A BALANCING ACT: A FRAMEWORK FOR PARTICIPATION OF NON-STATE ACTORS IN THE WORLD TRADE ORGANIZATION

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Résumé

Cette thèse examine dans une perspective de droit international public l'interaction entre, d'une part, deux catégories d'acteurs non-étatiques : les acteurs des entreprises du secteur privé et les organisations non-gouvernementales et, d'autre part, les états, dans le contexte de l'Organisation Mondiale du Commerce (OMC). Elle part du constat que de considérer les états en tant que seuls sujets du droit international ne permet pas de répondre de manière adéquate à un système moderne de gouvernance mondiale, puisque cela mène à ignorer les réalités d'une mondialisation accélérée et d'une coopération croissante dans un monde ou les limites entre le domaine privé et le domaine public sont de plus en plus estompées. Cette thèse ne fournit pas nécessairement des solutions à la participation des acteurs non-étatiques à l'OMC, mais démontre que les développements dans les relations internationales justifient l'aménagement d'une plus grande place pour la participation des acteurs non-étatiques, et que le système actuel de l'OMC échoue à ce chapitre.

La thèse propose que pour des raisons de nature historique et pragmatique, les développements dans le système du GATT et du droit du commerce international sont apparus en dehors de leur contexte naturel, ce qui a mené à la création du mythe d'un régime commercial à la fois séparé et fonctionnant en dehors du cadre du droit international public. Contrairement à ses prédécesseurs, l'OMC possède un cadre institutionnel et un mandat approprié, et ne peut donc plus alléguer un quelconque handicap institutionnel qui l'exclurait du système de gouvernance mondiale. La libéralisation du commerce international a des conséquences considérables qui ne sont pas limitées au domaine du commerce et de l'OMC. Les états membres de l'OMC ainsi que leurs juristes en droit commercial doivent assumer leur rôle dans le cadre d'un ordre juridique international plus vaste. La participation formelle d'acteurs non-étatiques peut contribuer à établir un équilibre entre les différents intérêts et les forces en présence dans le domaine de la libéralisation du commerce et de son impact sur les domaines qui ne sont pas liés au commerce international.

Après avoir mis en avant le cadre de l'étude, la thèse donne un aperçu de différents modes de participation des acteurs non-étatiques dans la création et la modification du droit de l'OMC, dans la mise en application de ce droit ainsi que dans le système de règlement des différends de l'OMC. Ces modes de participation sont ensuite comparés avec ceux d'autres domaines du droit international afin de tirer des leçons pour fournir un nouveau cadre à la participation des acteurs non-étatiques dans le contexte de l'OMC. Partant de cette comparaison ainsi que de l'analyse de plusieurs développements dans les relations internationales, la thèse affirme qu'une nouvelle approche pour la participation des acteurs non-étatiques est nécessaire. Les linéaments d'une nouvelle approche sont ensuite proposés en vue de fournir un cadre approprié pour atteindre ce but. Ce cadre va au-delà d'une approche formelle du droit international, et met en exergue l'importance de la légitimité, de la participation des acteurs, de leurs identités et de leur interaction dans un système juridique international. Pour conclure, un certain nombre de propositions sont offertes afin d'améliorer les voies formelles de participation.

Abstract

This thesis focuses on the interaction of two categories of non-state actors, private sector corporate actors and non-governmental organizations, with states in the context of the World Trade Organization (WTO) through a lens of public international law. It builds on the premise that the notion of states as the only subjects of international law is not adequate for a modern system of global governance, as it does not reflect the realities of fast-paced globalization and increased co-operation in a world where the boundaries of the private and public are increasingly blurred. It does not necessarily provide solutions for participation of non-state actors in the WTO, but demonstrates that developments in international relations warrant more space for participation of non-state actors, and that the current system of the WTO fails to provide sufficient space for participation.

The thesis argues that, for both historical and pragmatic reasons, developments in the areas of GATT and international trade law occurred outside their natural course, leading to the myth of a "self-contained" trade regime not part of public international law. The WTO, unlike its predecessor, enjoys a proper institutional framework and mandate; one can no longer use the excuse of institutional handicap for excluding it from the system of global governance. Liberalization of international trade has far-reaching consequences which are not limited to the trade arena and the WTO, its member states, and scholars of international trade law have to assume their role in the broader context of an international legal order. Non-state actors' formal participation can contribute to striking a balance between different forces and interests at work in the area of trade liberalization and its interplay with other non-trade issues.

After setting the framework for the study, the thesis outlines modes of participation of non-state actors in the creation and modification of WTO law as well as in its enforcement and adjudication. These are then juxtaposed with participation in other areas of international law in order to draw lessons for a new framework for participation of non-state actors in the WTO. Based on this comparison as well as on an analysis of several developments in international relations, it is argued that a new approach to the participation of non-state actors is justified. Elements of a new approach are then proposed in order to provide an appropriate framework for participation, which goes beyond a formalistic approach to international law by highlighting the importance of the legitimacy, the practices of actors, their identities and their interaction in an international legal system. Finally, a number of proposals are made to enhance formal channels of participation.

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Table of Abbreviations

Am. Bus. L.J.	American Business Law Journal
Am. J. Int'l L.	American Journal of International Law
Am. Rev. Int'l Arb.	American Review of International Arbitration
Am. U. Int'l L. Rev.	American University International Law Review
Am. U.J. Int'l L & Pol'y	American University Journal of International Law and Policy
Ann. fran. dr. int.	Annuaire français de droit international
APEC	Asia Pacific Economic Cooperation
Arb. Int'l	Arbitration International
ASEAN	Association of Southeast Asian Nations
ATC	*Agreement on Textiles and Clothing*
B.I.S.D.	Basic Instruments and Selected Documents (GATT)
Berkeley J. Int'l L.	Berkeley Journal of International Law
Boston Col. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
Brit. Y.B. Int'l L.	British Yearbook of International Law
C.M.L.R.	Common Market Law Reports
C.M.L. Rev.	Common Market Law Review
Cambridge L.J.	Cambridge Law Journal
Can. Int'l Lawyer	Canadian International Lawyer
Can. T.S.	Canadian Treaty Series
Can. Y.B. Int'l L.	Canadian Yearbook of International Law
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
Chicago J. Int'l L.	Chicago Journal of International Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
Duke L.J.	Duke Law Journal
E.C.R.	European Court Reports of Cases before the Court
EC	European Community
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
Eur. J. Int'l L.	European Journal of International Law
F.	Federal Reporter (United States)
F. Supp.	Federal Supplement (United States)
Fordham Int'l L.J.	Fordham International Law Journal
Fordham L. Rev.	Fordham Law Review
FTAA	Free Trade Area of the Americas

GA	General Assembly (United Nations)
GATS	*General Agreement on Trade in Services*
GATT	*General Agreement on Tariffs and Trade*
GATT, the	General Agreement on Tariffs and Trade (as the *de facto* organization)
Geo. J. Legal Ethics	Georgetown Journal of Legal Ethics
German Y.B. Int'l L.	German Yearbook of International Law
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
I.C.J. Pleadings	International Court of Justice: Pleadings, Oral Arguments, Documents
I.C.J. Rep.	International Court of Justice: Reports of Judgments, Advisory Opinions and Orders
I.C.L.Q.	International and Comparative Law Quarterly
I.C.S.I.D. Rep.	Reports of Cases Decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965
I.C.S.I.D. Rev.	International Center for the Settlement of Investment Disputes Review
I.L.M.	International Legal Materials
IBRD	International Bank for Reconstruction and Development ("World Bank")
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
IDB	Inter-American Development Bank
ILO	International Labour Organization
IMF	International Monetary Fund
Ind. J. Global Leg. Stud.	Indiana Journal of Global Legal Studies
Int'l Bus. Lawyer	International Business Lawyer
Int'l Org.	International Organization
Int'l Trade & Bus. L.J.	International Trade and Business Law Journal
Iran-U.S. C.T.R.	Iran-United States Claims Tribunal Reports
ITO	International Trade Organisation
J. Int'l Econ. L.	Journal of International Economic Law
J. World T.	Journal of World Trade
L. & Pol'y Int'l Bus.	Law and Policy of International Business
L.N.T.S.	League of Nations Treaty Series
LDCs	Least Developed Countries
McGill L.J.	McGill Law Journal
MEA	Multilateral Environment Agreement
MERCOSUR	Mercado Comun del Sur (Common Market of the Southern Cone)
MFN	Most-favoured nation
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
MOU	Memorandum of Understanding

N.Y.U. J. Int'l L. & Pol'y	New York University Journal of International Law and Policy
Netherl. Y.B. Int'l L.	Netherlands Yearbook of International Law
NIEO	New International Economic Order
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
OECD	Organisation for Economic Co-operation and Development
P.C.I.J. (Ser. A)	Publications of the Permanent Court of International Justice: Series A, Collection of Judgments
P.C.I.J. (Ser. A/B)	Publications of the Permanent Court of International Justice: Series A/B, Judgments, Orders and Advisory Opinions
P.C.I.J. (Ser. B)	Publications of the Permanent Court of International Justice: Series B, Collection of Advisory Opinions
P.C.I.J. (Ser. C)	Publications of the Permanent Court of International Justice: Series C, Acts and documents relating to Judgments and Advisory Opinions given by the Court
P.C.I.J. (Ser. E)	Publications of the Permanent Court of International Justice: Series E, Annual Reports
PCIJ	Permanent Court of International Justice
R.I.A.A.	Report of International Arbitral Award
Rec. des Cours	Recueil des cours de l'Académie de droit international de La Haye
Rev. D.I. & D.C.	Revue de droit international et de droit comparé
Rev. D.I.P.	Revue générale de droit international public
Rutgers L. Rev.	Rutgers Law Review
Subsidies Agreement	*Agreement on Subsidies and Countervailing Measures*
SIEL	Society of International Economic Law
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*
TBT Agreement	*Agreement on Technical Barriers to Trade*
Texas Int'l L.J.	Texas International Law Journal
TPRM	Trade Policy Review Mechanism
TRIMs Agreement	*Agreement on Trade-Related Aspects of Investment Measures*
TRIPS Agreement	*Agreement on Trade-Related Intellectual Property Rights*
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
U.N.T.S.	United Nations Treaty Series
U.S.	United States of America
U.S.C.	United States Code
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNRIAA	United Nations Reports of International Arbitration Awards
URAA	Uruguay Round Agreements Act (United States)
USITC	United States International Trade Commission
USTR	United States Trade Representative
Va. J. Int'l L.	Virginia Journal of International Law
WTO	World Trade Organization
WTO Agreement	*Marrakech Agreement Establishing the World Trade Organization*
WTO agreements	Uruguay Round Agreements
Yale J. Int'l L.	Yale Journal of International Law

My son, although commerce is not an occupation which can with complete accuracy be called a skilled craft, yet properly regarded it has its laws just as the professions have. Clever men say that the root of commerce is established in venturesomeness and its branches in deliberateness, or, as the Arabs express it, "Were it not for venturesome men, mankind would perish". What is meant by these words is that merchants, in their eagerness for gain, bring goods from the east to the west, exposing their lives to peril on mountains and seas, careless of robbers and highwaymen and without fear either of living the life of brutal people or of the insecurity of the roads. To benefit the inhabitants of the west they import the wealth of the east and for those of the east the wealth of the west, and by so doing become the instrument of the world's civilization. None of this could be brought about except by commerce, and such hazardous tasks would not be undertaken except by men the eyes of whose prudence are stitched up ...

Kai Ka'us ibn Iskandar, Prince of Gurgan (Persia)
to his son Gilanshah (circa. 1080 A.D.)[1]

[1] *A Mirror for Princes, The Qabus Nama,* Translated from the Persian by, Reuben Levy (London: E.P. Dutton & Co., 1951) at 156.

Introduction

One can hardly think of any phenomenon which affects interaction between human beings and societies as much as economic activities and exchange. Both at international and national levels regulating economic relations, markets and factors of production are among the most important concerns of ideologies as well as legal systems. Trade is the most important manifestation of economic exchange which has existed from pre-historic times, has not been limited by geography, and has, literally, led to expansion of horizons, cultural cross-fertilization and an ongoing process of globalization. Civilizations rose, prospered or expanded through trade, and land and sea trade routes or the quest thereof have an indispensable part in human history. The Silk Road for instance was much more than a trade route, and was an important element in the development of modern civilization.[2]

Nationally, contract and tort law (broadly including areas like competition and consumer protection) are key subjects of legal systems regulating markets and commercial activities. Internationally, traditional international law focused on allocation of resources (including in land and sea) between sovereign states and on resolution of conflicts related to allocation of resources, without coordination of international markets apart from bilateral agreements between countries.[3] For centuries after the Treaty of Westphalia and the birth of modern nation-states, the dominant view in international relations was that "commerce was static and that the world could only support a definite volume of commerce."[4] Even early accounts of political economy, which defended free market policies, presented a state-centric approach that focused on ensuring trade surpluses. For instance, in *the Wealth of Nations*, Adam Smith stated that,

> wealth consisted in gold and silver, and that those metals could be brought into a country which had no mines only by the balance of trade, or by exporting to a greater value than it imported; it necessarily became the great object of political

[2] See *e.g.* V. Elisseeff, ed., *The Silk Roads: Highways of Culture and Commerce* (Paris: UNESCO, 2001).

[3] *Lex mercatoria,* on the other hand, regulated the private interactions of merchants.

[4] G.A. Bunting, "GATT and the Evolution of the Global Trade System: A Historical Perspective" (1996) 11 St. John's J.L. Comm. 505 at 508.

> economy to diminish as much as possible the importation of foreign goods for home consumption, and to increase as much as possible the exportation of the produce of domestic industry.[5]

As a result, while often carried out by private entities and affected individuals, international trade decisions remained state-centered.[6] Lack of a higher legal authority to enforce occasionally recognized international norms in international relations—including in the area of international trade—led to a world in which trade and power politics were deeply interrelated.[7] This situation resulted in ongoing conflict and competition between countries fighting to preserve trade surpluses and access to resources. Where trade failed, or where an advantage in trade was sought, occupation or colonialization paved the way for access to land, resources, labour, capital and markets.

The efforts after World War I to create a new world order were only partially successful and did not result in an international economic order. At the end of World War II, however, there was consensus among the architects of the post-War order that a stable international political and economic structure was essential in order to avoid future armed conflicts. It was understood that "[t]here can be no real progress toward confidence or peace nor permanent trade recovery while retaliations and bitter trade controversies rage."[8] This vision contributed, ideologically, to the creation of the system of the United Nations and particularly to the Bretton Woods institutions which, according to blueprint, should have included an International Trade Organisation (ITO). The ITO, however, was stillborn, and the GATT served as a *de facto* trade organization until the post-War project

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[5] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Amsterdam: MetaLibri Digital Edition, 2007) at 345.

[6] The merchants were in most cases private entities, occasionally working in close collaboration with or being supported by states. Accordingly in the state-centric post-Westphalian world corporations like the Dutch and English East India companies were influential players. See *infra* note 362 and accompanying text (also noting that Hugo Grotius worked for a part of his career as an employee of the Dutch East India Company).

[7] Bunting, *supra* note 4 at 510-512.

[8] Statement made by Cordell Hull in 1931. H.B. Hinton, *Cordell Hull: A Biography*, at 144 cited in G. Jahn, "The Nobel Peace Prize 1945: Presentation Speech" (The Nobel Peace Prize 1945, Nobel Institute, Oslo, 10 December 1945), online: Nobelprize.org <http://nobelprize.org/nobel_prizes/peace/laureates/1945/press.html> (date accessed 5 March 2008). Cordell Hull, the Secretary of State under President F.D. Roosevelt, was one of the architects of the post-War world order and won the Nobel Peace Prize in 1945 for his contributions to stabilization of international relations through promoting trade liberalization and creating the United Nations. See also "Cordell Hull, the Nobel Peace Prize 1945: Biography," online: Nobelprize.org <http://nobelprize.org/nobel_prizes/peace/laureates/1945/hull-bio.html> (date accessed 5 March 2008).

was completed in 1995 with the creation of the World Trade Organization. These developments remained state-centered.

In the meantime, non-state actors rose in power and influence on the international scene. While nation-states are social structures characterized by links of geography, population and political system and sovereignty, non-state actors represent a different kind of social structure organizing groups of people who are pursuing common social or economic goals. Faster globalization, trade liberalization and increased international cooperation have thus led to the emergence of transnational private sector corporate actors with unparalleled economic clout as well networks of non-governmental and civil society organizations that have left their mark on the international scene.[9] Alvarez observes that "[a]lthough the impact of NGOs on legal development ebbs and flows, no one questions today the fact that international law—both its content and its impact—has been forever changed by the empowerment of NGOs."[10] However, international law does not reflect this influence and impact and it is observed that "the political reality that nongovernmental organizations are important participants in international society ought to be given legal expression."[11]

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This thesis focuses on the interaction of the above-mentioned categories of non-state actors—private sector corporate actors and NGOs—with states in the context of the WTO through a lens of public international law.[12] It builds on the premise that

[9] Even during the time that I have been writing this thesis, several developments have highlighted the rising and changing nature of non-state actors participation or influence at the international level. The events of 11 September 2001, the last war in Iraq and role of private security firms, growing development and philanthropic activities of private foundations around the world (*e.g.* Clinton and Bill Gates foundations), and growing partnerships between public and private actors (UN Global Compact) are examples of this new trend.

[10] J.E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005) at 611.

[11] P. Sands, "The Environment, Community and International Law" (1989) 30 Har. Int'l L. J. 393 at 394; other authors also called for recognition of NGOs see, C. Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law" (1993) 4 Eur. J. Int'l L. 447; D.C. Esty, "Non-governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion" (1998) 1 J. Int'l Econ. L. 123 [hereinafter Esty, "Cooperation, Competition, or Exclusion"]; and T. Farer, "New Players in the Old Game: The De Facto Expansion of Standing to Participate in Global Security Negotiations" (1995) 38 Am. Behavorial Scientist 842.

[12] Other categories of non-state actors *e.g.* international organizations, multilateral development banks or multinational peace-keeping operations are outside the scope of this thesis.

increasingly the notion of states as the only "subjects" of international law has failed to address many important questions related to participation of non-state actors in international relations and international fora or to protect their rights adequately in the face of transgressions carried out by states. The picture becomes further complicated as "[w]e cannot pretend that the public/private distinction is a preordained static border. It is closer to a battleground, with ideological forces wishing to shift the frontline in order to consolidate their own gains."[13] Many functions which were performed by states (*e.g.* provision of basic services, communications, energy, transportation, health, education, security) are now privatized and need to be regulated by states. But globalization and trade liberalization may affect the states regulatory powers.

Joseph Stiglitz was not the first to point out that the evidence is overwhelming that globalization has failed to live up to its potential to bring enormous benefits to those in both the developing and the developed world.[14] But given his involvement in international economic policy-making at the highest levels, his words have to be given special credence.[15] Non-state actors are especially important in the context of the WTO, because they support strong interests and positions at both ends of the spectrum of the globalization debate.

Corporations have great interest and, behind the scenes, a great role in trade negotiations and the settlement of trade disputes. It is not a coincidence that a major WTO dispute is referred to as Kodak-Fuji, and yet another referred to colloquially as Airbus-Boeing. Very often corporations are crouching behind their governments, fighting their wars by proxy.

Furthermore, critiques of globalization have reinforced the importance of global civil society and have fought to accord a new prominence to the discussion of NGOs in international law. Civil society organizations may be seen as playing a moderating role which Philip Allot finds missing in the context of economic globalization:

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[13] A. Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press, 2006) at 1.

[14] *Making Globalization Work* (New York: W.W. Norton & Co., 2006) at 4 [hereinafter Stiglitz, *Making Globalization Work*]. See also J. Stiglitz, *Globalization and its Discontents* (New York: W.W. Norton & Co., 2003) [hereinafter Stiglitz, *Globalization and its Discontents*].

> It so happens that we have also inherited from the twentieth century an unprecedented degree of human socialisation, unprecedented possibilities of the good that social systems can do, unprecedented possibilities of social evil. What is called 'globalization' is seen, like the political and economic imperialism of the nineteenth century, as an extrapolating of the national realm into the international realm. The risk now facing humanity is the globalising of all-powerful, all-consuming social systems, without the moral, legal, political and cultural aspirations and constraints, such as they are, which moderate social action at the national level.[16]

The central questions of this thesis are therefore: why are non-state actors important in the context of international law and the WTO? How are they accommodated in the current system? Are lessons from participation of non-state actors in other areas of international law relevant to participation in international economic law and the WTO? What is the theoretical basis for arguing for enhanced participation of non-state actors? And how can non-state actors be sufficiently (or better) represented in the WTO? The question of non-state actors participation in the WTO is, therefore, not reduced to the oft-cited issue of *amicus curiae* briefs, and this thesis attempts to go beyond a merely formalistic approach to the question.

In setting the framework for an approach to these questions, Part I lays the background and presents the state of affairs regarding participation of non-state actors in the WTO. Chapter one sets the framework of this study. It first examines the relationship between international economic law and international law in order to demonstrate the relevance of developments in the broader area of international law to the WTO. Next, the history, organization and structure of the WTO are reviewed followed by a presentation of the categories of non-state actors which are subject of this study and developments in international relations which have given more prominence and importance to these actors and warranted a new approach to their participation. Chapter Two then presents the current status of non-state actors within the WTO in the areas of creation and enforcement of WTO law and in its adjudication, concluding that a new approach is needed to adequately accommodate non-state actors in the WTO.

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[15] Stiglitz is a Nobel laureate in economics who served as the chair of the President's Council of Economic Advisors in the Clinton Administration (1995-1997) and as a Senior Vice President and Chief Economist at the World Bank (1997-2000).

[16] *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002) at 93 [hereinafter Allott, *The Health of Nations*].

Part II of the thesis presents arguments for a new framework for participation of non-state actors in the WTO. In order to draw on lessons from other areas of international relations and to present a yardstick for comparison, Chapter Three presents a survey of participation of non-state actors in norm-creation, enforcement and dispute settlement in international law generally.

Finally, Chapter Four highlights the need and policy arguments for a new framework for participation and presents proposals for increased participation of non-state actors in the WTO. This chapter builds on the ongoing work on an interactional theory of international law to present elements of a new framework for participation in international law generally which better reflects the realities on the ground. While the goals of this thesis are not to present specific solutions, but to argue for more participation in the WTO, the last two sections make a number of proposals for enhanced participation of non-state actors in the WTO.

A comprehensive study of participation of non-state actors in the WTO requires a more in-depth examination of the political process at the WTO, based on systematic and empirical analysis of the decision-making and dispute settlement processes in the organization. That would be an over-ambitious goal for this thesis. However, it is hoped that this thesis can serve as a (theoretical) building block to such a study, and contribute to the debate over non-state actors in public international law in general. This thesis does not necessarily provide solutions for participation of non-state actors in the WTO, but demonstrates that developments in international relations point towards a need for more space for participation of non-state actors, and that the current system of the WTO fails to provide sufficient space for participation.

Part I- Law of the world trading system and the role of non-state actors: *de lege lata*

At the beginning of this part various key terms central to the subject matter of this thesis are defined, and the scope of each is determined. After demonstrating that the subject matter of this thesis is located in the domain of international economic law, a more detailed analysis of this field of law and existing approaches to it are presented. I identify two major approaches to international economic law and survey the roots and views of each, positioning myself in the spectrum of views presented. On the basis of that determination, the methodology pursued in this thesis and relevant sources of law will be introduced, leading to an examination of the world trading system with special focus on the position of non-state actors in the WTO. The goal parting Part I is to demonstrate that the WTO legal system is a separate branch of international law and to draw a picture of the current status of non-state actors within the WTO before I argue for and propose elements of a new framework for their participation in Part II.

Chapter One- Setting the framework

In order to set the framework for this study I will first delineate the scope of international economic law and different approaches to its study, elaborate on history, organization and structure of the WTO and place the WTO law in the broader context of international law. I will then present an overview of non-state actors in international relations, and expatiate on reasons for their rising importance.

1- International economic *law* or international economic *relations*

As much as the term "international economic law" is popular these days, sources dedicated uniquely to this subject are scarce.[17] Only a few textbooks are entitled "international economic law," and among the works of prominent scholars in this field different and often incommensurable approaches can be discerned. To facilitate this study, I have made a loose distinction between European and North American approaches. Apart from European and North American approaches, there is an important stream of literature on international economic law from (or on) developing country perspectives which focuses mostly on reorganization of the international economic system. In the pre-WTO era, and especially in the 1970s, the focus of this type of literature was on the New International Economic Order (NIEO).[18] In more recent years,

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[17] A title search for books entitled "International Economic Law" will produce few results. See *infra* notes 22 and 23.

[18] On NIEO see M. Bedjaoui, *Towards a New International Economic Order* (Paris: UNESCO, 1979); B. Bollecker-Stern, "The Legal Character of Emerging Norms Relating to the New International Economic Order: Some Comments" in K. Hossain, ed., *Legal Aspects of the New International Economic Order* (London: Pinter, 1980) 71; C.N. Brower & J.B. Tepe, Jr., "The Charter of Economic Rights and Duties of States: A reflection or Rejection of International Law" (1975) 9 Int'l Lawyer 295; D. Dicke, & E.-U. Petersmann, E.-U., eds., Foreign Trade in the Present and a New International Economic Order (Fribourg: University Press, 1988); G. Feuer, "Refléxions sur la Charte des droit et devoirs économiques des Etates" (1975) 79 Rev. D.I.P. 273; T.M. Franck & M.M. Munansangu, *The New International Economic Order: International Law in the Making* (New York: UNITAR, 1982); G.W. Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of States" (1975) 9 Int'l Lawyer 591; D.A. Holly "L'O.N.U., le système économique international et la politique internationale" (1975) 29 Int'l Org. 469; J. Makarczyk, *Principles of a New International Economic Order* (Dordrecht: Martinus Nijhoff, 1988); "The New New International Economic Order" (1993) Proceedings of the 87th Annual Meeting of the American Society of International Law 459; S.J. Rubin, "Economic and Social Human Rights and the New International Economic Order" (1986) 1 Am. J. Int'l L. & Pol'y 67; D.K. Tarullo, "Logic, Myth, and International Economic Order" 26 (1985) Harv. Int'l L. J. 533 [hereinafter Tarullo, "Logic, Myth and

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some scholars focused on GATT and developing countries, the implications of the Uruguay Round and new trade rules for these countries and technical issues related to application of WTO law to its new developing members, and participation of these countries in the world trading system and decision-making.[19] Apart from NIEO which did not carry the day,[20] this body of literature has not produced a comprehensive analysis of international economic law, and will not be included in my analysis. In this section, I will trace the origins of the European and North American approaches, briefly explain the methodologies used and sketch out the approach which will be adopted in this thesis.[21]

International Economic Order"]; M. Virally, "La charte des droits et devoirs économiques des états" (1974) 20 Ann. fran. dr. int. 57; T.W. Waelde, "A Requiem for the 'New International Economic Order': The Rise and Fall of Paradigms in International Economic Law and a Post-Mortem with Timeless Significance" in G. Hafner et al., eds., *Liber Amicorum Professor Seidl-Hohenveldern – in Honour of his 80th Birthday* (The Hague: Kluwer, 1998) 771; G. White, "The New International Economic Order: Principles and Trends" in H. Fox, *International Economic Law and Developing States* (London: The British Institute of International and Comparative Law, 1992) 25; R.C.A. White, "A New International Economic Order" (1975) 24 I.C.L.Q. 542.

[19] On GATT and developing countries see A. Hoda, *Developing Countries in the International Trading System* (Ahmedabad: Allied, 1987); M.M. Kostecki, *East-West Trade and The GATT System* (New York: St. Martin's Press for the Trade Policy Research Centre, 1979); D. Tussie, *The Less Developed Countries and the World Trading System: A Challenge to the GATT* (New York: St. Martin's Press, 1987). On analysis of developing countries in the Uruguay Round and transition to the WTO see M. Dubey, *An Unequal Treaty: World Trading Order After GATT* (New Delhi: New Age International, 1996); S. Haggard, *Developing Nations and the Politics of Global Integration* (Washington, D.C.: Brookings Institution, 1995); A.O. Krueger, *Trade Policies and Developing Nations* (Washington, D.C.: Brookings Institution, 1995); R.Z. Lawrence, D. Rodrik & J. Whalley, *Emerging Agenda for Global Trade: High Stakes for Developing Countries* (Washington, D.C.: Overseas Development Council, 1996); W. Martin, L.A. Winters, *The Uruguay Round and The Developing Economies* (Cambridge: Cambridge University Press, 1996). On developing countries in the WTO see M.E. Footer, "Developing Country Practice in the Matter of WTO Dispute Settlement" (2001) 35 J. World T. 55; F.J. Garcia, "Trade and Inequality: Economic Justice and the Developing World" (2000) 21 Mich. J. Int'l L. 975; J. Lacarte-Muro & P. Gappah, "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench" (2000) 3 J. Int'l Econ. L. 395; E.H. Preeg, "The South Rises in Seattle" (2000) 3 J. Int'l Econ. L. 183.

[20] See *e.g.* Carreau, Flory & Juillard, *supra* note 13 at 84-86; Seidl-Hohenveldern, *International Economic Law, supra* note 22 at 3-9; Tarullo, "Logic, Myth and International Economic Order," *supra* note 20 at 535; Lowenfeld, *supra* note 22 at 413; Waelde, *ibid.* at 796. As Waelde put it "[w]ithin the period of twenty years, this dominant paradigm of international economic relations has changed dramatically. In many issues one can see in fact a complete reversal—from statism to market liberalism, from nationalisation to privatisation, from foreign investment restriction to deregulated open-door policies." However certain achievements of NIEO have been acknowledged by different authors. Carreau, Flory and Julliard describe the achievement of the NIEO as "*fragmentaires.*" *Ibid.* at 86. Seidl-Hohenveldern refers to the acceptance of the idea of compensating inequality by the "Western and Others" Group in specific areas like the GATT and the *Lomé Conventions* (which is now replaced by the *Cotonou Agreement*). *Ibid.*

[21] This distinction between the European and the North American approaches not used in any of the books dedicated to the subject, and in the next sections a few textbooks are briefly noted to illustrate this loose categorization. Professor ver Loren van Themaat, however, in his preface to Lady Fox's *International Economic Law and Developing States: An Introduction* and Lady Fox herself in her introduction to the

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a- Scope of the subject matter

International economic law is a very curious field of law. On the one hand, in this era of economic liberalization, economic activities (international and domestic alike) are most often performed by private persons; on the other hand because international economic exchanges involve the transfer of goods, capital and services across borders and engage different legal regimes, government regulation is required. As a result, different authors have used—sometimes in a confounding manner—four different terms to qualify the legal regimes governing only one part or the whole range of international economic activities: international economic law, international trade law, international business law, and international commercial law. Often a collection of books entitled "international trade law" may treat entirely different issues, or a book on "international trade law" and one on "international economic law" in fact treat the same subject.[22]

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same book have underlined that distinction, without elaborating much on it. *International Economic Law and Developing States: An Introduction* (London: The British Institute of International and Comparative Law, 1992) at v. A comprehensive survey of different approaches to international economic law would also warrant examination of international trade/economic law course curricula at different universities and countries as well as the prerequisites for taking courses on this subject (*e.g.* whether prior study of public international law is a requirement for taking a course in this field). Such a study, while interesting, is beyond the scope of this thesis.

[22] At one end of the spectrum, there are authors who only deal with the public side of international economic activities, and at the other end there are those who limit themselves to private aspect of international economic activities or even only international sales of goods. For example, Seidl-Hohenfeldern, in *International Economic Law,* 2nd rev. ed. (Dordrecht: M, Nijhoff, 1992) [hereinafter Seidl-Hohenfeldern, *International Economic Law*] and Carreau, Flory & Juillard's famous treatise, *Droit international économique*, 3è éd. (Paris: Librairie générale de droit et de jurisprudence, 1990) deal with the law of economic relations of states.

Trebilcock, & Howse's, *The Regulation of International Trade,* 2nd d. (London & New York: Routledge, 1999), J.H. Jackson's, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1997), and Hudec's *Enforcing International Trade Law: The Evolution of The Modern GATT Legal System* (Salem, N.H.: Butterworth Legal, 1993) [hereinafter Hudec, *Evolution of the GATT Legal System*] all cover a more limited perspective on economic relations of states (the law of the world trading system and WTO). Lowenfeld in his *International Economic Law* (New York: Oxford University Press, 2002) belongs to this group, while he comes close to the first group in that he also covers the international monetary system and economic controls for political ends (economic sanctions).

Van Houtte's *The Law of International Trade* (London: Sweet & Maxwell, 1995) bridges the public side and the private side, and also covers international sales, distribution agreements, international payment and etc. K.W. Ryan's *International Trade Law* (Sydney: Law Book, 1975) falls into this category as well. It begins with the GATT, followed by outlining the trade policies of different groups of countries: the Developing Countries (and the New International Economic Order); Western Europe; U.S. and Japan; the Centrally Planned Economy Countries; Australia. The last two chapters are dedicated to international commercial law. *Ibid*.

On the other hand, one of the most important textbooks in the field of international trade, *Schmitthoff's Export Trade: The Law and Practice of International Trade,* is confined to issues of international sale of

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Given this discrepancy that is so commonplace[23] it is important to embark on a definitional exercise before tackling the main subject of the thesis. Although definitions can be arid, in this case their presence is merited. The relation between different terms and their use in this thesis must be clarified at the outset.

i- Scope of "international economic law"

For the purposes of this thesis, international economic law is the broadest of the four terms mentioned above.[24] It refers to the area of law covering all international

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goods—formation of contract, financing, transportation, insurance, and international commercial dispute resolution, etc. See D'Arcy, L., Carole, M., & Cleave, B., *Schmitthoff's Export Trade: The Law and Practice of International Trade,* 10th ed. (London: Sweet & Maxwell, 2000). The same is true for three other books entitled the law of international trade. See J.C.T. Chuah, *Law of International Trade* (London: Sweet & Maxwell, 1998); M.S.W. Hoyle, *The Law of International Trade,* 2nd ed. (Oxfordshire: CCH Editions, 1985); Tiplady, D., *Introduction to the Law of International Trade* (Oxford: BSP Professional Books, 1989).

[23] It is, thus, not surprising that the inaugural conference of the recently established Society of International Economic Law (hereinafter SIEL) "aims to explore the many different faces of 'international economic law', in order to reflect critically on its past, present and future paths. It will seek to explore issues concerning the content of the discipline, its evolution as a distinct field, and its relation with other fields of study." "SIEL Inaugural Conference: Call for Papers," online: SIEL <http://www.sielnet.org/> (last modified 9 October 2007).

It is interesting to note that since there is no "international economic law" subject heading in the Library of Congress cataloguing system and all the books on this subject are classified under the "international economic relations" or "foreign trade regulation" subject headings.

Legal journals also reflect the same trend as the books in this area and journals of international economic or trade law cover the same subjects. Among the journals it is interesting to note that only a few journals (and only since mid-1990s) are dedicated to international economic law. See for example: Asper Review of International Business and Trade Law (since 2001; published by University of Manitoba); International Trade and Business Law Review (since 2005; published by the Australian Institute of Foreign and Comparative Law); Journal of International Economic Law (since 1998; published by the Oxford University Press); Journal of World Trade (since 1987; formerly World Trade Law); Manchester Journal of International Economic Law (since 2004); Maryland Journal of International Law and Trade (since 1975; published by University of Maryland Law School and replaced the International Trade Law Journal); Minnesota Journal of Global Trade (1992-2005; published by the University of Minnesota Law School and now replaced by Minnesota Journal of International Law); Studies in International Financial, Economic, and Technology Law (since 2003; published by the British Institute of International and Comparative Law); University of Pennsylvania Journal of International Economic Law (1996-2007; formerly University of Pennsylvania Journal of International Business Law, and now replaced by University of Pennsylvania Journal of International Law); Yearbook of International Financial and Economic Law (since 1996; published by the London Institute of International Banking, Finance, and Development Law in cooperation with Centre for Commercial Law Studies, University of London).

[24] As pointed out in the call for papers of the SIEL "[p]erhaps inevitably, the term 'international economic law' now defies easy definition – at once a fully integrated part of public international law and an identifiable field in its own right, with a broader or narrower scope depending on perspective. "SIEL Inaugural Conference: Call for Papers," *supra* note 22. See also K.W. Abbott, "'International Economic Law': Implications for Scholarship" (1996) 17 U. Penn. J. Int'l Econ. L. 505-511 [hereinafter Abbott, "IEL: Implications for Scholarship"].

economic exchanges, encompassing both international private law governing exchanges between private persons and public international law regulating economic relations between states. In this sense international economic law includes the law governing international business between private persons, international trade between states, international development, investment and monetary law, as well as the law governing international financial, economic and trade institutions.

ii- Scope of "international trade law"

Although this term has been used to refer to the international private law aspect of international trade,[25] in this thesis, as in some other texts, it is used interchangeably with "international economic law."[26] Generally, however, international trade law is less encompassing than international economic law, and does not include international development, monetary or investment issues. Nowadays international trade law is almost synonymous with the law related to the WTO.[27]

iii- Scope of "international commercial law" and "international business law"

These two terms are narrower in scope. They refer only to international private law that governs international economic transactions, such as the international sale of goods, remedies in international sales, carriage of goods, payments and finance for international trade, and commercial arbitration.[28] These issues are not directly related to the subject matter of this thesis.

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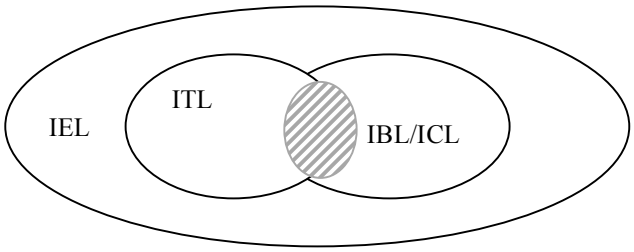
[25] See *e.g.* Chuah, *supra* note 22.

[26] See *e.g.* D. McRae, "The Contribution of International Trade Law to the Development of International Law" (1996) 260 Rec. des Cours 99 [hereinafter McRae, "Contribution of International Trade Law"].

[27] See *e.g.* Trebilcock & Howse, *supra* note 22. Conversely, it should be noted that the general mandate of the United Nations Commission on International Trade Law (UNCITRAL) established in accordance with resolution 2205 (XXI) of the General Assembly of the United Nations is to further the progressive harmonization and unification of the law of international trade and as such the work of UNCITRAL primarily deals with "international commercial law" according to our definition. *Establishment of the United Nations Commission on International Trade Law,* GA Res. 2205 (XXI) (17 December 1966) online: UNCITRAL < http://www.uncitral.org/uncitral/en/GA/resolutions.html > (date accessed 12 June 2007).

[28] *E.g.* W.J.H. Wiggers *International Commercial Law: Source Materials* (The Hague: Kluwer Law International, 2001). Wiggers gathers international material under the following headings: Arbitration and mediation, contract law, electronic commerce, financial law, intellectual property, contractual arrangements on transport, trusts, insolvency, taxation, corporate governance, transparency, bribery and codes of conduct. See also I. Davies, ed., *Issues in International Commercial Law* (Aldershot: Ashgate, 2005); C. Chatterjee, *International Business Law* (London: Routledge, 2006).

Figure 1- The relationship between international economic law, international trade law and international commercial and business law:



As this thesis deals with participation in the WTO, and must therefore survey a wide range of questions as they pertain to various subjects of international law, locating this thesis in the domain of international economic law allows us a more encompassing analysis of the issues implicated therein.[29] Different views on the nature of this field are examined in more detail in the following section.

b- A European approach: a broader definition

The common trend among European scholars is to consider international economic law as a branch of public international law dealing with economic issues.[30] They also follow a typical formalistic public international law approach in presenting international economic law, beginning with definition, subjects, sources and then identifying relevant principles and rules in different sectors.

i- First scholarly trend: public international law-oriented

According to Professor Seidl-Hohenveldern's definition "[i]nternational *economic* law, in its widest meaning, refers to those rules of public international law which directly concern economic exchange between the subjects of international law."[31] Carreau, Flory and Juillard present an even wider meaning of international economic law. They

[29] In particular this thesis examines WTO law in a broader context, linking trade with environment, development, labour and human rights issues—the so called "trade and" agendas. Abbott notes that the rise of "international economic law" is less a result of external changes in rules and institutions than of internal changes in perception and elaborates on developments in boundaries of the field to include issues of sustainable development and social policy. "IEL: Implications for Scholarship," *supra* note 24 at 506 and 509.

[30] Prosper Weil discusses this issue at length and reaches the conclusion that international economic law is not an autonomous field of law. See P. Weil, "Le droit international économique – mythe ou réalité?" in Société Française pour le droit international, ed., *Colloque d'Orléans, Aspects du droit international économique* (Paris: Pedone, 1972) 3-34.

[31] Seidl-Hohenfeldern, *International Economic Law, supra* note 22 at 1 [emphasis (underline) added].

distinguish a broad definition of international economic law from a narrow one. In the broad sense international economic law regulates international micro- and macro-economic relations.[32] In this sense international economic law will even include rules of international sales of goods. In the narrow sense, international economic law deals only with macro-economic relations. It is a "framework" law[33] that regulates international economic relations (international investment, and international movement of goods, services and payments). Even in this narrow definition (which coincides with Seidl-Hohenveldern's definition), Carreau, Flory and Juillard contend that sources of international economic law are not limited to international law sources. In addition to conventional and non-conventional sources of international law, they view national laws as an important source.[34] They argue, in light of a wider diversity of sources, that international economic law is irreducible to international law.

Schwarzenberger,[35] however, is unequivocal in considering international economic law as a branch of *public* international law,

> which is concerned with (1) the ownership and exploitation of natural resources; (2) the production and distribution of goods; (3) invisible international transactions of an economic or financial character; (4) currency and finance; (5) related services and (6) the status and organization of those engaged in such activities.[36]

But he also admits that even a restrictively defined international economic law would overlap to a certain extent with international private law and international commercial law.[37]

However, establishment of the WTO is no doubt one of the most important developments in the field of international economic law. It has considerably strengthened the institutional and legal framework of international trade and is a significant step

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[32] D. Carreau, T. Flory, & P. Juillard, P., *Droit international économique*, 3è éd. (Paris: Librairie générale de droit et de jurisprudence, 1990) at 45.

[33] "C'est un droit du cadre", Carreau, Flory & Juillard, *supra* note 32 at 46.

[34] Carreau, Flory & Juillard, *supra* note 32 at 46.

[35] Even though Schwarzenberger taught and wrote in England, due to his early academic formation in Germany, I have counted him among continental scholars.

[36] G. Schwarzenberger, "The Principles and Standards of International Economic Law" (1966) 117 Rec. des Cours 1 at 7 [hereinafter "The Principles of IEL"].

[37] *Ibid*. at 8.

towards rule-oriented international trade relations. It is, therefore, important to take note of more recent scholarly work in the area of international economic law.

For example, one recent European textbook in this area—Qureshi's *International Economic Law*[38]— in line with other European scholarly works, locates international economic law within the public international law system. Like all traditional studies of public international law, Qureshi sets the foundations of international economic law in the first part of his book. Nature and sources, economic sovereignty, the question of extraterritorial jurisdiction in the economic sphere, and the relationship between national and international economic law are dealt with in this part. The next three parts are dedicated, respectively, to three areas of international economic law, *i.e.*, international monetary law, international trade law (WTO issues), and international development law.[39]

ii- Second scholarly trend: GATT/WTO-oriented

There is also a European body of WTO-oriented scholarly works. Prominent among them are them are the works of Ernst-Ulrich Petersmann, a leading GATT/WTO specialist and the first "legal officer" of the GATT in 1981.[40] No doubt due to Petersmann's professional experience in the German Ministry of the Economy and the GATT and his education in law and economics, his work can be distinguished from that of other European scholars in the field of international economic law in two ways. First, he underlines the importance of economic analysis of international economic law. Second, his works are mostly focused on the GATT/WTO institutions and mechanisms. Even though Petersmann's *Constitutional Functions and Constitutional Problems of International Economic Law*[41] describes many elements of *a* theory of international economic law, it is not—and it does not intend to be—a general textbook on this subject. His more general work in this field focuses on the constitutional problems of international economic law, stresses the importance of individual rights, and proposes that foreign trade policy should be constitutionalized through liberal international rules and

[38] A.H. Qureshi, *International Economic Law* (London: Sweet & Maxwell, 1999) [hereinafter Qureshi, *International Economic Law*].

[39] See also D. Carreau & P. Juillard, *Droit international économique*, 2è éd. (Paris: Dalloz, 2005)

[40] E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: University Press, 1991) at xxix [hereinafter Petersmann, *Constitutional Functions of IEL*].

incorporated into domestic constitutional systems. Specifically on WTO law Petersmann focuses on the constitutional functions of the WTO agreements: "[a]s a new global framework agreement for the conduct of trade-related policies, the WTO Agreement sets out the basic rights and duties of its member countries and lays the legal foundation for a new international economic order for the 21st century."[42]

There are other European writers who focus on WTO issues without adopting a specific theoretical framework.[43]

c- North American view: a policy-focused definition

The leading American scholar in the field is John H. Jackson. He has been described as having "pioneered [the] new academic discipline" of international trade law with his book[44] *World Trade and the Law of GATT* in 1969.[45] For more than forty years now, Professor Jackson has been researching, teaching and publishing in the field of international trade law and the law of the GATT/WTO.[46] Because of Jackson's influence on scholarly works and teaching in the field of international economic law and in order to trace the differences between the North American and European approaches, it will be useful to examine the development of what I have labeled "Jackson's paradigm."[47]

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[41] *Ibid.*

[42] "Constitutionalism and International Organizations" (1996-97) 17 Nw J. Int'l L. & Bus. 398 at 446 [hereinafter, Petersmann, "Constitutionalism and International Organizations"].

[43] See *e.g.* van Houtte's book which adopts more holistic view of' the subject and moves from the substantive WTO law to the private side of international trade (*e.g.* international contracts of sale, and letters of credit). H. van Houtte, *The Law of International Trade* (London: Sweet & Maxwell, 2002). See also P. ver Loren van Themaat, *The Changing Structure of International Economic Law* (The Hague: Martinus Nijhoff, 1981).

[44] M. Bronckers, & R. Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer, 2000) at ix [hereinafter Bronckers & Quick, *Essays in Honour of Jackson*].

[45] *World Trade and The Law of GATT* (Indianapolis, Bobbs-Merrill, 1969) [hereinafter, Jackson, *The Law of GATT*].

[46] See the 12-page bibliography of Jackson's principal publication as of January 2000 in Bronckers & Quick, *Essays in Honour of Jackson*, *supra* note 44 at 571-582. After years of teaching at Michigan Law School, Jackson joined Georgetown University's Law Center, Washington D.C., in 1998, where he is also heading the Institute of International Economic Law. See Institute of International Economic Law, online: <http://www.law.georgetown.edu/iiel> (date accessed 25 July 2002). In the same year he started the Journal of International Economic Law published by Oxford University Press and has been its editor-in chief since. See Journal of International Economic Law, online: <http://www.jiel.oupjournals.org> (date accessed 25 July 2002).

[47] Hudec, *Evolution of the GATT Legal System*, *supra* note 22.

i- A paradigm is born

Jackson's first book[48] is limited in ambition. It was intended to be a treatise on the law of the GATT and to present a pragmatic analysis for government and GATT officials, private attorneys and legal scholars.[49] As evidenced by its title and content it was not intended as, and had no claim to being, a treatise on international economic law or even international trade law. It was this "pragmatic analysis" that laid the cornerstone for later works by Jackson and other scholars working in this field. In fact, it opened the door to the unexplored and unfamiliar field of GATT law, which was seen as exotic and technical to international lawyers.[50]

What distinguishes that Jackson's early works from the contemporary works of his European counterparts is a focus on GATT issues, an ambiguous position on the role of GATT law in the broader picture of international law, and a distinct policy-oriented approach. He refers to the position of law in the GATT system of that time in the following terms:

> [o]ne of the more puzzling questions facing a legal scholar is the question of what role "law" plays in international affairs. The question in the context of GATT is perhaps slightly more perplexing than the same question in the context of international relations generally. One of the reasons that makes the GATT an interesting object of scrutiny with respect to this question is that it was intended to contain precisely formulated legal rules, some times termed "contractual," which were to be directly applied without further elaboration.[51]

After comparing the GATT to other international economic organizations he observes that the "GATT […] has no legal staff. Its legal framework is sketchy and inadequate."[52]

In his major book on world trade in a section entitled "International Law and International Economic Relations: An Introduction," Jackson dedicated merely a page to "international economic law." [53] He takes note of differing ideas about the meaning of the term and first presents the broad view that "cast[s] a very wide net, and embrace[s] almost

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[48] Jackson, *The Law of GATT, supra* note 45.

[49] *Ibid. "*preface" at ix.

[50] McRae, "Contribution of International Trade Law," *supra* note 26 at 113-115.

[51] Jackson, *The Law of GATT, supra* note 45 at 12.

[52] *Ibid.* at 13.

[53] *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1997) at 25 [hereinafter Jackson, *World Trading System*].

any aspect of international law that relates to any sort of economic matter."[54] From his treatment of the subject, however, it appears that he favours a more restrained definition that "would embrace trade, investment, and services when they are involved in transactions that cross national borders, and those subjects that involve the establishment on national territory of economic activity of persons or firms originating from outside that territory."[55] In this meaning, international economic law does not seem any different from international trade law.[56] Jackson's definition almost coincides with the definition presented by European scholars; it is only narrower in scope. But as will be discussed below, the real difference between North American and European views is in their approach to the subject matter, not in their definitions.

ii- International economic relations approach

It is telling that Jackson is hesitant to use the term *international economic law*[57] and is inclined to use *international economic relations*—as evidenced in the title of his book.[58] This use of international economic relations, instead of international economic law, brings to mind the distinction between international law (IL) and international relations (IR) theory. From the viewpoint of the IR scholar, international lawyers have "a highly formalistic and exclusively technical international legal positivist approach to international relations"[59] and are not concerned "about the international society in which that law operates, about the nations and the relations between nations which that law orders, about the national interests and policies which that law furthers."[60] From the

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[54] *Ibid.*

[55] *Ibid.*

[56] Jackson himself continues by stating that "[i]n any event, clearly the subject of international trade whether in goods or in services (or both), is at the core of international economic law." (*ibid.*)

[57] Ironically, Jackson is the author of "Economic Law, International" entry in the Encyclopedia of Public International Law. In his article he favourably quotes Carreau, Juliard, and Flory's definition of international economic law, but his treatment of the subject is no different than his book. *Encyclopedia of Public International Law,* 1985, vol. 8, "Economic Law, International" by J.H. Jackson, at 150 [hereinafter Jackson, "Economic Law, International"].

[58] See also *supra* note 23 (on system of subject headings at the Library of Congress cataloguing system).

[59] F. Boyle, *World Politics and International Law* (Durham, N.C.: Duke University Press, 1985) at 59. See also K.W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 Yale J. Int'l L. 335 at 336 [hereinafter Abbott, "Modern International Relations Theory"].

[60] L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (New York: Columbia University Press, 1979), at ix.

perspective of international law scholars, the field of international relations is so dominated by a realist and neo-realist paradigm that they see "little point in a dialogue with [its] adherents..."[61] It is only during the past two or three decades that major interdisciplinary works linking these two fields have emerged.[62]

Similar to that IR/IL distinction, use of the term *law of international economic relations* (IER) underlines the focus on economic realities of the world trading system where economic power is of primary importance, as opposed to an abstract environment of international economic law (IEL) built by lawyers.

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[61] Abbott, "Modern International Relations Theory," *supra* note 59 at 338.

[62] As A.M. Slaughter points out, "[t]he discipline of international relations was born after World War I in a haze of aspirations for the future of world government." "International Law and International Relations Theory: A Dual Agenda" (1993) 87 Am. J. Int'l L. 205 at 207 [hereinafter Slaugther, "A Dual Agenda"]. After World War II, however, the high aspirations for a world government and international rule of law gave way to Political Realism, according to which the law on international level was law of politics and politics was "a struggle for power." See H.J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 4th ed. (New York, Knopf, 1967). Abbott observes that, "Realism, the dominant IR theory for over two thousand years, has had little to say to students of international law." "Modern International Relations Theory," *supra* note 59 at 337. From this traditional perspective law and politics were seen as two different domains, often uninformed by the developments of one another. Until not very long ago, that estrangement of law and politics on the international level continued. Even though theoretical works on international law informed by international relations (*e.g.* New Haven School) existed, they could not be considered as interdisciplinary works on international law and international relations. See *e.g.* M.S. McDougal et al*., Studies in World Public Order* (New Haven: New Haven Press, 1987) or C. de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris: Pedone, 1970). In 1968, in his preface to the first edition of his interdisciplinary oeuvre, L. Henkin noted how scholarly work on international relations were empty of any reference to international law, and vice versa. *Supra* note 60 at ix. But as other schools of international relations (institutionalism, constructivism, liberalism, néoliberalism, *etc.*) developed, more common grounds between international law and international relations theory were found. In 1989, Abbott noted how regime theory could be useful for international lawyers. "Modern International Relations Theory," *supra* note 59. Things are different nowadays. More and more—especially North American—authors attempt interdisciplinary approach to international legal issues. For a bibliography of interdisciplinary scholarship involving international relations and international law see A.-M. Slaughter, A.S. Tulumelloe & S. Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 Am. J. Int'l L. 367 at 393-397. For a brief overview of IR theories see P.J. Katzenstein, R.O. Keohane & S.D. Krasner, "*International Organization* and the Study of World Politics" (1998) 52 Int'l Org. 645; J. Brunnée & S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transn'l L. 19 [hereinafter Brunnée & Toope, "International Law and Constructivism"]; J. Brunnée & S.J. Toope, *Legitimacy and Persuasion: The Hard Work of International Law* [forthcoming in 2009] [hereinafter Brunnée & Toope, *Legitimacy and Persuasion*]; see also the Special issue of International Organization on legalization (volume 54, number 3) which includes articles on legalization and world politics, legalization and dispute resolution, law and economic integration and legalization in three issue areas, and also a critique of that volume in M. Finnemore & S.J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics" (2001) 55 Int'l Org. 734.

This understanding is reinforced by Professor McRae's approach in his lectures at the Hague Academy of International Law[63] as well as by Professor Lowenfeld's in *International Economic Law*.[64] McRae, unlike Jackson, does not refer expressly to the law of IER, but his conclusions are also more of an *economic relations*, rather than *economic law*, type. In all three cases the authors use illustrative examples to present Ricardo's theory of comparative advantage as "a powerful intellectual underpinning" of the liberal trade ideal.[65] This starting point marks the divergence of their approach from formalistic public international law.[66] Instead of starting with the sources and subjects of law, Jackson, McRae and Lowenfeld start with an economic theory and then describe the rules that govern the liberal trading system. This would have been similar to adopting one of several IR theories as the underlying theory and starting point of public international law.

It is noteworthy that neither Jackson, nor McRae are explicit about their international economic relations approach.[67] They both, however, acknowledge this

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[63] *Supra* note 26. McRae is a New Zealander in Canada, operating in the North American tradition and was elected to the United Nations International Law Commission in November 2006. See also: "Membership," online: International Law Commission of the United Nations <http://www.un.org/law/ilc/> (date accessed 3 January 2007). He acknowledges the influence of Jackson's works on his own writings in D.M. McRae, "GATT Article XX and the WTO Appellate Body" in Bronckers & Quick, *Essays in Honour of Jackson supra* note 44, 218 at 218. McRae's lecture is particularly important because he treated the relationship between international trade law and public international law at a time that the subject was largely ignored by international law scholars.

[64] *Supra* note 22. Lowenfeld's is the only North American treatise entitled the *International Economic Law*.

[65] Jackson, *World Trading System, supra* note 53 at 15; see also McRae, "Contribution of International Trade Law," *supra* note 6 at 139-142. According to Lowenfeld the "doctrine of comparative advantage has informed, if not quite dominated, the GATT since its creation in the early post-war years, and has sustained that fragile enterprise for half a century, exclaimed by establishment of the World Trade Organization in 1994." After presenting the theory he goes on to address its shortcomings from a policy-making perspective. *Supra* note 22 at 3 and 7 [footnote omitted].

[66] Professor Deardorff, a professor of International Economics at University of Michigan, explains how for many years, at the very beginning of Jackson's trade law class, he gave two lectures about the theory of comparative advantage. A.V. Deardorff, "The Economics of Government Market Intervention and Its International Dimension" in Bronckers & Quick, *Essays in Honour of Jackson supra* note 44, 70 at 70.

[67] Bronckers and Quick in their introduction to a collection of essays in honour of Jackson state that "Jackson also brought his own brand of realism to bear on this legal realm." Bronckers & Quick, *Essays in Honour of Jackson supra* note 44 at ix. One former student of Jackson, in the same volume, observes that "[Jackson] has obviously imparted [his former students] with the knowledge, analytical skills, and 'Realpolitik' of the WTO/GATT system." M. Schaefer, "U.S. State, Sub-Federal Rules, and the World Trading System" in Bronckers & Quick, *Essays in Honour of Jackson supra* note 44, 524 at 524. And another former student refers to his "pragmatic realism." E. Vermust, "Anti-Dumping in the Second

continued on the next page ➢

interdisciplinary approach to international trade issues, and proceed on what could be labeled as the "efficient market model,"[68] which is not the only theory in the field. To better understand this approach, it is useful to present a summary of McRae's views.

McRae uses the terms international trade law and international economic law interchangeably and presents a clear and systematic analysis of his view of international economic law. He takes issue with the traditional perspectives on international trade and international economic law—the above-mentioned positions of Schwarzenberger and Seidl-Hohenverdern—according to which international economic law had to be explained in the traditional terms of international law.[69]

In McRae's view, international law and international economic law are based on different premises and "start from different, almost conflicting, assumptions."[70] McRae elaborates on the economic and legal foundations of international trade law and of international law. He, like Jackson, is unequivocal in associating the "existing international trade law regime with the political philosophy of liberalism and the economic system of capitalism."[71] McRae further concludes that, "in terms of its basic objective the free trade rationale runs contrary to the idea that each state is a separate autonomous economic unit."[72]

On the other hand, McRae points out that international law is based on sovereignty of states and "[t]raditionally international law was concerned with defining the limits of jurisdiction of states, focusing on the areas in which States come into contact with each other."[73] McRae's conclusion is that full application of the international trade regime runs counter to the assumptions on which international law has traditionally rested.

Millennium: The Need to Revise Basic Concepts" in Bronckers & Quick, *Essays in Honour of Jackson supra* note 44, 258 at 258.

[68] Term used by in G.R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 Duke L.J. 829 [hereinafter, Shell, "Trade Legalism and IR Theory"].

[69] McRae, "Contribution of International Trade Law," *supra* note 6 at 119-120.

[70] *Ibid.* at 130.

[71] *Ibid.* at 137; see also Jackson, *World Trading System, supra* note 53 at 11.

[72] McRae, "Contribution of International Trade Law," *supra* note 6, at 144.

[73] *Ibid.* at 149.

Neither Jackson nor McRae deny the close relationship of international economic law and international law. In fact McRae's Hague lectures were intended to demonstrate the interrelationship between the two. Jackson even argues that "[m]any norms of international law apply also to international economic law,"[74] but he is quick to add that "[n]evertheless, there are certain characteristics or at least nuances, of the subject of international economic law that differ from general international law."[75] Even though they do not state so expressly, Jackson—in his earlier works—and McRae seem not to consider international economic law to be a branch of public international law.

It is important and interesting, however, to note that Jackson, in his penultimate book, revisited the question of the link between the WTO and general international law in great length and in a manner that he had not done in his earlier writings.[76] While his book delves into important challenges posed by globalization to the generally accepted assumptions of international law, Jackson concludes that "[a]lthough others have tried to develop a 'unified theory' of international law and/or international economic law, it is not the desire here to so disguise the complexity and variability of the subject."[77]

d- Inadequacy of the two approaches

In my view neither the formalist legal European approach, nor the economics-centered North-American analysis provides an adequate general theoretical framework for regulating international trade relations of states, and neither addresses the question of participation.

On one hand, a formalistic international law approach to international trade issues will be misleading, or at best incomplete, as it will not recognize the driving force behind

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[74] Jackson, "Economic Law, International," *supra* note 57 at 155.

[75] *Ibid.* 155.

[76] *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006) [hereinafter Jackson, *WTO and Changing Fundamentals*].

[77] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 258. Jackson acknowledges that "international economic law (IEL), and the WTO in particular, is enmeshed in [the] broader issues of international law, but also practices and experiences that are extremely relevant to discussions in the broader context." *Ibid.* at 4. As Jackson explains in its preface, the book is in part based on annual international law lecture series at the Cambridge University Lauterpacht Research Centre in 2002. *Ibid.* at ix. It has to be noted that since the advent of the WTO and its dispute settlement mechanism WTO law has incited international lawyers' interest in a manner which is not comparable with the earlier GATT period.

trade liberalization.[78] It is not informed by economic theories of international economic relations, and most importantly for the purposes of this thesis, it largely ignores the role of non-state actors in formation and implementation of the law.

On the other hand, the North American approach can be criticized for taking a purely economic paradigm too far. Extending the theory of comparative advantage from domestic markets to the international scene is problematic, because domestically even in the purest models of capitalism the government plays a balancing role between public interest and individual rights.[79] In the words of Oscar Schachter "States alone have provided the structures of authority needed to cope with the incessant claims of competing societal groups and to provide public justice essential to social order and responsibility."[80] On the international scene, in the absence of a supra-national government to play that balancing role, uncritical application of the theory of comparative advantage fails to create the necessary equilibrium between public interest and individual rights, and can result in widespread dissatisfaction.[81]

Second, the fact that states constantly violate free trade agreements demonstrates that there are other forces at work, and an analysis relying uniquely on the theory of comparative advantage is not a comprehensive analysis.

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[78] Some works of this stream of literature ignore the most important issues in this field. For instance, to my great surprise, the latest "revised edition" of Seidl-Hohenverldern's *International Economic Law*, includes references to the World Trade Organization on only 3 of its 250 pages and dedicates two lines to the dispute settlement system of that organization. *International Economic Law*, 3rd Rev. ed., (The Hague: Kluwer, 1999).

[79] It has to be noted that in recent year as world trade issues have attracted more attention among international lawyers some interesting attempts have been made to discern different perspectives in the field of international economic law. The focus on two approaches in this thesis should not lead to ignoring these other perspectives. On the contrary studying the range of different perspectives reinforces our conclusions regarding the limited scope of the two mainstream perspectives studies in this thesis. See *e.g.* A.H. Qureshi, ed., *Perspectives in International Economic Law* (The Hague: Kluwer Law International, 2002) (bringing together a range perspectives including: legal, institutional, developing country, regional, human rights, feminist, ideological, goal-oriented, subject-based perspectives).

[80] "The Decline of the Nation-State and its Implications for International Law" (1997) 35 Colum. J. Transnat'l L. 7 at 22.

[81] See *e.g.* B. Stern, "How to Regulate Globalization?" in M. Byers, ed., *The Role of Law in International Politics* (New York: Oxford University Press, 2000) 247 at 254 [hereinafter Stern, "How to Regulate Globalization"] (quoting Jacques de Larosière, President of European Bank for Reconstruction and Development, and Michel Camdessus, Director-General of the International Monetary Fund, on risks of globalization). A proper functioning of the system of liberal trade requires "*creation of a truly world-wide international law system of regulation*"—perhaps a mechanism comparable to that of the European Union. *Ibid.* at 255 [emphasis in the original].

Third, the widespread acceptance of a liberal trading order does not necessarily result from a philosophical or ideological commitment,[82] but as McRae himself has pointed out, in many cases "a liberal trade regime is being adopted because pragmatically it seems to be better than other options."[83] This means that based on the theory of comparative advantage many states are inclined to opt for liberalization of trade and join the WTO. In making this choice, states are exercising their *sovereignty* within the framework of international law. It is not clear, however, why this choice would create a regime separate from general international law governing the international economic relations of states.

Fourth, international economic law is not restricted to issues related to *international trade*. A non-exhaustive list of other relevant legal matters would include: foreign direct investment, expropriations, development contracts, development financing, issues of sustainable development, monetary regulation, and economic initiatives within the UN system. If one bases this entire field of law only on the theory of comparative advantage it will not be possible to explain the link between one sector of international economic law (or for that purpose international economic relations) and others. In fact, inclusion of the concept of sustainable development in the preamble of the *Marrakech Agreement Establishing the World Trade Organization,*[84] and article XX of the *GATT*, containing policies that may justify exceptions to the principles of free trade, indicates that the international trade regime is not all about comparative advantage.[85]

Fifth, in distinguishing international economic law from general international law, very often emphasis is put on the fact that international law is "founded on the notion of sovereignty whereas the concept of interdependence was fundamental to international

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[82] See A. Hurrell & N. Woods, "Globalisation and Inequality" (1995) 24 Millennium: J. of Int'l Studies 447.

[83] McRae, "Contribution of International Trade Law," *supra* note 6, at 157.

[84] 33 I.L.M. 1144 (entered into force 1 January 1995) [hereinafter the *WTO Agreement*].

[85] G. Marceau, "A Call for Coherence in International Law: Praises for the Prohibition against 'Clinical Isolation' in WTO Dispute Settlement" (1999) 33 J. World T. 87 at 87-88.[hereinafter, "A Call for Coherence in International Law"]. For further detail on article XX of the GATT and preamble of WTO see section 2:c:ii, below.

economic law."[86] In this regard, McRae also acknowledges that sovereignty of states plays an important role in the development of international trade law. [87] At the same time, as will be demonstrated later in this thesis, the tendency to limit national sovereignty and transfer the state's regulatory functions to international bodies is not a new trend and is certainly not restricted only to the field of international economic law.[88]

Finally, for present purposes an "international economic relations" approach, at least based on the premises which were presented above, cannot provide any framework for participation of non-state actors. Or it may be argued that because of the narrow view that this approach has on international economic law issues it can only accommodate economic actors.

Before leaving the two approaches aside, we should determine whether they are commensurable. The closest that European authors come to the North American view is perhaps found in Carreau, Flory and Julliard's book, where international economic law is considered an original field of law.[89] But even though this conclusion is similar to that of many North American scholars, each group reaches the conclusion by way of a different path. Carreau, Flory and Julliard's conclusion is based on their analysis of the sources of international economic law. They note that international law is a law of *protection* but international economic law is a law of *expansion*.[90] The general North American conclusion is based on the different starting point of each field. In fact, after presenting definitions of the scope of the field of international economic law (which are common to a certain extent), each school follows a different path. For instance, Carreau, Flory, and Julliard appear to hold (as do McRae and Jackson) that international economic law is an

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[86] McRae, "Contribution of International Trade Law," *supra* note 6 at 122 (quoting Carreau, *Colloque d'Orléans* at 126).

[87] McRae, "Contribution of International Trade Law," *supra* note 6 at 166. See also Pauwelyn's critique of McRae in *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) at 29-35 [hereinafter Pauwelyn, *Conflict of Norms*].

[88] As far back as 1927 (before the advent of the present world trading system), Politis in his book takes note of a development towards limiting state sovereignty and its substitution by international law. *Les Nouvelles Tendances du Droit International* (Paris: Librarie Hachette, 1927) at 18 [hereinafter Politis, *Les Nouvelles Tendances*]. A comparable development can be traced in areas of international human rights law and international environmental law. See Chapter Three:2:b, below.

[89] Carreau, Flory & Juillard, *supra* note 32 at 47.

[90] Carreau, Flory & Juillard, *supra* note 13 at 47.

original branch of law, but they follow a public international law methodology in their analysis of international economic law[91] and do not limit themselves to issues of the multilateral trading system (GATT/WTO). They also address issues related to international monetary regimes and international investment.

The North American view is very much influenced by the first four-and-a-half decades of the GATT, during which it was a strange "mélange of law and non-law, institutions and non-institutions"[92] when the intention was to distinguish law from (a sort of) "diplomat's jurisprudence."[93] Conversely, while the European view may not have been corresponding to the realities of that trade regime, the advent of the WTO reinforced the institutional and legal side of the international trade regime, bringing it closer to a type of "Wilsonian Institutional Liberalism,"[94] and distancing it from the old realism. Thus, the European approach may be more relevant today than it was before. [95]

2- The WTO: History, organization and structure

Following the failed attempts to create an International Trade Organization (ITO) in 1948 and an Organization for Trade Cooperation (OTC) in 1955,[96] a 1990 Canadian proposal for creating a new institution to be called the World Trade Organization finally carried the day.[97] The WTO was established as the "principal institution for international trade"[98] in 1995 following eight years of negotiations under the Uruguay Round[99] by the

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[91] The first 90 pages of their book is dedicated to definition, sources, and actors of international economic law. *Supra* note 13.

[92] D. Kennedy, "The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law" (1995) 10 Am. U.J. Int'l L. & Pol'y 671 at 685.

[93] Term used by Robert E. Hudec. See *The GATT Legal System and World Trade Diplomacy*, 2nd ed. (Salem, N.H.: Butterworth Legal, 1990) at 30 [hereinafter Hudec, *GATT Legal System*].

[94] Term used by Anne-Marie Slaughter. See "Liberal International Relations Theory and International Economic Law" (1995) 10 Am. U.J. Int'l L. & Pol'y 717 [hereinafter "Liberal IR Theory and IEL"].

[95] Another view of the theoretical frameworks of international economic law distinguishes between those which "see the development of legal norms as the culmination of a process of conscious agreement and exchange" and those which "see the development of norms as a means to create a more just international economic system." S. Zamora, "Is there Customary International Economic Law" (1990) 32 German Y.B. Int'l L. 9 at 40.

[96] An organizational protocol was drafted in a 1955 review session of the GATT but failed again due to the U.S. Congress disapproval. See Jackson, *World Trading System, supra* note 53 at 42.

[97] Jackson, *World Trading System, supra* note 53 at 45.

[98] Jackson, *World Trading System, supra* note 53 at 31.

Contracting Parties to its predecessor, the GATT. As the subject matter of this thesis is obviously located in the realm of WTO law, it is necessary to study the organization, structure and legal issues related to participation of non-state actors in this organization. Due to the strong foundation provided by the GATT in the formation of the WTO, it is also essential to start with an overview of the history of the GATT as an institution within the Bretton Woods system.[100]

a- From GATT to the WTO

In 1944, towards the end of World War II, Britain and the United States envisaged the creation of three key international institutions aimed at post-war reconstruction of the world economy.[101] The IMF, the World Bank and the ITO would have been charged with maintaining exchange rate stability, providing reconstruction capital to war-torn economies (and later development capital to less developed countries), and overseeing the negotiation and administration of a new multilateral liberal world trading regime, respectively.[102] The third pillar of the post-war international economic order, the ITO, never came into existence due to opposition in the U.S. Congress.[103] However, pending

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[99] The Uruguay Round of Multilateral Trade Negotiations under the GATT was launched in Punta del Este, Uruguay, in September 1986, and lasted till 1994, when the *WTO Agreement* was signed.

[100] The importance of the GATT history is underlined in article 16 of the *WTO Agreement* in the following terms:

> the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

Supra note 84.

[101] J.H. Jackson, *Restructuring The GATT System* (New York: Council on Foreign Relations Press, 1990) at 9 [hereinafter Jackson, *Restructuring the GATT*]; The Bretton Woods Conference in 1944 was primarily devoted to monetary and banking issues and did not deal with trade as such. However, it was recognized that comparable institutions for trade should be created to complement the monetary institutions. See United Nations Monetary and Financial Conference (Bretton Woods, NH, 1-22 July 1944), Proceedings and Documents 941 (U.S. Department of State Pub. No. 2866, 1948) cited in *ibid.* at 105, note 3.

[102] Trebilcock & Howse, *supra* note 22 at 21. For more on the link between the world trade system and international financial institutions see D. Ahn, "Linkages between International Financial and Trade Institutions" (2000) 34 J. World T. 1 [hereinafter Ahn, "Linkages between IFIs and WTO"].

[103] Trebilcock & Howse, *supra* note 22 at 21. For a detailed account for efforts to ratify the *Havana Charter* in the United States and failure of ITO see W. Diebold, Jr., *The End of the ITO,* Essays in International Finance, No. 16 (Princeton: Princeton University, International Finance Section, 1952) (hereinafter Diebold, *The End of the ITO*).

the completion of negotiations on the *Havana Charter* (establishing the ITO)[104] a part of the Charter entitled the *General Agreement on Tariffs and Trade* (*GATT*)[105] came into force by virtue of a protocol of provisional application.[106] As such, the *GATT*, which was not intended to be an organization in the proper sense of the term, filled the vacuum caused by failure of the ITO negotiations and became a *de facto* international organization.[107] Not surprisingly, in the framework of the GATT, as opposed to other international organizations, emphasis was put on "process over structure, on policy rather than institution, and on pragmatism at the expense of idealism."[108] This approach, which went against the "embedded liberalism bargain" at the origin of the GATT,[109] was reflected in all of its activities and specifically in the formation of GATT law and its dispute settlement system. This has been labeled "diplomat's jurisprudence."[110]

During forty-seven years of activity, several attempts were made to develop the GATT's institutional framework and ameliorate its structure and procedures in dealing

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[104] United Nations Conference on Trade and Employment, *Havana Charter for an International Trade Organization and Final Act and Related Documents,* Havana, Cuba, November 21, 1947, to March 24, 1948, UN Doc. ICITO/1/4/1948, reprinted in U.S. Department of State Publication 3206, Commercial Policy Series 114 (1948) [hereinafter *Havana Charter*].

[105] *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 187, Can. T.S. 1947 No.27. (entered into force 1 January 1948) [hereinafter *GATT 1947*].

[106] *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 308 (entered into force 1 January 1948). To see in more detail why the Protocol of Provisional Application was adopted before the end of negotiations on *Havana Charter* see Jackson, *World Trading System, supra* note 53 at 39-40. See also, M.N. Hansen & E. Vermulst, "The GATT Protocol of Provisional Application: A Dying Grandfather?" (1988/89) 27 Colum. J. Transnat'l L. 263.

[107] Jackson, *World Trading System, supra* note 53 at 41-42. To avoid confusion, in this thesis, "*GATT 1947*" refers to the original agreement referred to in *supra* note 105. The term "the GATT", refers to the *de facto* international organization which was in charge of application of *GATT 1947*, and which ceased to exist at the end of 1995. "*GATT*" (otherwise known as *GATT 1994*) refers to the agreement on trade in goods which is in force now and it comprises *GATT 1947* (see *infra* note 124).

[108] G.R. Winham, *The Evolution of International Trade Agreements* (Toronto: University of Toronto Press, 1992) at 44.

[109] J. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998) at 62 [hereinafter Ruggie, *Constructing the World Polity*]. Howse elaborated on the idea that "trade liberalization was embedded within a *political* commitment broadly shared among the major players in the trading system of that era, to the progressive, interventionist welfare state." R. Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime" in J.E. Alvarez, ed., Symposium: The Boundaries of the WTO (2002) 96 Am. J. Int'l L. 94 at 97 [hereinafter Howse "From Politics to Technocracy"].

[110] See *supra* note 93.

with trade and dispute settlement issues.[111] Finally, after eight negotiating rounds,[112] the latest of which was the Uruguay round with 100 states participating, the World Trade Organization came into existence on 1 January 1995.

i- The need for a new trade institution

The transition from the *GATT* to the WTO legal system was the natural evolution towards completion of the unfinished project of the post-War world order and filled the void created by the failure of the *Havana Charter*.[113] Ad hoc evolution of the GATT system throughout the years had not been able to remedy chronic weaknesses of the GATT. This problem became especially acute after the Tokyo Round (1974-1979) which resulted in the conclusion of different specific agreements ("codes"), which were signed by different sets of contracting parties to the GATT ("GATT à la carte"), thus creating different sets of obligations as well as different dispute settlement fora.[114]

At a general level, the Uruguay Round specifically addressed the problems which were caused by unnatural growth of GATT as well as its lack of an institutional structure. The *WTO Agreement* created a single undertaking, meaning that the agreements which resulted from the round are an inseparable whole which should be singed up to by any member of the WTO, and thus putting an end to the "GATT à la carte."[115] It also created

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[111] See P. Demaret, "The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization" (1995) 34 Colum. J. Transnat'l L. 123 at 126-133.

[112] First negotiating round was Geneva (1947) with 23 countries participating, followed by Annecy (1949) with 33 countries, Torquay (1950) with 34 countries, Geneva (1956) with 22 countries, Dillon (1960-61) with 45 countries, Kennedy (1962-67) with 48 countries, Tokyo (1973-79) with 99 countries, and Uruguay (1986-93) with 100 countries. First five rounds concentrated on tariff reduction. The sixth, Kennedy Round, looked at non-tariff barriers and was only partly successful. The Tokyo Round made non-tariff barriers (*e.g.* government procurement policies, subsidy policies, customs valuation policies, and technical standards) a priority objective. It resulted in conclusion of nine different plurilateral agreements on non-tariff measures and institutional reforms to the GATT. See Jackson, J.H., *Restructuring the GATT* at 36-37; Trebilcock & Howse, *supra* note 22 at 21; T. Flory, *L'organisation mondiale du commerce: Droit institutionnel et substantiel* (Brussels: Bruylant, 1999) at 4-5 [hereinafter Flory, *L'organisation mondiale du commerce*].

[113] See Hudec, *Evolution of the GATT Legal System*, *supra* note 22. On creation of Legal Affairs Office in the GATT see *ibid.* at 137-138.

[114] Demaret, *supra* note 111 at 127-128.

[115] Which is made effective through article II:2 and 3 of the *WTO Agreement*. According to that article

> 2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.
> 3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those

continued on the next page ➢

a centralized and reinforced dispute settlement system, in some cases formalizing practices that had been adopted by the GATT. [116] In addition, apart from adding specific agreements for trade in agriculture and textiles, and expanding the scope of trade liberalization to trade in services, the Uruguay Round also resulted in agreements concerning trade protection measures and subsidies, as well as agreements relating to restrictive measures and trade-related aspects of intellectual property.[117]

ii- A new rule-oriented system

For years the domain of international economic law witnessed a struggle between "partisans of the rule of law" on one hand and economic "realists" on the other.[118] With the advent of the WTO, those in favour of an orderly, codified economic order won out, and the world trading system and its institutions entered a new rule-oriented era.[119]

> Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

Supra note 84. As a result, the WTO is the "common institutional framework" for enforcing these agreements. See *WTO Agreement, ibid.* art. II:1. This was contrary to the situation under the GATT where many contracting parties were allowed not to participate in certain agreements ("GATT à la carte"). See Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 449. Furthermore, according to the Preamble of the *WTO Agreement*, members have

> [r]esolved … to develop an integrated, more viable and durable multilateral trading system, encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.

Supra note 84.

[116] G. Guibert, "L'Organisation mondiale du commerce (OMC), continuité, changement et incertitudes" (1994) 3 Politique Étrangère 805 at 807. The new dispute settlement system introduced time tables for different stages in the procedure, reversed the consensus requirement for adoption of reports (a consensus is now required to avoid adoption of a panel report), created a permanent Appellate Body, and a monitoring mechanism to ensure a party's compliance with the panel decisions. As a result of these improvements the dispute settlement system of the WTO is much more legalized than that of the GATT. See Jackson, *World Trading System*, *supra* note 53 at 48; Guibert, *ibid.* at 813-813.

[117] See section 2:b:ii, below.

[118] Tarullo, "Logic, Myth and International Economic Order," *supra* note 20 at 534. The debate over rule of law in international trade dates back to the GATT era. See, *e.g.* P.R. Trimble, "International Trade and the 'Rule of Law'" (1985) 83 Mich. L. Rev. 1016.

[119] Jackson wrote in 1978, "[t]o a large degree the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach." "The Crumbling Institution of the Liberal Trade System" (1978) 12 J. World T. L. 93 at 99. On the notion of legalization, its elements and its variability in international relations see K.W. Abbott et al., "The Concept of Legalization" (2000) 54 Int'l Org. 401-419. Abott et al. identify three components for legalization: obligation, precision and delegation (the extent to which states and other actors delegate authority to designated third parties). *Ibid.*

Overall, the most significant aspect of the transition from the GATT to the WTO was the move towards a rule-oriented system, with more transparency, foreseeability and legal certainty in the system. This new tendency is evidenced by the new dispute settlement mechanism and the institutional framework of that branch of the WTO, as well as the overwhelmingly legalistic nature of the academic literature focusing on WTO.[120]

What are the implications of a new rule-oriented system for our study?

First, this new era requires a new approach in studying legal issues involved in the international trading system. It is no longer desirable or adequate to have a solely policy-oriented approach for a rule-oriented system.

Second, on the other hand, legal formalism and preoccupation with sources of law pervades the practice of international law,[121] and a solely legal approach fails to take into account the new realities of international relations.

Third, this study has to test the assumption that changes towards a rule-oriented system create an environment which is more conducive to participation of non-state actors in activities of the WTO.

b- The WTO as an institutions

A brief overview of structure, scope and functions, legal status and decision-making and dispute settlement system of the WTO in this section lays the background for a survey of non-state actors' participation in the next chapter.

i- Structure of the WTO Agreement

As a result of the Uruguay Round negotiations, "a full-fledged legally constituted international organization," with clear functions and structure, secretariat, director-general and a series of sub-bodies was created (see Figure 2).[122] The GATT as an

[120] Among other significant changes, the Appellate Body of the organization, for instance, is composed of seven people, six of whom are lawyers and teach in different fields of law. They include Professor Georges Abi-Saab of Egypt who is primarily known as a leading public international law professor, Professors Luiz Olavo Baptista of Brazil, Merit E. Janow of the United States, Giorgio Sacerdoti of Italy, Yasuhei Taniguchi of Japan and David Unterhalter of South Africa are specialized in fields of international trade law, arbitration, civil procedure, competition and/or public law. Eight former members of the Appellate Body were all lawyers. "Appellate Body Members", online: World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm> (date accessed: 15 January 2008).

[121] Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Ch. 1 at 28.

[122] Jackson, *World Trading System, supra* note 53 at 48.

institution ceased to exist at the end of 1995,[123] but substantive obligations of GATT 1947 continue as part of *GATT* which is the first part of Annex 1A of the *WTO Agreement*.[124]

The *WTO Agreement* includes a set of indivisible multilateral agreements, which are an integral part of the *WTO Agreement* and are binding on all members of the WTO, and four Plurilateral Trade Agreements, which are only binding on those members who have accepted them.[125] The multilateral agreements can be categorized as institutional agreements—most importantly, the *WTO Agreement* and its Annex 2 on *Understanding on Rules and Procedures Governing the Settlement of Disputes*;[126] *Agreements on Trade in Goods*;[127] *Agreement on Trade in Services*;[128] and *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[129] The *WTO Agreement* is complemented by Ministerial Decisions and Declarations which are related to certain agreements.[130]

In Palmeter's categorization of the WTO agreements on the basis of Hart's model, the first Annex to the *WTO Agreement*—with three parts—sets out most of the WTO's primary rules. The *DSU* (annex 2) which contains most of the rules of adjudication is an important part of the system's body of secondary rules.[131] The Trade Policy Review Mechanism[132] contains both primary rules and secondary rules of procedure.[133]

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[123] There was one year of overlap in the activities of the GATT and the WTO, the former ended its activities at the end of 1995 and the WTO began at beginning of 1995. On technicalities of the transition from GATT to the WTO see P. Moore, "Current Developments: The Decisions Bridging the GATT 1947 and the WTO Agreement" (1996) 90 Am. J. Int'l L. 317.

[124] *General Agreement on Tariffs and Trade 1994*, 14 April 1994, *Marrakech Agreement Establishing the World Trade Organization*, Annex 1A, 33 I.L.M. 1144 (entered into force 1 January 1995) [hereinafter GATT 1994].

[125] Plurilateral agreements are comprised of *Agreement on Trade in Civil Aircraft*, *the Agreement on Government Procurement, the International Diary Arrangement*, and *the Arrangement Regarding Bovine Meat* and form annex 4(a), 4(b), 4(c), and 4(c) to the *WTO Agreement*. *Supra* note 84.

[126] *WTO Agreement, supra* note 84, annex 2 [hereinafter the *DSU*].

[127] All included in annex 1A of the *WTO Agreement*. *Supra* note 84.

[128] *WTO Agreement, supra* note 84, annex 1B [hereinafter GATS].

[129] *WTO Agreement, supra* note 84, annex 1C [hereinafter TRIPS].

[130] These Decisions and Declarations are not "covered agreements" and are not directly subject to dispute settlement. Some of them, however, could be relevant to the interpretation of a covered agreement.

