John R. Magnus
Dewey Ballantine LLP

November 6, 2000

Presentation to Global Business Dialogue:

NGOs, Governments and the WTO

-- Speaking Notes --

Greetings to you all, and hearty thanks to Judge for including me in this panel. The topic is a timely one.

Rather than begin with a definition of the term "NGO," I will let that definition emerge from the balance of my presentation.

I. NGO Access to the WTO

In considering the relationship and access of NGOs to the WTO, it is useful to think in terms of three distinct categories of WTO activity: (1) negotiations, (2) committees and working groups, and (3) dispute settlement. The score card where NGO access is concerned can be easily summarized:

- negations -- partially closed
- committees and working groups -- mostly closed
- dispute settlement – closed.

Negotiations -- Partially Closed

Interestingly, the best "openness" score is for negotiations. In Seattle there were a great many NGOs in attendance and not just in the street demonstrations. At Dewey Ballantine, we were involved in registering a couple of NGOs that were officially accredited by the WTO. One was LICIT, the Labor-Industry Coalition for International Trade -- a group of companies and labor unions that make common cause on trade issues. We secured badges to send four representatives of LICIT to Seattle. Likewise, we were involved in the paperwork for the participation of the Semiconductor Industry Association as an NGO.

These are not, perhaps, what you would think of as prototypical NGOs, but in the eyes of the WTO secretariat officials that handled accreditation for the Seattle Ministerial they were NGOs just like any other. Not only did the WTO itself accredit NGO representatives and issue badges, but a number of NGO representatives were included in

the U.S. delegation. It was a very large delegation. As near as I can tell, this is all standard procedure, although, in the case of Seattle, it may have been a bit more fraught than at past Ministerials.

There was also an NGO day at the Seattle Ministerial, which some of you will remember -- an entire day of presentations aimed at the NGO representatives in attendance. As far as I know, that was something new.

So, yes, there was access at that level. But, of course, there were levels of access -- negotiating being, after all, a diplomatic function that does require a certain amount of secrecy. In terms of the Green Room, where some of the most sensitive decisions were being made and discussions were being held on the Ministerial Declaration and the contours of the proposed new round, there were a great many *governments* around the world that would have liked better access to those discussions, as I suppose would have the NGOs. So, the record on negotiations is: partially closed.

Committees & Working Groups -- Mostly Closed

Generally, there is no right of the public or of NGO representatives to watch the regular business of the WTO being transacted. The organization itself has committees and working groups on a whole variety of subjects, from intellectual property to services to subsidies to competition policy, and ordinarily nobody but delegates is allowed to participate in or even observe those discussions.

This is even true for working groups that are convened in the WTO for "educational purposes," such as the working group on trade and competition policy, which has been in existence since it was established in the Singapore Ministerial. This group has no negotiating mandate. Yet its meetings are held in secret, and the written submissions of participating governments are treated as restricted documents, unavailable to the public unless the submitting government decides to publish them.

Some outreach is beginning to happen. And, perhaps predictably, business NGOs are involved. I was fortunate to participate in a briefing given to participants in the WTO's Working Group on Interaction between Trade and Competition Policy. This opportunity was granted to the International Chamber of Commerce, which itself has a trade and competition policy study group. Several of us were permitted to meet in a room in the WTO building with a number of the delegates from this particular WTO working group. The session was organized by the WTO secretariat officials who staff the working group, but they were at great pains to stress that we were not actually meeting with the working group itself. That would be considered improper. So, we just were together sharing the same space and having a discussion with anyone who wanted to attend on the subject of trade and competition policy. The exchange was fabulous.

Working groups and committees in the WTO are forums in which a certain amount of negotiating can sometimes take place. And so it might be said that there is some appropriate level of secrecy for those discussions as well. Fair enough.

Dispute Settlement -- Closed

No such justification exists in the case of WTO dispute settlement, the third category. In dispute settlement proceedings, what might you want to do if you work for an NGO? You might want to attend and watch oral arguments. Or you might want to send in briefs of your own directly to the tribunal deciding the case. Amicus submissions are now possibly a reality. Attendance most certainly is not.

On attendance, the most desirable approach, as a matter of principle, would be total openness. Adjudication is what is occurring in these WTO panel proceedings. They ought to occur in public, if for no other reason than to enhance their credibility. However, that is not what the current dispute settlement rules dictate, and it is not a widely shared value among the WTO Members. Given that situation, there is a lot the U.S. government could do to try to increase transparency and access for outside groups that are affected by the results of the WTO dispute settlement.

In the cases that have gone through recently -- a couple of which I have been involved with -- there is a sort of dance step that goes on, a *pas de deux*. Particularly in cases challenging U.S. measures, the United States, in preparing for a meeting of the panel and oral argument, will submit a written request to the panel asking that observers be admitted into the room. This is a means of trying to accommodate requests that are coming in from NGO representatives who want to be there, want to see what is going on. These are NGOs whose members are affected by the outcome of the case, or think they could be affected by the outcome of the case.

So the panel will field the U.S. government's request. And it will reply: "We thank you for your request, and we are just going to ask the other governments participating whether they would like to have observers or not." The other governments, predictably, will say "no, we would rather not have any observers." The panel will so inform the U.S. government, and that is the end of the story. There are no observers, and attendance in the room is limited to the official delegations.

