

DO NGOS MAKE A DIFFERENCE? IN LIGHT OF NGOS INFLUENCE IN THE WTO

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ABSTRACT: *The World Trade Organization (WTO) is an intergovernmental organizations dealing with the rules of trade between its members. According to theory and organizational norms, in principle, only sovereign states and the separate customs territories are eligible to have the full membership of the WTO and enjoy the legal rights and have obligations. In addition to the members, the WTO also allows non-state actors, particularly nongovernmental organizations (NGOs) whose international legal personality are not recognized, to participate in international trade with diverse paths in respect of WTO activities. By analyzing two cases about the Biotech Products Dispute and the AIDS Drugs in South Africa, this paper compares the participation of NGOs and Transnational Corporations (TNCs) in the WTO. It shows that in spite of the similarity of their nature—the transnational non-state actor—between NGOs and TNCs, the formal participation of the former in the WTO has far less influence than the informal participation of the latter. In other words, TNCs seems to have much more real influence over the WTO than NGOs. This research finding demonstrates that forms of participation or pure institutional participation do not guarantee non-state actors to exert their influence on the WTO. Conversely, what kind of power used by them and the relationship they established with members' governments are the critical factors to explain whether NGOs really can make some differences in the WTO.*

KEYWORDS: WTO, NGOs, TNCs, Non-State Actors, Influence, Power

INTRODUCTION

Over the last two decades, international society has witnessed an unprecedented activity of nongovernmental organizations (NGOs) in the field of human rights and environmental protection. Therefore, it might be reasonable to argue that NGOs have played a crucial role in setting some global agendas, in influencing international rule-making, and in contributing to the implementation of social justice as well as public interest. However, the rise of NGOs has also created doubts and skepticism at the same time about their performance, effectiveness, or influence because the WTO does not have a strong will to be more transparent and accountable while the interaction between the

WTO and NGOs has matured into a more substance-based one according to the WTO's *World Trade Report 2007* (hereafter *Report 2007*).¹ To be specific, in *Report 2007*, the WTO recognizes that the earlier suspicion of NGOs among WTO members has been replaced by a more constructive relationship based on mutual cooperation on substantive issues;² unfortunately, the real truth does not look like this way. In the opinion of WTO's opponents, this global trade regime as a vehicle only moved by corporate profit-seeking logic.³ Actually, in lots of cases that have been brought to the WTO challenging environmental or public health legislation on behalf of transnational corporations (TNCs), the TNCs have won in the long run.⁴

Given this, some questions are worth our time to consider: Are NGOs significant actors in the area of international trade affairs today? Are they still the traditional non-state actors outside the WTO without any influence, or have they become policy-making participants inside the WTO with the impact? Furthermore, is there a better choice for NGOs to adjust their strategies when interacting with the WTO? In order to answer these questions, a basic understanding of the relationship between NGOs and the WTO is essential.

The academic debate over the role of NGOs has two viewpoints; on the one hand many scholars of international relations recognize that NGOs have played an important role in raising awareness and applying pressure to ensure environment and human rights issues discussed in the WTO.⁵ However, on the other hand, some research suggest that NGOs should not be involved in the WTO because they lack accountability and have no direct stake in the field of international trade.⁶ In practice, the WTO has established an institutional (formal) relationship with NGOs since 1995. According to the second paragraph of Article V on *Marrakesh Agreement Establishing the World Trade Organization* (hereafter *Marrakesh Agreement*), the basis for NGOs engagement with WTO is the following:

¹ Alan Fowler, "NGO Futures: Beyond Aid: NGDO Values and The Fourth Position," *Third World Quarterly*, Vol.21, No.4 (2000): 589-603.

² WTO, *World Trade Report 2007: Six Decades of Multilateral Trade Cooperation*, available at: http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf (p. 324; last visited: 2019/07/10)

³ J. Eckhardt, C. Holden, and C. Callard, "Tobacco Control and the World Trade Organization: Mapping Member States' Positions after the Framework Convention on Tobacco Control," *Tobacco Control*, Vol. 25, No. 6 (2016): 692-698.

⁴ Claude Barfield, *Free Trade, Sovereignty, Democracy: Future of the World Trade Organization* (Washington, DC: AEI. Press, 2001): 42-43. It is worth mentioning that there is no legally precise and universally accepted definition of TNCs. Therefore, this paper briefly describes TNCs as an economic and a legal entity.

⁵ Anne T. Feraru, "Transnational Political Interests and the Global Environment," *International Organization*, Vol. 28, No. 1 (Winter 1974): 31-60; Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization," *University of Pennsylvania Journal of International Economic Law*, Vol. 17, No. 1 (1996): 340.

⁶ Alnoor Ebrahim, "Towards a Reflective Accountability in NGOs," in Alnoor Ebrahim and Edward Weisband eds., *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge: Cambridge University Press, 2007): 193-224.

“The General Council may make appropriate arrangements for consultations and cooperation with non-governmental organizations concerned with matters related to those of the WTO.”⁷

Nevertheless, the article mentioned above does not provide an explicit guidance on the procedures in which the WTO or NGOs can engage mutually. Accordingly, another direction was provided in the documentation *Guidelines for Arrangement on Relations with NGOs*, adopted by the WTO General Council on 18 July 1996 (hereafter *Guidelines 1996*). *Guidelines 1996* establishes a principle of strategy for advancing the relationship between the WTO and NGOs. Moreover, the registered NGOs are entitled to observe plenary sessions and Ministerial Conferences in the WTO. Looking at these, people would like to argue that the practice of NGOs participation in the WTO had moved forward considerably than what they did.⁸ The fact is quite the other way, however, since all trade agreements under the WTO system are legally binding treaties of rights and obligations among its members (the sovereign states or rare separate customs territories), NGOs are not permitted to be ‘directly involved’ in the work of the WTO or its meetings.⁹ In other words, the WTO does not allow NGOs to participate in its decision-making process before getting a consensus of its members.¹⁰

Besides the participation in the administrative decision-making process mentioned above, the judicial procedure for resolving trade disputes between members, the Dispute Settlement Understanding and its process (DSU and DSP), provides another possibility in which NGOs could participate: *amicus curiae* brief.¹¹ Again, this is a practice for ‘indirect participation’ recognized by the WTO Appellate Body,¹² and it has not been formally mentioned in the DSU *per se* until now.

It is interesting when people compare the NGOs administrative and judicial participations in the WTO with the practice of TNCs because there are two manifest differences can be found. First,

⁷ The whole context could via at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last visited: 2019/07/10)

⁸ Jeffrey Dunoff, “The Misguided Debate Over NGO Participation at the WTO,” *Journal of International Economic Law*, Vol. 1, No. 3 (1998): 433-434.