[131] "The WTO as a Legal System" (2000) 24 Fordham Int'l L.J. 444 at 465 [hereinafter Palmeter, "WTO as a Legal System"]. Hart's view of primary and secondary rules can be summarized as follows: Primary rules are the rules to be obeyed; secondary rules outline how this is to be done. However, primary rules alone do not create a legal system. Primary rules need to be applied to different situations and should be interpreted. Disputes may arise as to whether a rule has been violated or how a rule should be interpreted or there may be a need to change a primary rule. The response to these problems lies in the existence of secondary rules.

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ii- Scope and functions of the WTO

First, the WTO is the "common institutional framework for the conduct of trade relations among its Members" in matters related the *WTO Agreement* and its annexes.[134] Accordingly, WTO's functions are, mainly: to facilitate the implementation, administration and operation, of the multilateral trade agreements; to further the objectives of these agreements; to provide the framework for the implementation administration and operation of the Pulrilateral Trade Agreements; to administer the TPRM; and to administer the *DSU*.[135]

Second, the WTO has a function regarding future trade negotiations. The organization has to provide the forum for negotiations among WTO members concerning their multilateral trade relations in matters dealt with in the agreements.[136]

Secondary rules supplement primary rules, and complement the legal system. "They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined," Hart explains. See H.L.A. Hart, *The Concept of Law,* 2nd ed. (Oxford: Clarendon Press, 1994) at 94. Consequently, secondary rules are divided into three categories: rules of recognition; rules of adjudication; and rules of change. Rules of recognition are "accepted and used for the identification of primary rules of obligation." He then points out that the rules of recognition are seldom "formulated" from the internal point of view; they are "*used*." *Ibid*. at 100 and 102 [emphasis in original]. From the external point of view a non-member of a group or society may observe the rules members follow and ascertain the rule of recognition by observation. "Internal" and "external" viewpoints are also notions used by Hart. For more on Hart's internal and external point of view see N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1994) at 175-92. Rules of recognition are not assumed or postulated; those who use a system presuppose rules of recognition. Rules of adjudication are rules that make an authoritative determination of whether primary rules are broken and what the remedy and sanction should be. The authority that applies rules of adjudication makes use of rules of recognition to make decisions. Rules of change are those that regulate processes of change. Hart, *ibid*. at chapter V and VI. Rules of recognition are the most important among secondary rules in the WTO system. Identifying primary rules or rules of change and adjudication are only possible by first identifying rules of recognition. Even though Hart himself believes that international law "resembles the simple form of social structure, consisting only of primary rules of obligation," we may be able to find secondary rules within the treaty-based system of the WTO set in the wider context of international law. *Ibid*. at 214; see also the discussion in section 3:d, below, regarding the relationship between WTO law and the broader corpus of international law.

[132] Trade Policy Review Mechanism [hereinafter TPRM] is provided for in the Annex 3 to the *WTO Agreement*. *Supra* note 84.

[133] Palmeter, "WTO as a Legal System," *supra* note 131 at 465. Palmeter, in his article, seeks to find an answer to the question "whether the WTO legal regime more closely resembles a primitive or a modern municipal legal system." He concludes that "[this] is not an easy question to answer and, perhaps, cannot be answered in a meaningful way." *Ibid.* at 478.

[134] *WTO Agreement, supra* note 84, art. II:1.

[135] *Ibid.* art. III:1,3 and 4.

[136] *Ibid.* art. III:2.

Finally, the organization is required ("shall") to make appropriate arrangements for cooperation with intergovernmental organizations that have responsibilities related to those of the WTO and is authorized ("may") to cooperate with non-governmental organizations in the field.[137] Specifically, the WTO is required ("shall") to cooperate with the IMF and the World Bank (and affiliated agencies) with a view to achieving greater coherence in global economic policy-making.[138]

iii- Legal status and structure of the organization

Article VIII.1 of the *WTO Agreement* bestows legal personality on the WTO:

> The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.[139]

The next 4 paragraphs of article VIII accord the WTO full status as an international organization.[140] The WTO is not a specialized agency of the United Nations—as would have been the case for the ITO—the reason being, perhaps, the specificity of this international economic organization and particularity of field of trade and its procedures and negotiations.[141] The WTO has currently 151 members, with 32 states enjoying observer status.[142]

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[137] *Ibid.* art. V.

[138] *Ibid.* art. III:5.

[139] *Ibid.*

[140] Members shall accord privileges and immunities that are necessary for the exercise of WTO's functions. Privileges and immunities stipulated in the *Convention on Privileges and Immunities of the Specialized Agencies* should be accorded to the WTO, its officials and the representatives of its members. GA Res. 179(II), UN GAOR, 2nd Sess., UN Doc. A/519 (1948) 112. And, the WTO can conclude a headquarters agreement. A headquarter agreement was concluded with the Swiss Confederation on 31 May 1995. WTO, Press Release PRESS/88, "Golden Jubilee of the Multilateral Trading System" (5 February 1998), online: WTO <http://www.wto.org/english/news_e/pres98_e/pr88_e.htm> (date accessed 12 April 2008).

[141] Flory, *L'organisation mondiale du commerce, supra* note 112 at 15. WTO's relations with the UN is governed by the "Arrangements for Effective Cooperation with other Intergovernmental Organizations-Relations Between the WTO and the United Nations" signed on 15, November 1995. Director-General of the WTO is also a member of United Nations System Chief Executives Board for Coordination (CEB), which brings together executive heads from various UN bodies (agencies, programmes, funds), the WTO and Bretton Woods institutions. CEB is the designated authority for promoting coherence within the UN system and wider, and serves as the main instrument for executive heads to coordinate their actions and policies. The CEB meets twice a year under the chairmanship of the UN Secretary-General and reports on its activities to the Economic and Social Council (ECOSOC). See, online: CEB <http://www.unsystemceb.org> (date accessed: 10 October 2007).

[142] WTO, "Members and Observers," online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (date accessed: 20 April 2008). In accordance with article XI of the *WTO Agreement*, all the

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The highest organ in the WTO is the Ministerial Conference composed of representatives of all the members. The Conference should meet at least once every two years and has the authority to make decisions on all matters related to multilateral agreements.[143]

Between meetings of the Ministerial Conference a General Council, composed of representatives of all the members assumes the authoritative function.[144] The General Council also convenes in two other capacities: as the Dispute Settlement Body (hereinafter DSB) as envisaged in the *DSU*, and as Trade Policy Review Body provided for in the TRPM.[145]

There are also three Councils which "operate under the general guidance of the General Council" and which oversee the functioning of agreements on trade in goods, the *GATS* and the *TRIPS Agreement*.[146] Membership of these Councils is open to all members of the WTO and the Councils can establish their subsidiary bodies as required.[147]

Article VII of the *WTO Agreement* also requires the Ministerial Conference to establish subsidiary committees on Trade and Development, Balance-of-Payments Restrictions and Budget, Finance and Administration, as well as and any other committee that it deems appropriate. In addition to these committees, committees on Trade and Environment, and a Committee on Regional Trade Agreements have been established.[148] Membership of these committees is open to representatives from all members.

Contracting Parties to GATT 1947 and the European Communities, which accepted the agreement, became original members of the WTO on 1 January 1995. *Supra* note 84. With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers. Decision on accession is made by the Ministerial Conference by a two-thirds majority of the members of the WTO. *Ibid*. art. XII. On the process of application and accession to the WTO see Flory, *L'organisation mondiale du commerce, supra* note 112 at 15-16.

[143] So far the Ministerial Conference has met six times. In 1996 (Singapore), 1998 (Geneva), 1999 (Seattle) and 2001 (Doha), 2003 (Cancun) and 2005 (Hong Kong). No Ministerial Conference was held in 2007. WTO, "Ministerial Conferences," online: WTO <http://www.wto.org/english/thewto_e/minist_e/minist_e.htm> (date accessed 20 April 2008).

[144] *WTO Agreement, supra* note 84, art. IV:1.

[145] *Ibid.* art. IV:3 and 4.

[146] *Ibid.* art. IV:5.

[147] *Ibid.* art. IV:5 and 6.

[148] Flory, *L'organisation mondiale du commerce, supra* note 112 at 18.

The WTO Secretariat, which is headed by the Director-General, has around 600 staff members who supply technical and professional support for the various councils and committees, provide technical assistance for developing countries, monitor and analyze developments in world trade, provide information to the public and the media and organize ministerial conferences. The Secretariat also provides some forms of legal assistance in the dispute settlement process and advises governments wishing to become Members of the WTO. It has no decision-making powers.[149] The Appellate Body of the WTO has its own Secretariat.[150] The Director-General is appointed by the Ministerial Conference, which also adopts regulations which set out the powers and duties of the Director-General.[151] The External Relations Division within the Secretariat is the contact point for relationships with NGOs.[152]

iv- Decision-making, rule-making and amending the agreements

WTO rules of change can be found in articles IX and X of the *WTO Agreement.* Article IX of the *WTO Agreement* deals with decision-making in the WTO. In the WTO decisions are taken by consensus,[153] and where a decision cannot be arrived at by consensus, the matter at issue is decided by majority vote unless otherwise provided in the relevant agreement.[154] Each member of the WTO has one vote.[155]

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[149] Nonetheless, the Secretariat does exercise some power. Generally see Y. Xu, and P. Weller, *The Governance of World Trade: International Civil Servants and GATT/WTO* (Cheltenham: Edward Elgar, 2004) (focusing on the influence and impact of WTO practitioners and arguing that the WTO Secretariat plays an active role in promoting multilateral cooperation).

[150] WTO, *Annual Report 2007* (Geneva: WTO, 2007) at 100.

[151] *WTO Agreement*, *supra* note 84, art. VI.

[152] WTO, "Non-Governmental Organizations (NGO): Contact Point," online: WTO <http://www.wto.org/english/forums_e/ngo_e/contac_e.htm> (date accessed 20 April 2008).

[153] For more on the role of consensus in the WTO, its development from GATT 1947, and its importance in international economic relations see M.E. Footer, "The Role of Consensus in GATT/WTO Decision-making" (1996/97) 17 Nw J. Int'l L. & Bus. 653.

[154] However, in case of amendments a two-thirds majority, in case of interpretation of the WTO agreements a three-fourths majority, and in case of derogation from WTO agreements a three-fourths majority is required. *WTO Agreement*, *supra* note 84, arts. IX:2 and X. When the General Council is convened as the DSB according to the provisions of article 2:4 of the *DSU*, decisions are taken by consensus.

[155] *WTO Agreement*, *supra* note 84, art. IX:1. Where the European Communities exercise their right to vote, they have a number of votes equal to the number of their member states that are members of the WTO. For a comprehensive review of decision-making and rule-making in the WTO see M.E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Leiden: M. Nijhoff, 2006) at 129-180 and 181-326 respectively [hereinafter Footer, *An Institutional and Normative Analysis*].

Rule-making in the WTO is done through creating the primary treaty rules through inter-governmental negotiations, or through secondary treaty rules that revise or interpret primary treaty rules (*e.g.* protocols supplementing schedules or modification to schedules following negotiations) or through subsidiary rule-making of the WTO bodies "in the form of delegated rule-making based on express and implied powers."[156]

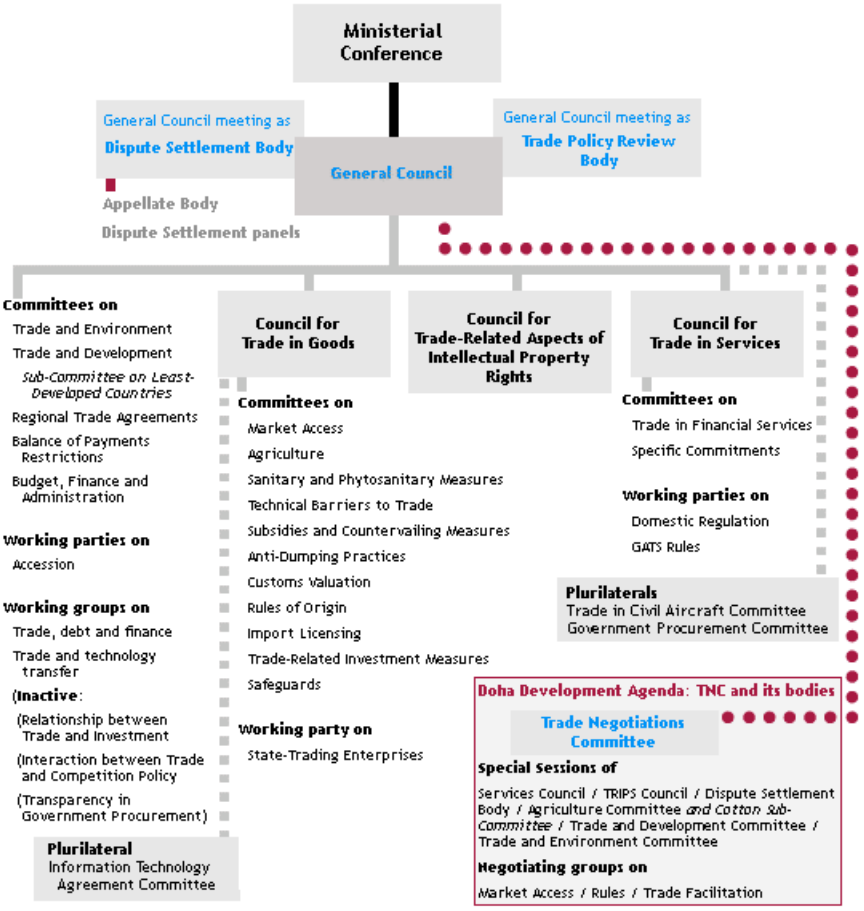

Figure 2- WTO organization chart[157]

When it comes to changing the provisions of the WTO agreements, the issue is more complicated. Under article IX:2 of the *WTO Agreement* a three-fourths majority can adopt definitive interpretation of the WTO agreements. Even though this article clearly states that "[t]his paragraph shall not be used in a manner that would undermine the

[156] Footer, *An Institutional and Normative Analysis, supra* note 155 at 8; see also Figure 2 above.

[157] "WTO organization chart" online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm> (date accessed 12 May 2008).

amendment provisions of Article X," Jackson believes that a definitive interpretation under article IX:2 binds all Members "irrevocably, as a matter of treaty text law."[158] It is, thus, difficult to see the difference between such an interpretation and an amendment.

Rules for amendments, *sensu stricto,* are set out in article X of the *WTO Agreement*. According to this article a decision to submit a proposed amendments to the members shall be taken by consensus, and in case the consensus is not reached, by a two-thirds majority of the members.[159] In the case of the latter, if two-thirds accept, the amendment will take effect for those members that have voted in favour.[160] Amendments of a nature that would not alter the rights and obligations of the Members shall take effect for all Members upon acceptance by two-thirds of the Members."[161] Furthermore, amendments to the *DSU* and the *TRIMs Agreement* shall be approved by consensus and are effective for all members upon approval by the Ministerial Conference.[162] Not surprisingly, where consensus is required for amendments to be effective, the prospect for change has proven to be difficult.[163] Amendments to the WTO agreements are indeed

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[158] Jackson, *World Trading System, supra* note at 124.

[159] Article X:2 of the *WTO Agreement,* state however, that amendments to article X, article IX (decision-making), article I of *GATT* (MFN) and article II of *GATT* (tariff binding) and article II:1 of *GATS* (MFN) and article 4 of the *TRIPS Agreement* (MFN) shall take effect upon acceptance by all members. *Supra* note 84.

[160] *WTO Agreement*, *supra* note 84, art. X:3. Article X:3 of the *WTO Agreement* then goes on to state that

> [T]he Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

[161] *Ibid.* X:4.

[162] *Ibid.* X:8. Special amendment requirements are also provided for *GATS* and *TRIPS Agreement*. According to article X:5 of the *WTO Agreement* amendments to the first three parts of *GATS* (scope and definition, general obligation and disciplines, and specific commitments) shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members. MFN requirement of the GATS is covered by article X:2. See *supra* note 159. Article 71.2 of the *TRIPS Agreement* provides that amendments that adjust to higher levels of protection of intellectual property rights in other multilateral agreements that are accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action under article X:6 of the *WTO Agreement*, according to which such amendments may be adopted by the Ministerial Conference without further formal acceptance process.

[163] For example the *DSU* had to be reviewed within four years after the entry into force of the *WTO Agreement* but the Members have been unable to agree in time and negotiations are still ongoing. See "Official Says WTO Members Still Disagree on How to Disagree in Resolving Disputes" Daily Rep. For Executives, Oct. 28, 1999, A-11 cited in "WTO as a Legal System," *supra* note 131 at 479 note 112.

procedurally cumbersome, and realistically alternative methods for amending the rules may be necessary.[164]

v- Dispute settlement

The WTO dispute settlement system, created by the Dispute Settlement Understanding as an Annex to the *WTO Agreement*, replaced the disintegrated dispute settlement under the GATT. The new dispute settlement system has been described as a *sui generis regime*—it is composed of diplomatic as well as legal means of settlement of disputes.[165] On the one hand, the Dispute Settlement Body (DSB), which is composed of all the members of the WTO, is present at every step of the process of dispute settlement, and as such, this process is a process of diplomatic settlement. On the other hand, in comparison with the *GATT 1947* regime, it is evident that the *DSU* has considerably increased the legal element in the dispute settlement. The creation of the Appellate Body, automatic adoption of panel decisions by the DSB (negative consensus, instead of the GATT's positive consensus) and procedure of surveillance and implementation of recommendations and rulings of panels or the Appellate Body are all evidence of this evolution.[166] The dispute settlement system prohibits unilateral coercive action against other members, and subjects any action in response to violation of obligations by a member state to the procedures set forth in the *DSU*.[167]

According to the *DSU* the procedure of dispute settlement consists of several phases. First, if one member "considers that any benefits accruing directly or indirectly under the covered agreements are being impaired by measures taken by another is essential to the effective functioning of the WTO and the maintenance of a proper balance

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[164] H. Nottage, and T. Sebastian, "Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law" (2006) 9 J. Int'l Econ. L. 989 at 989 and 1014-1016. Nottage and Sebastian present an analysis of alternative methods including modification of schedules, waivers, authoritative interpretations, decisions of the Council of Ministers, new multilateral or plurilateral agreements and reference rules accepted through entries in schedules. *Ibid.* 1015.

[165] Flory, *L'organisation mondiale du commerce, supra* note 112 at 21.

[166] *Ibid.*.

[167] See *DSU,* arts. 21 and 23. It should be added that the *DSU* has taken note of the special situation of least-developed country members and has also underlined the importance of strengthening of the multilateral system by avoiding adoption of unilateral measures in case of breach of obligations by other members. *Ibid.* arts. 23 and 24.

between the rights and obligations of Members,"[168] that member can request the initiation of bilateral consultations with the other member.[169] If consultations fail to settle the dispute within 60 days after the date of receipt of the request for consultations, a panel is established at the request of the complaining party. [170] Once established, within the time limits envisaged in the DSU, the panel should submit a final report to the DSB.[171]

A major change from the GATT is the possibility of appeal from the decision of the panel. For that purpose, a standing Appellate Body has been established which is composed of seven members, three of whom serve on any one case.[172] The appeal is limited to "issues of law covered in the panel report" and "legal interpretations developed by the panel," and the Appellate Body can uphold, modify, or reverse the legal finding and conclusions of the panel.[173]

Finally, once the DSB adopts the report of the panel or the Appellate Body, the member concerned is under the obligation to implement the recommendations and rulings of the DSB within "a reasonable period of time."[174]

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[168] *Ibid.* art. 3:3.

[169] See also E. Baroncini, "The WTO Dispute Settlement Understanding as a Promoter of Transparent, Rule-Oriented, Mutually Agreed Solutions—A Study on the Value of DSU Consultations and their Positive Conclusion" in P. Mengozzi, ed., *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (Milano: A. Giuffrè, 1999) 153 (elaborating on the success of the pre-panel consultations procedure which are transparent and consensus-based negotiations).

[170] The DSB should establish a panel no later than its first meeting following that at which the request for establishing a panel is submitted, unless there is a negative consensus in the DSB. *DSU* art. 4:7 The three members of a panel are selected by agreement of the parties to the dispute and failing such an agreement by the Director-General of the WTO. The details regarding composition of a panel and method of selection of its members are set out in article 8 of the *DSU*.

[171] See *DSU* art. 12 and appendix 3 (Panel Procedures). This report will be automatically adopted by the DSB, except if there is a negative consensus. *Ibid.* art. 16.

[172] *Ibid.* art. 17:1.

[173] *Ibid.* art. 17:13. "Its report will be adopted unconditionally by the DSB, unless the DSB decided by consensus not to adopt the Appellate Body report." *Ibid.* art. 17:14.

[174] *Ibid.* art. 21:3. If there is no agreement over a reasonable period of time, the matter will be referred to binding arbitration. *Ibid.* In the event that a concerned member fails to implement the recommendation or rulings of the DSB, compensation and the suspension of concessions and other obligations are available as temporary measures. *Ibid*. art. 22:1. The method of determination of compensation, and in case of failure to agree over compensation, the principles and procedures to be followed in case of suspension of concessions or obligations are detailed in the *DSU*. *Ibid.* art. 22:2 to 9. If the member concerned objects to the level of suspension proposed, the matter will be referred to arbitration under the conditions set out in article 22:6 of the *DSU*.

The dispute settlement process of the WTO has been criticized for its rigidity because "[t]o the extent that the World Trade Organization forces countries to reform their laws so as to exalt the value of free trade over other values, the empirical legitimacy of national laws could be eroded."[175]

c- Substantive rules of the WTO

In order to examine the question of participation in the WTO it is necessary to first study the substantive rules of the organization to understand importance and interest of non-state actors participation in formation, modification and implementation of these rules.

The main objective of the GATT and the WTO is to facilitate trade between members and to reduce the barriers to trade between members. Barriers to trade can be in the form of both tariff and non-tariff barriers. Two foundational obligations of non-discrimination were imposed on members according to GATT and are borrowed by agreements such as *GATS* and *TRIPS*: these are, most-favoured-nation treatment (hereinafter MFN) and national treatment. Both of these principles originate from a tradition of bilateral treaties of commerce. WTO agreements also impose obligations related to custom duties on members. However, under certain circumstances, members of the WTO can be relieved of their obligations under the agreements and can adopt measures that are against their obligations under WTO agreements.[176] For the purposes of this thesis the policy space exceptions (*e.g.* public order, health, the environment, labour-related, security exceptions, and exceptions intended for the purpose of economic development) are of particular importance, because these are the exceptions which are of

[175] P.M. Nichols, "Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Nongovernment Third Parties" (1996) 17 U. Penn. J. Int'l Econ. L. 295 at 300 [*hereinafter* Nichols, "Extension of Standing in WTO Disputes"].

[176] Exceptions to the obligations under the agreements can be categorized from the perspective of the obligation that is being avoided, or from the perspective of their justification or purpose. Adopting the first perspective, exceptions can be divided into exceptions to the MFN, national treatment or prohibition of quantitative restrictions. The second approach leads to division of exceptions into those intended to encourage regional economic integration, security exceptions, exceptions to protect environment or health and exceptions to promote economic development, for example. In order to avoid a lengthy discussion of the exceptions, and, in order to follow the order of provisions of the *WTO agreement* (and specifically the *GATT*)—to the extent that is possible—the approach taken in this discussion of exceptions is a combination of both.

more interest to non-state actors who may be pursuing specific business or public interests.

i- Obligations under the WTO agreements

MFN and national treatment: According to the principle of MFN, if two members of the WTO accord to each other trade concessions higher than those negotiated and contained in the annexes to *GATT*, these concessions should, *ipso facto*, be accorded to all other members of the WTO.[177] In other words contracting parties should be treated equally.[178] MFN does not operate in isolation and "by itself […] does little to liberalise barriers to trade." [179] This principle should be accompanied by reciprocity to bring about liberalisation. According to the second principle, that of national treatment, imported products—once they become part of the domestic market—and national products should be treated no less favourably than domestic like products.[180] This obligation is now extended to trade in services and intellectual property.[181]

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[177] For a comprehensive study of MFN generally see E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble: Presses Universitaires de Grenoble, 1972). See also D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine – problèmes posés par la Communauté économiqu européenne," (1970) 130 Rec. des Cours 207-350; B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels," (1932) 39 Rec. des Cours 1-130. For more on details of di0fferent types (conditional, unconditional or "code-conditional") of the MFN see Jackson, *World Trading System, supra* note 53 at 161-162, and Sauvignon, *ibid.* at 19-30. For background on principles of MFN and national treatment in international law see ver Loren van Themaat, *supra* note 43, Chapter 1; Brownlie, *supra* note 215 at 526-527.

[178] Jackson, *World Trading System, supra* note 53 at 157. This obligation dates back to the twelfth century, when it was introduced in order to "develop networks of trading relationships." *Ibid.* at 158. For history of MFN see generally Sauvignon, *ibid*. at 9-14. It can be applied in different sectors of trade and is envisaged in trade in goods, services and under other WTO agreements. *GATT,* art. I, *GATS,* art. II and *TRIPS Agreement,* art. 4. MFN is complemented by an obligation of nondiscriminatory administration of quantitative restrictions. *GATT*, art. XIII. This obligation is a negative formulation of the MFN. According to this obligation "the exports of a Member must not be prohibited or encounter restriction into domestic markets, 'unless the importation of the like product of all third countries is similarly prohibited or restricted'." R. Wilkinson, *Multilateralism and the World Trade Organisation: The Architecture and extension of international trade regulation* (London: Routledge, 2000) at 82. Conversely, neither *GATS* nor *TRIPS Agreement* have a quantitative restriction clause. This omission can be explained as signaling "a commitment to move away from the discriminatory and trade-distorting effects of such restriction." *Ibid*.

[179] Wilkinson, *supra* note 178 at 100.

[180] *GATT*, art. III. For a historical perspective see also N. Feinberg, "The National Treatment Clause in Historical Perspective" in *Recueil d'études de droit international: en hommage à Paul Guggenheim* (Geneva: Graduate Institute of International Studies, 1968) 44.

[181] See *GATS,* art. XVII, and *TRIPS Agreement,* art. 3. However, as evidenced by the text of the *GATS*, application of this obligation to new fields has proven itself complicated. Jackson, *World Trading System,*

continued on the next page ➢

Obligations related to custom duties, quantitative restrictions and non-tariff barriers: *GATT* does not require complete elimination of import tariffs. It only requires reduction and consolidation of custom duties.[182] Quantitative restrictions are an obstacle—even more significant in impact than tariffs—to liberalisation of international trade.[183] Article XI of *GATT* prohibits the use of quotas or measures other than duties to restrict either imports or exports.[184]

Principles related to state trading enterprises and other trade related economic practices of states: WTO members are under the obligation to notify their state trading enterprises to the Organization with the goal of ensuring more transparency in the activities of such enterprises.[185] Furthermore, In order to promote free trade and ensure proper adherence to the principles of MFN and national treatment, and to protect the projected economic effectiveness of negotiated tariff reductions, the *WTO Agreement* contains several provisions and agreements concerning economic practices of states that

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supra note 53 at 214. This obligation also is rooted in treaties from past centuries. ver Loren van Themaat, *supra* note 43 at 16.

[182] Flory, *L'organisation mondiale du commerce, supra* note 112 at 39. Article XVIII*bis* of *GATT*, recognizes custom duties as a serious obstacle to trade and invites members of the WTO to negotiate and reduce custom duties on a reciprocal and mutually advantageous basis. Tariff concessions, once negotiated during a multilateral trade conference and included in the annexes to *GATT 1994*, are consolidated and cannot be increased unilaterally by a member. However, there are exceptions to the principle of consolidation. See, *ibid*. 40-41.

[183] *Ibid.* at 42; Jackson, *World Trading System, supra* note 53 at 153.

[184] Flory, *L'organisation mondiale du commerce, supra* note 112 at 41; Jackson, *World Trading System, supra* note 53 at 153. Quantitative import restrictions generally pursue economic objectives—*e.g.* protection of national industries against foreign competition, saving jobs, or balance of payment equilibrium—while quantitative export restrictions can pursue economic—*e.g.* avoiding shortage of certain goods—or political—*e.g.* embargo against another state—goals. Certain exceptions are allowed to this prohibition. *Ibid*. at 42.

[185] State trading enterprises are defined under WTO Agreements as follows:

> Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.

Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra* note 84, annex 1A, para. 1 [hereinafter the *Understanding on Article XVII*]. A working party (formed in accordance with paragraph 5 of the *Interpretation of Article XVII*) on behalf of the Council for Trade in Goods reviews the notifications. The Council for Trade in Goods makes recommendations on the basis of this review. This control mechanism over state enterprises was put in place to ensure more transparency in the activities of state trading enterprises—since they are capable of influencing import or exports of a member—and at the same time to allow a stricter application of the principle of non-discrimination. Flory, *L'organisation mondiale du commerce, supra* note 112 at 47.

can violate the liberalization goals of WTO agreements or render them ineffective. Such practices include: subsidies and antidumping and countervailing duties and technical barriers to trade. Articles VI and XVI of *GATT 1994* (respectively on "antidumping and countervailing duties" and "subsidies"), as well as the *Agreement on Subsidies and Countervailing Measures*,[186] and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*,[187] deal with the questions of trade related practices of states which may affects free trade.

ii- Exceptions and waivers of obligations

Plurilateral or multilateral exceptions: Under certain circumstances the agreements may not be applied permanently between particular members of the WTO, or temporarily between a member and other members. According to articles XXXV of *GATT* and XIII of the *WTO Agreement*, *GATT*, or multilateral trade agreements will not apply between two members if either member, upon entering into WTO does not consent to such application. This non-application of obligations can be restricted to article II of *GATT* (Schedules of Concessions).[188] Finally, full application of the MFN and national

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[186] *WTO Agreement*, *supra* note 84, annex 1A [hereinafter the *Subsidies Agreement*].

[187] *WTO Agreement*, *supra* note 84, annex 1A [hereinafter the *Agreement on Implementation of Article VI*].

[188] Between original members of the WTO, article XIII of the *WTO Agreement* can be invoked only if they had invoked Article XXXV of *GATT 1947* earlier between themselves. See *WTO Agreement, supra* note 84, art. XIII:1. The *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* [hereinafter the *Understanding on Waivers*], together with article IX (paragraphs 3 and 4) of the *WTO Agreement*, have created a new procedure for granting waivers from obligations to WTO members. This procedure has replaced the old waiver procedure, provided for in article XXV:5 of *GATT 1947*. Waivers accorded under the old system were terminated with entry into force of the *WTO Agreement,* unless they were extended in accordance with the new procedures. Under this new procedure, the Ministerial Conference can decide by a vote of three fourths of its Members "to waive an obligation imposed on a Member by [the *WTO Agreement*] or any of the Multilateral Trade Agreements." See *Understanding on Waivers, WTO Agreement*, *supra* note 84, annex 1A; *WTO Agreement, ibid.* art. IX:3. The same article has set the details of procedure of decision-making for granting waivers. A member requesting a waiver should explain "the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under *GATT 1994*." *Understanding on Waivers,* para. 1. The decision to grant the waiver should also state the exceptional circumstances justifying the decision and terms and conditions governing the application of the waiver. *WTO Agreement*, *ibid.* art. IX:4. Disputes over the application of waivers will be referred to the dispute settlement system of the WTO. As will be seen, under articles 22 of the *DSU* and XXIII of *GATT 1994*, in the event of a member failing to abide by the recommendations of the DSB or the Appellate Body, a sanctioning mechanism is put in place which authorizes members to temporarily suspend their concessions or obligations towards the member in default. In adopting such temporary measures the procedure set in article 22 of the *DSU* should be followed. See Chapter Two:3, below.

treatment principles will render the formation of agreements on regional economic integration impossible. However, article XXIV of the *GATT* states that regional economic integration efforts will be considered an exception to article I of *GATT*.[189]

Policy space exceptions: Different WTO agreements also provide for certain exceptions which are based on policy choices of the member states, including on issues related to public morals, health, culture, security and monetary and economic policy including issues related to economic development. Articles XX and XXI of *GATT* outline exceptions that are intended to preserve the ability of members to take policy measures designed to protect concerns expressed domestically.[190] These exceptions can be categorized as follows: exceptions necessary to protect public morals (paragraph a); exceptions related to protection of environment and health (paragraphs b and g); exception related to products of prison labour (paragraph g) which creates a link between international trade and international labour law; exception for protection of culture (paragraph f); exception related to certain materials under certain circumstances, i.e., export and import of gold or silver (paragraph c), related to intergovernmental commodity agreements (paragraph h), material necessary for national production (paragraph i), or in case of materials are in short supply (paragraph j); exceptions necessary to protect intellectual property rights under national laws (paragraph d); exception related to

[189] Article XXIV:4 of *GATT* recognizes the importance of regional economic integration, and, *WTO Agreements* further encourage the formation of such free-trade areas and customs unions and recognize their "contribution to the expansion of world trade." Preamble, *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, WTO Agreement*, *supra* note 84, annex 1A [hereinafter the *Understanding on Article XXIV*].

[190] Articles XIV and XIV*bis* of *GATS* contain similar general and security exceptions as in *GATT,* with modifications to be made appropriate for trade in services. Article 73 of the *TRIPS Agreement* mirrors the security exceptions contained in article XXI of *GATT*. However, the general exceptions of article XX of *GATT* are irrelevant in the context of intellectual property and are not repeated in the *TRIPS Agreement*. See *TRIPS Agreement,* arts. 3.1 and 4. Flory, *L'organisation mondiale du commerce, supra* note 112 at 176-177. Notably in article XIV of *GATS*, the *GATT* exceptions which are related to trade in certain materials and the cultural exception are absent. On the other hand, *GATS* includes exceptions specific to trade in services which do not appear in the *GATT*. These include exceptions on measures to prevent deceptive and fraudulent practices, measures to protect the privacy of individuals in dissemination of personal date, and discriminations for recovering direct taxes, or to implement agreements on avoidance of double taxation provisions. See Flory, *ibid.* at 152-153. In addition to that on a note on article XIV of *GATS* has clarified the application of the public order exception. Security exceptions in article XIV*bis* of *GATS* are repeated word by word, an additionally includes a requirement that the Council for Trade in Services be informed to the fullest extent possible of measures taken under this exception.

national monopolies (paragraph d).[191] In addition to being justifiable under one of the categories of article XX exceptions, measures that violate WTO obligations are only acceptable if they meet two other conditions. First, exceptions should not arbitrarily discriminate between trading partners where the "same conditions prevail". Second, they should not be a disguised restriction on international trade.[192] Security exceptions are enumerated in article XXI of *GATT*. Paragraphs (a) and (b) of the article are related to the protection of national security.[193] Paragraph (c) of article XXI ensures that obligations under the WTO will not prevent the members from taking action to adhere to obligations under the *Charter of the United Nations*[194] "for the maintenance of international peace and security."[195] Articles XX and XXI of *GATT* are especially important to a discussion of exceptions, because most disputes arise on application and interpretation of these

[191] See Flory, *L'organisation mondiale du commerce, supra* note 112 at 55. Article IV of *GATT* also contains a cultural exception related to cinematograph films. See also L. Bartels, "Article XX of GATT and the Problem of Extraterritorial Jurisdiction The Case of Trade Measures for the Protection of Human Rights" (2002) 36 J. World T. 353-403 (arguing for exceptional use of article XX for extraterritorial sanctions when the subject of the sanctions falls within one of the legitimate exceptions of article XX and complies with the conditions of the Chapeau); P. de Waart, "Quality of Life at the Mercy of WTO Panels: GATT's Article XX an Empty Shell?" in F. Weiss, E., Denters, P., & de Waart, eds., *International Economic Law with a Human Face* (The Hague: Kluwer Law International, 1998) 109-131

[192] On the discussion of the chapeau of *GATT* article XX see S.E. Gaines, "The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures" (2001) 22 U. Penn. J. Int'l Econ. L. 739 (arguing that that article XX is itself an integral part of the *GATT* meant to preserve national prerogatives with respect to certain policy realms, and is thus not subordinate to other *GATT* objectives); D.M. McRae "GATT Article XX and the WTO Appellate Body" in M. Bronckers, & R. Quick, eds., *New Directions in International Economic Law: Essays in Hounour of John H. Jackson* (The Hague: Kluwer, 2000) 218 (criticizing the Appellate Body's interpretation of the Chapeau).

[193] These two paragraphs are drafted in a vague language, which is source of ambiguity. As such they can be abused by states wanting to escape their obligations under the WTO system. During the GATT and the WTO period different members have invoked this exception to justify action that contravene their treaty obligations. The matter has never been addressed by a panel or by other organs of the GATT or the WTO. See Flory *L'organisation mondiale du commerce, supra* note 372 at 59. R. Goodman, "Norms and National Security: The WTO as a Catalyst For Inquiry" (2001) 2 Chicago J. Int'l L. 101 (arguing that the United States sanctions against Cuba involves a legitimate definition of "security interests" under article XXI of *GATT* and that the legal and social history following World War II has integrated into the concept of security interests a concern for human rights conditions in other countries).

[194] 26 June 1945, Can. T.S. 1945 No. 7.

[195] Accordingly, in case of conflict between WTO obligations and members' obligations under the *Charter of the United Nations*, including actions called for in Resolutions of the United Nations Security Council, the latter prevail. Again, similarly as noted above, this exception has never been treated by a panel or the Appellate Body of the WTO. See A.F. Perez, "The WTO and U.N. Law: Institutional Comity in National Security" (1998) 21 Yale J. Int'l L. 301.

articles. Members often evoke general or security exceptions to justify actions that may be deemed to violate obligations.

Apart from general and security exceptions certain provisions of WTO agreements allow exceptions to WTO obligations in order to foster economic development of members.[196] In addition to the exceptions discussed above, other exceptional import or export restrictions are authorized under different provisions of the *WTO Agreements*.[197] Most of these import or export restriction are authorized by reference to economic circumstances.[198]

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[196] Article XVIII of *GATT* ("Governmental Assistance to Economic Development") is significant in this regard. Section A, C and D of this article allows members to modify or withdraw a concession or adopt measures in order to support "infant industries" in accordance with the procedure envisaged in that article. Article XVII:B recognizes the balance of payment difficulties that member may face in the course of implementation of development programmes and provides for exceptions from their obligations. The exceptions contained in article XVIII:B of *GATT*, are in the form of authorization of quantitative import restrictions outlined below.

[197] The textiles sector is unique with regards to quantitative restrictions on import. The *Agreement on Textiles and Clothing* (*ATC*) authorizes importing states to adopt safeguard measures under certain conditions. *WTO Agreement*, *supra* note 84, annex 1A [hereinafter the *ATC*]. Apart from this particular case, three categories of exceptions to the prohibition on quantitative restrictions on imports can be distinguished. According to article XI:2:c and article XI:2:c of *GATT*, members are allowed under certain circumstances to impose restriction on the import of agricultural products to solve a domestic problem of surplus. The jurisprudence of the GATT has clarified the conditions of acceptability of such restrictions. See Flory, *L'organisation mondiale du commerce, supra* note 112 at 42-43.

[198] The second group consists of exceptions intended to rectify adverse balance of payments situations. According to article XII and XVIII:B of *GATT 1994*, complemented by the *Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*, under certain conditions, members of the WTO are authorized to impose quantitative restrictions on importation due to their balance of payments. According to article XV:2 of GATT 1994, the IMF should be consulted in this regard. The *Understanding on Balance-of-Payments* encourages members to give priority least trade restrictive measures and sets the procedures for authorization of quantitative restrictions. *Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*, *WTO Agreement*, *supra* note 84, annex 1A [hereinafter the *Understanding on Balance-of-Payments*]; *Understanding on Balance-of-Payments, ibid*. Finally, article XIX of GATT 1994, under certain conditions and following certain procedures, permits members to adopt emergency measures of protection against imports which cause or threaten serious injury to domestic producers. Provisions of article XIX are substantially complemented by the *Agreement on Safeguards*. See Flory, *L'organisation mondiale du commerce, supra* note 112 at 45. Like import restrictions, *ATC* allows particular quotas for exports in the textiles and clothing sector. Furthermore, there are three categories of exceptions on the obligation to avoid quantitative restrictions on export. First, according to article XI:2:a of *GATT 1994*,in order to prevent or relieve critical shortages of foodstuffs, WTO members are authorized to impose temporary prohibition or quantitative restriction on their agricultural exports. Second, certain international commodity agreements have provided for the adoption of regulatory measures on export of such products. Adoption of export restrictions under commodity agreements will be an exception to article XI:1 of *GATT*. However, since most commodity agreements have become obsolete, this exception has become largely theoretical. J.L. Dunoff, "The Misguided Debate over NGO Participation at the WTO" (1998) 1 J. Int'l Econ. L. 433 at 434 [hereinafter "Debate over NGO Participation at the WTO"].

A number of exceptions referred to above are particularly important in addressing the tension between trade and other policy areas, such as health, human rights and security, which may be espoused by non-state actors.

3- WTO treaties in a wider context: the myth of a self-contained regime

In order to answer questions raised in this thesis, it is important to determine the relationship between WTO law and the rest of international law, the implications of developments in international law for WTO law and the sources that can be used within the WTO and its dispute settlement system to settle legal issues.

In order to identify these sources, another question should first be addressed. Is the GATT/WTO law a self-contained regime, or not?[199] As Joost Pauwelyn points out, for international lawyers the fact that WTO rules are part of public international law "is a truism," however, "[t]o many negotiators and other WTO experts in Geneva […] the fact that WTO law is 'just' a branch of the wider corpus of international law comes as a surprise."[200]

To address this question we should examine the relation of the trade treaties to public international law, and determine whether the *WTO Agreement* is an exceptional case in this regard. After concluding that international law is, as a rule, applicable within the WTO, we should examine the limitations to that rule, the question of limited

[199] On "self-contained" regimes see, B. Simma, "Self-contained Regimes" (1985) 16 Netherl.YB. Int'l L. 111 [hereinafter Simma, "Self-Contained Regimes"]. The concept was first introduced in the *S.S. Wimbeldon* case, where the PCIJ decided that provisions of the Treaty of Versailles regarding the Kiel Canal. The Treaty of Versailles had "taken care not to assimilate [the Kiel Canal] to the other internal navigable waterways" and had designed special rules for this canal which were different in more than one respect from rules that applied to other navigable waterways. The court decided that "[t]he provisions relating to the Kiel Canal in the Treaty of Versailles [were] therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways…they would lose their 'raison d'être.'" (1923) P.C.I.J. (Ser. A) No. 1, at 23-24. The notion was endorsed by the ICJ, only in terms of state responsibility, in the *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* [1980] I.C.J. Rep. 3, at para. 80 [hereinafter *Tehran Hostage* case]. *Contra,* Simma, "Self-Contained Regimes," *ibid.* at 120-123.

[200] Pauwelyn, *Conflict of Norms*, *supra* note 87 at 26. Donald McRae lists three reasons for the view that situates trade law outside the mainstream of international law: the social traditions which do not view commerce and economic matters with favour and traditional international lawyers who see trade law as too technical; "the insidious distinction between the public and the private" which sees trade as an issue of private sphere; "the problem of fitting international trade and economic law into a discipline that defined itself in terms of peace and security." "Contribution of International Trade Law," *supra* note 26 at 115-117.

jurisdiction, and possible points of conflict between the WTO treaties and other rules of international law.

The view has been expressed by some prominent experts that the WTO dispute settlement system can apply solely the rules set out in the covered agreements and, according to article 3:2 of the *DSU*,[201] interpret them in accordance with the rules of customary international law.[202] A second group of experts holds that sources of WTO law are not limited to the covered agreements, and the WTO system is not a "closed" or "self-contained" regime.[203] Adopting one of these two views has important repercussions for questions related to compatibility of WTO obligations and obligations of member states in other fields of international law.

Every international treaty, including the *WTO Agreement*, creates international obligations that are part of public international law.[204] Treaties are not created in a vacuous legal environment. Just as a contract in domestic law is seen against the backdrop of the domestic legal system, a new treaty is drafted and concluded among states *under international law* and implemented and interpreted *within the international legal system*.[205] As Lord McNair put it, "[t]reaties must be applied and interpreted against

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[201] *Supra* note 126.

[202] See *e.g.* J.I. Charney "Is International Law Threatened by Multiple Tribunals?" (1998) 271 Rec. des Cours 101 at 219, L.D. Guruswamy, "Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?" (1998) 7 Minnesota Journal of Global Trade 287 at 311, "A Call for Coherence in International Law," *supra* note 85 at 109-115, J.P. Trachtman, "The Domain of WTO Dispute Resolution"(1999) 40 Harv. Int'l L.J. 333 at 342 note 41. On GATT as a self-contained regime see P.J. Kuyper, "The Law of GATT as a Special Field of INTERNATIONAL LAW—Ignorance, Further Refinement or Self-Contained System of International Law" (1994) 25 Netherl. YB. Int'l L. 227 [hereinafter Kuyper, "Law of GATT as a Special Field of IL"]; and Simma, *Self-contained Regimes, supra* 199.

[203] J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95:3 Am. J. Int'l L. 535 at 577 [hereinafter Pauwelyn "The Role of Public International Law in the WTO"]; see also D. Palmeter & P.C. Mavroidis, "The WTO Legal System: Sources of Law" (1998) 92 Am. J. Int'l L. 398 [hereinafter Palmeter & Mavroidis, "The WTO Legal System"]; L. Bartels, "Applicable Law in WTO Dispute Settlement Proceedings" (2001) 35 J. World T. 499-520; P. Lamy, "The Place of the WTO and its Law in the International Legal Order" (2006) 17 Eur. J. Int'l L. 969 at 972 (stating that WTO legal system is not "clinically isolated") [hereinafter Lamy, "The Place of the WTO"]. *Contra* J.H. Bello, "The WTO Dispute Settlement Understanding: Less is More" (1996) 90 Am. J. Int'l L. 416-418 (disagreeing that WTO rules are part of public international law, and holding that they are not binding in the traditional sense).

[204] Pauwelyn "The Role of Public International Law in the WTO," *supra* note 203 at 538.

[205] *Ibid.* at 537.

the background of the general principles of international law."[206] Another prominent international lawyer, Sir Hirsch Lauterpacht, states that

> [i]t is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty, once signed and ratified is more than the expression of the intention of the parties. It is part of international law and must be interpreted against the general background of its rules and principles.[207]

There is no reason to believe that the *WTO Agreement* is an exception to this rule. The fact that negotiators of the WTO agreements did not have public international law in mind during negotiations,[208] and that there are but a few references to sources of international law or principles of public international law,[209] is not enough ground for arguments against the relevance of public international law in the context of the WTO. The reference in the *WTO Agreement* to customary rules of interpretation of international treaties, may lead some to believe that other rules of international law, which are not referred to, are not applicable in the context of the WTO. In fact, the reference to customary rules of international law is only an emphasis on applicability of those rules, and in the absence of such a reference the customary rules of interpretation would have been relevant, nonetheless.

As discussed in the previous section, the economic and trade relations between states are regulated by international economic law,[210] and WTO law is an important part of that law. By adopting the WTO agreements, members of the organization may have contracted out of parts of the general international economic law, but to the extent that they have not contracted out of that law, public international law and international economic law are still applicable even within the WTO.[211] This view was confirmed by

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[206] *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 466. The rule finds partial expression in article 31:3:c of the *Vienna Convention*. See *infra* note 318 and accompanying text.

[207] "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties" (1949) 26 Brit. Y.B. Int'l L. 48 at 76 [emphasis added].

[208] Pauwelyn "The Role of Public International Law in the WTO," *supra* note 203 at 538. Pauwelyn also points out that representatives of many negotiating states were not international law experts but experts from ministries of trade.

[209] With the exception of article 3:2 of the *DSU* on customary rules of treaty interpretation. See section 3:b:iii, below.

[210] See section 1:a, above.

[211] WTO law as an independent system is parasitical upon public international law because states derive their capacity to act from public international law.

the Appellate Body of the WTO when in a 1996 decision it wrote that trade rules are "not to be read in clinical isolation from public international law,"[212] as well as the references in the Preamble of the *WTO Agreement* to the aim of "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so," is an indication of the attention paid to the broader context of international law by the drafters of the agreement.[213]

a- Managing the sources of WTO law and their conflict

As defined in the previous section, in this thesis international economic law is considered a branch of public international law that is deeply affected by the interaction between state and non-state actors. Furthermore the subject of the present study requires an examination of some sources of domestic law, as well as specific sources of law related to the WTO. Adopting a formalistic view of international economic law, it would be appropriate to start with an examination of the classical sources of international law.

Classical international law textbooks often refer to article 38 of the *Statute of International Court of Justice*[214] "as a statement of sources of international law."[215] According to this article, primary sources of international law are "international conventions," "international custom" and "general principles of law."[216] "Judicial decisions" and "the teachings of the most highly qualified publicists of the various nations" are enumerated as subsidiary means for determination of rules of law.[217] This article reflects the practice of arbitral tribunals and "is generally regarded as a complete

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[212] *United States—Standards for Reformulated and Conventional Gasoline, (Appellees Brazil and Venezuela)* (1996) AB-1996-1, WTO Doc. WT/DS2/AB/R at 18 (Appellate Body Report), reprinted in (1996) 35 ILM 603 [hereinafter *Reformulated Gasoline Appeal Report*].

[213] See "Constitutionalism and International Organizations," *supra* note 42 at 447. See also P. Sands, & P. Klein, *Bowett's Law of International Institutions,* 5th ed. (London: Sweet & Maxwell, 2001) at 440, 456, 470.

[214] *Statute of the International Court of Justice,* 26 June 1945, Can. T.S. 1945 No. 7 at 48 [hereinafter *Statute of the ICJ*].

[215] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 3. Older texts of international law recognize the same sources. See *e.g.* Pollock, "The Sources of International Law" (1902) 2 Colum. L. Rev. 511. See also R.J. Jennings, & A.W. Watts, eds., *Oppenheim's International Law*, vol. 1, Intro. & Part 1, 9th ed. (Essex: Longman, 1992) at 22 [hereinafter *Oppenheim's International Law*].

[216] *Statute of the ICJ,* art. 38:1, subparagraph (a),(b) and (c).

[217] *Ibid.* art. 38:1, subparagraph (d).

statement of the sources of international law."[218] While it is not clear whether there is a hierarchy among these sources, international conventions refer to "source[s] of mutual obligations of the parties" and state that these have priority. [219]

Sources of international economic law can be presented in the order proposed by article 38 of the *Statute of the ICJ*. Thus, treaties related to international economic law, customary international economic law, general principles of law, subsidiary means for determination of international economic law and the specific legal issues of each category related to international economic law are discussed in this section.

In this context, I find the view expressed by Palmeter and Mavroidis that finds "Article 7 of the DSU as the WTO substitute, *mutatis mutandis*, for Article 38 [of the *Statute of the ICJ*]" untenable.[220] Article 7 of the *DSU* only refers to the jurisdiction of the panels and not to the sources. There are no similar provisions to those of article 38 of the *Statute of the ICJ* or article 293:1 of the *United Nations Convention on the Law of the Sea* (*ILOS*)[221] in the *WTO Agreement*. Nonetheless, as demonstrated in these pages, the WTO dispute settlement system can apply rules of international law which are not incompatible with the agreements. As such, all the sources of law which are discussed in the next

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[218] Brownlie, *supra* note 215 at 3.

[219] It should be added at this point that sources of law are also divided into formal and material sources. Formal sources "are those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees," while material sources "provide evidence of the existence of rules which, when proved have the status of legally binding rules of general application." Brownlie, *supra* note 215 at 1. Brownlie, however, points out that in view of the lack of a "constitutional machinery of [international] law-making," the formal sources of law do not exist in international law, and so both custom—"general consent of states that creates rules of general application"—and general principles of law can be considered "substitute, and perhaps an equivalent" to formal sources. *Ibid.* at 1-2; on the theory of sources see the following articles O. Schachter, "Towards a Theory of International Obligation," R.Y. Jennings, "What is International Law and How Do We Tell It When We See It?" G.G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," and D. Kennedy, "Theses about International Law Discourse," reprinted in M. Koskenniemi, ed., *Sources of International Law* (Aldershot, England: Ashgate, 2000) respectively at 3, 27, 57 and 81.

[220] "The WTO Legal System: Sources of Law," *supra* note 203 at 399. Article 7 of the *DSU* in part states that terms of reference of panels shall be

> [t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB [and to] address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

[221] 1833 U.N.T.S. 3 (entered into force 16 November 1994) [hereinafter *ILOS*]. In the case of *ILOS*, it is expressly stated that in determining the disputes concerning the interpretation or application of the Convention, it "shall apply this Convention and *other rules of international law not incompatible with this Convention*." *Ibid.* art. 293:1 (emphasis added).

section are applicable within the WTO dispute settlement system, and are subject only to the limitations described in the next section.

The only limit on application of outside sources of international law to the WTO dispute settlement system is that it not add to or diminish the rights and obligations provided in the covered agreements.[222] It is important to determine both the interaction of WTO agreements with other agreements concluded between WTO members and the interaction of the obligations held therein. I should commence with a brief survey of different sources of the WTO law and the approach to handling them in the present system. I will then move to the management of conflict in sources of international law, and the question of hierarchy of norms.

i- Treaties

Treaties are the main sources of international economic law. Since the nature of economic activities requires clarity of rules and norms, a history of bilateral economic relations and a strong tradition of reciprocity of trade concessions between states have made bilateral, regional and multilateral treaties the preferred source in this field.

There are numerous examples of bilateral economic treaties between states, most commonly found in the form of friendship, navigation and commerce treaties, double taxation agreements, trade agreements, and bilateral investment or investment protection treaties.[223] Regional agreements deal with regional economic integration and are usually in the form of free trade agreements and custom union agreements.[224] Multilateral

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[222] See the *DSU*, art. 3:2. Article 19:2 of the *DSU* also states that

> In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

This restriction, is an equivalent of the restriction set by article 293:1 of the *ILOS* which states that other conventions and rules of international law can be applied as far as they are "not incompatible with this convention."

[223] Qureshi, *International Economic Law*, *supra* note 38 at 20.

[224] Major examples include: *The Treaty of Maastricht creating the European Union* (1992), the *Treaty of Rome establishing the European Economic Community* (1957) and the *Treaty establishing the European Coal and Steel Community* (1951). (http://europa.eu/abc/treaties/index_en.htm, accessed May 5 2008); the Stockholm and Vaduz Conventions (195 and 200 respectively) (http://secretariat.efta.int accessed May 5 2008); the North American Free Trade Agreement of 1994 (http://www.nafta-sec-alena.org accessed May 5 2008); the ASEAN Declaration establishing the Association of Southeast Asian Nations in 1967 (http://www.aseansec.org/64.htm accessed May 5 2008); the Caragena Agreement establishing the Andean Community in 1969 (http://www.comunidadandina.org/ingles/treaties.htm accessed May 5 2008); the

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agreements in the field of international economic law are primarily treaties establishing international economic organizations, such as the *Articles of Agreement of the IMF*,[225] *Articles of Agreement of the International Bank for Reconstruction and Development*[226] and the Organization for Economic Cooperation and Development (OECD).[227] For the purpose of this study, the most important example of such a treaty is the *WTO Agreement*.[228]

In addition to general problems related to interpretation of treaties[229] and their reception into domestic law,[230] another problem is particularly important to the field of international economic law. One of the main challenges of international economic law is the coordination of conflicting obligations that arise from numerous bilateral, regional, and multilateral agreements covering the same area or subject matter.[231] There could be conflicts between different agreements that a state has entered into in the field of trade, or conflicts between trade obligations of a state and its other obligations under international law—*e.g.* environmental treaties. In some cases treaties provide exceptions that can be evoked in case of conflicts but, eventually, given the multitude of international agreements, the conflicts themselves are inevitable.[232] The potential conflict of a state's

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Treaty of Asunción establishing the Mercado Comun del Sur (MERCOSUR) in 1991 (http://www.nyulawglobal.org/globalex/mercosur.htm#_I._Background accessed May 5 2008).

[225] 22 July 1944, 2 U.N.T.S. 39 (entered into force 27 December 1945; as amended through 28 June 1990).

[226] 22 July 1944, 2 U.N.T.S. 134 (entered into force 27 December 1945; As amended effective February 16, 1989). Ancillary bodies of the World Bank should also be mentioned in this category. They include: International Development Association; the International Finance Corporation; the Centre for Settlement of Investment Disputes (ICSID); the Bank for International Settlements. *Articles of Agreement of the IDA,* 26 Jan. 1960, 439 U.N.T.S. 249; *Agreement of the International Finance Corporation*, 25 May 1955, 264 U.N.T.S. 117; *Convention on the Settlement of Investment Disputes Between States and Nationals of other Sates*, 18 March 1965, 575, U.N.T.S. 159 [hereinafter *ICSID Convention*]; *International Convention respecting the Bank for International Settlements*, 1930, 104 L.N.T.S. 441.

[227] *Convention on the Organisation for Economic Co-operation and Development,* 14 Dec. 1960, 888 U.N.T.S. 179.

[228] *Supra* note 84.

[229] For examples see Qureshi, *International Economic Law*, *supra* note 38 at 10.

[230] For more details on different schools in reception of treaties see: J.H. Jackson & A.O. Sykes, "Introduction and Overview" in J.H. Jackson & A.O. Sykes, *Implementing the Uruguay Round* (Oxford: Oxford University Press, 1997) [Jackson & Sykes, "Introduction"]. The issue of reception of treaties into domestic laws covered later in this thesis. See Chapter Three:2:a, below.

[231] Qureshi, *International Economic Law*, *supra* note 38 at 19.

[232] See *e.g. WTO Agreement*, *supra* note 84, art. XVI:3 (regarding conflict between the *WTO Agreement* and other multilateral trade agreement); *GATT,* art. XXI:3 (regarding conflict with obligations under the

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trade obligations and its other obligations under international law has become an important problem in the past few years.

Accordingly, treaties as source of WTO law can be divided into three categories: agreements concluded in the framework of GATT/WTO; agreements referred to in the covered agreements; and agreements that parties to a dispute are parties to. The agreements concluded in the framework of the GATT/WTO negotiations—and "establishing rules expressly recognized" [233]—are the most important.[234] Agreements other than the covered agreements can be sources of law in the WTO system for one of the two following reasons: first, if they are referred to in the covered agreements; second, if the parties to a WTO dispute are also parties to another agreement.[235]

Covered agreements: Article 7 of the DSU refers to the "covered agreements" cited by the parties. These agreements include all the multilateral WTO agreements (annexes to the *WTO Agreement*).[236] These agreements provide the legal foundation upon which disputes are brought.[237] The legal basis for establishment of a panel is to be found in these agreements.[238]

Agreements referred to in the *WTO* Agreements: Some of WTO agreements refer to other international agreements. For instance, the *TRIPS Agreement* refers to several major international intellectual property conventions including, the *Paris Convention* (1967), the *Bern Convention* (1971), the *Rome Convention*, and the *Treaty on Intellectual Property in Respect of Integrated Circuits.*[239] The *Subsidies Agreement* refers to provisions of the *Arrangement on Guidelines for Officially Supported Export Credits of*

Charter of the United Nations for the maintenance of international peace and security). However, in general, "the interpretation process of a particular international economic agreement has to take into account the corpus of IEL as it governs the relations between the parties." Qureshi, *International Economic Law*, *supra* note 38 at 20 [footnote omitted].

[233] *Statute of the ICJ*, art. 38:1:a.

[234] "The WTO Legal System: Sources of Law," *supra* note 203 at 398.

[235] *Ibid.* at 409.

[236] *Supra* note 84.

[237] "The WTO Legal System: Sources of Law," *supra* note 203 at 399.

[238] Article 6:2 of the *DSU* requires the parties to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

[239] *TRIPS Agreement,* art. I:3.

the Organisation for Economic Co-operation and Development.[240] The *Agreement on the Application of Sanitary and Phytosanitary Measures* refers the member states to international agreements like the *International Protection Convention* in order to "base their sanitary or phytosanitary measures on international standards." [241] The question remains "whether the WTO rights and obligations change as these agreements change."[242] The Appellate Body has also held that the reference to "customary rules of interpretation of public international law" refers to articles 31 and 32 of the Vienna Convention.[243] This reference to the Vienna Convention in turn opens the way to invoking other international agreements which may not be directly referenced in WTO agreements.[244]

Agreements between the parties: WTO members are parties to many other agreements that regulate trade and other relations. These agreements may affect the rights and obligations of WTO members *vis-à-vis* other members. The potential conflict of obligations under environmental treaties with WTO obligations is especially worth mentioning. In fact, the GATT and WTO panels have often been called in to opine on such issues.

This raised the question of who ought to interpret the pertinent provisions of non-WTO agreements: the panels and the Appellate Body or the parties themselves? According to Palmeter and Mavroidis, "it now seems settled that WTO panels and the Appellate Body interpret their terms for WTO purposes."[245]

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[240] *Subsidies Agreement,* annex I(k). "OECD Arrangement," OECD Doc. OCDE/GD(92)95 (1992) cited in "The WTO Legal System: Sources of Law," *supra* note 203.

[241] *Agreement on the Application of Sanitary and Phytosanitary Measures*, *WTO Agreement*, *supra* note 84, annex 1A, art. 3 [hereinafter *SPS Agreement*]. The reference is made in Annex A to the *SPS Agreement.*

[242] "The WTO Legal System: Sources of Law," *supra* note 203 at 409. However, a footnote to the *TRIPS Agreement* states that references to the intellectual property conventions are to specific versions of those conventions. See *TRIPS Agreement,* footnote 2. Conversely, a NAFTA panel has interpreted a reference to the GATT as reference to the evolving system of the GATT and not GATT as existed when the NAFTA provision came into effect. See Arbitral Panel Established Pursuant to Article 2008 of the North American Free Trade Agreement, Final Report: In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products (Dec. 2, 1996). CITATION Cited in "The WTO Legal System: Sources of Law," *supra* note 203 at note 75 and accompanying text.

[243] See *supra* note 334 and accompanying text.

[244] "The WTO Legal System: Sources of Law," *supra* note 203 at 409.

[245] *Ibid.* at 412. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas,* WTO Doc. AB-1997-3, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *Banana Appeal Report*].

ii- Customary international law

Customary international law, perhaps because of the preference given to treaty law for reasons outlined in the previous section, is not considered as an important source of international economic law.[246] However, according to Zamora, while customary international economic law may be unimportant at the judicial level, it is important at the political level, and should be given due regard as a normative guide.[247]

Schwarzenberger, while considering international customary law less important than treaties, sees three important functions for it:

> 1. It provides the background against which consensual international economic law must be construed.
> 2. In its rules on international responsibility and warfare on land and at sea, international customary law provides the bulk of the rules governing the laws of international economic torts and economic warfare.
> 3. By the treaties and parallel national practices to which, in an evolution extending over nearly a millenium, International Economic Law has given rise, it has made two major contributions to international law at large. By way of generalisation of rules originally limited to foreign merchants, it has laid the foundations for the rules of general international customary law on the freedom of the seas in times of peace and war, and for the rule on the minimum standard for the treatment of foreign nationals.[248]

Accordingly, customary international law provides the foundations and the background for the institutions of international economic relations.[249] Principles such as *pacta sunt servanda,* freedom of communication, freedom of the high seas, diplomatic protection and international claims are examples of such customary norms.[250] Some principles of customary international law are also directly incorporated in international economic law agreements.

In the context of the WTO, even though customary international law is not named as a source of WTO law,[251] its role in the system has been reinforced by the inclusion of

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[246] See Fox, H., "The Definition and Sources of International Economic Law" in Fox, H., ed., *International Economic Law and Developing States, vol.2*, 1 at 20; Qureshi, *International Economic Law*, *supra* note 38 at 21.

[247] Zamora, "Is there Customary International Economic Law," *supra* note 95 at 41-42.

[248] Schwarzenberger, "The Principles of IEL," *supra* note 36 at 14.

[249] Qureshi, *International Economic Law*, *supra* note 38 at 20.

[250] *Ibid.* at 5.

[251] The reference to "customary practices" in article XVI:1 of the *WTO Agreement,* is not a reference to customary international law. See "The WTO Legal System: Sources of Law," *supra* note 203 at 407.

the aforementioned article 3:2 of the *DSU*, which refers to customary rules of interpretation of international law.[252] In another instance of reference to customary international law, a panel faced the question whether the precautionary principle itself constitutes customary law.[253] In *EC—Measures Concerning Meat and Meat Products*,[254] the panel found that, even if the precautionary principle is considered customary international law, the explicit provisions of the WTO Agreements would override it.[255] The Appellate Body, on the other hand, stated that while the precautionary principle might have become a general principle of customary international environmental law, it is not clear whether it has been widely accepted as a principle of general or customary international law.[256] However, it is not clear from this opinion what the consequence

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[252] See section 3:b:iii, below.

[253] Principle 15 of the *Rio Declaration on Environment and Development* refers to the Precautionary principle in the following terms:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

14 June 1992, 31 ILM 874 at 879 (1992).

[254] (Complaint by the United Sates) (1997) WTO Doc. WT/DS26/R/USA; (Complaint by Canada) (1997) WTO Doc. WT/DS48/R/CAN [hereinafter *Hormones* Case].

[255] *Ibid.* para. 8.157 (USA), and 8.160 (Canada). The "precautionary principle"

> is a notion which supports taking protective action before there is complete scientific proof of a risk; that is, action should not be delayed simply because full scientific information is lacking. The "precautionary principle" or precautionary approach has been incorporated into several international environmental agreements, and some claim that it is now recognized as a general principle of international environmental law.

WTO, "Training Module on SPS: Current Issues," online: WTO <http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c8s2p1_e.htm> (date accessed 12 January 2008).

[256] The Appellate Body stated that

> [t]he status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.

EC—Measures Concerning Meat and Meat Products, WTO Doc. AB-1997-4, WT/DS26/AB/R (Jan. 16, 1998), 1998 WTO DS LEXIS 5, para. 123 (footnote omitted) [hereinafter *EC Hormones Appeal Report*].

would have been had the principle been deemed part of customary international environmental law.[257]

iii- General principles of law

General principles of law as a source of international law have been the subject of some disagreement. While many international lawyers accept article 38:1 of the *Statute of the ICJ*—like the same article of the Statute of its predecessor, the Permanent Court of International Justice[258]—as codification of the preexisting law,[259] some prominent international lawyers dispute that contention, at least as it regards subparagraph (c) of that article. Most important among them, Dionisio Anzilotti, holds that these general principles, which exist outside international law, can only be invoked under certain conditions.[260] The problem with article 38:1:c in the *Statute of the PCIJ* seems to have been resolved with the inclusion of a *chapeau* in article 38:1 of the *Statute of the ICJ*, which states that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply […]."[261]

Even if we adhere to the view of the majority, that general principles of law constitute an independent source of international law, this source is susceptible to controversy in the field of international economic law.[262] In addition to the principle of

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[257] See "The WTO Legal System: Sources of Law," *supra* note 203 at 412.

[258] *Statute of the Permanent Court of International Justice*, 16 December 1920, 6 L.N.T.S. 379 [hereinafter the *Statute of the PCIJ*].

[259] See *e.g.* A. Cassese, *International Law* (New York: Oxford University Press, 2005) at 183.

[260] As cited in A. Verdross, "Les Principes généraux de droit dans le système des sources du droit international public" in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva: Faculté de droit de l'université de Genève, 1968) 521 at 522.

[261] Even after the adoption of the *Statute of the ICJ*, some international lawyers—*e.g.* Tunkin—continue to argue that general principles of law is not a source of international law outside custom and treaty. See Verdross, *supra* note 260 at 522.

[262] Forty-five years ago Schwarzenberger found general principles of law open to abuse and of merely limited significance in the field of international economic law—like in any field dominated by treaties. "The Principles of IEL," *supra* note 36 at 14-15. Since then, this source has gained more importance with the evolution of the international economic order. Qureshi, *International Economic Law*, *supra* note 38 at 22. According to Zamora, "International Economic Organisations can and have promoted harmonisation and uniformity in domestic law. This domestic development may in turn spawn the birth of General Principles of IEL at the international level." "Economic Relations and Development" in O. Schacter & C.C. Joyner, eds., *United Nations Legal Order,* vol. 1 (Cambridge: Cambridge University Press, 1995) 503 at 550 [footnotes omitted].

proportionality that has been included in the *DSU*,[263] GATT and WTO panels and the Appellate Body have referred to general principles of law on several occasions. Principles of narrow interpretation of an exception to the rule,[264] the principle of estoppel,[265] and the interpretive principle of avoiding redundancy or inutility[266] have been invoked by panels and the Appellate Body.[267]

iv- Judicial decisions

While there is no *stare decisis* in international law,[268] international lawyers and scholars are keen observers and analysts of activities of international and domestic tribunals. International economic law is no exception. Much of the legal literature in international economic and trade law journals increasingly refers to or is dedicated to analysis of cases decided by the WTO panels and the Appellate Body.[269] More generally, many decisions of international tribunals and national courts are related to international economic law issues.[270] Decisions of national courts can be especially interesting to clarify the implementation of international economic law in the domestic sphere.

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[263] *DSU*, arts. 22:4 and 22:6 (on level of suspension of concessions).

[264] See *e.g. U.S.—Restrictions on Imports Cotton and Man-Made Fiber Underwater*, WTO Doc. WT/DS24/R, 1996 WTO DS LEXIS 4, para. 7.21 See WTO Doc. WT/DS24/R adopted as modified by the Appellate Body (Feb. 25, 1997) [hereinafter *U.S. Cotton Panel Report* and *U.S. Cotton Appeal Report* respectively], which also refers to several other panel reports in footnote 22. However, the Appellate Body, which in *Hormone* Case (Appeal) rejected the invocation of this principle, and stated that

> merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

Supra note 256.

[265] See *e.g. United States—Measures Affecting Imports of Softwood Lumber from Canada*, Oct. 27-28, 1993, GATT, B.I.S.D. (40th Supp.) at 358, 480-86, paras. 308-25 (1994).

[266] See *e.g. Reformulated Gasoline* Panel Report, *supra* note 212, at 23.

[267] See also J. Cameron, & K.R. Gray, "Principles of International Law in The WTO Dispute Settlement Body" (2001) 50 I.C.L.Q. 248.

[268] See *e.g.* Article 59 of the *Statute of the ICJ* which states that "[t]he decision of the Court has no binding force except between the parties in respect of that particular case."

[269] For instance, the American Journal of International Law under "International Decisions" and the European Journal of International Law under "Current Developments" regularly survey decisions of the WTO dispute settlement mechanism.

[270] Schwarzenberger refers to many cases before the PCIJ and the ICJ that turned on international economic law. "The Principles of IEL," *supra* note 36 at 14-15. In Qureshi's view, however, the role of ICJ in international economic law issues is insignificant because "international economic organisations have

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Predictability of rules, continuity, consistency and certainty are important attributes of any legal system and are equally important in trade and economic relations. One may expect that because of the unique nature of the dispute settlement system in the WTO—a blend of *ad hoc* panels following a process akin to arbitration, and a standing Appellate Body—the importance of precedents in the WTO may be less than in the ICJ, which is a standing body. At least, it may be assumed that, because of the different natures of the issuing bodies, panel reports and Appellate Body reports carry different weight.

In the *Japan-Alcoholic Beverages*, the Appellate Body held that there is no *stare decisis*[271] in the WTO, and adopted panel reports have the same position as previous judicial decisions within the ICJ.[272] The Appellate Body stated that

> [Adopted reports] are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. […]
>
> It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the

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internalised their interpretative and dispute settlement mechanisms." Qureshi, *International Economic Law*, *supra* note 38 at 25.

[271] The statement of the Appellate Body was made in overturning the Panels interpretation of article XXVI:1 of the *WTO Agreement* which states that

> the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947.

Supra note 84. The panel's interpretation would have placed the jurisprudence in the GATT and the WTO system in a higher position than in the ICJ—where judicial decisions are only "subsidiary" sources of international law. Article 38:1:d of the *Statute of the ICJ*. The panel determined that adopted GATT panel reports are "other decisions of the Contracting Parties to GATT 1947" and as a result are an integral part of GATT 1994 (Article 1:b:iv of GATT 1994). See *Japan—Taxes on Alcoholic Beverages,* WTO Doc. WT/DS8/R. WT/DS10/R. WT/DS11/R. adopted and modified by the Appellate Body (Nov. 1, 1996) para. 6.10 [hereinafter *Japan Alcoholic Beverages Panel Report*]. Such an interpretation of article XXVI:1 of the *WTO Agreement* and the wording of that article—"WTO shall be guided"—suggest that the binding force of GATT and WTO dispute settlement decisions is not confined to the parties; as opposed to article 59 of the *Statute of the ICJ*, which confines the effect of the decisions to the parties to the dispute. It was, perhaps, to avoid this *stare decisis* effect that the Appellate Body overturned the panel's interpretation of article XXVI:1 of the *WTO Agreement*, by stating that adopted GATT panel reports are an important part of the GATT "acquis"—and not "decisions"—without further elaborating on the meaning of acquis. *Ibid.*

[272] *Japan—Taxes on Alcoholic Beverages (Complaints by the European Communities, Canada and the United States)* (1996), WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Appellate Body Report) at 13 (text of Oct. 4, 1996), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 July 2006). [hereinafter *Japan Alcoholic Beverages Appeal Report*].

> development by the Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.[273]

It would be difficult for a panel to decide not to follow a prior report "which has create[d] legitimate expectations." If it so decides, however, it should address the prior report and present persuasive arguments justifying its departure from prior cases.[274] As Sir Gerald Fitzmaurice puts it, in case of the World Court

> It would seem that, although the Court is not obliged to decide … on the basis of previous decisions *as such,* what it can do is to take them fully into account in arriving at subsequent decisions, and that … it is mandatory for it to apply judicial decisions in the sense of employing them as part of the process whereby it arrives at its legal conclusions in the case.[275]

Panel reports not adopted in the GATT or the WTO system are less important,[276] but "a panel could nevertheless find useful guidance in the reasoning of an unadopted report that it considered to be relevant."[277]

Appellate Body reports have at least the same position as panel reports. While some panels have treated Appellate Body reports in the same manner as panel reports, some other panels have adopted a more deferential tone in referring to Appellate Body

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[273] *Japan Alcoholic Beverages Appeal Report*, *supra* note 272 at 15 and note 30. The Appellate Body was referring to adopted panel reports under *GATT 1947*, but the same reasoning applies, *mutatis mutandis,* to panel reports adopted in the WTO dispute settlement system. Palmeter & Mavroidis, "The WTO Legal System," *supra* note 203 at 401.

[274] See *e.g. Japan Alcoholic Beverages Panel Report, supra* note 271 at para. 6.18. The panel presented its arguments and declined to follow the reasoning in two prior panels on the interpretation of the term 'like product' in Article III:2. *Ibid.* Conversely, there have been instances of panels totally ignoring the findings of another panel on the same subject. For example the *U.S. Cotton Panel Report* panel found an argument set forth by a 1985 panel forceful. *Supra* note 264 at para. 7.12. Only two months later, the *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* dismissed the said 1985 report without mentioning the *U.S. Cotton Panel Report*. See (1997) WTO Doc. WT/DS33/R. para. 7.15 (Jan. 6, 1997) (Panel Report) [hereinafter *U.S. Wool Panel Report*]. Such instances may be caused by the time overlap of the panels and strict timeframes on panel proceedings.

[275] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986) 584 cited in "The WTO Legal System: Sources of Law," *supra* note 203 at 403.

[276] In the case of GATT, Palmeter states that "most of the time, GATT dispute settlement panels have found prior reports on the same subject highly persuasive." "WTO as a Legal System" *supra* note 131 at 465. See also Palmeter & Mavroidis*, Dispute Settlement in the WTO*, *supra* note 203 at 38-45 and "The WTO Legal System: Sources of Law," *supra* note 203 at 401. See also F. Gélinas, "Dispute Resolution as Institutionalization in International Trade and Technology" (2005) 74 Fordham L. Rev. 489 at 492-494 [hereinafter Gélinas, "Dispute Resolution as Institutionalization"].

[277] *Japan Alcoholic Beverages Appeal Report*, *supra* note 272 at 16.

reports.[278] The Appellate Body as a standing body is more likely to follow its own precedents. As Judge Shahabuddeen has observed, "[o]nce standing judicial bodies have come into existence, they provide an additional mechanism for the further development of the law."[279] In fact, from the very beginning the Appellate Body has referred to its previous opinions with a tone suggesting that the issues addressed in previous decisions are closed.[280] Most recently, however, the Appellate Body directly addressed this question and stated that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[281] Of course by adopting that approach the Appellate Body does not mean to suggest it is infallible and that its previous decisions are irreversible.

In case of both Appellate Body and panel reports the final decision is made by the DSB, which decides to adopt the report. But under the WTO system, where the final reports are automatically adopted absent contrary consensus,[282] it is very unlikely for a final report not to be adopted.[283]

For our purposes it is important to note that "GATT and WTO panel and Appellate Body reports, as well as the DSB decisions adopting these reports, are not acts

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[278] See *e.g. Japan Alcoholic Beverages Panel Report, supra* note 271 at para. 6.22, where the panel "recalls" the conclusions of the Appellate Body; *contra, U.S. Wool Panel Report*, *supra* note 274, which "notes that the Appellate Body has made clear …."

[279] M. Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996) at 45.

[280] See *Japan Alcoholic Beverages Appeal Report, supra* note 272 at 10-11, referring to *Reformulated Gasoline Appeal Report, supra* note 212 on rules of treaty interpretation. Palmeter & Mavroidis observe that the use of "we noted" and "we stressed" by the Appellate Body in referring to its past decision indicated an authoritative tone and suggests that in the view of the Appellate Body, those issues are closed. "The WTO Legal System," *supra* note 203 at 406.

[281] *United States - Final Anti-dumping Measures on Stainless Steel from Mexico* (2008) WTO Doc. WT/DS344/AB/R (Appellate Body Report) para. 160, online: WTO Documents Online <http://docsonline.wto.org/> (date accessed 30 May 2008). This position is expected to stir some controversy at the WTO. See also C. Raghavan, "AB Ruling on 'Zeroing' Makes Doha Deal More Difficult" (15 May 2008), online: SUNS-South North Development Monitor <http://www.sunsonline.org/PRIV/article.php?num_suns=6474&art=0> (date accessed 16 May 2008).

[282] *DSU,* art. 16.

[283] See also A.T.L. Chua, "Precedent and Principles of WTO Panel Jurisprudence" (1998) 16 Berkeley J. Int'l L. 171; A. Chua, "The Precedential Effect of WTO Panel and Appellate Body Reports" (1998) 11:1 Leiden J. Int'l L. 45-61.

of WTO political organs or 'subsequent practice' legally binding on all WTO members, but rather judicial decisions binding only on the parties to a particular dispute."[284]

v- Teachings of the most highly qualified publicists

Since international economic law is a relatively young branch of international law, the role of the few influential publicists in the field becomes even more important than general international law or other branches of international law. The teachings of those few pioneers of the field in different jurisdictions are standard textbooks at universities and reference books for practicing lawyers and thus influence the interpretation and application of norms by practitioners.[285] Interestingly the contribution of scholars from developing countries, while on the rise in the recent years, has been rather limited in the field of general international economic law.[286]

WTO Panel reports have referred to teachings and writings of highly qualified publicists in GATT law. Palmeter and Mavroidis found these references rare and sporadic in 1998.[287] This description may have been true in the case of the GATT in 1947. In 2008, however, those adjectives are no longer suitable for describing the references to writings of publicists in WTO panels. With the advent of the Appellate Body, whose members have experience ranging from sitting as Judge *ad hoc* at the International Court of Justice,[288] to serving as domestic Supreme Court Judges,[289] and with the new trend of

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[284] Pauwelyn, *Conflict of Norms*, *supra* note 87 at 51. *Contra* Kuyper. "Law of GATT as a Special Field of IL," *supra* note 202 at 230. According to Kuyper the GATT dispute settlement decisions former were adopted only by the consensus of the plenary organ of the GATT and, as such, they could be regarded as "subsequent practice" of the GATT contracting parties within the meaning of article 31:3 of the *Vienna Convention*. *Ibid.* Based on this view, a distinction should be made between panel reports adopted under the GATT and panel reports adopted under the WTO. The latter is closer to third party adjudication in international law.

[285] As mentioned earlier, for example, works of John H. Jackson in United States, or Carreau, Flory and Julliard in France are now established as standard references in their respective countries.

[286] See *supra* notes 18and 19 and accompanying text.

[287] "Sources of WTO Law," *supra* note 203 at 407. They speculate that the reluctance to refer to works of publicists may "stem from GATT's diplomatic heritage." *Ibid.*

[288] For example, George Abi-Saab, who was elected to the Appellate Body in 2000 has served twice as judge ad hoc on the ICJ, as Judge on the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and as a Commissioner of the United Nations Compensation Commission. "Appellate Body Members", online: World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm> (date accessed: 15 January 2008).

[289] Justice Florentino Feliciano of the Philippines was as Senior Associate Justice of the Supreme Court of the Philippines before serving on the Appellate Body from 1995 to 2001. He is also a Member of the

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scholars serving as panelists,[290] it is not surprising to see more references to works of qualified publicists.[291] What is interesting is that the Appellate Body has also referred to ICJ decisions in the *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*.[292] Reference to ICJ decisions is not exactly reference to teachings of publicists, but in the context of the WTO, their value come closer to this source.[293]

vi- International economic soft law

Even though some scholars reject the notion of "soft law," stating that law is either binding or not law at all, in international economic relations there are rules that are not formulated in such firm terms.[294] Even firm treaty obligations are sometimes "softened by escape clauses."[295] Soft law rules are characterized by "vagueness, imprecision, recommendatory language, strictly formulated obligations but contained in recommendatory non-binding instruments (*e.g.* General Assembly Resolutions), guidelines, and codes of conduct."[296] Soft law can serve several purposes. It is a "pre-legal or legislative apparatus."[297] In the framework of an institution like the WTO,

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Institut de Droit International, has lectured at The Hague Academy of International Law and serves as a Member of the Curatorium of the Academy.

[290] The list of WTO panelists includes prominent scholars of international trade law, *e.g.* Armand de Mestral, Donald McRae, Mitsuo Matsushita, and Ernst-Ulrich Petersmann. See "WTO Panel Report" online: WorldTradeLaw.net <http://www.worldtradelaw.net/reports/wtopanels/> (date accessed 12 April 2008).

[291] See *e.g. EC Hormones Appeal Report*, *supra* note 256 at para. 92 (referring to writing of J.H. Jackson and E.-U. Petersmann to support the position that the standard of review appropriately applicable in proceedings under the *SPS Agreement* "must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves").

[292] See *e.g. EC Hormones Appeal Report*, *supra* note 256 at para. 93.

[293] Pauwelyn, while not counting reference to judicial decisions of other courts and tribunals, such as the ICJ and the ECJ, among academic writing, refers to them in the same paragraph, without elaborating on their value. See *e.g.* Pauwelyn, *Conflict of Norms*, *supra* note 87 at 50-51.

[294] Seidl-Hohenfeldern, *International Economic Law*, *supra* note 22 at 42.

[295] *Ibid.*

[296] Qureshi, *International Economic Law*, *supra* note 38 at 23 [footnotes omitted].

[297] For more on soft law see Seidl-Hohenveldern, *International Economic Law, supra* note 22 at 42; S.A. Voitovich, "Normative Acts of the International Economic Organizations in International Law-Making" (1990) 24 J.W.T. 21-38. In the area of international economic law important examples of soft law include *lex mercatoriai* which is beyond the scope of this thesis, because it is related to the private aspect of international trade relations. See P. Juillard, "L'évolution des sources du droit des investissements" (1994) 250 Rec. des Cours 9-216.

however, this source may be relevant insofar as it comes close to, or may be confused with, general principles of law.[298]

b- Resolving conflict between sources

When a dispute involves rules and procedures under more than one covered agreement, conflicts between rules and procedures of different agreements are resolved in accordance to article 1:2 of the *DSU*.[299] Furthermore, article XVI:3 of the *WTO Agreement* envisages the possibility of conflict between the WTO rules and provisions of other multilateral trade agreements. This article states that

> [i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.[300]

In the same vain, *GATT* supersedes free-trade areas, custom unions agreements[301] and intergovernmental commodity agreements.[302] Apart from the above-mentioned cases, the *WTO Agreement*, surprisingly, "contains very little in terms of how it relates to other rules of international law."[303] The result is that rules of customary international law for

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[298] *E.g.* the aforementioned precautionary principle is an example of such case. See section 3:iii, above.

