. In the context of this commentary, this would mean that the type of state-to-state dispute mechanism chosen offers the opportunity of sharing a model of governance and democracy in dispute settlement. According to Housman, failures to take this opportunity 'to democratize trade decision-making are troubling because these failures squander an important opportunity to further the recognition of democratic principles'.[134]

An example of where such an opportunity would present itself is in the formation of trade policy on state-to-state dispute mechanisms with several members of ASEAN, most notably Burma. The Australian Foreign Affairs Minister, Alexander Downer, has even publicly recognised the need to democratise the authoritarian state when he stated:

> [W]ith regard to conditions in Burma I have spoken out consistently and strongly called for greater dialogue between the SLORC and Daw Aung San Suu Kyi and supported calls for political liberalisation. Australia will continue to make representations to the Government of Burma on specific human rights cases of concern and will maintain regular contact with opposition spokespeople, including Daw Aung San Suu Kyi. The Government has also maintained the

130 Housman, above n 125, 703. See also Schneider, above n 118.
131 Housman, above n 125, 744–5.
132 See above n 116.
133 Housman, above n 125, 746.
134 Ibid 702.

> 'benchmarks approach' in relation to Burma *which links greater bilateral contact with moves toward greater regard for human rights*.[135]

A preference for this approach can also be seen in the 2003 *Foreign and Trade Policy White Paper*, which states that '[t]he Government advances human rights principally through focused bilateral efforts that promote international human rights standards'.[136] The *Foreign and Trade Policy White Paper* also demonstrates a clear preference for practical outcomes, stating that '[e]ngaging with regimes that offend some of the values of the Australian community can, if focused on practical outcomes, give us some hope of improving respect for human rights'.[137]

Including democratic values by endorsing an open state-to-state dispute mechanism with Burma, for example, would not only accord with Australia's broad foreign policy objective, as outlined above, but would also be consistent with its preferred method of engagement. The open state-to-state dispute mechanism is a practical method of ensuring that principles of democracy, which are sometimes vague and difficult to promote, are endorsed through its bilateral relations with neighbouring states.

If the policy of open state-to-state dispute mechanisms in FTAs is not endorsed by the Australian Government, then the Government should openly explain why a closed system of dispute settlement is being accepted. This explanation would, at the very least, fulfil the right of citizens to know why and how a trade policy that affects their rights, obligations and liberties is developed.[138] For ultimately, if a closed model is endorsed, the decision will not simply have external ramifications, but also a significant internal effect. As Housman notes, closed systems serve 'to undermine the role of democracy in nations that already have democratic systems of government'.[139] In this regard, according to Housman, it would be regressive and undermine democracy in Australia if Australian citizens did not have some form of access to the state-to-state legal proceedings — the failure to democratise dispute settlement mechanisms in trade would deny Australians 'the same form of access [citizens] enjoy in other judicial settings'.[140]

Australian academic Madelaine Chiam has written about this need for participation (democratic engagement) in the formation of trade policy that has an internal effect. In relation to participation in the FTA negotiating process, Chiam states:

> As a consequence of the secrecy surrounding the bilateral negotiating process, Parliament and the Australian public feel unable to influence either the nature of the deal captured by the FTA, or the wording of the FTA itself. We are effectively left with a 'take it or leave it' option in relation to FTAs, creating a tension

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135 Alexander Downer, Minister for Foreign Affairs, 'Human Rights in Australian Foreign Policy' (Speech delivered at the Consultation between the Department of Foreign Affairs and Trade and Non-Government Organisations on Human Rights, Canberra, Australia, 30 July 1996) available at <http://www.dfat.gov.au/hr/speeches/960730_downer_dfat_ngo.html> at 1 October 2005 (emphasis added).

136 *Foreign and Trade Policy White Paper*, above n 113, 115.

137 Ibid.

138 Housman, above n 125, 703.

139 Ibid 730.

140 Ibid 744.

> between the legitimate economic and strategic interests of Australia on the one hand and transparency and accountability in the FTA negotiation process on the other.[141]

While we cannot agree with the level of engagement with which Chiam supports, we can and do endorse public participation in shaping the public policy positions which influence and shape FTA negotiations.