⁹ The sixth paragraph of *Guidelines 1996* states that: “..... As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level.....” Please see: NGOs: GUIDELINES, WT/L/162 (23 July 1996), available at WTO official web site: http://www.wto.org/english/forums_e/ngo_e/guide_e.htm (last visited: 2019/07/10)

¹⁰ Internal Transparency and Decision-making processes at the WTO: Critical Issues and Recommendations, WTO NGO Symposium (1 May 2002).

¹¹ The concept of *amicus curiae* is that an individual or group who is not a party to the specific trade dispute may submit a document to the Dispute Settlement Body (DSB) in which it may articulate its point of view on legal questions and inform the DSB about facts in order to facilitate its ability to decide the case. Please see: Dinah Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings,” *American Journal of International Law*, Vol. 88, No. 4 (1994): 611.

¹² The issue of *amicus curiae* first came up in the US-Shrimp case. See: Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (November 6, 1998), para. 107-108.

TNCs seem to be more powerful than NGOs to exert considerable influence on the trade negotiations and decision-making of the WTO, even without any formal access to it. Second, WTO's decisions, whether administrative or judicial, are usually in line with TNCs' expectations rather than NGOs', even *Report 2007* indicates that NGOs have switched to a closer cooperation with the WTO and have had more influence. In short, in spite of the similarity of their nature—the transnational non-state actor—between TNCs and NGOs, the former seem to have much more real influence over the WTO than NGOs do in a realistic world.

The preliminary objective of this paper is to explore NGOs' influence in the WTO. By using a comparative approach and case studies,¹³ the paper compared the practice of NGOs with TNCs' in the WTO and sets some variables (indicators) to examine the conditions under which NGOs are most likely or least possible to influence WTO's policy making or judicial decision.¹⁴ Further, this paper hypothesizes the influence of NGOs has a thin linkage with their goal whether it is social justice or not, and is less relative to its status in the WTO system. Conversely, the type of power used and the relationship with the governments of some WTO's members are more persuasive to explain the reason why NGOs cannot influence the WTO or push it to adjust its trade regulations or judgments. In conclusion, this paper points out that NGOs only have an extremely limited possibility to affect policies and decisions of the WTO. Further, the WTO deliberately lets NGOs be bound to some extent by the constraints of its institution.

LITERATURE REVIEW

A. *NGOs and Their Influence*

The increasingly important role that NGOs have played from service providers to major actors with the influence to change policies implemented by governments and intergovernmental organizations (IGOs) has received many empirical and theoretical attentions.¹⁵ For example, Teegen, Doh, and Vachani suggested that NGOs have become new political vehicles to deliver social justice and public interests such as environmental protection, food safety, and poverty relief.¹⁶ However, what is the

¹³ By exploring the *Biotech Products case* and *AIDS Drugs in South Africa case*, this paper will provide a reasonable basis upon which to answer the research question: do NGOs make a difference?

¹⁴ Please see Table 1, p. 8.

¹⁵ Hildy Teegen, Jonathan Doh, and Sushil Vachani, "The Importance of Nongovernmental Organizations (NGOs) in Global Governance and Value Creation: An International Business Research Agenda," *Journal of International Business Studies*, Vol. 35, No. 6 (2004): 463-483; David Fidler, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations," *Chinese Journal of International Law*, Vol. 4, No. 2 (2005): 325-392.

¹⁶ Teegen, et al., *supra* note 15: 475.

influence of NGOs when they play the role? And how do they affect states and IGOs behaviors?¹⁷

To use the classic definition by Dahl, the influence exists “when X causes Y to the extent that X gets Y to do something that Y would not otherwise do.”¹⁸ According to this definition, most NGOs exert no influence on governments or IGOs to the extent that they anticipate governments or IGOs doing because most NGOs often do not have the means to use. Although it is the case that ‘some’ NGOs in the North are able to exert influence, that does not mean that ‘all’ NGOs in the North or in other regions are influential especially those that are active but less able to raise funds for themselves. In this sense, at international level only few NGOs, those come from the North and have economic independence, are the cases that can be recognized to wield their influence over sovereign states or IGOs. Otherwise, NGOs influences, as Barrow’s critique, are “discursive practices” to form coalitions with limited countries and organizations such as the cases of the establishment of the International Criminal Court (ICC) and its constitution: *the Rome Statute of the International Criminal Court*.¹⁹

In He and Murphy’s research, the conclusion suggested that the global social movement to allow developing countries to exclude medicines from being granted patents successfully challenges the pessimism about NGOs influence.²⁰ Besides, their case studies revealed that NGOs must consolidate their roles as active actors by urging sovereign states and TNCs to commit themselves to maintain social justice, not just at the WTO arena.²¹ This perspective leads to some meaningful enlightenment to understand the feature of NGOs influence, but it does not offer a clear answer to tell people how NGOs exert their influence when they have become an insider in the WTO mechanism.

In comparison with these research literatures, this paper focuses on assessing the influence of NGOs on the WTO. It categorizes the influence into two different sets of criteria: process and outcome. The process criterion includes NGOs access in the policy-making or judicial process and whether their participation made WTO’s decision different. The outcome criterion includes NGOs success in

¹⁷ Keck and Sikkink’s research provides some types for us to assess the influence of NGOs, but it doesn’t offer concrete indicators to establish the validity and reliability. Even though they designed the “boomerang pattern” of influence, this pattern could not explain why NGOs influence is weak or useless under some conditions. Please see: Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998): 13; 25-27.

¹⁸ Robert Dahl, *Who Governs? Democracy and Power in an American City* (New Haven: Yale University Press, 1961): 80.

¹⁹ Kristie Barrow, “The Role of NGOs in the Establishment of the International Criminal Court,” *Dialogue*, Vol. 2, No. 1 (2004): 11-22; Michael Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York: Palgrave Macmillan, 2008): 83-84; 110.

²⁰ Baogang He and Hannah Murphy, “Global Social Justice at the WTO? The Role of NGOs in Constructing the Global Social Contracts,” *International Affairs*, Vol. 83 No. 4 (2007): 707-727.

²¹ *Ibid.*: 727.

challenging the status quo such as ensuring more fairness in WTO's trade agreements. In sum, emphasizing the influence of NGOs at both the process and the outcome levels, this paper develops a set of indicators to measure NGOs influence (please see Table 1).

Table 1: The Similarities and Differences between NGOs and TNCs:

		NGOs	TNCs
Sim.	Nature	Non-state actor	Non-state actor
	Scope of activity	international	international
Dif.	Status in the WTO	limited but formal access to participate	not have any formal access to participate
	Goal	social justice/public interests	economic profits
	Type of power	Ideal and soft	Material and hard
	Relationship with gov.	generally weak	usually strong

Source: made by the author

In the Table 1, we will see both NGOs and TNCs are similar in the nature and the scope of activity. However there are four items in which NGOs and TNCs are different from each other. These four items not only be used to distinguish NGOs and TNCs, but also play an essential role to assess NGOs influence. As mentioned earlier, this paper will demonstrate why the influence of NGOs only has a weak link with their goal, and is less relative to their status in the WTO. Conversely, the type of power used by them and the relationship they established with members' governments are the critical factors to explain if NGOs really can make some differences such as a more transparent and just WTO.