[299] Article 1:2 of the *DSU* states that

> The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

[300] *WTO Agreement*, *supra* note 84, art. XVI:3. See also the general interpretative note at the beginning of annex 1A (which comprises agreements in the area of trade in goods) of the *WTO Agreement* which envisages conflicts among the various agreements in the goods sector, and states that in the event of a conflict between *GATT* and a provision of an agreement in Annex 1A, the latter shall prevail. See also *SPS Agreement*, *supra* note 241, art. 2:4.

[301] *GATT*, art. XXIV.

[302] *GATT*, art. XX:g.

[303] Pauwelyn, *Conflict of Norms*, *supra* note 87 at 343. Given the vast potential for interplay between WTO norms and other norms Pauwelyn explains this absence of conflict resolution by referring to a lack of preoccupation of WTO negotiators (mostly trade officials) with public international law and "political

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resolving conflicts between international agreements relating to the same subject matter which are captured in article 30 of the *Vienna Convention* apply to the resolution of conflict of rules under WTO agreements.[304] Accordingly, when parties to a dispute are also both party to two agreements, the later in time prevails (*lex posterior*); when one of the parties is party to two treaties, and another is only party to one treaty, the treaty to which both are parties prevails.[305] Within both the GATT and the WTO, practice has not been consistent. In recent years it seems that panels and the Appellate Body have adopted an approach closer to that of public international law. In the controversial *Shrimp-Turtle* case, involving U.S. restrictions on imports of shrimps from countries not meeting U.S. standards for the protection of sea turtles, the panel noted that while all the parties to the dispute were parties to the *Convention on International Trade in Endangered Species of*

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deadlock for those rules of international law that WTO negotiators did have in mind." *Ibid.* Pauwelyin presents the few instances where the *WTO Agreement* addresses conflict issues, which are: *GATT* superseding *GATT 1947* instruments which were not incorporated in the *WTO Agreement*; the WIPO conventions incorporated into the *TRIPS Agreement*; IMF rules covered in the *Declaration on the Relationship of the WTO with the IMF*; OECD arrangements on export credits; international standards referred to in the *SPS* and *TBT Agreements*; and multilateral environmental agreements covered in *Declaration on Trade and Environment*; the *Charter of the United Nations* obligations for the maintenance of international peace and security; and consultation and dispute settlement provisions in the area of health covered in the *SPS Agreement*. *Ibid.* 344-351. *Contra* Bartels, *supra* note 203 at 499. Bartels argues that applying the conflict resolution rules of international law undermines the provisions of articles 3:2 and 19:2 of the *DSU* since it may be seen as adding or diminishing the rights and obligations provided in the covered agreements.

[304] Article 30 of the *Vienna Convention* on "application of successive treaties relating to the same subject-matter" states that,

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

Wild Fauna and Flora (*CITES*),[306] on the basis of which the U.S. had restricted imports of shrimp, shrimp are not endangered species covered by *CITES*.[307] Without more elaboration on the question of resolving conflicts of norms within the WTO it is important to raise three questions: Distinguishing between "jurisdiction" and "applicable law"; hierarchy of norms in international law; and, application of customary rules of interpretation.

i- Distinguishing between "jurisdiction" and "applicable law"

The distinction between "jurisdiction" and "applicable law" in the dispute settlement system of the WTO is important for the purposes of the subject at hand, especially in terms of addressing the tension between trade and other policy areas and role of non-state actors in implementation and adjudicaton of WTO rules.

That international law is applicable in the context of the WTO does not mean that the organization can implement all the rules of international law or international economic law. Neither does it mean that the law applied in the dispute settlement system of this organization is restricted to the agreements concluded in the framework of the WTO.

The WTO is an organization whose scope and functions are limited to the field of international trade. The jurisdiction of its Dispute Settlement Body is equally restricted to disputes within the mandate of that organization.[308] Article 1:1 of the DSU defines the jurisdiction of the Appellate Body and Panels in the following terms

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[305] For a comprehensive coverage of issue of resolving conflicts of norms under international law and specifically in the context of the WTO see Pauwelyn, *Conflict of Norms*, *supra* note 87.

[306] 3 March 1973, 993 U.N.T.S. 243, 12 [hereinafter the *CITES*]

[307] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R. para. 7.57 (6 April 1998)[hereinafter *Shrimp-Turtle* Case]. Also in another case, Brazil argued that a bilateral agreement between that country and the European Community (the Oilseeds Agreement) applied to the resolution of the dispute involving exports of poultry products from Brazil to Europe. The Panel noted that the Oilseeds Agreement was negotiated within the framework of GATT Article XXVIII, and "to the extent relevant to the determination of the ECs obligation under WTO agreements vis-à-vis Brazil" should be considered by the panel. *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WTO Doc. WT/DS69/R (March 12, 1998) [hereinafter *Poultry* Case]. Compare, *United States—Restriction on Imports of Tuna*, GATT Doc. DS29/R (June 16, 1994), 33 ILM 839 (1994), in which the panel decided that *CITES* was not concluded among the contracting parties to the GATT and did not apply to the interpretation of the GATT or the application of its provisions.

[308] Bartels, *supra* note 203 at 499. Unlike the ICJ that when states have consented to its jurisdiction has a relatively broad jurisdiction over disputes submitted to it. See articles 36 and 38:1 of the *Statute of the ICJ.*

> [t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedures of the agreements listed in Appendix 1 to this Understanding (referred to in this understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

In addition to disputes concerning rights and obligation of members under the *WTO Agreement* and the *DSU*, this article refers to dispute settlement rules and procedures of the covered agreements. Provisions similar to those of *GATT*, which provide for "violation", "non-violation" and "situation" complaints are repeated in other WTO covered agreements.[309] Under the first category—"violation complaints—which is the most common, a WTO member can bring a claim when it considers that a benefit owed to it directly or indirectly under an agreement is being nullified or impaired because of the failure of another contracting party to carry out its obligations under the agreement. Once a panel is established, its jurisdiction is defined by its terms of reference.[310] The panel's jurisdiction is limited by its terms of reference and "it may not go beyond them to consider whether the measure or actions complained of are inconsistent with other

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[309] Article XXIII:1 of *GATT* states that

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
>
> (c) the existence of any other situation,

The following agreements have incorporated those provisions of *GATT* by reference: *TRIPS Agreement,* art. 64; *Agreement on Agriculture*, art. 19; *SPS Agreement,* art. 11; *ATC*, art. 8; *TBT Agreement,* art. 14; *TRIMs Agreement,* art. 8; *Agreement on Preshipment Inspection,* art. 8; *Agreement on Rules of Origin,* art. 8; *Agreement on Import Licensing Procedures*, art. 6; *Subsidies Agreement*, art. 30; *Agreement on Safeguards,* art. 38; *Understanding on Article II.1(b) of GATT,* art. 6; *Understanding on Article XXIV of GATT,* art. 12; *Understanding on the Balance of Payments Provisions in GATT,* footnote 1. Article XXIII of *GATS* refers to article XXIII of *GATT* but excludes non-violation for a period of five years, and situation complaints altogether. Article 17 of the *Antidumping Agreement* and article 19 of the *Agreement on Implementation of Article VII* (Custom Valuation) do not refer to article XXIII of *GATT* but provide for nullification and impairment disputes. *Understanding on Article XVII and Article XVIII of GATT*, *Understanding on Waivers*, and the *Marrakesh Protocol*, do not contain any dispute settlement provisions.

[310] See *DSU,* art. 7, cited *supra* note 220.

agreements or other provisions of the agreements cited."[311] The jurisdiction of the DSB is further limited by other technical issues which have no bearing on the subject of this thesis.[312] Dispute settlement under the *ILOS* is similar to that of the WTO, in that a court of limited jurisdiction is not restricted in terms of the law that it can apply.[313] There is no provision similar to article 293:1 of the *ILOS* in the *WTO Agreement.* Article 3:2 of the *DSU*, which calls for application of customary rules of interpretation, is the closest that WTO legal system comes to the *ILOS* in this respect. As was demonstrated in previous pages, article 3:2 by implication allows for the use of other sources of international law in interpreting WTO agreements.

ii- Hierarchy of norms in international law

Another question related to the discussion of conflict of obligations in international law, is that of hierarchy of norms. As Kamminga has stated, "[p]artly as a consequence of the proliferation of international rules, particularly in the field of human rights, the need for a certain hierarchy in these rules made itself felt."[314] As a result, some rights and obligations under international law have been distinguished from other—arguably less important—ones.[315] *Jus cogens*, obligations *erga omnes* or peremptory norms of international law are rules of international law which are of "overriding value and importance" to all the subjects of international law, and as a consequence, breaches of

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[311] N.D. Palmeter & P.C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure,* The (Hague: Kluwer Law International, 1999) at 31 (footnote omitted) [hereinafter Palmeter & Mavroidis, *Dispute Settlement in the WTO*].

[312] Other questions which can arise in dealing with jurisdiction include: the cases of conflict among agreements (*DSU,* art. 1:2); simultaneous application of different agreements; non-application of certain agreements between particular members (*WTO Agreement,* art. XIII:1); non-application to non-member countries or territories (unlike the ICJ where there is possibility for non-members to refer to the ICJ), and issues related to succession of states; measures adopted by regional and local governments (*GATT,* art. XXIV:12; *Understanding on Article XXIV*; *GATS,* art. I:3(a)(i)). See generally "The WTO Legal System: Sources of Law," *supra* note 203 at 20-29.

[313] Bartels, *supra* note 203 at 503. See *ILOS*, art. 293:1 cited in *supra* note 221 and accompanying text.

[314] M.T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992) at 157.

[315] Obligations thus distinguished are recognized under a number of different labels. In addition to *jus cogens* and *erga omnes* obligations, other labels mentioned by Kamminga are, "nonderogable rights," and "international crimes." It should be mentioned that, "the exact scope of each of these categories has not always been clearly defined, and the categories partly overlap, though no two are identical" (*ibid*). For more on relationship between the concept of obligations *erga omnes* and the concept of *jus cogens* see M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford: Clarendon Press, 1997).

such rules are considered to be very serious.[316] The ICJ, in its decision in the *Barcelona Traction* case concluded that all states have an interest in the protection of these rights. The Court stated that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved all States can be held to have a legal interest in their protection.[317]

According to customary rules of the law of treaties, a treaty is void if it conflicts with a peremptory norm of international law.[318] It is recognized, further, that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[319]

It is also difficult to enumerate the obligations that are *erga omnes.* The ICJ in the *Barcelona Traction* case has given examples of such obligations. The prohibition of aggression and genocide and the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination are among those obligations. I will not enter into the debate over the scope of *erga omnes* obligations. There is much controversy surrounding the question of scope of such obligations.[320] The contention that some norms of international environmental law have

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[316] Brownlie, *supra* note 215 at 514-517; see also the definition of the *Vienna Convention*, *infra* note318.

[317] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain*) [1970] I.C.J. Rep. 1 at 33 [hereinafter *Barcelona Traction* case].

[318] Article 53 of the *Vienna Convention* states that

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character

[319] Article 64 of the *Vienna Convention*. On *Jus Cogens* in the Law of treaties see C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (Amsterdam: North-Holland, 1976); J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Vienna: Springer-Verlag, 1974).

[320] See generally Ragazzi, *supra* note 315 at 132-188. The uncertainty regarding the scope of the notions of *erga omnes* obligations, international crimes and the consequences to flow from these notions is reflected in the International Law Commission's (ILC) commentaries on article 48 of the *Draft articles on Responsibility of States for Internationally Wrongful Acts* adopted by ILC on its second reading. Draft article 48:1 reads as follows:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another States in accordance with paragraph 2 if:

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gained such a status can have serious repercussions for WTO disputes.[321] Accordingly, if it is established that a rule of international law is a peremptory norm it will override the WTO obligations and can be invoked in the WTO dispute settlement system—arguably even by panels, as a form of *actio popularis* and even if there is no reference to hierarchy of norms in the *WTO Agreements.*[322] A question that can arise in the context of this thesis is what avenues, if any, do exist for non-state actors to institute such *action popularis*?

iii- Application of customary rules of interpretation

In addressing the question of the potential conflict of WTO law with other international law it is appropriate to address the question of rules of interpretation in the WTO dispute settlement system. Accordingly, article 3:2 of the *DSU* should be examined in more detail. This article states that

> [t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendation and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

In this section, the reference to "customary rules of interpretation of public international law" is our focus. Two major doctrines are identifiable in the interpretation of international law: the doctrine of textual interpretation and the teleological method.[323]

> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (b) the obligation breached is owed to the international community as a whole.

In its commentary, the ILC states that "Obligations coming within the scope of paragraph 1(a) have to be 'collective obligations', i.e. they must apply between a group of States and have been established in some collective interest. They might concern, for example, the environment or security of a region […]." The commentary, however, states that it is not "the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole." International Law Commission, *Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)* UNGA Official Records, Fifty-sixth Session, Supplement No. 10, UN Doc. A/56/10 at 319-321 [*Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*].

[321] That is especially the case if, as it is argued by some authors, *erga omnes* effect is given to certain 'public interest' norms (*e.g.* environmental law norms). See Pauwelyn, *Conflict of Norms*, *supra* note 87 at 101-106 (referring to authors making such arguments and presenting counter-arguments).

[322] R. Howse & M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Montreal: International Centre for Human Rights and Democratic Development, 2000) at 23.

[323] See G.G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 Brit. Y.B. Int'l L. 1 at 7 [hereinafter Fitzmaurice, "Treaty Interpretation" (1951)];

According to the former, the intentions of drafters of a treaty are expressed in the actual text rather than in the *travaux préparatoire* of the treaty or other relevant elements of context. A radical alternative to the textual approach, the "teleological approach," seeks to clarify the ambiguities of a treaty by reference to its objects and purposes as evidenced notably in the *travaux préparatoire*.[324]

The jurisprudence of the International Court of Justice,[325] as well as the work of the United Nations International Law Commission (ILC) support a more textual approach, as opposed to one based on the intention of the parties as an independent basis of interpretation.[326] Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[327] have adopted a qualified textual approach.

Article 31 of the *Vienna Convention*, lays out the "general rule of interpretation," according to which

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context of the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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[324] Brownlie, *supra* note 215 at 637. Brownlie notes, "in a small specialized organization, with supranational elements and efficient procedures for amendment of constituent treaties and rules and regulations, the teleological approach, with its aspect of judicial legislation, may be thought to have a constructive role to play." *Ibid.* Fitzmaurice also observes that this method of interpretation is "more connected with the general multilateral convention of the 'normative', and particularly, of the sociological or humanitarian type [and the] charters or constitutive instruments of international organizations." G.G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Certain Other Treaty Points" (1957) 33 Brit. Y.B. Int'l L. 202 at 207 [hereinafter Fitzmaurice, "Treaty Interpretation" (1957)].

[325] Fitzmaurice, "Treaty Interpretation" (1951), *supra* note 323 at 7.

[326] Brownlie, *supra* note 215 at 632.

[327] *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 354, Can. T.S. 1980 No.37 (entered into force 27 January 1980). [hereinafter the *Vienna Convention*].

(b) any subsequent practice in application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

According to the Commentary of the ILC, the application of this article would be "a single combined operation."[328] At the same time, even the ICJ, especially in advisory opinions concerning powers of organs of the United Nations, has come close to applying a teleological approach and adopted a principle of institutional effectiveness as a result of which it freely implied the existence of powers which in its view were consistent with the purposes of the *Charter of the United Nations*.[329] In the same vein, the *Vienna Convention* has given a "cautious qualification" to the textual approach adopted in article 31, by stating in article 32 on "supplementary means of interpretation" that

> [r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

The view expressed by the Appellate Body of the WTO on the issue of interpretation should be understood in this context.[330] The Appellate Body has stated that,

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[328] Brownlie, *supra* note 215 at 633.

[329] *Ibid.* at 637. See *e.g.* cases of *Reparation for Injuries Case,* [1949] I.C.J. Rep. 174 at 180 [hereinafter the *Reparation* Case]; *Effects of Awards of Compensation made by the U.N. Administrative Tribunal*, [1954] I.C.J. Rep. 47 at 56-57; the *Expenses case*, [1962] I.C.J. Rep. 151 at 167.

[330] See also E. Canal-Forgues, "Sur l'interprétation dans le droit de l'OMC" (2001) 105 Rev. D.I.P. 5-24 [hereinafter Canal-Forgues, "Sur l'interprétation"]. Canal-Forgues observes that the panel the Appellate Body practice suggests that DSB goes further than article 3:2 of the *DSU* in that it does not distinguish between treaty and customary law of interpretation. The fundamental principles of legal security, such as the principle of good faith, the principle of evolutionary interpretation or the principle of precaution are also considered by the DSB, and that articles 31 and 32 of the *Vienna Convention* are adopted as rules of interpretation with an eye on a purposive approach. He observes that a teleological approach of the WTO system should favour the establishment of a 'constitution' of the world trading system which keeps in mind the necessity to carefully balance trade and non-trade consideration. *Ibid.* at 22-24. For a critical analysis of use the use of customary rules of interpretation in the WTO see T. Skouteris, "Customary Rules of Interpretation of Public International Law and Interpretative Practices in the WTO Dispute Settlement System" in Mengozzi, ed., *supra* note 169, 113. Skouteris argues that interpretation of WTO law is a complex, political and subjective exercise and should not be technical, but rather it should be creative and common sensical. He recognizes, however, that the reference to the *Vienna Convention* has had a legitimizing effect. *Ibid.*

"[t]he proper interpretation of the Article is, first of all, a textual interpretation,"[331] while taking note of elements of a teleological approach.[332] The qualifying term in this sentence—"first of all"—reminds us of the approach adopted by the ILC, which is very close to what is labeled by Sir Gerald Fitzmaurice as "reconciliation of [the two] doctrines."[333] In fact, the Appellate Body has made it clear that customary rules of interpretation of public international law in article 3:2 of the *DSU* refer to articles 31 and 32 of the *Vienna Convention*,[334] an approach that can increase the legitimacy of the WTO.[335] Finally it is important to note that the *Doha Declaration on TRIPS Agreement and Public Health* has reinforced the relevance of the teleolological approach in the interpretation of the *TRIPS Agreement.*[336]

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[331] *Japan Alcoholic Beverages Appeal Report, supra* note 272.

[332] *See United States - Import Prohibition of Certain Shrimp and Shrimp Products,* AB-1998-4, WTO Doc. WT/DS58/AB/R (Oct. 12 1998) (Appellate Body Report), at para. 152, online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 17 September 2006) (emphasis in original) [hereinafter *Shrimp-Turtle Appeal Report*]. The Appellate Body cites article 32 of the *Vienna Convention* and states that "[h]ere, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached." *Ibid.* For other examples of similar references by the Appellate Body see Canal-Forgues, "Sur l'interprétation," *supra* note 330 at 21.

[333] Fitzmaurice, "Treaty Interpretation" (1951), *supra* note 323 at 8. In 1951, Fitzmaurice summarizes Articles 31 and 32 of the *Vienna Convention* and enumerates the major principles of interpretation as follows: (1) principle of Actuality (treaties are to be interpreted primarily as they stand); (2) principle of the Natural or Ordinary Meaning; subject to, these two, (3) principle of Integration (interpretation of treaty as a whole); (4) Effectiveness (*ut res magis valeat quam pereat*); and (5) the principle of Subsequent Practice (that the conduct of parties in relation to a treaty is valid evidence as to its true meaning). In 1957, he added a sixth principle, the "principle of Contemporaneity," according to which the texts and terms should be interpreted in the light of the meaning they possessed, or the sense in which they were normally used at the time when the treaty was concluded. See *Ibid.* at 9; "Treaty Interpretation" (1957), *supra* note 324 at 203-204.

[334] *Reformulated Gasoline Appeal Report, supra* note 212 at 17.

[335] See also R. Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Law: The Early Years of WTO Jurisprudence", in J.H.H. Weiler, ed., *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford and New York: Oxford University Press, 2000) 35-69 [hereinafter Howse, "Adjudicative Legitimacy"]. Howse observes that "the Appellate Body, in the first few years of its jurisprudence, has done much to address the problem of lack of coherence and integrity in panel legal interpretation." *Ibid.* at 52.

[336] The *Doha Declaration on TRIPS Agreement and Public Health*, adopted on 14 November 2001, WTO Doc. WT/MIN(01)/DEC/2 (20 November 2001), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006) [hereinafter *Doha Declaration on Public Health*]. Paragraph 5 of the *Declaration* states that "while maintaining [members] commitments in the TRIPS Agreement," the *TRIPS Agreement* flexibilities include:

> 1. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

Ibid.

c- WTO as part of public international law

The main goal of this section was to demonstrate that WTO law is part of public international law and that obligations under WTO agreements cannot be interpreted and implemented in isolation from other obligations of WTO members. It is important to put emphasis on this conclusion because, as Weiler points out, many international trade lawyers worked—and may still work—under very different assumptions under the GATT:

> A very dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the 'outside' world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (or free trade) and shared institutional (and personal) ambitions […] and friendly personal relationships. GATT operatives became classical 'networks'. […] Within this ethos, there was an institutional goal to prevent trade disputes from spilling over or, indeed, spilling out into the wider circle of international relations.[337]

Furthermore, as it will be argued in the last chapter of this thesis, placing WTO law in the broader context of international law justifies participation of intergovernmental and non-state actors focusing on non-trade issues which are affected by trade policies.[338]

4- Non-state actors in international relations: why do they matter?

At this stage I have to clarify the definition and scope of non-state actors as used in this thesis. The question is less complex at the national level. Individuals are rights holders at the national level, and their associations (*i.e.* non-state actors), whether for profit or non-profit, are regulated by domestic legal systems.

At the international level, in complement to state-to-state interaction, many non-state actors, ranging from economic actors and firms and networks of scientists and experts with professional ties to networks of activists formed by shared principled ideas

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[337] J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats-Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35:2 J. World Trade 191 at 194-195 [footnote omitted] [hereinafter Weiler, "The Rule of Lawyers"].

[338] On the question of relationship between WTO obligations and other international agreements see also D.K. Tarullo, "The Relationship of WTO Obligations to Other International Arrangements" in M. Bronckers & R. Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer, 2000) 155 (analyzing the constitutional issues raised by the integration of agreements or determinations from other international organizations into WTO obligations).

or values, interact with states and with each other."[339] Even before the more recent developments in international relations[340] and during earlier eras of international relations when international law was much more of a state-centric system, non-state actors have "participated" in international processes. Globalization has reinforced the presence of new non-territorial actors "whose influence partially de-territorializes the notion of state sovereignty." [341] During the past decade numerous studies have been dedicated to demonstrating the influence of non-state actors on world politics.[342]

At the outset, however, the discussion of non-state actors should be limited to the groups that are important for the purposes of this study. Individuals, private sector corporate actors and NGOs are the only non-state actors that are of importance for our purposes.[343] The reason is that these are the non-state actors that can play a role in the domain of the economy.[344] As such, other non-state actors, such as non-state political entities, insurgents, national liberation movements, have been left out.[345] It is necessary to briefly present each of these actors and elaborate on their increasing importance in international law and relations in general, and in the international trade context in particular. The question of non-state actors as subjects of international law will be revisited later in this thesis.[346]

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[339] M.E. Keck & K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998) at 1.

[340] As discussed in Chapter Four:1:a, below.

[341] D. Thürer, "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State" in Hofmann, ed., *supra* note 725, 37 at 58.

[342] See *e.g.* K. Ronit, & V. Schneider, eds., *Private Organizations in Global Politics* (London: Routledge, 2000); A. Vedder, et al., eds., *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Boston: Martinus Nijhoff, 2007).

[343] These categories almost correspond to the Keck and Sikkink's division of transnational networks in three different categories based on their motivations:

> (1) those with essentially *instrumental goals*, especially transnational corporations and banks; (2) those motivated primarily by *shared causal ideas*, such as scientific groups or epistemic communities; [fn] and (3) those motivated primarily by *shared principled ideas or values* (transnational advocacy networks).

Supra note 339 at 30.

[344] However, the question of the private law relationship of international organizations with non-state actors is also outside the scope of this thesis. See J.P. Colin & M.H. Sinkondo, "Les relations contractuelles des organisations internationales avec les personnes privées" (1992) 69 Rev. D.I. & D.C. 7.

[345] See generally Cassese, *supra* note 259 at 124-142.

[346] See especially the opening of Chapter Three, below.

a- The individual

Individuals are the main holders of rights and obligations in domestic law; "any representation of law will always ultimately refer to the action and forbearances of the human beings whose behavior is regulated by the legal norms."[347] On the international plane, however the legal personality of the individual remains a subject of controversy.[348] According to Brownlie,

> [t]here is no general rule that the individual cannot be a 'subject of international law', and in particular contexts he appears as a legal person on the international plane. At the same time to classify the individual as a 'subject' of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject.[349]

However, without going as far as to reject the idea of states as subjects of international law, a vast majority of modern international lawyers have recognized that international law is not only the law of states, but also the law of humans. [350]

Whatever position is adopted, several developments in the field of international law have occurred in connection to the traditional position of individuals. On one hand criminal responsibility of individuals for breaches of international humanitarian law is

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[347] Kelsen, *General Theory of Law, supra* note 753.

[348] See P. Malanczuk, *Akehurst's Modern Introduction to International Law,* 7th rev. ed. (London: Routledge, 2003) at 100; and E.A. Daes, *Freedom of the Individual under Law: a Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights* (New York: United Nations Centre for Human Rights, 1990 at 50. For international legal personality of individuals generally see: *Oppenheim's International Law*, *supra* note 215 at 848-849; M. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 181; M. Sørensen, *ed., Manual of Public International Law* (New York, St. Martin's Press, 1968) at 265-266; Cassese, *supra* note 259 at 142-150; E.-I.A. Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels* (New York: United Nations, 1992). See also Chapter Three, below.

[349] Brownlie, *supra* note 215 at 66.

[350] R. Cassin, "L'homme, sujet du droit international et la protection des droits de l'homme dans la société universelle" in *La Technique et les principes du droit public: études en l'honneur de Georges Scelle,* vol. 1 (Paris: Librairie générale de droit et de jurisprudence, 1950) 67 at 68; Politis, "Les nouvelles tendances du Droit international" (1935) 54 Rec. des Cours 76-77 [hereinafter, Politis, "Les nouvelles tendances"]. A more idealistic view of international law which holds individuals as subjects of international law is not embraced by most international lawyers. See generally G. Scelle, "Règles générales du droit de la paix" (1933) 46 Rec. des Cours 327; T.M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (New York: Oxford University Press, 1999) [hereinafter Franck, *The Empowered Self*]; O. Schachter, "The Decline of the Nation-State and its Implications for International Law" in R.J. Beck & T. Ambrosio, *International Law and the Rise of Nations: The State System and the Challenge of Ethnic Groups* (New York: Chatham House, 2001) 143-155.

recognized under contemporary international law at least since the Nuremberg trials.[351] On the other hand, international law rules have been developed for protection of human rights and fundamental freedoms of individuals.[352] In certain cases international organizations can override the sovereignty of states to directly protect the individual.[353] In certain regional international organizations the position of the individual is even more established. [354]

The position of individuals in international law from a human rights perspective, however, is less relevant to the subject of this thesis. Even from a non-human rights perspective Thomas Franck in *The Empowered Self: Law and Society in the Age of Individualism*, concludes that

> persons are beginning to define themselves as autonomous *individuals*. Gradually, this is surfacing: in national and international law and in a new social

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[351] See *e.g.* W.T. D'Zurilla, "Individual Responsibility for Torture under International Law"(1981) 56 Tulane Law Review 186-226; P.A. French, ed., Individual and Collective Responsibility (Rochester, Vt.: Schenkman Books, 1998); J. Hogan-Doran & B.T. van Ginkel, "Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court" (1996) 43 Netherlands Int'l L. Rev. 321-351; P.H. Kooijmans, "The Judging of War Criminals: Individual Responsibility and Jurisdiction" (1995) 8 Leiden J. Int'l L. 443; D.P. Kunstle, "Kadic v. Karadzic (70 F.3d 232 (2nd Cir. 1995)): do private individuals have enforceable rights and obligations under the Alien Tort Claims Act?" (1996) 6 Duke J. Comp. & Int'l L. 319-46; J.J. Paust, "Individual Criminal Responsibility for Human Rights Atrocities and Sanction Strategies" (1998) 33 Texas Int'l L. J. 631-41; L.S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht: M. Nijhoff, 1992).

[352] According to Franck,

> [f]rom the practices of a broad range of international and regional rights-protecting regimes it can be surmised that individuals are now generally accepted as rights-holders and as claimants. […] Most remarkably, there is no widespread recognition that the various forms of assistance to governments provided by intergovernmental institutions—security, fiscal stability, and development aid—can and should be conditioned on the recipients' compliance with fundamental human rights norms.

The Empowered Self, *supra* note 350 at 281.

[353] Vellas, *supra* note 763 at 328.

[354] For example in the context of the European Union the members of the European Parliament are directly elected by the people and private persons can directly refer to the Court of Justice of the European Communities. These developments led Schwarzenberger and Brown to optimistically conclude that "[t]he more closely international law approximates to national law, the more the individual has a chance to become a direct bearer of legal rights and duties." G. Schwarzenberger & E.D. Brown, *Manual of International Law*, 6th ed. (London: Professional Books, 1976) at 65. "The test in each case is whether, without the concurrence of the individual or corporation concerned, contracting parties have reserved to themselves the power to withdraw such privileges." *Ibid.* But a quarter of a century after Schwarzenberger and Brown, Franck is more realistic in stating that "[l]ittle, […], is about to be done about instituting direct popular representation in international institutions of governance. Something is being done, however, to ensure that those who speak in global discourse, at least do represent governments that, themselves, have been chosen democratically." *The Empowered Self*, *supra* note 350 at 284.

> consciousness … Persons are even insinuating themselves into corridors of international diplomacy, where laws and policies are made.[355]

Question of position of individuals in international law, as subjects or objects of international law will be examined later in this thesis.[356]

b- Private sector corporate actors

Private sector corporate actors can be divided into transnational corporations (TNCs) and multinational corporations (MNCs). While the former strive for "world-wide intra-firm division of labour," the latter attempts to "replicate production within a number of regions in order to avoid the risks of trade blocs."[357] These corporate actors are privately owned institutions founded under the domestic law of a state and are engaged in lucrative operations beyond the borders of one state. It is important to note that there is a wide variety of corporate actors and the roles they play in the international arena are equally varied. International institutions must understand and be sensitive to these roles and adjust accordingly.[358]

Even though transnational and multinational corporations are governed by the law of at least one state—the state in which they are constituted—in recent years increasing capital mobility has eroded the ability of governments to make policies that constrain the activities of corporations within its own jurisdiction.[359] This is due to both the geographical flexibility of such corporations and the trade liberalization trend at regional and global levels. Commercially oriented entities have in fact played a crucial role in the development of international law from its early days.[360] Defending economic interests of

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[355] *Supra* note 350 at 278 [emphasis in original]; he goes on stating that "[w]e thus are seeing the emergence of a right triad—individual, state and group—locked in a precarious and stressed balance." *Ibid.* at 281.

[356] See Chapter Three, below.

[357] R.A. Higgott, G.R.D. Underhill & A. Bieler, "Introduction: Globalisation and Non-state Actors" in R.A. Higgott, G.R.D. Underhill & A. Bieler, eds., *Non-State Actors and Authority in the Global System* (London: Routledge, 2000) 1 at 1 [hereinafter Higgot, Underhill & Bieler, "Introduction"]. The distinction reflects the different dynamics of work and interests of these entities which may affect their position towards international trade issues. MNC have clearly anchored national bases, while TNCs usually stem from small countries and due to small home markets and high labour costs expand abroad. *Ibid.* at 2.

[358] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 28.

[359] A. Walter, "Globalisation and Policy Convergence: The Case of Direct Investment Rules" in Higgot, Underhill & Bieler, eds., *supra* note 357, 51 at 51; Thürer, *supra* note 341 at 46-47.

[360] The question of personality of multinational companies under international law has been subject to some controversy similar to the debate over personality of individuals. See *Akehurst's Modern Introduction to*

continued on the next page ➢

nationals involved in economic activities, or securing resources necessary for economic progress have been at the center of many conflicts and development of principles and institutions of international law.[361] Diplomatic protection, regional economic integration, international trade liberalization, colonization, or development of law of the sea, are but a few of such examples.[362]

Private sector corporate actors have long been protagonists within the international legal order, through involvement in creation, implementation and adjudication of international law.[363] In some cases private sector corporate actors hold more economic and political power than many states and their annual revenue is greater than the gross domestic product of some states.[364] Due to strong economic power, or political connections of transnational corporations, these entities have sometimes demonstrated considerable influence in setting political agendas even at the international level through their direct or indirect power, or have influenced states and contributed directly to treaty negotiations.[365] Corporations can exercise direct power through the

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International Law, supra note 348 at 100-102. It has also been argued that private corporations should be formally recognized under international law as actors in the international scene. See D.A. Ijalaye, *The Extension of Corporate Personality in International Law* (Debbs Ferry, N.Y.: Oceana Publications, 1978) (arguing that based on increasing similarity of their function to states, corporation should be given personality under international law).

[361] For a historical perspective on some pre-World War II development in area of trade regulation see P.M. Gerhart, "The World Trade Organization and Participatory Democracy: The Historical Evidence" (2004) 37 Vanderbilt Journal of Transnational Law 897 at 904-909.

[362] International conflicts and wars are also very often related to economic interests or competition over resources. The result of this competition among mercantilist states was colonial expansion in the Americas, Africa and Asia, which expanded foreign markets and increased access to natural resources. See J.E. Spero, *The Politics of International Economic Relations*, 4th ed., (London: Routledg, 1990) at 5. For instance the First and Second Anglo-Dutch Wars (1664 and 1678) were fought over economic competition, or in resolving the War of Spanish Succession (1710-1713), the Peace of Utrecht granted Britain the exclusive right to sell slaves to Spanish possessions in South America (*asiento*), because of Britain's intervention in the conflict. See J. Israel, *The Dutch Republic* (1995) at 713-715, 934-936 and 941, and H. Kamen, *The War of Succession in Spain (1700-1715)* (1969) at 9 and 24 cited in Bunting, *supra* note 4 at 508. Trade ventures like the Honourable East India Company (or British East India Company), the Dutch East India Company, or the Virginia Company are examples of powerful economic actors in earlier days of modern international law that have influenced the course of history and international law. Interestingly, Hugo Grotius, one of the most influential figures of modern international law, spent a significant part of his early career dealing with the affairs of the East Indies, either in the employ of the Dutch East India Company, or as a negotiator on behalf of the Dutch Republic. See P. Borschberg, "Hugo Grotius, East India Trade and the King of Johor" (1999) 30 J. Southeast Asian Stud. 225 at 225.

[363] See generally S. Tully, *Corporations and International Lawmaking* (Boston: Martinus Nijhoff, 2007).

[364] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 28.

[365] See the example of IPC's influence in creation of TRIPS. Chapter Two:1:iii, below.

mobilization of resources and pressure, provision of information and expertise, lobbying activities and institutional access, or apply indirect power based on the societal acceptance of their political weight.[366] They also participate in enforcing international law against governments through national courts, diplomatic protection and arbitration—*e.g.*, in WTO and NAFTA respectively.

On the other hand, the extent of power and influence exercised by corporations has raised the question of their responsibility in international law which is outside the scope of this thesis.

Corporate actors are often interested in a government's regulatory measures in sectors as varied as safety standards, food standards, employment or environment and seek to influence the governmental or inter-governmental policies in these areas.[367]

c- Non-governmental organizations

There is no generally accepted definition of NGOs in international law. [368] NGOs, as opposed to IGOs (Inter-Governmental Organizations) are defined as private institutions, not established by a government or an intergovernmental agreement, but founded upon the private law regime of a state, and whose purposes and objects are of public nature.[369] Breton-Le Goff defines an international non-governmental organization as a domestic law private entity that regroups private or public persons from different national origins, and pursues non-profit activities with general international interests in countries other than the country of establishment of the organization.[370] Accordingly the

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[366] Sell, "Structures, Agents and Institutions," *supra* note 485 at 97-102.

[367] See *Akehurst's Modern Introduction to International Law, supra* note 348 at 102; Jackson, *WTO and Changing Fundamentals, supra* note 76 at 28.

[368] A.-K. Lindblom, *Non-Governmental Organisations in International Law* (Cambridge: Cambridge University Press, 2005) at 36.

[369] Thürer, *supra* note 341 at 43. In practice, however, there are many government-related or business-related NGOs (BINGOs or GRINGOs in UN parlance) which are admitted as NGOs in the UN system. J.D. Aston, "The United Nations Committee on Non-Governmental Organizations: Guarding the Entrance to a Politically Divided House" (2001) 12:5 Eur. J. Int'l L. 943 at 951. The reason is that the ECOSOC Resolution (see *infra* note 811) regulating the activities of the NGOs has failed to present a clear definition of NGOs.

[370] G. Breton-Le Goff, *L'Influence des Organisations Non Gouvernementales (ONG) sur la Négociation de quelques Instruments Internationaux* (Bruxelles: Bruylant, 2001) at 13-14. This definition is similar to the one adopted by a report of the Secretary-General of the United Nations, which while acknowledging that there is no universally accepted definition, identifies an NGO as a "non-profit entity whose members are citizens or associations of one or more countries and whose activities are determined by the collective will

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three main characteristics of international NGOs are their international structure, their private nature, and their non-profit goals.[371] As opposed to states and private sector corporate actors, NGOs credibility, respect and influence is based on nonmaterial power resources, and the source of their authority is the "grounding of their identities on non-profitable and non-violent aims and philosophies."[372]

Once established in accordance with national regulations, NGOs are autonomous and independent from government authority.[373] There have been a number of failed attempts to accord legal personality to NGOs.[374] However, as a rule, NGOs, unlike international IGOs, do not enjoy international personality.[375] Important exceptions

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of its members in response to the needs of the members of one or more communities with which the NGO cooperates." *General Review of Arrangements for Consultations with Non-governmental Organizations: Report of the Secretary-General*, UN ESCOR, 1st Sess., Agenda Item 3, UN Doc. E/AC.70/1994/5 (1994) at 4 [hereinafter *Report of the Secretary-General on Consultations with NGOs (1994)*].

[371] Charnovitz holds that it is not always easy to distinguish a public interest from a special interest or a public benefit from a mutual benefit and therefore does not exclude from the definition of an NGO the labour unions, professional associations, or other organizations that pursue a "single interest" or a "special interest." S. Charnovitz, "Nongovernmental Organizations and International Law" (2006) 100 Am. J. Int'l L. 348 at 350 [Charnovitz, "NGOs and International Law"].

[372] A. Holzscheiter, "Discourse as Capability: Non-State Actors' Capital in Global Governance" (2005) 33 Millennium: J. Int'l Stud. 723 at 726. Holzscheiter notes that the capital of NGOs resides in the discourses they represent and their abilities to promote these discourses within state-centred and state-created frameworks for communicative interaction. *Ibid.* I have to put emphasis on this point, especially in the context of WTO's interaction with certain NGOs where the experience of violent encounters in Seattle and during other meetings has contributed to an environment of distrust. For our purposes NGOs are law-abiding organizations which are established under the law.

[373] Y. Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Dordrecht: Martinus Nijhoff, 1991) at 80.

[374] See *e.g.* the *Hague Convention if 1 June 1956 Concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions,* The Hague Conference on Private International Law (not yet in force), online: Hague Conference on Private International Law, <http://www.hcch.net/e/conventions/menu07e.html> (date accessed 28 July 2002). Two drafts conventions regarding the legal status of international institutions were prepared for *Institut de Droit International* under the supervision of N. Politis in 1923, and S. Bastid in 1950, but the *Institut* did not make much progress. See (1910) 23 Annuaire de l'Institut de droit International 551; *Convention relative a la Condition Juridique des Associations Internationales* (1923) 30 Annuaires de l'Institut de droit international 385. The convention provided for central international registration of international associations, after which the NGO was to enjoy the rights of incorporation in any of the state parties. *Ibid.* arts. 4 and 7. On the efforts by *Institut de Droit International* and the International Law Association to promote consideration of a convention to grant legal personality to international NGOs see the Charnovitz, "NGOs and International Law," *supra* note 371 at 356-357.

[375] Thürer, *supra* note 341 at 43-44. The International Committee of the Red Cross (ICRC), however, has a special status and is recognized as a subject of international law. See *Encyclopedia of Public International Law*, 1985 vol. 5, "Red Cross" by D. Bindschelder-Robert, at 248; P. Reuter, "La Personalité juridique internationale du Comité International de la Croix-Rouge" in C. Swinarski, ed., *Etudes et essais sur le droit*

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include the *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*,[376] which provides for general recognition of the legal personality acquired by an NGO in any state party, and the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (the *Aarhus Convention*) which gives NGOs the right to information and a voice in decision-making, as well as the right to adjudication on environmental matters.[377]

There is a wide range of different kinds of civil society organizations; NGOs organized by governments or supported by corporations, people's movements, and non-profit organizations and NGO coalitions covering a vast range of issues or regions.[378] NGOs have played an important role in aid delivery and humanitarian operations[379] as

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international humanitaire et sur les principes de la Croit-Rouge en l'honneur de Jean Pictet (Geneva: Comité international de la Croix-Rouge, 1984) 783; and Beigbeder, *ibid.* at 61.

[376] 24 April 1986, Council of Europe, European Treaty Series - No. 124 (entered into force 1 January 1991), online: Council of Europe < http://conventions.coe.int/Treaty/en/Treaties/Html/124.htm> (date accessed 28 July 2002) [hereinafter *European Convention on Recognition of INGOs*]. The Convention recognized that INGOs "carry out work of value to the international community, particularly in the scientific, cultural, charitable, philanthropic, health and education fields, and that they contribute to the achievement of the aims and principles of the United Nations Charter and the Statute of the Council of Europe." According to article 1 of the *European Convention on Recoginition of INGOs* the

> Convention shall apply to associations, foundations and other private institutions (hereinafter referred to as "NGOs") which satisfy the following conditions:
> a- have a non profit making aim of international utility;
> b- have been established by an instrument governed by the internal law of a Party;
> c- carry on their activities with effect in at least two States; and
> d- have their statutory office in the territory of a Party and the central management and control in the territory of that Party or of another Party.

Ibid.

[377] 25 June 1998. "Introducing the Aarhus Convention," Online: United Nations Economic Commission for Europe <http://www.unece.org/env/pp/compliance.htm> (date accessed 7 January 2008). See also Advisory Council on International Affairs, *supra* note 1237.

[378] Most prominent NGO involvement occurs in the fields of human rights, environment, women's rights, development assistance, humanitarian aid, peace, and family issues. Keck & Sikkink, *supra* note 339 at 11; J. Boli & G.M. Thomas, "INGOs and the Organization of World Culture" in J. Boli & G.M. Thomas, eds., *Constructing World Culture: International Nongovernmental Organizations Since 1875* (Stanford: Stanford University Press, 1999) 13 at 42. There is also a wide diversity of NGO coalitions that intend to collectively influence governments and IGOs. See C. Ritchie, "Coordinate? Cooperate? Harmonise? NGO Policy and Cooperational Coalitions" in T. Weiss & L. Gordenker, eds., *NGOs, the UN, and Global Governance* (London: Lynne Rienner, 1996) 177 (on different NGO coalitions and variety of stratagems and tactics that they adopt to convey their messages).

[379] The International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, Interaction, the International Council of Voluntary Agencies, and the Steering Committee for Humanitarian Response, participate in the "central humanitarian policy-making body of the UN system." Report of the Secretary-General, para. 36, cited in R. Wedgwood, "Legal Personality and the

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well as human rights monitoring[380] by the United Nations, holding states accountable to honour their obligations under international law, and "promot[ing] the development of standards and principles in various fields of social behavior."[381]

For practical purposes, international NGOs can be divided in term of their structure into international-federative or transnational-centralist organizations, the first category composed of autonomous national affiliates with similar aims and goals, and the second group guided by a top-down approach with strong international administrative bodies guiding the work of the dependent national sections.[382]

From a functional perspective NGOs can be divided into "advocacy" NGOs, seeking to influence political processes and introduce their objectives to decision-makers, and "service" NGOs aiming to provide their target group with support and resources.[383] Focusing on the driving force behind them, a distinction can be made between independent international NGOs (INGOs), business international NGOs (BINGOs) and government-organized NGOs (GONGOs).[384]

As Boutros Boutros-Ghali, the then-Secretary-General the United Nations observed, NGOs have become "a basic form of popular participation and representation

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Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System" in R. Hofmann, ed., *supra* note 725 at 24 footnote 8. M. Duffield, "NGO Relief in War Zones" Toward an Analysis of the New Aid Paradigm" in T. Weiss, ed., *Beyond UN Subcontracting: Task-Sharing with Regional Security Arrangements and Service Providing NGOs* (1988) cited in Wedgwood, *ibid.* at 23. See also P. Sollis, "Partners in Development? The State, NGOs, and the UN in Central America" in Weiss & Gordenker, eds., *supra* note 378, 189 (focusing on NGOs with a regional range).

[380] The International Commission of Jurists, Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch have played and important role in this field. See generally, F.D. Gaer, "Reality Check: Human Rights NGOs Confront Governments at the UN" in Weiss & Gordenker, eds., *supra* note 378, 51-66.

[381] Thürer, *supra* note 341 at 44-45.

[382] D.R. Young, "Organising Principles of International Advocacy Associations" (1991) 3 Voluntas 1 at 10; Martens, *supra* note 778 at 25-30.

[383] L. Gordenker & T. Weiss, "Pluralizing Global Governance: Analytical Approaches and Dimensions" in Weiss & Gordenker, eds., *supra* note 378, 17; P. Willetts, "Consultative Status for NGOs at the United Nations" in Willetts, ed., *supra* note 815, 59; Martens, *supra* note 778 at 30-33.

[384] C. Archer, *International Organizations,* 3rd ed. (London: Routledge, 2001) at 37-38. A similar division is distinguishing between societally-sponsored NGOs, and state-sponsored NGOs. GONGO are also referred to as Manipulated Non-Governmental Organizations (MANGOs) or Governmentally Regulated and Initiated Non-Governmental Organizations (GRINGOs). Higgot, Underhill & Bieler, "Introduction," *supra* note 357 at 2.

in the present-day world."[385] The *Report of the Panel of Eminent Persons on United Nations-Civil Society Relations* considers involvement of the civil society and the private sector as "essential for effective action on global priorities [and] a protection against further erosion of multilateralism."[386] In reaction to that report, the Secretary-General of the United Nations has recognized that

> expanding United Nations consultations with different constituencies and facilitating their input into relevant debates of global significance can only enhance the quality and depth of policy analysis and actionable outcomes, including in the form of partnerships. Multi-stakeholder partnerships can help the United Nations to devise innovative answers to critical questions. [387]

The question, therefore, for governments and multilateral organizations is not whether to include non-state actors in their activities, "but how to incorporate NGOs into the international system in a way that takes account of their diversity and scope, their various strengths and weaknesses, and their capacity to disrupt as well as to create."[388]

d- Developments in international law and rise of non-state actors

It is important to survey a number of more recent developments that have led to increased prominence of non-state actors which warrants increased channels of formal participation of these actors.

The beginning of the 20th century marks the dawning of a new era of international law. During a long period of time international law was, in the words of Philip Allott, "the minimal law necessary to enable state-societies to act as closed systems internally

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[385] B. Boutros-Ghali, "Foreword" in Weiss & Gordenker, eds., *supra* note 378 at 7. It is also suggested that

> … as a general rule, NGOs support states in carrying out those tasks which are inherent in the concept of statehood under modern international law, namely, to be the guardians of the values and principles of humanity as a whole (such as human rights and democracy) and thereby to promote the public interests of those living and acting within their jurisdiction.

Thürer, *supra* note 341 at 44-46.

[386] United Nations, *We the Peoples: civil society, the United Nations and global governance, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations*, UN GAOR, 58th Session, Agenda item 59, UN Doc. A/58/817 (11 June 2004) at 7 [hereinafter *Cardoso Report*].

[387] United Nations, *Report of the Secretary-General in response to the report of the panel of eminent persons on United Nations-civil society relations*, UN Doc. A/59/354 (13 September 2004), para. 4 [hereinafter *Report of the Secretary-General in response to Cardoso Report*].

[388] P.J. Simmons, "Learning to Live with NGOs" (1998) 112 Foreign Policy 82 at 83.

and act as territory owners in relation to each other,"[389] but, "[c]ontemporary international law has moved far beyond such minimal law."[390] At the end of World War I, facing the atrocities committed during the war, it became evident that international society could no longer turn a blind eye to situations of human suffering and could not consider war solely as related to the domain of relations among states. The effort to create a legally organised international community commenced from that time.[391]

At around the same period the idea of absolute state sovereignty was shaken by the Wilsonian idea of "self-determination of peoples" and lawyers came to realize that the state is not an end in itself, but only a means for satisfying the needs of individuals and groups.[392] According to the new notion of sovereignty, the state is no longer the exclusive authority under international law within the territorial limits of its jurisdiction; it has obligations to realize basic purposes recognized by the international community.[393] Furthermore, several other developments, some of which are directly related to international economic activities, especially during the last decades of the 20th century, have fundamentally changed our world.

In this last section of Chapter One, I will canvass a number of inter-related developments in international relations, which render the traditional views on subjects of international law ineffective. Three inter-connected themes will guide the analysis in this section to suggest that a new framework for participation of private persons in international law is warranted; first, fast-paced globalization during the past fifty years through a new international economic system and improved means of communications; second, the shift in international relations from conflict resolution to international cooperation and the changing notion of sovereignty; and third, the blurring boundaries of private and public, domestic and international as well as vertical and horizontal

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[389] P. Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990) at 324 [hereinafter *Eunomia*].

[390] B. Simma, "From Bilateralism to Community Interest in International Law" (1994) 250 Rec. des Cours 217 [hereinafter Simma, "From Bilateralism to Community Interest"].

[391] Cassin, *supra* note 350 at 68.

[392] Spiropoulos, *supra* note 750 at 197. See also A. Whelan, "Wilsonian Self-Determination and the Versailles Settlement" (1994) 41 I.C.L.Q. 99 at 99-115.

[393] Thürer, *supra* note 341 at 38.

representation in international law. These developments are all related to each other and in some cases cause or exacerbate the other developments.[394]

i- Globalization: A new international economic system and improved means of communication

Globalization has been a buzzword for the past decades.[395] People and countries around the world are increasingly connected because of technological advances—transport, communication and information technologies—and increased economic exchange as well as political and cultural convergence.[396] In fact, the history of humankind can be seen as a steady movement towards increased globalization, under several empires from ancient times through to more recent expansionist policies of European powers from the 16th century onward: "Increasingly, resources and threats that matter, including money, information, pollution, and popular culture, circulate and shape lives and economies with little regard for political boundaries."[397] The intensity, speed and reach of globalization during the past 50 years have been unprecedented. This phenomenon is in part caused or assisted by international institutions and international law developments and in turn requires further developments of international law and

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[394] International lawyers have been preoccupied with developments that have raised serious questions regarding the viability of the Westphalian model for the past few decades. Friedmann, for example, identified five significant changes in *the Changing Structure of International Law*:

> (1) Horizontal expansion of the world community to include a greater number of non-Western countries; (2) vertical extension of international relations to embrace social and political matters; (3) increasing significance is accorded to principles and methods of international economic development; (4) coexistence between rival political blocs has become an immediate condition of mankind's survival; and (5) absence of adequate measures for international conservation of natural resources, taken in combination with the worldwide population explosion, poses a serious threat to the survival of mankind.

Supra note 766 at 365.

[395] Globalization is, of course, a complex and much studied phenomenon. This thesis does not attempt to define or review the voluminous literature on globalization, but only highlights trends towards globally integrated structures as new realities in the international arena. For a taxonomy of the literature on globalization see: R. Higgott, & S. Reich, "Globalization and Sites of Conflict: Towards Definition and Taxonomy" (CSGR Working Paper No. 01/98, Center for Study of Globalization and Regionalization, March 1998) online: Social Science Research Network <http://ssrn.com/abstract=146972> (data accessed: 19 October 2006).

[396] A distinction has been made between "physical globalization" (freer movement of people and goods) and "intellectual" globalization (flow of information and knowledge) which shapes opinions and values. Coomans, M., *Non State Actors: Nouveaux Acteurs de Pouvoirs dans le Cadre de la Globalisation: Qui Sont-ils? Que veulent-ils? Quels sont leur statut et leurs droits? Quelles conséquences pour les militaires?* (Bruxelles: Centre d'études de défense, 2006) at 4.

[397] Mathews, *supra* note 841 at 50.

institutions to address emerging issues.[398] As José Alvarez points out "states are driven to regulate at the international level by ever-rising movements of people, goods, and capital across borders, along with the positive and negative externalities emerging from such flows– from rise in a common human rights ideal to emerging threats to the global commons."[399]

Economic globalization is a result of liberalization of trade through regional or international trade agreements, and has an impact on globalization in other areas such as culture. As the world becomes more interdependent as a result of economic and cultural globalization, non-state actors are increasingly affected by the policies pursued by states at the global level.[400] On the other hand, new and easier means of communication have changed the world and the way people, including non-state actors, connect to each other. With the advent of virtual communities, different interests can unite and organize themselves more easily and influence policies.[401] Globalization has indeed unleashed the power of certain non-state actors and increased the capacity of people and social movements to organize themselves and exert influence in different spheres of governance. The existence of "networks of economic and cultural interaction" that go beyond borders is not a new phenomenon.[402] New means of communications together with economic liberalization have sped up this process as well as the efficiency of such networks in an unprecedented manner.

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[398] These developments have led to growth of international law through conventions. For example, between 1970 and 1997 the number of international treaties more than tripled. In 1995, 1500 multilateral treaties existed. J. Alvarez, "The New Treaty Maker" (2002) 25 Boston Col. Int'l & Comp. L. Rev. 213 at 216.

[399] Alvarez, *ibid.* at 217.

[400] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 90.

[401] According to Gordenker and Weiss,

> Electronic means have literally made it possible to ignore borders and to create the kinds of communities based on common values and objectives that were once almost the exclusive prerogative of nationalism.
>
> Modern Communications technology is independent of territory. […] 'Consequently', as another study claims, 'global social change organizations may represent a unique social invention of the postmodern, postindustrial, information-rich and service-focused, globally linked world system.

L. Gordenker, & T. Weiss, "Pluralizing Global Governance: Analytical Approaches and Dimensions" in Weiss & Gordenker, eds., *supra* note 378, 17 at 25.

[402] Clapham, *supra* note 13 at 4.

There is, however, a down side to this phenomenon. On one hand, the same dynamics that led to increased globalization have led to the emergence of new globally inter-connected problems like terrorism, organized and transnational crime (e.g., money laundering, securities fraud, drug and human trafficking), and environmental problems which call for solutions based on international cooperation.[403] On the other hand, the prevalent "free markets" economic model dictated by international economic institutions may have an adverse impact on the marginalized and the poor in different societies,[404] or on models of consumption, development and in turn on the environment. [405] Pascal Lamy, the current Director-General of the WTO, recognizes that "[g]lobalization is already a reality, but it is also an on-going process that creates a new need for efficiency that cannot be met by nation-states alone."[406]

ii- From conflict resolution to promoting welfare and well-being of individuals and from sovereignty (state-centerism) to geo-governance

An important development in the past century as a result of increasing globalization has been the changing role of the governments as well as international institutions. According to Brand,

> [t]he governmental duty to provide citizen security can no longer be defined solely in reference to feudal concepts. The economic and technological interdependence of people requires fresh approaches to the way in which we view the development of the legal framework that allows us to live together globally.[407]

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[403] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 29.

[404] Clapham, *supra* note 13 at 4.

[405] These problems are inter-connected: advanced technology results in more production which can lead to more prosperity and consumption and more pollution, as well as widening gap between the rich and the poor; more production requires more raw material and energy resources, which can result in exploiting the environment; pollution and environmental degradation are linked to global warming, desertification and access o water resources which can lead to disruption in food production, poverty or lead to conflicts or failing states. Generally see L.R. Brown, *Plan B 2.0: Rescuing a Planet Under Stress and a Civilization in Trouble* (New York: W.W. Norton & Co., 2006). Globalization and economic or development models adopted in countries in transition from rural or traditional societies, as well as global inequalities have consequences in the cultural sphere and in shaping identities and can lead to alienation of populations and result in violence and terrorism. A. Sen, *Identity and Violence* (New York: W.W. Norton & Co., 2006) 142-148.

[406] Lamy, "Towards Global Governance?" *supra* note 1073.

[407] "Direct Effect of International Economic Law," *supra* note 586 at 608.

The UN system, as opposed to the system of the League of Nations, enjoys much broader membership and is vested with more powers and responsibilities.[408] In addition to security, development and human rights are two pillars of the UN mandate and, among others, the new organization is seriously preoccupied with economic and social questions that were not addressed adequately at a global level previously.[409]

During the last decade of the twentieth century the fall of Communism and the East-West schism facilitated more international cooperation and further shifted the focus of international law from conflict resolution, security and armament issues to human welfare issues, human rights, environmental protection and trade.[410] Consequently, "[a] global shift in politics, economics and law"[411] has occurred during the past half century which may not fit exactly in the Westphalian pattern of international law. Slaughter cautions on this point that

> [t]o say that the purpose of international law is to enhance the welfare of individual citizens or groups, however, still begs a very large question. This

[408] As opposed to the *United Nations Charter,* the *Covenant of the League of Nations* had only reference in its preamble to international co-operation and no reference to issues related to social and economic development. See also Bourquin, M., "L'humanisation du droit des gens" in *La technique et les principes du droit public: études en l'honneur de Georges Scelle,* vol. 1 (Paris: Librairie générale de droit et de jurisprudence, 1950) 21 (on changes in goals of international law).

[409] World leaders have acknowledged

> that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.

See *2005 World Summit Outcome,* GA Res. 60/1, UN Doc. A/RES/60/1 (16 September 2005) at para. 9. See also De Soto, *supra* note 759 at 700. This change is also explained as "the post-war transformation of the anarchic 'international law of coexistence' into a peaceful 'international law of coexistence'." Petersmann, "Constitutionalism and International Organizations," *supra* note 42 at 400. Of course the same is true of the role of government at national level:

> The purpose of government is not to perpetuate traditional power structures, it is to provide security and economic development for its citizens. If that security and development can be provided better through the application of global rules – particularly if doing so can lead to a strengthening of the global legal framework – then the institutions of government should welcome the application of those rules."

"Direct Effect of International Economic Law," *supra* note 586 at 608.

[410] Thürer, *supra* note 341 at 42. See also M. Reisman, "International Law after the Cold War" (1990) 84 Am. J. Int'l L. 859.

[411] Thürer, *ibid.* at 51.

> conception of international law is empty unless coupled with a more specific and explicitly normative theory of how best to enhance individual welfare.[412]

Regardless of the theoretical debate, the pursuit of the broader goals promoting the welfare of human beings at the international level as well as managing globalization has led to an erosion of sovereignty in some areas. In many ways, the structure of our global system today is far from the state-centered system, including the concept of sovereign equality, which was established with the treaties of Westphalia and lasted until the 20th century.[413]

The developments outlined above, and two disastrous world wars have, arguably, led to the acceptance of some kind of global "constitutional rules."[414] Today in addition to around 200 sovereign states, there are more than 300 intergovernmental international organizations, which play an important role in international relations and in many cases aim at "limiting abuses of government powers (such as acts of aggression, oppression of fundamental rights, welfare-reducing protectionism, competitive monetary devaluations) and at supplying international public goods (such as peace, legal security, stable exchange rates, currency convertibility, liberal trade, protection of the environment, democracy, social welfare)."[415] In addition to numerous new United Nations agencies and intergovernmental organizations several United Nations world summits, and rounds of negotiations on trade liberalization were held on a range of different policy questions.[416] Accordingly, in areas like protection of human rights, environment, international security, and trade policy much power is transferred from states to multilateral arrangements. However, as Krisch and Kingsbury point out "[g]lobal governance does not fit easily into the structures of classical, inter-state consent-based models of international law; too much

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[412] Slaughter, A.-M., "International Law and International Relations" (2000) 285 Rec. des Cours 9 at 161-162 [hereinafter Slaughter, "International Law and International Relations"].

[413] It is, however, argued that given the *de facto* inequality of states, the concept of sovereign equality of states is a fiction. See B. Kingsbury, "Sovereignty and Inequality" (1998) 9 Eur. J. Int'l L. Kingsbury, nonetheless, recognized that the concept of sovereignty affords weaker states important protections. *Ibid.*

[414] Petersmann, "Constitutionalism and International Organizations," *supra* note 42 at 425.

[415] *Ibid.* at 425-427.

[416] M. Pianta, *UN World Summits and Civil Society: the State of the Art* (Geneva: United Nations Research Institute for Social Development, 2005) at 1.

of it operates outside the traditional binding forms of law."[417] As Kofi Annan, then-Secretary-General of the United Nations put it "our post-war institutions were built for an international world, but we now live in a global world."[418]

The expansion of international activities to new areas has important implications for involvement of non-state actors in international activities. As the ICJ observed early in the UN era the "progressive increase in the collective action of the States has already given rise to instances of action upon the international plane by certain entities which are not states.[419] The *Secretary-General's Millennium Report* takes note of the role of participation in new global governance system in the following terms

> [b]etter governance means greater participation, coupled with accountability. Therefore, the international public domain — including the United Nations — must be opened up further to the participation of the many actors whose contributions are essential to managing the path of globalization. Depending on the issues at hand, this may include civil society organizations, the private sector, parliamentarians, local authorities, scientific associations, educational institutions and many others.[420]

iii- Blurring boundaries: public/private, domestic/international and vertical/horizontal representation

Another result of globalization is the blurring of boundaries between private and public as well as those between the domestic and the international, and the advent of vertical and horizontal representation in response to new challenges.

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[417] N. Krisch & B. Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17:1 Eur. J. Int'l L. 1 at 10. Notwithstanding different views on the role of states and the meaning of sovereignty, it may be more accurate to conclude that the role of states has been strengthened in some areas, and weakened in others, and that it has been changed rather than diminished. This is a middle ground between two extreme views regarding the impact of globalization on sovereignty. The "Globalist" view holds that globalization is moving to a borderless world and economic level playing field in which global companies are the primary actors and little is left to states beyond the provision of basic public goods and infrastructure. "Internationalist," on the other hand, hold that states are still the main actors in international economics and politics and that the changes in transnational relations are internationalization rather than globalization. Higgot, Underhill & Bieler, "Introduction," *supra* note 357 at 1.

[418] *Secretary-General's Millennium Report, supra* note 892 at para. 26.

[419] See the *Reparation of Injuries Case*, *supra* note 329.

[420] *Secretary-General's Millennium Report, supra* note 892 at para. 46. Boutros Boutros-Ghali, then-Secretary General of the United Nations went as far as to suggest that, "peace in the largest sense cannot be accomplished by the United Nations system or by Governments alone. Nongovernmental organizations, academic institutions, parliamentarians, business and professional communities, the media and the public at large must all be involved." B. Boutros-Ghali, *An Agenda for Peace*.

In recent years, the deregulatory policies pursued in many states—former East bloc as well as Western States—have resulted in the growth of an "internationally highly integrated private economic sector."[421] Simultaneously, global trade liberalization, economic integration at the regional and international levels (*e.g.* in the framework of the EU or the WTO) and policies dictated by international financial institutions (*e.g.* structural adjustment programmes of the World Bank or the IMF) also resulted in a shift in many fields from the public to the private sector.[422] It is stated that economic globalization

> is privileging the private over the public sphere and over the commons. It is eroding the authority of states differentially to set the social, economic and political agenda within their respective political space. It erodes the capacity of states in different degrees to secure the livelihoods of their respective citizens by narrowing the parameters of legitimate state activity.[423]

Indeed the question of what should be treated as public has become a key question of public policy and politics,[424] and Alston believes that "insufficient attention has been given to the implications for international law of the changing internal role of the state, as opposed to the implications of the changing international context for the state's external relations."[425] In some areas, this shift from public to private has led to a shift from domestic to international orders even though "[i]n the global administrative space, the line that separates the domestic and international orders is often indistinct."[426]

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[421] Thürer, *supra* note 341 at 40. The blurring between public and private also extends to the dark side of globalization. See *e.g.* A. Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (New York: Routledge, 2005) (exploring the private wrongs against human rights).

[422] Clapham, *supra* note 13 at 8. "Furthermore, the privatization of functions such as law enforcement, health care, education, telecommunications, and broadcasting has meant in some cases the evaporation of controls which were placed on these sectors to ensure respect for civil and political rights." *Ibid.*

[423] C. Thomas, "International Financial Institutions and social and economic rights: an exploration" in D. Evans, ed., *Human Rights Fifty Years on: A Reappraisal* (Manchester: Manchester University Press, 1998) 161 at 163.

[424] P. Cerney, "Globalization, Governance and Complexity" in A. Prakash, & J.A. Hart, eds., *Globalization and Governance* (London: Routledge, 1999) 188 at 199.

[425] P. Alston, "The Myopia of the Handmaidens: International Lawyers and Globalization", (1997) 8 Eur. J. Int'l L. 435 at 446 [hereinafter Alston, "International Lawyers and Globalization"].

[426] According to Krisch and Kingsbury,

> [r]egulators come together in global institutions and set standards that they then implement in their domestic capacity; and individuals or private entities are often the real addressees of such global standards and follow them even where no formal legal implementing act has been undertaken by the regulator. Individuals or private entities are in some cases directly subject to binding international decisions; and domestic courts are

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Traditionally, the separation between domestic and international law meant that "[s]tates could organize their domestic institutions according to their various widely diverging visions of political order; and the international order could, in principle, rest on the consent of the various states."[427] Now it is argued that as a result of the enmeshment of domestic and international orders the legitimacy of international law, in a traditional sense, dwindles.

Finally, groups of like-minded citizens with overlapping interests across national borders have throughout history organized themselves to support certain positions at the international level and technological advances have made such organization far easier during our time.[428] Transnational groups with similar positions in the face of global policies have organized themselves in order to influence the process of globalization, or international policies. On the one hand economic actors and business interests in different countries have at times joined force to support a certain position at the international level. On the other hand globalization and the perceived dangers of global economic forces and actors have led to mobilization of "a network of civil society groups which are trying to act with regard to new challenges."[429] Consequently, as well as horizontal representation through their states, these groups create channels for vertical representation.[430]

These developments have led some to refer to a notion of a global civil society. Even though the phrase global civil society is often used in the academia and mass media

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> perhaps beginning to assert stronger power of review over global regulatory action. Thus, the ordering functions performed by the domestic/international dichotomy in international law may become attenuated.

Supra note 417 at 11.

[427] *Ibid*.

[428] Esty, "We the People," *supra* note 1092 at 97. Technological developments like internet have also contributed to creation of a "horizontal, egalitarian network of knowledge." Stern, "How to Regulate Globalization," *supra* note 81 at 268.

[429] Clapham, *supra* note 13 at 7. Clapham elaborates that "[a]n important consequence of this interdependence of civil responses to 'top-down' globalization is that the global peoples' networks by their common action are claiming rights that need to be protected from non-state actors in the sphere of economics and finance." *Ibid*.

[430] Similarly, the work of inter-governmental organizations has a vertical and horizontal dimension. The vertical dimension is related to the question of allocation of power or decision-making competence between international organizations, state or non-state actors. The horizontal dimension is related to division of competencies between different intergovernmental organizations. See Jackson, *WTO and Changing Fundamentals, supra* note 76 at 128-129.

in the recent years, it is not yet clearly defined.[431] According to one definition global civil society is "a parallel arrangement of political interaction, one that does not take anarchy or self-help as central organizing principles but is focused on the self-conscious constructions of networks of knowledge and action, by decentred, local actors, that cross the reified boundaries of space as though they were not there."[432] Keck and Sikkink, however, reject the claim that economic globalization or globalization from revolutions in communication and transportation technologies have led to the emergence of a global civil society.[433] Instead, in their view strategic actors who are dedicated to particular causes pursue their deliberate policy choices through transnational networking, through motivating state action.[434] Scholars of international relations have further elaborated on transnational networks through different theories, such as the idea of communities of practice.[435]

iv- The rise of non-state actors

As a result of this changing notion of sovereignty and the new focus of international law, both the "vertical" and the "horizontal" structure of participation at the

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[431] R. Taylor, "Interpreting Global Civil Society" in R. Taylor, ed., *Creating a Better World: Interpreting Global Civil Society* (Bloomfield, CT: Kumarian Press, 2004) 1 at 1.

[432] R. Lipschutz, "Restructuring World Politics: The Emergence of Global Civil Society" in (1992) 21 Millenium 389. "[W]ithin this conceptual scheme of a global civil society, NGOs become significant and effectual political actors." C. Warkentin, & K. Mingst, "International Institutions, the State, and Global Civil Society in the Age of the World Wide Web" (2000) 6 Global Governance 237 at 239.

[433] Keck & Sikkink, *supra* note 339 at 33. *Contra* R. Munck, "Global Civil Society: Myths and Prospects" in R. Taylor, ed., *Creating a Better World: Interpreting Global Civil Society* (Bloomfield, CT: Kumarian Press, 2004) 13 at 24-25.

[434] Slaughter, "International Law and International Relations," *supra* note 412 at 117. Boli and Thomas similarly refer to empirical studies in areas like education, women's rights, social security programs, environmental policy and constitutional arrangements that find considerable homology across countries. They observe that "[f]or a century and more, the world has constituted a singular polity. By this we mean that the world has been conceptualized as a unitary social system, increasingly integrated by networks of exchange, competition, and cooperation." Boli & Thomas, *supra* note 378 at 13-14. In fact, notwithstanding the theoretical view on the position of NGOs as subjects of international law, the participation of NGOs in the international arena even predates the UN system. Wedgwood, *supra* note 379, at 21. Examples of NGOs international participation can be found as far back as the nineteenth-century campaign for the abolition of slavery, "but their number, size, and professionalism, and the speed, density, and complexity of international linkages among them has grown dramatically in the last three decades." Keck & Sikkink, *supra* note 339 at 10.

[435] For example Adler's analysis argues that communities of practice mediate between individual and state agency and social structures. E. Adler, *Communitarian International Relations: the Epistemic Foundations of International Relations* (New York: Routledge, 2005) at 7. Some of these views will be revisited later in this chapter.

international level are changing. In addition to the "federalization" of international law—which refers to diversification of participants in international law and diffusion of state authority in two directions, towards sub-state entities on the one hand and international institutions on the other—globalization has led to a "shift of power from the system of public order to the realm of private actors."[436] The result is that the role of the state has changed and the importance of global forces outside the state control has grown considerably.[437] In the face of the growing influence of transnational corporations and financial institutions, civil society has become more organized to protect social justice.

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This chapter laid the background for what follows in the next chapters of this thesis. Apart from providing some basic definitions and historical background related to international economic law and the WTO, it highlighted the increasing importance of non-state actors. The *Cardoso Report* takes note of the important role of non-state actors and concludes, as I do here, that "[t]he involvement of a diverse range of actors, including those from civil society and private sector, as well as local authorities and parliamentarians, is not only essential for effective action on global priorities but is also protection against further erosion of multilateralism.[438]

Having established the importance of non-state actors in international relations, the next chapter focuses on participation of non-state actors in the WTO.

[436] Thürer, *supra* note 341 at 39-40. See also C. Schreuer, *supra* note 11 (calling for a "new paradigm" of international law that would accommodate a host of non-state actors.).

[437] Clapham, *supra* note 13 at 5.

[438] *Cardos Report, supra* note 825.

Chapter Two- The WTO and non-state actors

In order to identify the elements of a new framework for participation in the WTO it is important to understand the legal framework within which the organization operates, as well as the mechanisms currently in place for participation of non-state actors.[439] I will present different modes of participation of non-state actors in the three areas of creation of norms and policies, enforcement and monitoring and adjudication. It has to be noted that some of the mechanisms presented under one heading are related to more than one category (*e.g.*, consultation mechanisms can be related to creation of norms as well as implementation).[440] In the last section of this chapter characteristics of the current arrangements for participation of non-state actors are identified, to be compared with mechanisms for participation in other areas of international law in the next chapter.

1- Non-state actors in creation and modification of the WTO law

Formally, the creation and modification of WTO norms is strictly an inter-governmental affair. The obligations under WTO agreements as well as possible exceptions to WTO rules as spelled out in the previous chapter directly affect non-state actors, be they companies, entrepreneurs, workers, or ordinary citizens. While formal participation in the WTO activities is limited to state actors, in practice non-state actors play an important role in WTO processes; however their participation is mostly "indirect, unofficial and largely *ad hoc*."[441]

The WTO has made important improvements for non-state actors participation.[442] Still, the WTO agreements, in very limited circumstances, provide for a role for non-state

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[439] This thesis does not focus on an empirical study of informal participation of no-state actors in the WTO, but on formal channels available for participation.

[440] Furthermore, implementation and enforcement are closely related to dispute settlement, but in this thesis adjudication focuses on the dispute settlement system of the WTO.

[441] Dunoff, "Debate over NGO Participation at the WTO," *supra* note 198 at 452.

[442] Making improvements in comparison to GATT was not difficult, as GATT had no mechanism for interacting with non-state actors. The former Director-General of the WTO, however, overstated these improvements when he wrote "[t]he active participation of private sectors and NGOs is a welcome development and we may have to take their legitimate concerns into consideration in our future deliberations. The NGOs could provide valuable inputs and share their thoughts and main concerns to improve the working of the WTO process." S. Panitchpakdi, "Balancing Competing Interests: the Future

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actors in consultations.[443] Before looking at different modes of non-state actors' participation in the creation and modification of WTO rules I will examine the modes of participation in the WTO predecessor and its failed primogenitor.

a- Participation in the pre-WTO era

In light of the current institutional framework of the WTO, it is very important to attempt to understand the debates that surrounded the effort to create an International Trade Organisation (ITO) sixty years ago. Robert W. Cox, in his Preface to *Aux Sources de l'OMC, La Charte de La Havane 1941-1950*,[444] explains the importance of revisiting the failed attempt. He writes,

> [w]e can look to the past in order to understand better the issues involved in setting up the new trade organization […] The questions underlying a return to the history of the ITO project are: Is there a continuity between an ITO, possibly ahead of its time, and a WTO that at the close of the century successfully bring into being something that was not possible at the mid-century point? Or are the concepts of world order exemplified by each of these projects fundamentally different, so that the WTO is the means of consolidating a world order that negates the principles which the ITO project was intended to embody?[445]

I have, therefore, distinguished between the non-state actor participation in the discussions of building the post-War trading system and arrangements which were made for non-state actor participation in an ITO; non-state actors participation in the GATT; and their participation during the Uruguay Round.

i- Non-state actors in the stillborn ITO

The stillborn ITO would have been based on a comprehensive agreement on international trade, covering a vast range of issues including employment and economic activity,[446] economic development and reconstruction,[447] commercial policy,[448] restrictive

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Role of the WTO" in Sampson, G.P., ed., *The Role of The World Trade Organization In Global Governance* (Tokyo: United Nations University Press, 2001) 29 at 34.

[443] For a comprehensive survey of principle and subsidiary rule-making in the WTO see also Footer, *An Institutional and Normative Analysis, supra* note 155 at 181-326.

[444] J.-C. Graz, *Aux Sources de l'OMC, La Charte de La Havane 1941-1950* (Geneva: Droz, 1999).

[445] *Ibid.* at ix.

[446] *Havana Charter*, *supra* note 104, articles 2-7. Recognition of labour rights in the *Havana Charter* is quite important in the context of this thesis. The *Charter* went as far as recognizing that unequitable labour norms created problems in international trade and that labour norms contained in international conventions that member states had ratified had to be implemented. *Ibid.* article. 7.

[447] *Havana Charter*, *supra* note 104, arts. 8-15.

business practices,[449] and intergovernmental commodity agreements.[450] Importantly, the purpose of the organization was the realization of "the aims set forth in the *Charter of the United Nations*, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter."[451]

NGOs were involved in negotiations that led to adoption of the *Havana Charter* and the "primogenitor" of the WTO, had also envisaged a significant role for NGOs.[452] This role was in part rooted in the United States' long-standing policy of consulting private business and NGOs prior to concluding trade agreements.[453] Furthermore, even in the preparation for the International Conference on Trade and Employment,[454] a United States proposal to give NGOs consultative status was accepted and the rules of procedure were modified accordingly.[455] NGOs did actively participate in the two Preparatory Committee Sessions and in the conference itself.[456] After little discussion the NGO-

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[448] *Ibid.* arts. 16-45.

[449] *Ibid.* arts. 46-54.

[450] *Ibid.* arts. 55-70. See Jackson, *The Law of GATT, supra* note 45 at 35-57.For a more detailed study of the *Havana Charter* see C. Wilcox, *A Charter for World Trade* (New York: Macmillan, 1949) at 3-52; W.A. Brown, *The United States and the Restoration of World Trade* (Washington D.C.: Brookings Institution, 1949) 15-160 [hereinafter Brown, *U.S. and Restoration of World Trade*]. See also *Diebold*, *The End of the ITO*, *supra* note 103.

[451] *Havana Charter*, *supra* note 104, article 1.

[452] S. Charnovitz, & J. Wickham, "Non-governmental organizations and the original international trade regime" (1995) 29:5 J. of World Trade 111 at 111; see also R.F. Housman, "Democratizing International Trade Decision-Making" (1994) 27 Cornell Int'l L. J. 699 at 704.

[453] Charnovitz & Wickham, at 111. This practice was reflected, for instance, in the *Reciprocal Trade Agreements Act of 1934* according to which in negotiating bilateral tariff reductions, the President received recommendations from the Committee for Reciprocity Information, which in turn held hearing and received information from interested parties. *Ibid.* at 111-12. Based on that policy, in the *Suggested Charter for an International Trade Organization*, the United States, proposed an article which read "[t]he Organization may make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within its competence and may invite them to undertake specific tasks." See *Suggested Charter for an International Trade Organization of the United Nations,* Department of State Publication 2598, Commercial Policy Series 93 (1946) cited in Charnovitz & Wickham, at 111 note 2 [hereinafter *ITO Charter (U.S. Proposal)*].

[454] The UN Conference on Trade and Employment (1946-1948) and a Preparatory Committee to establish its agenda, were established upon a proposal by the U.S. in the first meeting of the Economic and Social Council of the UN. Charnovitz & Wickham, *supra* note 452 at 112.

[455] UN Doc. E/PC/T/EC.2 (1946) cited in Charnovitz & Wickham, *supra* note 452 at 113 note 7.

[456] UN Docs.: Press Release/ITO/82, 29 November 1947; Press Release/ITO/92, 1 December 1947; Press Release/ITO/96, 1 December 1947; Press Release/ITO/99, 2 December 1947; Press Release/ITO/101, 2

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related provision of the *ITO Charter (U.S. Proposal)* was modified in the final *Havana Charter.* Article 87:2 of the *Charter* read as follows

> The Organization may make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within the scope of this Charter.

This provision of the *Havana Charter* is identical to article 71 of the *Charter of the United Nations*,[457] except that it goes a step further by adding the word "co-operation." Pursuant to the adoption of the *Havana Charter*, the Interim Commission for the International Trade Organization (ICITO) was established and charged with preparing the first session of the ITO.[458] Among others, ICITO had "to prepare, in consultation with non-governmental organizations, for presentation to the first regular session of the Conference recommendations regarding the implementation of the provisions of paragraph 2 of Article 87 of the Charter."[459] After the election of an Executive Committee,[460] NGOs attended the meetings of this Committee and were even allowed to address the Committee in discussions related to their issues. It is interesting to note that the Secretariat that assisted the ICITO and its Executive Committee gradually evolved into the GATT Secretariat.[461]

In implementing article 87:2 of the *Havana Charter*, the Secretariat of the ICITO prepared a note entitled "Relations with Non-Governmental Organizations."[462] According to this note, the procedures regarding NGO participation in the activities of the ECOSOC were not suitable for the ITO and a more flexible NGO arrangement was recommended.[463] It also recommended that NGOs be allowed to suggest items for

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December 1947; Press Release/ITO/109, 6 December 1947, cited in Charnovitz & Wickham, *supra* note 452 at 115 notes 28 and 29. See also Charnovitz, "Two Centuries of Participation," *supra* note 781 at 282.

[457] For the text of article 71 of the *Charter of the United Nations* see *infra* note 809 and accompanying text.

[458] *Resolution Establishing an Interim Commission for the International Trade Organization*, reprinted in U.S. Department of State Publication 3206, Commercial Policy Series 114 (1948) at 145 [hereinafter *Resolution Establishing ICITO*].

[459] *Ibid.* at 146.

[460] Pursuant to the provision of the Annex to the *Resolution Establishing ICITO*. *Ibid*. at 146.

[461] Charnovitz & Wickham, *supra* note 452 at 117.

[462] ICITO/EC.2/11, 15 July 1948 (1948) cited in Charnovitz & Wickham, *supra* note 452 at 117 footnote 36 [hereinafter the ICITO Secretariat note].

[463] The Secretariat found that the practice of categorization of NGOs was too rigid for the trade field, and that unlike the ECOSOC where NGOs with broadest policy interests were given more consultation rights, in

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inclusion in the provisional agenda of conference sessions, and be given the right to make statements to the Conference in case that their items are accepted on the agenda.[464] The ICITO Secretariat note also envisaged circulation of the list of documents received from NGOs, and a right for the Director-General to appoint advisory committees consisting of representatives of NGOs.[465] The Executive Secretary of the Interim Commission for the ITO then made a number of practical suggestions to the Executive Committee.[466] According to these suggestions the ITO was to adopt a list of consultants (NGOs) chosen from the ECOSOC list of NGOs with consultative status on the recommendation of the Director-General with the approval of the Executive Board, who were to be invited to send observers to the Annual Conference of the ITO and would be allowed to propose items for the Conference agenda. The Director-General would have had the authority to set up, if he deemed appropriate, an advisory committee of representatives of NGOs.[467]

After discussions in the Executive Committee the matter was referred to the Subcommittee on Administration, which essentially followed the Secretariat's submission.[468] One question which was subject to some discussion and finally was left unresolved was the creation of a permanent advisory committee of NGOs.[469] The discussions of the Executive Committee and the contents of the Subcommittee's report were later incorporated into a *Proposed Report of the Interim Commission of the First Conference of the International Trade Organization.*[470] According to this *Proposed*

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the ITO more specialized interests directly related to the ITO work were more desirable. Charnovitz & Wickham, *supra* note 452 at 117.

[464] Charnovitz & Wickham, *supra* note 452 at 117.

[465] *Ibid.* The Note also provided a list of NGOs that might become involved in the ITO.

[466] G. Marceau & P.N. Pedersen, "Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-Governmental Organisations and Civil Society's Claim for More Transparency and Public Participation" (1999) 33:1 J. World T. 5 at 9; Charnovitz & Wickham, *supra* note 452 at 118. The account of Marceau and Pedersen is especially important and is cited extensively in parts of this chapter, because as staff of the legal affairs, and external affairs divisions of the Secretariat they provide an interesting insight into the history and modalities of civil society participation in the WTO.

[467] ICITO/EC.2/SC.3/5, 2 September 1948 (1948). For meetings other than the Annual Conference, the Director-General was to be entrusted to ensure that NGOs were consulted, and subject to decision of relevant committees of commission NGOs could have been invited to address a specific meeting directly. *Ibid.*

[468] Charnovitz & Wickham, *supra* note 452 at 119.

[469] *Ibid.* at 120.

[470] *Ibid.*

Report, the NGOs were allowed to attend Conference sessions and even were allowed to submit matters or suggestions to the Conference for its consideration.[471] The ITO was never established and as such the *Proposed Report* was never adopted, however, it is interesting to note that the model for an ITO included an elaborate mechanism for participation of NGOs.[472]

Finally, the failure of the *Havana Charter* is in part linked to private actors and the fact that "most influential segments of business opinion turned against it."[473] According to William Diebold, who helped design the postwar economic system, "other problems could have been overcome if there had been strong business support for ITO."[474]

ii- Non-state actors in the GATT

Despite attempts to institutionalize the ITO's interaction with NGOs, there was no initiative under the GATT to provide for a role for non-state actors in GATT activities.[475] Perhaps because the GATT was not intended to function as an institution issues like

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[471] *Proposed Report of the Interim Commission to the First Conference of the International Trade Organization*, file folder, Box 153, Lot File 57D-284 of U.S. National Archives at 58-61, cited in Charnovitz & Wickham, *supra* note 452 at 121 footnotes 68 and 69. The proposal suggested that: (1) appropriate NGOs be listed as consultative organizations; (2) these listed organizations be invited to ITO Conference sessions; (3) NGO representatives be able to make statements on items which they submitted reports, and on other items at the discretion of the chairperson; and (3) these organizations receive ITO documents as necessary for effective consultations. Charnovitz "Participation of NGOs in WTO", *supra* note 1094 at 339.