As well as promoting transparency and democracy, there are also pragmatic and national interest reasons for Australia to adopt the open model of dispute settlement as part of any future FTA. This is due to the fact that the US will promote the open dispute settlement mechanism as part of its future FTA negotiations, including in all of its negotiations with the ASEAN Member States (both individually and collectively).[142]

The US has already entered into an FTA with Singapore which, unlike the *SAFTA*, contains an open model of state-to-state dispute settlement.[143] The Advisory Committee for Trade Policy and Negotiations ('ACTPN'), the US Government's senior trade advisory panel, stated that '[t]he ACTPN hopes that the Singapore FTA will serve as a template for other agreements in Southeast Asia and the Pacific'.[144] Furthermore, several NGOs and business associations within the US have specifically stated that the model used in the *United States–Singapore Free Trade Agreement* ('*USSFTA*') will be used with ASEAN. For instance, Ernie Bower, President of the US–ASEAN Business Council, stated in a media release that '[t]he US–Singapore FTA will serve as a cornerstone of the

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141 Chiam, above n 12, 19.

142 DFAT has noted that the US 'has announced an Enterprise for ASEAN Initiative (EAI), which holds out the prospect of bilateral FTAs with ASEAN economies committed to economic reforms and openness': Mark Vaile, Minister for Trade, *Trade 2004* (2004) ch 2 <http://www.dfat.gov.au/trade/trade2004/chapter_02.html> at 1 October 2005.

143 The *United States–Singapore Free Trade Agreement*, signed 6 May 2003, art 20.4(4)(d) (entered into force 1 January 2004) available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html> at 1 October 2005 states that:

> The Parties shall establish by the date of entry into force of this Agreement model rules of procedure, which shall ensure:
>
> (i) a right to at least one hearing before the panel, which, subject to clause (vi), shall be open to the public;
>
> …
>
> (iii) that each Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel will be made public within ten days after they are submitted, subject to clause (vi);
>
> (iv) that the panel shall consider requests from nongovernmental entities in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties …

144 Advisory Committee for Trade Policy and Negotiations, *Report to the President, the Congress, and the United States Trade Representative on the* United States–Singapore Free Trade Agreement (2003) 2 available at <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Reports/asset_upload_file86_3223.pdf> at 1 October 2005.

Enterprise for ASEAN Initiative'.[145] The US has also strongly promoted the open state-to-state dispute mechanism in its recent FTAs with Chile[146] and the Central American nations.[147]

It is acknowledged that the recently negotiated *ASEAN Protocol on Enhanced Dispute Settlement Mechanism* ('*ASEAN Protocol*') suggests that there is an ongoing preference, at least within ASEAN itself, for closed proceedings, but it again is simply repeating existing *DSU* language regarding both transparency and non-state participation.[148] It is unknown how the wording of the exact provisions in the context of ASEAN will be interpreted and, as the Appellate Body has begun interpreting the *DSU* language in a liberal manner that allows for openness (upon request) and for limited non-state participation, it cannot authoritatively be said that the dispute settlement panels of ASEAN will go against this persuasive precedent. Furthermore, the *ASEAN Protocol* is designed for internal ASEAN disputes, and it cannot be presumed that the terms of the *ASEAN Protocol* will necessarily dictate how ASEAN will engage with non-members. It might be the case that ASEAN prefers to settle disputes within the association in a closed manner so as to maintain more traditional Asian modalities of dispute settlement, but these values may not be so important in disputes with outside countries or unions. Comments by Tommy Koh, the Chief Negotiator for Singapore in the *USSFTA* and Ambassador-at-Large at the Singaporean Ministry of Foreign Affairs, suggest openness to alternative models of international trade dispute resolution. Mr Koh recognises that the *USSFTA* will 'serve as a template for the US in its negotiations with other Asian countries'[149] and that 'Singapore would like its FTA with the US to lead eventually to an FTA between the US and ASEAN'.[150] Taken together, these two comments suggest that Mr Koh is both aware of and open to the possibility of ASEAN endorsing the principles included in the *USSFTA*. As it is widely known that the US only negotiates FTAs that include open panel proceedings and (albeit limited) participatory rights for non-state actors, Mr Koh has implicitly stated that Singapore, at the very least, is open to ASEAN accepting these principles in an agreement with the US.