B. NGOs participation in IGOs

There are some arguments in favor of NGOs participation in IGOs.²² First, NGOs participation will enhance the decision-making process because NGOs can provide more information that governments do not have. As Daniel Esty said, NGOs can play a role of intellectual competitors to governments in the quest for optimal policies.²³ In other words, NGOs may help governments investigate certain difficult issues such as environment and technology. Furthermore, NGOs may frequently enhance the

²² Ann Marie Clark, Elisabeth J. Friedman and Kathryn Hochstetler, "The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women," *World Politics*, Vol. 51, No. 1 (1998): 1-35; P. J. Simmons, "Learning to Live with NGOs," *Foreign Policy*, No. 112 (Autumn, 1998): 82-96; Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance," *Michigan Journal of International Law*, Vol. 18, No. 2 (1997): 281-282.

²³ Daniel Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion," *Journal of International Economic Law*, Vol. 1, No. 1 (1998): 136.

resources and expertise available as well as enrich the policy debate.²⁴ Second, NGOs participation will increase the legitimacy of IGOs. For example, the WTO is more or less a secretive IGO in which the governments of the members set the agenda and push through rules that affect the rights of many people without supervision of parliaments or democratic due process. With this vision, WTO's decision-making has been described as undemocratic and lacking transparency.²⁵ The legitimacy of and public confidence in the WTO will increase when NGOs have the opportunity to participate in and to observe its decision-making procedure. Third, NGOs participation in the debate at domestic level is not always the case in the WTO members because an open or democratic process at domestic level is not the real truth for all members. Hence, the participation of NGOs in the WTO can compensate for this flaw.²⁶

Beyond the favor of NGOs participation, there are equally some arguments which challenge the involvement of NGOs in IGOs. First of all, they think it very likely lead the decision-making process to be captured by special interests rather than whole social justice.²⁷ Second, most developing countries prefer to object to NGOs participation in the WTO because they view most NGOs coming from the North as unfriendly to their trade interests.²⁸ In other words, allowing NGOs a more possibility of participation may therefore further risk the situation to their disadvantage in the field of international trade. Third, because of its consensus requirement, WTO decision-making takes time and is difficult to get. Therefore, NGOs participation will undoubtedly make it even tougher and inefficient.²⁹

C. WTO's Practices for NGOs

1. 'Formal Rules' for participation

IGOs have responded positively to the call of NGOs for involvement and currently allow NGOs to participate in their activities. To some extent, this is also the case for the WTO. However, the debate

²⁴ Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2005): 156.

²⁵ Ann Capling and Patrick Low, *Government, Non-State Actors and Trade Policy-Making, Negotiating Preferentially or Multilaterally?* (Cambridge: Cambridge University Press, 2010): Ch. 1

²⁶ Henry J. Steiner, Ryan Goodman, and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (Oxford: Oxford University Press, 2007): 1387-1390.

²⁷ Jeffrey Dunoff, "The Misguided Debate over NGO Participation at the WTO," *Journal of International Economic Law*, Vol. 1, No. 3 (1998): 437.

²⁸ For example, one British coffee company named Cafedirect committed to sell fair trade coffee. Oxfam, a famous NGO strongly support fair trade movement, advocated a campaign targeted at some coffee companies which are Cafedirect's competitors in the African market. Oxfam accused them of exploiting growers by paying a tiny part of the retail price they sell. However, Oxfam in fact owns 25% of Cafedirect. Please see: Krishnamurthy Sriramesh and Dejan Verčič, *The Global Public Relations Handbook: Theory, Research, and Practice*, 2nd ed. (New York: Routledge, 2009): 893.

²⁹ Seema Sapra, "The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-state Actors," *Oregon Review of International Law Journal*, Vol. 11, No. 1 (2009): 93-94.

on the level of involvement of NGOs is very controversial. On the one hand, the NGOs participation in the decision-making processes enhances the quality of decision making as mentioned before, improves accountability and transparency of the process, as well as enriches outcomes through a variety of views,³⁰ but on the other hand this kind of participation can confuse choices, hamper the search for consensus, and cause distraction at meetings. According *Marrakesh Agreement* Article V, para. 2, “the General Council may make appropriate arrangements for consultations and cooperation with NGOs concerned with matters related to those of the WTO.” Furthermore, the General Council adopted the other documentation, *Guidelines 1996*, in the year after 1995, in which members recognized that NGOs can play a role to increase the awareness of the public in respect of WTO activities and that NGOs are a valuable resource that can contribute richness of the public debate.³¹ To be specific, *Guidelines 1996* agrees that interaction with NGOs can be developed through the organization of symposia on particular trade related issues. However, *Guidelines 1996* also makes the limit of NGOs involvement. In the concluding paragraph of it, the General Council decided that it is impossible for NGOs to be directly involved in the work of the WTO or its meetings.³² Hence, if there is a closer consultation or cooperation that exists between the WTO and NGOs, that must be due to there is an appropriate processes at the national level.³³

2. The ‘Real Practice’ for Participation

In practice, the ways of WTO’s engagement with NGOs are several: (a) attendance of the meetings of the Ministerial Conference. This attendance has now become an established practice; however, there is no formal arrangement for the participation of NGOs in this kind of meetings. In fact, for each Session of the Ministerial Conference, the General Council has the right to decline NGOs attendance.³⁴ (b) informal meetings with NGOs. Even the *Guidelines 1996* creates the possibility for WTO councils and committees to meet with NGOs. There are no formal procedures that would manage such meetings. Sometimes meetings are held upon the suggestion of the relevant chairpersons or WTO’s Secretariat, but in most cases, the Secretariat is not involved in. Similar informal meetings also take place between NGOs and WTO’s Secretariat staff from various divisions. These meetings may be devoted to negotiations or cover technical issues of interests to NGOs. However, there is no regular schedule for these meetings neither. Put simply, these meetings are

³⁰ *UN System and Civil Society: An Inventory and Analysis of Practices* (May 2003). Available at: <http://www.un.org/reform/pdfs/hlp9.htm> (last visited: 2019/06/23).

³¹ *Guidelines 1996*, *supra* note 9, paras. 2 and 4

³² *Ibid.*, para. 4.