[472] Charnovitz observes that governments extensively discussed the *Proposed Report* and would have likely adopted them if the ITO came into existence. "Participation of NGOs in WTO", *supra* note 1094 at 339.

[473] W. Diebold, "Reflections on the International Trade Organization" (1994) 14 N. Illinois U. L. Rev. 335 at 339 [hereinafter Diebold, "Reflection on the ITO"].

[474] Diebold, "Reflection on the ITO," *supra* note at 339. Diebold "spent the war years working on wartime economic challenges and helping design a postwar economic system, both as a member of the council's War and Peace Studies Program and at the Office of Strategic Services." Paul Lewis, "William Diebold, 84, Economist Who Influenced Postwar Policies" *The [New York] Times* (6 April 2002), online: New York Times <http://query.nytimes.com/gst/fullpage.html?res=9907E2D9173DF935A35757C0A9649C8 B63> (date accessed: 15 January 2006).

[475] Article XXIX of GATT which called for observance of certain principles of the *Havana Charter* excluded its Chapter VII which contained the provisions related to NGOs. Article XXIX of GATT outlined the relation between GATT and the *Havana Charter,* and stated that

> [the contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.

On non-state actors involvement in the GATT generally see Housman, *supra* note 452 at 703-716.

institutional interactions with non-state actors were not addressed in GATT negotiations.[476] Apart from informal and *ad hoc* contact with GATT Contracting Parties and the Secretariat, non-state actors were thus never formally present "in the negotiating room or even in the corridors of the GATT building," and were never accredited with access to specific meeting and annual conferences.[477] This was in part the result of the special institutional position of the GATT, or as Charnovitz and Wickham note, the GATT's "institutional insecurities" that made it "insular" and prevented it from developing ties with NGOs.[478] Similarly, the GATT created no formal mechanism for interaction with private interests. However, especially at national level, private associations were active in pursing their interests through their governments.[479] Moreover, for many years GATT served as a political forum for resolving bilateral trade disputes by negotiation and efforts to turn it into a more organized and legalistic organization faced resistance from certain contracting parties.[480]

During the period of activities of the GATT, however, other initiatives were taken on, creating a global trade organization. Article 11:c of the proposed Organization for Trade Co-operation in March 1955 stated that the Organization "may make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within the scope of the Organization."[481] But the attempt to establish this Organization also failed.

This lack of an institutional mechanism for interaction with non-state actors, coupled with secrecy and lack of transparency surrounding the GATT happened against

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[476] Housman, *supra* note 452 at 705.

[477] Marceau & Pedersen, *supra* 466 note at 5-6 and 10. See also S. Charnovitz, "Opening the WTO to Nongovernmental Interests" (2000) 24 Fordham Int'l L.J. 173 at 174-183 [hereinafter Charnovitz, "Opening the WTO"].

[478] *Supra* note 452 at 122.

[479] G. Curzon & V. Curzon, "GATT: Traders' Club" in R.W. Cox & H.K. Jacobson, *The Anatomy of Influence: Decision Making In International Organization* (New Haven: Yale University Press, 1974) 298 at 317.

[480] Bunting, *supra* note 4 at 519. The governments that had signed GATT were officially known as "GATT contracting parties."

[481] GATT, B.I.S.D. 1 (Revised) 75.

the backdrop of growing involvement of non-state actors with other intergovernmental organizations. [482]

iii- Non-state actors during the Uruguay Round

Throughout the Uruguay Round negotiations non-state actors had no direct access to negotiators. In the Marrakesh Ministerial Meeting in April 1994, which led to establishment of the WTO, there were no provisions for participation of NGOs. Non-state actors that did attend the meeting did so by acquiring press credentials.[483]

Despite the lack of formal participation for non-state actors, it is argued that the countries participating in the Uruguay Round made significant efforts to solicit public comments.[484] Furthermore, just before the launch of the Uruguay Round in March 1986, a group of twelve like-minded CEOs of U.S.-based MNCs and their advisors formed the *ad hoc* Intellectual Property Committee (IPC), which, it is argued, greatly influenced the development of a system of international regulation of intellectual property which protects their private interests through a *TRIPS Agreement*.[485] In 1988, the IPC together with European and Japanese corporate coalitions reached a consensus on a proposal that

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[482] Housman, *supra* note 452 at 705. Official GATT meetings were conducted in secret, no record or transcript of these meetings or negotiations were made public, and a vast number of GATT documents were classified and could not be obtained by the general public, or were declassified after long periods of time. *Ibid.*

[483] WTO, *World Trade Report 2007* (Geneva: WTO, 2007) at 334. "[T]he Ministerial meeting in Brussels in December 1990 witnessed the first coordinated denouncement of the trade talks as a '*GATTastrophe*' by a number of NGOs." *Ibid.* See also Croome, J., *Reshaping The World Trading System: A History of The Uruguay Round* (Geneva: World Trade Organization, 1995).

[484] Nichols, "Extension of Standing in WTO Disputes," *supra* note 175 at 305-306.

[485] S.K. Sell, "Structures, Agents and Institutions: Private Corporate Power and the Globalisation of Intellectual Property Rights" in Higgot, Underhill & Bieler, eds., *supra* note 357, 91 at 91 and 93 [hereinafter Sell, "Structures, Agents and Institutions"]. Throughout the period between 1986 and 1996 membership of IPC fluctuated from eleven to fourteen, and at times it included the following corporations representing a broad spectrum of intellectual property interests including chemical, computers, entertainment, pharmaceutical and software industries: Bristol-Myers Squibb, CBS, Digital Equipment Corporation, DuPont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Procter & Gamble, Rockwell International and Time Warner. *Ibid.* at 93-94 and 104. Ironically the *TRIPS Agreement* stands out among Uruguay Round agreements because it is not about trade liberalization but extending more protection. B.M. Hoekman, & M.M. Kostecki, *The Political Economy of The World Trading System: From GATT to WTO* (Oxford: Oxford University Press, 1995) at 152.

became the basis of the eventual *TRIPS Agreement*.[486] The proposal was presented to the GATT Secretariat and to member states of these business associations, and the United States governments sent out this proposal as reflecting its own views.[487] The success of the IPC in advancing its interests was due to influence of this group within the United States;[488] the American policy-makers' receptiveness of MNCs efforts in the face of the changing structure of global capitalism; that country's structural power on the international scene; and IPC's ability to mobilize an inter-sectoral transnational private sector consensus on substantive norms of intellectual property protection.[489]

Apart from IPC's success, however, participation of non-state actors in formation of WTO was influenced by the GATT's culture of non-transparency.

b- WTO consultations with non-state actors

i- Article V:2 of the WTO Agreement

Nowhere in the WTO agreements are non-state actors provided with the opportunity to participate in the creation or modification of norms. The limited instances of non-state actors participation in policy-making processes of the WTO are listed below.

It is noted that "the negotiating history appears to show that the idea of allowing NGOs access to the dispute settlement process had been proposed but rejected."[490] Article V:2 of the *WTO Agreement* calls upon the General Council to "make appropriate

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[486] Intellectual Property Committee, Keidanren, UNICE, *Basic Framework of GATT Provisions On Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities, The Intellectual Property Committee (USA), Keidanren (Japan), UNICE (Europe)* (June 1988) cited in Sell, "Structures, Agents and Institutions," *supra* note 485 at 105.

[487] Sell, "Structures, Agents and Institutions," *supra* note 485 at 91 and 101-102.

[488] According to Hoekman and Kostecki there was a "recognition that without a deal on TRIPS, ratification of the Uruguay Round package in the US Congress was unlikely given the political weight of the US industries supporting strong IPR discipline." *Supra* note 485 at 157.

[489] Sell, "Structures, Agents and Institutions," *supra* note 485 at 91 and 100. IPS convinced their European and Japanese counterparts that the issue of intellectual property was too important to leave to governments and that a trade-based approach was beneficial to protection of these rights. The joint action by American, European and Japanese business communities represented a "significant breakthrough in involvement of the international business community in trade negotiations." *Ibid.* at 101. See also J.A. Bradley, "Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations" 23 (1987) Stanford J. Int'l L. 57 and S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

[490] B.S. Chimin, "The World Trade Organization, Democracy and Development: A View From the South" (2006) 40 J. World T. 5 at 22.

arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."[491] Article V:2 of the *WTO Agreement* on its own did not provide for the modalities of NGO participation. In 1996, based on the ICITO Secretariat note,[492] the General Council drafted *Guidelines for Arrangements on Relations with Non-Governmental Organizations*.[493]

ii- NGO Guidelines

According to the *NGO Guidelines,* the Secretariat has to play

> a more active role in its direct contacts with NGOs … [T]his interaction […] should be developed through various means such as *inter alia* the organization on an *ad hoc* basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.[494]

The *NGO Guidelines* focus on improved transparency and better communication with NGOs, but given the inter-governmental nature of the WTO, it goes on to elaborate that is not possible for NGOs "to be directly involved in the work of the WTO or its meetings."[495] The *NGO Guidelines,* therefore, encourage the member states to engage in national-level consultations with the interested groups.[496] According to the Secretariat, the *NGO Guidelines* "[p]rovided the WTO Secretariat with a much needed platform for dealing with civil society" but "fell short of providing these organisations with any direct and formal role in the work of the WTO."[497]

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[491] *WTO Agreement*, art. V:2, *supra* 99. It is interesting to note that this article is almost identical to article 87:2 of the *Havana Charter*. See above at 28.

[492] *Supra* note 462. See Marceau & Pedersen, *supra* 466 note at 8.

[493] *Guidelines For Arrangements on Relations with Non-Governmental Organizations, adopted by General Council on 18 July 1996*, WTO Doc. WT/L/162 (23 July 1996), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006) [hereinafter *NGO Guidelines*].

[494] *NGO Guidelines, supra* note 493, para. IV.

[495] *NGO Guidelines, supra* note 493, paras. II and VI. Simultaneously, the General Council of the TO also adopted the *Procedures for the Circulation and Derestriction of Documents*. *Decision of General Council of 18 July 1996,* WTO Doc. WT/L/160/Rev.1, (22 July 1996) [hereinafter *1996 Decision on Derestriction of Documents*]. That decision was replaced by another decision in 2002. *Procedures for the Circulation and Derestriction of Documents*, *Decision of General Council of 14 May 2002*, WTO Doc. WT/L/452 (16 May 1996) [hereinafter *2002 Decision on Derestriction of Documents*].

[496] *NGO Guidelines, supra* note 493, para. VI.

[497] *World Trade Report 2007*, *supra* note 483 at 334.

Another decision within the framework of the WTO in relation to article V of the *WTO Agreement,* was the *Decision on Trade and Environment*[498] which invited the Sub-Committee of the Preparatory Committee of the World Trade organization and the Committee on Trade and Environment, when established, "to provide input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO."[499]

As demonstrated in this section the *NGO Guidelines* did not go very far in provide a formal channel of participation for non-state actors.

iii- Non-state actors in Ministerial Conferences

The *NGO Guidelines* is a very short document and does not provide any details on such issues as the presence of NGOs at Ministerial Conferences. A problem became evident during the first WTO Ministerial Conference in Singapore in December 1996. The WTO membership was sharply divided over NGO participation, with some members facing domestic pressure to ensure that NGOs be allowed entry. After recurring discussions at the informal meetings, the General Council mandated the Secretariat to present a proposal on NGO participation.[500] The Secretariat's proposal focused on ensuring that NGOs could attend the plenary sessions of the Ministerial Conference and on making an NGO Centre with facilities for organizing meetings and workshops open to NGOs. According to this proposal, NGOs whose activities were "concerned with those of the WTO" were required to submit a written request for registration materials in preparation of a list of NGOs to be circulated to members for review or comments. After a period of two weeks, in the absence of objections, registration forms were to be forwarded to NGOs.[501] The General Council discussed these proposals and its Chairman stated that it was not necessary to have a formal decision by the General Council on the list of NGOs to be invited. The General Council agreed with the procedure proposed by

[498] 14 April 1994, 33 I.L.M. 1144 at 1267 [hereinafter the *Decision on Trade and Environment*].

[499] *Decision on Trade and Environment*, *supra* note 498.

[500] Marceau & Pedersen, *supra* 466 note at 12.

[501] *Ibid.* at 13.

the Chairman.[502] Further informal discussions among members focused on the status of NGOs in the Ministerial Conference and the value of this practice as precedent within the organization. It was decided that the NGOs will "attend" and not "observe" the meeting, and that these arrangements were made on an *ad hoc* basis and did no create precedent for

[502] The issue was discussed in a meeting of the General Council on the same day that *NGO Guidelines* were adopted. The discussions at the meeting demonstrate the hesitation of the General Council to adopt a formal decision on participation of NGOs:

> The Chairman, speaking under "Other Business", said he believed it was necessary to determine urgently how to proceed with requests from non-governmental organizations to attend the Ministerial Conference in an observer capacity. As Members were aware, Article V:2 of the WTO Agreement stipulated that the "General Council may make appropriate arrangements for consultations and cooperation with non-governmental organizations concerned with matters related to those of the WTO." Since the General Council had just agreed on guidelines for relations with NGOs under Item 9(c) of the Agenda, which emphasized the need for greater transparency in relations between the WTO and NGOs, and on the basis of informal consultations as well as contacts with Singapore's authorities, he proposed the following method for proceeding: (i) NGOs would be allowed to attend the Plenary Sessions of the Conference; (ii) applications from NGOs to be registered would be accepted on the basis of Article V of the WTO Agreement, i.e. such NGOs "concerned with matters related to those of the WTO"; and (iii) a deadline would be established for the registration of NGOs that wished to attend the Conference. A list of the NGOs that had applied for attendance would be circulated subsequently for the information of the General Council. Attendance at plenary sessions by NGOs would also depend upon the availability of space.
>
> The representative of Morocco asked whether it would be the Secretariat or the General Council that would determine the list of NGOs which sought attendance at the Conference and met the criteria mentioned by the Chairman.
>
> The representative of El Salvador echoed Morocco's query.
>
> The Chairman said that the Secretariat would receive the applications from NGOs and examine them to see if the organizations concerned met the criteria. A list of those that did would then be circulated by the Secretariat.
>
> The representative of El Salvador asked who would approve the list of the NGOs seeking to attend the Ministerial Conference.
>
> The Chairman said that if delegations did not indicate any problems with the list, then those NGOs would be invited to the Ministerial Conference. He did not wish to formalize the process.
>
> The representative of Morocco asked if it could not be stated clearly that the examination of the applications would be done by the Secretariat, and that Members would be presented with a list of NGOs meeting the criteria. It would then be up to the General Council to accept the list or not. If Members had problems with certain NGOs, consultations should be held to resolve them.
>
> The Chairman said that it was not necessary to have a formal decision by the General Council on the list of NGOs to be invited. It was clear that if any Member had a problem with the list circulated by the Secretariat, this would be resolved through consultations. The list would be considered approved in the absence of any reservations to it.
>
> The General Council took note of the statements and agreed with the procedure proposed by the Chairman.

WTO, General Council, *Minutes of Meeting* (held on 18 July 1996), WTO Doc. WT/GC/M/13, online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 July 2006).

future conferences.[503] Eventually 159 NGOs submitted registration requests. All of them received registration forms and 108 of them sent representatives to the Ministerial Conference.[504]

Accreditation of the NGOs was also done by the Secretariat, which due to a lack of resources decided to grant accreditation to any "non-profit" organization which could point to "activities related to those of the WTO." Accordingly, a large number of private companies and law firms that had applied for registration forms were advised that they had to register through industry associations or professional groupings.[505]

Similar arrangements were made for participation of civil society in the Geneva Ministerial Conference in 1998, where 152 NGOs registered to attend plenary sessions, facilities were made available to NGOs, and the WTO Secretariat regularly briefed them on the progress of informal working sessions. [506] As can be seen in table 1 below, the number of NGOs participating in the WTO Ministerial Conferences grew dramatically after the Singapore and Geneva Ministerial Conferences. In the Seattle Ministerial Conference in 1999, 686 NGOs participated under arrangements similar to those made at previous Ministerial Conferences.[507] The increased number of NGOs also reflected a wider range of groups going beyond the traditional fields of business, environment,

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[503] See WTO, *Report of the General Council to the 1996 Ministerial Conference, Vol. 1*, WTO Doc. WT/MIN(96)/2 (26 November 1996) online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006); *World Trade Report 2007*, *supra* note 483 at 334.

[504] Marceau & Pedersen, *supra* note 466 at 13-15. Marceau and Pedersen also describe the facilities that were provided to NGOs by the government of Singapore, and note that NGOs were given access to the Plenary Sessions of the Ministerial Conference, press area, and the floor level of the conference center, and were provided with a well-equipped NGO Centre with meeting rooms for conducting meetings with delegations. Furthermore, a taskforce, consisting of representatives of different segments of the civil society and the Secretariat met regularly to deal with specific problems and requests of NGOs. They conclude "[t]he co-operative spirit of the NGOs aided the success of these meetings and the process of interaction eliminated some of the misunderstandings which had frustrated communications between NGOs and the WTO Secretariat." *Ibid.* at 15.

[505] Marceau & Pedersen, *supra* 466 note at 14. Private entities have been invited to participate in other meetings of the WTO, including different symposia. *Ibid.*

[506] WTO, *WTO Annual Report 1998* (Geneva: WTO, 1998) at 136.

[507] The General Council agreed with the same procedures that were followed for the 1996 and 1998 Ministerial Conferences. WTO, General Council, *Minutes of Meeting* (held on 15 June 1999), WTO Doc. WT/GC/M/40/Add.3, online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 July 2006), para. 11. WTO, *WTO Annual Report 2000* (Geneva: WTO, 2000) at 90. According to the Secretariat throughout the Ministerial Conference more than 160 meetings (workshops, seminars, and private meetings) took place in the NGO Center. *Ibid.*

development and labour organizations and geographic regions which were represented in previous meetings. New participants included health groups, human rights, consumer groups, religious groups and think tanks.[508] Furthermore, by this time the original reluctance of many WTO members *vis-à-vis* NGOs was fading away and was replaced by improved cooperation and information-sharing from WTO members. The chaotic street protests surrounding the Seattle Ministerial Conference brought the relationship between WTO and the Civil Society further to the fore and attracted more media attention to this subject. At the same time the NGOs started focusing more on the substantive agenda of the WTO in addition to process and transparency issues.[509]

In the months leading up to the Doha Ministerial Conference in 2001 the WTO Secretariat organized a series of activities for NGOs with the basic objective of facilitating and encouraging substantive and responsible discussion with NGOs on issues falling within the mandate of the WTO.[510] While the procedural and practical arrangements for NGO participation remained unchanged, during the Doha Ministerial Conference the number of accredited organizations fell due to physical constraints, and each NGO was allowed to accredit one representative.[511]

The Cancún Ministerial Conference in 2003 and Hong Kong Ministerial Conference in 2005 were attended by around 800 NGOs represented by 1600 participants.[512]

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[508] *World Trade Report 2007*, *supra* note 483 at 336. The number of NGO representatives accredited as members of member delegations also increased in Seattle Ministerial Conference. *Ibid.*

[509] *Ibid*.

[510] WTO, *WTO Secretariat Activities with NGOs*, WTO Doc. WT/INF/30 (12 April 2001), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 March 2007). These activities included small-scale NGO lunchtime dialogues, small-scale issue-driven, "open dialogue" discussions, NGO briefings, technical seminars organized by the WTO Secretariat in Geneva, stand-alone workshops by the WTO Secretariat, and NGO-focused website outreach before the meetings in Doha. For duration of the Ministerial Conference the Secretariat planned general daily NGO briefings, issue-specific NGO briefings, and workshops organized by the WTO Secretariat. *Ibid.*

[511] *World Trade Report 2007*, *supra* note 483 at 336.

[512] WTO, *WTO Annual Report 2004* (Geneva: WTO, 2003) at 7; WTO, *WTO Annual Report 2006* (Geneva: WTO, 2003) at 60.

Ministerial	No. of eligible NGOS	NGOs who attended	No. of participants
Singapore 1996	159	108	235
Geneva 1998	153	128	362
Seattle 1999	776	686	1,500
Doha 2001	651	370	370
Cancún 2003	961	795	1578
Hong Kong 2005	1065	812	1596

Table 1 – NGO attendance at WTO Ministerial Conferences[513]

In different Ministerial Conferences of the WTO heads of state and ministers have taken note of the need for the organization to interact more effectively with NGOs and the public.[514] The *Ministerial Declarations*, however, have not gone beyond "recogniz[ing] the importance of enhancing public understanding of the benefits of the multilateral trading system in order to build support for it," or calling for more transparency or public understanding "[w]hile emphasizing the intergovernmental character of the organization."[515] The *Ministerial Declarations* have never referred to non-state actors and their participation, and participation in the Ministerial Conferences does not provide for formal channels of providing input in the system.

iv- Issue-specific symposia and dialogues

Since 1994 the Secretariat also initiated a process of informal consultations between the Secretariat and NGOs through organizing different symposia. The Trade and Environment Committee started this process by organizing symposia on trade and environment which focused on the relationship between international trade, environmental policies and sustainable development. The symposia in 1994 and 1997 were successful in attracting input from NGOs, but "interest among members was only moderate."[516]

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[513] *World Trade Report 2007*, *supra* note 483 at 337.

[514] Marceau & Pedersen, *supra* note 466 at 7.

[515] *Ministerial Declaration adopted on 20 May 1998*, WT/MIN(98)/DEC/1 (25 May 1998), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 15 August 2007), para. 4; *Ministerial Declaration adopted on 14 November 2001*, WT/MIN(01)/DEC/1 (20 November 2001), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006), para. 10.

[516] Marceau & Pedersen, *supra* 466 note at 11 and 14.

In September 1997, a number of NGOs participated in a Joint WTO/UNCTAD NGO Symposium on Trade-Related Issues Affecting Least Developed Countries (LDCs).[517] Specific resources were allocated to ensure participation of NGOs from LDCs and the conclusions and recommendations of the NGO proceedings were then forwarded to the High Level Meeting for Least Developed Countries as an official WTO document.[518] In March 1998, another Symposium entitled "Strengthening Complementarities: Trade, Environment and Sustainable Development" which aimed at broadening and deepening "the dialogue between NGOs and the WTO on the relationship between international trade, environmental policies and sustainable development" was organized by the WTO.[519] Around the same time a symposium on trade facilitation was held with speakers from private enterprises and industry groups.[520]

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[517] WTO, Committee on Trade and Development, *Note by Secretariat: Update on Preparations for the High-Level Meeting on Least-Developed Countries*, WTO Doc. WT/COMTD/W/28/Add.1 (23 July 1997), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006). Furthermore, the Director-General invited a group of business leaders and investors to serve, in their personal capacity, as resource persons for the Meeting. *Ibid*. See also WTO, Sub-Committee on Least Developed Countries, *Note by Secretariat: Joint WTO-UNCTAD NGO Symposium on Trade and the Least Developed Countries*, WTO Doc. WT/COMTD/LLDC/W/9 (17 September 1997), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006).

[518] WTO, High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development, *Report and Recommendations from the Joint WTO/UNCTAD NGO Symposium on Trade-Related Issues Affecting Least-Developed Countries*, WTO Doc. WT/LDC/HL/16 (24 October 1997), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006). The recommendations, among others, focused on the role of NGOs and stated that

> NGOs and governments share a common public service mission but differentiated responsibilities and abilities. NGOs have a distinctive role in building trade capacity as a result of their long-standing operational experience at the grassroots level. Like governments, NGOs have a substantial and legitimate role to play in ensuring that the benefits and costs of trade liberalization and foreign investment are equitably distributed.

They also recommended that the High Level Meeting

> encourage and enable LDC governments to take advantage of the special experience and technical expertise NGOs have gathered in activities ranging from pursuit of trade initiatives, to industry and market analysis, to development programme design and provision. Specifically NGOs can […] assist in national and international trade processes in supplementing government capacity to actively participate in the WTO and international trade fora.

Finally NGOs recommended that "the WTO and the other five international agencies involved in the HLM make better use of NGOs' special competence," and "[t]hat national governments include and consult with NGOs as part of their periodic WTO Trade Policy Reviews," and "[t]hat the WTO and the other participating agencies make use of NGOs to more effectively disseminate information." *Ibid.* paras. 22-28.

[519] Held on 17-18 March 1998. *WTO Annual Report 1998*, *supra* note 506 at 124. See also, "Debate over NGO Participation at the WTO," *supra* note 441 at 451.

[520] Held on 9-10 March 1998. *WTO Annual Report 1998*, *supra* note 506 at 79.

In March 1999 a High-Level Symposium on Trade and Environment was followed by a High-Level Symposium on Trade and Development. During both symposia representatives of NGOs exchanged views with senior government officials from WTO member and observer governments.[521] By contrast another WTO Symposium on Trade and Sustainable Development within the Framework of Paragraph 51 of the Doha Ministerial Declaration, which was organized at the request of members in the Committee on Trade and Environment and held on 10-11 October 2005, was only open to members and observers.[522]

Parallel to the Seattle Ministerial Conference in November 1999 the Seattle Symposium on International Trade Issues in the First Decades of the Next Century was held to provide NGOs with an opportunity to engage in "an informal dialogue" with WTO members "on issues likely to affect the international trading system of the WTO in the next century."[523]

In 2007 the WTO Secretariat started the first of many issue-specific dialogues to "provide an opportunity for representatives of Civil Society, WTO Members and

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[521] Held respectively on 15-16 and 17-18 March 1999. WTO, *WTO Annual Report 1999* (Geneva: WTO, 1999) at 100, 101 and 111.

[522] The mandate in Paragraph 51 of the Doha Ministerial Declaration instructs the Committee on Trade and Environment and the Committee on Trade and Development "to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected." *Ministerial Declaration* adopted on 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1 (20 November 2001), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006), para. 51. All panel participants were also from intergovernmental organizations or academia. The only representative outside these categories was from Environment and Development Action in the Third World, an international organization with diplomatic immunity that is a joint programme of the United Nations Environmental Programme, African Institute for Economic Development and Planning (a subsidiary body of the United Nations Economic Commission for Africa) and the Swedish International Development Cooperation Agency. See online: Environment and Development Action in the Third World (ENDA-TM) <http://www.enda.sn/> (date accessed 12 October 2007). For the event programme and more information see WTO, "WTO Symposium on Trade and Sustainable Development within the Framework of Paragraph 51 of the Doha Ministerial Declaration," online WTO <http://www.wto.org/ english/tratop_e/envir_e/sym_oct05_e/sym_oct05_e.htm> (date accessed 12 October 2007).

[523] The symposium discussed a wide range of issues, including the role of international trade in poverty-elimination, the effects of globalization on developing countries, the integration of LDCs into the multilateral trading system, increasing public concerns with the trading system, trade and sustainable development, and trade and technological development. *WTO Annual Report 2000*, *supra* note 507 at 90. For the report of the symposium see, International Institute for Sustainable Development, *Summary Report of the Seattle Symposium on International Trade issues in the First Decades of the Next Century*, online: WTO <www.wto.org/english/thewto_e/minist_e/min99_e/english/ngo_e/sdvol34no1.pdf> (date accessed 10 March 2003).

Observers and Secretariat staff to exchange information and views on matters related to the multilateral trading system of particular relevance to them."[524] These issue-specific symposia, while providing an important fora for exchange of ideas, cannot be seen as a channel for provision of input into the organization's policy-making.

v- The WTO Public Forum

Apart from the issue-specific dialogues, since 2001 the WTO Secretariat has organized annual public symposia in collaboration with NGOs which generally focus on a wide range of issues during two or three days of meetings.[525]

The three-day symposium in 2002 entitled "the Doha Development Agenda and beyond" work sessions were organized by the WTO as well as by NGOs, and issues like market access, development opportunities, trade and environment, role of parliamentarians in the WTO, globalization and trade, food security and relations between intergovernmental organizations and civil society were discussed.[526] The public symposia were held again in 2003 and 2004, entitled "Challenges Ahead on the Road to Cancún"[527] and "Multilateralism at a crossroads"[528] respectively. In 2005 the WTO annual Public

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[524] Dialogues take place at the WTO in an informal setting and are off the record. The first addressed "The Development Component of the Doha Development Agenda," on 27 April 2007. WTO, "First series of Issue-specific dialogues with Civil Society organized by the WTO Secretariat" online: WTO < http://www.wto.org/english/forums_e/ngo_e/ngo_dialogue_e.htm> (date accessed 15 May 2007).

[525] On 6 and 7 July 2001 a symposium was held in Geneva on critical issues confronting the world trading system with the aim of providing as much time as possible for both general and specific issues-based discussion. For more information on the structure and issues discussed during this symposium see WTO, "Symposium on issues confronting the world trading system," online: WTO, < http://www.wto.org/english/forums_e/ngo_e/ngo_symp_2001_e.htm> (date accessed 5 August 2006). For full report and audio recordings of the sessions see International Institute for Sustainable Development, "World Trade Organization Symposium on Issues Confronting the World Trade System," online: IISD < http://www.iisd.ca/sd/wto-issues/> (date accessed 12 July 2005)

[526] This was attended by 800 participants and held on 29 April to 1 May 2002. WTO, *WTO Annual Report 2003* (Geneva: WTO, 2003) at 118. For the programme, documents and information on different sessions see WTO, "WTO public symposium: the Doha Development Agenda and beyond," online: WTO, <http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_02_e.htm> (date accessed 5 August 2006).

[527] This was held on 16 to 18 June 2003. For the programme, documents and information on different sessions see WTO, "WTO hosts public symposium: 'Challenges Ahead on the Road to Cancún,'" online: WTO, < http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_03_e.htm> (date accessed 5 August 2006).

[528] Held on 25 to 27 May 2004, the symposium brought together 800 participants who discussed development opportunities, functioning of the WTO and agriculture during sessions organized by WTO and twenty-five sessions organized by NGOs. WTO, *WTO Annual Report 2005* (Geneva: WTO, 2005) at 67. For the programme, documents and information on different sessions see WTO, "WTO hosts its annual

continued on the next page ➢

Symposium was entitled. "WTO After 10 Years — Global Problems and Multilateral Solutions."[529]

Throughout the years the format of the annual public symposia has evolved from large open-ended plenary sessions to more individual, interactive working sessions to allow for broader agenda and a more effective dialogue with and between NGOs. While the inaugural symposia were subject to interference by WTO members, the Secretariat has had greater independence in organizing the recent public fora and participants themselves have organized the majority of sessions at these events.[530] Since 2006 these meetings were renamed as the WTO Public Forum which meets annually.[531]

While in practice the Public Forum is held every year, in theory it remains an *ad hoc* event with no regular budget, and does not provide NGOs with a formalized or direct access to the process of WTO agenda-setting.[532] No official report emanating from meetings of the WTO Public Forum is submitted to WTO bodies and no official follow up to recommendations or conclusions of its panels is envisaged within the system.

vi- NGO briefings

During a General Council meeting on 15 July 1998 the Director-General of the WTO informed members of new steps being taken to enhance transparency and participation of non-state actors. These steps included holding "regular briefings for

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Public Symposium: 'Multilateralism at crossroads,'" online: WTO, <http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_04_e.htm> (date accessed 5 August 2006).

[529] Held on 20 to 22 April 2005, this forum brought together 1000 participants. *WTO Annual Report 2006, supra* note 513 at 61. For the programme, documents and information on different sessions see WTO, "WTO hosts its 2005 annual Public Symposium—'WTO After 10 Year: Global Problems and Multilateral Solutions,'" online: WTO, <http://www.wto.org/english/news_e/events_e/symp05_e/symposium_2005_e.htm> (date accessed 5 August 2006).

[530] *World Trade Report 2007*, *supra* note 483 at 337. Participation in the public forum has grown to more than 1000 people, including NGOs, academics, journalists, parliamentarians and business representatives. *Ibid.*

[531] The 2006 WTO Public Forum held on 25 and 26 September was entitled "What WTO for the XXIst century?" For the programme, documents and information on different sessions see WTO, "WTO Public Forum 2006," online: WTO, <http://www.wto.org/english/forums_e/public_forum_e/forum06_e.htm> (date accessed 10 December 2007); on 4-5 October 2007, the WTO Public Forum focused "How Can the WTO Help Harness Globalization?" For the programme, documents and information on different sessions see WTO, "WTO Public Forum 2007," online: WTO, <http://www.wto.org/english/forums_e/public_forum2007_e/public_forum07 _e.htm> (date accessed 10 December 2007).

NGOs along the lines of the briefings already offered to the media, but tailored to the NGO community's particular interests and perspectives;" compiling a monthly list of NGO documents received by the Secretariat which would be made available to all Members that were interested; organizing an "NGO forum" on the WTO website containing information of particular interest to NGOs, such as the announcement of future symposia, publications, and contact people within the Secretariat; organizing a series of informal meetings between the Director-General and different NGO representatives—all with the goal of improving and enhancing the present mutual understanding.[533]

Regular briefings are now held for NGOs at the WTO headquarters and the Director-General of the WTO regularly briefs and interacts with NGOs in Geneva and elsewhere, and through on-line chats.[534] The Secretariat has also organized significant outreach programmes for parliamentarians during the past few years.[535] A more informed parliament can conduct a more informed debate at the national level and thus enhances public participation in making decisions that are related to the WTO.

These NGO briefings certainly contribute to better understanding and dialogue between the WTO and non-state actors but cannot be considered a formal channel of participation.

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[532] *World Trade Report 2007*, *supra* note 483 at 337.

[533] WTO, General Council, *Minutes of Meeting* (held on 15, 16 and 22 July 1996), WTO Doc. WT/GC/M/29, online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 July 2006).

[534] *World Trade Report 2007*, *supra* note 483 at 338. For example on 27 March 2007 WTO Director-General, Pascal Lamy, briefed NGOs on the State of Play of the Doha Round Negotiations. WTO, "WTO Director-General, Pascal Lamy, briefed NGOs on the State of Play of the Doha Round Negotiations," online: WTO <http://www.wto.org/english/forums_e/ngo_e/ngo_briefing_e.htm> (date accessed 10 August 2007). The Secretariat also has initiated regional outreach programmes for civil society representatives in developing countries. Since April 2000 the Secretariat also started a monthly electronic news bulletin that is available to NGOs. WTO, *WTO Annual Report 2001* (Geneva: WTO, 2001) at 113.

[535] For example in 2003 regional workshops were organized in Cape Town, Trinidad, Sao Paolo, and national workshops were conducted in St Lucia, Namibia and Moldova. WTO has also strengthened its contacts with the Inter-Parliamentary Union (IPU) and Commonwealth Parliamentary Associations. *WTO Annual Report 2004*, *supra* note 512 at 7. In 2004, 2005 and 2006 also regional and national workshops were organized for parliamentarians and WTO also attended the Brussels Session of the Parliamentary Conference on the WTO in 2004 as well as the Hong Kong Session of the Parliamentary Conference on the WTO on the occasion of the Hong Kong Ministerial Conference both organized by the IPU and the European Parliament. *WTO Annual Report 2005, supra* note 528 at 67-68; *WTO Annual Report 2006, supra* note 513 at 61; *WTO Annual Report 2007, supra* note 150 at 61.

c- Lobbying efforts

Lobbying is certainly not a new phenomenon in the context of the international trading system. However, it is very difficult to present a survey of lobbying efforts on WTO issues at national and international level. While there are some efforts at national level in certain jurisdictions to regulate lobbying, at international level there are no rules in this regard. The private sector has traditionally been more successful in influencing negotiating positions at the domestic level and even as members of developed country delegations. In more recent years, however, NGOs have also been able to influence policy-making within the WTO.[536]

i- Private sector corporate actors

A study based on information gathered from participants in trade negotiations claims that "[t]he role of powerful Northern-based multinational corporations (MNCs) deals a severe blow to the negotiations process at the WTO" and that "MNC representatives are constantly meeting with Geneva-based delegates and government officials in the capitals, and often use their own governments to further their interests."[537] This is not surprising as the officials of international corporations inevitably have access to circles of power. For instance, fora like the annual meeting of the World Economic Forum (WEF) in Davos, Switzerland where major international corporations have a strong presence and influence in setting the agenda, attract the major policy-makers and officials from Member States of WTO[538] and serve as informal meeting venues for economic and trade negotiations.[539]

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[536] *World Trade Report 2007*, *supra* note 483 at 340.

[537] F. Jawara, & A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (London: Zed Books, 2003) at 54. The same study quotes a developed country delegate who acknowledges that multinational corporations try to lobby the delegates all the time in Geneva, and relates as an example the efforts by pharmaceutical companies to lobby the Zimbabwean ambassador at the WTO when he served as the Chairman of the TRIPS Council pre-Doha (when the interpretation of the TRIPS agreement in relation to pharmaceuticals was a key issue at the negotiations). *Ibid.* at 54-55. Another study focusing on the GATT-era highlights the lobbying efforts of private associations at the national level. See *supra* note 479 and accompanying text.

[538] The co-chairs of WEF annual meeting in 2007 were John Browne of Madingley, Group Chief Executive, BP, United Kingdom, Michelle Guthrie, Chief Executive Officer, Star Group, Hong Kong SAR, E. Neville Isdell, Chairman and Chief Executive Officer, The Coca-Cola Company, USA, Sunil Bharti Mittal, Chairman and Group Managing Director, Bharti Enterprises, India, James J. Schiro, Group Chief Executive Officer and Chairman of the Group Management Board, Zurich Financial Services, Switzerland, Eric Schmidt, Chairman of the Executive Committee and Chief Executive Officer, Google, USA. The list of

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Even more significantly it is claimed that "the pharmaceutical industry played a large role in the drafting of TRIPS. In this regard, the intellectual property and policy concerns and perspectives of Member States were not necessarily accurately reflected in TRIPS."[540] In case of the Intellectual Property Committee (IPC), referred to earlier,[541] a member of IPC was an advisor to the United States Official Delegation at the Uruguay Round, and the group worked closely with the USTR, the United States Commerce Department and the Patent and Trademark Office to shape the United States proposals and negotiation positions.[542]

ii- NGO lobbying

While participation of NGOs in the WTO does not involve direct input into the legislative process of the organization, it provides NGOs with increased opportunities for lobbying the WTO members. Furthermore, more organized participation of NGOs and the media coverage during WTO Ministerial Conferences has also led to the launch of campaigns for specific causes being organized by NGOs.[543] WTO members, especially the ones from developing countries who were originally reluctant to allow NGO participation have increasingly engaged with NGOs and their delegates began meeting

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participants at this meeting serves as a "who's who" of international economy and politics. Even though major NGO leaders are also invited to Davos, there is no doubt that business leaders' presence is far stronger. See World Economic Forum, Press Release, "World Economic Forum Annual Meeting 2007 in Davos: World leaders confront 'The Shifting Power Equation'" (17 January 2007), online: WEF <http://www.weforum.org/en/media/Latest%20Press%20Releases/AM07_pre Davospressrelease> (last modified 14 February 2007).

[539] For instance, the latest developments in trade negotiations happened at Davos, where talks between ministers of 30 countries at the WEF Annual Meeting 2007 led to the re-launch of negotiations which where suspended in July 2006. See World Economic Forum, Press Release, "Trade round gets new impetus from Davos talks" (27 January 2007), online: WEF < http://www.weforum.org/en/media/Latest%20Press%20Releases/AM07_trade_pressrelease> (last modified 14 February 2007).

[540] K.M. Bombach, "Can South Africa Fight AIDS: Reconciling the South African Medicines and Related Substances Act with the TRIPS Agreement," (2001) 19 B.U. Int'l L.J. 273 at 290.

[541] See *supra* note 485 and accompanying text.

[542] Sell, "Structures, Agents and Institutions," *supra* note 485 at 104.

[543] Oxfam and Médicins Sans Frontieres have done important advocacy work in relation to the constraints imposed by the *TRIPS Agreement* on access to essential medicines, or the Institute for Agriculture and Trade Policy (IATP) has conducted important studies on agriculture subsidies. B. Lal Das, *The WTO and the Multilateral Trading System: Past, Present and Future* (London and New York: Zed Books, 2003) at 229. The Oxfam "Big Noise" petition is signed by nearly 20 million people and reminds the world leaders of their promises to make affordable medicines available to all. See online: Make Trade Fair <http://www.maketradefair.com/en/index.htm> (1 November 2007).

NGO representatives in areas related to development. Furthermore, some delegations, due to lack of resources, have turned to specialized NGOs for assistance in undertaking research and preparing negotiating positions.[544]

iii- Significant campaigns: Access to medicines, cotton subsidies, fisheries subsidies

A number of decisions in the WTO during the past few years illustrate the ability of NGOs to affect policy-making and norm creation in the WTO. In two instances—access to medicines and cotton subsidies debates—NGOs provided a number of less developed WTO members with policy advice and assisted them with campaigns to raise awareness among the public. In the debate over fisheries subsidies NGOs that had been long involved in environmental issues provided input into the debate through parallel fora.

In the case of access to medicines, civil society groups provided technical expertise and expert legal advice and assisted in drafting proposals to a number of developing countries, and orchestrated a public campaign that influenced public opinion and policymakers. The campaign was established in 1996 and employed national and international networking to promote public health concerns in trade policies. The campaign worked with Governments, international negotiators, pharmaceutical companies, regional organizations and the media. It succeeded in changing policies relating to access to essential drugs. The campaign became a factor leading to an initial success during the Doha Ministerial Conference.[545] The *Doha Declaration on the Public Health* clarified the provisions in the *TRIPS Agreement* to promote public health, in particular access to medicines, and identified one area where the *TRIPS Agreement* lacked flexibility in allowing poorer countries to import cheaper generics made under compulsory licensing schemes.[546] In 2003, the WTO General Council decided to waive

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[544] *World Trade Report 2007*, *supra* note 483 at 337 and 340; For example the Third World Network (TWN) or Southern and Eastern African Trade Information and Negotiations Institute (SEATINI) have contributed to preparation of developing countries for negotiations. Lal Das, *ibid.*

[545] United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: Oxford university Press, 2002) at 106 [hereinafter *HDR 2002*].

[546] Paragraph 6 of the *Doha Declaration on Public Health* states

> We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an

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members' obligations under a provision of the *TRIPS Agreement* which prevented export of generic drugs produced under compulsory licensing schemes.[547] This waiver was transformed into a permanent amendment when in 2005 WTO members approved changes to the *TRIPS Agreement* to provide more flexibility for exporting generics.[548]

Another example of close cooperation between NGOs and WTO delegations is the case of the "cotton initiative."[549] In 2003, a number of cotton producing West African Least Developed Countries (LDCs) which were facing difficulties as a result of cotton subsidies paid by certain WTO members were supported by NGOs through high-profile campaigns, technical expertise and policy advice which has set into motion negotiations to resolve this issue.[550]

Finally in the case of fisheries subsides some NGOs took a proactive role by providing analytical papers and proposals presented in public symposia to encourage

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expeditious solution to this problem and to report to the General Council before the end of 2002.

Supra note 336.

[547] *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of the General Council of 30 August 2003*, WTO Doc. WT/L/540 and Corr.1 (1 September 2003) online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 17 December 2006). Article 31(f) of the *TRIPS Agreement* stated that production under compulsory licensing must be predominantly for the domestic market. This effectively limited the ability of countries that could not make pharmaceutical products from importing cheaper generics from countries where pharmaceuticals were patented.

[548] *Amendment of the TRIPS Agreement, Decision of the General Council of 6 December 2005,* WTO Doc. WT/L/641 (8 December 2005). Once two thirds of members have formally accepted it, the amendment will take effect in those members and will replace the 2003 waiver for them. For each of the remaining members, the waiver will continue to apply until that member accepts the amendment and it takes effect. *Ibid*. para. 3.

[549] J. Baffes, "The 'Cotton Problem'" (2005) 20 The World Bank Research Observer 109 at 127.

[550] The issue remains unresolved. Benin, Burkina Faso, Chad and Mali with the assistance of IDEAS, a Geneva-based NGO submitted a proposal to WTO demanding removal of cotton subsidies by the United States, China and the European Union. The issue received considerable attention during the Cancún Ministerial Conference and while supported by a number of WTO members and the Director-General of the WTO was not resolved in Cancún. Baffes, *supra* note 550 at 127-128. In response to the proposal, which was distributed as an official document during the Cancún Ministerial Conference, WTO members agreed to create a Cotton Sub-Committee to tackle the sector. *Poverty Reduction: Sectoral Initiative on Cotton (Wording of Paragraph 27 of the Revised Draft Cancún Ministerial Text, Communication from Benin to the WTO General Council),* WTO Doc. WT/GC/W/516 (7 October 2003) online: WTO Documents Online <http://docsonline.wto.org/> (date accessed 17 December 2006). See also WTO, "The Cotton Sub-Committee," online: WTO <http://www.wto.org/english/tratop_e/agric_e/ cotton_subcommittee_e.htm> (date accessed 17 May 2007).

governments and international organizations to adopt new binding international rules to eliminate fishing subsidies that contribute to over fishing.[551]

These examples of informal lobbying appear to represent the most significant modes of participation of non-state actors in comparison with other official channels of participation.

d- Formal mechanisms at national level

The constitutional or statutory systems in place at national level may provide opportunities for participation of NGOs, private parties and interest groups, in addition to legislative bodies, in WTO negotiations.[552] Furthermore, some members invite NGO representatives to participate as members of their national delegation in Ministerial Conferences, as well as other WTO meetings.[553] The WTO agreements do not recommend or require creation of any mechanisms for consultation at the national level; the issue is left to the discretion of each member. It is thus conceivable that the level of consultation and non-state actor involvement in formulation of positions in the WTO will depend on the level of democracy in members, which may provide for parliamentary representation or more direct consultation channels,[554] and may even start before accession to the organization.[555]

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[551] *World Trade Report 2007*, *supra* note 483 at 337 and 341. See, *e.g.* Information on an open forum organized on this subject by the International Centre for Trade and Sustainable Development (ICTSD) on 11 May 2006. ICTSD, "Development and Sustainability in the WTO Fishery Subsidies Negotiations: Issues and Alternatives", online: ICTSD <http://www.ictsd.org/dlogue/2006-05-11/2006-05-11-desc.htm> (last updated on 7 July 2006).

[552] J.H. Jackson, & A.O. Sykes, "Introduction and Overview" in Jackson & Sykes, *Implementing the Uruguay Round, supra* note 230 at 6 [hereinafter Jackson & Sykes, "Introduction"].

[553] Marceau & Pedersen, *supra* 466 note at 7.

[554] *E.g.* the Task Force on WTO Agreement on Agriculture (Re)negotiations (TF-WAR) in the Philippines sets up a transparent and participatory process beyond being merely informative or consultative which "resulted in positions and evaluations that fully reflect the concerns and ambitions of stakeholders with full confirmation by the government." D.S. Baracol, "Philippines: Stakeholder Participation in Agricultural Policy Formation" in P. Gallagher, P. Low, & A.L. Stoler, eds., *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge University Press, 2005) 486 at 500-501. By contrast, in Botswana, consultations are conducted on an ad hoc basis and only involve business and industry associations and research institutions. But these ad hoc consultations do not generate much interest among business associations. K.K. Mbekeani, "Inter-Agency Policy Co-ordination in Botswana" in Gallagher, Low, & Stoler, eds., *ibid.* 95 at 102. Similarly, in Venezuela, where a similar formal mechanism is not in place many problems persist and it is recommended that formal channels of communication have to be created. R. Giacalone, & E. Porcarelli, "Public and Private Participation in Agricultural Negotiations: the Experience of Venezuela" in Gallagher, Low, & Stoler, eds., *ibid.* 607 at 618. But even within informal systems of consultation experiences of different countries and different sectors can be very different. For

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2- Non-state actors in enforcement and monitoring of WTO law

Some of the mechanisms for participation non-state actors in creation and modification of WTO norms also apply to enforcement and monitoring of WTO law. For instance the mechanism for consultations can also be related to enforcement issues. In this section I will present a few additional mechanisms which are unique to participation in enforcement of WTO law.

After reviewing the WTO provisions directed at non-state actors and analyzing the views of different international economic law scholars on the issue of domestic application of the WTO rules, I will focus on the practice of two members of the WTO, namely the European Union and the United States. These cases are selected because of the elaborate mechanisms which are in place in the European Union and United States, as well as their importance in the world trading system.

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instance in France the agricultural lobbying is vocal and "better organized and more efficient than other sectors," but industrial and services sectors are not good at trade lobbying. NGOs on the other hand "in France are considered influential on policy-making [and] bring in experience on the ground, especially on the development dimension." Paugam observes that "French authorities thus hold regular meetings with 'civil society', associating NGOs, businesses, trade unions and members of Parliament in trade negotiations. Business lobbies deplore the fact that an indiscriminate process grants disproportionate influence to NGOs. 'Businesses make trade, not NGOs.'" J.-M. Paugam "The Road to Cancún: the French Decision-Making Process and WTO Negotiations" in Gallagher, Low, & Stoler, eds., *ibid.* 201 at 205-208. In the context of trade in services negotiations, Uruguay private-sector agents and civil society representatives sought to improve communication channels with the government and claimed that effective participation in the decision-making process requires involvement in the "daily strategic decision-making process." But the government and private-sector held contrasting views on institutionalizing consultations and participation. S. Salvador, & P. Azar, "Uruguay in the Services Negotiations: Strategy and Challenges" in Gallagher, Low, & Stoler, eds., *ibid.* 577 at 584-585; In another case in Pakistan, the proactive engagement on the part of the public and private sectors helped temporarily resolve issues emanating from import restrictions imposed by the EC. See A. Muhammed, & W.H. Pirzada, "Pakistan: The Consequences of a Change in the EC Rice Regime" in Gallagher, Low, & Stoler, eds., *ibid.* 473.

[555] *E.g.* in case of Nepal's accession to the WTO NGOs played an advocacy role in helping the public understand the debate over accession and positively influenced the public opinion towards the WTO. P.R. Rajkarnikar, "Nepal: The Role of an NGO in Support of Accession" in Gallagher, Low, & Stoler, eds., *ibid.* 420 at 428; or in Vanatu the manufacturers were against accession to the WTO, and NGOs' position, which was initially influenced by European NGOs, changed over time. D. Gay, "Vanuatu's Suspended Accession Bid: Second Thoughts?" in Gallagher, Low, & Stoler, eds., *ibid.* 590 at 597-598. Participation can also occur at the level of trading blocks. For instance, creation of the new Southern trade bloc of G20 also "involved intensive interaction between public and private domestic actors and between these actors and external players. P. da Motta Veiga, "Brazil and the G-20 Group of Developing Countries" in Gallagher, Low, & Stoler, eds., *ibid.* 109 at 110.

a- Enforcement of WTO rules: Indirect participation through member states

Non-state actors' participation in WTO activities is in most cases indirect, through influence upon member states at domestic level. In addition to the democratic means of public participation, certain member states have specific domestic mechanisms in place for public participation in policy-making or for public initiation of trade complaints at the WTO level and enforcement of obligations under the *WTO agreements*. The question is closely related to domestic implementation of international obligations and techniques adopted by governments to best fulfill their obligations under international treaties including the WTO agreements.

b- Provisions related to enforcement mechanisms or directed at private persons

A close examination of certain provisions of WTO agreements in this section demonstrates that the Uruguay Round negotiators have, indeed, envisaged certain "enforcement mechanisms that go well beyond the framework of classic interstate rights and obligations."[556] Article XVI:4 of the *WTO Agreement* states that

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

The *WTO Agreement* does not provide any further detail on modalities of application of WTO obligations at national level. However, there are a number of WTO provisions that refer to enforcement of obligations under the WTO agreements. Furthermore, WTO agreements include "numerous precise and unconditional guarantees of freedom, non-discrimination and private rights, such as the intellectual property rights protected in the [*TRIPS Agreement*] and the large number of guarantees of private access to *domestic courts*."[557]

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[556] C.D. Espósito, "International Trade and National Legal Orders: The Problem of Direct Applicability of WTO Law" in Mengozzi, ed., *supra* note 169, 429 at 448 [hereinafter Esposito, "International Trade & National Legal Orders"]. Article X is entitled "Publication and Administration of Trade Regulations." Paragraph 1 of that article also takes note of the interests of private enterprises and after providing for measures for publication of trade regulations states that

> The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the *legitimate commercial interests of particular enterprises, public or private*. [emphasis added]

[557] "Constitutionalism and International Organizations," *supra* note 42 at 419 [emphasis in original].

i- Article X:3 of GATT 1994

Article X of *GATT 1994* is entitled "Publication and Administration of Trade Regulations." This article reflects the principle of transparency,[558] and in paragraph 3 calls for a "uniform, impartial, and reasonable" administration of all the laws, regulations, judicial decisions and administrative rulings of general application covered by the article. Subsection b of this paragraph further states that

> [e]ach contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

ii- Article 13 of the Anti-Dumping Agreement

Article 13 of the *Anti-Dumping Agreement*[559] entitled "Judicial Review" states that

> [e]ach Member whose national legislation contains provisions on anti dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

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[558] *U.S. Cotton Appeal Report* takes note of this article and states that,

> Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance—that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures. We believe that the Panel here gave to Article X:2, *General Agreement*, an interpretation that is appropriately protective of the basic principle there projected.

Supra note 264 at Section IV. See also Espósito, "International Trade & National Legal Orders," *supra* note 558 at 442.

[559] *Supra* note 309.

iii- Article 23 of the Subsidies Agreement

Article 23 of the *Subsidies Agreement*[560] is identical in its title and first sentence to article 13 of the *Anti-Dumping Agreement*.[561] The only difference is found in the second sentence of the article, which is longer and reads as follows, "[s]uch tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review."[562] The Appellate Body has elaborated on this provision, stating that

> [b]ecause a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply to avoid uncertainty, unpredictability and unfairness concerning the rights of states and privates under the domestic laws in force when the *WTO Agreement* came into effect.[563]

iv- TRIPS Agreement

The role of private persons is more conspicuous in the *TRIPS Agreement*.[564] The preamble to this agreement recognized that "intellectual property rights are private rights."[565] In fact, the agreement is a reflection of "a common concern in the negotiations about the degree of protection that private parties may have at domestic levels."[566] Article

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[560] *Supra* note 186.

[561] Only, the reference to "anti-dumping measures" is replaced by "countervailing duty measures" and the reference to article 11 is replaced by article 21.

[562] *Subsidies Agreement,* art. 23. The Appellate Body in *Brazil—Measures Affecting Desiccated Coconut* elaborates on this subject and states that

> [a] decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary determination and a final determination. A positive final determination that subsidized imports are causing injury to a domestic industry authorizes the domestic authorities to impose a definitive countervailing duty on subsidized imports.

WTO Doc. AB/1996/4 [hereinafter *Brazil Coconut Appeal Report*]. *Ibid.* at IV.A.

[563] *Brazil Coconut Appeal Report*, *supra* note 562 at Part E.3.

[564] It is suggested that intellectual property lawmaking now operates in a complex, interactive dynamic at national and international levels, and that long-term credibility of the international system depends upon accommodating diversity of political economy as well as a diversity of substantive intellectual property strategies. G.B. Dinwoodie & R.C. Dreyfuss, "TRIPS and the Dynamics of Intellectual Property Lawmaking" (2004) 36 Case W. Res. J. Int'l L. 95.

[565] Generally see Part III of the *TRIPS Agreement,* arts. 41-61.

[566] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 447 [footnote omitted].

41 of the *TRIPS Agreement*, in particular, sets an elaborate list of actions to be taken by governments in these preserving private rights. According to this article,

> Members shall ensure that enforcement procedures […] are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.[567]

Accordingly, the *TRIPS Agreement* includes clear obligations to establish effective methods of civil, administrative and criminal protection of intellectual property rights.

v- Article 4 of the Agreement on Preshipment Inspections

The WTO assisted in the establishment of a dispute resolution system that is open to private parties. This mechanism, currently administered by the WTO, is provided for by the *Agreement on Preshipment Inspection*[568] According to article 4 of this agreement, disputes between preshipment inspection entities (PSIs) and exporters shall be administered by an "Independent Entity" to be constituted jointly by an organization representing PSIs and an organization representing exporters:[569]

> Members shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

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[567] Art. 41:1. Article 41 elaborates in detail on the requirements of the procedures concerning the enforcement of intellectual property rights. The procedure shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays; decisions on the merits of a case shall be in writing and reasoned, and made available at least to the parties to the proceeding without undue delay and shall be based only on evidence in respect of which parties were offered the opportunity to be heard. The article also requires that the parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases. It is understood that the agreement does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in the agreement creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general. *Ibid.*

[568] *WTO Agreement*, *supra* note 84, annex 1A,

[569] This "Independent Entity" was established by the WTO, the International Chamber of Commerce (representing exporters) and the International Federation of Inspection Agencies (representing PSIs). This body, which became operational on 1 May 1996, is formally considered a subsidiary body of the Council for Trade in Goods. Dunoff, "Debate over NGO Participation at the WTO," *supra* note 198 at 452.

> (a) these procedures shall be administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this Agreement;
>
> (b) the independent entity referred to in subparagraph (a) shall establish a list of experts as follows:
>
> (i) a section of members nominated by an organization representing preshipment inspection entities;
>
> (ii) a section of members nominated by an organization representing exporters;
>
> (iii) a section of independent trade experts, nominated by the independent entity referred to in subparagraph (a) […][570]

The *Agreement on Preshipment Inspection* agreement sets out the procedure of settlement of disputes according to which exporters and PSIs can request the formation of a panel to settle disputes and file written submissions or make oral representations to the panel.[571]

c- For and against direct applicability of the WTO Law

While national and international rules and organizations are developed to coordinate the functioning of the current international order, there is no constitutional theory at international level to guide the relationship between the national and international rules and organizations.[572] The result is that implementation of international accords remains a matter of constitutional processes at the national level. In the "context of plurality of legal orders," states have the authority to decide the mode for implementation of international law including international trade law and "almost all the

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[570] *Agreement on Preshipment Inspection*, art. 4.

[571] *Agreement on Preshipment Inspection,* arts. 4:c-4:h. See "Debate over NGO Participation at the WTO," *supra* note 441 at 452. In addition to the above-mentioned provisions, article XX:2 of the *WTO Agreement on Government Procurement* can be interpreted as requiring direct applicability of WTO law in certain circumstances. *Supra* note 125. This article requires each member country to "provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest." *Ibid*. See "Constitutionalism and International Organizations," *supra* note 42 at 419.

[572] Petersmann, "Constitutionalism and International Organizations," *supra* note 42 at 407. "Should individual citizens be entitled to invoke and enforce international guarantees of freedom and non-discrimination (such as those in GATT/WTO and EC law) in domestic courts? Neither constitutional theories nor the constitutional traditions in various countries of the world seem to offer clear answers to these questions." *Ibid.* at 408. The plurality of legal orders raises several issues and has several consequences, including—apart from the question of the status of international law in domestic legal system and its impact on the level of compliance with international obligations—the influence of different domestic constitutional structures on the negotiation of international agreements, and consequences of

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major trade powers adopt a negative enforcement solution in relation to private parties."[573] The question of standing of private parties to enforce international accords is also related to the design of domestic legal system for implementation of international obligations.[574]

Nonetheless, according to the *Vienna Convention*, "[e]very treaty in force is binding upon the parties and it must be performed by them in good faith" and "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." [575] Still, "[o]ne of the most important and challenging issues in international law is the manner in which we address the relationship between the individual and the international legal system" and "the concept of direct effect of international economic law carries great significance in the development of th[is] relationship […]."[576]

Treaties can be viewed in two broad categories: treaties directed exclusively to states and those directed to both states and individuals. Disarmament treaties provide an example of the former. Many human rights treaties are examples of the latter. Some treaties of this latter category are self-executing. In addition to the subject of the treaty, the wording and purpose of the provisions assist us in determining the role of individuals in enforcing the rights and obligations provided by the agreement.[577] The *WTO Agreement* is not the type of treaty that is directed exclusively to states.

'subsidiarity' and 'federalism' for international economic order and standing of private parties to enforce international accords. Jackson & Sykes, "Introduction," *supra* note 552 at 2.

[573] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 467. That is, use of punitive measures or sanctions. Moreover, states can also use other enforcement solutions including "reciprocity, respect for the constitutional allocation of power between governments and parliaments, the principle of equilibrium in the balance of rights and obligations in international trade relations, and the possible detrimental effects of granting direct applicability." *Ibid.* [footnotes omitted]. Petersmann, however, argues that principle of reciprocity is relevant to bilateral frameworks. "Application of GATT by the Court of Justice of the European Communities" (1983) 20 C.M.L. Rev. 397 at 433.

[574] The question is to a great extent related to adjudication and dispute settlement at national level, but from an international standpoint it is a mechanism for implementation by non-state actor, and is therefore studied in this section rather than the next section.

[575] Articles 26 and 27. See *supra* note 327.

[576] Brand, "Direct Effect of International Economic Law," *supra* note 586 at 608.

[577] See T. Burgenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law" (1992) 235 Rec. des Cours 303 at 338-340.

The *WTO agreement*, in *general*, does not require the member states to establish methods of direct application of international trade law.[578] However, as was demonstrated in the previous section, there are exceptions to this general rule, and certain norms or provisions are capable of being directly applied.[579]

On the other hand, individuals are the ultimate beneficiaries of trade agreements, and "once directly applicable norms have been established by States, […] the legitimate expectations of the private parties should be taken seriously by their domestic legal orders."[580] As Professor Hilf has noted

> [p]erhaps like the European Community, the WTO should be understood as a system serving in the last resort not only its Members, but mainly the individual operators in the markets, who by their use of economic freedoms bring the abstract rules into application.[581]

Other scholars, like Petersmann, go as far as calling for individuals to be allowed to bring cases before domestic courts relying on the WTO agreements.[582] He argues that "[p]olitical theory and historical experience (e.g. in the context of EC law and the European Convention of Human Rights), confirm that granting actionable rights to self-interested citizens offers the most effective incentives for self-enforcing liberal constitutions. For a variety of reasons, periodically elected governments cannot act as neutral maximizers of the *public interests.*"[583]

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[578] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 433.

[579] *Ibid*.

[580] *Ibid.* at 436.

[581] "New Frontiers in International Trade: The Role of National Courts in International Trade Relations" (1997) 18 Mich. J. Int'l L. 321 at 356.

[582] E.-U., Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Boston: Kluwer Law International, 1997) at 8 [hereinafter Petersmann, *GATT/WTO Dispute Settlement System*]. Other writers have also found this idea useful. See P.J. Kuijper, "The New WTO Dispute Settlement System: The Impact on the European Community" (1995) 29 J. World T. 49 [hereinafter Kuijper, "New WTO Dispute Settlement"]; P.J. Kuijper, "The Conclusion and Implementation of the Uruguay Round Results by the European Community" (1995) 6 Eur. J. Int'l L. 222; P. Lee, & B. Kennedy, "The Potential Direct Effect of GATT 1994 in European Community Law" (1996) 30 J. World T. 67.

[583] Petersmann, *GATT/WTO Dispute Settlement System, supra* note 582 at 8 and "Constitutionalism and International Organizations," *supra* note 42 at 406 [emphasis in original]. Petersmann claims that "[e]mpirical research into the relationship between economic freedom and economic growth of 102 countries over the period 1975-1995 has confirmed that the more economic freedom a country has had, the more economic growth it has achieved and the richer its citizens have become." See "Constitutionalism and International Organizations," *supra* note 42 at 407; See also J. Gwartney et al., *Economic Freedom of the World: 1975-1995* (1996) cited in *ibid. Contra* C.D. Espósito, "The Role of the European Court of Justice

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A number of different approaches to this question, notably in the United States and the European Union are surveyed below:

i- U.S. Law

In general, article VI of the U.S. Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[584] Furthermore, in case of conflict between a treaty and a statute, the rule *lex posterior derogat priori*[585] applies.[586] In the absence of conflicting treaty legislation and implementing legislation, treaty rules are applied only if the provision in question is self-executing.[587]

On the other hand, according to U.S. constitutional law, Congress has the power to restrict or completely prohibit foreign trade.[588] U.S. foreign trade legislation in general does not render international trade agreements self-executing.[589]

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in the Direct Applicability and Direct Effect of WTO Law, with a Dantesque Metaphor" (1998) 16:1 Berkeley J. Int'l L. 138 at 150-151 [hereinafter Esposito, "ECJ and Direct Effect of WTO Law"].

[584] U.S. Const. art. VI, cl. 2.

[585] The later in time prevails.

[586] See R.A., Brand, "Direct Effect of International Economic Law in the United States and the European Union" (1996/97) 17 Nw J. Int'l L. & Bus. 556 at 560 [hereinafter, Brand, "Direct Effect of International Economic Law"]. This rule was enunciated by the Supreme Court. See *Head Money Cases*, 112 U.S. 580, 598-99 (18840, *Whitney* v. *Robertson,* 124 U.S. 190 (1888), *Diggs* v. *Shultz*, 470 F.2d 461 (D.C. Cir. 1972) *cert. Denied*, 411 U.S. 931 (1973); cited in Brand, *ibid.* at 560, note 18.

[587] According to the U.S. Supreme Court jurisprudence a treaty is self-executing when it "operates itself without aid of any legislative provision" (*Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), and "whenever its provisions prescribe a rule by which the rights of private citizen or subject may be determined" (*Head Money Cases*, 112 U.S. at 598-99). See "Direct Effect of International Economic Law," *supra* note 586 at 561, notes 20-21.

[588] This interpretation of the commerce clause in article I:8:3 of the U.S. Constitution is affirmed by jurisprudence. The U.S. Supreme Court has decided, "that no one has a vested right to trade with foreign nations." *Buttfield* v. *Stranahan,* 192 U.S. 470, 493, cited in Petersmann, "National Constitutions and IEL" *supra* note 1182 at 14 footnote 16. The above-quoted phrase from this decision is repeated, out of context according to Petersmann, in subsequent decisions of the U.S. courts. Petersmann, *ibid.* See also *Arjay Associates Inc.* v. *Bush*, 891 F.2d 891, 898 (Fed. Cir. 1989) cited in Petersmann, *ibid.* at 15 footnote 17.

[589] "Constitutionalism and International Organizations," *supra* note 42 at 416. See the *Trade Agreements Act of 1979*, which made clear that the implementation of the Tokyo Round agreements, would not allow any provision of those agreements prevail over U.S. laws. See U.S.C. s. 2504, Pub. L. No. 96-39, Sec. 3(1), 93 Stat. 144, 148. *The United States-Canada Free Trade Agreement Implementation Act* while clearly stating "[n]o provision of the Agreement, nor the application of any such provisions to any person or circumstance, which is in conflict with any law of the United States shall have effect," provides that the provisions of the Agreement prevail over any conflicting state law. See Publ. L. No. 100-449, s. 102, 102 Stat. 1851, 1853 (1988). The *North American Free Trade Agreement Implementation Act*, has similar provisions, but clearly excludes private persons from challenging conflicting state laws and removed any

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In the same vein, even though some earlier court decisions indicated a basis for direct effect of *GATT 1947* provisions,[590] the *Uruguay Round Agreements Act of 1994*[591] does not allow direct applicability of the provisions of the *WTO Agreements*, and stipulates that private parties cannot use the provisions of the Uruguay Round Agreements to challenge any federal or state law.[592] It further states that no other person except the U.S. "shall have any cause of action or defense under any of the Uruguay Round Agreements."[593] It also envisages that the agreements cannot be used to challenge "any action or inaction of the United States, any state, or any political subdivision of a state on the ground that such action or inaction is inconsistent"[594] with WTO law.[595]

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direct effect of NAFTA. See 19 U.S.C. s. 3312 (Supp. 1996), Pub. L. No. 103-182, s. 102, 107 Stat. 2057 (1992).

[590] There was no similar act for implementing the WTO's predecessor, and the U.S. entered *GATT 1947* through executive agreement. See R.A. Brand, "The Status of the General Agreement on Tariffs and Trade in United States Domestic Law" (1990) 26 Stanford J. Int'l L. 479 [hereinafter Brand, "The Status of GATT in the U.S."]. Several court decisions implied self-executing status for *GATT 1947* provisions, and in certain cases the issue was avoided. Federal court decisions regarding *GATT 1947* provisions consistently rejected arguments that challenged legislation violated *GATT 1947* obligations, and thus implicitly recognized the self-executing status of *GATT 1947* provisions. See *e.g. Farr Man & Co.* v. *United States,* 544 F. Supp. 908 (Ct. Int'l Trade 1982); *U.S. Cane Sugar Refiners' Association* v. *Block*, 683 F.2d 399 (C.C.P.A. 1982); *Michelin Tire Corp.* v. *United States*, 2 Ct. Int'l Trade 143 (1981); *American Express Co.* v. *United States*, 472 F.2d 1050, 1059 n. 14 (C.C.P.A. 1973); *Regiomontana* v. *United States,* 64 F.3d 1579 (Fed. Cir. 1995); *China Liquor Distrib. Co.* v. *United States,* 343 F.2d 1005 (C.C.P.A. 1964), *cert. Denied,* 380 U.S. 962 (1965); *Bercut-Vandervoort* v. *United States,* 151 F. Supp. 942 (C.C.P.A. 1957), 46 C.C.P.A. 28 (1958), *cert. Denied*, 359 U.S. 953 (1959); *Schieffelin & Co.* v. *United States,* 424 F.2d 1396 (C.C.P.A) *cert. denied*, 400 U.S. 896 (1970); *United States* v. *Star Industries*, 462 F.2d 557 (C.C.P.A. 1972) cited in "Direct Effect of International Economic Law," *supra* note 586 at 564 note 43, 44 and 47. For more details see Brand, *ibid*. R. Hudec, "The Legal Status of GATT in the Domestic Law of the United Sates" in M. Hilf, F.G. Jacobs, E.-U. Petersmann, eds., *The European Community and GATT* (Deventer: Kluwer, 1986) 187 [hereinafter Hudec, "Legal Status of GATT in the U.S."]. J.H. Jackson, "The General Agreement on Tariffs and Trade in United States Domestic Law" (1967) 66 Mich. L. Rev. 250.

[591] 19 U.S.C. s. 3512, Pub. L. No 103-465, 108 Stat. 4809 [hereinafter *URAA*].

[592] According to this act

> No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

Section 102, URAA, 19 U.S.C. s. 3512.

[593] Section 102, URAA, 19 U.S.C. s. 3512.

[594] Section 102:c:1, URAA, 19 U.S.C. s. 3512(c)(1). It further states that

> Nothing in this Act shall be construed
> (A) to amend or modify any law of the United States, including any law relating to the protection of human, animal, or plant life or health,
> (i) the protection of the environment, or
> (ii) worker safety, or

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On the other hand there are administrative mechanisms of enforcement. According to section 301 of the *Trade Act of 1974*,[596] individuals can file a petition with the U.S. Trade Representative requesting that action be taken where U.S. rights under a trade agreement are allegedly being violated.

Apparent contradiction with article 23 of the *DSU*—which has limited the discretionary powers of member states to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements"[597]— has led some to believe that section 301 is no longer valid after the *WTO Agreements* entered into force.[598] But the *Uruguay Round Agreement Act (URAA)* does not support that view.[599] However, the timetable in section 301 is adapted to the WTO dispute settlement timetable, in order to allow the U.S. Trade Representative to await the results of the WTO dispute settlement system before deciding on the imposition of sanctions.[600] It should be noted that section 301 does not fully empower private persons in the U.S. domestic system. The mechanism envisaged under section 301 is only a one-way mechanism intended for opening the foreign markets to American experts and defending them against unfair trade practices of foreign governments.[601] Accordingly, even though section 301 does provide a level of protection to private persons in certain cases, it is not intended to

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(B) to limit any authority conferred under any law of the United States including section 301 of the Trade Act of 1974, unless specifically provided for in this Act.

Section 102:a:2, *ibid.*

[595] The *Statement of Administrative Action* accompanying the Uruguay Round Agreements Act reinforced the no-direct-effect statements in the Act, as it specifies that "[i]f there is a conflict between U.S. law and any of the Uruguay agreements, section 102(1) of the implementing bill makes clear that U.S. law will take precedence. See the *Uruguay Round Agreements Act Statement of Administrative Action*, 103d Cong. 2d Sess., H. Doc. 103-316, vol. I, 659 (1994) cited in "Direct Effect of International Economic Law," *supra* note 586 at 571 note 76.

[596] 19 U.S.C. 2411 (1974).

[597] *DSU,* art. 23.

[598] A.L. Pucket & W.L. Reynolds, "Current Developments: Rules, Sanctions and Enforcement Under Section 301: At odds with the WTO" (1996) 90 Am. J. Int'l L. 675 at 675-676.

[599] See Section 102:a:2:B of the URAA, *supra* note 594.

[600] D.W. Leebron, "An Overview of the Uruguay Round Results" (1995) 34 Colum. J. Transnat'l L. 11 at 17 [hereinafter Leebron, "Overview of the Uruguay Round"].

[601] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 456.

grant general protection to private persons.[602] In any event much in the procedures under section 301 depends on the discretionary powers of the administration.[603]

The role of U.S. Courts in the application of the WTO rules has been almost negligible.[604] In addition to the obstacles caused by the statutes of implementation of international trade law, the question is related to the unclear role of the courts with regard to foreign affairs in view of the role of President and Congress in the matter.[605] It can be concluded that disputes over the consistency of U.S. laws and regulations with the international obligations under the WTO are more likely resolved at the international level rather than before domestic U.S. courts.[606]

As for disputes involving the U.S. in the WTO dispute settlement system, the *URAA* prescribes transparent handling of disputes in close consultation with Congressional committees, private sector and NGOs.[607]

It is interesting to point out that legislation introduced by Senator Dole in 1995, entitled *WTO Dispute Settlement Review Commission Act,*[608] among others proposed that economic interests chosen by the U.S. Trade Representative be permitted to have access to WTO proceedings, and required the U.S. Trade Representative to allow them to

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[602] Leebron, "Implementation of the Uruguay Round in the United States" in Jackson & Sykes, *Implementing the Uruguay Round* (Oxford: Oxford University Press, 1997) 175 at 176 [hereinafter Leebron, "Implementation of the Uruguay Round in the U.S."].

[603] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 456. See also T.W. Walsh, "Dispute Settlement at the World trade Organization: Do Municipal Laws Promoting Private Party Identification of Trade Disputes Affect State participation?" (2006) 40:5 J. World Trade 889 at 896.

[604] *Contra* see Brand, *supra* note 576.

[605] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 457.

[606] "Constitutionalism and International Organizations," *supra* note 42 at 417; Walsh, *supra* note 603 at 897.

[607] According to the *URAA*,

> In General.—Whenever the United States is a party before a dispute settlement panel established pursuant to Article 6 of the Dispute Settlement Understanding, the Trade Representative shall, at each stage of the proceeding before the panel or the Appellate Body, consult with the appropriate congressional committees, the petitioner (if any) under section 302(a) of the Trade Act of 1974 (19 U.S.C. 2412) with respect to the matter that is the subject of the proceeding, and relevant private sector advisory committees established under section 135 of the Trade Act of 1974 (19 U.S.C. 2155), and shall consider the views of representatives of appropriate interested private sector and nongovernmental organizations concerning the matter.

Section 127, 19 U.S.C. 3537.

[608] Petersmann, *GATT/WTO Dispute Settlement System, supra* note 582 at 245; G.N. Horlick "WTO Dispute Settlement and the Dole Commission" (1995) 29 J. World T. 45-48.

participate in the formulation of the U.S. position, and under certain circumstances, to appear before the panel.[609]

ii- European Union

For an in depth analysis of direct applicability of the *WTO Agreements* in the EU, the *Treaty Establishing the European Economic Community*[610] should be examined. According to article 228 of the *EC Treaty*, "[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States."[611] But this article does not regulate the question of incorporation. This lack of clarity in the *EC Treaty* has led to the conclusion that "directly effective Community legislation can be invoked by individuals; international agreements, on the other hand, may lack such effect."[612] It should be noted that the doctrine of the direct effect of Community law was an outcome of the judicial decisions of the ECJ,[613] and that

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[609] This legislation, drafted with the goal of assuring that U.S. sovereignty will be protected within WTO, provided that when a WTO dispute settlement decision finds the U.S. in violation of its WTO obligations. Such decision will be abided by only after a domestic implementation process controlled by Congress, and subject to review of a Commission consisting of federal appeals court judges. Under certain circumstances, the "WTO Dispute Settlement Review Commission" could lead Congress to direct the President to undertake negotiations to modify the WTO dispute settlement rules. Following three such instances, within a 5-year period, Congress could require the U.S.'s withdrawal from the WTO. The introduction of this process was part of the deal struck by the Clinton administration to gain support of Senator Dole's essential support for the *URAA*. See Horlick, *Ibid.*

[610] 25 March 1957, 298 U.N.T.S. 11 [hereinafter the *EC Treaty*].

[611] *EC Treaty, ibid.* art. 228:7. The ECJ has interpreted this obligation to the effect that international agreements concluded by the EC become and integral part of the Community legal system with legal primacy over secondary EC law. See "Constitutionalism and International Organizations," *supra* note 42 at 420.

[612] C.D. Ehlermann, "Application of GATT Rules in the EC" in M. Hilf et al., eds., *The European Community and GATT* (Boston: Kluwer, 1986) 127 at 134. See also Espósito, "International Trade & National Legal Orders," *supra* note 558 at 461. The ECJ has confirmed this view in *Hauptzollamt Mainz* v. *C.A. Kupferberg & Cie,* Judgment of 26 October 1982, case 104/81, [1982] E.C.R. 3641. *Contra* A. Hagelüken, *The Impact of EC Law and WTO Law on Domestic Law: A Critical Analysis of The Case Law of The European Court of Justice* (LL.M. Thesis, McGill University, Institute of Comparative Law, 1998) [unpublished] at 87. Generally see also Van den Bossche, L.H., "The European Community and the Uruguay Round" in Jackson & Sykes, *Implementing the Uruguay Round* (Oxford: Oxford University Press, 1997) 23.

[613] It began in 1963 with the famous European case of *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen,* case 26/62 [1963] E.C.R. 12. For our purposes it is important to underscore that the ECJ noted that in order to determine whether national courts must protect rights emanating from the Treaty, it is "necessary to consider the spirit, the general scheme and the wording of those provision." *Ibid.* Thus in examining article 12 of the *EC Treaty*, which states that "Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each

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the ECJ has allowed direct effect with certain international agreements.[614] It is "difficult to draw from the case law of the [ECJ] any clear tests applicable to direct effect questions that might arise in future cases involving international agreements of the Community."[615]

When it comes to *GATT 1947*, the ECJ rejected direct applicability of that agreement in a leading case in 1972.[616] Subsequent cases have consistently denied the direct applicability of *GATT 1947*,[617] and the ECJ expressly stated that *GATT 1947* does "not contain provisions of such a nature as to confer rights on individuals which they could rely on before national courts in order to challenge the application of conflicting national provisions."[618]

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other," the Court held that "it must be interpreted as producing direct effects and creating individual rights which national courts must protect." *Ibid.* Subsequent cases have expanded the concept of direct applicability of the *EC Treaty* to other articles of that treaty. See *Lüttck* v. *Hauptzollamt Saarlouis*, 1966 E.C.R. 205, [1971] 10 C.M.L.R. 674, *Costa* v. *Enel* case 6/64 1964 E.C.R. 585 [1964] 3 C.M.L.R. 425 cited in Brand, "Direct Effect of IEL" *supra* note 586 at 573 note 88.

[614] See *Bresciani* v. *Amministrazione Italiana delle Finanze*, case 87/75 [1976] E.C.R. 129, (1976) 2 C.M.L.R. 62, in which the violation of the *EC Treaty* and the *Yaoundé Convention* were in question. The ECJ, implicitly distinguished the *Yaoundé Convention* from the GATT in that the former was negotiated and concluded under article 228 of the *EC Treaty*, made reference to article 13 of the *EC Treaty* and used a precise language. Brand, "Direct Effect of IEL" *supra* note 586 at 583. See also Espósito, "International Trade & National Legal Orders," *supra* note 558 at 463. More examples can be found in Brand, *ibid.* at 585-591, and P. Pescatore, "Treaty-Making in the European Communities" in Jacobs, & Roberts, eds., *supra* note 867, 171 at 184-188. Pescatore, himself a former Judge at the ECJ, notes that "the case-law of the Court is in a state of profound and seemingly hopeless confusion as far as the problem of direct applicability of treaties is concerned." *Ibid.* at 184.

[615] Brand, "Direct Effect of IEL" *supra* note 586 at 591.

[616] See *International Fruit Company and others* v. *Producktschap voor Groenten en Fruit,* cases 21-24/72 [1972] E.C.R. 1219 at 1227. *Contra* Hagelüken*, ibid.* at 90. Earlier cases had mentioned the GATT without addressing the issue of direct applicability. See *e.g. Interfood GmbH* v. *Hauptzollamt Hamburg-Ericus,* 1972 E.C.R. 2442, [1973] C.M.L.R. 562, 576.

[617] See *Carl Schlüter* v. *Haupzollamt Lörrach*, case 9/73 [1973] E.C.R. 1135; *Nederlandse Spoorwegen* v. *Inspecteur der invoeerrechten en accijnzen*, case 38/75 [1975] E.C.R. 1439; *Società Italiana per l'Oleodotto Transalpino (SIOT)* v. *Ministerio delle Finanze dello Stato*, case 266/81 [1983] E.C.R. 731; *Amministrazione delle Finanze dello Stato* v. *Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI),* cases 267-269/81 [1983] E.C.R. 801; *Compagnia Singer SpA and Geigy SpA* v. *Amministrazione delle Finanze dello Stato,* cases 290-291/81 [1983] E.C.R. 847; *Germany* v. *Council,* case C-280/93 [1994] E.C.R. I-4973.

[618] *Amministrazione delle Finanze dello Stato* v. *Chiquita Italia SpA*, case C-469/93 [1995] E.C.R. I-4533. Exceptions to this case law are the cases in which the EC intends to implement a particular obligation provided by GATT law, and cases in which a Community act makes express reference to a particular GATT provision. On the former see *Feidol III* case, *supra* note 631; on the latter see *Nakajima All Precision Co. Ltd.* v. *Council,* case C-69/89 [1991] E.C.R. I-2069. The *Fiedol III* holding "may be limited to the interpretation of GATT provisions specifically incorporated in a Community regulation for purposes of considering the measures of another contracting party to the GATT." Brand, "Direct Effect of IEL" *supra* note 586 at 581.

But after the conclusion and implementation of the Uruguay Round Agreements, the question resurfaced again. In its *Decision of 22 December 1994 on the conclusion, on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986-1994)*,[619] however, the Council of the EU inserted a preambular clause stating that the WTO Agreements could not be invoked directly before the courts of the European Community or its member states.[620] But given the examples of WTO provisions that require guarantees for private access to domestic courts,[621] "the reference to the 'nature' of the WTO Agreements is no convincing reason for preventing EC citizens from invoking precise and unconditional WTO rules before domestic courts."[622]

Furthermore, the case law of ECJ appears to create some confusion and uncertainty: "The ambiguity with which the Court criticized the GATT in *International Fruit*, combined with the Court's decisions finding directly effective provisions in other international agreements of the Community, seems to leave European direct effects jurisprudence as flexible as the GATT system it considers."[623]

Accordingly, divergent views have been expressed regarding direct applicability of provisions of the WTO agreements. This thesis does not intend to enter into a detailed study of precise state of European Community law. However, it has to be noted that some scholars support direct applicability of some GATT/WTO rules,[624] while others are

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[619] Official Journal L 36/1, 23 December 1994.

[620] According to this declaration

> [w]hereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.

Ibid. This declaration is justified on the basis of the other major trading partners of the EU's—notably the U.S.'s—refusal of direct applicability of the WTO rules. See Kuijper, "New WTO Dispute Settlement," *supra* note 582 at 64.

[621] Section 2:b, above.

[622] "Constitutionalism and International Organizations," *supra* note 42 at 419.

[623] "Direct Effect of International Economic Law," *supra* note 586 at 599 [footnote omitted]. For a critique of the ECJ jurisprudence in this area see Petersmann, "National Constitutions and IEL" *supra* note 1182 at 30.

[624] See *e.g.* K.J. Kuilwijk, *The European Court of Justice and The GATT Dilemma: Public Interest versus Individual Rights?* (Beuningen: Nexed Editions, 1996); Petersmann, *GATT/WTO Dispute Settlement System, supra* note 582; P. Mengozzi, "Les droit des citoyens de l'Union européenne et l'applicabilité directe des accords de Marrakech" (1994) Revue du Marché Unique Européen 165 ; M.H. Hahn, & G.