That last word holds the key for what the U.S. Government can do to improve the situation: it can include more people in its delegations. The U.S. Government has complete control over the composition of its delegations for dispute settlement sessions, just as it does in the case of negotiation meetings and committee meetings.

What you will hear from the government when this idea is raised is: "How would we ever decide whom to let in the door? How could we let in representatives of Group A and not of Group B?" It seems to me there is a very easy answer to that. Decisions on including non-government experts in your delegation should be based on two things.

One of these is agreement with the U.S. government's position. The U.S. government is defending itself in Geneva, has been challenged, has a measure that is in the dock, and

the U.S. government's position is that its measure is fully consistent with the WTO rules. You would want everybody in the delegation to agree with that.

Second is expertise and ability to help. Who might, if in the room and listening to what is going on, actually be in a position to give helpful feedback to the U.S. government lawyers who are arguing the case?

This should not be controversial. It has nothing to do with the right to grab the microphone and speak for the United States. It is just about the ability to be inside the room, hear what is going on, and potentially provide helpful input to the advocates who *are* speaking for the United States. I think those criteria would work. Whether the outside interests involved are 20,000 steel workers or 20,000 members of an environmental NGO, the principle is the same. Do you agree with the U.S. government? And, do you have expertise that would potentially enable you to be helpful if you were permitted to witness the oral proceedings?

As for amicus briefs, the current situation is that, after a great deal of effort, it has now been established that the Appellate Body and the panels *may* accept amicus briefs. It may surprise some of you to learn that this was a disputed point, a heavily litigated issue. In a recent case involving countervailing duties on steel bars from the United Kingdom, the U.S. Government took the view that the Appellate Body had the authority to accept amicus briefs if it wanted to. Incredibly, some of the other governments participating in that case took the view that the Appellate Body had no such authority, because it was not spelled out in the Dispute Settlement Understanding or in the Appellate Body's written procedural rules.

The United States pointed out that there are number of things that are not specifically laid out in the DSU or in the written procedures for the Appellate Body. For example, no document specifically says that you can hold an oral argument on a Monday. But indeed the Appellate Body certainly has -- and nobody would seriously argue that it does not have -- the authority to hold an oral argument on a Monday. Well, the acceptance of an amicus brief is very much in that same category. It has to do with the tribunal's control of the proceeding over which it is presiding. Ultimately, the Appellate Body was able to conclude that it could accept amicus briefs if it wished to do so and if they were filed in a manner consistent with the filing rules of a dispute settlement proceeding. The next step, which of course will be much more difficult, will be elaborating criteria for when amicus briefs from outside groups such as NGOs should be actually considered and responded to.

II. NGO Access to the U.S. Government

The U.S. picture is easier to describe. NGO access to trade decision-making here in Washington is much less of a problem. Anyone who thinks that NGOs are not influential in Washington must inhabit different circles than I do.

The debate over participation in the official advisory committees, the advisory committees established pursuant to the Trade Act of 1974 under the umbrella of the Advisory Committee on Trade Policy and Negotiations, has been an interesting one, since the advisory committees are only one source of input to U.S. negotiators, and since the system includes a Labor Advisory Committee and a Trade and Environment Policy Advisory Committee. Many of the perspectives that one typically hears raised under the "NGO" heading are represented in the official advisory committee system. Furthermore, the main statutory role for the advisory committees is simply to issue advisory reports on completed agreements for the benefit of the Congress, which has to decide whether to implement these completed agreements. And, of course, on Capitol Hill, NGOs have no shortage of direct influence of their own.

Nevertheless, the inclusion of different perspectives, including NGO perspectives, on the advisory committees has been, on balance, a good thing. One can of course question whether courts ought to be *ordering* that these different perspectives be added to specific advisory committees.

The new Executive Order on environmental review of trade agreements represents a significant departure. Its unstated premise is that the environmental advice that is available to negotiators under current procedures, whether through the advisory committee system or otherwise, is too little; that there is some kind of structural reason *why* it is too little; and that accordingly some further official procedure for getting environmental input has to be constructed.

I am not sure that the facts bear out those premises, and I suspect that disagreements over substance have been confused with disagreements over procedure. The fact that the U.S. government went ahead with certain trade initiatives, even though there were claims about environmental harm that would result, has been taken to mean that the public input procedures are somehow defective. But, we'll see. We shall see how that Executive Order is actually implemented. That is another subject for a different panel, perhaps.

The next frontier domestically, it seems to me, has got to be deputization, the inclusion of outside experts in U.S. delegations. I don't just mean negotiating delegations. It definitely should include committee delegations and -- most important of all -- dispute settlement delegations.

People at events like this frequently talk about forging a new consensus on trade. Often that turns out to be a discussion of procedures, such as what debate rules will apply in Congress for consideration of an implementing bill. In this area of procedures, one of the highest priorities, it seems to me, for the new administration, should be to roll out a policy on deputizing, getting outside experts into the U.S. delegations, and to start trying that policy out in specific gatherings in Geneva.

* * *

Thanks for your attention, and I look forward to your questions.