³³ *Ibid.*

³⁴ Please see: WTO Ministerial Conference, Procedures Regarding Registration and Attendance of Non-Governmental Organizations at the Sixth Session of the Ministerial Conference, WT/MIN(05)/INF/6, dated 1 June 2005.

organized on an *ad hoc* basis and case by case.³⁵ (c) the informal NGO Advisory Body. There is no permanent body in the WTO that provides a chance of dialogue between members and NGOs. Suggestions to establish such a body, however, have received little support from WTO members. In 2003, WTO Director-General tried to establish an informal NGO Advisory Body, which was designed to provide a platform for dialogue between the WTO Director-General and NGOs. However, this practice did not result in any specific and positive response.³⁶ (d) involvement in dispute settlement. In US-Shrimp case, the WTO Appellate Body indicated that WTO Panel has the authority to accept and consider *amicus curiae* briefs.³⁷ It does not represent that NGOs opinions are necessarily accepted and considered. In other words, it means that WTO Panel has the right to decide if it will consider NGOs opinions in the specific trade dispute. Actually, in most cases WTO Panel was preferable to refuse to accept NGOs *amicus curiae* briefs.³⁸

D. TNCs participation in the WTO

This section will discuss the role that TNCs play in shaping the policy of the WTO. Some research so far have investigated how TNCs use political strategies as a tool against regulatory limitations from the WTO or other international trade regimes.³⁹ Other studies of TNCs emphasize that size and scale determine which kind of TNCs have the capacity to apply political leverage.⁴⁰ Both these two categories are similar to the hypothesis of this paper. To be specific, the larger TNCs are, the more influence TNCs have, and the more possibility TNCs affect WTO's behavior or persuade the government to support their interests. To use an old cliché, power is worth a thousand words.

1. TNCs *de facto* existence in the WTO

TNCs are one of the most important non-state actors in the field of global economy, occupying a more powerful position than ever before.⁴¹ TNCs frequently use their commercial and political

³⁵ http://www.wto.org/english/forums_e/ngo_e/intro_e.htm (last visited: 2019/06/23)

³⁶ Debra P. Steger, *Redesigning the World Trade Organization for The Twenty-First Century* (Ottawa: CIGI and Wilfrid Laurier University Press, 2010): 328.

³⁷ See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (November 6, 1998), paras. 104, 105 and 106.

³⁸ Eric de Brabandere, "NGOs and the Public Interest," *Chicago Journal of International Law*, Vol. 12, No. 1 (Summer 2011): 86-113; C. L. Lim, "The Amicus Brief Issue at the WTO," *Chinese Journal of International Law*, Vol. 4, No. 1 (2005): 92.

³⁹ David L. Levy and Aseem Prakash, "Bargains Old and New: Multinational Corporations in Global Governance," *Business and Politics*, Vol. 5, No. 2 (2003): 132-134; John Ruggie, "Multinationals as Global Institution: Power, Authority and Relative Autonomy," *Regulation & Governance*, Vol. 12, No. 3 (September 2018): 317-333.

⁴⁰ The size and scale play a key role at the interaction level in which TNCs establish its connection with governments. Please see: Susan Strange, "Big Business and the State," *Millennium-Journal of International Studies*, Vol. 20, No. 2 (1991): 245-250.

⁴¹ Bennett Harrison, *Lean and Mean: The Changing Landscape of Corporate Power in the Age of Flexibility* (New York: Basic Books, 1997): 5; Doris Fuchs, "Theorizing the Power of Global Companies," in J. Mikler, ed., *The Handbook of Global Companies* (Chichester: Wiley-Blackwell, 2013): 77-95.

leverage to influence international trade negotiations and take advantage of a worldwide trend towards economic liberalism.⁴² Moreover, TNCs are powerful enough to exert considerable influence on the agenda and rules of the WTO. Although the WTO is made up of sovereign states or separated customs territories, it is TNCs rather than these WTO members that actually do the trade. Given this, people will not be surprised that WTO's practice is usually in line with TNCs expectation and the WTO's policy or agenda is dominated by a set of TNCs interests.⁴³

In practice, TNCs have a long and successful history of shaping WTO's regulations to their benefit. *The Agreement on Trade-Related Aspects of Intellectual Property Rights* (hereafter TRIPS) is a classical case in point. Policies on intellectual property rights were originally decided in the domestic level; however, using their influences in the governmental departments, Monsanto, DuPont, IBM, General Electric, and other TNCs in the United States ensured that intellectual property rights were brought into the global trade agenda in the late 1980s.⁴⁴ The adoption of TRIPS was a huge victory for these TNCs, giving them an exclusive protection against pirate in the global trade market. For example, 70% of patents on crops and seeds are held by six transnational agribusinesses (Monsanto is one of them); namely their power can set the market price and block competition. Obviously, such transnational enterprises not only have their intervention into WTO's regulation, but also monopolize the global food market.⁴⁵

When we see TNCs wielding their economic power over the WTO and taking advantages from it, the logical next step for us is to ask why TNCs have such a *de facto* influence over the trade agreements and policies in the WTO. According to the report issued by United Nations Conference on Trade and Development (UNCTAD), rich developed countries, such as the states in the European Union (EU) and the U.S. are home to third quarter of the world's top 100 TNCs.⁴⁶ Given this fact, it is not hard to image that the EU and the U.S. have a commitment to promote their domestic industries interests by pushing to open global trade markets through the WTO. In fact, the market economy and globalization over the past decades have caused an irreversible phenomenon, which empowers European and North American TNCs to become colossal economic powers. The result is that TNCs are wielding this enormous *de facto* power at the domestic and international level and using it to

⁴² David Levy and Aseem Prakash, "Bargains Old and New: Multinational Corporations in Global Governance," *Business and Politics*, Vol. 5, No. 2 (2003): 137-139.

⁴³ N. Dahan, J. Doh, and T. Guay, "The Role of Multinational Corporations in Transnational Institution Building: A policy Network Perspective," *Human Relations*, Vol. 59, No. 1 (2006): 1582.

⁴⁴ Duncan Matthews, *Globalising Intellectual property Rights: the TRIPs Agreement* (London: Routledge, 2002): 20.

⁴⁵ Philip McMichael, "Global Development and the Corporate Food Regime," in Frederick H. Buttel and Philip McMichael eds., *New Directions in the Sociology of Global Development* (Oxford: Emerald Group Publishing Limited, 2005): 287-288.

⁴⁶ UNCTAD, *The Universe of the Largest Transnational Corporations* (NY: United Nations, 2007): 3; 21-22.

affect substantially all the policies and regulations in the WTO.