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arguing for non-direct applicability of those rules.[625] The arguments for direct application generally take note of the fact that the WTO system is more rule-oriented than its predecessor, that GATT rules are sufficiently precise, and that WTO obligations, given the strengthened dispute settlement system, are more difficult to derogate from.[626] The opponents of direct application, on the other hand, base their arguments on the intentions of EU members and European Communities institutions, and the position of U.S. and Japanese law on the issue.[627]

On the other hand, in the EU, as in the U.S., an administrative mechanism provides private parties right to be heard in certain cases of illegal trade practices with third countries. With its *Trade Barriers Regulation*[628] the Council of the EU improved the system by allowing private persons to complain along with member states and the private sectors (European industries).[629] Unlike section 301, the *Trade Barriers Regulation* does not provide for retaliatory sanction and expressly provides that the action taken under its authority must be in accordance with international law.[630] However, similar to section 301, the *Trade Barriers Regulation* only provides for private persons to target the illegal

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Schuster, "Le droit des états membres de se prévaloir en justice d'un accord liant la Communauté" (1995) 100 Rev. D.I.P. 367.

[625] See *e.g.* Kuijper, "New WTO Dispute Settlement," *supra* note 582.

[626] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 464; see also Kuilwijk, *supra* note 624.

[627] See *ibid*. at 465; Lee & Kennedy, *supra* note 582 at 87; and P. Eeckhout, "The Domestic Legal Status of the WTO Agreement: Interconnecting Legal System" (1997) 34 C.M.L. Rev. 11. The EC Council Decision on the conclusion of the Uruguay Round Agreements "shows a clear preference of the Council for maximizing its own trade policy powers," and that the foreign policy considerations are seen as more important than protecting the rights of EC citizens. "Constitutionalism and International Organizations," *supra* note 42 at 421.

[628] EC, *Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization*, [1994] O.J.L. 349/71 [hereinafter *Trade Barriers Regulation*]. This regulation replaced the *New Commercial Policy Instrument.* EEC, *Council Regulation 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices* [1984] O.J.L., L 252/1.

[629] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 459; Walsh, *supra* note 603 at 897.

[630] *Ibid.* For an overview of complaints treated by this mechanism during its first few years see N. McNelis, "Success for Private Complainants under the EU's Trade Barriers Regulation" (1999) 2 J. Int'l Econ. L. 519.

trade practices of members of the WTO, and the Commission has broad discretionary power in implementing the regulation.[631]

iii- Other cases

Other countries have also created comparable mechanisms for private enforcement of international trade rules. Canada and Japan for example have not established formal petitioning rights for their national for investigation of potential trade violations by foreign nations, but have informal mechanisms through their trade policy-making bodies.[632] Australia's WTO Disputes Investigation and Enforcement Mechanism or China's *Provisional Regulation for Investigation on Foreign Trade Barriers*, on the other hand have established formal mechanisms to handle petitions of private parties.[633]

d- Trade Policy Review Mechanism

The Trade Policy Review Mechanism (TPRM) is the WTO's mechanism for periodic examination of every member with respect to all policies and practices related to multilateral trade. According to the *TPRM*

> (i) The purpose of the Trade Policy Review Mechanism ("TPRM") is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements […] and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. [634]

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[631] But the Commission's discretion is more limited than what is provided for under section 301 in the U.S. system, because the European Court of Justice has jurisdiction to review the Commission's decisions regarding the regulation. See *Feidol III* case, in which the Court decided under the *New Commercial Policy Instrument*, that the Commission proceeded illegally. *Fédération de l'industrie de l'huilerie de la CEE (Fediol)* v. *Commission*, case 70/87 [1989] E.C.R. 1781.

[632] Walsh, *supra* note 603 at 905-906. See also H. Yamane, "The WTO Dispute Settlement Mechanism and Japanese Traders" (1998) 3 J. Int'l Econ. L. 683 (for Japan). There is no public right of action in Canada's free trade agreements including the WTO. Carmody, "Stay Tuned", *supra* note 654 at 2. See *World Trade Organization Agreement Implementation Act*, S.C. 1994, ch. 47, ss. 5-6.

[633] Walsh, *supra* note 603 at 899-907. See also A.K. Schneider, "Democracy and Dispute Resolution: Individual Rights in International Trade Organizations" (1998) 19 U. Penn. J. Int'l Econ. L. 587-638; A.K. Schneider, "Getting Along: the Evolution of Dispute Resolution Regimes in International Trade Organizations" (1999) 20 Mich. J. Int'l L. 697.

[634] *TPRM*, *supra* note 132, sec. A(i).

The TPRM, thus is a mechanism for collective review and evaluation of member's trade policies and their impact on the functioning of the multilateral trading system.[635] The *TPRM* further stipulates that reviews are conducted "against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment."[636] Within the WTO Secretariat, the Trade Policy Review Body (TPRB) conducts reviews on the basis of a policy statement by the Member under review and a report prepared by economists in the Secretariat's Trade Policy Review Division. The TPRB seeks the cooperation of the member in preparing its report.[637]

While TPRM has a great potential for participation of non-state actors and can benefit from "shadow reports" or information through non-governmental sources, it appears that non-state actors are not involved in the process.[638]

3- Non-state actors in WTO adjudication

The dispute settlement system of the WTO is one of the main features of its move towards a more rule-oriented system and does provide room for participation of non-state actors under certain circumstances. The questions of direct applicability of WTO rules at the national level and national mechanisms for triggering the WTO dispute settlement mechanism are also related to the discussion of non-state actor participation in the WTO's adjudication but were examined under enforcement of WTO rules at the national level. In

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[635] See also A. Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester: Manchester University Press. 1996), at chapter 5 (entitled "The Trade Policy Review Mechanism").

[636] *TPRM*, *supra* note 132, sec. A(ii).

[637] The reports of the TPRM

> consist of detailed chapters examining the trade policies and practices of the Member and describing trade policymaking institutions and the macroeconomic situation; these chapters are preceded by the Secretariat's Summary Observations, which summarize the report and presents the Secretariat's perspective on the Member's trade policies. The Secretariat report and the Member's policy statement are published after the review meeting, along with the minutes of the meeting and the text of the TPRB Chairperson's Concluding Remarks delivered at the conclusion of the meeting.

WTO, "Overseeing national trade policies: the TPRM" online: <http://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm> (date accessed 10 April 2008).

[638] TPRM, *Report of the Trade Policy Review Body for 2007*, WTO Doc. WT/TPR/213 (12 November 2007) online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 5 April 2008).

this section different possibilities for participation of non-state actors in the WTO adjudication are surveyed starting with the pre-WTO era.

a- Pre-WTO era

It is interesting to recall that the *Havana Charter*, at least in relation to dispute settlement related to restrictive business practices, envisaged the participation of private enterprises.[639] The *Charter* stipulated that members had to take measures to prevent, on the part of private or public commercial enterprises, "business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control."[640] It created an investigation procedure for "any affected Member on its own behalf or any Member on behalf of any affected person, enterprise or organization within that Member's jurisdiction."[641] The *ITO Charter (U.S. Proposal)* even envisaged direct access to the dispute settlement system for private persons.[642] The GATT, however, did not include any similar procedure and the dispute settlement system of the GATT was marked by its lack of transparency and access to the non-state actors.

b- Article 13:1 of the **DSU***: seeking information*

The *DSU* grants panels the authority to "seek information and technical advice from any individual or body which it deems appropriate."[643] In the *Hormones* case, the panel sought the scientific opinion of experts who, in their personal capacity, "as individual advisers to the Panel," [644] gave their opinion. This practice was approved by the Appellate Body.[645] However, article 13 does not elaborate on the value to be

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[639] See *Havana Charter*, *supra* note 104, arts. 46-48. See also Wilcox, *supra* note 450 at 109.

[640] *Havana Charter*, *supra* note 104, art. 46:1.

[641] *Havana Charter*, *supra* note 104, art. 48:1. See Wilcox, *supra* note 450 at 109.

[642] *Supra* note 453; Brown, *U.S. and Restoration of World Trade, supra* note 450at 106; Wilcox, *supra* note 450 at 106.

[643] Article 13:1 of the *DSU*. Article 13 of the *DSU* provides panels with the authority to seek the advice of experts to assist them in the determinations of disputes. Two mechanisms for obtaining expert advice are authorized by article 13 of the *DSU*: ad hoc advice from individual experts and expert review groups. Appendix 4 lays out the procedures for the establishment of expert review groups. In great part due to time constraints, panels have not utilized the option of expert review group and have opted to obtain advice from individual experts on an ad hoc basis. T.P. Stewart & A.A. Karpel, "Review of Dispute Settlement Understanding: Operation of Panels" 2000 Law & Pol Int'l Bus. 593 at 633.

[644] *Supra* note 254.

[645] See *EC Hormones Appeal Report*, *supra* note 256.

attributed to the expert opinions and it appears that panels have broad discretion to decide the weight they afford to expert opinions.[646]

c- Appellate Body's interpretation of article 13:1 of the DSU: amicus curiae *briefs*

From the early days of the WTO participation of non-state actors in the panel proceedings, the procedural vehicle of *amicus curiae* briefs was suggested as a solution for providing non-state actors with a voice in the proceedings.[647] It has to be noted that the concept of *amicus curiae* does not exist in all legal cultures, but is "embedded in the common law tradition."[648]

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[646] In *Shrimp-Turtle*, for example, the panel did not refer to expert opinions in its decision. *Shrimp-Turtle* Case, *supra* note 307 at paras. 7:0-7:65. In *Australia—Measures Concerning Importation of Salmon*, on the other hand, the panel cited the views of its experts throughout its report. WTO Doc. WT/DS18/R (12 June 1998) at paras. 8:1-8:184 (Panel Report), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006) [hereinafter *Salmon Panel Report*]. In *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* the panel faced a different question which was whether or not it must accept as determinative information provided by an expert. In this case the panel sought information from the IMF concerning the status of Turkey's balance of payments. The United States argued as the claimant that the panel must accept IMF determinations on matters of fact specified in article XV:2 of *GATT 1994*. India rejected this argument and contended that acceptance of the U.S. argument would allow the legal status of the matters specified in article XV:2 to be determined by the IMF. The panel declined to decide the issue of whether it was obliged to consult with the IMF, or to what extent it must accept IMF information as dispositive. Rather, the panel chose to accept the IMF's information, citing its authority under article 13 of the *DSU* to seek information from experts. The panel noted that, in conformity with GATT 1994, it had the responsibility of making an objective assessment of this information. WTO Doc. WT/DS90/R (6 April 1999) at paras. 5:11 and 5:13 (Panel Report), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006) [hereinafter *India Quantitative Restrictions Panel Report*]. The Appellate Body similarly declined to address the issue. Instead, the Appellate Body agreed with the panel's authority to consult with experts and stated the panel had performed its duty to make an objective assessment of the facts. *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* WTO Doc. WT/DS90/AB/R (23 August 1999) at para. 5:11 (Appellate Body Report), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 August 2006) [hereinafter *India Quantitative Restrictions Appeal Report*].

[647] M. Lukas, "The Role of Private Parties in the Enforcement of The Uruguay Round Agreements" (1995) 29:5 J. of World T. 181 at 205. According to Black's Law Dictionary, *amicus curiae* is "[a] person who is not a party of a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." *Black's Law Dictionary,* 8th ed. (St-Paul, Minn.: West, 2004) at 93.

[648] P. Ala'i, "Judicial Lobbying at the WTO: the Debate Over the Use of Amicus Curiae Briefs and the U.S. Experience" (2000) 24 Fordham Int'l L. J. 62 at 93. Ala'i also presents a brief survey of use of *amicus curiae* briefs at Common Law, as well as the U.S. Supreme Court experience with such submission. *Ibid.* at 84-93. See also, "Issues of amicus curiae submissions: Note by the Editors" (2000) 3:4 J. Int'l Econ. L. 701 at 704. According to the U.S. Supreme Court Rules "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matters not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." *Ibid.*

A very important development in the practice of the WTO's dispute settlement system is the Appellate Body's broad interpretation of article 13:1 of the *DSU* which has opened a door for NGO participation. As will be demonstrated in this section, the practice of accepting *amicus curiae* submissions in the WTO dispute settlement system has been quite controversial.

Briefly put,

> according to the Appellate Body, the panels' comprehensive authority to seek information from any relevant source (Article 13 of the DSU) and to add to or depart from the Working Procedures in Appendix 3 to the DSU (Article 12.1 of the DSU) permits panels to accept and consider or to reject information and advice, even if submitted in an unsolicited fashion.[649]

Until now only in a few instances have panels used their discretionary right and accepted and considered unsolicited briefs. The Appellate Body has also received unsolicited briefs directly from *amicus curiae.*[650] The Appellate Body maintains that

> it has the authority to accept and consider any information it considers pertinent and useful in deciding an appeal, including unsolicited amicus curiae submissions. The Appellate Body believes such a right flows from its broad authority to adopt procedural rules, provided they do not conflict with the DSU or the covered agreements (Article 17.9 of the DSU).[651]

The Appellate Body has never considered any unsolicited submission to be pertinent or useful, and thus, no unsolicited submissions have been considered. The important cases were *amicus curiae* submissions are made to panels and the Appellate Body, and differing views of members on this issue are presented below.

i- The Shrimp-Turtle *case*

In July 1997, the *Shrimp-Turtle* case[652]—a dispute related to a provision of the U.S. *Endangered Species Act*,[653] which prohibited imports into the U.S. of shrimp from countries that cause high rates of sea turtle mortality in harvesting shrimp—was brought

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[649] WTO, "Dispute Settlement System Training Module: Participation in Dispute Settlement Proceedings," online: WTO < http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e /c9s3p1_e.htm> (date accessed 12 January 2008) [hereinafter "Dispute Settlement System Training Module"].

[650] In cases where *amicus curiae* submissions were attached to the submission of a participant (appellant or appellee), the Appellate Body has considered the briefs to be an integral part of the submission of that participant. *Shrimp-Turtle Appeal Report, supra* note 332 at paras. 89 and 91.

[651] "Dispute Settlement System Training Module," *supra* note 649.

[652] *Shrimp-Turtle Panel Report, supra* note 307 (see also the accompanying text).

[653] Public Law 93-205, 16 U.S.C. 1531 *et seq*.

to a WTO panel. Two U.S.-based environmental NGOs submitted a brief to the panel including information on the six turtle species at issue.[654] The panel, arguing that "accepting non-requested information from non-governmental sources would be incompatible with the DSU as currently applied,"[655] and that "the initiative to seek information and to select the source of the information rests with the Panel,"[656] rejected the brief, but, allowed the U.S. to append the brief to its submission. At the appeal level, the Appellate Body had to deal with the issue of admissibility of NGO material submitted to the panel. The Appellate Body held that "a panel has the discretionary authority either to accept and consider or reject information and advice submitted to it, *whether requested by the panel or not*."[657] This interpretation was based on the term "to seek" in article 13:1 of the *DSU* as well as article 12:1 of the *DSU*. According to article 12:1 of the *DSU*, "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."[658] The panel's power to accept submissions, however, is discretionary.[659] As stated by the Appellate Body, "[i]f, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or brief, subject to such conditions as it deems appropriate."[660] Furthermore, it was stated that submissions could be made on issues of fact and law.[661] However, the discretion to receive unsolicited information from non-members did not include an obligation to take this information into account.[662]

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[654] See C. Carmody, "Stay Tuned: Public Participation in WTO Dispute Settlement" (2001) 4 Can. Int'l Lawyer (2001) 125 at 129 [hereinafter Carmody, "Stay Tuned"] and A.E. Appleton, "*Amicus Curiae* Submissions in the *Carbon Steel* Case: Another Rabbit from the Appellate Body's Hat?" (2000) 3:4 J. Int'l Econ. L. 691 at 692 [hereinafter Appleton, "*Carbon Steel* Case"]. These were the Center for Marine Conservation and World Wide Fund for Nature. *Shrimp-Turtle Panel Report, supra* note 307 at para. 3:155.

[655] *Shrimp-Turtle Panel Report*, *supra* note 307 at para. 7:8.

[656] *Ibid.*

[657] *Shrimp-Turtle Appeal Report, supra* note 332 at para. 108.

[658] *DSU,* art. 12:1.

[659] Appleton, "*Carbon Steel* Case," *supra* note 654 at 693.

[660] *Shrimp-Turtle Appeal Report*, *supra* note 332 at para. 107.

[661] The Appellate Body held that the panels have "ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts." *Shrimp-Turtle Appeal Report*, *supra* note 332 at para. 106.

[662] *Ibid.* at para. 101.

It should be noted that since the Appellate Body decision in the *Shrimp-Turtle* case, the WTO members "were at odds over non-governmental organisations' (NGOs) participation in trade disputes."[663] This disagreement of member states surfaced in later developments. Furthermore, a number of barriers remain to effective participation of non-state actors in this process. First, states occasionally announce their decision to launch consultations, and when they do, their general announcement does not allow effective public participation. Second, even though individuals were allowed, under the *Shrimp-Turtle Appeal Report*, to submit information, in practice this was difficult because the WTO did not publish a hearing schedule or a roster of panel members.[664] Finally, perhaps restrained by its limited power to set new procedures, the Appellate Body initially failed to set a working procedure or guidelines for submissions. The problem with that situation was that only well-connected NGOs and businesses that had access to inside information were able to partake in the dispute resolution.[665]

ii- Carbon Steel *case*

The *Shrimp-Turtle Appeal Report* was followed by subsequent panels. The second decision to address *amicus curiae* submissions was *Australia—Measures Concerning Importation of Salmon—Recourse to Article 21.5 by Canada*.[666] Canada objected to Australia's "restrictions on the importation of fresh chilled and frozen salmon from Canada since 1975, on the basis that importation of Canadian salmon could result in the introduction of exotic disease agents into Australia, with negative consequences for the health of fish in Australia."[667] In that case two Tasmanian salmon farmers made a

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[663] G.A. Zonnekeyn, "The Appellate Body's Communication on Amicus Curiae Briefs in the Asbestos Case-An Echternach Procession?" (2001) 35 J. World T. 553 at 553.

[664] Carmody, "Stay Tuned", *supra* note 654 at 5.

[665] On *Shrimp-Turtle* cases generally see, D. Ahn, "Environmental Disputes in the GATT/WTO: Before and After *U.S.—Shrimp* Case" (1999) 20 Mich. J. Int'l L. 819.

[666] WTO Doc. WT/DS18/RW (18 February, 2000), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 17 September 2006) [hereinafter *Salmon RW Panel Report*]. In that case, an Australian ban on imports of fresh salmon was challenged by Canada. The panel and the Appellate Body found the ban unjustified and after finding Australia's compliance insufficient, Canada brought compliance proceedings under article 21:5 of the *DSU*.

[667] *Salmon RW Panel Report, ibid.* at para. 2:3. An Australian regulation prohibited importation unless the fish or parts of the fish had been subject to treatment. *Ibid.*

submission to a reconvened panel, which found the information relevant to its decision without providing any detail.[668]

In *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bisimuth Carbon Steel Products Originating in the United Kingdom,* the Appellate Body concluded that it can accept and consider *amicus curiae* briefs in an appeal procedure, even thought article 13:1 of the *DSU* on seeking information is limited to dispute settlement *panels* and not the Appellate Body.[669] Unlike *Shrimp-Turtle*, where the Appellate Body failed to address the question of its authority to accept submissions from non-parties, in *Carbon Steel,* that subject was addressed. The Appellate Body's decision was based on the granting of power under article 17:9 of the *DSU* to draw up working procedures.[670]

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[668] *Salmon RW Panel Report* at para. 7:8. The panel stated that

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

This decision was significant because submissions from non-parties were accepted in an article 12:5 proceeding and the information was found to be relevant. See Appleton, "*Carbon Steel* Case," *supra* note 654 at 693-694.

[669] WTO Doc. WT/DS138/R (23 December 1999), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 17 September 2006) [hereinafter *Carbon Steel Panel Report*] and WTO Doc. WT/DS138/AB/R (10 May 2000) at paras. 36-42, online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 17 September 2006) [hereinafter *Carbon Steel Appeal Report*]. In this case, the panel rejected an amicus brief submitted by the American Iron and Steel Institute (AISI). The reason for the panel's rejection rested, however, on the late submission of the AISI brief. The brief was submitted after the deadline for the parties' rebuttal submissions and after the second substantive meeting of the panel with the parties. The panel believed that acceptance of the submission after the parties' last statements to the panel would prejudice the parties' due process rights. However, in rejecting the submission, the panel was careful to reiterate the words of the Appellate Body in Shrimp-Turtle, affirming its authority under article 13 of the *DSU* to accept or reject any submissions made to it. *Carbon Steel Panel Report,* at para. 6:3.

[670] Article 17:9 of the *DSU* reads as follows,

> [w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

The Appellate Body supported this position by citing Rule 16:1 of the Working Procedures, and concluded that "We are of the opinion that we have the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two amicus curiae briefs filed into account in rendering our decision." *Carbon Steel Appeal Report*, *supra* note 669 at 42. On Rule 16:1 of the Working Procedures see *infra* note 678.

Business interests also have been active in making submissions to the panels. In the *Carbon Steel* case, the American Iron and Steel Institute and the Specialty Steel Industry of North America made submissions.[671] Similarly, in *United States—Section 110(5) of the U.S. Copyright Act* the American Society of Composers, Authors and Publishers made submissions.[672]

iii- The Asbestos *case*

Another important milestone in public participation in the WTO dispute settlement procedure is the *Asbestos* case.[673] France had banned import, sale, manufacture, and use of asbestos fibers, and Canada brought a complaint under the *DSU*. Five NGOs made submissions to the panel, two of which were taken into account by the panel in its decisions to uphold the ban.[674]

The Appellate Body took note of the fact that the panel had taken NGO submissions into account,[675] and invited the parties to the dispute and member states having declared themselves third parties to the dispute to submit their comments on questions related to submissions from persons other than the parties and the third parties—including the question whether the Appellate Body should adopt a "request for leave" procedure.[676] Subsequently, the Appellate Body reconfirmed that panels might

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[671] See *supra* note 669.

[672] WTO Doc. WT/DS160/R (June 15, 2000) at [hereinafter *U.S. Copyright Act Panel Report*]

[673] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Doc. WT/DS135/R (September 18, 2000), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 17 September 2006) [hereinafter *Asbestos Panel Report*] and WTO Doc. WT/DS135/AB/R (March 12, 2001), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 17 September 2006) [hereinafter *Asbestos Appeal Report*].

[674] Collegium Ramazzini, Ban Asbestos Network, Instituto Mexicano de Fibro-Industrias A.C., and American Federation of Labor and Congress of Industrial Organizations, Only Nature Endures (ONE from India) submitted amicus briefs. *Asbestos Panel Report*, *supra* note 673 at paras. 6:1 and 6:4. The Panel informed the parties that, "in the light of the EC's decision to incorporate into its own submissions the amicus briefs submitted by the Collegium Ramazzini and the American Federation of Labor and Congress of Industrial Organizations, the Panel would consider these two documents on the same basis as the other documents furnished by the EC in this dispute." The panel also decided not to take into consideration the *amicus* briefs submitted by the Ban Asbestos Network and by the Instituto Mexicano de Fibro-Industrias A.C., and did not consider the brief by ONE because of its late submission. The panel referred to the position taken by the Appellate Body in the *Shrimp-Turtle* Case. *Ibid*. at para. 8:12-8:14.

[675] The panel had done so selectively. See the *Asbestos Appeal Report, supra* note 673 at para. 50.

[676] That is permission to take some procedural step in litigation. In response to the Appellate Body's invitation Canada, the European Community (EC) and Brazil stated that the subject should be dealt with by the WTO Members themselves. The U.S. welcomed adoption of a request for leave procedure, and

continued on the next page ➢

receive submissions from non-parties, and a Communication of the Appellate Body[677] set the *Additional Procedure* specifically for the *Asbestos* Case.[678] This *Additional Procedure* set an eight day limit to apply for leave to file a brief and required a description of the entity making the submission, the nature of its interest, the specific issues of law that were addressed, the reason that it would be desirable for the Appellate Body to grant leave, and any relationship between the private party and one of the WTO members involved in the dispute.[679] It also required that, in case leave was granted, the submission should not be more than 20 pages, and should include "a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report …"[680] Several businesses and NGOs submitted requests for leave, but all were disqualified on the basis of failure to comply sufficiently with all the requirements in the *Additional Procedure*, without much elaboration.[681]

Zimbabwe indicated that it did not oppose adoption of such a procedure. See Zonnekeyn, *supra* note 663 at 554.

[677] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Communication from the Appellate Body,* WTO Doc. WT/DS135/9, (November 8, 2000), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 1 October 2006) (hereinafter the *Additional Procedure*).

[678] Pursuant to rule 16:1 of the *Working Procedures for Appellate Review*, under which the *Additional Procedure* was adopted,

> in the interest of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt *an appropriate procedure for the purposes of that appeal only*, provided that it is not inconsistent with the *DSU*, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body.

Appellate Body, WTO Doc. WT/AB/WP/5 (4 January 2005), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 5 October 2006) [emphasis added].

[679] *Asbestos Appeal Report, supra* note 673 at para. 52. Furthermore, the Appellate Body specified "[t]he 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." *Ibid.* at para. 52:5.

[680] *Asbestos Appeal Report, supra* note 673 at para. 52. Accordingly *amicus curiae* briefs are accepted only in support of a claim already raised by the WTO members with whom the private party sides. See also *Asbestos Panel Report*, *supra* note 673 at para. 8:12; *Shrimp-Turtle Appeal Report*, *supra* note 332 at para. 91 (indicating that arguments in an attached *amicus curiae* are only taken into consideration to the extent that the WTO members attaching the brief to its submission has agreed with the arguments put forward by the brief).

[681] Thirteen submissions from NGOs were disqualified for having been received before the adoption of the Additional Procedure and failure to comply, seventeen were submitted after the adoption of Additional Procedure, six of which were disqualified for tardiness, and the rest were disqualified for failure to comply with the Additional Procedures. *Asbestos Appeal Report, supra* note 673 at paras. 53, 55 and 56.

iv- Opposition to the Appellate Body's broad interpretation

Some states—especially developing countries—have accused the Appellate Body of exceeding its mandated function.[682] The function of the Dispute Settlement Body is described as "preserv[ing] the rights and obligations" of the member states,[683] and thus, a clarification of the role of Appellate Body decisions has been requested by developing countries in the ongoing *DSU* review.[684] Furthermore, the *Additional Procedure* envisaged by the Appellate Body faced the opposition of some WTO members from the outset.[685] It is believed that the summary disqualification of outside submissions was a result of this opposition.[686] The opposing member states have argued, in line with certain scholars of international economic law,[687] that through the *Additional Procedure* the

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[682] On position and arguments of different states on this issue see C.L. Lim, "The Amicus Brief Issue at the WTO" (2005) 4 Chinese J. Int'l L. 85 at 99-111.

[683] See *DSU*, article 3:2, *supra* note 73. The Appellate Body has tried to avoid that criticism by emphasizing that only members have a *right* to make submissions and have their submissions read. The Appellate Body expressly stated that

> Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body had no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO members which are parties or third parties in a particular dispute.

Carbon Steel Appeal Report, *supra* note 669 at para. 41 [footnote omitted] [emphasis added]. But the fact that under article 13 of the *DSU* panels have the right to seek information, but the Appellate Body has no similar right under the *DSU* makes this position hardly tenable. Appleton, "*Carbon Steel* Case," *supra* note 654 at 698.

[684] Ala'i, *supra* note 648 at 84. See also Slotboom, "Participation of NGOs," *supra* note 980 at 90-96 (arguing against Panel and Appellate Body decisions to accept *amicus curiae*); and D.B. Hollis, "Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty" (2002) 25 Boston Col. Int'l & Comp. L. Rev. 235-256 (concluding that both private actor participation in international law and the exercise of law-making authorities by international organizations has occurred, and can only continue to occur, with the consent of states). For proposals related to *amicus curiae* presented during the Doha Round see Chapter Four:4:d.

[685] See WTO, General Council, *Decision by the Appellate Body Concerning* Amicus Curiae *Briefs, Statement by Uruguay at the General Council on November 22, 2000*, WTO Doc. WT/GC/38 (4 December 2000), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 25 November 2006).

[686] Carmody, "Stay Tuned," *supra* note 654 at 8 and Zonnekeyn, *supra* note 663 at 563. In the end only the U.S., New Zealand, and Switzerland supported the Appellate Body. *Ibid.*

[687] A.H. Qureshi, "Extraterritorial Shrimps, NGOs and the WTO Appellate Body" (1999) 48 I.C.L.Q. 199 at 206. In the context of the *Shrimp-Turtle* case Qureshi observed that

> In interpreting Article 13 of the Understanding it would seem that the Appellate Body was influenced by the policy desideratum of facilitating maximum NGO participation in WTO affairs; and the enhancement of panel jurisdiction. The extent to which it sought to derive these policy objectives, whatever their merits, from primary focus on Article 13 of the Understanding is from a legal perspective controversial. Perhaps one of the appellants

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Appellate Body has in fact adopted a decision on relations with NGOs, which falls within the scope of functions of the General Council under the article V:2 of the *WTO Agreement,* not within the scope of functions of the Appellate Body.[688] Furthermore, since the *Additional Procedure* affected the Working Procedures of the Appellate Body, it should have been subject to consultations with the Chairman of the DSB and the Director-General in accordance with article 17:9 of the *DSU*, and finally the *Additional Procedures* grant individuals and institutions outside the WTO a right that even WTO members do not enjoy.[689]

In response, it can be argued that the General Council's authority under article V:2 of the *WTO Agreement* to consult and co-operate with NGOs does not establish an exclusive authority. Furthermore, panels and the Appellate Body have the authority to consider submissions and information from non-parties to the dispute. It has to be noted that "the Additional Procedure does not prejudice WTO Members' right to participate in disputes,"[690] and WTO members can choose to participate as Third Parties under article 10 of the *DSU*, under article 17:4 of the *DSU* at the appeal level, [691] or under the

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> should ask for an authoritative interpretation from the Ministerial Conference or the General Council of the WTO.

Ibid.

[688] In a meeting of the WTO General Council convened to consider the legitimacy of the procedure established by the WTO Appellate Body to allow *amicus curiae* briefs in the *Asbestos* case many WTO members expressed their view that the Appellate Body had not acted within its competence. WTO, General Council, *Minutes of Meeting* (held on 22 November 2000), WTO Doc. WT/GC/M/60 (23 January 2001), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 July 2006) at para. 30 [hereinafter *Minutes of Meeting of General Council on 22 November 2000*].

[689] Zonnekeyn, *supra* note 663 at 555. Before the *Asbestos* case, the Appellate Body's decision to accept *amicus curiae* briefs was also criticised for solely relying on article 17:9 of the *DSU* and failing to have recourse to Rule 16:1 of the Working Procedures. See Appleton, "*Carbon Steel* Case," *supra* note 654 at 696. After the *Asbestos* case that criticism is no longer relevant.

[690] Zonnekeyn, *supra* note 663 at 557. The World Bank Inspection Panel has also envisaged a similar procedure. See "Operating Procedure," online: The Inspection Panel < www.worldbank.org/inspectionpanel> (date accessed 17 November 2007).

[691] According to article 10 of the *DSU*

> 1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
>
> 2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

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Additional Procedure.[692] Finally, it is argued that article 12:2 of the *DSU* notes that "Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports," and the *amicus curiae* briefs assist in ensuring the quality of panel reports.[693]

Notwithstanding the debates regarding admission of *amicus curiae* submission, parties to a dispute can adopt *amicus curiae* as part of their own submission.[694]

d- Opening the dispute settlement hearings to the public

On 12 September 2005, the members of panel adjudicating on the *EC-Hormones* case decided to open, for the first time ever, the panel proceedings to the public after a request from Canada, the European Communities, and United States, the parties to the dispute.[695] Journalists, NGO representatives, and scholars watched the proceedings of the panel from a separate room at the WTO headquarters, via closed-circuit broadcast.[696] Since then, on other occasions, at the request of the parties to the dispute, panel proceedings have been opened to the public.[697]

> 3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.
>
> …

According to article 17:4 of the *DSU*

> [o]nly parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

[692] The *Additional Procedure* applied to "any person, whether natural or legal, other than a party or a third party to this dispute." *Supra* note 677 at para. 2.

[693] "Issues of amicus curiae submissions: Note by the Editors," *supra* note 648 at 706. It is further argued that the Appellate Body, which has more control over its procedures, should be equally concerned about the high quality of appellate reports. *Ibid.* See also Y. Guohua, B. Mercurio, & L. Yngjie, *WTO Dispute Settlement: A Detailed Interpretation* (The Hague: Kluwer Law International, 2005) at 170-180

[694] See *e.g. Shrimp-Turtle* Case, *supra* note 307 at para. 7:8. This practice has faced no objection from members. See Lim, "The Amicus Brief Issue," *supra* note 682 at 90-91.

[695] *Communication from the Chairman of the Panels, United States – Continued Suspension of Obligations in the EC – Hormones Dispute (WT/DS320) and Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (WT/DS321),* (WT/DS320/8) and (WT/DS321/8) (2 August 2005), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/ds320-21-8_e.pdf> (date accessed 11 April 2007).

[696] "WTO Opens Panel Proceeding to Public for the First Time," WTO News Items (12 September 2005) online: WTO < http://www.wto.org/english/news_e/news05_e/openpanel_12sep_e.htm> (date accessed 11 April 2007).

[697] "WTO Opens "Hormone" Panel Proceedings to Public," WTO News Items (27 September 2006); "WTO Hearings on Banana Dispute Opened to the Public," WTO News Items (29 October 2007); "WTO Hearings on Zeroing Dispute Opened to the Public," WTO News Items (8 January 2008); "WTO Hearings on Zeroing Dispute (DS350) Opened to Public Viewing" WTO News Items (14 March 2008); "WTO Hearings

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e- Private Counsel

Another mode of participation for private persons in the dispute settlement proceedings of the WTO is involvement as private counsel. Two types of private counsel participation are conceivable. The counsel may be hired directly by the government for assistance in the dispute settlement proceeding, or the counsel may be representing a private firm—that has stakes in the dispute—assisting the government. This section examines the former.

We should first determine whether WTO members are permitted to hire private lawyers to represent them in WTO proceedings. Under international institutional law,[698] the question is:

> whether the WTO organs […] have the power to inquire into questions concerning the representation of parties, and if so, whether the WTO may consider problems of representation as such or whether it is only concerned with the formal validity of credentials, and which of its organs is bestowed with the power to exercise this function.[699]

Usually member states, in the constituent instrument of international organizations, bestow the power to determine the issue of representation upon organs of the organization.[700] Furthermore, according to the *Vienna Convention on the Representation of States in Their Relations with International Organizations*[701]—which is believed to reflect the principles of customary international law, particularly in the section on delegations to organs and to conferences[702]—the sending state is free to appoint the members of its delegation.[703] On the other hand, the judicial organs of international

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on Zeroing Dispute (DS 294 (21.5)) Opened to the Public," WTO News Items (27 March 2008) online: WTO <http://www.wto.org/english/news_e/archive_e/dis_arc_e.htm> (date accessed 31 March 2008).

[698] See C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (New York: Cambridge University Press, 1996) at 12-14.

[699] R.S.J. Martha, "Representation of Parties in World Trade Disputes" (1997) 31:2 J. World T. 83 at 84 [footnotes omitted].

[700] D. Ciobanu, "Credentials of Delegations and Representations of Member States at the United Nations" (1976) 25 I.C.L.Q. 351 at 366 and F. Morgenstern, *Legal Problems of International Organizations* (Cambridge: Grotius Publications, 1986).

[701] U.N. Conference on the Representation of States in Their Relations with International Organizations, at 45, UN Doc. A/CONF.67/4 (1975) (not yet in force) [hereinafter the *Convention on Representation*].

[702] Martha, *supra* note 699 at 86.

[703] This is subject to the rules of the constituent instruments of organizations that may require members to delegate a minister or other specified representatives (article 42:1 of the *Convention on Representation*) and

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organizations, according to the practice of the ICJ,[704] have the power to decide not only the merits of the case, but also incidental proceedings arising in that case.[705] It is recognized in different international dispute settlement systems that the parties have the liberty to include both government officials and private practitioners in delegations by which they are represented.[706]

The GATT and WTO legal texts and specifically the *DSU* are silent on this issue, and in the absence of a WTO rule general international law should apply. As demonstrated above, both from the perspective of the principles of representation of states in international organizations and principles concerning agents and counsels in international dispute settlement, WTO members have the sovereign right to choose their representatives. But two years after the establishment of the WTO and its dispute settlement mechanism, the dominant view was that private counsel are not authorized in that system.[707] Gabrielle Marceau, a legal officer of the WTO Secretariat, noted in 1997,

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restrictions regarding the size of the delegation and the nomination of delegates with the nationality of the host state (article 43 of the *Convention on Representation*).

[704] *Case Concerning Land, Island and Maritime Frontier Disputes (El Salvador* v. *Honduras),* Application to Intervene, Order of 28 February 1990 [1990] I.C.J. Rep. 1 at 4 and 134 [hereinafter *Frontier Dispute*]; *Frontier Dispute*, Provisional Measures, Order of 10 January 1986 [1986] I.C.J. Rep. 1 at 3; *Case Concerning Elettronica Sicula S.p.A. (ELSI) (USA* v. *Italy),* [1986] I.C.J. Rep. at 49.

[705] Martha, *supra* note 699 at 85.

[706] The *Statute of the ICJ* has not regulated the manner by which the parties shall be represented before the Courts and parties have included private practitioners in their delegations. See S. Rosenne, *The Law and Practice of the International Court,* 2nd rev. ed. (Dordrecht: Martinus Nijhoff, 1985) at 214-216. Several cases of international arbitration also confirm this view. In arbitration between Russia and the United States in 1901, the renowned international jurist, T.M.C. Asser, who acted as the Sole Arbitrator, noted that in an international arbitration each party has the right to appoint its agent or counsel charged with its representation in the procedure, unless the arbitration agreement provides otherwise. See *Case Concerning the Schooners James Hamilton Lewis, C.H. White, Kate and Anna and the whaling bark Cape Horn Pigeon (Russia/United States)*, Interim Award, 9 UNRIAA at 59-61. See also *Pinson Case (France/Mexico)*, 5 UNRIAA, 329-466, and *Gulf of St. Lawrence Case (Canada/France)* 19 UNRIAA, 225 at 265. In the European Court of Justice member states and EU institutions can be represented by anyone. *EEC Statute*, art. 17; *Rules of Procedure of the Court of Justice*, art. 38(8), cited in Martha, *supra* note 699 at 89 footnote 38. Similarly UNCITRAL Arbitration Rules, the ICC Rules of Conciliation and Arbitration, the London Court of Arbitration Rules, and the World Intellectual Property Organization (WIPO) Arbitration Rules envisage that parties may be represented by persons of their choice and these representatives can be assisted by advisers. See Martha, *ibid.* at 89-89 and footnote 39.

[707] See G. Marceau, "NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison" (1997) 31 J. World T. 25 at 63 [hereinafter Marceau, "NAFTA and WTO Dispute Settlement Rules"] and B. Bahree, "Rules of the Game: WTO Slips Up on Denying Parties Outside Legal Help" Wall Street Journal [Europe] (17 September 1996) (citing a senior trade official as stating that "accepted practice is that private lawyers are not allowed without the consent of the parties").

"the GATT/WTO practice does not allow WTO Members to be represented by a lawyer or legal advisor before a panel … The absence of lawyer representatives has been maintained in the GATT/WTO forum as a testimony of the diplomatic roots of the system."[708] But she also predicted that "[t]he pressure of some countries to be represented by lawyers may change this policy."[709] That change occurred through the Appellate Body Report in the *Banana* case.[710] In that case, the panel decided not to admit a private lawyer representing Saint Lucia—a third party in the *Banana* case—to the panel proceedings because he was not a full-time employee of that government.[711] The panel's decision was based on the past practice of the GATT and WTO dispute settlement proceedings; the working procedures of the panel which stated that only members of governments would be expected to be present at panel meetings; fairness to other parties who were not accompanied by private lawyers assuming that all participant would comply with the panel's expectations; issue of confidentiality;[712] the financial burden of having private lawyers for smaller members;[713] and finally the concern over the intergovernmental character of WTO dispute settlement proceedings.[714] However, this prohibition was only

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[708] Marceau "NAFTA and WTO Dispute Settlement Rules," *supra* note 707 at 63.

[709] *Ibid.*

[710] See the *Banana Appeal Report*, *supra* note 245. Of course having private counsels on the member-state delegations in not equivalent to granting non-state actors access to the dispute settlement mechanism.

[711] *European Communities—Regime for the Importation, Sale and Distribution of Bananas,* WTO Doc. WT/DS27/R/USA (May 22, 1997) at para. 7.11 [hereinafter *Banana Panel Report*]. In that case a lawyer working for a Washington D.C. law firm, who was employed by the U.S. Trade Representative in Geneva until 1993, was hired by Saint Lucia's government. See J.C. Pearlman, "Participation by Private Counsel in World Trade Organization Dispute Settlement Proceedings" (1999) 30 L. and Pol'y Int'l Bus. 399 at 402 footnote 15.

[712] On issue of confidentiality it should be noted that even under the GATT practice private practitioners were allowed to participate in preparation of presentations to panels, and thus the issue of confidentiality was irrelevant. *Contra* P. McCalley, "The Dangers of Unregulated Counsel in the WTO" (2004) 18 Geo. J. Legal Ethics 975. McCalley raises the issue of the risk of unregulated participation of private counsel in the WTO disputes.

[713] Marceau shares this concern with the *Banana Panel Report* as she states that representation by private counsel "may not favour smaller developing countries which risk becoming victims of this commercialization [*sic.*] of legal information." "NAFTA and WTO Dispute Settlement Rules," *supra* note 707 at 63. But this concern is not convincing, in many cases a small developing country requires the temporary assistance of a trade law specialist for one case, and it is often developed countries that can afford to have "full-time diplomatic representatives at the WTO, much less a battery of government-employed, specialized trade lawyers." Martha, *supra* note 699 at 93. See also D. Palmeter, "The Need for Due Process in WTO Proceedings" (1997) 31 J. World T. 1 at 5.

[714] *Banana Panel Report* at para. 7:11. On the issue of the intergovernmental character of proceedings as Martha states, "whoever is appointed to represent a government is deemed to act in a governmental

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limited to the panel proceedings and did not affect the ability of members to consult with private lawyers in preparation for panel proceedings.[715] The Appellate Body, however, reached a different decision and stated that

> we can find nothing in the [*WTO Agreement*], the *DSU* or the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. Having carefully considered the request made by the government of Saint Lucia … we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.[716]

Even though the Appellate Body specified that its decision was limited to Saint Lucia's request regarding representation before the Appellate Body, the reasoning of this decision applies equally to panels, and in practice it allows WTO members to choose private counsels as part of their delegations. Panel decisions in *Indonesia-Certain Measures Affecting the Automobile Industry* and *Korea-Taxes on Alcoholic Beverages* cases followed the same reasoning.[717] Since the *Korea-Alcohol Panel Report,* however, the issue of whether private counsel may appear before a panel has not been the subject of a reported dispute before a panel indicating that, despite the absence of clear rules in either the *DSU* or the panel's *Working Procedures* the issue has been settled.[718] On the other hand, the question of private counsel participation in the consultation phase of the process, or guidelines for their participation could not be settled by the Appellate Body, and at least some parties have resisted having private counsel present during

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capacity, irrespective of his or her contractual relationship with the appointing government." *Supra* note 699 at 91.

[715] *Banana Panel Report, supra* note 245 at 7:12.

[716] *Banana Appeal Report, supra* note 245 at para. 10. Saint Lucia was a third party in the dispute and could not appeal, but it requested to be represented before the Appellate Body by private counsel. *Ibid.*

[717] In *Indonesia-Certain Measures Affecting the Automobile Industry,* the panel found "no provision in the WTO Agreement or the DSU […] which prevents a WTO Member from determining the composition of its delegation to WTO panel meetings." WTO Docs. WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS/64/R (2 July 1998) at para. 14:1 (Panel Report), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 15 January 2007) [hereinafter *Indonesia Autos Panel Report*]. In *Korea-Taxes on Alcoholic Beverages*, the panel followed the same reasoning and allowed Korea to be represented by private counsel. The panel noted that its decision was needed to ensure that Korea had "every opportunity to fully defend its interests." WTO Docs. WT/DS75/R and WT/DS84/R (2 July 1998) at para. 10:31 (Panel Report), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 15 January 2007) [hereinafter *Korea Alcohol Panel Report*].

[718] Stewart & Karpel, *supra* note 643 at 629.

consultations.[719] In the absence of regulation by WTO panels or the Appellate Body the responsibility to regulate is deferred to WTO members, and the risk of unethical behaviour persists.[720]

f- Non-state actors' litigation by proxy

In the cases where the counsel is representing a private firm, the question of non-state actor participation can be examined from the point of view of the fine balance between policy issues and private rights. On one hand, the participation of private practitioners in WTO dispute settlement or their domination of the process can undermine the larger policy goals of the member state.[721] On the other hand, in the WTO context, the private actors consider themselves to be most affected by the outcome of the dispute, and they may fear that "there is a danger that governments will seek to focus on matters beyond the dispute actually at issue."[722] To strike a balance between these two views in a multilateral forum, where there are governments with different ideas of their role in the society, is even more complicated than the domestic context.[723]

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[719] G.N. Horlick, "The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View" (1998) 32 Int'l Lawyer 685 at 692 [hereinafter Horlick, "A Private Practitioner's View"]. Where members have not agreed to leave private counsels out of the consultation meeting and the counsels have been allowed to be present, they have not been allowed to speak. *Ibid.* See also Also: M.C.E.J. Bronckers, & J.H. Jackson, "Editorial Comment: Outside Counsel in WTO Dispute Processes" (1998) 1 J. Int'l Econ. L. 155 (reflecting on elements for formulation a guideline for participation of outside counsel).

[720] See McCalley, *supra* note 712 at 986. The American Bar Association has proposed a "Code of Conduct" for private representatives. P.D. Ehrenhaft, "`Right to Counsel' in WTO Dispute Settlement Proceedings: A 1998 Resolution of the American Bar Association" (1999) 2 J. Int'l Econ. L. 159 at 162.

[721] Martha, *supra* note 699 at 91. As Professor Brownlie puts it the specialist lawyer can be insensitive to "connection between different, or apparently different, areas of inquiry, connections which are justified by principle or policy." "Problems of Specialization in International Law" in B. Cheng, ed., *International Law: Teaching and Practice* (London: Stevens, 1982) 109 at 111.

[722] A.W. Wolff & J.A. Ragosta, "Will the WTO Result in International Trade Common Law?" in T.P. Stewart, ed., *The WTO: The Multilateral Trade Framework for the 21st Century and U.S. Implementation Legislation* (Washington D.C: American Bar Association, 1996) 703 at 708. See also *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge: Grotius, 1990) at 3 [hereinafter Toope, *Mixed International Arbitration*] (raising a question on whether mixed international arbitration is just a matter of private rights or whether it should also recognize the sovereign policy objectives).

[723] Wolff & Ragosta for instance see the subject in the American context in the following terms, "[a] closed system is antithetical to U.S. belief in fairness, that individual rights should take precedence over government agencies' perceptions of broader interests in the disposition of specific cases and controversies." *Ibid.*

The example of *Kodak-Fuji* case is interesting in this regard.[724] As Michael Byers bluntly put it in a discussion, it is important:

> to think about how non-state actors are using the state-centric international legal system, how they are penetrating that system, manipulating that system, exercising their power within it. I think of, for example, the World Trade Organization, where you have a dispute between Japan and the United States, but which is in reality a dispute which is officially between Kodak and Fuji, where everyone knows that the transnational corporations are using the state as a figurehead for interaction within the international legal system.[725]

The two companies (Fuji and Kodak) and their lawyers played a very important role in the WTO proceedings at different levels.[726] The case illustrates the power of major private corporate actors in participating in the WTO dispute settlement system.[727]

4- Characteristics of the current arrangements for participation of non-state actors: inadequate and informal

In this Part I have set the framework for the current study, and surveyed the existing methods of participation of non-state actors in the WTO. Different approaches to the study of international economic law were outlined, and it was proposed that international economic law issues have to be examined in the broader context of public international law. Furthermore, several developments, which have led to increasing prominence of non-state actors in international relations, were surveyed. The study of the world trading system focused on the role of non-state actors in the development and implementation of WTO law. It was demonstrated that not-for-profit non-state actors have limited formal avenues for participation in the WTO system at international level. A full understanding of the scope of non-state actors participation in the WTO system will

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[724] *Japan—Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44, 31 March 1998 (13 April 2000) [hereinafter *Kodak-Fuji Panel Report*].

[725] "Discussion" in R. Hofmann, ed., *Non-state actors as new subjects of international law: international law - from the traditional state order towards the law of the global community* (Proceedings of an international symposium of the Kiel Walther-Schücking-Institute of International Law, March 25 to 28, 1998) (Berlin: Duncker & Humblot, 1999) at 75.

[726] See "Debate over NGO Participation at the WTO," *supra* note 441 at 441-448. See also J. Linarelli, "The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute" (2000) 31 Law & Pol'y Int'l Bus. 263; A. Reinisch, & C. Irgel, "The participation of non-governmental organisations (NGOs) in the WTO dispute settlement system" (2001) 1:2 Non-State Actors & Int'l L. 127 at 138-139.

[727] The subject can also be examined from the perspective of the actions of state responsibility in the context of the WTO caused by private parties. R.J. Zedalis, "When do the Activities of Private Parties Trigger WTO Rules?" (2007) 10 J. Int'l Econ. L. 335 (See also *ibid*. at 344-347 on the *Kodak-Fuji* case).

be possible after juxtaposing participation in the WTO system with participation in other international organizations. The latter will be the subject of the next chapter of this thesis. At this stage and before the comparison with other international organizations, however, a number of characteristics of the current arrangements in the WTO system can be highlighted:

a- Increasing but limited and ineffective channels of participation

The survey of participation of non-state actors in the WTO also revealed increasing but limited channels of participation. Clearly there have been considerable improvements in the WTO in comparison with its predecessor, the GATT. As the WTO Secretariat has observed

> [t]he past decade has seen a change in the way in which the WTO interacts with civil society. This relates not only to the practical interaction between the WTO Secretariat and WTO Members on the one hand and the NGOs on the other, but also in terms of how the NGOs view themselves *vis-à-vis* the multilateral trading system.
>
> From a sensitive, one dimensional and mostly process-oriented relationship which primarily evolved around access to information, the WTO – NGO interaction has matured into a more substance-based one […]
>
> The original hesitation and suspicion among a majority of Members with respect to the role of NGOs has been replaced by a more constructive relationship which often manifests itself through increased substantive cooperation. It can be argued that through closer bilateral cooperation with delegations, NGOs have succeeded in influencing the WTO's substantive agenda more effectively than would have been possible through established institutional channels, notably through the WTO Secretariat.[728]

While examples in this chapter confirm the growing influence of non-state actors in the WTO, the level of their involvement in the WTO has to be measured against participation of non-state actors in other international fora. This comparison will be possible after presentation of modes of participation of non-state actors in international law. In the meantime, however, it can be observed that formal channels of participation of non-state actors in the WTO are still limited and ad hoc. Article V:2 of the *WTO Agreement* and the *NGO Guidelines* have not led to veritable avenues of participation and arrangements for participation in Ministerial Conferences are *ad hoc.*

[728] *World Trade Report 2007*, *supra* note 483 at 341-342.

Furthermore, certain modes of formal participation are quite ineffective and do not provide possibility of real participation. The WTO Pubic Forum, for instance, while an interesting initiative for exchange of ideas, does not appear to provide any input in the work of the organization. Provisions of WTO agreements which are directed to private persons do not provide for participation of NGOs and are quite limited in their scope.

In area of WTO adjudication, while in principle accepting *amicus curiae* has been an important development, in practice opposition of some states has rendered this tool inutile.

b- Informal character of more effective modes of participation

The WTO Secretariat highlights the informal character of its current practices involving NGOs and states that "it is clear that current WTO practices for interacting with NGOs go far beyond anything that Members would be able to formally agree upon by consensus."[729] Several examples presented in this chapter confirm this characterization. The biggest successes of participation of non-state actors to date have been through informal channels of lobbying. Two momentous cases discussed earlier, both in the context of the *TRIPS Agreement* highlight the success of informal channels: these are, the role that the Intellectual Property Committee played in developing the *TRIPS Agreement*, and later role of the campaign for access to medicines in modifying it, which underline the importance of private sector corporate actors, and NGOs respectively. These ad hoc and unregulated channels of participation, albeit successful in certain cases, do not provide adequate room for participation, and apart from well-publicized cases may not be subject to scrutiny, and do not contribute to the goal of enhanced rule of law in the international arena.

c- Unbalanced representation of actors and interests

An inevitable result of prevalence of more effective informal channels of participation is that private sector corporate actors have more access to policy and decision-makers in the WTO in comparison with non-governmental organizations.[730] As

[729] *Ibid.* at 342.

[730] Weiler, "The Rule of Lawyers," *supra* note 337 at 203. Scholte, O'Brien and Williams note that in the Singapore Ministerial Conference 65 percent of NGOs accredited represented business interests. Furthermore, Northern NGOs and "urban-based, university-educated, computer literate, (relatively) high-

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it was demonstrated earlier officials of international corporations have more access to circles of power.[731] These different actors usually spouse different types of interest. While business lobbies or private corporate actors follow their economic interests, many non-governmental organizations focus on impact of trade policies on non-trade issues. The unbalanced representation of these actors, therefore, leads to unbalanced representation of private and public interests in the WTO.

d- Unused potential of existing mechanisms

Certain provisions in and mechanisms created by WTO Agreements have the potential for accommodating wider participation of non-state actors in the WTO Processes. Review mechanisms similar to TPRM in other settings (e.g., in the United Nations human rights system or in environmental bodies), for instance, rely heavily on input from non-state actors, in stark contrast with WTO's practice. The TPRB has not been open to non-state actors, and TPRM reports, unlike implementation review reports in certain areas of international law, have not solicited information from non-state actors.

Furthermore, provisions like article V:2 of the *WTO Agreement* which has a parallel in the *Charter of the United Nations* have not led to creation of the same elaborate system of accreditation and participation of non-state actors.

* * *

I believe that based on our conclusions in Chapter One, the current level of participation has to be put in perspective through comparison with participation of non-state actors in other areas of international law. Furthermore, the position and role of non-state actors in the WTO has to be determined against the backdrop of WTO's place in international law and as part of a system of global governance.

Accordingly Part II of this thesis will examine the position of non-state actors in other areas of international law and will rely on the development of international law in the past decades in order to present contours of a theoretical framework and proposals for participation of non-state actors in the WTO.

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earning English speakers" have had better access to the WTO. J.A. Scholte, R. O'Brien, & M. Williams, "The WTO and Civil Society" (1999) 33:1 J. World T. 107 at 118.

[731] See *supra* note 539 and accompanying text.

Part II - Proposing elements of a new framework for participation of non-state actors in the WTO: *de lege ferenda*

There is increasing awareness within WTO that there is a "need to enhance the transparency, democratic legitimacy, and accountability of the WTO."[732] One way of addressing such concerns is through increased involvement of non-state actors in the work of the WTO. In order to propose elements of a new framework for participation of non-state actors, the first chapter in Part II presents an overview of participation of non-state actors in other settings of international law. In the second chapter of this part, building on the lessons learnt from other areas of international law, I will first identify the shortcomings of the current model of participation at the WTO and present policy reasons as well as elements of a new framework for increased participation. I will then present reform proposals for more inclusive participation in WTO activities, including in the dispute settlement mechanism. The analysis is based on the conclusions reached in the previous chapters on the underlying assumptions regarding the purpose of the WTO and the current international trading system viewed in the broader context of public international law.

[732] E.-U., Petersmann, "Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society" (2006) 19:3 Leiden J. Int'l L. 633 at 638.

Chapter Three- Non-state actors and international law: "*jus cosmopoliticum*" or "*jus inter gentes*"

Traditionally, the question of the place of non-state actors in international law is part of the broader debate over the subjects of international law: are non-state actors subjects of international law? To answer that question, the meaning of a subject of international law must be defined at the outset.[733] According to Schwarzenberger, "international personality means the capacity to be a bearer of rights and duties under international law"[734] and a subject of international law—as opposed to a mere object of international law—is an entity which possesses international personality.[735] Oppenheim adds "the capacity to act on the international plane either directly, or indirectly through another state" to the definition of international personality.[736]

States are undeniably the primary subjects of international law.[737] According to almost all textbooks, international law is primarily about the relations amongst *states*. Even though, especially in the post-World War II period, the *other* subjects of international law have gradually gained more prominence in the study of general international law,[738] the focus remains on states as the *main* subjects of international law.

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[733] For a comprehensive examination of question of international legal personality, its history and different theoretical approaches to the subject see Nijman, J.E., *The Concept of International Legal Personality, An Inquiry into the History and Theory of International Law* (The Hague: T.M.C. Asser Press, 2004).

[734] Schwarzenberger & Brown, *supra* note 354 at 42. This definition corresponds to the view taken by the ICJ in the *Reparation for Injuries Case* and *Western Sahara Case*. *Supra* note 329 at 179; [1975] I.C.J. Rep. at 63 respectively. See also Brownlie, *supra* note 215 at 57.

[735] Schwarzenberger & Brown, *supra* note 354 at 42 and 64 (arguing that individuals as objects of international law are entitled to benefit from consensual or customary rules of international law only through their link with a subject of international law, namely a state).

[736] *Oppenheim's International Law*, *supra* note 215 at 119-120.

[737] International law textbooks deal in detail with the questions related to states as subjects of international law (*e.g.* elements constituting states, different types of states, recognition of states, etc.) For the purposes of this thesis, it is not necessary to examine the questions related to states as subjects of international law. See Brownlie, *supra* note 215 at 57-65 & 85-104, *Oppenheim's International Law*, *supra* note 215 at 119.

[738] Different authors have distinguished between states and other subjects of international law by using different categorizations. Schwarzenberger labels independent states, dependent states, and League mandates and United Nations trust territories as "typical" subjects and the Holy See, international institutions and individuals as "non-typical" subjects of international law (*Manual of International Law, supra* note 734 at 43-49 and 62-64). Brownlie distinguishes between established legal persons, which include states, political entities legally proximate to states, *condominia*, international territories,

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It should also be noted, however, that parallel to the state-centric mainstream of international law some distinguished international lawyers have long-focused on individuals as subjects of international law.[739]

The utopian view of international law, ***jus cosmopoliticum***, puts the emphasis on individuals, together with states as subjects of international law.[740] A prominent

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international organizations, and agencies of states; special types of personality, which includes non-self governing peoples; states *in statu nascendi*, legal constructions, belligerent and insurgent communities, entities *sui generis*, and individuals; and controversial candidatures, which include transnational corporations, 'intergovernemental corporations of private law' and 'établissements publics internationaux.' See *supra* note 215 at 59-68.

See also Okeke's work which lists international organizations, unrecognized states, national liberation movements, non-governmental organizations and private corporations in the category of "controversial" subjects of international law. *Controversial Subjects of Contemporary International Law* (Rotterdam: Rotterdam University Press, 1974).

[739] As early as 1928, Spiropoulos in his lectures at the Hague Academy of International Law recognized three categories in this debate. See J. Spiropoulos, "L'individu et le droit international" (1929) 30 Rec. des Cours 191 at 196 at 200 [hereinafter Spiropoulos, "L'individu et le droit international"]. According to one view, international law only regulates the inter-state relationships and contains no rights or obligations for individuals or other legal persons. Anzilotti, *Corso di diritto internazonale,* I, 1912, Diena, *Principii di dirrito internazionale publico*, 1914 and Hofer et Schön, *Die völkerrechtliche Haftung der Staaten* cited in "L'individu et le droit international" at 201. Another doctrine holds that international law in principle regulates the relations between states, but it also contains rights (rights of individuals under Peace Conventions …) and obligations (obligations not to commit crimes against humanity, slavery, piracy etc.) directly imposed on individuals. There are two variations on this view; one that holds that individuals do not become subjects of international law because of their rights and obligations. Schücking, *Der Staatenverband der Haager Konferenzen* cited in "L'individu et le droit international" at 203. And another one according to which individuals have rights and obligations in a limited way. Cavaglieri, Fiore, Bonfils, W. Kaufmann, Rehm, Kelsen, Verdross, Isay, Ebers cited in "L'individu et le droit international," at 204; J. Spiropoulos, *L'individu en droit international* (Paris: Librairie générale de droit & de jurisprudence, 1928) at 7-14 [hereinafter, Spiropoulos, *L'individu en droit international*]. Spiropoulos himself in his 1929 lecture points out that he has abandoned his state-centric views expressed a year earlier in *L'individu en droit international. Supra* note 750 at 200 footnote 1. Finally, a third school sees individuals as *exclusive* subjects of international law and rejects the idea of states—as fictitious concepts—being subjects of international law at all. Duguit, Krabbe, and Politis cited in "L'individu et le droit international," *ibid.* at 252 and in *L'individu en droit international, ibid.* at 14-18. Spiropoulos went to great length to argue the new developments in 1920's in the face of still influential idea of limitless sovereignty of states based on the view of Hegel. *L'individu en droit international, ibid*. at 33.

[740] According to Kant:

> all men who can at all influence one another must adhere to some kind of civil constitution" of the three following types:
> (1) a constitution based on the *civil rights* of individuals within a nation (*ius civitatis*);
> (2) a constitution based on the *international rights* of states in their relationship with one another (*ius gentium*);
> (3) a constitution based on *cosmopolitan right*, in so far as individuals and states, coexisting in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (*ius comopoliticum*). This classification, with respect to the idea of a perpetual peace, is not arbitrary but necessary. For if even one of the parties

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international lawyer, Georges Scelle,[741] is most eloquent in explaining this position in the following terms "*[c]'est l'homme l'individu, qui constitue l'élément premier et l'agent des formations sociales. Il n'y a de sociétés que des individus*." [742] He elaborates on his idea by stating that

> *[l]a Société internationale résulte non pas de la coexistance et de la juxtaposition des Etats, mais au contraire, de l'interpénétration des peuples par le commerce international. Il serait bien curieux que le phénonmène de sociabilité qui est à la base de la société étatique s'arrêtat aux frontières de l'Etat. […] Les relations internationale sont des realtions inter-individuelles ou intergroupales qui se nouent par dessus les frontières.*[743]

> were able to influence the others physically and yet itself remained in a state of nature, there would be a risk of war, which it is precisely the aim of the above articles to prevent.

Kant, *Political Writings* (Hans, Reiss & H.B. Nisbet, eds., 1991) at 98; also cited in Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 423.

[741] For more on the works, ideas and life of Georges Scelle see: G. Berlia, "La doctrine de Georges Scelle: Etude de quelques thèmes" in *Droit public interne et international, Etudes et réflexions (Recueil publié en hommage à la mémoire de Georges Berlia)* (Paris: Librairie générale de droit et de jurisprudence, 1980); J. Buchmann, A la recherche d'un ordre international (Louvain: Ed. E. Nauwelaerts, 1957); A. Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (dédoublement fonctionnel) in International Law" (1990) 1 Eur. J. Int'l L. 210; L. Condorelli, "Scholie sur l'idiome scellien des manuels francophones de droit international public" (1990) 1 Eur. J. Int'l L. 232; R.-J. Dupuy, "Images de Georges Scelle" (1990) 1 Eur. J. Int'l L. 235; N. Kasirer, "A Reading of Georges Scelle's *Précis de droit des gens*" 24 Can. Y.B. Int'l L. (1986) 372; L. Kopelmanas, "La pensée de Georges Scelle et ses possibilités d'application à quelques problèmes récents de droit international" (1960) 88 Journal du droit international (Clunet) (1960) 350; *La technique et les principes du droit public: Etudes en l'honneur de Georges Scelle*, (Paris: Librairie générale de droit et de jurisprudence, 1950); Ch. Rousseau, "Georges Scelle (1878-1961)" (1961) 65 Rev. D.I.P. 5; T. Tanca, "Georges Scelle (1878 - 1961): Biographical note with Bibliography" (1990) 1 Eur. J. Int'l L. 240; H. Thierry, "The Thought of Georges Scelle" (1990) 1 Eur. J. Int'l L.193.

[742] G. Scelle, "Règles générales du droit de la paix" (1933) 46 Rec. des Cours 327 at 342 [hereinafter Scelle, "Règles générales du droit de la paix"] [emphasis in original]. He also rejects the idea of the international society being a society of states:

> Abandonnons donc définitivement l'idée que la société internationale est une société d'États. C'est une vue fausse, une abstraction anthropomorphique, historiquement responsable du caractère fictif et de la paralysie de la science traditionelle du droit des gens.

Ibid. Scelle also goes as far as describing diplomatic protection as a "fictious innovation which is insubstantial and illusory" and adds that not only does the fictious personality of the state swallow up the real personality of the individual, but the result is that the original and real subject of law is completely eliminated, and the initial legal relationship is replaced by a political one. *Ibid*. at 660-661. See also section 3:b, below, on diplomatic protection.

[743] G. Scelle, *Manuel de droit international Public* (Paris: Editions Domat-Montchrestien, 1948) at 18-19 [hereinafter Scelle, *Manuel*]. *Contra* see Koskenniemi's view that

> [t]he interminable discussion of whether the "true" subjects of international law are States or individuals fails to recognize the differences in our communal ties. Any attept [*sic*.] to overrule those ties will immediately seem like irrelevant utopianism or harmful totalitarianism. Indeed, it may be that the State/Individual opposition contains no alternatives at all but that we think of individuals as autonomous and equal entities only because we have internalized a formal conception of statehood from the perspective of which individuals do appear in such a way.

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According to this view commercial, intellectual, and familial links form the essence of international community, and the task of public international law is to facilitate inter-individual relations.[744] In other words public international law was originally in the service of international private law.[745] This view is more compatible with the natural law period of international law and views of Vitoria,[746] Suarez,[747] and Grotius,[748] the three great jurists, whose works preceded the advent of the modern nation-state and laid the foundations of the modern international law.[749] For these pioneers, "*droit des gens*" was not only about inter-state relationships, it also regulated the relations between the state and the individual as well as the relations between individuals from different states.[750] This does not mean that individuals at that time enjoyed the same legal position as they do today, but at least they could be expected to gradually participate more actively in the international life.[751]

Other prominent legal theoreticians have supported this view. According to Kelsen, "law is essentially the regulation of human conduct [and] like all law, international law, too, is a regulation of human conduct." He continues, "[i]f international law lays down duties, responsibilities, and rights (it must do so if it is a legal order), these duties, responsibilities, and rights can have only human conduct for content."[752] He

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From Apology to Utopia: the Structure of International Legal Argument (Helsinki: Lakimiesliiton Kustannus, 1989) at 499-500 [hereinafter Koskenniemi, *From Apology to Utopia*]. It is important to note that Scelle's work does not adequately focus on groups.

[744] Scelle, *Manuel, supra* note 743 at 19.

[745] *Ibid.*

[746] François Vitoria, author of *De Indis,* born circa. 1480 A.D., died in 1546 A.D.

[747] François Suarez, author of *Tractatus de Legibus ac Deo Legislatore* and *Tractatus de Caritate*, born in 1548 A.D., died in 1617 A.D. in Lisbon.

[748] Hugo Grotius, born in Delft in 1583 A.D., died in 1645 A.D in Rostok. Wrote *De jure belli ac pacis* in 1625 A.D.

[749] Treaty of peace of Westphalia (Münster and Osanbrück) in 1648 is considered to be the beginning of modern states and recognition of modern principles of equality of states and cooperation of states. A. Verdross, "Règles générales du Droit international de la paix" (1929) 30 Rec. des Cours 271 at 285.

[750] Spiropoulos, "L'individu et le droit international," *supra* note 739; Spiropoulos, *L'individu en droit international, supra* note 739 at IX. See also P.P. Remec, *The Position of The Individual in International Law according to Grotius and Vattel* (The Hague: M. Nijhoff, 1960) at 60.

[751] Spiropoulos, "L'individu et le droit international," *supra* note 739.

[752] H. Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952) at 96 [hereinafter, Kelsen, *Principles of International Law*]. Nonetheless, and interestingly Kelsen upheld a state positivism.

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admits that law can obligate and authorize "juristic persons" also, but rejects as "untenable" the "traditional" view that only states—juristic persons—are subjects of international law. Keslen explains, "individuals are subjects of international law in a specific way."[753]

***Jus inter gentes*,** on the other hand, is based on the fact that in the early stages of formation of modern international law the relation among peoples was through the state personified in the absolute ruler.[754] Schwarzenberger traces the position of states as the primary subjects of international law back to the "feudal nexus" within the Holy Roman Empire, which existed even after some of the rulers were practically independent from the Emperor.[755] He observes, "for a long time, these crowned heads rather than their States were considered to be subjects of international law."[756] On the basis of the precedents of the United Provinces of the Low Countries,[757] of Cromwell's Commonwealth,[758] and the model of aristocratic free cities in the Holy Roman Empire, the emphasis gradually

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Generally see *Pure Theory of Law*, trans. from the second (revised and enlarged) German ed. M. Knight (Berkeley: University of California Press, 1978).

[753] Kelsen, *Principles of International Law, ibid.*; see also, H. Kelsen, "Théorie du droit international public" (1953) 84 Rec. des Cours at 62-.; H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg (Cambridge, MA: Harvard University Press, 1945) at 96 [hereinafter Kelsen, *General Theory of Law*].

[754] States intentionally avoided granting individuals rights resulting from norms of international law. Spiropoulos, *supra* note 750 at 196.

[755] Schwarzenberger & Brown, *supra* note 354 at 43.

[756] *Ibid*.

[757] The Republic of the Seven United Netherlands (or "of the Seven United Low Countries") was a European republic between 1581 and 1795, in about the same location as the modern Kingdom of the Netherlands, which is the successor state. This idea is present in the opening lines of the 1581 Dutch Declaration of Independence:

> The States General of the United Provinces of the Low Countries, to all whom it may concern, do by these Presents send greeting:
> As it is apparent to all that a prince is constituted by God to be ruler of a people, to defend them from oppression and violence as the shepherd his sheep; and whereas God did not create the people slaves to their prince, to obey his commands, whether right or wrong, but rather the prince for the sake of the subjects (without which he could be no prince) …

O.J. Thatcher, ed., *The Library of Original Sources* (Milwaukee: University Research Extension, 1907), Vol. V: 9th to 16th Centuries, pp. 189-197, cited in "The Dutch Declaration of Independence, 1581," online: Internet Modern History Sourcebook <http://www.fordham.edu/halsall/mod/1581dutch.html> (date accessed: 18 July 2007).

[758] The Commonwealth of England was the republican government which was declared by the Rump Parliament after the execution of Charles I in 1649, and initially ruled England and Wales, and then Ireland and Scotland from 1649 to 1660. The government during 1653 to 1659 is properly called The Protectorate, and took the form of direct personal rule by Oliver Cromwell and, after his death, his son Richard, as Lord Protector.

shifted from the head of state to the state itself as an international person.[759] As a result, it is contended that "the 'modern' law of nations is conditioned by the genesis of the modern State, which characterises its structure."[760] According to this view of international law, which found its way into international decisions,[761] for three centuries a stricter view of sovereignty and of states as the only subject of international law dominated the study of this field[762] and the individual was treated as a subject of international law only indirectly and through his or her relationship to a state;[763] hence the importance of "nationality" in traditional public international law.[764] Nonetheless, this state-centric view of international law acknowledges the rise of non-state actors—non-governmental organizations and private corporate actors—especially in the post-cold War period, even if "for the most part, [they] act within the confines of the state-centric international legal system."[765]

Each of the conflicting views set out above holds part of the truth, yet they both fail to depict the complete picture of the subjects of international law. That is why some international legal scholars have engaged in more elaborate definitions of the subjects or contours of international law.[766] Barberis, for example, distinguishes between the

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[759] Schwarzenberger & Brown, *supra* note 354 at 43. In Marxist views, the fate of the state is even clearer. The modern state is the consequence of capitalist civilisation, resulting from the proletariat being dominated by the bourgeoisie. See J. De Soto, "L'individu comme sujet du droit des gens" in *La technique et les principes du droit public: études en l'honneur de Georges Scelle,* vol. 2 (Paris: Librairie générale de droit et de jurisprudence, 1950) 687 at 689-690.

[760] W.G. Grewe, *The Epochs of International Law*, trans. & rev. Byers, M., (Berlin: Walter De Gruyter, 2000) at 163.

[761] See *Lotus* case which refers to independent states as the subjects of international law. *The Case of the S.S. "Lotus"* (1927) P.C.I.J. (Ser. A) No. 10 at 18 [hereinafter the *Lotus* case]; (Ser. A) No. 20-21 at 41. Anzilloti who was an influential Judge at that PCIJ, was one of the major proponents of the idea of states as the only subjects of international law.

[762] N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux" (1925) 6 Rec. des Cours 1 at 5 [hereinafter Politis, "Le problème des limitations de la souveraineté"].

[763] See P. Vellas, *Droit international public: Institutions internationales* (Paris: Librairie générale de droit et de jurisprudence, 1970) at 327.

[764] See *e.g. Barcelona Traction* case, *supra* note 317 (addressing question of nationality of corporations); *Nottebohm (Liechtenstein v. Guatemala)* [1955] I.C.J. Rep. 4 at 22-54 (elaborating on effective link between an individual and the state of nationality).

[765] See Michael Byers "Epilogue" to Grewe's classic work on history of international law. *Supra* note 760 at 709.

[766] See *e.g.* Kant's view *supra* note 740. There have been similar efforts by North American scholars to present a framework to address issues related to non-state actors in international law. Jessup, for instance,

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definition of subjects under the "pure theory of law" of Kelsen[767] and under the "theory of responsibility,"[768] and then proposes a third way to avoid the criticism addressed to those two.[769] According to Barberis, even those who have only a few rights and responsibilities are subjects of the law, and being a subject of international law does not necessarily mean that the entity holds specific obligations.[770] He contends that there exists no norm of positive international law indicating that certain entities possess international personality, or that confers specific rights to all subjects of international law; furthermore, international practice does not indicate the existence of such a norm.[771] The law only confers personality to an entity through the granting of rights or imposition of obligations, without indicating whether that entity is a subject of law.[772] This view is supported by the ICJ's functional approach in the *Reparation* and *Western Sahara* cases according to which the subjects of a legal system are not necessarily identical in their nature or their rights.[773] Barberis rejects the view that all actors on the international scene belong to the

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challenged the doctrinal and conceptual boundaries of both public and private international law and offered another concept in order capture normative and transactional relations across national borders. He uses the term "transnational law" that "include[s] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." *Transnational Law* (New Haven: Yale University Press, 1956) at 2. Jenks also argues that international law is not merely the legal system governing the relations among a limited group of sovereign states, but has changed to a "common law of mankind" which is

> the law of an organized world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon, the individual citizen, and confronted with a wide range of economic, social and technological problems calling for uniform regulation on an international basis which represents a growing proportion of the subject-matter of the law.

The Common Law of Mankind (New York: Praeger, 1958) at 8. Finally, Friedmann also suggests that public organizations and private corporations and human individuals be included as active participants and subject of international law. *The Changing Structure of International Law* (London: Stevens, 1964) at 365.

[767] See *supra* note 753 and accompanying text.

[768] The theory of responsibility is stated by Eustathiades, according to whom there are two conditions for being a subject of international law: 1) having rights and being able to claim them at the international level; 2) having obligations and having the capacity to commit an international delict (see "Les sujets du droit international et la responsabilité internationale: nouvelles tendances" (1953) 84 Rec. des Cours 397.

[769] J.A. Barberis, "Nouvelles Questions Concernant la Personalité Juridique Internationale" (1983) 179 Rec. des Cours 145 at 160-180.

[770] Barberis, *supra* note 769 at 168.

[771] *Ibid*.

[772] *Ibid.*

[773] *Reparation for Injuries Case, supra* note 329; *Western Sahara* Case, *supra* note 734.

same category.[774] This view is supported by the school of thought that considers states to be the only subjects of international law, while the opposing school considers individuals as the only subjects of international law. Barberis responds to this view by pointing out that the rights and obligations of a state are distinct from the rights and obligations of non-state actors. This difference is important, because states are an essential part of the current international legal order, and without taking them into account any description of international law will be inaccurate.[775] However, this observation equally applies to non-state entities with rights or obligations.

In 1927, after observing that international law is in a period of transition, Politis concluded that "*si [le droit international] n'est plus exclusivement le droit des États, il n'est plus encore complètement celui des hommes*."[776] Eighty years later, I must come to the same conclusion.

To present elements of a framework to examine the participation of non-state actors in international fora it is necessary to survey their participation in creating and enforcing international law as individuals or non-state actors and not as representatives of a collectivity.[777] This review will also serve as a basis for comparison between the level of participation of non-state actors in the WTO with other organizations. In line with the structure adopted in the study of non-state actor participation in the WTO, three concepts (norm-creation, enforcement and adjudication) are examined separately, beginning with a review of the historical context in each case. The last section of this chapter focuses on

[774] Barberis, *supra* note 769 at 170-171.

[775] *Ibid.* at 172-3. He also rejects the attempt to elaborate a theory of a third legal order, distinct from international or domestic legal orders, to explain the position of certain entities. In explaining the position of the Catholic Church, humanitarian law and trials of war criminals, agreements between states and foreign enterprises, internal law of international organizations, regulations governing multinational enterprises, and national liberation movements, a third legal order has been invoked. Barberis contends that the reason for invoking this third legal order, and putting certain entities on the margins of the international community is ideological, and he rejects that idea. For him, the relation between different entities in international law is either subordination, or coordination. In the case of the former, the internal law of the state governs it and in the case of the latter international law. *Ibid.* at 174.

[776] Politis *Les Nouvelles Tendances, supra* note 88 at 91.

[777] De Soto, *supra* note 759 at 693; and H. Kelsen, "Théorie générale du droit international public: problèmes choisis" (1932) 42 Rec. des Cours 117 at 161 [hereinafter Kelsen, "Théorie générale du droit international"].

presenting a balance sheet of participation in international organizations by listing certain problems of participation followed by a brief comparison with participation in the WTO.

1- Norm-creation and policy making

Participation of non-state actors in policy-making can take many different forms, from activity initiation including agenda-setting, information provision and lobbying, to policy development, including policy formulation and policy advice.[778] This includes participation in world trade issues, where "NGO's approaches to international norms and authority are increasingly varied," and in addition to non-state actors initiatives that appeal to international norms to influence domestic policy, there are now non-state actors which partner with governments to influence international policies.[779] After providing a historical background to participation of non-state actors,[780] I will canvass a variety of mechanisms for participation in different international organizations. Because of its wide-ranging activities and important role in coordinating international efforts, more attention is given to the United Nations mechanisms in this section.

a- Historical context: before the UN era

The history of involvement of non-state actors in international law dates back to long before the advent of the United Nations.[781] For a long period of time the discussions related to petitioning in international law—at least as regards petition-requests—has significant bearing on the examination of the role of non-state actors in norm-creation. With only a few exceptions, until more recent times there was no right of petitioning for

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[778] K. Martens, *NGOs and the United Nations: Institutionalization, Professionalization and Adaptation* (New York: Palgrave Macmillan, 2005) at 156.

[779] Nelson, *supra* note 1028 at 129. According to Nelson "Civil society activists collaborate with governments to weaken or change the rules of international organizations (for example, the IMF or the WTO), or to reduce the influence of certain international organizations or norms (for example, neoliberal economic theory)." *Ibid*.

[780] My intention is not to provide a complete historical survey of participation of non-state actors, but only to provide examples of the breath and depth of their participation in the past centuries.

[781] Generally see S. Charnovitz, "Two Centuries of Participation; NGOs and International Governance" (1997) 18 Mich. J. Int'l L. 183-286 [hereinafter Charnovitz, "Two Centuries of Participation"]. Charnovitz divides non-state actors involvement into seven historical periods: emergence (1775-1918), engagement (1918-1934), disengagement (1935-1944), formalization (1945-1949), underachievement (1950-1971), intensification (1972-1991), and empowerment (1992-). *Ibid.* at 190. See also United Nations, *The Right To Petition: Report by the Secretary-General*, UN Doc. E/CN.4/419 (11 April 1950) [hereinafter *Report of the Secretary General on the Right to Petition*].

private persons in international law. Conversely, the practice, even if inconsistent, dates back to the first days of the advent of modern international law.[782]

One may assume that the question of petitioning under international law was only raised after the creation of permanent international institutions. A review of the process–verbaux of important international conferences and congresses, however, demonstrates that petitions existed long before the League of Nations was created.[783] Historically, there are a few instances of intervention by non-state actors in international conferences prior to the 19th century,[784] but for the purposes of this study some events of the 19th century are worth mentioning. A few of the very important international conferences of the 19th century were convened by the initiative of individuals or private interests.[785]

Furthermore, there are examples of cases where petitions by private persons were submitted to delegations participating in international conferences. During the Congress of Vienna (1814-1815),[786] in addition to many officials there were several representatives from diverse corporations or private associations and even individuals who were there to

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[782] Generally see, N. Feinberg, "La pétition en droit international" (1932) 40 Rec. des Cours 525 [hereinfater Feingberg, "La pétition en droit international"]. In his study, Feinberg distinguishes between the "*inorganique*" period of international law (pre-1919), when no international organization existed and their functions were performed by international conferences and congresses and the period after the creation of the League of Nations and the International Labour Organization. *Ibid*. at 533.

[783] Feingberg, "La pétition en droit international," *supra* note 781 at 535.

[784] In the Congress of Breda in 1667 (which was held to establish peace between the Republic of United Provinces—Republic of the Seven United Low Countries—and France on one side and England on the other) John Amos Coménius, the famous Czech philosopher and educator, sent a message of peace (*Angelus pacis*) and in the Congress of Nijmegen in 1678 (held with a view to putting an end to the Franco-Dutch War) the famous Quaker of the time Robert Barclay appealed for peace to European rulers and asked them to find ways for establishing lasting peace based on principles of Christianity. The founder of the Quaker sect, George Fox also intervened for the same cause during the Congress of Nijmegen. Feingberg, "La pétition en droit international," *supra* note 781 at 535-36. This is particularly interesting in the context of this thesis because the Anglo-Dutch wars were essentially wars over control of international trade.

[785] The famous 1864 Geneva Conference for protection of the sick and injured originated from Henri Dunant's book, *Un Souvenir de Solférino* (Genève: Imprimerie Jules-Guillaume Fick, 1862). The idea of the creation of a Universal Postal Union for the first time came from the German von Stephan. The initiative for the 1880 and 1880 Conferences for regulation and protection of industrial property was related to the universal expositions of Vienna and Paris. Feingberg, "La pétition en droit international," *supra* note 781 at 536. The First Conference for protection of literary and artistic works held in 1884 in Bern followed the appeal by the Association of the Authors and Artists to the "civilized" governments. Feingberg, "La pétition en droit international," *supra* note 781 at 537. But these instances are not examples of petitioning in international law.

[786] The Congress of Vienna was the conference of major European powers which was held pursuant the defeat of Napoleon to redraw the continent's political map. Generally see C.K. Webster, *The Congress of Vienna, 1814-1815* (London: Oxford University Press, 1919).

defend their interests on a wide variety of issues, from treatment of minorities to freedom of expression, and abolition of slavery.[787]

During the Aix-la-Chapelle Congress of 1818[788] which brought together the four Allied Powers and France, Tsar Alexander I received a series of documents from an English clergyman Rev. Lewis Way in favour of the emancipation of Jews in Europe. Alexander I shared these documents to other officials who were present, which was noted in the documents of the Congress.[789]

Furthermore, in 1874, during the Conference of Brussels, which was held to regulate the laws on customs of war, the Belgian Government received a petition from the inhabitants of Antwerp, expressing regret at the fact that the proposed draft convention did not prohibit destruction of the private property of an inoffensive population. The petition was handed to the Commission which was reviewing the draft, but when the Commission wanted to respond to the petitioners, the Belgian Government objected stating that there was no direct link between the petitioners and the Conference and that communication should be through the Belgian Government.[790]

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[787] *Report of the Secretary General on the Right to Petition, supra* note 781 at para. 13. Unfortunately, there is not much information on the procedure followed in consideration of petitions in the Congress of Vienna. However, from examining the published documents of the Congress it becomes evident that a great number of petitions submitted to the Congress of Vienna were officially taken into account, and some of the issues raised in petitions were addressed. The President of the Congress, Prince Metternich, even officially informed some representatives of private groups that their petitions was taken into account and action was taken on them. Feingberg, "La pétition en droit international," *supra* note 781 at 540-43. See also Charnovitz, "Two Centuries of Participation," *supra* note 781 at 192 and 195.