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145 Ernie Bower, President of the US–ASEAN Business Council, 'US–ASEAN Business Council Hails Passage of the *US–Singapore FTA*' (Press Release, 1 August 2003) available at <http://www.us-asean.org/Press_Releases/2003/USSFTA_1Aug03.asp> at 1 October 2005.

146 *United States–Chile Free Trade Agreement*, signed 6 June 2003 (entered into force 1 January 2004) available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html> at 1 October 2005.

147 *Central America–Dominican Republic–United States Free Trade Agreement*, signed 5 August 2004 (due to enter into force 1 January 2006) available at <http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html> at 1 October 2005.

148 ASEAN, *ASEAN Protocol on Enhanced Dispute Settlement Mechanism* (2004) <http://www.aseansec.org/16754.htm> at 1 October 2005.

149 Tommy Koh, 'The *USSFTA*: A Personal Perspective' in Tommy Koh and Chang Li Lin (eds), *The* United States–Singapore Free Trade Agreement*: Highlights and Insights* (2004) 3, 8.

150 Ibid 10.

Therefore, while there is a general consensus among trade scholars that Asian states are opposed to both open and transparent as well as legalistic and adjudicative models of dispute settlement, ASEAN itself has not officially stated its position in relation to the open or closed model of state-to-state dispute settlement.[151] It is merely speculative and potentially limiting for ASEAN's targeted FTA partners to presume to know how ASEAN will negotiate on this or any issue. Thus, even if ASEAN is still opposed to an open and transparent dispute settlement system in its FTAs, the barrier to an open system is not insurmountable. Instead, it is clear on this evidence that an open or closed method of dispute settlement is an issue to be discussed during the negotiations.

IV CONCLUSION

Australia has the opportunity to negotiate for an open model of dispute settlement, and thus to promote transparency, in its future FTAs. Although the text of the WTO *DSU* (on which most FTA dispute settlement systems are currently based) embraces a closed model of dispute settlement, Appellate Body interpretations and decisions have slowly changed the nature of the system to embrace a more open approach. The US, Canada and the EC recently agreed to open a panel proceeding to the public via closed-circuit television and the Appellate Body found nothing in the *DSU* to prohibit this from being achieved. The consequences of this decision represent an enormous step towards making the multilateral trading system more transparent and open. Moreover, even though the *DSU* Review is not complete and it would be unwise, if not academically reckless, to forecast which of the potential amendments for increasing transparency within the *DSU* will be incorporated into the final document, the sheer number of proposals favouring some form of increased transparency in the system is not likely to be ignored.

Further, the open model of dispute settlement is consistent with both Australia's foreign policy and national interest. Practically speaking, the open model of dispute settlement allows for interested observers to understand and accept the nature of the system and counteracts the often ill-informed protestors and action groups who attract attention and even support by demonstrating against 'secret' international proceedings that affect the rights and lives of citizens. Moreover, as several scholars have noted, the open model of dispute settlement is consistent with democratic ideals and is an essential aspect of inclusive and responsive governance.

Finally, even if ASEAN and other potential FTA partners are opposed to the open model, the barrier does not appear to be insurmountable. Singapore's recent endorsement of the open model in the context of its FTA with the US indicates that Singapore, at least, does not have an intractable objection to public proceedings or non-governmental participation. Other ASEAN states may likewise be willing to consider an open model and to discuss the issue. Generally, reliance on a state-to-state dispute settlement mechanism only occurs

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[151] See Paul Davidson, 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation' (2004) 8 *Singapore Year Book of International Law* 165, 165–73; Helen Nesadurai, 'Cooperation and Institutional Transformation in ASEAN: Insights from the AFTA Project' in Ramesh Thakur and Edward Newman (eds), *Broadening Asia's Security Discourse and Agenda: Political, Social, and Environmental Perspectives* (2004) 292–3.

as a last resort. Yet even if a mechanism is only rarely used, it is in Australia's policy interests to promote, if only symbolically, a commitment to democratic and open dispute settlement systems in all of its FTAs.