2. TNCs have play a *de facto* role in DSP

In the DSP, although the DSU only provides for dispute settlement between members, TNCs and industry lobbying groups play a significant role in the way that members initiate trade disputes under the DSU.⁴⁷ As Gregory Shaffer suggested, TNCs adapted “public-private collaborative modes” (hereafter PP mode) to enforce WTO law and advance their interests.⁴⁸ In more detail, PP mode integrate the interests of businesses and government authorities, being an important tool that TNCs wield in addressing international trade disputes. Hence, although governments of members are the only parties to DSP, very often WTO disputes arise from the interests of TNCs. In other words, many trade disputes heard by the WTO were dispute *de facto* brought by governments at the instigation of industries or companies. For instance, in Japan-Film case, Kodak Company actively supported the U.S. government to claim against Japan. Moreover, in EC-Bananas III case, Chiquita Company played a central role in the involvement of the U.S. government in the dispute.⁴⁹

The legislation of some WTO Members, in particular the U.S., the EU, and China, provides a possibility for individuals and business entities to address its government with a request to open a DSP due to breach of WTO law by another members. Furthermore, companies or industry associations will not only lobby governments to bring dispute settlement cases to the WTO, they will also play an important and behind-the-scenes role in planning the legal strategy and drafting the submissions.⁵⁰ In the U.S., PP mode centers on informal channels for lobbying and consultation, petitioning for the U.S. government to combat trade barriers and discriminatory policies enacted by foreign governments.⁵¹ Put simply, the DSP has become an option that TNCs might use to combat restricting policies enacted by foreign governments, the importing countries in particular.⁵²

Although PP mode in the European countries operate differently from that in the U.S., European

⁴⁷ Greg Shaffer, *Defending Interests: Public Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003): 144-146.

⁴⁸ *Ibid.*: 144.

⁴⁹ Wei-en Tan, “State-Centric Realism Eclipsed: TNCs as the Rising Powerful Actors in the Age of Trade Liberalization,” *Journal of Politics and Law*, Vol. 8, No. 4 (December 2015): 227-228; T. E. Josling, “Bananas and the WTO: Testing the New Dispute Settlement Process,” in T. E. Josling and T. G. Taylor, eds., *Banana Wars the Anatomy of a Trade Dispute* (California: Institute for International Studies Stanford University, 2003): 169-194.

⁵⁰ Andrew T. Guzman and Boalt Hall, “Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes,” *Journal of Legal Studies*, Vol. 34, No. 2 (2005): 557-598; Jeffrey M. Drope and Wendy L. Hansen, “Purchasing Protection? The Effect of Political Spending on U.S. Trade Policy,” *Political Research Quarterly*, Vol. 57, No. 1 (2004): 27-37.

⁵¹ Shaffer, *supra* note 47: 19.

⁵² Homer Moyer, Jr. and Hal Shapiro, “Are WTO Dispute Settlement Proceedings Right for Your Company?” *Corporate Legae Times* (December 1st, 1998): 53.

TNCs and their governments also benefit from this mode with respect to WTO dispute settlements.⁵³ In fact, the EU Trade Directorate has been quite favorable to match up TNCs interests to accuse of potential violations by other member states. The evidences can be found in the law of the EU system where PP mode has been encouraged under Article 133 of *the Treaty Establishing the European Economic Community* of 1958, as amended by *the Treaty of Amsterdam* in 1999.⁵⁴ Under Article 133, the *de facto* process involves direct consultation between representatives of European TNCs and the European Commission, and only requires informal consent by a majority of state before the European Commission uses DSP.⁵⁵ In short, whether in the U.S. or in the Europe, TNCs have the access to directly complain about foreign trade barriers to their parent governments, working closely with official authorities to defense of their economic interests before a formal WTO dispute settlement mechanism begins.⁵⁶

I. Case Studies

A. Biotech Products Dispute

The case regarding biotech products trade dispute chosen here for several reasons: first, in food safety, public interests and social justice are especially relevant to NGOs interests and controversially debated in recent years.⁵⁷ Second, trade in biotech products is a matter of considerable economic profits, thereby causing TNCs involvement at the same time. Given these information, this case is applicable and worth examining.

1. Background

In this case, three nations that produce and export biotech products: the U.S., Canada, and Argentina. They challenged two European Communities (EC) directives and one regulation which established a pre-marketing approval process for biotech products in the European market. The regulation and directives set a complicated process involving member states and EC officials for approval of biotech products before they could be imported or marketed in the EU.⁵⁸ Unlike the U.S., Canada and

⁵³ Andrea Ewart, "Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement," *Syracuse Journal of International Law & Commerce*, Vol. 35, No. 1 (2007): 27.

⁵⁴ Shaffer, *supra* note 47: 71-72; 101.

⁵⁵ Shaffer, *supra* note 47: 78-79.

⁵⁶ Karsten Nowrot, "Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?" *Indiana Journal of Global Legal Studies*, Vol. 18, No. 2 (2011): 803-842.

⁵⁷ Karsten Jensen and Peter Sandoe, "Food Safety and Ethics: The Interplay between Science and Values," *Journal of Agricultural and Environmental Ethics*, Vol. 15, No. 3 (2002): 245-253; Jeffrey Atkinson and Martin Scurrah, *Globalizing Social Justice: The Role of Non-Government Organizations in Bringing about Social Change* (New York: Palgrave Macmillan, 2009).

⁵⁸ Biswajit Nag and Debashis Chakraborty, "WTO Ruling on the EU-US Biotech Products Dispute: A Review of Issues," *Asian Biotechnology and Development Review*, Vol. 9, No. 2 (2007): 123-130. The background on the biotech products dispute is available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (last visited: 2019/07/10)

Argentina in this case also accused the EC by claiming that the discrimination between “like products”.⁵⁹ Specifically, they argued that as a result of the product-specific bans and national measures, biotech products are treated less favorably than those imported and domestically grown non-biotech products.

In the judicial process of WTO panel, this case became the target of NGOs mobilization,⁶⁰ including a petition presented to Director-General Pascal Lamy, which was signed by more than 135,000 people from over 100 countries. This petition asked WTO Panel not to weaken the right of individual countries to protect their environment and public health from risks posed by biotechnical foods and crops, but WTO panel finally ruled that EC’s regulation and directives were illegal.⁶¹

2. NGOs vs. TNCs: Who Was the Winner?

In the field of biotechnology, TNCs have been key actors for a long time through conducting scientific studies and controlling the relevant information. Moreover, by contacting with government officials, TNCs guarantee that their privilege has the access to the WTO. For example, TransAtlantic Business Dialogue, a network of European and American companies, is highly influential in pushing for their trade interests. They worked with government officials on food related issues and were frequently invited to present their recommendations at high level meetings of official bureaus. According to research, there is a hidden mechanism called *revolving doors* between many biotech companies and government delegations, switching high ranking individuals from companies to public offices and vice versa.⁶²

Compared to TNCs, NGOs, as mentioned earlier, not only have very limited means to put their concern on the WTO agenda even they can participate the WTO, but also have weak interaction with authorities of parent governments. Therefore, NGOs only can chose other ways to raise attention such as consumer boycotts, to seek dialogue with other IGOs such as World Health Organization, and to lobby local supermarkets to declare their shops do not sell biotech products. However, it

⁵⁹ The issue about “like products” please see: *SPS AGREEMENT TRAINING MODULE: CHAPTER 8*, available at: http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c8slp1_e.htm (2019/07/10).