[788] The Third Congress or Conference of Aix-la-Chapelle (Aachen), held in the autumn of 1818, was primarily a meeting of the four allied powers Britain, Austria, Prussia and Russia to decide the question of the withdrawal of the army of occupation from France and the nature of the modifications to be introduced in consequence into the relations of the four powers towards each other, and collectively towards France. See A.W. Ward, *The Period of Congresses* (London: n/a, 1919) at Part III.

[789] M.J. Kohler, *Jewish Rights at the Congress of Vienna (1814-1815) and Aix-la-Chapelle (1818)* (New York: 1918) at 50-56 cited in Feingberg, "La pétition en droit international," *supra* note 781 at 538. There is even less information about the procedure followed in dealing with petitions in that Congress. Another notable among the petitions was the one submitted by Robert Owen (through the British representative) in favour of workers. Feingberg, "La pétition en droit international," *supra* note 781 at 543.

[790] Feingberg, "La pétition en droit international," *supra* note 781 at 538-39. By contrast, in 1856 during the Congress of Paris three representatives of the Peace Society of London went to Paris to solicit the British Plenipotentiary, Lord Clarendon, for inclusion of a general clause on mediation in the treaty and succeeded in doing so. *Ibid.* at 537.

The Berlin Congress of 1878[791] is especially interesting as it established a procedure to hear petitions. In that case, (Prussian Chancellor Otto von) Bismarck decided that a list of the more important petitions should be complied and distributed to the delegations and the documents should be deposited and available at the secretariat of the Congress.[792]

The 1884 Conference for Protection of Literary and Artistic Works, and a 1889-1890 conference for the repression of slavery held in Brussels in addition saw a brief description of the content of the petitions distributed to the delegations. In some cases, petitions were read in their entirety to the Conference.[793] The subjects of petitions were diverse, but were of course related to the subject of the international gathering. Very often they contained proposals for elaboration of conventions, and in rare cases, they explicitly addressed private interests. According to the *procès verbaux* of some conferences, receipt of petitions was acknowledged by the conference.[794]

For most of the international conferences of the second half of the 18th century as well as the 19th century, the procedure set by the Berlin Congress was sufficient. The two important Peace Conferences of the Hague in 1899 and 1907 for the first time faced a large scale of mass petitions which required more elaborate procedures.[795]

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[791] The Congress had as its topic national boundaries and political issues in the Balkans. Charnovitz, "Two Centuries of Participation," *supra* note 781 at 196.

[792] *Report of the Secretary General on the Right to Petition, supra* note 781 at para. 15. Even an anonymous petition was later deposited with the secretariat. Feingberg, "La pétition en droit international," *supra* note 781 at 545. The same procedure was followed in the 1890 Conference for regulation of labour in industrial establishments and mines, and the 1903 Conference on cordless telegraph. *Ibid*. at 547.

[793] *Report of the Secretary General on the Right to Petition, supra* note 781 at para. 16. Generally the slave trade was a target of an internationally organized anti-slavery movement since the late eighteenth century. See Charnovitz, "Two Centuries of Participation," *supra* note 781 at 191-192.

[794] Feingberg, "La pétition en droit international," *supra* note 781 at 547-49.

[795] For example in 1907 the documents presented by the International Council of Women and the American Peace Society each had two million signatures. Feingberg, "La pétition en droit international," *supra* note 781 at 549-50. In 1899 a Commission was given the task of surveying the petitions and submitting a report to the plenary assembly. The commission divided the petitions into three groups, the ones that had to be responded to, the ones that needed no response and the ones, which fell outside the competence of the Conference. The second Hague Peace Conference followed the same procedure almost without any change. *Report of the Secretary General on the Right to Petition, supra* note 781 at paras. 17 and 18. Also of note is the role of Tzar Nikolai in organizing the Hague Peace Conferences. During this period up to 1914 the only form of petitioning in front of international conferences was written submissions, and there were no instances of oral pleading. Feingberg, "La pétition en droit international," *supra* note 781 at 555.

The 1919 Peace Conference was the first time ever that an international conference included precise rules on the procedure concerning petitions in its regulations.[796] But another interesting development in this conference was the instances of direct participation in the work of the conference. During the conference, organizations fighting for women's rights gained the right to directly address certain commissions whose works were related to women's rights.[797]

In the League of Nations system, for the first few years, the Secretary General forwarded communications submitted by individuals to the Council at his discretion. In 1923 the Secretary General asked for the Council's opinion on how to deal with the petitions. The Council decided that the League of Nations being an inter-governmental organization, documents emanating from non-governmental entities—except petitions concerning protection of minorities or other petitions for which a procedure was set by decisions of the Council—should not be transmitted to the Council and such entities should contact their governments.[798] Public opinion reacted strongly to this decision.[799] The Council in 1928 decided not to modify the procedure adopted in 1923.[800] The

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[796] According to article 11 of the Regulations all petitions should be received and classified by the secretariat and the ones with special political interest should be summarized in a list distributed among the delegations. In practice, however, the secretariat sometimes distributed the full text of certain communications. Feingberg, "La pétition en droit international," *supra* note 781 at 556-57. The Versailles Conference is especially important in this regard. Before this Conference the rules related to petitions were created after the conference started, but in Versailles the regulations on petitions were incorporated in the general rules established before the opening of the Conference. *Ibid.* at 630.

[797] See Charnovitz, "Two Centuries of Participation," *supra* note 781 at 213-214.

[798] Feingberg, "La pétition en droit international," *supra* note 781 at 580.

[799] The International Union of Associations for the League of Nations in a long letter to the Secretary General requested that the question be reconsidered and proposed that a three-member commission be created for screening the communications from private organizations and forwarding the more important ones to the Council. Upon this request the Secretary General referred the matter to the Council again at the end of 1923. The Council "reached the same decision as before, but authorized the Secretary General to submit at the beginning of each session a list of communications received from international associations." Even this modification to the former decision restricted the access of private entities to the Council of League of Nations. Especially that the list of documents only included those coming from international organizations. National organizations asked the Council not to discriminate against them and to, at least, adopt a broader definition of international organizations to include also organizations whose activities are related to international issues. Feingberg, "La pétition en droit international," *supra* note 781 at 581-82.

[800] Feingberg, "La pétition en droit international," *supra* note 781 at 584. The Council also rejected a broader definition of the "international" adjective to include national organizations whose activities were related to international issues. "During 1930 and 1931 only 9 communications were listed for each year. Furthermore in certain cases Governments submitted communications emanating from a private association." The Assembly of League of Nations during the first years of its activities published

continued on the next page ➢

Council also established a Consultative Committee in 1927 as a formal advisory group that included NGOs.[801]

While the Council and the Assembly of the League of Nations adopted a more restrictive approach to accepting petitions, subsidiary organs of the League of Nations did not adopt the same formal and precise or uniform rules on petitions. Participation of non-state actors in subsidiary organs of the League of Nations evolved from a basic model of petition submission to a more developed presence in the everyday functioning of their activities. Their collaboration was made in the form of participation as advisors in the deliberation or invitation to a special session for private entities, or admission of representatives as observers.[802]

After 1920, most international conferences were organized through the League of Nations.[803] Around this time the necessity of participation of social forces other than states in the international life was being felt, and the participation of private association in international conferences—e.g. as advisors on issues related to their field of specialty—

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communications from private organizations in its Journal of the Assembly. Since the first Assembly in 1920 it even supplemented the Journal with a special supplement that included the text of a certain number of communications. In certain cases private petitions were distributed to members as official documents. To avoid this non-uniform practice in 1921 a regulation was adopted for certain types of petitions. "A general regulation was adopted in 1924 after the Council adopted a uniform practice in this regard." The relevant resolution decided that the receipt of all communications from international non-official organizations should be announced by the Secretary General in the Journal, indicating the source, the date and the subject of the document, and that upon the request of a delegation the document can be distributed to members of the Assembly. Furthermore, representatives of non-governmental organizations met the President of the Assembly on several occasions. *Ibid.* at 584-87.

[801] Charnovitz, "Two Centuries of Participation," *supra* note 781 at 281. A proposal by the Secretary-General of the United Nations Conference on Trade and Development (UNCTAD) to establish a similar Global Advisory Committee comprising representatives of business, trade unions, and academia was not accepted by the UNCTAD IX Conference. However, a similar mechanism is the UN Advisory Board on Disarmament Matters. *Ibid.* at 280-281.

[802] Feingberg, "La pétition en droit international," *supra* note 781 at 588. The general principle applied in subsidiary organs of the League of Nations regarding private entities was that the Secretariat of the League did not have the right to distribute documents from private sources unless authorized to do so by the president of the relevant organ. *Ibid.* As discussed later in this chapter, International Labour Organisation (ILO), however, has had a special place among other international organizations. While other subsidiary organs were intergovernmental the ILO is composed of representatives of states and representatives of employers and employees. *Ibid.* at 592.

[803] "One of the few conferences outside that framework was the 1922 Conference of Lausanne, which was convened by France, England and Italy to establish peace with Turkey. The Conference set the procedure for distribution of petitions to delegations, notably representatives of the Armenian communities were allowed to present their petitions to a sub-commission of the Conference, which caused much controversy." Feingberg, "La pétition en droit international," *supra* note 781 at 562-63.

was becoming the rule rather than the exception.[804] As a result of this direct participation, petitioning to conferences lost its importance.

Finally, during several trade and finance conferences in 1920's non-state actors—including business associations, and notably the International Chamber of Commerce (ICC)—took part in an advisory capacity.[805]

The cases discussed in this section demonstrate a pragmatic approach to giving a voice to non-state actors long before creation of international institution. This long history

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[804] Feingberg, "La pétition en droit international," *supra* note 781 at 565.

[805] These conferences included: the International Financial Conference of Brussels in 1920, the 1923 International Conference on the Simplification of Custom Formalities, the 1925 and 1927 World Economic Conference, the 1927 and 1928 Conferences on the Abolition of Import and Export Prohibitions, and the 1928 International Conference on Statistics. Charnovitz, "Two Centuries of Participation," *supra* note 781 at 222-226.

The Sixth Pan-American Conference in 1928 (Havana) also granted hearings to diverse women associations. "In the 1930 Conference for Codification of International Law, two international private associations were given the right to make presentations to a commission, and their presentations were included in the *procès-verbaux* of the meetings, and their submissions distributed." On the other hand a demand from a national association was rejected. This rejection was based on invoking a "tradition" in the League of Nations that only international associations can present requests and memorandums. The 1931 Conference for Limitation of Production of Narcotics, in article 3 envisaged the establishment of a Committee to examining communications from private institutions and individuals to be reported to the Conference. From the opening of the Conference, certain private groups asked to be given certain privileges to follow the work of the Conference and if necessary take part in deliberations. The request was sent to the above-mentioned Committee, which recommended that the Conference give the representatives of private organizations the chance to be heard, their letters be published, and the non-confidential documents be made available to them. The Conference agreed with all these proposals.

International organizations and associations showed great interest also in the 1932 Conference for Reduction and Limitation of Armament, which created much hope in the public opinion. From the opening of the Conference, its president proposed that a Committee of five members be in charge of petitions; create the principles to be followed in presenting the petitions and their publication in the official organ of the Conference. The president, invoking the precedents of other international conferences, also suggested that a plenary session be dedicated to presentations of petitioners. "The proposals were accepted by the Conference, and the mentioned Committee decided that the presentations of the private persons should be done in an ad hoc plenary session before the opening of general discussions and that will be reported in an annex to the *procès-verbaux*." The private groups were divided into 5 categories ("Women's associations, students' organisations, religious groups, associations for the League of Nations, and workers organizations") and their written text of their presentations to the Conference had to be submitted to the Committee in advance. The Committee also decided that the correspondence of international organizations would be published in the Journal of the Conference, with a summary of their content, the correspondence of national organizations would be named and the number of letters and telegrams received from individuals would be indicated to the conference. After the presentations at the *ad hoc* plenary session on 6 February 1932, the representatives of women international organizations and women from more than 30 countries presented a petition signed by 8 million individuals in their countries in support of peace. A presentation that proved that international public opinion is not a myth, but a reality. The regulation of private person's participation in the disarmament conference was the most detailed in comparison with its predecessors. Feingberg, "La pétition en droit international," *supra* note 781 at 565-73.

and practice of taking petitions from non-state actors into account stands is in stark contrast with the current situation in the WTO as discussed in the previous chapter.

b- Institutional mechanisms participation in international organizations

Access to intergovernmental organizations enables non-state actors to meet with government delegates, obtain and spread information and participate in meetings. In return, intergovernmental organizations can receive additional information, advice and support from non-state actors.[806] In practice, of course, non-state actors exercise considerable indirect influence.[807] Participation of non-state actors in the post-World War II system of international governance is regulated within different organizations in different manners.[808]

i- The United Nations

Article 71 of the *Charter of the United Nations* acknowledges the role of NGOs on the international scene, stating that

> [t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.[809]

Implementation of this article was the subject of discussions from the very first session of the General Assembly, and was affected by early East-West tensions within the United Nations. [810] Eventually, to enforce article 71 of the *Charter of the United Nations*, an elaborate system has been put in place within the ECOSOC to identify the NGOs that can

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[806] Martens, *supra* note 778 at 125.

[807] Slaughter, "International Law and International Relations," *supra* note 412 at 139.

[808] See also Tully, *Corporations and International Lawmaking, supra* note 363.

[809] *Supra* note 194.

[810] Martens, *supra* note 778 at 126. Also under the *Agreement on the Headquarters of the United Nations* the United States has an obligation not to impede transit of the NGOs "recognized by the United Nations for the purposes of consultation under Article 71 of the Charter [of the United Nations]." 26 June 1947, sec. 11, 61 Stat. 3416. For more details see Y.-L. Liang, "The Question of Access to the United Nations Headquarters of Representatives of non-Governmental Organizations in Consultative Status" (1954) 48 Am. J. Int'l L. 434.

enjoy consultative status.[811] An ever-increasing number of NGOs, currently standing at over 3000, have sought and obtained the consultative status with the ECOSOC.[812]

The NGOs in consultative status are divided in the three following distinct categories with differing degrees of competence to participate in the activities of the ECOSOC: general consultative status, special consultative status, or being on the roster.[813] Organizations with general consultative status are those concerned with most of the activities of the ECOSOC and whose membership is broadly representative of major segments of society in a large number of countries and in different regions of the world. These organizations may designate United Nations representatives, participate in United Nations Conferences, attend United Nations meetings, circulate statements of 2000 words at meeting of ECOSOC and its subsidiary bodies, and even propose items for the agenda of ECOSOC. Special consultative status is reserved for organizations whose scope of

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[811] See the ECOSOC resolution entitled *Consultative Relationship between the United Nations and Non-Governmental Organizations* (ESC Res. 1996/31, UN ESCOR, 1996, Supp. No. 1, UN Doc. E/1996/96 (1996) 53) [hereinafter ECOSOC Resolution 1996/31]. Originally, based on the recommendations of a temporary committee which was established to work out a resolution on the NGOs relationship with the United Nations ECOSOC introduced a three class system of NGO consultations (which included categories A, B, and C of NGOs). Martens, *supra* note 778 at 126. In 1950, ECOSOC adopted Resolution 288 B (X) of 27 February 1950 which was replaced in 1968 by Resolution 1296 (XLIV). *Review of Consultative Arrangements with Non-Governmental Organizations,* Resolution ESC Res. 288(X), UN ESCOR, 27 February 1950, UN Doc. E/RES/288(X); *Arrangements for Consultation with Non-Governmental Organizations*, ESC Res. 1296 (XLIV), UN ESCOR, 23 May 1968, UN Doc. E/RES/1296(XLIV). Resolution 1296 (XLIV) replaced the old system with a roster and categories I and II and required NGO statements concerning their financial resources and quadrennial reports. On background of the changing institutional interactions between NGOs and the United Nations see A. Donini, "The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs" in Weiss & Gordenker, eds., *supra* note 378, 83.

[812] The growth in the number of NGO's with consultative status with the ECOSOC is astounding. The number has risen from 41 in 1948 to 377 in 1968 to 1350 in 1998. *Arrangements and Practices for the Interaction of Non-Governmental Organizations in all activities of the United Nations System: Report of the Secretary-General*, UN General Assembly, 53rd Sess., Agenda Item 58, UN Doc. A/53/170 (10 July 1998) para. 2 [hereinafter *Report of the Secretary-General on Practices for Interaction with NGOs*]. As of August 2001 that number stood on 2091 organizations. See Aston *supra* note 369 at 944. Today around 3052 NGOs have attained consultative status. "Introduction to Consultative Status," online: United Nations Department of Economic and Social Affairs <http://esa.un.org/coordination/ngo /new/index.asp?page=intro> (date accessed: 15 December 2007). Two reasons are cited to explain the exponential growth of NGO participation: first, many NGOs which had informal relations with the United Nations sought to formalize their relationship following several United Nations conferences in the first half of 1990s; second, various United Nations bodies and agencies which had their own mechanisms for NGO accreditation, were asked to provide lists of associated NGOs which were automatically included in the consultative status scheme. See Martens, *supra* note 778 at 129-130 (citing interview with a United Nations official).

[813] For more details on ECOSOC's relations with NGOs and the three categories see Sands & Klein, *supra* note 213 at 61.

competence and activity is limited to only a few of the fields of activity covered by ECOSOC (see table 2, below). Such organizations enjoy the same privileges as those accorded to organizations with general consultative status, except that they cannot propose any item on ECOSOC agenda or speak at meetings of ECOSOC. Organizations that do not fulfill the above-mentioned criteria but are deemed to be able to make occasional and useful contributions to the work of the ECOSOC may be put on a roster, and can be consulted at the request of ECOSOC or its subsidiary bodies.[814] Most importantly the official status enables NGOs to have access to United Nations premises and a chance to informally meet government delegates.[815]

For NGOs to attain status they must have an established headquarters, an executive organ and officer, a democratically adopted constitution which provides for the determination of policy by a representative body, an authority to speak for its members, and financial independence from governmental bodies.[816] A number of requirements are, however, not clearly defined in the resolution.[817] The NGO applications for accreditation are submitted to the United Nations' Department of Economic and Social Affairs, which forwards approved applications to an inter-governmental Committee on Non-Governmental Organizations.[818]

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[814] See ECOSOC Resolution 1996/31 *supra* note 811, paras. 22-31. As of December 2007 there were 139 NGOs with general consultative status, 1956 with special consultative status and 955 with Roster status with ECOSOC. "Consultative Status with ECOSOC," online: United Nations Department of Economic and Social Affairs <http://esa.un.org/coordination/ngo/new/index.asp?page=table2007> (date accessed: 15 December 2007).

[815] H. Cook, "Amnesty International at the United Nations" in P. Willetts, ed., *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (London: Hurst & Company, 1996) 181 at 187. According to Cook, "[a]t any UN meeting the discussions in the coffee lounges and corridors are as important as, if not more important than, the official speeches." *Ibid*.

[816] See ECOSOC Resolution 1996/31, *supra* note 811 at paras. 9-13.

[817] For example, "recognized standing within the particular field of their competence," and "representative character" are vague criteria. ECOSOC Resolution 1996/31, *supra* note 811 at para. 9.

[818] See ECOSOC Resolution 1996/31, *supra* note 811 at paras. 61-63.

Status / Participation Right	General Status	Special Status	Roster
Receive documents for all meetings	Yes	Yes	Yes
Attend all meetings	Yes	Yes	Yes, for meetings within their field
Propose agenda items in Council or in subsidiary bodies	Yes, with introductory statement and a response to the debate	No	No
Written statements **(a) in Council** **(b) in subsidiary bodies**	 (a) up to 2000 words (b) up to 2000 words	 (a) up to 500 words (b) up to 1500 words	If invited by the Secretary-General, the same as Special Status
Oral hearings **(a) in Council** **(b) in subsidiary bodies**	 (a) Yes (b) Yes	(a) Yes (if no other body covers the issue) (b) Yes	 (a) No (b) if invited

Table 2- Participation rights of NGO's in ECOSOC and its subsidiary bodies[819]

The current system of accreditation of NGOs is often criticized on the following grounds: large numbers of applications have resulted in long delays in processing times; the process is politicized, especially for human rights NGOs; member states promote government-organized NGOs (GONGOs);[820] and some states intensely observe the behaviour of NGOs that they dislike in order to find reasons to justify their expulsion.[821] Nonetheless, the intermediary role of NGOs and their role in following UN proceedings and expressing the views of sectors of the public have been found useful.[822] It is suggested that

> [t]he independent sources of legitimacy of many NGOs, in their affiliation with church groups, with widely-held political philosophies, or with public professions, and their grass roots structure, have allowed NGOs to summon

[819] P. Willetts, "The Rules of the Game: The United Nations and Civil Society" in J.W. Foster, & A. Anand, eds., *Whose World is it Anyway? Civil Society, the United Nations and the Multilateral Future* (Ottawa: United Nations Association in Canada, 1999) 247 at 262.

[820] Martens, *supra* note 778 at 130-132. See also See Charnovitz, "NGOs and International Law," *supra* note 371 at 359. The Committee is overburdened with applications. From more than 400 applications that it receives every year, the Committee can only deal with around 100 applications during its annual sessions. Decisions of the Committee can be very political as some member states have great interest in serving on the Committee, in order to prevent NGOs which are opposed to them from being accredited. Furthermore, since accreditation was extended to national NGOs, government-organized NGOs (GONGOs) have also been used to promote the interests of certain member states.

[821] It is also argued that integration of NGOs into intergovernmental bodies can negatively impact their role as independent observers, because governments use their power to withdraw the accreditation. Martens, *supra* note 778 at 134-135.

[822] Wedgwood, *supra* note 379, at 23.

> public support for formal UN decisions and emerging proposals complementing and challenging the direct voice of governments.[823]

In more recent years then Secretary General of the United Nations, Kofi Annan, appointed a "Panel of Eminent Persons on United Nations--Civil Society Relations,"[824] as part of a broad set of reform measures. The 2004 *Cardoso Report* is a seminal report which was prepared under the chairmanship of the former Brazilian President Fernando Cardoso on the relationship between civil society and the United Nations.[825] The panel examined existing guidelines, decisions and practices that affect NGO access to and participation in United Nations processes, and proposed a radically new approach to the relationship of the United Nations with non-state actors. Instead of NGO input to multilateral decisions, the panel calls for "multi-constituency dialogue" that would include business, parliamentarians, indigenous peoples, and others identified as key players by the United Nations.[826] In response to the *Cardoso Report* the Secretary-General issued a report which commended the *Report* and building on its proposals made concrete suggestions for increasing the participation of NGOs in intergovernmental bodies.[827] The *Report of the Secretary-General* avoids some of the more controversial features of the *Cardoso Report* and proposes, among others, NGO accreditation to the General Assembly, a depoliticized accreditation process, and a trust fund to promote more participation of NGOs from the South.[828] Nonetheless, these developments clearly demonstrate the intention to improve channels of participation for non-state actors in the United Nations system, which are already far more elaborate than those existing in the WTO.

ii- Financial, trade and development institutions

In addition to the United Nations, certain international financial institutions have recognized the importance of promoting participation in the context of their activities at the national and international level. For instance, the World Bank and IMF poverty

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[823] *Ibid*.

[824] UN Doc. A/57/387.

[825] *Cardoso Report, supra* note 386.

[826] *Ibid.* at 8-9.

[827] *Report of the Secretary-General in response to Cardoso Report*, *supra* note 387.

reduction strategy papers (PRSPs) promote broad-based participation of civil society and other stakeholders in all operational steps of development of the strategy.[829] The World Bank has also developed extensive relationships with NGOs[830] based on the *Articles of Agreement of the IBRD and IDA*,[831] which led to heightened activities in early 1980s and the creation of the NGO-World Bank Committee in 1982.[832]

Other organizations active in the field of trade or development have created similar mechanisms. [833] The latest conference of the United Nations Conference on Trade and Development (UNCTAD) recommended that UNCTAD should make participation of civil society and the private sector in its work more systematic in order to enhance the

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[828] *Ibid.* paras. 8, 20, 23, 26, and 28.

[829] See, Wolrd Bank, "Poverty Reduction Strategies," online: World bank < http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,menuPK:384207~pagePK:149018~piPK:149093~theSitePK:384201,00.html > (date accessed: 15 July 2007). However, this type of participation has been subject to some criticism as ambiguous or lacking real collaborative planning and decision making. See, *HDR 2002*, *supra* note 545 at 102.

[830] S. Cleary, "The World Bank and NGOs" in Willetts, ed., *supra* note 815, 63; P.J. Nelson, *The World Bank and Non-Governmental Organizations: the Limits of Apolitical Development* (New York: St. Martin's Press, 1995). I.F.I. Shihata, "The World Bank and Non-Governmental Organizations" (1992) 25 Cornell Int'l L. J. 623.

[831] Article V:8 of the *Articles of Agreement of IBRD* states that

> a) The Bank, within the terms of this Agreement, shall cooperate with any general international organization and with public international organizations having specialized responsibilities in related fields. Any arrangements for such cooperation which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Article VIII.
> (b) In making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organization of the types specified in the preceding paragraph and participated in primarily by members of the Bank, the Bank shall give consideration to the views and recommendations of such organization.

See *supra* note 226. Article V:4 of the *Articles of Agreement of IDA* reads as follows

> The Association shall cooperate with those public international organizations and members which provide financial and technical assistance to the less-developed areas of the world.

Supra note 226.

[832] Shihata, *supra* note 830 at 624. See also Cleary, *supra* note 830 at 63.

[833] More specifically on issues related to globalization there are examples of NGO participation in shaping policies. The Jubilee 2000 campaign on debt relief also demonstrates the success of civil society networks in influencing policy-making. In this case, different actors, including academics, trade unions, environmental organizations and grass-roots groups came together to encourage international financial institutions and rich countries to cancel the debt of Highly Indebted Poor Countires (HIPCs). *HDR 2002*, *supra* note 545 at 103-104.

value added from that cooperation.[834] The OECD has, since 1961, established advisory committees to consult trade unions and business and industries.[835] Of particular interest for our purposes is the trade liberalization negotiations for the Free Trade Area of the Americas (FTAA) in which the governments involved have set up a Civil Society Committee, which has issued an "Open and Ongoing Invitation" to non-state actors to provide written contributions to the governments.[836]

iii- Other organizations

An important and unique example of non-state actor participation is the ILO's tripartite system, which incorporates workers and employers organizations in the ILO deliberative processes. Furthermore, several ILO covenants and a large number of more technical instruments provide for workers' and employers' participation directly in their implementation. The *Convention (No. 144) concerning Tripartite Consultations to Promote the Implementation of International Labour Standards*[837] was specifically adopted to regulate this process and make it more coherent. Furthermore, the ILO Constitution and supervisory procedures envisage the right to take a direct part in the supervisory process for international workers' and employers' organizations, including the right to file complaints for violations of ratified conventions and on the basis of principles of freedom of association and collective bargaining.[838]

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[834] UNCTAD, *São Paulo Consensus,* Eleventh session, UN Doc. TD/410 (25 June 2004), online: UNCTAD < www.unctad.org/en/docs/td410_en.pdf> (date accessed 17 January 2008).

[835] D.A. Wirth, "Public Participation in International Processes: Environmental Case Studies at the National and International Levels" (1996) 7 Colorado J. of Int'l Env'l L. & Pol. 1 at 19-22. The trade union committee of the OECD evolved out of an advisory committee to the Marshall Plan. See M.J. Hogan, *The Marshall Plan* (1987), at 147 cited in Charnovitz, "Two Centuries of Participation," *supra* note 781 at 260.

[836] See FTAA-Committee of Government Representatives on the Participation of Civil Society, "Open and Ongoing Invitation to Civil Society in FTAA Participating Countries," FTAA.soc/15/Rev.5 (31 March 2004) online: FTAA <http://www.ftaa-alca.org/spcomm/SOC/INVITATION/soc15r5_e.asp> (date accessed: 10 November 2007).

See E. Dannenmaier, "Trade, Democracy, and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas" (2004) 27 Fordham Int'l L.J. 1066.

[837] 21 June 1976, 15 ILM 967 [hereinafter *Tripartite Consultations (International Labour Standards) Convention*].

[838] Generally see ILO, *The ILO at a Glance* (Geneva: ILO, 2008).

Other intergovernmental organization like the Organization for Security and Cooperation in Europe (OSCE) and the Council of Europe have followed the example of the United Nations and set up directives for cooperation with NGOs.[839]

In all these instances, member states and organizations have opted for formal mechanism (e.g., Civil Society/NGO Committees) for participation of non-state actors. These elaborate systems of participation, which in the case of the United Nations were put in place since its early days and have been subject to several developments, do not have any parallel in the WTO system or its predecessor.

c- Participation in international and treaty-making conferences

As demonstrated in the previous section there is a long history of non-state actors' participation in international conferences. In the United Nations era this tradition has continued from the outset, and included contributions to drafting important documents like the *Universal Declaration of Human Rights*.[840] Participation of NGOs in several United Nations world summits in the early 1990s is generally considered a turning point in the relationship between NGOs and international organizations.[841] In the environmental negotiations in Rio in 1992,[842] the Vienna Conference on Human Rights in 1993, the Women's Conference in Beijing in 1994, the International Campaign to Ban Landmines which culminated in the adoption of the 1997 Landmines Convention,[843] the Habitat Conference in Cairo in 1994,[844] the Social Summit in Copenhagen in 1995,[845] and the Rome negotiations for the establishment of the International Criminal Court, the role of

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[839] Martens, *supra* note 778 at 4.

[840] See Charnovitz, "NGOs and International Law," *supra* note 371 at 352 and sources cited in footnote 25.

[841] See J.T. Mathews, "Power Shift" (1997) 76 Foreign Affairs 50 at 55; Martens, *supra* note 778 at 9; P. Willetts, "From Stockholm to Rio and beyond: the Impact of the Environment Movement on the United Nations Consultative Arrangements for NGOs" (1996) 22 Rev. Int'l Studies 57 at 59 [hereinafter Willetts, "From Stockholm to Rio"].

[842] Interestingly during the Earth Summit in Rio de Janeiro in 1992, in addition to several members of NGOs who served on government delegations, the island state of Vanuatu turned its delegation over to an NGO. See Mathews, *ibid.* at 55.

[843] *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and Their Destruction*, (1997) 36 ILM 1507. See generally, L. Maresca & S. Maslen, *The Banning of Anti-Personnel Landmines: The legal contribution of the International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2000).

[844] Thürer, *supra* note 341 at 45.

[845] *Ibid*.

NGOs has been considerable.[846] The World Summit on Information Society, for example, established a "truly multi-stakeholder process" for participation, which involved the civil society organizations and the private sector,[847] and the Cairo Habitat Conference urged governments to include NGOs on delegations to conferences where population and development are being discussed.[848]

During conferences NGOs can comment on programs, propose new policy objectives, and respond to the general debate, "[h]owever, they are not supposed to exercise direct influence on the precise text for inclusion in a resolution, declaration, or convention that governments are going to adopt."[849] As discussed earlier, unlike other international and treaty-making conferences of that period, during the Uruguay Round negotiations and the Marrakesh Ministerial Meeting in April 1994, there were no provisions for participation of non-state actors.[850]

d- Initiating norm-making processes

There are numerous examples of NGO and non-state actors' participation in drafting processes for the development of international norms. In compliment to NGOs, individuals participate in elaborating international customs through scholarly societies, and conferences,[851] but in treaty law they remain on the sidelines.[852]

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[846] *Rome Statute of the International Criminal Court of 17 July 1998,* UN A/CONF./183/9. See Wedgwood, *supra* note 379, at 25. See also M.H. Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 93 Am. J. Int'l L. 22 at 23-39.

[847] World Summit on Information Society, "Participation," online: International Telecommunication Union <http://www.itu.int/wsis/participation/index.html> (last modified: 5 October 2006).

[848] *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994,* UN A/CONF.171/13/Rev. 1 (1995). The United States did send a mixed delegation to the First Pan American Conference. Charnovitz, "Two Centuries of Participation," *supra* note 781 at 281

[849] P. Willetts, "From 'Consultative Arrangements' to 'Partnership': The Changing Status of NGOs in Diplomacy at the UN" (2000) 6 Global Governance 191 at 206-207 [hereinafter Willetts, "From 'Consultative Arrangements' to 'Partnership'"].

[850] See *supra* note 483 and accompanying text.

[851] De Soto, *supra* note 759 at 694-95.

[852] There are, of course, important examples of individuals as the driving force behind creating a treaty, like that of Raphael Lemkin in creating the Genocide Convention. See R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944); see also W.A. *Schabas, Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000) at 27. In their discussion of "norm-entrepreneurs" ("agents having strong notions about appropriate or desirable behavior in their community"), Finnemore and Sikkink also cite the examples of Henri Dunant and his work towards foundation of the

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For instance, in the case of the *Declaration on the Protection of All Persons from Enforced Disappearances* the International Commission of Jurists took the lead on advancing the text, while Amnesty International remained closely involved in the drafting and in lobbying until adoption by the General Assembly.[853] Or the campaign against landmines was launched by a coalition of six NGOs in 1992,[854] and led to the *Landmines Convention* in 1997.[855] In the context of WTO, the Intellectual Property Committee, a coalition of private interests played a key role in adoption of the *TRIPS,* but as demonstrated earlier this influence was mostly due to lobbying efforts at national level.[856]

2- Enforcement and monitoring

Participation in the enforcement of international law can be conceived of at the levels of administration, implementation and adjudication. While the latter is more important for the purpose of the subject at hand, in this section I briefly discuss administration and policy implementation practices, including supplementing work and subcontracting.[857]

In terms of non-state actors (in this case mostly individuals) participation in the administration of international affairs, much is in the hands of states. Still the situation is different from that which prevailed in past centuries, when, in the absence of global institutions, international affairs were settled solely through diplomacy shrouded in

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International Committee of the Red Cross through an international treaty, as well as the international campaign for women's suffrage which was led by Elizabeth Cady Santon, Susan B. Anthony, Millicent Garrett Fawcett and Emmeline Pankhurst. M. Finnemore, M., & K. Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Int'l Orgs. 887 at 896-897.

[853] See Cook, *supra* note 815 at 193. For more examples and generally a detailed study of participation of Amnesty International, Fédération Internationale des Droits de l'Homme (FIDH), Cooperative for Assistance and Relief Everywhere (CARE International), and Oxford Committee for Famine Relief (Oxfam International) in initiation and implementation of policies within the United Nations see Martens, *supra* note 778 at 54-95.

[854] See "How did it all start?" online: International Campaign to Ban Landmines < http://www.icbl.org/tools/faq/campaign/start> (date accessed 17 January 2008). The six NGOs were Handicap International, Human Rights Watch, medico international, Mines Advisory Group, Physicians for Human Rights and Vietnam Veterans of America Foundation. *Ibid.*

[855] *Supra* note 843. See also R. Price, "Emerging Customary Norms and Anti-Personnel Landmines," in C. Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 106.

[856] See *supra* note 485 and accompanying text.

[857] Martens, *supra* note 778 at 156. See also Ranjeva, R., "Les organisations non gouvernementales et la mise en oeuvre du droit international" (1997) 270 Rec. des Cours 9.

secrecy.[858] Interestingly, even the Security Council, an organ in which inter-state politics is predominant, has not been immune from the influence of NGOs. In recent years the Security Council has met regularly with NGO representatives for briefings on current affairs and has sought consultations on local conditions from NGOs present in remote areas.[859] In doing so, the Security Council has adopted a practice that is a mix of formal and informal arrangements.[860]

In addition, civil society at the domestic and international level and NGOs play an increasingly important role in international fora. Even though the states influence the selection of international civil servants at higher levels, once elected, at least in theory, they should act independently. Furthermore, especially in the field of international humanitarian activities, NGOs play a very important role in implementing the decisions of governments or assisting International Governmental Organizations in carrying out their operations.[861] NGOs also "promote norm implementation, by pressuring target

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[858] De Soto, *supra* note 759 at 694-96.

[859] Martens, *supra* note 778 at 4. *E.g.* in the crisis in the Great Lakes region of Africa, the Council consulted with NGOs. See Wedgwood, *supra* note 379, at 27. The Permanent Mission of Jamaica convened a meeting 17 October 2001 to address the humanitarian situation in Liberia, in which case apart from Council members, participants included Yvonne Terlingen of Amnesty International, Peter Alley of Global Witness, Muthoni Muriu of Oxfam International, and Catherine Dumait-Harper of Médecins Sans Frontières. *Letter dated 21 December 2001 from the Permanent Representative of Ireland to the United Nations addressed to the President of the Security Council,* UN Doc. S/2001/1298 at para. 30 (31 December 2001). There have been isolated cases involving non-state actors throughout the history of the Security Council. For example Mr. Papanek, the permanent representative of Czechoslovakia who was dismissed by his government following the events of 22 February 1948 in his country, asked the Security Council to make an investigation on the USSR's threats of use of force against Czechoslovakia. The Secretary-General refused to transmit this request to the Council. However, after the Chile took note of the events, it brought the case to the attention of the Security Council and included Mr. Papanek's letter in its documents presented to the Council. The Council decided by a vote of 9 to 2 to hear Mr. Papanak. De Soto, *supra* note 759 at 698-99.

[860] The arrangement is known as the "Arria Formula" in the name of the Venezuelan ambassador who, in 1992, initiated semi-formal briefings with NGOs outside the Security Council official chambers. These meeting which take place at least once a month are attended by high-level delegates, are announced at the beginning of each month by the President of the Council; during these meetings no other Security Council meeting is organized, and these briefings are provided with full language interpretation by the Secretariat. See J. Paul, "The Arria Formula," online: Global Policy Forum <http://www.globalpolicy.org/security/mtgsetc/arria.htm> (last modified October 2003) [hereinafter Paul, "The Arria Formula"]. For a list of such meetings see Global Policy Forum, "Arria and Other Special Meetings between NGOs and Security Council Members" online: Global Policy Forum <http://www.globalpolicy.org/security/mtgsetc/brieindx.htm> (date accessed 28 December 2007). See also J. Paul, "NGOs and the Security Council," online: Global Policy Forum < http://www.globalpolicy.org/security/ngowkgrp/gpfpaper.htm> (last modified 2004).

[861] Beside the vital role played by the ICRC in the field of international humanitarian law, several other NGOs have close collaborations with different IGOs, *e.g.* International Relief Union (formally ceased to

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actors to adopt new policies, and by monitoring compliance with international standards."[862]

As is outlined in the last section of this chapter the rights of individuals and groups to participate in the formulation, implementation and monitoring of rules and policies, including development and trade policies, is clearly outlined in several human rights instruments.[863] An important element in the implementation of participatory rights, however, is an accountability mechanism at the national level, which ensures justiciability of rights created at the internationial level and provides means of redress to individuals whose rights are not taken into account in decision-making processes.[864] It is, therefore, important to present an overview of different approaches to application of international treaties at the domestic level. I have then surveyed examples of participation of non-state actors in monitoring and interpretation of international treaties on human rights or environmental issues as models of participation at the international level. Finally questions of co-operation of non-state actors with inter-governmental organizations and public-private partnerships are examined.

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exist in 1960s), The U.N. Relief and Rehabilitation Administration (between 1943-47), the International Refugee Organisation (ceased to exist in 1952), the U.N. High Commissioner for Refugees, the U.N. Relief and Works Agency for Palestine Refugees in the New East, the International Organisation for Migration, the U.N. Children's Fund, the World Health Organisation, the World Food Programme, the U.N. Educational, Scientific and Cultural Organisation, the Food and Agriculture Organisation of the U.N., the Office of the U.N. Disaster Relief Coordinator, the U.N. Development Programme, and the U.N. Volunteers Programme, have all relied on the cooperation of NGOs in carrying out their duties. See Beigbeder, *supra* note 373 at 24-57.

[862] Keck & Sikkink, *supra* note 339 at 3. Keck and Sikkink see the participation of the NGOs slightly differently. They identify the following types or stages of network influence:

> (1) issue creation and agenda setting; (2) influence on discursive positions of states and international organizations; (3) influence on institutional procedures; (4) influence on policy change in "target actors" which may be states, international organizations like the World Bank, or private actors like the Nestlé Corporation; and (5) influence on state behavior.

Ibid. at 25

[863] See *infra* notes 1011 and 1012 and accompanying text.

[864] World Commission on the Social Dimension of Globalization, *A Fair Globalization: Opportunities and Challenges for Developing Countries* (Geneva: ILO, 2004) at 120-121 [hereinafter *A Fair Globalization*].

a- Application of international treaties at domestic level: monism, dualism or pluralism?

Application of international treaties in domestic legal systems is one of the basic questions of international law. In the case at hand we should examine whether WTO rights and obligations create any right for private persons to seek enforcement of WTO obligations through their governments.[865]

While under the general principles of international law states are under an obligation to effectively carry out the provisions of international treaties that they have ratified—*pacta sunt servanda*[866]—, the method of application of these international obligations is left to states.[867] Classically, states have been classified in two categories as regards their attitude to the relationship between international law and domestic law: monist and dualist schools. According to the former, international law is automatically incorporated as part of the domestic law.[868] Dualism, on the other hand, is based on the duality of domestic and international law obligations and sees them as essentially different systems regulating different subject matters.[869] In a dualist system, in order to become part of domestic law international law has to be integrated by an act of transformation. But this "oversimplified" distinction alone does not present the complete picture.[870] Clearly, domestic constitutional law governs the application of treaties. State practice with regards to international treaties, however, goes beyond the extreme monist

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[865] See also J.H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis" (1992) 86 Am. J. Int'l L. 310 (presenting policy considerations for giving direct access to individuals).

[866] See Brownlie, *supra* note 215 at 616. This obligation is confirmed by article 26 of the *Vienna Convention* which states that a treaty in force is binding upon the parties and must be performed by them in good faith. See *supra* note 327.

[867] F.G. Jacobs, "Introduction" in F.G. Jacobs, & S. Roberts, eds., *The Effect of Treaties in Domestic Law* (London: Sweet and Maxwell, 1987) at xxiv. The Permanent Court of International Justice also referred to "a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modification as may be necessary to ensure the fulfillment of obligations undertaken." See *Exchange of Greek and Turkish Populations* (1925) P.C.I.J. (Ser. B) No. 10 at 20-21.

[868] Distinguished international lawyers such as Hans Kelsen, and Sir Hersch Lauterpacht supported monism in international law. See H. Kelsen, "Les rapports de système entre le droit interne et le droit international public" (1926) 14 Rec. des Cours 227. According to Kelsen all legal norms receive their validity from a fundamental common rule, the "*Grundnorm.*" P. Lardy, *La Force Obligatoire du Droit International en Droit Interne* (Paris, Librarie Générale de Droit et de Jurisprudence, 1966) at 21.

[869] See Lardy, *supra* note 868 at 15-20.

[870] Jacobs, *supra* note 867 at xxiv.

or dualist approaches as presented above and is more complex. In a more elaborate analysis three approaches to international treaties are identifiable in domestic constitutional systems: A monist approach, where the treaty becomes directly part of the national legal system at the moment of its ratification;[871] a modified dualist approach, according to which a legislative act that approves the international treaty *in toto*, without reenacting each provision of the treaty, is required;[872] and a dualist system, in which the international treaty has to be transformed through national law that incorporates the treaty.[873] Even within these three categories the practice of states is more nuanced and "a wide variety of methods [are] used to give effect to treaties; and the methods used differ within the same State, depending on the nature and terms of the treaty."[874] Finally, it should be noted that, even in countries where a monist approach is adopted, national courts might fail to give effect to international treaties.[875]

On the question of direct effect of treaties, "the particular context in which a treaty is invoked" should be considered.[876] In the context of international trade law, Espósito finds the notion of a "pluralistic conception"[877] of legal orders more realistic, and believes that it better explains the *status quo* than the monist or pluralist distinction.[878] This means "direct applicability may depend not only on international agreements, but also sometimes almost exclusively, on national law."[879] International trade obligations usually set the objectives in trade agreements without establishing the means of reaching those

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[871] *E.g.* the system in Belgium, France, the Netherlands and the U.S. *Ibid.*

[872] *E.g.* Germany and Italy. *Ibid.* at xxv.

[873] This category includes countries like Denmark and the UK. *Ibid.*

[874] *Ibid.* at xxvi.

[875] *Ibid.* This failure may be due to the view that the treaty is not justiciable, or that it does not have direct effect.

[876] *Ibid.* at xxvii.

[877] The expression is used by G. Morelli among others. *Nozioni di dirritto internazionale,* (7th ed., 1967) at 68 cited in Espósito, "International Trade & National Legal Orders" *supra* note 558 at 431 footnote 3.

[878] I agree, to a certain degree, with Espósito who uses the expression

> to avoid the somewhat unfruitful discussion on dualism and monism at the end of the 20th century. [Espósito] accept[s] that there are good examples of both systems, particularly if one takes the transformation/implementation of law as the main distinction, but [he] doubt[s] as to the relevance of the terms without qualifications, probably because [he is] skeptical of the administrative and judicial enforcement of monism in domestic systems.

Supra note 558 at 431.

[879] Espósito, "International Trade & National Legal Orders" *supra* note 558 at 431 [footnotes omitted].

obligations. State parties to trade agreements have to determine the mode of achieving the objectives.[880] Furthermore, There are added complications when the treaties have to be applied in a federal system, with competing federal and state jurisdictions. [881]

The situation has been no different under the GATT and the WTO system,[882] in that states can determine the means of observing their obligations.

b- Non-state actors and monitoring and interpretation of international treaties

During the 1990s the political processes in the areas of human rights and environmental issues shifted from the national to the international level,[883] leading to what is described as "trans-societal approaches" with increasing harmonization of societal actors in their activity on the international level.[884]

In the area of human rights, committee members of different human rights treaty bodies in charge of monitoring and implementation of human rights treaties and other human rights mechanisms rely heavily on the information they receive from NGOs.[885] NGOs submit written statements to the Human Rights Council (which has replaced the Commission on Human Rights), and exchange information with country and thematic

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[880] *Ibid.* at 432.

[881] In the context of implementation of WTO agreements in the United States federal system and implementation of international agreements under federal and state law see W.J. Aceves, "Lost Sovereignty? The Implications of the Uruguay Round Agreements" (1995) 19 Fordham Int'l L.J. 427 at 457-470.

[882] See *Thailand-Restriction on Importation of and Internal Taxes on Cigarettes*, 37th Supp. B.I.S.D. 200 (1991) (adopted 7 November 1990). In the light of article XVI:1 of the *WTO Agreement* that decision of the GATT Council is still valid under the WTO system. See Chapter One:2:a, above. This was confirmed in the *Reformulated Gasoline Appeal Report*, where the Appellate Body stated that, "[s]o far as concerns the WTO, [the autonomy of WTO members to determine their own policies] is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements." *Supra* note 212, Part V. [emphasis in original].

[883] J. Smith, R. Pagnucco, & G.A. Lopez, "Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s" (1998) 20 H.R.Q. 379.

[884] Martens, *supra* note 778 at 15. For example it is claimed that "[t]he emergence of a global network of environmental organizations has transformed the environmental debate." K. Conca, "Greening the UN: Environmental Organisations and the UN System" in Weiss & Gordenker, eds., *supra* note 378, 103 at 116.

[885] Gaer, *supra* note 379 at 56. Independent Experts in treaty bodies are usually employed full time with other tasks and do not have the time or the incentives to carefully study the reports sent to them prior to the sessions, and cannot receive enough support from an understaffed and overburdened secretariat. NGOs often fill this gap. A. Clapham, "UN Human Rights Reporting Procedures: An NGO Perspective" in P. Alston & J. Crawford, eds., *The future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 175 at 188.

officers at the United Nations.[886] As Abram and Antonia Chayes have observed, "[i]n a real sense, [NGOs] supply the personnel and resources for managing compliance that states have become increasingly reluctant to provide."[887] Non-state actors have also been involved in interpretation of international law[888] or identifying its norms.[889] Two examples of non-state actors involvement in implementation of international norms include: The *Aarhus Convention* on participation in environmental matters which allows NGOs with observer status to nominate candidates for the Convention's Compliance Committee;[890] and the *Convention on the Rights of the Child,* which in article 45 grants a special role to NGOs in providing "expert advice on implementation of the Convention."[891] In the WTO, while there is potential for creating similar avenues for

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[886] Gaer, *supra* note 379 at 55. For instance in 1995, 74 per cent of the cases that were dealt with at the Working Group on Arbitrary Detentions were brought up by international NGOs.

[887] A. Chayes & A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995) at 250-251. Chapter 11 of the book is dedicated to the impact of NGOs on treaty compliance.

[888] "Siracusa Principles" which address the meaning and scope of the derogation and limitation provisions of the ICCPR were developed with assistance from the International Commission of Jurists, the International Association of Penal Law, and the Urban Morgan Institute of Human Rights. T. van Boven, "The Role of Non-governmental Organizations in International Human Rights Standards-Setting: A Prerequisite of Democracy" (1990) 20 Cal. W. Int'l L. J. 207 at 219-220.

[889] An example is a major study undertaken by the International Committee of the Red Cross (ICRC), alongside a range of renowned experts and at the request of the international community, into current state practice in international humanitarian law in order to identify customary law in this area. The study which started in 1995 was completed ten years later. See J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law,* 3 vols. (Cambridge: Cambridge University Press, 2005).

[890] Charnovitz, "NGOs and International Law" *supra* note 371 at 355. Article 15 of the *Aarhus Convention* stipulates that

> [t]he Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

A Compliance Committee was established pursuant to this article. The compliance mechanism may be triggered in four ways: (1) a Party may make a submission about compliance by another Party; (2) a Party may make a submission concerning its own compliance; (3) the secretariat may make a referral to the Committee; (4) members of the public may make communications concerning a Party's compliance with the convention. Online: United Nations Economic Commission for Europe <http://www.unece.org/env/pp/compliance.htm> (date accessed 7 January 2008). Most early environmental treaties made no provision for non-state actors, in contrast to recent agreements which have admitted non-state actors as observers under liberal criteria. K.W. Abbott, "'Economic' Issues and Political Participation: The Evolving Boundaries of International Federalism" (1996) 18 Cardozo L. Rev. 971 at 1001 [hereinafter Abbott, "Economic Issues and Political Participation"].

[891] See *Convention on the Rights of the Child,* 20 Nov. 1989, 1577 U.N.T.S. 3.

participation of non-state actors—*e.g.* through TPRM—no similar arrangements currently exists.

c- Co-operation with inter-governmental organizations

In 2000, Kofi Annan, then-Secretary-General of the United Nations re-emphasized that strengthening the relations between the United Nations and non-state actors was a priority of his mandate and sought to "give full opportunities to non-governmental organizations and other non-state actors to make their indispensable contribution to the Organization's work."[892] On other occasions Annan acknowledged the importance of partnership with NGOs and stated that "as the comparative strengths of NGOs and the potential for their complementarity with the United Nations grew more evident, they have become indispensable partners, not only in development and relief operations, but also in public information and advocacy."[893]

Moreover, NGOs have been active in assisting intergovernmental organizations in carrying out their activities and projects,[894] or collective enforcement efforts.[895] Significantly humanitarian and development NGOs and UN bodies with identical goals

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[892] United Nations, *We the peoples: the role of the United Nations in the twenty-first century, Report of the Secretary-General*, UN Doc. A/54/2000 (27 March 2000), para. 367 [hereinafter *Secretary-General's Millennium Report*].

[893] *Report of the Secretary-General on Practices for Interaction with NGOs, supra* note 812 at para. 32. Uvin claims that IGOs have five related reasons for seeking to collaborate with NGOs: increased funding, ideological preferences, programme effectiveness and sustainability, external pressure and the creation of constituencies. P. Uvin, "Scaling Up the Grassroots and Scaling Down the Summit: The Relations Between Third World NGOs and the UN" in Weiss & Gordenker, eds., *supra* note 378, 159 at 163.

[894] The Secretary-General also takes note of NGOs contribution in this regard

> [t]he comparative advantages of NGOs in operational matters, as clearly summarized by UNIDO in a 1997 working paper entitled "UNIDO's approach to Non-Governmental Organizations", "lie in the proximity to their members or clients, their flexibility and the high degree of people's involvement and participation in their activities, which leads to strong commitments, appropriateness of solutions and high acceptance of decisions implemented". Most agencies, funds and programmes of the United Nations system would agree to the following list, drawn up by UNIDO, of the assets provided by NGOs: Local accountability; Independent assessment of issues and problems; Expertise and advice; Important constituencies; Provision and dissemination of information; Awareness-raising.

Report of the Secretary-General on Practices for Interaction with NGOs, supra note 812 at para. 33.

[895] See *e.g.* United Nations Security Council resolutions regarding the former Yugoslavia that called on "international humanitarian organizations to collate substantiated information [on violations of humanitarian law]" or regarding Sierra Leone that asked "non-governmental organizations to continue to support the National Recovery Strategy of the Government of Sierra Leone." SC Res. 771, para.5 (13 August 1992); SC Res. 1470, para. 8 (28 March 2003).

share their workloads in the field,[896] either by dividing tasks and performing supplementary or complementary roles, or by NGOs being subcontracted to implement specific UN programmes.[897]

d- Public-private partnerships

In recent years several partnerships between public and private actors, joining their influence and resources, have been created at the international level.[898] In January 1999, Kofi Annan urged business leaders at the Davos World Economic Forum to join the UN and other global actors in an effort to help provide the social pillars that a sustainable global economy requires. Annan proposed a "global compact," enlisting corporate engagement in promoting ten principles drawn from the Universal Declaration of Human Rights, the Declaration of Fundamental Principles and Rights at Work of the International

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[896] Martens, *supra* note 778 at 52. For example, United Nations High Commissioner for Refugees (UNHCR), annually signs partnership agreements with more than 500 NGOs and in 1997 it funded 443 NGOs in 131 countries to implement 931 projects. *Ibid*. at 52-53. UNHCR also launched the Partnership-in-Action in cooperation with the International Council of Voluntary Agencies, a coalition of NGOs. See Ritchie, *supra* note 378 at 180-181 (also refers to diverse UN/NGO coalition links).

[897] L. Gordenker, & T. Weiss, "Devolving Responsibilities: a Framework for Analysing NGOs and Services" in T. Weiss, ed., *Beyond UN Subcontracting: Task-Sharing with Regional Security Arrangements and Service-Providing NGOs* (London: Macmillan, 1998) 30 at 44. There are also examples of individual initiatives which have significant impact in achieving development and poverty-reduction goals of international organizations. Examples include the Nobel prize winning initiative of Muhammad Yunus, the Grammen Bank which provides micro-credits to the poor, and the less known CANHELP Thailand, a small NGO created by a retired American professor which builds schools in poor regions of Thailand. S. Ahmed, & D. Potter, *NGOs in International Politics* (Bloomfield: Kumarian Press, 2006) at 6-7. There are also examples of unsuccessful attempts by NGOs to be involved in managing programmes. For instance, in 1996, Jönsson & Söderholm observed that NGOs participated in framing the AIDS epidemic as an international issue but had little direct role at the international level in managing programmes. "IGO-NGO Relations and HIV/AIDS: Innovation or Stalemate?" in Weiss & Gordenker, eds., *supra* note 378, 121 at 132-137.

[898] For instance, the United Nations Fund for International Partnerships (UNFIP) provides a "one-stop" service for partnership opportunities with the UN family. Established by Kofi Annan in March 1998, the United Nations Fund for International Partnerships (UNFIP) was set up as an autonomous trust fund, headed by an Executive Director. UNFIP collaborates with the United Nations Fund to encourage greater private sector investment in the development and implementation of innovative, high-impact initiatives, campaigns and projects on the ground to achieve the MDGs in four priority areas: (1) Children's Health; (2) Population and Women (focus on adolescent girls); (3) Environment (biodiversity, energy and climate change); and (4) Peace and Security, and Human Rights. See UNFIP, "Overview," online: <http://www.un.org/unfip/> (date accessed 10 January 2008).

See also K. Buse & A. Waxman, "Public-private health partnerships: a strategy for WHO" (2001) 79 Buletin of the World Health Organization 748.

Labour Organisation (ILO) and the Rio Declaration on Environment and Development.[899] The Global Compact employs three instruments to achieve its aims: information sharing and learning; policy dialogues; and partnership projects.[900] Another example is the Global Fund to Fight AIDS, Tuberculosis and Malaria, a partnership between governments, civil society, the private sector and affected communities, which was created to dramatically increase resources to fight these three diseases, and to direct those resources to areas of greatest need.[901] The United Nations has also adopted *Guidelines on Cooperation between the UN and the Business Community* in order "to facilitate the formulation and implementation of co-operation between the United Nations and the business community in a manner that ensures the integrity and independence of the Organization."[902]

In all the above-mentioned areas, comparable developments in the WTO have been non-existent.

3- Adjudication

International law until recently left the remedy of violated rights to the victim.[903] The ultimate goal of international law, like any other system of law, is to ensure a

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[899] Kofi A. Annan, "A Compact for the New Century" (address to the World Economic Forum, Davos, Switzerland, 31 January 1999), UN Press Release SG/SM/6881/Rev.1. Ten Global Compact principles in areas of human rights, labour standards, environment and anti-corruption call on businesses to support and respect the protection of internationally proclaimed human rights; make sure that they are not complicit in human rights abuses; uphold the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; the elimination of discrimination in respect of employment and occupation; support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; encourage the development and diffusion of environmentally friendly technologies; work against corruption in all its forms, including extortion and bribery. See UN Global Compact, "Ten Principles," online: United Nations Global Compact <http://unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (date accessed 10 January 2006).

[900] Ruggie, J., "The Global Compact: An Extraordinary Journey" in Fussler, C., Cramer, A., & van der Vegt, S., eds., *Raising the Bar: Creating Value with the UN Global Compact* (Sheffield: Greenleaf, 2004) 15 at 16. "Through partnership projects in developing countries the Compact contributes to capacity-building where it is needed most. Examples include support for micro lending, investment promotion, HIV/AIDS awareness and treatment programmes for employees in sub-Saharan Africa, the devising of sustainable alternatives to child labour, and a host of initiatives in eco-efficiency and other dimensions of environmental management." *Ibid*.

[901] The Global Fund, "How the Global Fund Works," online: The Global Fund < http://www.theglobalfund.org/en/about/how/> (date accessed 12 March 2008).

[902] UNFIP, "Guidelines on Cooperation between the UN and the Business Community," online: UNFIP <http://www.un.org/unfip/YGuidelines.htm> (date accessed 10 January 2008).

[903] von der Heydte, "L'individu et les tribunaux internationaux" (1962) 107 Rec. des Cours 287 at 300.

minimum of rights for humans, and respect for their personality.[904] But, while individuals and non-state actors only play their role in public international law through the medium of the states of which they are citizens, individuals and non-state actors as the ultimate unit of the law are confronted with the rules of international law without the intermediary of states.[905] Very often, scholars ignore the fact that the goal of law is to protect individuals and non-state actors even against their own states.[906] In many cases where non-state actors are the beneficiaries of certain rights or protections under international law they do not enjoy the right to enforce their protection.[907]

The role of private persons in enforcing international law through adjudication is conceivable in three manners. The first judicial technique used in the international order for protecting private persons is to accord them the right of legal action in domestic courts on the basis of an international agreement.[908] The second technique is to bring a claim to an international tribunal, which in turn can be done in different ways.[909] The most common and most traditional is diplomatic protection.[910] In certain cases the entity diplomatically protected can participate in defending its interests and is consulted.[911] A variant is the cases of regional human rights agreements where the individual can bring claims to the Commission and the Commission can decide to bring the case against a member state.[912]

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[904] *Ibid.* at 301.

[905] *Ibid.* 301-302.

[906] *Ibid.* 302.

[907] Barberis, *supra* note 769 at 185. Barberis distinguishes between international treaties that accord a right of action to private persons and quasi-international agreements that accord such a right to the private parties. *Ibid.* at 186.

[908] *Ibid.* at 185.

[909] *Ibid.* at 182-185.

[910] See *Mavrommatis Palestine Concessions Case (Jurisdiction) (Greece v UK)* (1924) P.C.I.J. (Ser. A) No. 2, at 12 [hereinafter *Mavrommatis Case*].

[911] See examples Barberis, *supra* note 769 at 183 (notes 54-59).

[912] *Human Rights Conventions of Rome,* 4 November 1950 and *San José of Costa Rica,* 22 November 1969. See also Barberis, *supra* note 769 at 184 (on the mechanism provided in the *Optional Protocol to the CCPR*).

The third form of participation of private persons in international adjudication is through submitting *amicus curiae* briefs. [913] Certain legal systems allow non-parties to a dispute to provide the court with information on points of law, or elements of fact.[914] Usually participation as *amicus curiae* requires demonstrating an interest and authorization from the court.[915] It is contended that using *amicus curiae* has certain advantages over other forms of participation. It is less costly and time-consuming than direct participation and does not require the same level of interest as required for intervention.[916]

Whatever the form of participation of non-state actors in international adjudication, a fundamental question that Stephen Toope raises in the context of international mixed arbitration is relevant:

> when a party to an arbitration is a public entity with full international legal personality and the other is a body incorporated under a system of municipal law it becomes necessary to articulate first principles in order to understand the very nature of the process. A number of basic questions arise. Is arbitration between a state and a foreign corporation simply a procedure to adjust private (usually contractual) rights, or is it an international legal process that must recognise the

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[913] For a survey of NGO participation in the ICJ, ITLOS, NAFTA Chapter 20 (where NGOs have no standing and have not established a practice of *amicus* participation), and ICSID and ECJ which provide for NGO intervention, as well as the International Criminal Tribunals for former Yugoslavia and Rwanda, the International Criminal Court, regional human rights tribunals and regional trade agreements see Marceau & Stilwell, *supra* note 1040 at 164-175.

[914] H. Ascensio, "L'amicus curiae devant les jurisdictions internationales" (2001) 105:4 Rev. D.I.P. 897 at 897. *Amicus curiae*, or the friend of the court, as an institution was known in the Roman law and was adopted in common law as a result of difficult procedures for third-party intervention. "The *amicus* appears to have been originally a bystander who, without any direct interest in the litigation, intervened on his own initiative to make a suggestion to the court on matters of fact and law within his own knowledge: the death of a party, manifest error, collusion, etc." E. Angell, "The Amicus Curiae: American Development of English Institutions" (1967) 16 I.C.L.Q. 1017 at 1017. Krislov summarized the development of amicus practice from Roman times until more recent times and noted that *amicus* participation is very likely in important legal controversies. "Where the stakes are highest for the groups, and where the needs on the part of the judges for information and for sharing of responsibility through consultation are at a peak, access has appropriately, and almost inevitably, been at its greatest." S. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" (1963) 72 Yale L.J. 694 at 703-704.

[915] Shelton, *supra* note 919 at 611. Ascensio, *supra* note 914 at 911. See also Ala'i at 86-93 (for conditions of participation in the United States Supreme Court). See also L. Boisson de Chazournes, "Transparency and 'Amicus Curiae' briefs" (2004) 5 J. W. Investment & T 333 at 334 (exploring the existence of a customary international rule which allows the submission of *amicus curiae* briefs).

[916] Shelton, *supra* note 919 at 611. The disadvantages are that the *amici* cannot control the direction of the action, are not served papers of documents of the case, cannot offer evidence or examine witnesses, cannot be heard without special leave of the court, and are not entitled to any compensation. *Ibid.* at 612.

> sovereign policy objectives of the state party (and perhaps of the national state of the foreign private party)?[917]

In order to draw useful lessons for participation of non-state actors in the WTO dispute settlement system, in this section, after presenting a historical perspective on efforts to give direct access to private persons and elaborating on diplomatic protection, the status of private persons in a number of different mechanisms will be briefly examined.

a- Historical efforts to give direct access to private persons

A brief history of direct access for private persons should be examined in more detail at this stage. Important attempts have been made during the past century to give direct access to international justice to private persons. Among scholars of international law Professor Hans Wehberg was the first to propose in 1911 a world court to which individuals would have access.[918] In practice, the first example was that of the Central American Court of Justice established by a treaty, concluded in 1907,[919] that allowed citizens of a member state to bring cases against other members (but not their own government—except if their government had so agreed).[920] During the same period the XIIth Convention of the Hague in 1907 (which did not receive enough ratifications)

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[917] The problems is very similar to the problem raised by Toope in the context of mixed international arbitration

> when a party to an arbitration is a public entity with full international legal personality and the other is a body incorporated under a system of municipal law it becomes necessary to articulate first principles in order to understand the very nature of the process. A number of basic questions arise. Is arbitration between a state and a foreign corporation simply a procedure to adjust private (usually contractual) rights, or is it an international legal process that must recognise the sovereign policy objectives of the state party (and perhaps of the national state of the foreign private party)?

Toope, *Mixed International Arbitration*, *supra* note 723 at 3.

[918] von der Heydte, *supra* note 903 at 300 and 320. For a history of individuals in international tribunals see *ibid.*; and S. Séfériadès, "Le problème de l'accès des particuliers à des jurisdiction internationales" (1935) 51 Rec. des Cours 1. It is primarily in arbitration that States have accepted individuals as a party to litigation. von der Heydte, *ibid.* at 313.

[919] Convención para el Establecimiento de una Corte de Justicia Centroamericana, Dec. 20, 1907, Art. 2, 1 Anales de la Corte de Justicia Centroamericana 3 (1911) cited in D. Shelton, "The Participation of Non-Governmental Organizations in International Judicial Proceedings" (1994) 88 Am. J. Int'l L. 611 at 612 note 2.

[920] von der Heydte, *supra* note 903 at 320. To do so, individuals had only to prove that they have either exhausted the local remedies, or that they were denied justice in that State. This Court was not very active and in most cases, individuals were refused because they did not meet the mentioned requirements. The Court ceased to exist in 1918 after the establishing treaty expired without being renewed. *Ibid.* at 321. See also M.O. Hudson, *Permanent Court of International Justice* (1943) 49.

envisaged an International Prize Court with possibility of claims by individuals.[921] The general claims commissions established by treaties signed by the U.S. with Mexico, and with Panama, established arbitration for virtually all claims arisen on either side since 1868 and 1903 respectively, against the other side "whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties."[922]

In preparing the *Statute of the PCIJ* different drafts adopted different positions and opposing views were expressed for and against private persons' access to the Court.[923]

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[921] The preamble to the convention expressly referred to reconciling public and private interests in he following terms: "Considering that, if these courts are to continue to exercise their functions in the manner determined by national legislation, it is desirable that in certain cases an appeal should be provided under conditions conciliating, as far as possible, the public and private interests involved in matters of prize." *Convention Relative to the Creation of an International Prize Court*, the Hague, 18 October 1907. See "Hague Convention," online: Brigham Young University Library <http://net.lib.byu.edu/~rdh7/wwi/hague/hague11b.html> (last modified: 15 February 1996). See also von der Heydte, *supra* note 903 at 321 [hereinafter *Convention on Internatioanl Prize Court*].

[922] *General Claims Convention of September 8, 1923, the United Mexican States and the United States America, modified by the Convention of August 16, 1927*, art. 1; *Claims Convention of July 28, 1926, modified by the Convention of December 17, 1932* (22 May 1933-29 June 1933), L.N.T.S., vol. 138, at 120-133. art. 1. For text of the conventions and their decisions see Reports of InternationalArtbitral Awards, online: RIAA, <untreaty.un.org/cod/riaa/cases/vol_IV/7-320.pdf> and <untreaty.un.org/cod/riaa/cases/vol_VI/293-386_General_Claims.pdf> (date accessed 21 March 2008). Furthermore, the treaties that put an end to World War I (Article 297 of the *Treaty of Versailles*) as well as the Geneva Conventions of 15 May 1922, which instituted the Upper Silesia Arbitral Tribunal (Beuthen Fond) created mixed international arbitration. NRG, 3eme série, t. 16 at 645, articles 587-. Generally see G. Kaeckenbeeck, "The Character and Work of the Arbitral Tribunal of Upper Silesia" (1935) 21 Transactions of the Grotius Society 27 at 27-44; Spiropoulos, *supra* note 750 at 222 (on mixed international arbitration created by the *Treaty of Versailles*).

[923] Article 21 of the Draft Statute of the PCIJ presented by a commission named by the Government of the Netherlands in 1919 stated clearly that "… la Cour est compétente pour des conflits juridiques, soit entre Etats, *soit entre un Etat et les ressortissants d'un autre Etat,* soit entre les ressortissants d'Etats différents, qui sont portés devant elle en vertu d'un traité ou d'un accord spécial…" Séfériadès, *supra* note 918 at 43 [emphasis added]. Another draft prepared by the Comité de Paris de la Ligue internationale de la Paix et de la Liberté stipulated in article 5 that "… la Cour internationale est chargée de statuer sur tous les différends intéressant une nation qui lui sont soumis, qu'ils soient de nation à nation, *de nation à particulier et de particulier à nation,* à l'exception toutefois des différends de droit privé entre une nation et ses ressortissants." Published in La Paix organisée, 15 April 1919, cited in Séfériadès, *supra* note 918 at 43-44 [emphasis added]. Proposals by the "League to enforce peace" and article 31 of the proposals by Germany also gave competence to the international court to settle disputes between individuals and States and between individuals in matters related to application of treaties. Séfériadès, *supra* note 918 at 44. Conversely other drafts clearly opposed this idea. Article 30 of the Scandinavian draft of 1918 (Denmark, Norway, Sweden), Article 20 of the Commission of the Government of Sweden, article 22 of the draft of 30 April 1920 by Mr. Clovis Bevilaqua (Brazil) and article 20 of the draft prepared in the Hague by five neutral powers (Denmark, Norway, the Netherlands, Sweden and Switzerland), unlike the aforementioned draft from the Netherlands, rejected the idea of the individuals having direct access to the international court. Séfériadès, *supra* note 918 at 45. Separate drafts prepared by Swiss, Danish and Norwegian commissions were silent on this question. Séfériadès, *supra* note 918 at 45. Finally, the text adopted by the

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But, finally, the idea of granting access to individuals in the PCIJ was considered "premature" and was abandoned.[924]

During the same period note should also be taken of complaint-petitions in international law. In the League of Nations system, a category of complaint-petitions were accepted in the cases of minorities[925] and mandates,[926] and issues related to Saarland and Danzig territories.[927] In neither of these cases, however, did the relevant international instruments envisage a right to petition.[928]

Later, in 1927, the *Institut de Droit international* established a commission to study the problems of access of individuals to international jurisdictions. The

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Committee of Jurists of the Hague entrusted by the Council of the League of Nations (in accordance with article 14 of *the Covenant of the League*) to prepare the official draft of the Statute of the PCIJ, in article 34 limited the jurisdiction of the court to disputes between states. But the Committee was not unanimous in its decision. Certain French political figures and a few members of the preparatory committee, such as Geouffre de la Pradelle and Loder opposed the text. von der Heydte, *supra* note 903 at 322. Especially Loder insisted that the Committee had the right and even the obligation to give direct access to the PCIJ to individuals. In supporting his position he argued that in the English text of article 14 of the *Covenant of the League* the word "parties" was written with a small "p." Séfériadès, *supra* note 918 at 46-47. See also J.B. Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary* (Washington D.C.: The Endowment, 1920) at 92.

[924] von der Heydte, *supra* note 903 at 322.

[925] Feinberg, "La pétition en droit international," *supra* note 781 at 601. On question of minorities, the relevant treaty only indicated that in case of breach of rights of minorities by the state, other member states could bring the matter to the attention of the Council of the League of Nations. But in practice it was impossible for states to follow the situation of minorities in different countries. As such, the members of the Council recognized the necessity of according to the minority groups the right to petition for breaches of their rights under the treaty. The procedure for submitting these petitions was set by resolutions by the Council from 1920-1925 and later in 1929 a Committee was given the task to examine the procedure, which resulted in resolutions voted in Madrid in 1929. Feinberg, "La pétition en droit international," *supra* note 781 at 602.

[926] In the case of the mandate system established under the League of Nations no right to petition was envisaged in either article 22 of the *Covenant of the League* or the texts of the 14 mandates. But upon an initiative from the Government of the Great Britain a right of petitioning was introduced in 1923. Feinberg, "La pétition en droit international," *supra* note 781 at 612-613.

[927] In the cases of Saarland and Danzig, the right of petitioning did not exist in the international instruments that defined the status of these territories but was later established by the Council of the League. As early as 1920 the inhabitants of Sarrland made complaints to the League of Nations. After the Council of the League recognized the rights of private complaints, several complaints were made, especially between 1920-1926. Feinberg, "La pétition en droit international," *supra* note 781 at 625.

[928] In the case of petition-complaints the rules are strict and written. Petition-complaints, unlike petition-requests do not emanate from international usage it is only through the League of Nations that they are introduced into international law, and are a result of international legislative acts. There was the obligation for the League of Nations to receive petitions, as well as the right for individuals to send petitions. With the subjects of petition-complaints clearly defined, member states were not allowed to prevent nationals from submitting petitions. Feinberg, "La pétition en droit international," *supra* note 781 at 633.

Commission reached the conclusion that there is neither legal nor political reason preventing the settlement of disputes between states and individuals in international tribunals.[929] The *Institut* adopted this view and asked the same commission to specify in another project the conditions of recourse to, as well as, the organization and competence of the international jurisdiction in such cases. In a resolution adopted by the *Institut de Droit international* in 1929 during its New York session, the *Institut* reached the conclusion that "*il y a des cas dans lequels il peut être désirable que le droit soit reconnu aux particuliers de saisir directement, sous des conditions à déterminer, une instance de justice internationale dans leurs différends avec des Etats*." [930] Finally, right of petition existed in the Trusteeship system of the United Nation and its predecessor League of Nations.[931] Several other international tribunals provided for non-state actor participation in the years after World War II.[932]

b- Diplomatic protection

From a purist international law perspective diplomatic protection was the principal means of securing international protection for individuals, especially before the advent of mechanisms for protecting human rights and foreign investment.[933] In a strict sense,

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[929] Séfériadès, *supra* note 918 at 55.

[930] *Annuaires de l'Institut de droit international*, 1929, vol. II, at 265.

[931] Article 87 of the *United Nations Charter* provides that, "[t]he General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may: (a) consider reports submitted by the administering authority; (b) accept petitions and examine them in consultation with the administering authority." The Trusteeship Council suspended operation on 1 November 1994, with the independence of Palau, the last remaining United Nations trust territory, on 1 October 1994. "Trusteeship Council" online: United Nations <http://www.un.org/documents/tc.htm> (date accessed 12 December 2007). See also De Soto, *supra* note 759 at 697-698 (on the League of Nations procedures for petitioning).

[932] After World War II tribunals were created under the *Paris Convention of 23 October 1954 on Settlement of Questions Related to the War and Occupation*, as well as arbitral tribunal created by the *German-Austria Treaty of 15 June 1957*. Currently, the treaty concluded between Germany, France and Luxembourg, 27 October 1956 related to Moselle confers right of action to private persons. This convention envisages the creation of a national tribunal for civil and criminal questions related to navigation, but non-state actors can appeal the decisions of this tribunal at a superior national tribunal or at a appeal committee which is an international tribunal composed of three judges. The Rhine Commission, created after the reforms under the *Strasbourg Convention of 20 November 1963* has a similar jurisdictional system. The *Treaty of 20 December 1957 on the establishment of control of security in the field of nuclear energy* constitutes another example of non-state actors access to international tribunals.

[933] International Law Commission, *First report on diplomatic protection by Mr. John R. Dugard, Special Rapporteur*, Fifty-second session, 1 May-9 June and 10 July-18 August 2000, UN Doc. A/CN.4/506 (7 March 2000) at paras. 11 and 16 [hereinafter *First Report on Diplomatic Protection*].

according to *Draft Articles on Diplomatic Protection* as adopted in first reading by the International Law Commission, "[d]iplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State."[934] The principle was elaborated upon by the PCIJ and later confirmed in several international judicial decisions.[935]

The notion of diplomatic protection however has been "one of the most controversial subjects in international law," seen by developing nations as a discriminatory exercise of power.[936] It has also been suggested that developments in the

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[934] International Law Commission, *Report on the work of its fifty-sixth session (3 May to 4 June and 5 July to 6 August 2004),* UNGA Official Records, Fifty-ninth Session, Supplement No. 10, UN Doc. A/59/10 at para. 59 [hereinafter *Draft Articles on Diplomatic Protection*]. In a broader sense diplomatic protection refers to any legal procedure though which a state protects the rights of its nationals on the international arena. F.S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore: The Johns Hopkins Press, 1932) at 58; J.P. Puissochet, "La pratique française de la protection diplomatique" in J.-F. Flauss, ed., *La protection diplomatique: mutations contemporaines et pratiques nationales* (Brussels: Nemesis/Bruylant, 2003) at 115-120. In this sense diplomatic protection can include measures that are exercised by diplomatic and consular authorities in other countries in protection of their nationals. Puissochet, *ibid*. at 115-120.

[935] In *Mavrommatis* case, PCIJ held that

> [i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law.

supra note 910 at 12. This dictum was repeated by the PCIJ in the *Panevezys Saldutiskis Railway case (Estonia v Lithuania)* (1939) P.C.I.J. (Ser. A/B) No. 76 at 16. See also *Barcelona Traction* case, *supra* note 317. Most recently in the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* the court reaffirmed the rule in *Barcelona Traction* and noted the ability of a State (Guinea) to protect the direct rights of its national (M. Diallo), including his rights as a shareholder. See Preliminary Objections (24 May 2007), online: ICJ <http://www.icj-cij.org/docket/files/103/13856.pdf> (date accessed 25 December 2007).

[936] *First Report on Diplomatic Protection*, *supra* note 933 at paras. 10-11. John Dugard, also refers to great abuses of diplomatic protection:

> The Anglo-Boer war (1899-1902) was justified by Britain as an intervention to protect its nationals who owned the gold mines of the Witwatersrand. American military intervention, on the pretext of defending United States nationals in Latin America, has continued until recent times, as shown by the interventions in Grenada in 1983 and Panama in 1989. Non-military intervention, in the form of demands for compensation for injuries inflicted on the persons or property of aliens, has also been abused, although one writer has suggested that the settlement of claims by arbitration often saved Latin American States from military intervention to enforce such claims.

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field of international human rights law and protection of aliens have rendered diplomatic protection obsolete and that the right of a state "to assert its own right when it acts on behalf of its national is an outdated fiction which should be discarded."[937] Despite these critiques, as Professor Lillich points out,

> Pending the establishment of international machinery guaranteeing third party determination of disputes between alien claimants and States, it is in the interests of international lawyers not only to support the doctrine but to oppose vigorously any effort to cripple or destroy it.[938]

Exercise of diplomatic protection is subject to two conditions. According to the first condition, "nationality of claim", diplomatic protection can only be extended to nationals of the claimant state. The second condition, "exhaustion of local remedies", requires that the person whose right is violated must have exhausted all remedies provided to redress the wrong at the national level of the host state.[939]

For the purposes of this thesis, it has to be noted that the dispute settlement system of the WTO is not a form of diplomatic protection, because initiating a claim in the WTO dispute settlement mechanism does not require the aforementioned conditions.

Ibid. at para. 14 [footnotes omitted]. See also *Barcelona Traction* case, individual opinion of Judge Padilla Nervo, *supra* note 317 at 246.

[937] *First Report on Diplomatic Protection*, *supra* note 933 at paras. 17-20 (summarizing these arguments). See also International Law Commission, *Preliminary Report on Diplomatic Protection, Mohamed Bennouna, Special Rapporteur*, Fiftieth session, 20 April-12 June and 27 July-14 August 1998, UN Doc. A/CN.4/484 (4 February 1998) at paras. 21-23 and 34-37 [hereinafter *Preliminary Report on Diplomatic Protection*]; F. V. García Amador, "State Responsibility: Some New Problems" (1958) 94 Rec. des Cours 421 at 437-439. The argument regarding coverage of international human rights treaties is exaggerated. At the global level universal human rights conventions, particularly the International Covenant on Civil and Political Rights, do not provide individuals with effective remedies for the protection of their human rights. The European Convention on Human Rights does offer real remedies to Europeans, however, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights have not achieved the same degree of success, and Asia is not covered by a regional human rights convention. The position of the alien abroad is no better. While universal and regional human rights conventions do extend protection to all individuals within the territory of States parties, there is no multilateral convention that seeks to provide the alien with remedies for the protection of her rights outside the field of foreign investment. See *First Report on Diplomatic Protection*, *supra* note 933 at paras. 25-26.

[938] "The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack" (1975) 69 Am. J. Int'l L. 359. Dugard also holds that "[u]ntil the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection." *First Report on Diplomatic Protection*, *supra* note 933 at para. 29.

[939] See the *Interhandel Case* (Judgement of 21 March 1959), [1959] I.C.J. Rep. 6 at 27; *Elettronica Sicula S.p.A. (ELSI)* (Judgement), [1989] I.C.J. Rep. 15 at 42. See also *Draft Articles on Diplomatic Protection, supra* note 934, draft article 14. Each of these conditions have been subject to different interpretations. For purposes of this thesis it is not necessary to enter into the debate over different definitions of the nationality of claim (including issues such as dual or multiple nationality), or extent of exhaustion of local remedies.

Furthermore, while different definitions of diplomatic protection do not provide for participation of NGOs or entities not directly affected by violations of international law, it can be argued that depending on the internal mechanisms envisaged for initiating WTO disputes, NGOs or other non-state actors may be able to initiate claims through a member state.[940]

c- PCIJ and ICJ

In the discussion of what is arguably the most important institution of adjudication at the international level, there is not much to say about individuals and non-state actors.[941] The World Court succeeded the Permanent Court of International Justice: had progressive international lawyers at the time of negotiation toward the statute of the latter

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[940] According to C. Joseph "diplomatic protection can be defined as a procedure for giving effect to State responsibility involving breaches of international law arising out of legal injuries to the person or property of the citizen of a State." *Nationality and Diplomatic Protection — The Commonwealth of Nations* (Leiden: Sijthoff, 1969) at 1. E.M. Brochard states that "[d]iplomatic protection is in its nature an international proceeding, constituting 'an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties'." *The Diplomatic Protection of Citizens Abroad* (New York: Banks Law Publishing Company, 1916) at 354 (citing Secretary of State Blaine). C. de Visscher sees diplomatic protection as "a procedure by which States assert the right of their citizens to a treatment in accordance with international law." "Cours général de principes de droit international public" (1954) 86 Rec. des Cours 1 at 507. According to the Encyclopedia of International Law "[d]iplomatic protection is … the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law." *Encyclopedia of Public International Law*, 1992, vol. 5, "Diplomatic Protection" by W.K. Geck, at 1046.