⁶⁰ For example, Greenpeace said that the WTO case should not to undermine existing international agreements on biosafety as recognized in the Cartagena Protocol. Please see: “WTO Threatens Countries’ Right to Ban GMOs,” *Greenpeace International* (July 28, 2005), available at: http://www.ems.org/nws/2005/07/28/wto_to_bulldoze (last visited: 2019/07/10).

⁶¹ *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (DS291), available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (last visited: 2019/07/10).

⁶² Jennifer Ferrara, “Revolving Doors: Monsanto and the Regulators,” *Ecologist*, Vol. 28, No 5 (September/October 1998): 280-286.

might be worth noting that these efforts have, if not zero, tiny influence on the WTO.⁶³ Incidentally, this paper discovered that outside the U.S., NGOs indeed had a higher capacity to shape governmental behavior and consumers' identity in the field of food safety than in the U.S. because in the top five global biotechnical TNCs there are three in the U.S., which hold 42% of global biotech products market (please see Table 2). This means that global biotechnical food companies have relative weak influence in the European market.⁶⁴

Table 2: World's Top Five Biotech Companies

Biotech TNCs	Sales (US\$ millions)	% of Global Proprietary
Monsanto (US)	4964	23
DuPont (US)	3000	15
Syngenta (Switzerland)	2018	9
Groupe Limagrain (France)	1226	6
Land O' Lakes (US)	917	4

Source: <http://www.etcgroup.org/en/node/615> (last visited: 2019/06/23)

The investigation of biotech products case shows that TNCs interests are heavily represented at the governments of members and then are transmitted to the WTO. While it does not have formally access to the WTO as same as NGOs, TNCs still quite effectively pushes their commercial interests and voice to be addressed in the WTO fast and directly.⁶⁵ In fact, TNCs have been so successful in lobbying policy-makers that some observers came to argue that WTO Panel's decision is "the favor on TNCs rather than the regulation of biotech products".⁶⁶ Further, according to Correa, the development of WTO rules has been determined by TNCs in every part.⁶⁷

Although TNCs are such a powerful non-state actor, NGOs participation at WTO Ministerial Conferences has indeed increased steadily within the last couple of years.⁶⁸ Hence, someone may argue that the increasing level of participation in Ministerial Conferences can be explained by the

⁶³ Thomas Bernaure, *Genes, Trade and Regulation: The Seeds of Conflict in Food Biotechnology* (Princeton: Princeton University Press, 2003): 100

⁶⁴ European Commission Directorate General for Health and Consumers, *Evaluation of the EU Legislative Framework in the Field of GM Food and Feed*, Final Report (12 July 2010): 63-72.

⁶⁵ Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (Oxford: Oxford University Press, 2001): 70.

⁶⁶ *Ibid.*: 72.

⁶⁷ Carlos M. Correa, "Implementing National Public Health Policies in the Framework of WTO Agreements," *Journal of World Trade*, Vol. 34, No. 5 (2000): 112.

⁶⁸ Since the founding of the WTO, five Ministerial Conferences have taken place. The growing number of NGOs participating in those meetings was very apparent.

fact that the WTO has raised its concern about public interests; therefore, NGOs also have the influence. Unfortunately, the evidence below will rebuke this argument. When we focus on NGOs, such as Greenpeace and Consumers International, which participated in Ministerial Conference, offered WTO Panels public symposia, or issued an *amicus curiae* brief in the biotech products case, we cannot forget that the presence at Ministerial Conference is generally limited to NGOs. For each conference, the number of NGOs representatives to be allowed to attend is evaluated case by case, depending on the total number of applications and the capacity of the facilities.⁶⁹ The TNCs, in contrast, have an advantage to take 'direct part in policy-making'. To say this even further, TNCs usually have the strong capacities for organizing high level informal private meetings or even personal appointments with the officials. What is more, TNCs established the direct contact to delegates and decision-makers from governments, thereby having the realistic and useful access to the WTO.⁷⁰ In sum, at the practice level, in comparison with TNCs, NGOs participation in the WTO is conditional and limited if the WTO would like to dole out NGOs this kind of opportunity. Otherwise, NGOs only can rely on informal contacts or other strategies. Conversely, TNCs do not have any formal or legal access to the WTO, but they either have the way to establish pragmatic linkage with members especially or have the great trade power and through them to maintain or pursue their commercial interests in the WTO system.

Finally, this paper discovered that the WTO Panel established a scientific advisory committee to assist in non-judicial questions such as on the consequences of the introduction of biotech products to the open environment or the potential harm to human health.⁷¹ In the process of establishing this committee, all parties to this dispute had the right to propose scientists to join this committee. NGO by contrast cannot obtain any information, not to mention the right to recommend qualified candidates. Given this minor finding and other discussions so far, we can draw a short conclusion in the case of biotech product dispute below.

NGOs influence is to be found mainly within the limited participation rather within the substantive affection. Theoretically, NGOs could form transnational advocacy coalitions, could mobilize the public in a specific issue area, and could try to influence WTO's policy-making through the participation. In the biotech product case, however, these strategies seem not to result in a successful or concrete influence which could be judged as an evidence to convince people that NGOs can make

⁶⁹ Steve Charnovitz, "Opening the WTO to Nongovernmental Interests," *Fordham International Law Journal*, Vol. 24, No. 1 (November/December, 2000): 188.

⁷⁰ Susan Sell, "Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights," in A. Claire Cutler et al. eds., *Private Authority and International Affairs* (Albany: SUNY Press, 1999): 195.

⁷¹ WTO Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (Sept. 29, 2006), para. 7.3260-3261.

the WTO of difference. Even at the judicial level NGOs *amicus curiae* briefs had arguments in favor of the EC, the WTO Panel's final judicial decision favored TNCs interests.⁷²

B. AIDS Drugs in South Africa

The case regarding AIDS drugs in South Africa chosen here for several reasons. First, infectious diseases were ranked in the top ten causes of death worldwide in 2016 according to the statistics by WHO.⁷³ Every year over 10 million people killed by infectious diseases and more than 90% of whom are in the developing world.⁷⁴ The leading cause of these infectious diseases in African region is AIDS. Médecins sans Frontières (MSF), together with other NGOs, therefore, formulated the concern related to a specific WTO agreement: TRIPS, which creates the limitation to access patent AIDS drugs, as it forbid the developing countries from policies that get generic medicines.⁷⁵ Second, governments in developing countries that attempt to bring the price of AIDS drugs down have come under so big pressure from the transnational pharmaceutical industry (hereafter pharmaceutical TNCs) that they almost gave up the right of receiving low price AIDS drugs that the WTO permitted. Given these astounding truths, this case is applicable and worth examining.