[941] De Soto, *supra* note 759 at 702. However, the administrative practice of the PCIJ with regards to private persons should be noted. Even though article 34 of the *Statute of the PCIJ* clearly indicated that only States can bring their claims to the Court, in several occasions private persons addressed the Court for their claims against governments. In all these cases the registrar of the Court responded to the applicants that the Court had no competence for hearing their cases. Feinberg, "La pétition en droit international," *supra* note 781 at 596; See also PCIJ, *Eighth Annual Report of the Permanent Court of International Justice* (1931-1932) P.C.I.J. (Ser. E) No. 8 at 150. Nonetheless, in certain cases, the Court took petitions into account. In 1922, in case of the request by Mr. Kunter, making a complaint from the Polish government, the Court transmitted the request which related to the question of minorities to the Secretary General of the League of Nations, and officially asked him to bring it to the attention of the members of the Council. PCIJ, *First Annual Report of the Permanent Court of International Justice* (1922-1925) P.C.I.J. (Ser. E) No. 1 at 258-259 [hereinafter *First Annual Report of the PCIJ*]. In another case, the registrar of the Court transmitted to the Secretariat a request against the Court of Lebanon. Feinberg, *ibid.* at 597. Accordingly, the Permanent Court did not reject the private petitions that it received, but examined them attentively and sought the means of assisting their authors. In case of stateless people, the Court encouraged the secretary general to take action, and every year published a long list of the cases submitted to the Court by private persons in its annual report. *First Annual Report of the PCIJ* at 153-156; *Third Annual Report of the Permanent Court of International Justice* (1926-1927) P.C.I.J. (Ser. E) No. 3 at 107-111 [hereinafter *Third Annual Report of the PCIJ*]; *Fifth Annual Report of the Permanent Court of International Justice* (1928-1929) P.C.I.J. (Ser. E) No. 5 at 150-153; *Seventh Annual Report of the Permanent Court of International Justice* (1930-1931) P.C.I.J. (Ser. E) No. 7 at 181-185.

tried to create direct access for individuals to international justice, their attempts would have certainly failed. [942] Instead, the doctrine of diplomatic protection provided the individuals with the means for bringing claims against other governments.[943] In substituting the PCIJ with the ICJ no innovation or modification was made to the statute of the Court. The reason was that the PCIJ already had a satisfying record.[944] Even in the *1947 Treaties of Peace*—between Allies and Bulgaria, Finland, Hungary, Italy, and Romania—the solution of mixed arbitral tribunals of the 1919-1920 Peace Treaties was abandoned.[945]

Still, both in the PCIJ and the ICJ the rights of individuals had an eminent place in the contentious cases.[946] In the first case heard before the PCIJ in 1923, *S.S. Wimbledon*,[947] the rights of individuals were involved. In 1924, the *Mavromatis case* was

[942] See also De Soto, *supra* note 759 at 702 (elaborating on the attempts of, and opposition to the committee of lawyers at the Hague). As indicated earlier, during our discussion of the *Statute of the PCIJ,* arguments were made for and against direct access of private persons to the tribunal. Those opposing access argued on the following grounds: that states will never tolerate being attacked by an individual in a court; that individuals had no interest in having direct access to an international court, since if they are not supported by their government they will not have enough weight; that it is impossible for a state to have a diplomatic discussion with an individual; that extension of the competence of the court will increase the number of international conflicts; that international litigation is always between states and it is impossible to put the state and the individual on an equal footing; and that as individuals are not subjects of international law, such a situation will be against the principle of sovereignty. Séfériadès, *supra* note 918 at 47. Proponents of the idea of direct access rejected these arguments on several grounds citing cases of mixed arbitral tribunals, such as the *Convention on International Prize Court*, and the American Court of Justice to prove that states can face individuals in international tribunals. Furthermore, the different weights of a government and an individual should not affect an international tribunal—composed of learned experts of international law—in their decision. On the problem of an increase in the number of international conflicts, a distinction should be made between the number of disputes and the number of proceedings; denying access to justice cannot reduce the number of disputes. In response to the argument that states are the only subjects of international law, note should be taken of the trend in international law of recognizing individuals as subjects of international law. Nonetheless, it is contended that the question of access of individuals to international tribunals does not depend on the result of the debate over the status of individuals as subjects of international law and even if individuals are not deemed to be subjects of international law their direct access to international justice should not be obstructed. Finally on the argument of sovereignty of states, it is pointed out that sovereignty is not absolute, because absolute sovereignty is only possible in the case of total isolation of a state. Séfériadès, *supra* note 918 at 48-53.

[943] See Chapter Three:3:b, above.

[944] Article 34 of the *Statute of the PCIJ*, indicating that only states can bring their claims to the Court, was reiterated in article 34 of the *Statute of the ICJ.* At the time of Marshall plan agreements, there was a discussion of giving competence to ICJ for American individual complaints under certain circumstances, but this proposal was strongly opposed by states. De Soto, *supra* note 759 at 703.

[945] De Soto, *supra* note 759 at 703.

[946] von der Heydte, *supra* note 903 at 322.

[947] *Supra* note 199.

based on the request of an individual.[948] In all the cases of diplomatic protection before the Court, the claimant state overtook the case of the individual because there was a breach of international law. In the case of the *Serbian Loans*, however, the request submitted to the court was about the relationship between the debtor state and private individuals, a relationship governed by domestic law.[949] With this position the idea of the state substituting the individual was replaced by the idea that state represents the individual.[950] Nonetheless, individuals are still totally dependent on states, and states are to decide whether to exercise diplomatic protection. As Sir Humphrey Waldock observed, in spite of drastic developments in other fields related to international organizations, the position of individuals in the ICJ has not changed since the period of the League of Nations. In the World Court the state has the monopoly of representation of individuals and has no obligation to act.[951]

Article 66(2) of the *Statute of the ICJ* states that in the case of advisory opinions "any international organization"[952] considered likely to be able to furnish information should be notified "that the Court will be prepared to receive … written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question."[953] Conversely, article 34(2) of the *Statute of the ICJ*, which addresses the same subject but in contentious cases, only allows the Court to seek information from *public* international organizations.[954] Article 69(4) of the *Rules of Court* states that "the term

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[948] *Supra* note 910.

[949] *Serbian Loans* (1929) P.C.I.J. (Ser. A) No. 20.

[950] von der Heydte, *supra* note 903 at 325.

[951] *Ibid.* at 326.

[952] This reference is interpreted to include NGOs. Ascensio, *supra* note 914 at 906.

[953] Paragraph 4 of the same article further states that,

> States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

[954] According to this article,

> The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

'public international organization' denotes an international organization of States."[955] The *travaux préparatoire* of the *Statute of the ICJ* do not help in clarifying the difference between the references to "international organization" and "public international organization" in articles 66(2) and 34 respectively.[956] However, the history of the PCIJ, in which the International Labour Office[957]—an organ independent from the states and under the control of a Governing Body composed of non-state actors—had standing before the Court "indicates that, the distinction between 'public' and 'private' organizations has not been firm."[958] In the advisory proceedings of the PCIJ on several occasions NGOs were permitted to participate.[959] Conversely, non-state actors have had limited role in advisory proceedings before the ICJ,[960] and were denied participation in

[955] *Rules of Court*, adopted April 14, 1978, amended 2000.

[956] In discussions regarding the draft article 34, the Chairman, Gerald Fitzmaurice, noted that public international organizations are the ones that have states as their members. Article 66(2), however, was adopted with no objection. See Doc. Jurist 30, G/22, 14 U.N.C.I.O. Docs. 131, 133-137 cited in Shelton, *supra* note 919 at 620-621 notes 55, 56, 57, and Doc. Jurist 45, G/34, 14 U.N.C.I.O Docs. 485 at 175 and 183, cited in Shelton, *ibid*. note 60. Articles 34 and 66 of the *Statute of the ICJ* repeated the provisions of articles 26 and 66 (originating from article 73 of the 1922 *Rules of Court of the PCIJ*) of the *Statute of the PCIJ* respectively, and their difference is due to the difference of their sources in the *Statute of the PCIJ*.

[957] Composed of the Director-General, and the staff. One of the three organs of the International Labour Organisation. See the *Constitution of the International Labour Organisation,* 28 June 1919, 15 U.N.T.S. 35, art. 9:5 as amended (entered into force 10 Jan. 1920).

[958] Shelton, *supra* note 919 at 622.

[959] See *Designation of Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference* (1922) Advisory Opinion, P.C.I.J. (Ser. C) No. 1, 5 at 449; (Ser. B) No. 1, at 11; *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer* (1926) Advisory Opinion, P.C.I.J. (Ser. C) No. 12, at 259, 262, 269-87; *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer* (1926), Advisory Opinion , P.C.I.J. (Ser. B) No. 13, at 8; (Ser. A/B) No. 50, at 367. In two cases national organizations made submissions to the Court. See *Designation of Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference* (1922), Advisory Opinion, P.C.I.J. (Ser. B) No. 1, at 11 (citing Memorandum from Netherlands General Confederation of Trades Unions); *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*; *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production* (1922) Advisory Opinion , P.C.I.J. (Ser. B) No. 2&3, at 13 (citing Letter from the Central Association of French Agriculturalists). Furthermore, several international trade unions were permitted to participate in the advisory proceeding of the PCIJ. See also *Third Annual Report of the PCIJ, supra* note 941 at 225.

[960] In the *South-West Africa* Case, the International League for Human Rights was permitted to submit information. *International Status of South West Africa* [1950] I.C.J. Pleadings 324. See Shelton, *supra* note 919 at 623. In the 1970-71 *South West Africa* Case (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16, the request of the League for participation was refused. See [1970] I.C.J. Pleadings (2 Legal Consequences) at 639, 640, 644, 672, 678, 679.

contentious cases on the basis of the distinction between "international organization" and "public international organization" in articles 34 and 66 of the *Statute of the ICJ*.[961]

It is argued that the present rules of the ICJ, under article 66(2) of the *Statute of the ICJ* allow *amicus* participation in advisory cases, but such participation in contentious cases would require an amendment of the Court rules.[962] However, even without amending the rules, the Court could get expert opinions from non-state actors under article 50 of the *Statute of the ICJ*.[963] Moreover, even though the ICJ has not yet permitted *amicus curiae* briefs in its proceedings,[964] NGOs were influential in bringing the case on the *Legality of the Use by a State of Nuclear Weapons In Armed Conflict* to the Court.[965] In that case, NGO *amicus* briefs were made available to members of the Court, without being admitted as part of the record.[966] The World Court has yet to officially allow non-state actors to present briefs.[967]

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[961] In the *Asylum* case, the request of the International League for the Rights of Man to participate was rejected. See Robert Delson, Letter to the Registrar, 1950 ICJ Pleadings (2 Asylum) 227 (Mar. 7, 1950) cited in Shelton, *supra* note 919 at 623.

[962] In case of contentious cases the *Statute of the ICJ* clearly indicates that "[s]hould a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene." *Ibid*. art. 62.

[963] See Shelton, *supra* note 919 at 627-628. In *Greco-Bulgarian "Communities"* case and *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employers* the Court asked NGOs to provide their expert opinion. See respectively (1930) P.C.I.J. (Ser. C) No. 18-I at 1077 (Order of June 30) and (1926) P.C.I.J. (Ser. B) No. 13 (July 23).

[964] In the *Namibia* case, Professor Michael Reisman asked the Court about the possibility of submitting an *amicus curiae* brief based on the precedent of the League for Human Rights in 1950. The Registrar stated the Court's view that invoking *expressio unius est exclusio alterius* [The express mention of one thing excludes all others] concluded that under article 66 only international organizations had the power to submit statements to the Court. See R.S. Clark, "The International League for Human Rights and South West Africa 1947-1957: Human Rights NGO as Catalyst in the International Legal Process" (1981) 3 Hum. Rts. Q. 101 at 119-20 note 76; [1970] I.C.J. Pleadings at 636-638. More recently it appears that written submissions were unofficially received by the ICJ in *Case Concerning the Gabcikovo-Nagymaros Project*. [1997] I.C.J. Rep.

[965] [1996] I.C.J. Report at 66 (Advisory Opinion of 8 July 1996). The Court refused an *amicus curiae* from the International Physicians for the Prevention of Nuclear War, but, the government of Zimbabwe included information from the ICRC as part of its filing. Letter from the Registrar to Dr. Barry. D. Levy (Mar. 28, 1994) cited in Shelton *supra* note 919 at 624, note 81; see also Wedgwood, *supra* note 379, at 26.

[966] The registrar, with reference to an *amicus* brief from the Federation of American Scientists of the court explained that

> the amicus brief has been received by the court but has not been admitted as part of the record in these cases. It is, however, available to members of the court in their library.
> The court has received numerous documents, petitions and representations from non-governmental organizations, professional associations and other bodies that, while they

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d- Tribunals with direct access for private persons

Several international agreements provide direct access to private traders, producers, investors, employers, employees or other private persons to international dispute settlement bodies. Examples include the International Labour Organization (ILO) system of complaints; the arbitration mechanism of the International Center for Settlement of Investments Disputes (ICSID); the dispute settlement mechanisms provided for in the *Convention Establishing the Multilateral Investment Guarantee Agency* (MIGA); the Inspection Panel of the World Bank; the 1982 *United Nations Convention on the Law of the Sea*; the 1994 *WTO Agreement on Preshipment Inspection*; EC law and the 1995 *Protocol amending European Social Charter*; and the *Canada-United States Free Trade Agreement* and the *North American Free Trade Agreement*.[968] Generally speaking, two categories of disputes often pitch non-state actors against states: human rights cases and cases related to economic activities, including maritime and foreign investment cases. In foreign investment very often the capital exporting state signs a treaty with the recipient state according to which the disputes between the foreign enterprise and the state is settled by arbitration.[969] There are instances where the private

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> have no formal standing in the proceedings before it, wish to communicate their views on the subject matter of these important cases.

E. Valencia-Ospina, "Letter to the Editor," *International Herald Tribune* (15 November 1995) online: International Herald Tribune < http://www.iht.com/articles/1995/11/15/edlet.t_21.php> (date accessed: 12 June 2005).

[967] Prominent scholars like Shabtai Rosenne have called for the Court to provide direct access to non-state actors in order to "increase the appearance of justice" and "the general standing and prestige of the Court." According to Rosenne,

> It is in the interests of the proper administration of international justice that in appropriate cases the International Court of Justice should take advantage of all powers which it already possesses, and permit an individual directly concerned to present himself before the Court … and give his own version of the facts and his own construction of the law.

"Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice" in P. Sanders, ed., *International Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967) 240 at 250.

[968] "Constitutionalism and International Organizations," *supra* note 42 at 464.

[969] Generally see Toope, *Mixed International Arbitration*, *supra* note 723. See also F. Gélinas, "Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalization" in M. Gehring & M.C. Cordonier Segger, eds., *Sustainable Development in World Trade Law* (The Hague: Kluwer, 2005) 577.

There are also some quasi-international agreements which confer such a right to private persons. In the classic structure of international law, the foreigners who suffered damages by a state were covered by diplomatic protection, but this institution was neither always guaranteed nor efficient. As a solution foreign enterprises have used quasi-international contracts which are concluded between states and enterprises on

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persons have the right to directly refer to an international tribunal,[970] but in those cases their right is created in accordance with an international treaty between States and is dependent on their consent, and States can withdraw that right if they decide to do so.[971]

A number of these tribunals are briefly studied in this section:

i- Human rights system

The real developments in this field have occurred in regional organizations. The entry into force of the *European Convention for Protection of Human Rights and Fundamental Freedoms* (the *European Convention on Human Rights*) in 1950[972] and the establishment of the European Court of Human Rights in 1959, which is to a certain extent organised on the model of the ICJ are important in this regard. The major difference between the two is the existence of the European Commission of Human Rights, which can also bring cases to the European Court of Human Rights, and as such the monopoly of states over representing individuals has been dissolved.[973] The Commission is obliged to represent individuals with legitimate claims in front of the Court.[974]

The *American Convention on Human Rights* (the *Pact of San José*),[975] created two bodies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, both organs of the Organization of American States (OAS), responsible for overseeing compliance with the convention. In contrast to the European human rights system, individual citizens of the OAS member states are not allowed to take cases

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an equal footing, *inter pares* (to avoid unilateral modification of agreements by the State). Barberis, *supra* note 769 at 190 and details 189-206.

[970] Barberis, *supra* note 769 at 187.

[971] *Ibid.*

[972] *European Convention for the Protection of Human Rights and Fundamental Freedoms,* adopted in Rome, 4 November 1951, as amended by Protocol No. 11, Eur. T.S. No. 5. For more on the Convention see A. Drzemczewski, "The European Convention on Human Rights" (1982) 2 Y.B. Eur. L. 327.

[973] von der Heydte, *supra* note 903 at 327.

[974] According to amendments in 1982, the individual will be informed and invited to be individually represented when a case is transmitted to the Court. See Council of Europe, *European Court of Human Rights, Rules of Court A and B (1994),* and Council of Europe, *Protocol No. 11 to the European Convention on Human Rights and Explanatory Report*, Doc. H(94)5 (1994), reprinted in (1994) 33 ILM 943. For more details on *amicus curiae* submitted to the Court see Shelton, *supra* note 919 at 630-638.

[975] *American Convention on Human Rights,* O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

directly to the Inter-American Court of Human Rights, which is an autonomous judicial institution based in the city of San José, Costa Rica. Individuals who believe that their rights have been violated must first file a complaint with the Inter-American Commission on Human Rights and have that body rule on the admissibility of the claim. If the state is found to be at fault, the Commission will make recommendations to the sate and only if the state fails to abide by these recommendations, or if the Commission decides that the case is of particular importance or legal interest, it will refer the case to the Inter-American Court of Human Rights.

The European Court of Human Rights, and the Inter-American Court of Human Rights have accepted *amicus curiae* submissions in their proceedings,[976] and NGOs have been permitted to lodge complaints with the Inter-American Commission on Human Rights.[977]

In addition to the *European Convention on Human Rights* and the *Pact of San José* on the protection of human rights, an international agreement may envisage the creation of tribunals by contracting States with a limited competence. [978]

ii- The European Community

The European Community is one of the most advanced systems of regional integration and is home to an evolving supranational jurisdiction. The *EC Treaty* has envisaged several methods of recourse for private persons within the European system.[979] As a supranational organization, the European Community can adopt legislative and administrative acts, which frequently have a direct impact on citizens of European

[976] See Council of Europe, *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Explanatory Report*, Eur. T.S., No. 155 of 11 May 1994, Art. 36 (third party intervention); Council of Europe, *Explanatory Report and Protocol No. 11*, (1993) 33 ILM 943. Wedgwood, *supra* note 379, at 26-27.

[977] Wedgwood, *ibid*. at 25.

[978] At one time, after World War II, Australia made a proposal to create an international court of human rights where individuals can complain. De Soto, *supra* note 759 at 706. Participation of non-state actors in the framework of the *International Covenant on Civil and Political Rights* (ICCPR), *International Covenant on Economic Social and Cultural Rights* (ICESCR), the *Optional Protocol of the ICCPR*, and *African Charter on Human and People's Rights,* can also be studied.

[979] *Supra* note 610.

countries. It is therefore not surprising that its dispute settlement system is more elaborate than that of the WTO.[980]

Both the European Court of Justice and the Court of the First Instance of the European Community (ECFI) can entertain actions against the institutions and member states for breaches of Community law.[981] Natural and legal persons can challenge the legality of actions of Community institutions. The public interest in the Court is represented by Advocates General. Natural and legal persons, as well as the Advocate General can appear before the Court as *amicus curiae*.[982] These *amicus curiae* interventions are permitted when the individual or group asserts that the result of the case will affect their legal position, economic position or freedom of action.[983] Another avenue of participation for a non-state actor is to ask a party to the proceedings, be it a private party, a member state or a European institution, to file its *amicus curiae* brief as a document attached to the official pleading.[984]

Furthermore, in certain circumstances NGOs may challenge legislative and administrative acts of European Community institutions and the European Central Bank

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[980] M.M. Slotboom, "Participation of NGOs Before the WTO and EC Tribunals: Which Court is the Better Friend?" (2006) 5 World Trade Rev. 69 at 69 [hereinafter Slotboom, "Participation of NGOs"]. Furthermore, European Community institutions can begin legal proceedings against each other and against other member states of the Community. See also Reinisch, & Irgel, *supra* note 726 at 143-145.

[981] See *Protocol on the Statute of the Court of Justice of the European Economic Community,* 17 April 1957, 298 U.N.T.S. 147, as amended by Council Decision 88/591, 1989 O.J. (C 215) 1, arts. 169, 170, 173, 175, 178, 178, 184 [hereinafter the *Statute of the ECJ*].

[982] *Statute of the ECJ,* art. 37. The Statute does not use the term *amici curiae.* See *e.g. Costa v. Enel*, Case 6/64. 1964 E.C.R.1143 (Fr. Ed.), 1964 C.M.L.R. 425 in which the Advocate General participated; or participation of the Italian National Union of Consumers in Cases 41, 43, 48, 50, 111, 113 & 114/73, *Générale Sucrière v. Commission,* 1973 E.C.R.1465, 1 C.M.L.R. 215 (1974), the Federation of European Bearing Manufacturers Associations in Case 113/77, *NTN Toyt Bearing Co Ltd v. Council,* 1979 E.C.R.1185, 2 C.M.L.R. 257 (1979), the Consultative Committee of the Bars and Law Societies of the European Communities in Case 155/79, *A M & S Eur. Ltd. v. Commission*, 1982 E.C.R.1575, 2 C.M.L.R. 259 (1964) and the European Council of Chemical Manufacturers' Federation in Case 236/81, *Celanese Chem. Co. Inc. v. Council & Commission*.

[983] Shelton, *supra* note 919 at 630. See *Protocol on the Statute of the Court of Justice of the European Economic Community of 17 April 1957*, Art. 37, 298 U.N.T.S. 147, as amended by Council Decision 88/591, 1989 O.J. (C 215) 1, cited in Wedgwood, *supra* note 379, at 26 note 21.

[984] Slotboom, "Participation of NGOs," *supra* note 980 at 77. Article 37:4 of the Rules of Procedure of the ECJ and article 43:4 of the Rules of Procedure of the ECFI provide that "[t]o every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them." For example the International Trade Mark Association submitted an *amicus curiae* in case C-143/00, *Boehringer Ingelheim* [2002] E.C.R.I-3759. See online: International Trade Mark Association <http://www.inta.org/policy/amicus.html> (date accessed 21 December 2007).

before the European courts,[985] and complain in case these institutions fail to act after being called upon to do so,[986] or claim damage for their illegal acts.[987] In practice, however it is not easy for non-state actors to assert their *locus standi.* [988]

Non-state actors can also appear before European courts as interveners in proceedings between other parties.[989] However, the possibilities for non-state actors

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[985] According to article 230(4) of the *EC Treaty,* "[a]ny natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former." *Supra* note 610.

[986] Article 232(3) of the *EC Treaty* stipulates that "[a]ny natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion." *Supra* note 610. Accordingly the same condition as that of article 230(4) apply for NGOs that intend to claim standing under this article. Article 234 of the *EC Treaty* also gives the ECJ jurisdiction to issue preliminary rulings on the interpretation of the Treaty and of acts of the European institutions and on the validity of such acts. The same article provides that national courts of member states may refer such questions to the ECJ, and where there is no judicial remedy under national law against their judgments, national courts are obliged to do so; thus providing indirect access to NGOs. "Participation of NGOs," *supra* note 980 at 77.

[987] Articles 235 and 288 of the *EC Treaty* enable private parties, including NGOs, to claim compensation for damages suffered as a consequence of an illegal act of the European institutions. However, while the requirements for admissibility pursuant to these articles are less stringent than those of article 230 of the *EC Treaty*, in practice the option to claim damages is theoretical for NGOs. See Slotboom, "Participation of NGOs," *supra* note 980 at 79. European courts have also rejected the principle that NGOs have a collective right to damages with regard to personal damages to their members. See case 72/74, *Union Syndicale – Service Public Européen a.o.* v. *Council* [1975] E.C.R.401, at paras. 20-22.

[988] Of course the fact that NGOs have standing before the European courts does not mean that it is easy for them to bring actions under this article, as very often they have to demonstrate that notwithstanding the general nature of that measure, it is "of direct and individual concern to them." See Slotboom, "Participation of NGOs," *supra* note 980 at 71-73; J.A. Usher, "Direct and Individual Concern: An Effective Remedy or a Conventional Solution?," (2003) 28 Eur. L. Rev. at 575 at 577. The ECJ case law has clarified that an NGO is "individually concerned" if it represents individuals who are themselves entitled to bring an action for annulment under article 230(4) or if special circumstances exist which sufficiently distinguish the NGO in question (*e.g.* the NGO undertook a particular role in the procedure which led to the adoption of the EC measure). See *e.g.* case 19-22/62, *Fédération Nationale de la Viande en Gros v. Council* [1962] E.C.R.943; cases 67, 68 and 70/85, *Van der Kooy* [1988] E.C.R.219. Conversely, an NGO is not "individually concerned" just because the case is related to general interests it represents. See cases 16/62 and 17/62, *Confédération Nationale des Producteurs de Fruit et Légumes a.o.v. Council* [1962] E.C.R.901; case C-321/95 P, *Greenpeace v. Commission* [1998] E.C.R.I-1651. The amendment to the *EC Treaty* has adopted a more liberal approach to standing in relation to "regulatory acts" as opposed to "legislative acts" according to which regulators acts may be challenged if the individual can prove direct concern. *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.* (signed on 13 December 2007), paragraph 214 (c) [hereinafter *EU Reform Treaty*].

[989] Under article 40 of the *Statute of the ECJ*

> Member States and institutions of the Communities may intervene in cases before the Court. The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institution of the Communities or between Member States and institutions of the

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intervention in proceedings before the European courts are limited to supporting the conclusions of one of the parties (non-state actors cannot introduce new claims), and private parties cannot intervene in action between member states of the European Communities or in actions between the European institutions or between member states and European institutions.[990]

iii- North American Free Trade Agreement

NAFTA entered into force in 1994 and has been one of the most controversial free trade agreements to date. Chapter 11 of *NAFTA,* which is related to investment, provides for the settlement of investment disputes of investors.[991]

Two NAFTA arbitral tribunals have determined that they had the authority to accept *amicus curiae* briefs in disputes between private parties and states.[992] It appears

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> Communities … An application to intervene shall be limited to supporting the form of order sought by one of the parties.

The ECJ has interpreted the requirement that intervening party "establish[…] an interest in the result" quite broadly for NGOs. In contrast to intervention by other private parties, the ECJ does not require that intervening NGOs demonstrate that their own legal position or economic situations is affected. NGOs are generally allowed to intervene in cases where collective interest represented by the NGO is at stake and the case is thus held to be of general importance, or when they have participated in the preparation of the contested act. Slotboom, "Participation of NGOs," *supra* note 980 at 75-76.

[990] Slotboom, "Participation of NGOs," *supra* note 980 at 76. That is, NGOs only have a right to intervene in disputes before the European courts between private parties and European institutions. *Ibid.*

[991] According to article 1120 of *NAFTA* a disputing investor may submit the claim to arbitration under

> (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
> (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
> (c) the UNCITRAL Arbitration Rules.

[992] *Methanex Corporation v. United States of America,* Decision of the Tribunal on the Petition of Third Persons to Intervene as '*Amicus curiae*' UNCITRAL Arb., paras. 33 and 89 (15 January 2001) [hereinafter *Methanex* case]; *United Parcel Service of America, Inc. ("UPS") v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amicus Curiae*, UNCITRAL Arb., para. 60 (2001) [hereinafter *UPS* case]. In the *Methanex* case the International Institute for Sustainable Development (IISD), a Canada-based NGO, petitioned the tribunal for submitting an *amicus curiae* brief, to make oral submissions, to have access to documents filed in the arbitration and to have observer status in the oral hearings. See International Institute for Sustainable Development, "Petition to the Arbitral Tribunal," (26 August 2000) online: IISD < http://www.iisd.org/pdf/methanex_petition_sept72000.pdf > (date accessed 7 July 2006) para. 5.1. IISD claimed that the issues involved in the case were "matters of public interest distinct from the commercial issues that arbitration processes normally handle" and that because of this "vital public interest dimension" IISD wished to submit an *amicus* brief. *Ibid.* para. 3.3. Methanex and Mexico opposed the petition of IISD, and the United States and Canada supported the authority of the Tribunal to accept *amicus* written briefs, but considered that oral arguments required the consent of both arbitrating parties. H. Mann, "Opening the Doors, at least a little: Comment on the Amicus decision in *Methanex v. United States*" (2001) 10 Rev. Eur. Comm. & Int'l Env'l L. 241 at 242. See also P. Dumberry,

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that the *Shrimp-Turtle* case and *Carbon-Steel Appeal Report* influenced the outcome under *NAFTA* Chapter 11.[993] Following the *Methanex* and *UPS* cases *NAFTA* parties responded to civil society requests for transparency and participation in the dispute settlement proceedings. In July 2001, the Free Trade Commission interpreted access to documents in Chapter 11 arbitration proceedings and declared that *NAFTA* arbitration involved no general duty of confidentiality.[994] The Free Trade Commission also issued a Statement in 2003, declaring that nothing in *NAFTA* "limits a Tribunal's discretion to accept written submissions from a person or an entity that is not a disputing party," and recommended the procedures to be adopted by Chapter 11 Tribunals.[995]

iv- International Centre for Settlement of Investment Disputes

ICSID is an international organization established by the *Convention on Settlement of Investment Disputes Between States and Nationals of Other States*[996] as part

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"Admissibility of amicus curiae Briefs by NGOs in Investors-States Arbitration: The Precedent Set by the Methanex Case in the Context of NAFTA Chapter 11 Proceedings, The Case Notes" (2001) 1 Non-State Actors & Int'l L. 201

[993] In the *Methanex* case the Tribunal found support for its position in the practice of the Iran-U.S. Claims Tribunal and the World Trade organization. It referred to *Note 5 of the Iran-U.S. Claims Tribunal Notes to Article 15(1) of the UNCITRAL Arbitration Rules* and to the *Carbon Steel Appeal Report* of the WTO. *Methanex* case, *supra* note 992 at paras. 32-33. See also Carmody, "Stay Tuned", *supra* note 654 at 6.

[994] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en> (date modified: 21 January 2008). The Free Trade Commission is established under article 2001 of *NAFTA* and is comprised of cabinet-level representatives of the Parties and among others supervises the implementation of the agreement and oversee its further elaboration.

[995] NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation* (7 October 2003), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf> (date modified: 15 November 2007). The procedures proposed by the Commission permit "any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party," to apply for leave from the Tribunal to file a submission. According to the Statement,

> [i]n determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address matters within the scope of the dispute; (c) the non-disputing party has a significant interest in the arbitration; and (d) there is a public interest in the subject-matter of the arbitration.

Ibid.

[996] 18 March 1965, 575 U.N.T.S. 160 (entry into force: 14 October 1966) [hereinafter the *ICSID Convention*].

of the World Bank Group, and provides facilities for arbitration of investment disputes between states and nationals of other parties to the *ICSID Convention*, with the goal of creating an environment conducive to foreign investment in host states which can contribute to economic development of these states.[997]

The convention does not give the right of action to private persons, but the state and the enterprise can make an agreement to bring the action to arbitration in case of a dispute. ICSID arbitration is comprised of a written phase followed by an oral phase. The tribunal, with the consent of the parties, decides which other persons may attend the hearings. The deliberations of tribunals take place in private and remain secret; the minutes of hearings and arbitral awards can only be published with the consent of the parties.[998] However, the WTO and NAFTA practices appear to have been influenced by the ICSID arbitral tribunals.[999] After previous reluctance,[1000] in two recent cases ICSID tribunals have found that under article 44 of the *ICSID Convention*,[1001] under certain

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[997] A. Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972) 136 Rec. des Cours 331 at 335.

[998] *International Centre for the Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings*, [hereinafter *Arbitration Rules*] rule 15:1; *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes* [hereinafter Additional Facility Rules] article 24:1; *ICSID Convention, supra* note 996, article 48:5.

[999] In the first case where an ICSID tribunal favourably considered an NGO petition to submit *amicus curiae,* the Tribunal found support for its decision in the practices of NAFTA, the Iran-United States Claims Tribunal and the World Trade Organization. ICSID, *Order in Response to a Petition for Transparency and Participation as* Amicus Curiae (May 19, 2005) available online: ICSID < http://icsid.worldbank.org/ICSID/FrontServlet > (date modified 17 January 2008) para. 15 [hereinafter *ICSID Order on Participation in Aguas Argentinas*].

[1000] In the controversial case of *Aguas del Tunari*, following privatization of the municipal water supply in Cochabamba, Bolivia, Bechtel, an American company and its subsidiary, Agua del Tunari, increased water rates after they were granted a concession. Public riots ensued and the company abandoned the project and filed a case against Bolivia with the ICSID. A few NGOs petitioned the tribunal to intervene as parties or to participate as *Amici Curiae*, but the president of the tribunal dismissed the request by sending a letter. See *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3); M.M. Mbengue, & M. Tignino, "Transparency, Public Participation and Amicus Curiae in Water Disputes" in E. Brown Weiss, L. Boisson de Chazournes, & N. Bernasconi-Osterwalder, *Fresh Water and International Economic Law* (Oxford: Oxford University Press, 2005) 367 at 388.

[1001] According to article 44 of the *ICSID Convention*

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Ibid. supra note 996.

conditions,[1002] they had the power to allow suitable parties to make submissions as *amicus curiae*.[1003] Subsequently, ICSID revised its *Arbitration Rules* to allow *amicus* submissions.[1004]

[1002] *Aguas Argentinas* case was the first case were *amicus curiae* participation was allowed. *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (2005) (ICSID Case No. ARB/03/19). The Tribunal, based on a review of *amicus* practices in other fora concluded that exercise of the power to accept *amicus* submissions depend on three basic criteria: "a) the appropriateness of the subject matter of the case; b) suitability of a given nonparty to act as *amicus curiae* in that case, and c) the procedure by which the *amicus* submission is made and considered." *ICSID Order on Participation in Aguas Argentinas, supra* note 999 para. 17.

[1003] Four human rights and consumers' rights NGOs from Argentina and the Center for International Environmental Law (CIEL) requested access to hearings and documents and opportunity to present legal arguments as *amicus curiae*, and the tribunal decided to deny petitioners' request to attend the hearings, grant an opportunity to petitioners to apply for leave to make *amicus curiae* submissions, and defer a decision on petitioners' request for access to documents. *ICSID Order on Participation in Aguas Argentinas, supra* note 999 paras. 16 and 33. Later, the Tribunal permitted the NGOs leave to submit an *amicus* submission, and set the procedure for this submission. ICSID, *Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an* Amicus Curiae *Submission* (February 12, 2007) paras. 16 and 26-27. In a subsequent case, *Aguas Provinciales de Santa Fe S.A.* case a number of NGOs and individuals with expertise in law, human rights, and development, made a similar petition. *Suez, Sociedad General de Aguas de Barcelona S.A. and Inter Aguas Servicios Integrales del Agua S.A. v. Argentine Republic* (2006) (ICSID Case No. ARB/03/17). Because identical issues were raised, the Tribunal decided to apply the principles of the *Aguas Argentinas* case to the petition, and stated that "a nonparty must demonstrate three important attributes to qualify as an amicus curiae: relevant expertise, experience, and independence," and concluded that the petitioners had not provided it with sufficient specific information and reasons to conclude that they qualified as *amici curiae* and declined to grant them permission to make submission. ICSID, *Order in Response to a Petition for Participation as* Amicus Curiae (17 March 2006) available online: ICSID <http://icsid.worldbank.org/ICSID/ FrontServlet> (date modified 17 January 2008) paras. 4, 23, 29, 30, 34 and 38.

[1004] Rule 37(2) which became effective on 10 April 2006 reads as follows

> After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
> (c) the non-disputing party has a significant interest in the proceeding.
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Supra note 998. Furthermore, rule 32(2) stipulates that the Tribunal, unless either party objects, may after consultation with the Secretary-General of ICSID allow nonparties to observe the hearings. *Ibid.*

v- Other tribunals

The General Assembly of the United Nations adopted the *UNCITRAL Arbitration Rules* in 1976, which provide a comprehensive set of procedural rules upon which parties may agree to guide the conduct of arbitral proceedings arising from their commercial relationships. These are widely used in ad hoc arbitrations as well as administered arbitrations.[1005] The *UNCITRAL Arbitration Rules* are not administered by any particular institution and an arbitral tribunal under these rules may have a wide discretion in conducting its proceedings. Hearings are in principle *in camera* unless the parties agree otherwise, and the award can be made public with both parties' consent.[1006]

Furthermore, the Inspection panel at the World Bank is another accountability mechanism that investigates complaints from groups of people affected as a result of the Bank's violation of its own policies and procedures, and is part of "growing efforts to provide means to civil society to hold international intergovernmental organizations accountable for their actions."[1007]

Apart from tribunals active in areas of human rights and economic issues there are other examples of international tribunals that allow direct participation[1008] or *amicus curiae* participation.[1009]

Amicus curia participation is one area that non-state in which the WTO has been ahead of other international organization. However, as observed in the previous chapter

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[1005] GA/RES/31/98 (15 December 1976). United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*.

[1006] *UNCITRAL Arbitration Rules, supra* note 1005, articles 25:4 and 32:5.

[1007] E. Brown Weiss, "Invoking State Responsibility in the Twenty-first Century" (2002) 96 Am. J. Int'l L. 798 at 815, footnote 119.

[1008] Barberis, *supra* note 769 at 187. For instance, article 33 of the *Convention of Mannheim of 17 October 1868* (CTS, Parry the Consolidated Treaty Series, vol. 138 at 176-77) for tribunals for navigation on Rhine; modified by *Convention of Strasbourg of 20 Nov. 1963* (I.UWR. Vol. 2, at 963) and *Protocol of 25 Oct. 1972* (I. UWR. Vol. III at 972).

[1009] The International Criminal Tribunal for the former Yugoslavia also accepts *amicus curiae* submissions. See Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic a/k/a Dule*, International Criminal Tribunal for the former Yugoslavia, IT-94-1-AR72, Appeals Chamber, 2 October 1995, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, *Prosecutor* v. *Blaskic,* IT-95-14-PT, Trial Chamber II, 18 July 1997, reversed in part and affirmed in part in Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, *Prosecutor v. Blaskic*, IT-95-14-AR108 bis, Appeals Chamber, 2 October 1997; cited in Wedgwood, *supra* note 379, at 26 note 20.

certain WTO members have opposed the practice of the WTO dispute settlement system in this regard.

4- Balance sheet

The participation of new actors on the international scene, and specifically the participation of non-state actors are considered a right by some, but have been criticized on several grounds by others, which are outlined in this section.

I will briefly touch upon the question of a "right to participate" in international affairs and then, to close this chapter, take note of criticism directed at participation of non-state actors in international law. I will wrap up this chapter with a comparison of participation of non-state actors in the WTO and other organizations, setting the stage for the last chapter of this thesis which uses this comparison to put forward policy arguments as well as proposals for increased participation in the WTO.

a- A right to participate?

Participation is recognized as a principle of human rights in international human rights treaties primarily through the recognition of political rights. Article 21 of the Universal Declaration of Human Rights[1010] as well as article 25 of *the International Covenant on Civil and Political Rights* (*ICCPR*) [1011] broadly recognize political rights. According to article 25 of the *ICCPR*:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

The Human Rights Committee has adopted a broad interpretation of the right to take part in the conduct of public affairs to include "all aspects of public administration, and the formulation and implementation of policy at the *international*, national, regional

[1010] *Universal Declaration of Human Rights,* GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948) 71.

[1011] 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [hereinafter *ICCPR*].

and local levels."[1012] However, the exact application of this right at the international level is not specified. Furthermore, the *Convention on the Elimination of all forms of Discrimination against Women* (*CEDAW*)[1013] in articles 7 and 14(2) as well as the *International Convention on the Elimination of All Forms of Racial Discrimination* (*ICERD*)[1014] in article 5 have also recognized the right to participate in public affairs. Furthermore, *CEDAW* expressly refers to the international dimension of participation in article 8 which states that "States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations." The exercise of these "participatory rights" requires respect for several other human rights, including the freedom of expression, the freedom of assembly, the freedom of association, the freedom of movement and the right to seek, receive and impart information.[1015]

The *Declaration of the Right to Development*, while not creating obligations similar to international conventions, is also relevant. Article 1 of the *Declaration of the Right to Development* defines this right as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which human rights and fundamental freedoms can be fully realized."[1016]

According to the *High Commissioner for Human Rights' Study on Participation*, the main characteristic of participatory rights are that these rights go beyond merely

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[1012] Human Rights Committee, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)* (1996) [hereinafter *HRC General Comment 25*] [emphasis added].

[1013] 18 December 1979, 1249 U.N.T.S., (entered into force 3 September 1981) [hereinafter *CEDAW*].

[1014] 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969) [hereinafter *ICERD*].

[1015] Commission on Human Rights, *Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization,* UN Doc. E/CN.4/2005/41 (23 December 2004) para. 9 [hereinafter *High Commissioner for Human Rights' Study on Participation*]; *HRC General Comment 25,* paras. 8, 12, and 25. Furthermore, according to the Committee on Economic, Social and Cultural Rights (CESCR) the right to education, as an "empowerment right" is also related to enjoyment of participatory rights. Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (Art. 13)* (1999) [hereinafter *CESCR General Comment 13*].

[1016] GA Res. 41/128, UN GAOR, 41st Sess., UN Doc. A/RES/41/128 (1986), art. 1.

representative democracy and promote participation in public affairs and political and public life in various forms, must be enjoyed without discrimination, carry both positive and negative obligation on States to ensure their full realization, and finally, may be subject to limitations based on objective and reasonable criteria.[1017]

Furthermore, the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of the Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*[1018] in addition to recognizing the rights of everyone "individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels," reaffirms the rights of everyone, "individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country in the conduct of public affairs."[1019] More specifically, the Declaration states that the right to participate in the conduct of public affairs "includes, *inter alia*, the right individually and in association with others to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any respect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms."[1020]

While at the national level the right to participate may be translated to mechanisms of democratic governance at the international level, there is not much clarity regarding enforcement of this right.[1021] Nonetheless, different mechanisms for

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[1017] *High Commissioner for Human Rights' Study on Participation*, paras. 14-17. See also *HRC General Comment 25*, paras. 4, 11, 12, 18.

[1018] GA Res. 53/144, UN GAOR, 53rd Sess., UN Doc A/RES/53/144 (1999).

[1019] *Ibid,* arts. 1 and 8:1.

[1020] *Ibid.* art. 8:2.

[1021] The question of a right to petition is also relevant to the issue of participation. Even though the subject is no longer discussed in the modern international law literature, in 1932 Feinberg's view on the legal basis of petition-requests was that since unlike domestic law international law did not provide for a 'right' of individuals to submit petitions, there existed an obligation for international institutions to accept petitions and that states could not prevent their nationals from submitting petitions to international institutions, subject to their criminal laws. Feingberg, "La pétition en droit international," *supra* note 781 at 632. He further concluded that the obligation for international organizations to accept petitions does not create any position for individuals in the international order. *Ibid.* at 638. He then concluded that the practice of submitting petitions had been established and constant since the Congress of Vienna and pointed out that the *opinio juris* which was required to transform this practice to law was not easily identifiable. In

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participation of non-state actors at the international level contribute to broader, and in certain cases more direct, participation of public in international affairs.

b- Problems of participation

Participation of non-state actors is criticized on several grounds, most notably based on lack of legitimacy and accountability of non-state actors. Furthermore, in addition to success stories of non-state actors participation, there is no shortage of cases of failure or poor performance by non-state actors on the international scene.[1022] The most common problems associated with participation of non-state actors in international law processes include: Lack of legitimacy of non-state actors and risk of bypassing national democratic process; unbalanced and incompleteness of non-state actors' representation; questions related to accountability and responsibility of non-state actors; and practical problems of accreditation and overburdening the multilateral system. These critiques as well as responses to these critiques are surveyed in this section. In a final analysis, as observed by John Jackson, "these various worries and risks are not absent at the nation-state level either, so perhaps it can be concluded that on balance the NGOs do more good than harm, and this certainly seems true for a relatively large number of NGOs."[1023]

Feinberg's opinion, the practice of accepting petitions at diplomatic conferences was no more than a usage lacking an obligatory force. However, Feinberg contended that a detailed examination of "the gradual development of the rules related to petition-requests on the international level, especially the conferences since the creation of the League of Nations, demonstrated that the usage is transformed into a customary rule, this transformation was already complete or was almost complete." This conclusion was confirmed by the fact that the rules applied to petitions corresponded to social necessities and were inherent to the international public order. Feingberg, "La pétition en droit international," *supra* note 781 at 628-631. Furthermore, international organizations which do not accept petitions emanating from private sources put themselves at odds with the established practice and the "legal consciousness of peoples" and "the dominant opinion of the human collectivity." *Ibid*. at 630. The procedure applied to petitions, which was ad hoc for a long time, has progressively been precisely regulated. *Ibid.* at 630. Feinberg went as far as stating that petitioning is a way of expressing the international public opinion, which reflects the universal conscience. The International order should develop the right of petitioning which will allow the public opinion of the peoples to be heard. *Ibid.* at 639. See also J.W. Bruegel, "The Right to Petition an International Authority" (1953) 2 I.C.L.Q. 542.

[1022] In cases of humanitarian actions or development projects there are instances of well-intentioned participation of non-state actors that have contributed to "ethnic cleansing" or destruction of local capacities or "the fabric of the social structures." L. Gordenker & T. Weiss, "NGO Participation in the International Policy Process" in Weiss & Gordenker, eds., *supra* note 378, 209 at 217.

[1023] *WTO and Changing Fundamentals, supra* note 76 at 28.

i- Lack of legitimacy of non-state actors and risk of bypassing national democratic process

The most commonly raised problem with regards to non-state actors is the lack of political legitimacy they garner in comparison with that of states.[1024] Even though many states are undemocratic, "states do purport to speak for their whole population, even if the method of measuring general will is deficient."[1025] Many governments are more democratic than some of the NGOs that are criticizing international governmental institutions for themselves being undemocratic and/or unrepresentative.[1026] In the same vein, the factors that have contributed to increased contribution of legitimate NGOs have also made it possible for unrepresentative organizations to participate.[1027]

Not surprisingly, within international civil society deep divisions exist among NGOs and within some social movements, with the "populist left" identifying the "elite, professional wing of the NGO movement" as lacking mass political support and legitimacy.[1028] The tension "between NGO professionalism and populist protest"[1029] is important in the context of discussion of position of NGOs in international law. NGOs draw their legitimacy from mass support, but at the same time need credibility with international and national authorities.[1030]

Furthermore, some critiques of NGO participation see it as a "second bite at the apple," that is, through international participation civil society gets a second opportunity to "reargue their positions [that gives them advantage] over their opponents who are unwilling or unable to reargue their cases in international fora."[1031] In line with this position it is argued that NGOs' direct political participation at the international level leads to "evasion of the ordinary give-and-take of democratic national politics."[1032] While

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[1024] Wedgwood, *supra* note 379, at 28.

[1025] *Ibid.* at 29.

[1026] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 26-27.

[1027] *HDR 2002*, *supra* note 545 at 112.

[1028] Nelson, P., "New Agendas and New Patterns of International NGO Political Action" in R. Taylor, ed., *Creating a Better World: Interpreting Global Civil Society* (Bloomfield, CT: Kumarian Press, 2004) [hereinafter Taylor, *Creating a Better World*]116 at 128.

[1029] Nelson, *supra* note 1028 at 128.

[1030] *Ibid.*

[1031] J.R. Bolton, "Should We Take Global Governance Seriously?" (2000) 1 Chicago J. Int'l L. 205 at 217.

[1032] Wedgwood, *supra* note 379, at 29. In the context of the WTO, it is argued that since trade agreements are the result of negotiated compromises which often harm some domestic constituencies allowing non-

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these arguments may be true in some cases, they do not apply to transnational non-state actors which are unlikely to be presented by a national government.[1033]

Non-state actors' participation cannot be dismissed based on these concerns. Although they are valid in certain cases, they generally underestimate the importance of participatory democracy.[1034] Furthermore, a robust system of accreditation requiring transparent structures and widespread support can mitigate the risk of engaging with unrepresentative non-state actors.[1035] It is obviously very important to ensure adequate accountability mechanisms for civil society organizations and non-state actors,[1036] and to create a balance between participatory democracy and representative democracy.

ii- Unbalanced and incompleteness of non-state actors' representation

Professor Wedgwood also refers to "the incompleteness of NGO representation of public society" as another problem of non-state actors participation and points out that the voices of civil society at the international level are incomplete and typically give little weight to the private market sector.[1037] This criticism does not apply to non-state actors' participation in the WTO, as a large number of business and industry associations have great interest in this organization's activities and have exercised more influence in

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state actors direct access at the international level would lead to their opposition to governments' positions and uncertainty about the true position of the country. See Reinisch, & Irgel, *supra* note 726 at 145; Nichols, "Extension of Standing in WTO Disputes," *supra* note 175 at 316.

[1033] Reinisch, & Irgel, *supra* note 726 at 132.

[1034] See also Vedder *et al.* on conditions for NGOs to be considered legitimate by the public and the way in which NGOs and stakeholders perceive NGO legitimacy. *Supra* note 342.

[1035] Reinisch, & Irgel, *supra* note 726 at 132.

[1036] One World Trust, a UK-based NGO, has developed since 2001 a Global Accountability Project (GAP) which aims to generate wider commitment to the principles and values of accountability; increase the accountability of global organizations to those they affect and strengthen the capacity of civil society to better engage in decision making processes. As part of the project since 2003 One World Trust publishes a Global Accountability Report which is an annual assessment of 30 of the world's most powerful global organizations from the intergovernmental, non-governmental, and corporate sectors in terms of their accountability to civil society, affected communities, and the wider public. While findings of these reports cannot be generalized to apply to all NGOs, they provide interesting illustrations of shortcomings of some major NGOs in terms of transparency and accountability. See R. Lloyd, J. Oatham and M. Hammer, *2007 Global Accountability Report* (London: One World Trust, 2007) at 6-9. Previous Global Accountability Reports are available online. See online: Global Accountability Project (GAP) <http://www.oneworldtrust.org/?display=project&pid=10&view=pubs> (date accessed: 18 January 2008).

[1037] Wedgwood, *supra* note 379, at 30.

shaping the organization's agenda in comparison with other civil society organizations.[1038]

In the context of the WTO, there is also a concern among Southern countries that non-state actors' representation favours developed countries and that their participation will exacerbate the North-South imbalance in the WTO.[1039] It is argued that participation in WTO processes, including dispute settlement, requires significant financial and technical resources, and NGOs based in developed countries, specifically industry associations and firms, are most likely to possess such resources.[1040] Furthermore, in broader context, a "quasi-autonomous non-governmental organization" may "appear to multiply the influence of a single nation in the UN's deliberations."[1041] While little evidence is available to support this concern, it cannot be dismissed altogether.[1042] It is also important to note that a significant number of NGOs from developed countries would not be supporting the positions taken by their governments and are more likely to support Southern governments' perspectives.[1043]

[1038] See the example of the IPC and early involvement of the ICC in the WTO. See Chapter Two:1:a, above.

[1039] Slotboom, "Participation of NGOs," *supra* note 980 at 100. See also arguments of several representatives of WTO members in the General Council meeting on 22 November 2000. *Minutes of Meeting of General Council on 22 November 2000, supra* note 688 at paras. 22, 27, 38, 41, 66, 70, 89, 93, 97, and 108.

[1040] G. Marceau, & M. Stilwell, "Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies" (2001) 4:1 J. Int'l Econ. L. 155 at 164; Umbricht, *supra* note 1126 at 785-786. Some NGOs are remarkably wealthy, according to Jackson, who cites the annual budget of OXFAM (over US$300 million), which is three times more than the WTO, as an example. *WTO and Changing Fundamentals, supra* note 76 at 27.

[1041] Wedgwood, *supra* note 379, at 31.

[1042] Slotboom, "Participation of NGOs," *supra* note 980 at 101. Jamaica, for instance, noted that "very few non-Members from developing countries would have become aware of this additional procedure, communicated on 8 November, and with a deadline of 16 November for leave to apply to file a written brief." Pakistan also commented that "[w]ith regard to the manner in which this communication had been sent, i.e., to NGOs on the WTO e-mailing list, there was clearly an inherent discrimination since the largest number of NGOs from developing countries did not have access to the internet and were not on the WTO e-mailing list." *Minutes of Meeting of General Council on 22 November 2000, supra* note 688 at paras. 66 and 91.

[1043] Esty, "We the People," *supra* note 1092 at 94.

iii- Accountability and responsibility of non-state actors

The oft-cited question of accountability of NGOs is one that is not yet settled. The actions of NGOs may give rise to financial responsibility on the part of a state. This question is particularly important when a certain task or mandate is given to NGOs.[1044] It has been argued that there is an "intellectual marketplace" which disciplines NGO behaviour and ensures that organizations which provide inaccurate information and weak arguments will lose credibility.[1045] Otherwise, arguments regarding non-state actors or NGOs not being representative in a traditional sense are not entirely relevant, because these actors represent ideas and do not represent a defined group of people confined in a particular jurisdiction.[1046] The question of accountability is further complicated by issue of funding of non-state actors activities and their accountability towards their contributors.[1047]

A related question, which has no direct bearing on the subject of this thesis, is the issue of responsibility of non-state actors.[1048] With the widespread presence of the private actors on the international scene the need for more regulation of their activities at the international level as well as the question of their responsibility has become increasingly relevant in the development of international law beyond the traditional realm of state

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[1044] Wedgwood, *supra* note 379, at 32. According to the former Secretary General of the UN

> We are convinced that there are no limits to what a strong civil society can achieve in partnership with governments. But that is why I am so troubled when the NGO idea is abused; when NGOs are established to procure funding and nothing more; or when NGOs are used as fronts claiming to be one thing when, in fact they are another … it may be time for NGOs to consider ways to protect your own invaluable franchise."

See "Secretary General Calls for New United Nations-NGO Partnership Amidst Ongoing Human Rights Revolution" UN Press Release SG/SM/6697, PI/1079, 14 September 1998, cited in Wedgwood, *supra* note 379, at 32 note 31.

[1045] Esty, "We the People," *supra* note 1092 at 96.

[1046] *Ibid.*

[1047] The issue of source of financing for NGOs is also an important question. Some NGOs refuse governmental funds, while others are totally financed from public funds from governments and IGOs. Related to funding is issue of accountability of NGOs to their boards and to their contributors. A.S. Natsios, "NGOs and the UN System in Complex Humanitarian Emergencies: Conflict or Cooperation" in Weiss & Gordenker, eds., *supra* note 378, 67 at 68-72.

[1048] The issues is important legal personality is usually created in the criminal field when collective punishment of family or tribe of the guilty person is replaced by punishment of that person. De Soto, *supra* note 759 at 708. Jessup makes a similar point referring to substitution of "the present 'tort' basis of international law [with] a basis more comparable to that of criminal law in which the community takes cognizance of law violation." "The Subjects of a Modern Law of Nations" (1947) 45 Mich. L. Rev. 383 at 404.

responsibility.[1049] Indeed, all human rights were from early on either matched or pre-dated by responsibility within the formal legal system (as evidenced by the Nuremberg trials). In sum, international law developments have led to the creation of certain crimes: piracy, slavery, international terrorism, drug trafficking, war crimes, which should usually be tried by national authorities, but in cases of states' failure are sometimes prosecuted at the international level.[1050]

In more recent years new issues of non-state actors' responsibility have emerged in international law. From corporate social responsibility to responsibility of private security firms active in recent conflict zones, the responsibility of private actors and their human rights obligations are evolving areas of international law.[1051] However, questions surrounding responsibility of non-state actors do not have a direct bearing on their participation in international law processes.

iv- Problem of accreditation, overburdening the multilateral system and classic notions of sovereignty

In order to ensure legitimacy and representativeness of non-state actors, creating a viable system of accreditation is essential and raises question of evaluation, fairness and

[1049] See A. Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in P. Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37.

[1050] Developments after World War II in this area, including recent developments leading to the establishment of the International Criminal Court have happened faster than anyone had imagined. De Soto, *supra* note 759 at 710. War crimes tribunals in Nuremberg and Tokyo "pointed out that international law was not concerned solely with the action of sovereign states, but imposes duties and liabilities upon individuals as well as upon states." L.B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States" (1982) 32 Am. U.L. Rev. 1 at 10. See also the General Assembly resolution which "*[a]ffirms* the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal resolution that affirmed the Nuremberg principles. *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, General Assembly Resolution 95(I), UN Doc. A/64/Add.1 (11 December 1946); De Soto, *ibid.* at 710-711 (explaining the Allies actions in response to war crime through the Nuremberg tribunals); Scelle, *supra* note at 964-998. De Soto concludes that even though individuals do not have international personality, their criminal personality is developing rapidly, and criminal law may be the initiator for creation of personality in other fields of law. *Ibid.* at 716. Even terrorists now are globally organized. For obligations of private persons under international law, see Barberis, *supra* note 769 at 206-212. Compare, *Treaty of Versailles,* arts. 227 to 230. In that case the war criminals were not prosecuted and only 13 were tried and condemned in a German Court—the Emperor was given refuge in Holland.

[1051] See *e.g.* Clapham, *supra* note 13. An example is the activities of private security firms in Iraq. Work of Steve Ratner and John Ruggie on human right obligations of corporations should be examined in this regard. See Slaughter, "International Law and International Relations," *supra* note 412 at 119. Both corporation and NGOs are developing codes of conduct.

equity.[1052] Different intergovernmental organizations, however, have devised functioning systems of accreditation. Non-state actors' participation can also overburden the multilateral and intergovernmental systems and make it more difficult for international actors to efficiently address current issues and reach decisions.[1053] In some cases states feel "that civil society direct participation in the decision-making process could undermine the intergovernmental process."[1054]

In the case of the WTO dispute settlement system, the result may be that panels and the Appellate Body will be inundated with unsolicited information, and it may become difficult to ensure due process.[1055] This tendency can inhibit the organization from achieving its goals and result in governments opting for bilateral or regional arrangements instead of multilateral arrangements that may come to appear too burdensome for them.[1056]

Furthermore, participation of non-state actors in the WTO has been criticized based on classic notions of sovereignty. The Appellate Body's decision to accept *amicus*

[1052] Reinisch & Irgel, *supra* note 726 at 132.

[1053] Wedgwood, *supra* note 379, at 30. Such a concern was raised in the context of the WTO after the Appellate Body decision in the *Shrimp-Turtle* case. In that case, while Hong Kong, China "reluctantly agreed that panels should in general have the discretion to accept or reject non-requested information, it was concerned that the ruling might open up the floodgate of non-requested submissions which would in turn have serious implications on the work of future panels in terms of workload and efficiency." WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 6 November 1998), WTO Doc. WT/DSB/M/50 (14 December 1998), online: WTO Documents Online <http://docsonline.wto.org/ > (date accessed 6 July 2006) at 16.

[1054] High Level Panel on UN-Civil Society, *Civil Society and Global Governance: Contextual paper prepared by the Panel's Chairman Fernando Henrique Cardoso*, online: UN Non-Governmental Liaison Service <http://www.un-ngls.org/doc/ecosoc HL Panel - Contextual paper by Mr. Cardoso Chairman.doc> (date accessed 10 October 2007) [hereinafter *Contextual Paper of Cardoso*]. The paper notes that "[i]t is absolutely essential to reduce distrust, demonstrate the effectiveness of collaboration and build consensus around a positive agenda for the future." *Ibid.*

[1055] B. Stern, "The Intervention of Private Entities and States as 'Friends of the Court' in the WTO Dispute Settlement Proceedings" in F.J. Patrick et al., eds., *The World Trade Organization: Legal, Economic and Political Analysis* (Berlin: Springer, 2005), Vol. 1, 1427 at 1456 [hereinafter Stern, "The Intervention of Private Entities"].

[1056] P.M. Nichols, "Realism, liberalism, Values, and the World Trade Organization" (1996) 17 U. Penn. J. Int'l Econ. L. 851 at 851 [hereinafter Nichols, "Realism, Liberalism"]; *High Commissioner for Human Rights' Study on Participation*, *supra* note 1015, para. 45; Weiler, "The Rule of Lawyers," *supra* note 337 at 203. Weiler distinguishes between politicians' legitimacy, which is of a short nature and depends on outputs (results) and political institutions' legitimacy, which is of a more enduring nature and depends on inputs (process), and the courts' legitimacy which is meant to transcend specific results and will depend both on the integrity of process and the quality its reasoning. This distinction provides an insight into different perspectives on costs and benefits of participation of non-state actors. *Ibid.* at 204.

curiae submissions was heavily criticized by several members of the WTO, who found that the member states, and not the Appellate Body, had the authority to decide the extent of non-state actor involvement in WTO procedures and that the decision gave non-state actors rights exceeding those of members not participating in the dispute.[1057] In response to this criticism reference is made to the possibility of member states' participation as third parties to the dispute.

To conclude, the above-mentioned problems do exist at national level and in certain cases can be addressed through creating better systems of regulation, due dilligence and accreditation for non-state actors. However, at the final analysis on balance arguments (and realities) for non-state actors' participation are stronger than arguments against their participation.

c- Comparison with participation in the WTO

The theoretical debate over subjects of international law is not yet resolved, but the reality remains that actors other than states play an increasingly important role in international relations. Several developments in the past years have made the presence of non-state actors even more conspicuous and in certain cases controversial. Notwithstanding the theories, it was important to examine the developments that are relevant to participation of non-state actors in international law, as well as their impact during the past decades on the international legal process. The survey of participation of non-state actors in international law in this chapter revealed a long history and varied modes of participation.

To conclude this chapter, a comparison of level of participation of non-state actors in different international organizations with limited channels of participation in the WTO is important and reveals that: long history of participation of non-state actors in international legal processes stands in stark contrast to limited participation in the short history of GATT/WTO; almost in all areas of norm-creation, enforcement and adjudication there are a variety of formal channels of participation available in other international organizations which have no parallel in the WTO; certain

[1057] See *supra* note 688 and accompanying text. *Minutes of Meeting of General Council on 22 November 2000, supra* note 688.

mechanisms/provisions within the WTO have the potential to facilitate more participation; and there is no reason to treat participation of non-state actors in the WTO any different from participation in other international organizations.

i- Lessons of history

Study of the historical involvement of non-state actors in the processes of international law demonstrates that, before the UN era, non-state actors were accommodated through practical *ad hoc* solutions which were later turned into formal channels. Many examples in this chapter demonstrated serious efforts to accommodate participation of non-state actors through 18th to 20th centuries. The WTO, even in comparison with negotiations for its still-born primogenitor, appears to be ignoring this historical development towards increased participation. Conversely, as it was demonstrated in the previous chapter, it appears that lack of participation in negotiations that led to establishment of the WTO was due to its own historical reasons. The fact that the GATT did not entail any mechanisms for participation of non-state actors was in part due to its status as a *de facto* organization with incomplete institutional structures. Later developments that led to the advent of a full-fledged international organization should have led to addressing some of the institutional deficiencies of the GATT.

ii- Formal channels of participation in norm-creation and enforcement

In both areas of activity, *i.e.*, norm-creation and enforcement of norms, non-state actors have had formal channels of participation in a wide range of different organizations, including in economic and trade organizations, at a level that far exceeds the arrangements in the WTO. In particular, formal participation in WTO norm-creation has been considerably lower than other examples in international law. The comparison is even more striking when the history of WTO negotiations is juxtaposed with the history of ITO negotiations where non-state actors enjoyed formal arrangements for participation.[1058]

[1058] The analogy between WTO and other international organizations in terms of participation is refuted by some authors as flowed, arguing WTO is a rule-making and enforcement body whose policies could have a direct effect on national laws. See C.E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington D.C.: AEI Press, 2001) at 102; Nichols, "Extension of Standing in WTO Disputes," *supra* note 175 at 319. Nichols also argues that the unique nature of the WTO and complex compromises reached in trade rounds is not conducive to influence of non-state actors and that

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At national level, however, the record for participation on WTO-related issues and other areas of international law is mixed and depends on approaches adopted in different jurisdictions (especially in terms of monism or dualism). While some countries have provided for mechanisms of participation on trade policy issues at national level, others have not. This thesis did not engage in a systematic study of national approaches to application of international norms at the national level. Nonetheless, it is likely that legal systems that provide for national mechanisms for participation in international policy-making or implementation will have such mechanisms for different fields (*e.g.*, environmental issues, human rights and trade).

iii- Formal channels of participation in adjudication

In terms of direct access (or lack thereof) to adjudication in international organizations the WTO practice is not much different from other international organizations. The few international tribunals which provide direct access to non-state actors—in areas of human rights or international arbitration—still constitute exceptions.

One area, however, where WTO practice with regards to non-state actors has been quite progressive and has in some cases influenced other organizations is that of *amicus curiae* submissions to its dispute settlement process. While the Appellate Body's decision in this matter has been subject to severe criticism by WTO membership it will be very difficult to roll back this development in the WTO dispute settlement system.

iv- Comparison of similar institutional capacities

A comparison of similar institutional capacities for participation of non-state actors within WTO and other organization indicates that, while there is potential for increased participation, WTO has been less open to participation of non-state actors.

Article V:2 of the *WTO Agreement* and article 71 of the *Charter of the United Nations* have much in common in their language. However, their application has been drastically different in the two organizations: while the latter has led to creation of an elaborate system for according consultative status to non-state actors, the former has led

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"[c]omparative analysis cannot be reduced to a simple 'me, too' argument." Nichols, "Realism, Liberalism," *supra* note 1056 at 859-860.

to an *NGO Guidelines* which, in the words of the WTO Secretariat, failed to provide them any "direct and formal role in the work of the WTO."[1059]

Furthermore, as demonstrated in this and previous chapters, non-state actors have a prominent role in monitoring of international treaties in areas of human rights and environment. By contrast, in the WTO the review mechanism (TPRM) is not open to non-state actors' participation.

v- Reasons for a different approach to participation in the WTO

Another question that can be raised from comparison of participation of non-state actors in the WTO with other international organizations is whether there are any reasons that warrant a different approach to participation in the WTO. Given the long history of participation in different areas of international law, including international economic organizations (among others in the process of negotiations for the ITO), it is very difficult to argue that participation in the WTO warrants a different approach. On the contrary, the fact that the *WTO Agreement* includes an article similar to the article related to participation of non-state actors in the *Charter of the United Nations* suggests that negotiators of the *WTO Agreement*, were open to arrangement similar to the ones adopted in the United Nations system.

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Overall, comparison of participation of non-state actors in the international arena with the WTO demonstrates the limited scope for participation in the latter. While participation in other settings is criticized on several grounds, the problems of participation do not appear to be insurmountable and the general trend in many international organizations has been towards increased participation of non-state actors. The comparison also reveals that there are similar mechanisms within the WTO that could allow more participation, and that there is no inherent different in the WTO to make the organization less amenable to participation.

[1059] *World Trade Report 2007*, *supra* note 483 at 334.

Chapter Four- Proposals for participation in WTO

The importance and contribution of non-state actors has been well established in the previous chapters. In the context of international trade and the WTO, this thesis has demonstrated the current modes of participation, which are limited in comparison with other international organizations.[1060] Non-state actors are clearly present at different stages of international activities through national or international mechanisms. In the WTO the challenge is to structure the involvement of non-state actors to optimize the benefit of their participation in the creation of policies and norms as well as in their implementation and their adjudication. [1061]

In this chapter, drawing on developments in international relations as well as the practice of participation in international law, as studied in the previous chapters, I will first propose policy reasons for increased participation.

Against the backdrop of policy reasons for increased participation, and comparing the current system of participation in the WTO with that of other international organizations I will identify features of a new framework for participation in the WTO and then put forward proposals for improved participation in the WTO.

1- Policy arguments for enhanced participation of non-state actors: WTO and global governance

Philip Alston makes an important observation regarding the current normative basis of the world trade system:

> … the means which are always assumed to be an indispensable part of the globalization process, have in fact acquired the status of values in and of themselves. Those means/values include, for example: privatization of as many functions as possible; deregulation, particularly of private power, at both national and international levels; reliance upon the free market as the most efficient and appropriate value-allocating mechanism; minimal government except in relation

[1060] There are authors however, who believe that "the amount and significance of NGO participation in existing processes" of the WTO is substantively underestimated. Dunoff, "Debate over NGO Participation at the WTO," *supra* note 198 at 456. Ten years after Dunoff expressed his view, I believe that the situation of participation in the WTO has not improved and the organization's report card on this subject remains relatively poor.

[1061] In each category some of the proposed measures may be relevant to other categories too. *E.g.* increased transparency can improve participation in all areas of activity of the WTO.

> to law and order functions narrowly defined; and minimal international regulation except in relation to the 'new' international agenda items. [1062]

However, as outlined in the first part of this thesis, international economic law, and as a consequence WTO law, are part of the broader discipline of international law. Accordingly, developments which were outlined in Chapters One and Three regarding the position of non-state actors in international law have to be taken into account in future developments of WTO law in relation to participation of non-state actors. This section extrapolates the conclusions of earlier chapters to the field of WTO law, before proposing elements of a new framework as well as proposals for participation of non-state actors in the WTO.

First, what are the implications of the WTO law being part of public international law? As demonstrated in previous pages, apart from the technicalities related to inter-governmental relations—*e.g.*, adoption and interpretation of treaties, and questions related to state responsibility—states pursue a range of different goals in their inter-governmental cooperation. Among others, Judge Weeramantry in his dissenting opinion in the Advisory Opinion on Nuclear Weapons underlines six key concepts in the opening words of the *Charter of the United Nations*.[1063] The sixth of these is the *Charter*'s object of promoting social progress and better standards of life in larger freedom.[1064] In the quest for a new approach to international economic law, one question should be kept in mind: "will the new world economic order we describe lead to greater peace, stability, fairness and justice?"[1065] A similar concern is expressed in the preamble of the *WTO Agreement*.

[1062] Alston, "International Lawyers and Globalization," *supra* note 425 at 442. Abbott similarly observes that

> The notion that the 'market' should be conceived of and regulated autonomously, without regard to the effects of market activities on particular classes of persons or the environment […] becomes increasingly dubious as we learn more about the linkages among diverse elements of society and the natural world.

Furthermore, in more complex societies "the notion that the political and legal activities of persons and groups […] must be cabined within artificially defined arenas seems increasingly untenable." Abbott, "Economic Issues and Political Participation," *supra* note 890 at 1010.

[1063] *Supra* note 194.

[1064] ICJ Advisory Opinion on Threat or Use of Nuclear Weapons (1996) at 442 (Diss. Opp. Weeramantry).

[1065] "Call for Papers," annexed to Atik, J., "Interfaces: From International Trade to International Economic Law Introductory Essay Uncorking International Trade, Filling the Cup of International Economic Law" (2000) 15 Am. U. Int'l L. Rev. 1231.

While the scope and function of the WTO are related to regulating trade between its members, the *WTO Agreement* recognizes that the relations of its members

> in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[1066]

These considerations, coupled with the inclusion of the concept of sustainable development in the preamble to the *WTO Agreement,* indicate that the goal of the international trading system is not merely an unimpeded flow of goods and services. Accordingly, international economic law should not be considered merely the codification of means to achieve such narrow goals;[1067] sustainable development and raising the standards of living are the broader goals of the WTO, goals which are pursued through the regulation of trade. Facilitation of trade should be a means of promoting the welfare of individuals consistent with sustainable development.[1068]

John Jackson goes even further and holds that to "keep the peace" and avoid another war was another underlying goal of the post-War trading system, even though it is not explicitly highlighted in these trade texts.[1069] Based on developments in the WTO, Jackson enumerates five prominent goals for the WTO system:

> keep the peace, promote world economic development and welfare, work towards sustainable development and environmental protection, reduce the poverty of the

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[1066] *WTO Agreement, supra* note 300, preamble. Similarly preamble of *GATT 1947* is almost identical to the wording of the *WTO Agreement* preamble, without referring to objective of sustainable development. Article 1 of the *Havana Charter* entitled "Purpose and Objective" covered the same elements as the *GATT 1947* preamble, albeit in more detail.

[1067] Qureshi, *International Economic Law, supra* note 38 at 17.

[1068] See also Footer, *An Institutional and Normative Analysis, supra* note 155 at 22-23. Lal Das refers to the "mismatch between objectives and instrument" of the WTO and elaborates that "means of achieving these objectives, as given later in the preambles, are grossly inadequate and even misdirected." Lal Das, *supra* note 544 at 64.

[1069] *WTO and Changing Fundamentals, supra* note 76 at 85. He thus concludes that the principle original goals for GATT were broadly twofold: keeping the peace, and expanding world economic development and world welfare. *Ibid.* Cordell Hull, an influential figure in creating the post-War new political and economic order, saw this link when he stated "I have never faltered, and I will never falter, in my belief that enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade." C. Hull, *The Memoirs of Cordell Hull* (New York: Macmillan, 1948) at 75.

> poorest part of the world, and manage economic crises that might erupt partly due to the circumstances of globalization and interdependence.[1070]

Ruggie similarly argues that architects of the post-War institutions saw the market as "embedded" in a broader social fabric, where free trade, and stable currencies and economies could not be taken as autonomous goals. [1071] It follows that our approach to the issue of international economic law should be consistent with the broader goals of international law.

Understanding these broader goals of the WTO is important for placing this organization in the system of global governance.[1072] Consideration of the role of WTO and trade regulation in a broader context has led Pascal Lamy, Director-General of the WTO to develop his notion of the "Geneva Consensus" as "a new basis for the opening up of trade that takes into account the resultant cost of adjustments."[1073] Lamy deems at

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[1070] *WTO and Changing Fundamentals, supra* note 76 at 86.

[1071] J.G. Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order" (1982) 36 Int'l Org. 379. This argument certainly holds true in the post-War negotiations toward the creation of an ITO. The difference between the *Havana Charter* and the *WTO Agreement vis-à-vis* other international law mechanisms is striking. The *Havana Charter,* for example, provided for possibility of requesting advisory opinions from the ICJ:

> Reference to the International Court of Justice
> 1. The Organization may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.
> 2. Any decision of the Conference under this Charter shall, at the instance of any Member whose interests are prejudiced by the decision, be subject to review by the International Court of Justice by means of a request, in appropriate form, for an advisory opinion pursuant to the Statute of the Court.
> 3. The request for an opinion shall be accompanied by a statement of the question upon which the opinion is required and by all documents likely to throw light upon the question. This statement shall be furnished by the Organization in accordance with the Statute of the Court and after consultation with the Members substantially interested.
> 4. Pending the delivery of the opinion of the Court, the decision of the Conference shall have full force and effect; Provided that the Conference shall suspend the operation of any such decision pending the delivery of the opinion where, in the view of the Conference, damage difficult to repair would otherwise be caused to a Member concerned.

The Havana Charter, art. 96.

[1072] It is also another reason for understanding WTO law, and international economic law in general as part of public international law which governs relation of states.

[1073] P. Lamy, "Humanising Globalization" (Santiago de Chile, Chile, 30 January 2006), online: WTO < http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm> (date accessed 15 May 2007) [hereinafter Lamy, "Humanising Globalization"]. Lamy proposes a new Geneva consensus to replace the old--market fundamentalist—Washington consensus. See also P. Lamy, "Towards Global Governance?" (Master of Public Affairs inaugural lecture at the Institut d'Etudes Politique des Paris, 21 October 2005), online: WTO

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least three elements to be necessary in order to enhance and promote the interdependence of our world through a system of global governance: "common values," "actors who have sufficient legitimacy to get public opinion interested in the debate," and "mechanisms of governance that are truly effective and that can, *inter alia*, arbitrate values and interests in a legitimate way."[1074] Apart from common values and mechanisms of governance, "actors" as an element of global governance are important for purposes of this thesis.[1075] Lamy explains that the debate over interdependence and global governance requires actors

> who are capable of taking responsibility for the debate, and who can be held accountable. We must also ensure that the collective interests of all people are taken into account in our management of international relations and in the way we operate our regional and global systems of values, rights and obligations. The interdependence that unites us can be reflected at several levels of human activity. The problems and difficulties facing us may be local, regional or global, as are the interests to be defended and protected. Consequently, the representativeness of the interests concerned should also be reflective and consistent with the aspirations of the societies specifically affected by globalization and its operational tentacles.[1076]

Non-state actors in certain cases can fit the bill.[1077]

In the same vein, institutions other than the GATT/WTO—especially within the United Nations system—[1078] also address fundamental economic and development issues. Their efforts and achievements cannot be ignored or discarded; even if ideological programmes like the New International Economic Order (NIEO) do not seem to have

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< http://www.wto.org/english/news_e/sppl_e/sppl12_e.htm> (date accessed 15 May 2007) [hereinafter Lamy, "Towards Global Governance?"]. For Washington consensus see J. Williamson, "Did the Washington Consensus Fail?" (Outline of speech at the Center for Strategic & International Studies, Washington D.C., 6 November 2002) online: Peterson Institute for International Economics <http://www.iie.com/publications/papers/paper.cfm?ResearchID=488> (date accessed: 15 July 2007).

[1074] Lamy, "Humanising Globalization," *supra* note 1073.

[1075] See also L. Arbour & S. Majlessi, "Placing Human Right in the Geneva Consensus" in G. Sampson, ed., *The WTO and Global Governance: Future Directions* (Tokyo: United Nations University Press, 2008) 149.

[1076] Lamy, "Humanising Globalization," *supra* note 1073.

[1077] Elsewhere, on elaborating on the idea of actors in his notion of the Geneva Consensus, Lamy clearly refers to NGOs and civil society. After stating that "the WTO has learned to engage civil society in a variety of different ways" he lists a series of initiatives undertaken by the organization to interact with civil society. "Towards Global Governance?" *supra* note 1073.

[1078] See Société française pour le droit international, Colloque de Nice, *Les Nations Unies et le droit international économique* (Paris: Éditions Pedone, 1986).

carried the day.[1079] A new approach to participation has to contribute to promoting coherence and coordination between these different efforts and institutions.

On the other hand, during the past few years a new stream of literature and views critical of unchecked market liberalization has emerged that has raised many legitimate concerns over the consequences of trade liberalization.[1080] If not addressed such critiques can be usurped by protectionist forces and weaken the multilateral trade system.

The elements for a new approach proposed by this thesis should be capable of taking these diverse and influential concerns and efforts into consideration. Such an approach has to take note of development in other areas of international law, including human rights and environmental law, and the activities of other actors including the United Nations Development Programme (UNDP), International Labour Organization (ILO),[1081] the International Bank for Reconstruction and Development (World Bank), the International Monetary Fund (IMF),[1082] as well as non-state actors. My analysis would be

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[1079] See *supra* notes 19 and 20 and accompanying text.

[1080] The Third WTO Ministerial Conference held in Seattle in 1999 brought together a loose coalition of different anti-globalization groups with different agendas and interests whose protest overshadowed the WTO meetings and marked the beginning of a new discussion on nature and boundaries of globalization. In his address to the Ministerial Conference President Clinton took note of the protesters and stated,

> […] they represent millions of people who are now asking questions about whether this enterprise in fact will take us all where we want to go. And we ought to welcome their questions, and be prepared to give an answer, because if we cannot create an interconnected global economy that is increasing prosperity and genuine opportunity for people everywhere, then all of our political initiatives are going to be less successful. So I ask you to think about that.

"Remarks by the President to the Luncheon in honor of the Ministers Attending the Meetings of the World Trade Organization", online: United States Mission in Geneva <http://www.usmission.ch/press1999/122clin.html> (date accessed 3 January 2007). See also N. Klein, "Rebels in Search of Rules" *New York Times*, 10 December 1999; and T. Hayden, "The Battle in Seattle What Was That All About?" *Washington Post* 5 December 1999. Interestingly on this occasion the WTO was also forced to engage in addressing some of the issues raised by Seattle protestors. "Top 10 Reasons to Oppose the World Trade Organization? Criticism, yes … misinformation, no!", online: World Trade Organization <http://www.wto.org/English/thewto_e/minist_e/min99_e/english/misinf_e/00list_e.htm> (date accessed: 3 January 2007). See also report of the independent experts of the former Sub-Commission on Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural rights: Globalization and its Impact on the Full Enjoyment of Human Rights; Preliminary Report Submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8*, UN Doc. E/CN.4/Sub.2/2000/13 (15 June 2000) at paras. 15-16.

[1081] See *e.g.* A. Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8:2 Ind. J. Global Studies 401.

[1082] See *e.g.* B.A. Simmons, "The Legalization of International Monetary Affairs" (2000) 54:3 Int'l Org. 573-602 [hereinafter Simmons1], Carreau, Flory & Juillard, *supra* note 13 at 329-398.

incomplete without considering the influence of such factors on the development of international economic law.

Based on these considerations and developments which were discussed in the first chapter and in order to put forward elements of a theoretical framework a number of policy arguments can be put forward for enhanced participation of non-state actors in the WTO, including: balancing representation of actors; reinforcing the rule-oriented system; increasing transparency, representation and legitimacy in the WTO; and addressing the tension between trade and other policy areas.

a- Balancing representation of actors: developed/ developing countries, civil society/ corporate actors

Member States of the WTO have differing degrees of resources at their disposal for participation in trade negotiations as well as in dispute settlement within the WTO. During the Doha negotiations for example the size of delegations varied between over 50 for certain countries to one for some LDCs.[1083] Also in dealing with ongoing negotiations or in implementation and monitoring of the WTO agreements the capacity of some developing countries and LDCs is severely limited by their lack of resources.[1084] Naturally, the role that poor countries can play in WTO negotiations will be much more limited and passive. A lack of technical capacity can also lead to the inability of governments to defend their interests.[1085] Furthermore, the bargaining power of countries is dependent on their economic power.[1086]

[1083] The total number of delegates from the G7 nations in Doha (481) was almost twice the negotiating strength of the combined delegations of the 39 Least Developed Countries (276). EU had a total number of 502 on its delegations, Japan had 159 delegates, Canada had 62, Indonesia 60, United States 51, and India 48, by contrast Maldives had 2, St. Vincent had one and Haiti had none. See World Development Movement, Press Release, "Doha number-crunching reveals heavyweights EU and US overwhelm poorest countries" (11 November 2001), online: WDM < http://www.wdm.org.uk/news/archive/19992001/number.htm> (date accessed 7 September 2006).

[1084] Jawara & Kwa, have compiled a table demonstrating the number of professional staff of different missions of Member States in Geneva. The table shows a range of presence from Japan, EU and USA with 23, 18 and 14 staff to countries like Burkina Faso, Malawi, Mali and Namibia which have no professional staff in Geneva. *Supra* note 537 at 20

[1085] WTO has developed some technical assistance programs to develop the capacity of poorer countries. Furthermore, the Advisory Center on WTO Law, a public international organization independent of WTO was established in 2001 to provide legal advice on WTO and support governments in WTO dispute settlement proceedings.

[1086] *A Fair Globalization*, *supra* note at 864 at 77.

The need for consensus in the WTO has practically increased the number of informal processes for decision-making which often exclude poorer countries.[1087] Furthermore, some of the major international economic or trade decisions are made in the context of smaller organizations like the G8, which further limits the influence of the poorer countries.[1088] The result is that participation of many states in policy-making at the WTO is merely formal, a situation that can undercut the development of shared understanding and reciprocity.[1089]

The situation is similar at the IMF and the World Bank, where poor countries that are sometimes most affected by decisions have less political power in the decision-making process because of the disparity in the voting powers of different countries.[1090] Providing NGOs with access to negotiations will enable some LDCs whose interests overlap with the agenda of some NGOs to benefit from their support.

Apart from skewed governmental representation, in the absence of a formal mechanism for participation, the WTO system is also skewed by unequal access provided to private sector corporate actors.[1091]

b- Reinforcing the rule-oriented system: increasing predictability in the system

One characteristic of the WTO is the move away from the politically charged system of the GATT to a more rule-oriented system. While the changes have certainly contributed to a more rule-oriented system, the persistent "diplomatic ethos" which is coupled by "personal and institutional inertia" of the WTO leaves much room for improvement.[1092] Increased and more transparent participation of non-state actors and the

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[1087] UNDP, Heinrich Böll Foundation, the Rockefeller Brothers Fund, the Rockefeller Foundation and Wallace Global Fund, *Making Global Trade World for People* (London: Earthscan Publications, 2003) at 88.

[1088] An example is the recent meeting of G8 "Trade wasn't formally on the agenda of this year's Group of Eight summit, but the leaders of Brazil, India and China—all involved in the trade talks—were invited to a series of meetings with G8 leaders." Y.J. Dreazen & G. Hitt "G-8 Leaders Push for Trade Deal Amid Doha Round Complexities" *The Wall Street Journal* (17 July 2006).

[1089] Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Chapter 2, at 15.

[1090] *A Fair Globalization*, *supra* note at 864 at 66-67. Nearly half of the voting power in the World Bank and IMF is controlled by seven countries.

[1091] Weiler, "The Rule of Lawyers," *supra* note 337 at 203.

[1092] *Ibid.* at 193. Weiler notes that the dissonance between lawyers and diplomats persists. *Ibid.* at 200. Daniel Esty also refers to the inertia within the world trading system and the fact that those who are part of the system "are quite comfortable with the 'club' as they have designed it." D.C. Esty, "We the People:

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regulation of their ability to lobby is a step in that direction.[1093] The argument has been made, on both the NGO and the business community sides, that increased participation is important to ensuring continued relevance and legitimacy of the WTO.[1094] In turn, increased participation can only be achieved through a more rule-oriented trading system. A power-oriented negotiating process often requires secrecy and executive discretion in order to allow successful bargaining and compromise. Participation of non-state actors renders such a negotiation process impossible.[1095]

Occasionally the developing countries are under political pressure from the major developed countries to accept a certain position in trade negotiations and advocacy and campaigns of non-state actors "can work as counter-pressure so that the interests of the developing countries are protected."[1096]

Non-state actors can also contribute to the rule-oriented system through monitoring compliance of governments, who tend to overstate their own levels of compliance.[1097]

Civil Society and the World Trade Organization" in Bronckers, M., & Quick, R., eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer, 2000) 87 at 93 [hereinafter Esty, "We the People"].

[1093] Abbott and Snidal point out that states are often torn between benefits of hard legalization and the sovereignty costs it entails. Non-state actors, on the other hand, seek hard legal arrangements that reflect their particular interest and values, but which are often in conflict with those of other actors and governments. They present three theoretical perspectives on why non-state actors pursue different forms of legalization: "a pluralist account in which interactions among private groups determine national preferences and international outcomes; a public choice account in which government officials pursue private rewards; and a statist account in which (partially) autonomous national governments interact with private actors." They conclude that soft law is valuable on its own and provides a "basis for efficient international 'contracts' and it helps create normative 'covenants' and discourses that can reshape international politics." K.W. Abbott, & D. Snidal, "Hard and Soft Law in International Governance" (2000) 54:3 Int'l Org. 421 at 451-455.