1. Background

In the West, a new treatment called antiretrovirals which can significantly decrease the AIDS virus' replication, allowing patients to live much longer. However, this treatment comes with a high price costing US\$15,000 annually. Therefore, treating 4.2 million patients in South Africa would cost more than 20% of the nation's gross domestic product.⁷⁶ Because of this reason, only extremely few Africa's AIDS patients are available to receive the antiretroviral treatment. Given this, NGOs asked pharmaceutical TNCs to reduce the prices of patent AIDS drugs in the developing countries markets. Nevertheless, pharmaceutical TNCs had been unwilling to do this.

In South Africa, the average national annual income was less than US\$3000 in 1995, while the AIDS drugs can cost US\$15,000 a year. In 1997, the South African government decided to take steps to introduce compulsory licensing of AIDS drugs to ensure the availability of generic AIDS drugs.⁷⁷

⁷² Another very similar case happened in 1996; The EC banned the import of U.S. beef treated with growth hormones, and the U.S. had a formal WTO complaint. There was a long report from independent scientists showing that the hormones added to U.S. beef were cancer-causing. The WTO panel ruled that the EU did not present a "valid scientific evidence" to refuse import. Please see: European Communities—Measures Concerning Meat and Meat Products (DS26), available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (last visited: 2019/06/23).

⁷³ Please see: <https://www.who.int/news-room/fact-sheets/detail/the-top-10-causes-of-death> (last visited: 2019/06/23).

⁷⁴ WHO, *World Health Statistics 2018*, available at: <https://apps.who.int/iris/bitstream/handle/10665/272596/9789241565585-eng.pdf?ua=1> (pp. 5-6).

⁷⁵ MSF, *Fatal Imbalance: The Crisis in Research and Development for Drugs for Neglected Diseases* (Sept 2001). Available at: www.msf.org/source/access/2001/fatal/fatal.pdf

⁷⁶ Rachel Swarns, "Drug Makers Drop South Africa Suit Over AIDS Medicine," *New York Times*, A1 (20 April 2001).

⁷⁷ *Ibid.*

This decision, however, was stalled by a lawsuit in February 1998 by a group of north countries in which leading pharmaceutical TNCs claimed that South Africa's policy was inconsistent with its obligations under TRIPS.⁷⁸ The lawsuit in South Africa prompted a widening public concern of NGOs worldwide, including Oxfam and MSF. NGOs questioned the consequences of institutionalized patents in the WTO system and considered them as a threat to the public health of the developing countries.

2. NGOs vs. TNCs: Who Was the Winner?

In conjunction with local NGOs in South Africa, MSF, Oxfam, and Health Action International (HAI) initiated a campaign to challenge the WTO especially its patent mechanism. The campaign was born in 1998 after a number of pharmaceutical TNCs brought a suit against the government of South Africa in response to its 1997 decision: *Medicines and Related Substances Control Amendment*.

The suit alleged violation of TRIPS, which included specific provisions on dealing with generic medicine. It is worth noting, in addition to pharmaceutical TNCs, the EU authority and the U.S. government both offered their support and had pressured the South African government.⁷⁹ Fortunately, South Africa was not alone in this case, receiving support from NGOs and some WTO members such as Brazil and India. At the same time, some IGOs such as WHO, the World Bank, and the United Nations Development Programme (UNEP) also got involved, arguing the importance of the right to issue compulsory licenses.⁸⁰ For a rare coalition built among NGOs, IGOs and some sovereignty states, the worldwide pressure on pharmaceutical TNCs forced them have no choice but to withdraw the lawsuit against South Africa. For example, NGOs helped ensure this case had a high

⁷⁸ The WTO TRIPS Agreement codifies standards for adequate protection of patents. TRIPS allows two special practices that countries can use to lower the price of patent drugs: compulsory licensing and parallel importing. The former, compulsory licensing, gives the members the right to grant a license to a domestic manufacturer of a generic drug, provided that they pay royalties to the patent holder. Parallel importing allows members to "comparison-shop" for the world's best market price of a drug and import quantities for sale in the domestic market. Pharmaceutical TNCs particularly concerned that such practices, while legal authorized by South Africa's 1997 Medicines Act, will alert consumers in the West of the actual low prices of AIDS drugs, thereby cutting into their profits in the global market. In this sense, they had lobbied persistently the U.S. government to apply pressure to prevent compulsory licensing and parallel importing. Please see: Peter J. Hammer, "Differential Pricing of Essential AIDS Drugs: Markets, Politics and Public Health," *Journal of International Economic Law*, Vol. 5, No. 4 (2002): 883; J. M. Spectar, "The Hybrid of the Apocalypse: The Global AIDS Pandemic and the North-South Fracas," *Georgia Journal of International & Comparative Law*, Vol. 29, No. 2 (2001): 255-257.

⁷⁹ For example, the Pharmaceutical Research and Manufacturers of America (PhRMA), a trade group representing the U.S. pharmaceutical TNCs, managed to convince the U.S. government that the issue was important to warrant putting pressure on South Africa to repeal the contested legislative measures. As a result, James Joseph who was U.S. Ambassador to South Africa at that time wrote a letter to the South African government, strongly urging South Africa to alter their policy. Please see: National Assembly of South Africa, 1997: *Medicines and Related Substances Control Amendment Act*, No. 90. (October 21, 1997). This resource is requoted from: Robert L. Ostergard, Jr., "The Political Economy of the South Africa-United States Patent Dispute," *The Journal of World Intellectual Property*, Vol. 2, No. 6 (1999): 875-888.

⁸⁰ Swarns, *supra note* 76.

public profile around the world, helped organize transnational social campaigns, and wrote letters to governments and industries. Some pharmaceutical TNCs directors were publicly named and shamed in press briefings.⁸¹ Looking at these, a great number of research studies suggest that AIDS drugs case in South Africa is a symbol of NGOs achievement.⁸²

It is hard to say that AIDS drugs case is not an example to be an evidence of NGOs success; however, this paper would like to indicate that a successful NGOs influence without the cooperation with sovereign states is impossible, and that immunize the South Africa government from a lawsuit without a result of real access to AIDS drugs for developing countries is still doomed to failure. Further, the following sections will provide a deep analysis to show that AIDS drugs case is not suitable to be labeled as a successful paradigm of NGOs.

2.1 Who Is the Real Winner?

In 2001, as NGOs won a victory—the *Declaration on TRIPS and Public Health*—at the Ministerial Conference, some research indicated that AIDS drugs case is one of NGOs achievements again.⁸³ However, despite the importance of *the Declaration on TRIPS and Public Health* for developing countries, it fails to address the issue of nations that do not have the ability to manufacture AIDS drugs and must rely on the import of generic AIDS drugs produced under compulsory licenses. This problem was not addressed until 2003; in this year one document of the temporary waiver known as *the August 30 Decision* allowed developing countries that lacked the ability to manufacture AIDS drugs to import cheaper generic AIDS drugs made pursuant to a compulsory license. This decision was become permanent on December 6, 2005, as an amendment to TRIPS. When this amendment has been judged as significant NGOs accomplishment, its complexity and difficulty of the implementation have been omitted by NGOs. In other words, although *the August 30 Decision* sets out the mechanism to allow developing countries with insufficient or no pharmaceutical manufacturing capacities to import generic AIDS drugs from pharmaceutical TNCs, the nature of this decision is too complicated and burdensome to be applied by developing countries.

According to Hestermeyer, *the August 30 Decision* was comprised of three waivers from provisions in TRIPS Article 31 (Art. 31): (a) the obligation in Art. 31 that compulsory license shall be supplied

⁸¹ Duncan Matthews, *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Mass.: Edward Elgar, 2011): 98-100.

⁸² Such as T. Turmen, "Making Globalisation Work for Better Health," *Journal of the Society for International Development*, Vol. 42, No. 4 (1999): 8-11; Oxfam, *South Africa vs. the Drug Giants, GB policy papers* (April 2001); R. Labonte, "Healthy Public Policy and the World Trade Organisation: A Proposal for An International Health Presence in Future World Trade/ Investment Talks," *Health Promotion International*, Vol. 13, No. 3 (1998): 245-256.

⁸³ Peter Drahos, "Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution," *Journal of World Trade*, Vol. 41, No. 1 (2007): 191-210 (especially at p. 201)

for the domestic market; (b) the obligation in Art. 31 for the importing country to pay remuneration to the right holder; (c) the obligation in Art. 31 to the extent that re-export of the imported AIDS drugs is allowed among members of a regional trade agreement, if this agreement is composed of at least half least developed countries.⁸⁴ In theory, *the August 30 Decision* was supposed to help developing countries access affordable AIDS drugs, but in practice the regulation of this decision *per se* is so complicated that since 2005 no country has been able to benefit from it. As Michelle Childs said, *the August 30 Decision* is so cumbersome and full of hidden limitations for both parties that want to export and import medicines.⁸⁵ Why did *the August 30 Decision* go in this way?

The reason is pharmaceutical TNCs and the WTO offer expert and legal assistance to help industrialized countries become agents of patents. This assistance, however, does not take social justice and public interests into account. Both the governments of members and the WTO are under strong pressure to advance the interests of pharmaceutical TNCs that own patents and other intellectual property rights. In fact, *the August 30 Decision* requires that the developing country announce its intention when they want to use the compulsory licensing mechanism, to specify the quantity of drugs to be supplied, and to issue a legal license for the drugs.⁸⁶ These requirements actually very likely render developing countries vulnerable to pressure from TNCs. Put simply, developing countries will worry about the backlash from TNCs and trade partners' governments, thereby giving up apply *the August 30 Decision* to access the AIDS drugs they need. Believe or not, by the end of 2010, the only shipment of drugs under this decision was the case from Canada to Rwanda.⁸⁷

CONCLUSION

Since NGOs are not as powerful as TNCs in the field of international trade and do not have material resources that sovereign states have,⁸⁸ they only can depend on soft power such as ideas and

⁸⁴ Please see: http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last visited: 2019/06/29); and Holger P. Hestermeyer, "Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines," *ASIL Insights*, Vol. 11, No. 28 (December 10, 2007). Available at: <http://www.asil.org/insights071210.cfm> (last visited: 2019/06/29).

⁸⁵ Please see MSF web site, available at: <http://www.msfaccess.org/our-work/overcoming-barriers-access/article/656> (last visited: 2019/06/29)

⁸⁶ MSF, *Neither Expeditious, Nor A Solution: The WTO August 30th Decision in Unworkable*. Available at: http://www.msf.ca/features/aids2006/files/REP_JCPA_en.pdf (last visited: 2019/07/10)

⁸⁷ Ashley Weber and Lisa Mills, "A One-time-only Combination: Emergency Medicine Exports under Canada's Access to Medicines Regime," *Health and Human Rights*, Vol. 12, No 1 (2010). Available at: <http://www.hhrjournal.org/index.php/hhr/article/view/209/303> (last visited: 2019/07/10)

⁸⁸ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998): 16.

information to influence the WTO. While their rights to participate in the WTO allow them to propose information, opinions, and *amicus curiae* briefs, the WTO and its members are never obliged to adopt them. Let us put this finding even more precisely; when NGOs are able to participate in the trade affairs among members including their disputes in the WTO, they have no substantial influence to change WTO policies and to make it take decisions contrary to their members' interests.⁸⁹ In this vision, we can say that NGOs influence, if it exists, is anything but an instrument to make the WTO of difference.

According to Reimann's study, although the symbiotic nature exists in the interaction among sovereign states, IGOs, and NGOs, a "top-down" explanation for the growth of NGOs in the field of international relations is worth emphasizing,⁹⁰ since the decisions of states and IGOs, such as the WTO, determine the scope and level of NGOs influence. What is more, one of the great weaknesses of NGOs in the case studies of this paper is that they have not built the linkage with the most powerful members in the WTO, thus leading to poorly acquaint with the right access to have the real influence. In short, NGOs do not understand the language of *realpolitik* that other actors in the international stage do well. In this sense, NGOs are not significant actors in the area of international trade. Furthermore, they are still just the traditional non-state actors outside the power center without any concrete influence even they have become policy-making participants inside the WTO system. There is one sentence that could be better off expressing it: NGOs do not make a world of difference, especially in the area of global trade affairs.

The case studies of this paper demonstrate that there is a close connection between material power and influence; the higher the material power, the higher the influence, and vice versa. As Charnovitz explained, the value of NGOs participation in international relations lies in their role as policy entrepreneurs rather than as formal representatives.⁹¹ As for the WTO, it is more sensitive to political and economic material power from stronger member states or TNCs than the pressure of public opinion from NGOs. Finally, this paper would like to point out that a formal participatory status for NGOs may actually hide the attempt by IGOs member States to reduce NGOs influence. To be specific, the WTO lets NGOs be bound by the constraints of its institutional functions such as the participation in WTO Ministerial Conference and DSP on the one hand, and deprive of the informal pressures from NGOs such as social campaign and public demonstration on the other hand.

⁸⁹ Neera Chandhoke, "The Limits of Global Civil Society," in Marlies Glasius, ed., *Global Civil Society* (Oxford: Oxford University Press, 2002): 52.

⁹⁰ Kim Reimann, "A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs," *International Studies Quarterly*, Vol. 50, No. 1 (2006): 64

⁹¹ Charnovitz, *supra* note 69: 209-210.

By doing such a clever strategy, NGOs would be finally prevented from effectively playing their advocacy roles.

Given this, NGOs should focus their strategy of interaction on how to engage with the powerful WTO members and TNCs rather than concentrate on if they have the access to participate the meetings, sessions, and DSP of the WTO. However, while they have the engagement with powerful WTO members and TNCs, thereby becoming a real influential actor in the field of global trade, they should worry about that if they could keep their independent, impartial, and neutral features from the control of powerful governments or transnational businesses at the same time.

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