[1094] G.T. Schleyer, "Power to the people: allowing private parties to raise claims before the WTO dispute resolution system" (1997) 65 Fordham L. Rev. 2275 at 2293-4 (arguing for participation of private persons); S. Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 U. Penn. J. Int'l Econ. L. 331 at 351 [*hereinafter* Charnovitz "Participation of NGOs in WTO"] (arguing that a closed dispute resolution process will undermine popular support).

[1095] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 90.

[1096] Lal Das, *supra* note 544 at 229.

[1097] Abbott, "Economic Issues and Political Participation," *supra* note 890 at 1008. In areas of environment and human rights the monitoring role of NGOs is crucial.

c- Discretion of states to bring claims and lack of full representation by states

Member states have ultimate discretion to bring or not bring claims against other member states for violations of WTO obligations. Private parties may raise issues or claims in the context of the dispute settlement system that Member States may not be willing to raise for political reasons.[1098] In spite of their best intentions, governments may not be able to represent all of the varying interests within their societies,[1099] and may be unwilling to endanger amicable relations with trading partners by raising certain trade concerns of their constituents.[1100] Furthermore, some states may avoid challenging prohibited trade practices with the hope that other states will bring a claim,[1101] or they may be afraid that raising a violation in relation to one dispute may undermine their position in another case.[1102]

In this respect, lessons may be drawn from the European Union experience: "the effectiveness of national and international guarantees of freedom and non-discrimination has depended, at least in the process of European integration, on enabling the citizens to defend such freedoms as individual rights to be protected by the courts."[1103]

As a result, some issues may be raised without member states taking the political heat.[1104] Of course, there may be broader policy considerations in governments' decision to handle WTO disputes, but states have to adopt rules "in order to reconcile conflicts

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[1098] Charnovitz "Participation of NGOs in WTO", *supra* note 1094 at 353; Shell, "Trade Legalism and IR Theory," *supra* note 68 at 901.

[1099] Charnovitz "Participation of NGOs in WTO", *supra* note 1094 at 353.

[1100] Shell, "Trade Legalism and IR Theory," *supra* note 68 at 901. The dynamics at work and diverging views of different government agencies, private-sector actors and multi-national corporations in case of Costa Rica's challenge to U.S. import restriction illustrates the complex issues which may rise at the national level. J. Breckenridge, "Costa Rica's Challenge to US Restrictions on the Import of Underwear" in Gallagher, Low, & Stoler, eds., *supra* note 554, 178 at 182-183.

[1101] *Ibid.* at 901-2. Shell refers to this as the "free rider problems" which are due to the fact challenging a prohibited trade practice benefits all Member States, while the State which brings the claim will incur the political cost of doing so. *Ibid.*

[1102] Schleyer, *supra* note 1094 at 2297; Charnovitz "Participation of NGOs in WTO", *supra* note 1094 at 353.

[1103] Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 424.

[1104] Schleyer, *supra* note 1094 at 2294. *Contra* Nichols, "Extension of Standing in WTO Disputes," *supra* note 175 at 315.

among the short-term interests of their citizens with their common long-term interests."[1105]

d- Representation and legitimacy in the WTO

As more—particularly economic—decisions affecting individuals and communities are adopted at the international level, citizens of WTO members might feel that they are not in control of their destiny, or that they are not represented sufficiently in international decision-making. This, it can be argued, affects the legitimacy of organizations like the WTO.[1106]

At a broader level, the notion of international law and its legitimacy has been challenged at different stages of its history. Following the advent of the Soviet Union and in the post-colonial era, criticism has been focused on the Euro-centric nature of international law. In the post-Cold War era attention has shifted to imposition of the human rights discourse, the governance discourse and neo-liberal economic policies.[1107]

[1105] Petersmann, "How to Constitutionalize International Law?" *supra* at 1.

[1106] See *supra* note 400 and accompanying text. Lamy acknowledges that for some "[t]he future becomes an anxiogenic figure, because citizens are not convinced that there is a captain to pilot their plane." Lamy, "Towards Global Governance?" *supra* note 1073. The current Administrator of the United Nations Development Programme elaborates on Lamy's

> This "pilot" that Pascal Lamy and many of us in international institutions refer to is not, of course, a world government. Nation states remain strong and legitimate and will continue to be the crucial constituent elements of the international community. What is needed, however, is a much more advanced and transparent form of international cooperation. Global markets and global business must be embedded in global institutions and a global policy space that provide a sense of direction and that can manage risks and imbalances. The broad multilateral system, with the United Nations providing the overarching framework, and I very much include here the WTO, must try to provide this "missing pilot" that Pascal Lamy refers to, not in the form of a huge centralizing bureaucracy, but rather as a carrier of common values and a rules-based system.

K. Dervis, "Financial Times and International Finance Corporation Conference" (Mumbai, India, 9 November 2005), online: UNDP <http://content.undp.org/go/newsroom/2005/november/statement-dervis-corporation-conference-20051109.en;jsessionid=aZWrK_IcH6Yd?categoryID=349492&lang=en> (date accessed 12 October 2007).

[1107] Generally see Shaw, *supra* note at 31-38; E. Darian-Smith & P. Fitzpatrick, eds., *Laws of the Postcolonial* (Ann Arbour: University of Michigan Press, 1999); J. Thuo Gathii, "International Law and Eurocentricity" (1998) 9 Eur. J. Int'l L. 184; J. Thuo Gathii, "The Limits of the *New* International Rule of Law on Good Governance," in E. Kofi Quashigah & O. Chinedu Okafor, eds., *Legitimate Governance in Africa* (The Hague: Kluwer Law International, 1999); Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Chapter 2, at 18-19. This debate and the critical views of the international legal system, including the Third World Approaches to International Law are outside the scope of this thesis. See also M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002); S.N. Grovogui, "Postcolonialism," in T. Dunne, M. Kurki, & S. Smith, *International Relations Theories* (Oxford: Oxford University Press, 2006) 229; E.

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It has been argued that broader participation, including participation by non-state actors, is important in order to provide better representation to all communities, groups and entities in the WTO, and to ensure fair representation of legitimate interests by governments and legitimacy of WTO decisions.[1108] Perceived legitimacy of regulatory action is further increased by bringing the representatives of more affected interests into the policy-making process.[1109]

e- Addressing the tension between trade and other policy areas

Until recently years, GATT/WTO practitioners failed to understand the broader social and economic consequences of WTO policies and activities.[1110] Some of the old arguments against broader participation of non-state actors in the world trading system

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Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); B. Rajagopal, "International Law and Third World Resistance: A Theoretical Inquiry," in A. Anghie et al., eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Brill Academic, 2003).

Another important perspective that challenges the current structure in international law, and argues for broader participation is the feminist perspective in international law, including in international economic law. See M. Childs, "Feminist Perspectives on International Economic Law" in Qureshi, ed., *supra* note 79 163 at 169; F. Beveridge, "Further Feminist Readings on International Economic Law" in *ibid.* 177 at 184-185 (both highlighting the of NGOs bringing feminist perspectives and concerns to the international fora). See also Walker, S., "Human Rights, Gender and Trade: a Legal Framework" in Tran-Nguyen, A.-N, & Beviglia-Zampetti, A., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: UNCTAD, 2004) 321 at 336-337 (arguing for participatory rights).

[1108] Umbricht, *supra* note 1126 at 783. In response it is argued that representative democracy takes account of all legitimate concerns at the domestic level and there is no reason why this should not apply when governments defend their interests at the international level. In case of states which are not "fully functioning representative democracy," the democratic deficit cannot be compensated for by participation of NGOs at the international level. Slotboom, "Participation of NGOs," *supra* note 980 at 98. However, this response does not take into account the broader criticism directed at legitimacy of international law. *Contra* Barfield, *supra* note 1058 at 103-105.

[1109] Abbott, "Economic Issues and Political Participation," *supra* note 890 at 1008. See also the statement made by President of European Commission on the occasion of the 50th anniversary of the world trading system:

> [t]o be fully understood and accepted, the global integration movement must be better grasped by wider circles of public opinion. The WTO cannot allow itself to be branded with the image of an anti-democratic organization which disregards cultural diversity, has no respect for the environment or labour standards, and which acts against the interests of a large majority of citizens, in particular the most disadvantaged … I therefore think it is urgent not only to increase the transparency of the work carried out by the WTO, but also to engage in a genuine dialogue with all the representatives of civil society."

"Statement by Mr. Jacques Santer, President of the Commission of the European Communities in the Geneva WTO Ministerial Meeting (18 May 1998)" in World Trade Organization, *50th Anniversary of the Multilateral Trading System* (Geneva: WTO, 1998) 44 at 45.

which characterized the GATT as simply a negotiating forum are no longer accurate.[1111] Furthermore, domestic policies may lead to a shift of positions (*e.g.,* U.S. positions on environmental issues under certain administrations) that may be at odds with long-term needs of the planet or the interests of specific groups. While it is claimed that WTO is focusing on trade issues and away from the ideological divides that plague the United Nations system, this artificial separation is not sustainable: in order to have more legitimacy, the system has to take into account different interests and values. A number of shortcomings in this regard as seen now in the WTO are the heritage of the old GATT system.

It is increasingly recognized, however, that the work of the WTO in some areas is closely related to other fields of international law, including environmental law, labour law and human rights law.[1112] On occasion, settlement of trade disputes may have an impact on other policy areas.[1113] Achieving broader goals of the WTO calls for more institutional coherence and participation and can benefit from contributions of non-state actors in three areas, which are outlined here.[1114]

[1110] Weiler, "The Rule of Lawyers," *supra* note 337 at 196.

[1111] Esty, "We the People," *supra* note 1092 at 94.

[1112] In area of trade and human rights, for instance, Howse and Teitel observe that "[t]he problem stems largely from the historical isolation of the institutional culture of the trade regime from that of the human rights regime." R. Howse, & R.G. Teitel, *Beyond the Divid: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization* (Geneva: Friedrich-Ebert-Stiftung, 2007) at 28.

[1113] Different—positive and negative—views are expressed regarding the impact of WTO rules and procedures on other areas. In either case, the existence of a link signifies the possibility of conflicts or a need to ensure coherent interpretations with other areas of international law. See *e.g.* See also *Globalization and its Full Impact on the Enjoyment of Human Rights, Preliminary Report of the UN Secretary General*, UN Doc. A/55/342 (31 August 2000) at para. 22 (quoting a statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the WTO noting that human rights norms must shape the process of international economic formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors); see also R.D. Anderson & H. Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" (2006) 9 J. Int'l Econ. L. 707 (arguing the WTO rules and the protection of intellectual property rights are directly supportive of civil rights).

[1114] At the level of institutional framework for global economic governance with a view towards enhancing its responsiveness to diverse constituencies see F.M. Abbott, "Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance" in Bronckers, M., & Quick, R., eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer, 2000) 15-33.

i- The assessment of trade policy impact on non-trade policies

In this context, an issue which has been repeatedly raised by observers is the need for trade policy impact assessments.[1115] Assessments can be carried out *ex ante,* that is, prior, during or at the end of a round of trade negotiations or, *ex post*, that is, after a period of implementation.[1116] Already in the area of development cooperation the issue of human rights impact assessment has been accepted as part of a broader human rights-based approach to development.[1117] Depending on the context, different methodologies for impact assessment have been developed which are used by the international institutions, donor countries and civil society organizations. For instance, the World Bank has developed participatory methodologies for assessment of development projects.[1118] Similarly, the World Commission on the Social Dimension of Globalization has recommended that "there should be regular national review of the social implications of economic, financial and trade policies."[1119] Pursuant to this recommendation, the ILO has also been working with some Member States to develop methods for assessing the *ex ante* and *ex post* social and labour impacts of globalization.[1120] The experience and capacities of NGOs in carrying out such assessment can assist the WTO at the negotiation and dispute settlement levels.[1121]

[1115] See *High Commissioner for Human Rights' Study on Participation*, *supra* note 1015. See also Howse, & Teitel, *supra* note 1112 at 13 (on direct effects on social, economic and cultural rights of reduction in trade barriers).

[1116] *High Commissioner for Human Rights' Study on Participation*, *supra* note 1015, para. 24.

[1117] Human Rights Council, *Report of the Working Group on the Right to Development on its Eighth Session (Geneva, 26 February – 2 March 2007)*, UN Doc. A/HRC/4/47 (2007) at 16 (listing "The extent to which a partnership applies human rights impact assessments and provides, as needed, for social safety nets" as a criterion for periodic evaluation of global development partnership recommended by the Working Group).

[1118] D. Narayan, J. Reitbergen-McCracken, *World Bank, Participation and Social Assessment: Tools and Techniques* (Washington D.C.: World Bank, 1998). Other development agencies have also developed impact assessment tools. See *e.g.* Norwegian Agency for Development Cooperation (NORAD), *Handbook in Human Rights Assessment: State Obligations, Awareness and Empowerment* (Oslo: NORAD, 2001).

[1119] *A Fair Globalization*, *supra* note at 864 at 134. See also K. Addo, "The Correlation Between Labour Standards and International Trade: Which Way Forward?" (2002) 36 J. World T. 285; M. Vellano, "Le plein emploi et la clause sociale dans le cadre de l'Organisation Mondiale du Commerce (OMC)" (1998) Rev. D.I.P. 879; M. Vellano, "Full Employment and Fair Labour Standards in the Framework of the WTO" in Mengozzi, ed., *supra* note 169, 379.

[1120] *High Commissioner for Human Rights' Study on Participation*, *supra* note 1015, para. 28.

[1121] Advisory Council on International Affairs, *supra* note 1237.

ii- Ensuring policy coherence between the WTO and other organizations

In order to achieve the goals of the international system as well as the WTO there should be mechanisms of global governance that can achieve a balance between different interests that will ensure development and respect for the human rights of different stakeholders.[1122] According to Pascal Lamy, "[t]he WTO can become a fundamental player in this global governance. But in light of its impact on individuals, we need to politicize globalization – in other words, we need, if we want a more harmless globalization, to supplement the logic of the market capitalism efficiency of the WTO with a renewed attention to the conditions in which that logic would favour development."[1123] Non-state actors (particularly NGOs) often have the capacity to address issues of social justice in the context of international economic relations and present the perspective of stakeholders concerned with non-trade interests and values, thus enhancing the legitimacy of a system that takes competing values into account.[1124]

iii- Provision of information and expertise in areas of tension between trade and non-trade policy

Certain NGOs possess resources, knowledge and analytical capacity in their areas of expertise that together with their strong connections to local communities can enhance the breadth and quality of information available to the WTO and its dispute settlement system.[1125] NGOs can provide more in-depth analysis of national legislation and jurisprudence, or of practices of other international jurisdictions, thus reducing the chance

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[1122] According to Stern

> one of the consequences of economic globalization seems to be a 'downward' unification of social, environmental, and other standards for the protection of individuals. The rules governing trade, which are currently united almost solely by the single slogan of trade liberalizatioin, should take other dimensions into account.

Stern, "How to Regulate Globalization," *supra* note 81 at 267.

[1123] Lamy, "Humanising Globalization," *supra* note 1073.

[1124] B. He & H. Murphy, Global Social Justice at the WTO? The Role of NGOs in Constructing Global Social Contracts" (2007) 83 International Affairs 707; Howse, "Adjudicative Legitimacy," *supra* note 335 at 47. This argument is countered by the claim that a large number of NGOs speak on behalf of commercial interests and do not represent non-trade issues. Slotboom, "Participation of NGOs," *supra* note 980 at 99. Also in this regards the *ITO* would have been more advanced than the WTO. See *e.g. the Havana Charter,* art. 7, which refers to fair labour standards, and co-operation and consultation with the International Labour Organisation in matters related to labour standards.

[1125] Abbott, "Economic Issues and Political Participation," *supra* note 890 at 1007.

of wrong analysis or errors in fact.[1126] Through *amicus curiae* participation, sometimes very important issues of general international law, or a different branch of international law are brought to the attention of international tribunals, which tends to prevent the creation of closed systems or fragmentation of international law.[1127] For instance, the unsolicited brief submitted by the World Wide Fund for Nature (WWF) in the *Shrimp-Turtle* case argued that states are obliged under international law to supervise the control of activities within their jurisdiction that undermine the conservation of endangered species.[1128]

Addressing tensions between trade and other policies through the above-mentioned methods is a significant step towards putting the WTO in the broader context of global governance.

f- Transparency

Transparency is a precondition for effective participation. Even if there are mechanisms and channels for participation in place, for actors to be able to contribute to a process they need to have information. Even though efforts have been made to increase the WTO's transparency,[1129] the organization is still criticized for its "transparency

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[1126] Marceau & Pedersen, *supra* 466 note at 6; Ascensio, *supra* note 914 at 924; Dunoff, "Debate over NGO Participation at the WTO," *supra* note 198 at 451; G.C. Umbricht, "'Amicus Curiae Brief' on Amicus Curiae Briefs at the WTO" (2001) 4 J. Int'l Econ. L. 773 at 783-784. Slotboom rejects this point arguing that NGOs are capable of lobbying and conveying their information and arguments to member states; the WTO panels, in accordance with the *DSU*, have the means of collecting information; and NGOs are not simply "resource enhancers" but defend certain specific interests. "Participation of NGOs," *supra* note 980 at 97-98.

[1127] Ascensio, *supra* note 914 at 924.

[1128] Cameron & Gray, *supra* note 267 at 266-267. There are similar examples from other dispute settlement procedures. The Center for Justice and International Law submitted a brief to the European Court of Human Rights in the *Timurtas* case and reminded the Court of the jurisprudence of the Inter-American Court of Human Rights on issues of forced disappearances, also in the *Aydin* case, the information provided by Amnesty International regarding the jurisprudence of the Inter-American Court of Human Rights and the evolution of international criminal law played an important role in advancing the European jurisprudence in relation to consideration of rape as torture. See Ascensio, *supra* note 914 at 925.

[1129] See *1996 Decision on Derestriction of Documents, supra* note 495; *2002 Decision on Derestriction of Documents, supra* note 495. WTO is certainly far more transparent than its predecessor, GATT. The WTO also has modified its rules regarding access to documents in order to increase transparency. For a review of the original WTO procedures (1996) for dissemination of WTO documents see L.B. Van Dyke & J.B. Weiner, *An Introduction to the WTO Decision on Document Deristriction* (Geneva: International Centre for Trade and Sustainable Development, 1996) at 3-14.

deficit."[1130] The former Director-General of the WTO distinguishes between external and internal transparency, and deems the problem of external transparency of the WTO to be less acute than that of its internal transparency.[1131]

Regarding internal transparency, increasing secretiveness of decision-making, which can lead to exclusion of many developing countries, is seen as a problem that needs to be addressed to ensure that the process is more transparent and inclusive.[1132] The problem of access to information also exists in relation to the dispute settlement system, where hearings are only open to the disputants and "third parties," and documents are not made available to all members of the WTO.[1133]

For external transparency the WTO should expedite the derestriction of its documents and make its documents available to the public earlier.[1134] Some governments and WTO officials circumvent WTO's transparency rules by providing "non-documents" or by using documents that are not official documentation and are referred to as "job numbers."[1135]

Of particular importance for participation of non-state actors in policy-making is access to draft negotiation texts. [1136] There have been improvements in more recent trade negotiations and, in line with "the procedure set out at the Informal Heads of Delegation meetings," during more recent trade negotiations drafts negotiating texts have been posted

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[1130] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 119.

[1131] Panitchpakdi, *supra* note 442 at 32-33.

[1132] Furthermore, in some occasions "the bypassing of the national political arena" and transfer of authority from sovereign entities to international fora "implies a move away from arenas of relative transparency into back-rooms." Clapham, *supra* note 13 at 7.

[1133] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 119.

[1134] *2002 Decision on Derestriction of Documents* envisages that "[a]ll official WTO documents shall be unrestricted," and then sets the deadlines for derestriction as well as conditions for confidentiality. *Supra* note 495. Panitchpakdi, *supra* note 442 at 32-33.

[1135] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 119.

[1136] S. Charnovitz, "Transparency and Participation in the World Trade Organization" (2004) 56 Rutgers L. Rev. 927 at 954 [hereinafter Charnovitz, "Transparency and Participation"]. For instance, before and during the 2001 Ministerial Conference in Doha and the 2003 Ministerial Conference in Cancun, as welll as during negotiations for compulsory licensing of drugs the draft negotiating texts were not made available to the public. *Ibid.*

on the WTO website.[1137] However, there are no modalities for non-state actors to offer comments to negotiators.

Furthermore, in an important development certain dispute settlement proceedings have been opened to the public at the request of parties to the dispute. Nonetheless, in its report the Consultative Board of the WTO on the future of the organization found that "the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution."[1138] Others have also called for more transparency in the work of WTO committees and working groups, through public meetings, Internet broadcasts or provision of transcripts.[1139]

Finally, NGOs can also play an important role in disseminating information at the national level regarding activities of the WTO and thus enhance transparency of the organization.[1140]

All the policy arguments enumerated above, together with lessons from comparison of participation in international legal processes with participation in the WTO should assist us in formulating elements of a new framework and proposals for increased participation.

2- Towards a new framework for participation

Much of the traditional international legal literature dealing with non-state actors has focused on the question of their position as subjects of international law. Are they "subjects" or "objects" of international law? Answering this question either way fails to present the complete picture.[1141] To understand the importance of non-state actors in the development of international law, or their role in international relations, the question can be asked from another perspective: would international law be the same without the

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[1137] See *e.g. Draft General Council Decision of [...] July 2004* (16 July 2004), online: WTO < http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_19july04_e.htm> (date accessed: 15 January 2008).

[1138] *The Future of the WTO, supra* note 1276 at 58, para. 261.

[1139] Jackson, *WTO and Changing Fundamentals, supra* note 76 at 119.

[1140] Marceau & Pedersen, *supra* 466 note at 6-7; Slaughter, "International Law and International Relations," *supra* note 412 at 144.

[1141] Even in the more recent literature the focus remains on states as subject of international law. See *e.g.* G. Cansacchi, "Identité et continuité des sujets internationaux" (1970) 130 Rec. des Cours 1 (dealing only with

continued on the next page ➢

presence of non-state actors? As demonstrated in this and last chapter, "subject" or "object," non-state actors have left their mark on the international scene, and there are compelling policy reasons for their increased participation in the WTO.

It is precisely because different non-state actors with diverging interests have gained importance through the developments of the past century that we need a new framework for their participation in the international system. The theory of public international law has to reflect the realities, and the state-centric reading of international law does not correspond to the realities of international relations and the role of non-state actors in international relations demonstrated earlier in this thesis. Some authors have gone so far as to call the state-centric reading of international law a "myth."[1142] The question then remains as to how their participation can be explained and accommodated in a legal framework, since the traditional subject/object approach has failed to answer this question.

In this section, it is useful to present a summary of two different theoretical accounts that build on the North American and European approaches respectively which can create a framework for participation of non-state actors in the WTO. Before doing that, however, I will explore different elements which, based on conclusions of different chapters of this thesis have to be taken into account in developing a theoretical framework for participation. I will then present elements of a theory of general international law which would address the question of participation of non-state actors and could be used as a heuristic framework for participation in the WTO.[1143]

a- Outline and contours of a theoretical framework:

The developments outlined earlier in this thesis, the policy arguments presented in this chapter and the limited channels for participation of non-state actors in the WTO point to the need to create more space for their participation. Non-state actors have

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questions related to states as subjects of international law and does not mention other subjects of international law).

[1142] J. Paust, "The Reality of Private Rights, Duties, and Participation in the International Legal Process" (2004) 25 Mich. J. Int'l L. 1229 at 1230.

[1143] The task is further complicated by the fact that non-state actors cover a wide array of different actors with a wide range of activities which are very often treated by international lawyers and policy analysts "monolithically." Slaughter, "International Law and International Relations," *supra* note 412 at 150.

undoubtedly gained a more prominent position in the international legal order after the developments of the past few decades and their importance is undeniable. Even though they "do not enjoy the legal accouterments of states" and are not considered to have full legal personality, non-state actors are real actors in international systems, "affecting outcomes, mobilizing publics, and constraining states."[1144] Classic views of international legal system, however, do not provide a theoretical framework for their participation. As discussed earlier the debate over the position of non-state actors as "subjects" of international law remains unresolved and their position is not well-defined under traditional theories of international law.[1145] Some international lawyers and international relations scholars, dissatisfied with the dominant narratives of international law or international relations, have presented new theoretical accounts of these fields.[1146] As Slaughter put it

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[1144] Wedgwood, *supra* note 379, at 28.

[1145] Lady Higgins concludes that the debate over whether the individual is a mere "object" of international law (the traditional view) or a "subject" of international law is unhelpful and that today ensuring transparency and satisfying public opinion is on the agenda of every international organization as well as those of democratic governments. She suggests that it is more effective to view the individual as a *participant* in the international legal order. R. Higgins, *Problems and Process. International Law and How We Use It* (New York: Clarendon Press, 1994) at 48-55.

[1146] Different international relations theories also explore the role of non-state actors. From an international relations perspective, the question is how non-state actors actually influence outcomes in the international system and "[w]hat are the causal mechanisms through which they work?" Slaughter summarizes views of different schools of international relations on non-state actors in the following terms

> Realists will dismiss them as irrelevant gadflies. Institutionalists will look for how they might affect the structure or enhance the power of international institutions in ways that can influence the type and degree of inter-State co-operation. And Liberals will explore their role in shaping and/or reflecting preferences in domestic and transnational society and influencing the representation of those preferences through government institutions.

"International Law and International Relations," *supra* note 412 at 101. Philip Allott, in presenting a new paradigm of the international legal system, identifies its three characteristics as follows

> (1) The international legal system is a system for disaggregating the common interest of all humanity, rather than merely a system for aggregating the self-determined interests of so-called States. (2) The international legal system contains all legal phenomena everywhere, overcoming the artificial separation of the national and the international realms, and removing the anomalous exclusion of non-governmental transnational events and transactions. (3) The international legal system, like any legal system, implies and requires an idea of a society whose legal system it is, a society with its own self-consciousness, with its own theories, values, and purposes, and with its own system for choosing its future, including a system of politics.

P. Allott, "The Concept of International Law" in M. Byers, ed., *The Role of Law in International Politics* (New York: Oxford University Press, 2000) 69 at 89.

> The perception that the international system is changing fundamentally and evolving away from a State-centric system toward a system in which non-State actors take their place alongside States in an emerging global society reinforces a desire to change the fundamentals of the international legal system to keep pace with these changes. More narrowly, it underpins a belief that NGOs are sufficiently powerful to help achieve certain normatively desirable goals.[1147]

Presenting different theoretical views for participation of non-state actors in international law and particularly in the WTO is a daunting task, complicated by multiple layers of the subjects, perspectives and disciplines involved. The theoretical framework of international law or international relations; WTO law or international economic relations; non-state actors in international law or relations; and non-state actors in the WTO, are each subjects of studies which adopt different—increasingly inter-disciplinary—methodologies and use different terminology.[1148] Koskenniemi has commented on the complex theoretical discourse on general international law alone in the following terms:

> Theoretical discourse has repeatedly ended up in a series of opposing positions without finding a way to decide between or overcome them. 'Naturalism' is constantly opposed with 'positivism', 'idealism' is opposed with 'realism', 'rules' with 'processes' and so on. Whichever 'theoretical' position one has attempted to establish, it has seemed both vulnerable to valid criticisms from a contrasting position and without determining consequence on how one should undertake one's doctrinal tasks. [1149]

In his view, international lawyers have turned towards "an unreflective pragmatism," in order to avoid the endless and inconsequential theoretical discourse.[1150] Indeed, I believe that the different "approaches" to the study of international economic law which were studied in Chapter One of this thesis belong to a category of "pragmatic reflections" rather than a theoretical discourse.[1151]

In order to determine if and how increased participation of non-state actors has to be accommodated in the WTO system, the question of participation has to be considered through the underlying theoretical framework of international economic law. As

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[1147] Slaughter, "International Law and International Relations," *supra* note 412 at 149.

[1148] These theories intend to provide a formulae that is supposed to hold true in all cases as a normative theory, or deal with actual functioning of the law and the symbiotic relationship between the law and the community that it serves as descriptive theories. Generally see A. D'Amato *Jurisprudence: A Descriptive and Normative Analysis of Law* (The Hague: Martinus Nijhoff, 1984).

[1149] Koskenniemi, *From Apology to Utopia, supra* note 743 at xv.

[1150] *Ibid.*

concluded in the first chapter neither of the two dominant approaches to questions of international economic law (*i.e.* the European/formalist or North American/international economic relations approach) present an adequate theoretical framework for our study. Learning from the commonalities and differences of these two approaches, taking into account their analysis, as well as the survey of WTO law and the organization and participation of non-state actors in the WTO, one can identify a number of factors to be taken into account in adopting a comprehensive approach to the subject matter of this thesis:

1- International economic law in the broader context of international law: It was established that regulation of international economic relations, like all other types of international relations, happens in an environment of international law. As a result, development in other areas of international law, as well as theoretical frameworks of general international law are of relevance to international economic law and in particular to WTO law. As pointed out in the previous chapters, because of several developments in the international arena, the role and position of non-state actors has changed in today's world. The Westphalian system of international law has gone through important changes in the past century. As a result of these changes and a number of developments that also affect domestic and constitutional legal systems, the Westphalian system which was created between a handful of states cannot be applied today as it was a hundred year ago. Briefly put,

> the new realities of social interaction, conflict resolution, economic, scientific, and cultural development, transnational ecological and resource management, instantaneous mass communications, unlimited information storage and retrieval: all these combine to point to evolution of a complex, multilevel, vibrant new civil culture and civic society that slips the surly bonds of territoriality.[1152]

An increasing number of governmental and non-governmental organizations and multi-national corporations—covering a wide array of activities—are now playing a more prominent role in international relations. Parallel to—and partly as a result of—these developments, and in the light of economic globalization, the scope and exclusivity of state sovereignty in all areas of international law needs to be re-considered.

[1151] Throughout this thesis several issues related to a theoretical framework for participation of non-state actors were presented.

2- The historical context: As Cassese points out in his preface to *International Law*, "it is misleading to consider international law as a piece of reality cut off from its historical, political, and ideological context."[1153] International trade has been a strong element contributing to development of international law in all times. It is important to examine the issue of participation in the context of development of the world trade system. But, in the context of this thesis, as it was demonstrated in Chapter Two, the history of participation of non-state actors in other international organizations and in public international law processes is also relevant and can assist us in identifying elements of a model for their participation in the World Trade Organization.

3- An interdisciplinary approach: In the context of this thesis an interdisciplinary approach is indispensable as international relations and political science are preoccupied with exploring the underlying causal theory of how agents in the international system actually bring about changes or determine outcomes.[1154] There are certain elements in each of the North American and European views and their methodology which can be used to forge a new approach. The new approach can benefit from the North American openness to other disciplines and combine that with the European legal methodology. That is, the proposed theory should follow the recent trends among some international lawyers who draw on international relations theories in their works on international law.[1155] Such an approach provides us with the opportunity to examine the problems of international economic law in the broader setting of international law, and to draw on solutions from other fields of international law that are consistent with the rest of the body of international law. An interdisciplinary approach also necessitates an examination of alternative international relations and international

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[1152] Franck, *The Empowered Self*, *supra* note 350 at 280.

[1153] *Supra* note 259 at v.

[1154] Slaughter, "International Law and International Relations," *supra* note 412 at 150. Social movements, interest groups, and NGOs and their interaction with state institutions are subjects of study of disciplines like sociology, political science, and economics and relations between societal actors and state institutions are one of the oldest themes of modern political science. Martens, *supra* note 778 at 6. Martens herself has undertaken a study of change in patters of activity of NGOs as a result of their interaction with the United Nations, depending on how they have institutionalized their activities. She has conducted several interviews with current and former NGO representatives and focuses on a few case studies. *Ibid.*

[1155] See "Liberal IR Theory and IEL", *ibid.*; Slaughter, Tulumelloe, & Wood, *supra* note 62; Brunnée & Toope, "International Law and Constructivism," *supra* note 62.

economic relations theories, beyond the dominant theory that resembles a realist approach. In broad terms, one can discern a move from the realist perspective of the GATT period to an institutionalist one at the advent of the WTO. [1156] However, to address the challenges raised by the current world trading system, and to adequately take note of different actors and their values a constructivist approach may provide insights for an appropriate alternative.[1157]

4- The public/private dynamics: The variety both of approaches and content of studies of international business/trade/economic law is in part due to the overlap between the private and public domains in these disciplines. International trade and economic activities are carried out by private actors but are regulated by governments, and the development of relevant law is influenced by the perspective of the actors involved. The private lawyers who are involved in the practice of international trade and have been involved with the development of GATT/WTO law look at issues through a lens of their own. The public/private distinction is especially important in the context of this thesis and in understanding the role of the private actors in the WTO. According to Gregory Shaffer, "[t]he blurring of the public and the private spurs the growth of international economic law. WTO law, while formally a domain of *public* international law, profits and prejudices *private* parties."[1158]

An appropriate theoretical framework for participation of non-state actors in the WTO has to include the above-mentioned elements and address the policy arguments for increased participation.

Before exploring elements of a new framework for participation, two accounts for participation of non-state actors based on the North American and European approaches are surveyed below.

[1156] For a survey of the various realist, neoliberal, functional, public choice and constitutional theories of international relations and their relevance to the WTO see, Slaughter, A.M., "Liberal International Relations Theory and International Economic Law" (1995) 10 Am. U. J. Int'l L. & Pol'y 717-743 and Petersmann, E.-U., "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization" (1995) 6 Eur. J. Int'l L. 161.

[1157] See Chapter Four:1:c, below.

[1158] G.C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington D.C.: Brookings Institution Press, 2003) at 3 [emphasis in original] [hereinafter Shaffer, *Defending Interests*].

b- An account based on the North American approach: stakeholders regime

Richard Shell has constructed three theories of trade legalism to probe the developments which led to the creation of the WTO and its dispute settlement system and "to study jurisprudential techniques and choices made by trade adjudicators in actual cases."[1159]

The regime management model, based on an institutionalist regime theory, sees "trade treaties as 'contracts among sovereign states' that help stabilize cooperative trade systems."[1160] This models, founded on the assumptions that states are the principal actors in the international system and act to protect their sovereignty ("domestic political control and international autonomy"), tries to explain what states should logically want an international trade system to do.[1161] He concludes that the purpose of this regime is to "balance states' interests in free trade and autonomy."[1162] Based on this model participation in the world trading system should be limited to states and guarantee the possibility of non-compliance with the rules of the regime when necessary for domestic political purposes.[1163]

The second model, the efficient market model, is based on the liberal international relations theory,[1164] and puts the emphasis on individuals and groups as primary actors in international trade, rather than states that are "agent[s] for particular domestic constituencies' interests, not self-motivated actor[s] seeking power and political stability."[1165] This model is founded on a normative commitment to economic free trade theory and the doctrine of comparative advantage and views international trade laws and

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[1159] Shell, "Trade Legalism and IR Theory," *supra* note 68 at 925.

[1160] *Ibid.* at 864. See also Slaughter, "International Law and International Relations," *supra* note 412 at 156.

[1161] Slaughter, "International Law and International Relations," *supra* note 412 at 157.

[1162] Shell, "Trade Legalism and IR Theory," *supra* note 68 at 866.

[1163] *Ibid.* at 864. From this perspective, the regime management model "provides the best description of the specific adjudication structures adopted by the WTO." *Ibid.* at 897.

[1164] According to Teson, "[u]nder the liberal view, the proper purpose of international law is to enhance the welfare of individual citizens or groups, not the welfare, power or stability of governments as political entities." F.R. Teson, "The Kantian Theory of International Law" (1992) 92 Colum. L. Rev. 53 at 54.

[1165] Shell, "Trade Legalism and IR Theory," *supra* note 68 at 877.

tribunals as means of avoiding domestic protectionist groups used by governments and businesses.[1166]

The third model is the trade stakeholders model which is also theoretically rooted in the theory of liberalism, but seeks broader participation "for all parties with a stake in trade policy, not just commercial parties." Participation in this theory is a goal in itself not a means to other goals such as economic efficiency for global markets.[1167]

Shell concludes that, in spite of the move from realism to legalism in trade governance with the advent of the WTO, the regime management and efficient market models are currently the dominant models in the WTO. These models are narrow in scope, are founded on normative commitments to economic theory, and, unlike the trade stakeholders model, are not capable of addressing "long-term stability, distributive fairness and procedural justice" issues in the WTO.[1168]

Future developments of WTO will depend on the model which is adopted by negotiators. Accordingly, under the regime management model developments will not be in the direction of removing flexibility from the system and giving greater access to non-state actors.[1169] Shell argues that in the reform of the WTO the proponents of the efficient

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[1166] *Ibid.* at 878 and 885. Shell also present examples of trade-oriented jurisprudence at the WTO. See *ibid.* at 890-893. Slaughter concludes that from this perspective, the panelists "hold Governments to their word in terms of their expressed commitment to liberalize either a global or regional trading system, regardless of the political consequences." "International Law and International Relations," *supra* note 412 at 165.

[1167] Shell, "Trade Legalism and IR Theory," *supra* note 68 at 911. Shell cites the ILO and the European Union as examples of systems based on this model. *Ibid*.

[1168] *Ibid.* at 907. Shell also puts emphasis on the importance of relative, not just absolute gains from the trade system. *Ibid.*

[1169] Under this model WTO members and officials describe the system as one for settling the disputes and not as an increasingly rule-bound system. Slaughter, "International Law and International Relations," *supra* note 412 at 159 (also citing former Secretary General Runato Ruggiero's comment on the WTO dispute settlement system in footnote 458). Adhesion to this view of the world trading system also affects the panelists' handling of cases. Panelists tend to enforce the clear obligations of the states in an attempt to reinforce the system, and conversely, make interpretations that would protect state sovereignty in case of ambiguous provisions, in other words by "political 'management' of trade disputes" will opt for "regime maintenance." Shell, "Trade Legalism and IR Theory," *supra* note 68 at 868; See also Slaughter, "International Law and International Relations," *supra* note 412 at 160. Hudec observes that panelists have indeed followed this path. More specifically, in *EC Hormones Appeal Report*, the Appellate Body decided that

> The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the part assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.

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market model will support wider access for private interests.[1170] Realization within the WTO that governance structure should not focus narrowly on trade issues, and that parties affected by trade should not be excluded from participation in WTO policymaking and dispute settlement will lead to adoption of a trade stakeholders model.[1171]

c- An account based on the European approach: a constitutional view

Another theoretical framework for participation of non-state actors, proposed by Petersmann is closer to the European approach outlined in Chapter One, and builds on the idea of national and international constitutionalism.[1172] By adopting a constitutional approach to international law, it is argued, the debate over the position of non-state actors as subjects of international law can be avoided, and these entities can be integrated in a broader concept of "international community."[1173] Furthermore, this approach alleviates the concern over issues of legitimacy, human rights and control of power in the international legal system.[1174]

At the domestic level this framework focuses on the extent to which the domain of foreign relations is open to democratic scrutiny. At the international level it proposes

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Supra note 256, at 41-42.

[1170] Shell, "Trade Legalism and IR Theory," *supra* note 68 at 902-903.

[1171] *Ibid.* at 922-923. Slaughter, however, observes that Shell's models are developed through a deductive method drawing on international relations and economic theory that correspond to the rule-oriented approach of WTO agreements and are not based on an inductive methods through interviews or other empirical data regarding the actual participants in the Uruguay Round negotiations. Slaughter, "International Law and International Relations," *supra* note 412 at 156. Nichols also argues against the stakeholder model of governance, and sees the process of integrating noneconomic values with market principle occurring primarily within domestic society. "Extension of Standing in WTO Disputes," *supra* note 175 at 295-303.

[1172] Generally see E.-U. Petersmann, "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?" (1998) 20 Mich. J. Int'l L. 1 [hereinafter Petersmann, "How to Constitutionalize International Law?"]. There are also other authors who suggest that "[w]e should conceive of international law 'vertically' as a (hierarchical) legal system with a constitutional basis." Thürer, *supra* note 341 at 52 [footnote omitted]. See also H. Mosler, "The International Society as a Legal Community" (1974) 140 Rec. des Cours 1; C. Tomuschat, "Obligations Arising for States Without or Against Their Will" (1993) 241 Rec. des Cours 195 at 216; J.A. Frowein, "Reaction by Not Directly Affected States to Breaches of Public International Law" (1994) 248 Rec. des Cours 345 at 355; B. Simma, "From Bilateralism to Community Interest," *supra*, at 256. Thürer explains that by constitutional approach in international law he does not mean a "statist" model, but rather "a constitutional theory" or "a constitutional method" of conceiving, shaping and interpreting international law. *Ibid.* at 53.

[1173] Thürer, *ibid.* at 53.

[1174] *Ibid.* at 54-55.

mechanisms for international constitutional restraints on discretionary foreign policy powers.

Petersmann identifies three different concepts of foreign policy-making and analyzes the consequences of each for foreign relations law. The first is the Hobbesian concept of power politics and economic mercantilism;[1175] second is the Lockean concept of right-based domestic policies and the "primacy of foreign policy;"[1176] and third the Kantian concept of national and international constitutionalism.[1177] Depending on their constitutional structure, states may adopt any of the above-mentioned concepts to conduct their foreign relations. However, while such a constitutional question is a matter of domestic policy and there is no international norm which requires states to adopt one approach over the others, the developments from power-oriented 'diplomatic' to rule-oriented 'legal' methods of foreign policy-making and dispute settlement—e.g., the acceptance of a compulsory dispute settlement system as part of the *WTO Agreement*—point towards a move in the direction of Kantian international constitutionalism.[1178] Such

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[1175] Thomas Hobbes (1588-1679), the English philosopher, saw the government as a *legibus absolutus* that contains the selfish short-term interests of individuals. The unlimited power of the government allowed it to use its power in both domestic and international levels. Therefore, from the Westphalian peace treaties in 1648 until the First World War, international relations was marked by "anarchy," and "self-help" was the remedy to address breaches of obligation. Equally in international economic law mercantilism and colonialism were dominant. See Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 414. "The 'public interest' to be protected by the sovereign was the sum of the individual interests of the domestic citizens." *Ibid.* at 412-413.

[1176] John Locke (1632-1704), saw the sole task of governments as protecting the basic rights of citizens, including the right to life, liberty and property. "The *public interest* to be promoted by the governments was conceived as being identical with the sum of the individual interests of domestic citizens, as protected by their equal rights and democratic decision-making procedures." Conversely, according to this doctrine, the foreign policy powers were less controlled and where left "to the prudence and wisdom of those whose hands it is in, to be managed for the public good." Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 415. Later on, Montesquieu, in his theory of separation of powers, stated that foreign policy powers were limited by international law. Montesquieu, *De l'Esprit des Lois,* (1748), Chapter VI. But most states continued the practice of "assert[ing] constitutional power to violate international law in the name of the 'primacy of foreign policy' and of alleged 'national interests.'" Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 416.

[1177] Kant envisaged the creation of a federation of republican states, an international state or a *civitas gentium*, opposed to war. In his view individual citizens who have to bear the costs of welfare-reducing foreign policies, would choose rule-oriented rather than power-oriented policies in international affairs. See Petersmann, "How to Constitutionalize International Law?" *supra* note 1172 at 7-9.

[1178] Petermann goes even further in stating that Kant's view explains "why the 'constitutionalization' of domestic policy powers cannot remain effective without a corresponding constitutionalization of foreign policy powers through international legal rules for the relations among states as well as vis-à-vis foreign citizens." He also contends that for a number of economic, political and legal reasons, there should be

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an approach also guarantees consistency of international obligations of governments with their domestic policies, and is more conducive to public participation in international affairs.[1179]

Internationally, Petersmann views the "European constitutional law," and the "international economic law revolution" (*i.e.*, creation of the WTO) as models for further constitutionalization of international law.[1180] Petermann enumerates the provisions of the WTO agreements that reflect the constitutional, rule-making, executive, surveillance and dispute-settlement functions of the WTO as follows: the provisions underlying the "single undertaking;" termination of the GATT as an incentive for joining the WTO; legal primacy of the *WTO Agreement* over other international trade agreements; institutions and decision-making powers for overcoming the "prisoner's dilemma" of international cooperation; dispute settlement and the Trade Policy Review Mechanism (TPRM); and comprehensive legal guarantees of freedom, non-discrimination and rule of law which are the gist of several multilateral trade agreements annexed to the *WTO Agreement*.[1181] Petersmann has elaborated on his idea of constitutionalism in international law in several writings[1182] and believes that market integration and recognition of citizens as legal

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constitutional restraints on foreign policy powers. These reasons include the use of foreign policy for income redistribution (through trade restrictions), use of foreign policy to circumvent domestic policy restrictions (*e.g.* taxing), seeing foreign policy as prerogative of the executive where the executive enjoys broad discretionary foreign policy powers without substantive and procedural constitutional restraints ("a *Machiavallian* arena of power politics"), inadequate parliamentary and judicial control and irrational double standards and xenophobic mercantilist thinking. Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 408-411 and 421-422.

[1179] This debate is in part related to two other issues which were examined earlier in this thesis: question of monism or dualism in international law and participation in human rights law.

[1180] See Petersmann "Constitutionalism and International Organizations," *supra* note 42 at 446-454; "How to Constitutionalize International Law?" *supra* note 1172 at 14-23.

[1181] These provisions were studies in Chapter One of this thesis. See *supra* notes 144 and 145 and accompanying text on the decision-making process in the WTO which, unlike the "GATT à la carte" situation under the Tokyo Round Agreements, ensures the overall consistency of decision-making in the WTO, and avoids the mutually harmful, non-cooperative behaviour of members; on the period of transition from the GATT to the WTO see *supra* note … and accompanying text; *WTO Agreement,* art. XVI:3, *supra* note 300 and accompanying text; Chapter Two, section "3- Non-state actors in WTO adjudication," above, on the dispute settlement system; generally many provisions on protection of rights of private persons in section "1-b- Provisions related to enforcement mechanisms or directed at private persons," of Chapter Two above.

[1182] See E.-U. Petersmann, "National Constitutions and International Economic Law" in M. Hilf, & E.-U. Petersmann, eds., *National Constitutions and International Economic Law* (The Hague: Kluwer Law International, 1993) 3 [hereinafter Petersmann, "National Constitutions and IEL"]. See also some of these

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subjects of integration law promotes the emergence of international constitutional law.[1183] Petersmann ideas, however, have elicited strong reactions which challenged some of his underlying assumptions (*e.g.* that neo-liberal economic policy is linked with promotion of human rights).[1184] Adopting such a constitutional view of international law seems to be a pure exercise of theory, which is hardly based on realities of international relations.

d- An interactional theory of international law

The two frameworks which were presented above demonstrate two major flaws in the attempts to present a theoretical framework for participation of non-state actors. Frameworks relying on international relations theory are limited to the context of the WTO and are not connected to the broader international law discourse. Within the international law discourse attempts to present a framework for participation either rely on classic notions of international law (*e.g.* the subject/object dichotomy) or present a framework which strives to mirror domestic legal systems in an environment which has significant differences from the domestic environment.[1185]

Conversely a heuristic framework contributes to understanding the dynamics at work in international relations and addresses the developments which were discussed earlier in this thesis and can assist us in defining the role of non-state actors in international law. One theoretical framework which I find particularly suitable for accommodating a host of non-state actors in the international legal system is presented by Jutta Brunée and Stephen Toope in their ongoing work on an "interactional theory of international law."[1186]

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recurring themes in E.-U. Petersmann, "From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System" (1998) 1 J. Int'l Econ. L. 175.

[1183] E.-U. Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" (2002) 13 Eur. J. Int'l L. 621.

[1184] See P. Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann (2002) 13 Eur. J. Int'l L. 815; R. Howse, "Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann" (2002) 13 Eur. J. Int'l L. 651. *Contra* E.-U. Petersmann, "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston" (2002) 13 Eur. J. Int'l L. 845 (stating that Alston's comments systematically misrepresented his publications and imputed absurd views to Petersmann).

[1185] For a survey of different theories on non-state actors participation see Lindblom, *supra* note 368 at 79-115. See also Charnovitz. "NGOs and International Law," *supra* note 371 at 361-362.

[1186] See Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62. A full presentation of Brunée & Toope's interactional theory is beyond the scope and ambitions of this thesis, however, elements which are

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In developing their argument, Brunée and Toope dismiss positivist assumptions of international law and draw on the legal theories of Lon Fuller and constructivist theories of international relations.[1187] Fuller's theory of law, which explains law as "a purposive enterprise which is both shaped by human interaction and aimed at guiding that interaction in distinctive ways" focuses on generality, promulgation, non-retroactivity, clarity and congruence between rules and official action as requirements of legality—rather than concentrating on formal and hierarchical manifestations of law.[1188]

"Constructivism," the second element of this theory "provides a lens through which one can analyze the social structure of the international system."[1189] A constructivist theory of international relations, by putting emphasis on the practice of actors, identities, and their interactions,[1190] further sheds light on the workings of

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related to the subject of this thesis, are sketched here. See also Brunnée & Toope, "International Law and Constructivism," *supra* note 62.

[1187] As Brunnée and Toope point out "[i]nternational lawyers rely too heavily on positivist accounts of legality," which consider "formal enactment by a superior authority, application by courts, and centralized enforcement," as its defining feature. *Legitimacy and Persuasion, supra* note 62, Chapter 1, at 1 and 28.

[1188] Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Chapter 1, at 1 and 28. Fuller, while primarily preoccupied with domestic law, helps international lawyers to understand five things: that domestic law is also a horizontal normative order in some ways; that the power of law to shape human behaviour comes from its grounding in social interaction; that a procedural conception of the rule of law supports diversity in moral and political ends; that international lawyers rely too heavily on positivist accounts of legality; and that "'legitimacy' can have a specific, legal meaning." *Ibid* at 21.

[1189] J. Mertus, "Considering Nonstate Actors In The New Millennium: Toward Expanded Participation In Norm Generation And Norm Application" (2000) 32 N.Y.U. J. Int'l L. & Pol. 537 at 556.

[1190] See Brunnée & Toope, "International Law and Constructivism," *supra* note 62 at 25-38; Katzenstein, Keohane & Krasner, *supra* note 62 at 674-678; and Slaughter, Tulumelloe, & Wood, *supra* note 62 at 373. Wendt describes constructivism as a "concern with how world politics is 'socially constructed', which involves two basic claims: that the fundamental structures of international politics are social rather than strictly material (a claim that opposes materialism), and that these structures shape actors' identities and interests, rather than just their behaviour (a claim that opposes rationalism)." "Constructing International politics" (1994/95) 19 J. Int'l Security 5. Elsewhere he defines constructivism as an approach which accepts that actors' identities and interests are constructed and transformed under anarchy "by the institution of sovereignty, by an evolution of cooperation, and by intentional efforts to transform egoistic identities into collective identities." "Anarchy Is What States Make of: the Social Construction of Power Politics" (1992) 46 Int'l Orgs. 391. See also A. Wendt "Anarchy Is What States Make of: the Social Construction of Power Politics" (1992) 46 Int'l Orgs. 391; A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) 7 (identifying four "sociologies" involved in the debate over constructivism, namely individualism, holism, materialism, and idealism). According to Ruggie, "[C]onstructivism is about human consciousness and its role in international life... [N]ot only are identities and interests of actors socially constructed, but … they must share the stage with a whole host of other ideational factors that emanate from the human capacity and will …" "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52 Int'l Org 185 at 216. See also Ruggie, "Embedded Liberalism," *supra*; J.G. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998); A.T.F. Lang, "Reconstructing Embedded

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collaborative norm-making in a horizontal normative order and contributes to applying Fuller's theory of law at the international level.[1191] Informed by Fuller's theory of law and constructivist insights into international relations, the interactional framework places elements of the international legal system, like state consent, sources of international law, creation of international tribunals and better enforcement mechanisms, in the broader context of the international legal enterprise and "explains how diverse actors can interact through law and accommodate both the continuing pre-eminence of states in the international legal system and the rise of non-state actors."[1192] This framework requires a sustained practice of legality to ensure legal legitimacy. Bruneé and Toope explain that

> an interactional theory of law opens up lawmaking to a diversity of participants, indeed requires it, because of the need for reciprocity in the construction of law. It follows that any description of society at the international level must extend beyond the sphere of states. International organizations, NGOs, corporations, informal intergovernmental expert networks, and a variety of other groups are actively engaged in creation of shared understandings and the promotion of learning amongst states and other international actors.[1193]

They further point out that legal formalism—a view that treats form as the only indicator of law, close to legalism—and preoccupation with formal sources of law pervade the practice of international law. However, apart from form a treaty, for instance, has to meet criteria of legality, including being concluded through a process that allowed for genuine participation of relevant actors. In order for norms to be transformed into law, they must rest on shared understandings and there have to be processes that allow for the active participation of relevant social actors.[1194] Constructivist theorists present different accounts of how shared understandings evolve through collective knowledge, norms or

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Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime" (2006) 9 J. Int'l Econ. L. 81.

[1191] At first sight liberalism may also appear capable of providing some relevant insight. However, "liberalism assumes self-interested and risk-averse actors [in our case certain individuals or multinational corporations], and therefore its theory of how individuals and groups change their preferences must be based on changes in context leading to changing calculations of interest or risk." Keck and Sikkink, *supra* note 339 at 214 [footnote omitted]. But an important part of the actors currently studied are "individuals and groups who are motivated primarily by principled ideas and who, if not always risk-takers, at least are not risk-averse." *Ibid*.

[1192] Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Chapter 1, at 2-3. The authors acknowledge that states remain dominant within the international legal system, but are influenced in different ways and to different extents by activities of other actors. *Ibid.* at 28.

[1193] Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Chapter 1, at 28 [footnote omitted].

[1194] *Ibid.* at 29-32.

practices, with varying degrees of focus on the role of agents or social communication.[1195] Brunée and Toope consider the notion of "communities of practice" as the one that rests on a genuinely collective concept of learning for shared understanding; that is, actors generate and maintain collective understandings through their participation in social practice. State and non-state actors participate in international law and policy processes in areas of diplomacy, trade, environment or human rights as particular types of communities of practice.[1196]

The interactional theoretical framework is, therefore, capable of accommodating diversity and a plurality of actors and at the same time addressing the issues of legitimacy of the international legal system, without being posited in a liberal world community, and provides an avenue for further developing a theory of participation of non-state actors in international law.[1197] In the context of this thesis, the policy arguments that were presented in the previous section can be accommodated through this theory.

3- Lessons of international law processes: Proposals for participation in the creation of norms, enforcement and monitoring

Building on the experiences of other international organizations, the WTO can adopt a number of measures to improve participation of non-state actors in the process of policy-making and norm creation as well as their implementation and monitoring. The interactional theory of international law does not provide us with specific recipes for participation; however as a heuristic tool it contributes to understanding the role of non-

[1195] *Ibid. supra* note 62, Chapter 2, at 1. Three relevant accounts include the norm cycle, epistemic community and communities of practice. Norm cycle posits that norms are built by various actors or "norm entrepreneurs," including states, NGOs or individuals, who have to convince a sufficient number of states to endorse a new norm. See Finnemore & Sikkink, *supra* note 856 at 896-898. The second account focuses on the work of epistemic communities—a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain. See P. Haas, "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46 Int'l Org. 1 at 3. Both of these accounts pay less attention to the social communication which is necessary for building collective understanding. Norm cycle focuses more on actions of norm entrepreneurs and the second one puts more emphasis on influence of epistemic communities and "the unidirectional diffusion of norms." But the third account, that of communities of practice—according to which actors generate and maintain collective understandings through their participation in social practice—best reflects the collective concept of learning. Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Chapter 2, at 5-12. See also Adler, *supra* at 6 and 15.

[1196] Brunnée & Toope, *An Interactional Theory of International Law, supra* note 62, Chapter 2, at 6, 12 and 19.

[1197] Brunnée & Toope, *Legitimacy and Persuasion, supra* note 62, Chapter 2, at 6, 12 and 20.

state actors in creation of international norms. In the context of the WTO, participation of non-state actors is important to fulfill the condition of the "sustained practice of legality to ensure legitimacy" as laid out in the interactional theory of international law. While their participation can occur through formal and informal channels, because of asymmetry of power between different non-state actors providing formal channels will ensure representation of a broad range of issues and perspectives on trade issues. Realization of the role of non-state actors, therefore, requires proper channels of participation which are proposed in this section. These proposals build on experiences from other areas of international law and strive to address the policy arguments of balanced representation of actors, reinforcing the rule-oriented system, representation, legitimacy and transparency, and addressing the tension between trade and other policy areas, which were provided earlier for increased participation.

Many of the following proposals are related to the ongoing participation of non-state actors in WTO activities—be they in the creation of norms or their implementation. Since some of the proposed mechanisms or solutions for participation apply to both areas of norm-creation and implementation and in order to avoid repetition these two categories are presented together.

a- Participation of stakeholders in policy-making and implementation at the national level

Ensuring access to policy debate at the national level for different groups in society is the first step toward ensuring non-state actor participation at the multilateral level. This is an important step to ensure notably that WTO policies remain consistent with the human rights and other obligations of its members, and contributes to fulfillment of the right to participate. Earlier survey of participation of non-state actors in international legal processes did not focus on policy-making and implementation at the national level (apart from application of international treaties at domestic level). However, strengthening of participation at national level has clear implications for participation at international level and is, furthermore, warranted in fulfillment of the right to participate which was outlined earlier.

i- Channels of participation through democratic governance

The true policy debate should occur at the national level to ensure that all groups and stakeholders in the society are involved in shaping the position of a Member State at the international level. Democratic governance is thus imperative in order to provide legitimacy to the position of a state at the WTO negotiation table. This is due to the fact that, "democratic governments do function to fairly assess, evaluate, and coordinate various societal values and goals [and] this is true of trade policy as well."[1198]

Similarly, business interests have many possibilities for participation in policy-making at the national level. However, in general, business interests have more lobbying power in national settings. In many countries, efforts have been made to regulate the rules governing lobbying, for example with national parliaments.[1199] Participation at the national level is regulated in different ways. It is neither conceivable—nor desirable—for the WTO to impose a one-size-fits-all solution for participation at the national level. However, WTO member states, through the ways in which they formulate their negotiating positions in WTO negotiations can strengthen the obligation in WTO agreements to ensure domestic participation and transparency.[1200] Furthermore, where *ex ante* human rights and social impact assessment of international trade polices are carried out, non-state actors can contribute to such assessments.[1201]

ii- National accountability mechanisms

At the domestic level parliaments can provide national checks and balances on government actions at the international level and also through global parliamentary networks help ensure coherence between global economic and social policies.[1202] As policy issues are increasingly settled at the international level, national lawmakers and oversight bodies face new challenges in carrying out their functions. As Andrew Clapham

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[1198] Nichols, "Extension of Standing in WTO Disputes," *supra* note 175 at 311-312.

[1199] At the European level, for example, the European Parliament is currently considering regulations to bring transparency to activities of the lobbyists aiming to influence European institutions. See "MEPs call for mandatory register of Brussels lobbyists" online: EUobserver.com <http://euobserver.com/9/25901> (date accessed 1 April 2008).

[1200] Charnovitz, "Transparency and Participation," *supra* note 1136 at 953.

[1201] See Canada's example of "Consultations with Canadians" Program. Walsh, *supra* note 603 at 905.

[1202] *A Fair Globalization*, *supra* note 864 at 120.

points out "[p]art of the challenge is to find ways to hold governments accountable for these new diffusive activities, activities which tend to take place in fora which, while not opaque are less than transparent."[1203] Non-state actors can play an important role in informing national oversight bodies of policy debates taking place at the international level.

iii- Direct application of WTO obligations at the national level

As discussed in this thesis, the issue of direct applicability of WTO obligations is ultimately determined by the constitutional legal system of each country and its approach to implementation of international treaties. However, from the perspective of international law, WTO members are under an obligation to ensure implementation of the treaty and its enforceability at the national level. As far as non-state actors are concerned, this obligation translates into creation of mechanisms to address concerns of all stakeholders in the society and to ensure that rights of non-state actors are taken seriously.[1204] Future developments in the WTO system, and through amendments to its agreements, can be more specific concerning obligations related to implementation of the agreements at the domestic level or national mechanisms to ensure their implementation.

iv- Non-state actors on national delegations

A technique that can be used for ensuring non-state actor participation in policy-making is to include representatives from non-state actors on government delegations to Ministerial Conferences. As it was indicated earlier, this has been common practice in other international fora.[1205]

b- Regulation of participation at international level: A system of accreditation

At the international level, participation of non-state actors in WTO conferences can be based on a different model. There are clear lessons to be learnt from other international organizations in this regard. Many other international organizations have adopted a more open approach towards non-state actors.[1206] Non-state actors are

[1203] Clapham, *supra* note 13 at 8.

[1204] Espósito, "International Trade & National Legal Orders," *supra* note 558 at 469.

[1205] Charnovitz, "Two Centuries of Participation," *supra* note 781 at 280-281.

[1206] See also Reinisch, & Irgel, *supra* note 726 at 149.

indispensable in the international human rights or environmental movements and their model of participation in relevant intergovernmental organizations can be replicated to the WTO.

Non-state actors can be given the opportunity to participate in the preparatory committee for international conferences, as was the case in preparatory meetings for the UN Conference on Trade and Employment in 1946-47.[1207] In the area of trade negotiation broader participation has to be balanced with the recognition that states will remain the principal parties to negotiations and that a certain degree of confidentiality may be necessary in these negotiations.[1208] Nelson expresses of the view that "the politics of international financial and trade policy render some of INGOs' favored strategies less effective" and suggests the adoption of "human rights standards, and especially standards of economic and social rights as the common ground in an alliance among poor country governments, human rights and development NGOs and labor, student, and consumer movements." [1209] The reaction of the WTO to participation of such NGOs is in part tied to the general debate related to WTO and human rights,[1210] environment, and labour. The approach adopted by the WTO membership to address these issues as they relate specifically to trade policy will have an impact on the potential participation of NGOs and enterprises active in these fields in the debate over WTO policies.

The Director-General of the WTO has adopted a tone very open to non-state actors' participation. In 2006 he stated "[w]e have […] to ensure that authentic interests and the interests of most people are taken into account in our managements of international relations and the way we operate our regional and global systems of values, rights and obligations."[1211] He elaborated that

> [i]n this context, the various voices and groupings may depending on the issues or problems involved – may be horizontal, or sometimes vertical. For example,

[1207] See *supra* note 456 and accompanying text.

[1208] Housman, *supra* note 452 at 743.

[1209] Nelson *supra* note 1028 at 128. He names project-specific campaigns or U.S. government leadership as less effective techniques for INGOs in relation to international financial and trade policy.

[1210] A comprehensive study of this question is the subject of another thesis. See *e.g.* C.J. Lopez Hurtado, *The WTO Legal System and International Human Rights* (PhD Thesis, Université de Genève, Institut universitaire de hautes études internationales, 2006) [unpublished].

[1211] Lamy, "Humanising Globalization," *supra* note 1073.

> while some problems are fundamentally global – certain environmental phenomena for instance – and require the participation and representation of horizontal or global actors, other human difficulties and the negative consequences of globalization are more circumscribed. These issues call for the participation of actors representing smaller interests which, although perhaps more specialized, are every bit as important to maintaining the universal balance if we believe in justice and human equity.[1212]

Realizing this vision requires institutional measures to ensure participation. The Consultative Board of the WTO on the future of the organization has recommended that

> [t]he membership should thus develop a set of clear objectives for the WTO Secretariat's relations with civil society and the public at large. Within the general framework of these objectives, [the *NGO Guidelines*] should be further developed so as to guide the Secretariat staff in their consultations and dialogue with civil society and the public. Guidance should be included on the criteria to be employed in selecting those civil society organizations with which the Secretariat might develop more systematic and in-depth relations."[1213]

This is also in line with the recommendations of the World Commission on the Social Dimension of Globalization which calls for creation of formal consultation structures in the WTO.[1214] Systems of accreditation have been tried and proven to be effective in other international organizations and the WTO can adopt a model used by different United Nations agencies to provide permanent observer status to civil society organizations.[1215] Through accreditation non-state actors' participation will be institutionalized and will go beyond *ad hoc* participation during Ministerial Conferences or specific events. Furthermore an accreditation system can be extended to provide participatory opportunities, or observer status, in various WTO committees, bodies, and councils.[1216] At the same time the WTO can improve its staff capacities to deal with non-state actors.[1217]

[1212] Lamy, "Humanising Globalization," *supra* note 1073.

[1213] *The Future of the WTO, supra* note 1276 at para. 212. The report also notes that trade policy competence should not be the exclusive criterion for participation of NGOs.

[1214] *A Fair Globalization*, *supra* note at 864 at 124 and 146.

[1215] The argument that such a system may be open to abuse is not a convincing one. While cases of abuse will exist, experience of other organizations proves that this risk is manageable. Barfield, however, deems models of accreditation at the United Nations agencies "poor and misleading" and argues against adopting these models for the WTO. *Supra* note 1058 at 106.

[1216] Housman, *supra* note 452 at 743; Charnovitz, "Transparency and Participation," *supra* note 1136 at 954.

[1217] Scholte, O'Brien & Williams, *supra* note 1091 at 123.

Given the extensive use of accreditation methods in other international organizations, the proposal of formalizing participation in the WTO through such methods is quite non-controversial and cannot be rejected by any logic. Apart from a general system of accreditation, some more specific—and occasionally more innovative—proposals are listed below. Goal of all these proposals is to address the deficit in formal channels of participation in the WTO, which became evident in comparison of WTO with other organizations in Chapter Three.

i- An advisory body of non-state actors

Another model for participation of non-state actors in the WTO is the creation of an advisory body of NGOs and business and labour representatives.[1218] The body can serve as an expert body for specific issues like the linkages between trade and development or environment, based on the model of the Consultative Committee of the League of Nations.[1219] In the area of economic organizations, taking the OECD's experience of establishing advisory committees with trade unions and business and industries can serve as a model for the WTO.[1220] The main challenge in implementing this proposal is the criteria for participation—as it is in the case of accreditation. While there is some risk in having organizations that are not truly representative or are fronts for government agendas, the experience of other organizations can assist the WTO in reducing the risk.

[1218] In 2002, the International Law Association recommended that

> WTO members should strengthen the rule of law in international trade by enhancing the legitimacy and acceptance of WTO by
> (a) […] increasing the participation of national representatives of economic and social activities […] by creation of an Advisory Economic and Social Committee or an advisory parliamentary body of WTO to be consulted regularly by the WTO organs.

International Law Association, "Declaration on the Rule of Law in International Trade," Conf. Res. 2/2002 (25-26 July 2000), online: International Law Association <http://www.ila-hq.org/pdf/Trade%20Law/TradeLaw.pdf> [date accessed 5 October 2007] [hereinafter *Declaration on the Rule of Law in International Trade*].

[1219] See *supra* 801 and the accompanying text.

[1220] Julio Lacarte, former ambassador of Brazil to the WTO and chairman of the Appellate Body, has also supported a proposal to set up an WTO Economic and Social Committee enabling a more representative civil society participation and closer WTO contacts with 'the real world.'" E.-U. Petersmann, "Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO; Introduction and Summary" (2004) 7 J. Int'l Econ. L. 585 at 592 (hereinafter Petersmann, "Challenges to the Legitimacy of the WTO"). See J. Lacarte, "Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective" (2004) 7 J. Int'l Econ. L. 683

ii- Public consultation during negotiations

Another model for participation that has been used in other trade negotiation and can be replicated in WTO negotiations is public consultation similar to those conducted in negotiations for the FTAA.[1221] Other organizations have also conducted consultations, in the process of internal rulemaking, specifically in the area of economic activities; these include the OECD's process in preparation of the draft revision of its Corporate Governance Principles and the Inter-American Development Bank's process in preparation of its strategies and policies.[1222] Of course, it can be anticipated that such consultations will generate a large number of comments concerning WTO activities and it will be important to develop a practical system of handling these comments.

iii- Special sessions for non-state actor presentations

Consultations can also be conducted in the form of hearings where representatives of non-state actors can testify before government and WTO officials on a specific subject.[1223] The WTO General Council or the Ministerial Conference can organize special sessions for NGO presentations and briefings, similar to the informal practice of briefings provided by non-state actors to the United Nations Security Council.

iv- International accountability mechanisms

Similarly to national accountability mechanisms, at the international level parliaments can play a role in holding governments accountable and ensuring coherence of public policy. Different parliamentary networks like the Inter-Parliamentary Union (IPU), Parliamentarians for Global Action and the European Parliament can play a role in monitoring the enforcement of trade liberalization policies.[1224] One proposal in this regard is to create an inter-parliamentarian dimension to the WTO. [1225] Better informed

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[1221] See *supra* note 836 and accompanying text.

[1222] Charnovitz, "Transparency and Participation," *supra* note 1136 at 956. Charnovitz points out that in similar cases, in the WTO, *e.g.* when the Appellate Body was amending its Working Procedures, or when the TBT Committee enacted a decision on "Principles for the Development of International Standards" only governments comments were sought. *Ibid.* at 955.

[1223] See the proposal advanced in the *Report of the Secretary-General on Consultations with NGOs (1994), supra* note 370 at 49.

[1224] *A Fair Globalization*, *supra* note 864 at 121.

[1225] G. Shaffer, "Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts" (2004) 7 J. Int'l Econ. L. 629 at 651 [hereinafter Shaffer, "Parliamentary Oversight"]. Such an

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parliaments enhance public participation in public debates regarding globalization and trade liberalization and serve as a "strategy of making [WTO's] work and power as understandable and accountable as possible to the [public]."[1226] Pascal Lamy, in his previous capacity as the EU Trade Commissioner has argued that a parliamentary consultative assembly could "lead to a stronger public support for the multilateral trading system by making sure that societal choices and collective preferences are fed into the WTO process."[1227] He made a similar call in his position as the Director-General of the WTO

> The first, and relatively simple, steps that we have to take towards a more balanced representation of the world would be to encourage the establishment of parliamentary structures at the international level in order to bring together representatives from various national parliaments, and to admit representatives of civil society to an economic and social council capable of functioning effectively.[1228]

In practice, however, parliamentarians may not have the time and resources to be fully engaged in WTO matters directly at the international level. NGO participation—specifically of single issue NGOs—at the international level can complement the involvement of parliamentarians in WTO debates and contribute to informing policy debates at the national level.[1229]

v- Channeling participation through other inter-governmental organizations

The WTO can seek the input of non-state actors through other inter-governmental organizations that focus on issues that are affected by trade policies.[1230] Other inter-governmental organizations, especially relevant United Nations agencies, have experience

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inter-parliamentarian dimension can be an *ad hoc* structure or a standing body within the WTO institutional structure. *Ibid.* See also S. Charnovitz, "Trans-parliamentary Associations in Global Functional Agencies" (2002) Transnational Associations, online: SSRN <http://ssrn.com/abstract=324320> (date accessed 17 December 2007).

[1226] D.E. Skaggs, "How Can Parliamentary Participation in WTO Rule-Making and Democratic Control be Made More Effective in the WTO? A United States Congressional Perspective" (2004) 7 J. Int'l Econ. L. 655 at 657.

[1227] P. Lamy, "Global Policy without Democracy?" (Conference on the Participation and Interface of Parliamentarians and Civil Societies for Global Policy, Berlin, 26 November 2001), online: WTO < http://ec.europa.eu/archives/commission_1999_2004/lamy/speeches_articles/spla85_en.htm> (date accessed 20 May 2007) [hereinafter Lamy, "Global Policy"].

[1228] Lamy, "Humanising Globalization," *supra* note 1073.

[1229] Shaffer, "Parliamentary Oversight," *supra* note 1225 at 653.

[1230] Charnovitz, "Opening the WTO," *supra* note 477 at 214.

in interacting with non-state actors in their field of work. Given resource constraints at the WTO, joint consultations with agencies like the United Nations Environmental Programme, the International Labour Organisation, the United Nations Development Programme, UNCTAD, the Office of the United Nations High Commissioner for Human Rights, or the World Intellectual Property Organisation, can serve as a channel for receiving non-state actors' input in areas of overlap of trade policies with the work of each of these organizations.[1231]

WTO could also enter into agreements with UNCTAD or regional economic commissions of the United Nations which have wider reach to organize regional consultations with non-state actors or reach out and disseminate information to these actors.[1232] On the other hand, on occasion, non-state actors can also play the role of catalyst in establishing dialogues between the WTO and other intergovernmental organizations and government officials working on issues related to globalization whose work is related to and affected by trade policies.[1233]

c- Increased participation in monitoring implementation

The model of non-state actors role in monitoring states' compliance with their human rights and environmental obligations, which was referred to in Chapter Three, can be replicated within the WTO.[1234] TPRM within the WTO already has capacity of linking up with non-state actors in performing its duties, based on the model of interaction between monitoring bodies in other areas of international law. But, other models used in

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[1231] See also G. Sampson, "Is there a Need for Restructuring the Collaboration among the WTO and UN Agencies so as to Harness their Complementarities?" (2004) 7 J. Int'l Econ. L. 717. Sampson argues that WTO and UN agencies pursue common goals, including sustainable development, and could mutually benefit from closer cooperation. He proposes more specific arrangements for cooperation between WTO, UN agencies and NGOs

[1232] Such an arrangement could serve as an alternative to Pauwelyn's proposal that the WTO must consider the creation of regional WTO offices. J. Pauwelyn, "The Transformation of World Trade" (2005) 104 Mich. L. Rev. 1 at 59 [hereinafter Pauwelyn, "The Transformation of World Trade"].

[1233] For example, the Friedrich-Ebert-Stiftung (FES), an NGO has organized luncheons on trade and human rights with WTO Ambassadors and members of the Committee on Economic, Social and Cultural Rights (CESCR) of the United Nations, and staff of WTO and Office of the United Nations High Commissioner for Human Rights secretariats in Geneva in 2007. <http://www.fes-globalization.org/geneva/documents/HumanRights/21Nov07_Report_TradeHR.pdf> (date accessed 20 March 2008).

[1234] See *supra* note 1097 and accompanying text.

other international organizations, like the World Bank, can also be used for participation of non-state actors in implementation and monitoring of the WTO.

i- Contribution of non-state actors to the TPRM

One area for such involvement is the TPRM. The TPRM is made up of WTO members and conducts a review of national policies on the basis of a report prepared by the government under review as well as one prepared by the WTO Secretariat.[1235] Moreover, according to the WTO Agreement,

> [t]he assessment carried out under the review mechanism takes place, to the extent relevant, against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment.[1236]

However, there is no requirement that the review should rely on the participation of other actors and stakeholders such as individuals and groups. A proposal that is inspired by the role NGOs currently play in the reporting procedures of some human rights conventions is at most ambitious to entrust non-state actors with a greater role, and at least with the possibility of submitting shadow reports to assist the members of the TPRM to reach more informed and inclusive reviews.[1237]

ii- Creating a Compliance Committee

Another model for participation of non-state actors in monitoring implementation of WTO obligations is the creation of a Compliance Committee building on elements from the arrangement envisaged in the *Aarhus Convention*[1238] and the Inspection Panel of the World Bank.[1239]

[1235] *TPRM, supra* note 132, section C. The International Confederation of Free Trade Unions (ICFTU) has occasionally prepared shadow reports on the labor rights record of governments which were under review by the TPRM.

[1236] Section A(ii) of the TPRM, *supra* note 132.

[1237] Advisory Council on International Affairs (the Netherlands), *The Role of NGOs and the Private Sector in International Relations* (The Hague: AIV, 2006).

[1238] See *supra* note 890 and accompanying text.

[1239] Pauwelyn also suggests that a mechanism similar to the World Banks Inspection Panel "could increase its accountability in that it permits affected groups and individuals to challenge the substance of official WTO activities—such as technical cooperation—under the guidelines and rules of the WTO itself." Pauwelyn, "The Transformation of World Trade," *supra* note at 59.

Similarly, various councils, bodies and committees of the WTO (*e.g.,* the Council for Trade in Services, the Textiles Monitoring Body, and the Committee on Agriculture) that conduct executive activities can provide mechanisms for participation of non-state actors.[1240]

iii- Impact assessment of trade policies to avoid tension with non-trade policies

As was pointed out in this chapter the rules governing international trade should take other dimensions of government policies into account in order to ensure coherence between trade and other policies.[1241] A serious effort to address broader issues of global governance will require creating a mechanism for impact assessment within the WTO or imposing an obligation on WTO members to conduct, within their domestic jurisdiction, such an assessment. Proposals have been made that the TPRM may be utilized with respect to financial activities of the member states, in order to provide more informed *ex ante* guidance or assessment on balance of payment situations.[1242] The TPRM can similarly be used to conduct assessments of impact of trade policies on other social policies. Such impact assessment of policies or projects is another means of improving participation, by engaging non-state actors in its implementation.[1243]

d- Balancing representation of different actors

One major challenge in the pursuit of balanced participation of non-state actors in international organizations is a lack of resources for NGOs from the South which was referred to in the survey of problems of participation in Chapter Three. The solution could be the provision of funding by developed countries—who support civil society participation in the WTO—for capacity building to facilitate participation of NGOs from the South. Direct support from developed countries, however, may be met with suspicion

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[1240] Charnovitz, "Opening the WTO," *supra* note 477 at 213; see Figure 2 above.

[1241] Stern states that "[i]n order for all different human interests and values to be taken into account, and not just economic values, all States—and possibly other actors in international relations—should enjoy a fair representation in all international organizations. "How to Regulate Globalization," *supra* note 81 at 267.

[1242] Ahn, "Linkages between IFIs and WTO," *supra* note 102 at 28.

[1243] *High Commissioner for Human Rights' Study on Participation*, paras. 14-17. See also *HRC General Comment 25*, para. 24

of developing countries, and may prove counterproductive[1244] A trust fund could be established and administered by an independent body of experts selected by governments and supported by the WTO Secretariat, to determine the criteria for NGO eligibility for funding and to conduct capacity-building activities in partnership with NGOs from the South.[1245]

It is equally important to strike a balance between the power of corporations and non-profit organizations. Adopting a specific model aimed at enhancing the participation of NGOs will balance the informal influence that corporations can exercise on policy-making at the WTO.[1246]

e- Increased transparency

All efforts to increase participation will fail in the absence of transparency and access to information. While there have been considerable improvements in access to information in the WTO, there is still room for more transparency, especially during negotiations. Increased transparency can also be achieved through measures adopted at the national level to make information about WTO negotiations and dispute settlement proceedings available to the public.[1247]

However, the Consultative Board of the WTO on the future of the organization was cautious in addressing questions of transparency, and focused on the need for a certain level of confidentiality in trade negotiations.[1248] It is still important to ensure that the current level of official transparency in the WTO is preserved and that the informal practices devised to circumvent the rules on transparency are not continued.[1249]

[1244] Charnovitz cites the example of NGOs being investigated for accepting support from abroad without government approval. "Two Centuries of Participation," *supra* note 781 at 283-284.

[1245] Some features of the ACWL can serve as a model for such a body.

[1246] Dunoff calls this "horizontal equity argument." "Debate over NGO Participation at the WTO," *supra* note 198 at 456.

[1247] *E.g.* On measures adopted in the United States under the *Uruguay Agreement Act* see Aceves, *supra* note 881 at 452-452.

[1248] *The Future of the WTO, supra* note 1276 at 57-58, paras. 197-200.

[1249] In order to increase predictability, transparency and legitimacy in the WTO negotiations Blackhurst and Hartridge propose creation of a "WTO Consultative Board" which would not be empowered to take decisions that bind the general membership, but would consult, discuss, debate and negotiate and would make recommendations for approval by the membership. The board would be part of the WTO organizational chart, with fixed membership distributed between larger traders and groups. The model appears to be based on the IMF and the World Bank boards. This proposal, however, does not envisage any

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4- Proposals for participation in adjudication based on policy arguments for enhanced participation

Apart from the above-mentioned proposals geared towards increased participation in creation of norms and their enforcement, a number of proposals in this section focus on participation of non-state actors in adjudication. These proposals, unlike the proposals in the previous section, are less based on experience of other organizations, and are aimed at fulfilling some of the policy arguments for increased participation presented at the beginning of this chapter.

a- Direct access to (or third party participation in) the dispute settlement system for non-state actors

As demonstrated in the previous chapter, there are instances of direct access to non-state actors in international dispute settlement mechanisms. These are, however, rather limited and more common in disputes related to foreign direct investment. To propose direct access for non-state actors to the dispute settlement system of the WTO would appear premature if not naïve and impracticable.[1250] This does not exclude non-state actors from participation through other means, which are referred to in the next sections.

Even the rare instances of direct access for non-state actors to the international dispute settlement systems within intergovernmental structures are limited to cases where non-state actors are directly a party to the dispute. Attempts to provide more access to the WTO dispute settlement system have been criticized on the basis that "[t]he expansion of standing not only belies the reality of how trade policy is determined, but also could force the creation of trade policy even further into the public consciousness. The resulting loss of its low profile might prove disastrous for free trade."[1251]

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role for non-state actors. See R. Blackhurst, & D. Hartridge, "Improving the Capacity of WTO Institutions to Fulfill their Mandate" 7 J. Int'l Econ. L. 705.at 708-710.

[1250] The International Law Association, however, goes as far as to call on the WTO membership to "[allow] individual parties, both natural and corporate, an advisory locus standi in those dispute settlement procedures where their own rights and interests are affected." *Declaration on the Rule of Law in International Trade, supra* note 1218. There are also authors who believe that "[a]s long as private parties have to rely on their governments to initiate and advance trade disputes for them, they will be uncertain about the future enforcement of trade," and propose the modalities for private party standing before the WTO for those who have suffered actual harm due to illicit trade practices of other states. Schleyer, *supra* note 1094 at 2307-2311.

[1251] Nichols, "Extension of Standing in WTO Disputes," *supra* note 175 at 315.

b- Opening the dispute settlement hearings to the public

An issue separate from, but related to, direct access of non-state actors to the WTO dispute settlement system is opening the panel and Appellate Body hearings to the public. The trend towards more transparency in the WTO dispute settlement system should be encouraged and the practice of opening dispute settlement proceedings to the public should be formalized.[1252] There is no good justification for dispute settlement panels to hold their sessions *in camera*, and as stated earlier, on several occasions parties to the WTO disputes have agreed to open the panel proceedings to the public.[1253] Together with opening the proceedings transcripts of hearings can be made available to the public.[1254]

The Consultative Board of the WTO on the future of the organization, while considering this question a complex one, recommended that "as a matter of course, the first level panel hearings and Appellate Body hearing should generally be open to the public."[1255] The Consultative Board further recommended that the panel, Appellate Body or a disputing party should be able to argue that there is a "good and sufficient cause" to exclude the public from all or part of a hearing.[1256]

Of course, the efforts for increasing transparency in dispute settlement should be balanced with the protection of legitimate private or state interests.[1257] The issue has been

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[1252] The International Law Association also recommended that the WTO dispute settlement system should be opened "for observers representing legitimate interests in the respective procedures." *Declaration on the Rule of Law in International Trade, supra* note 1218.

[1253] According to James Bacchus the former Chairperson of the Appellate Body "[t]here is no reason for WTO proceedings to remain secret, and there is every reason for them to be open to public scrutiny." "Open Up the WTO" *Washington Post* (20 February 2004) A25.

[1254] C. Carmody, "Beyond Proposals: Public Participation in International Economic Law" (2000) 15 Am. U. Int'l L. Rev. 1321 at 1343. Carmody also suggests that a visible contact point, an accessible register (containing in chronological order every step taken during the case), and a public dossier of documents to be available prior to the process as measures to increase transparency in the dispute settlement system. *Ibid.* at 1243-1245.

[1255] *The Future of the WTO, supra* note 1276 at 58, paras. 261-2.

[1256] *The Future of the WTO, supra* note 1276 at 58, paras. 263. An example of such 'good and sufficient cause' in the view of the Consultative Board is "business confidential" matters, and the Board recommends that at least during the early years of this policy reasons given by a party as "good and sufficient" should be treated as determinative. *Ibid.*

[1257] The *Havana Charter* had taken this issue into account in relation to the publication of reports of the dispute settlement system. Article 48(9) of *Havana Charter* indicated that in the publication of such reports "[t]he Organization shall not, if a Member so requests, disclose confidential information furnished by that

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raised in the context of review of the *DSU*.[1258] Former President of the United States, Bill Clinton, for instance proposed in 1998 that

> [t]he WTO should take every feasible step to bring openness and accountability to its operations. Today, when one nation challenges the trade practices of another, the proceeding takes place behind closed doors. I propose that all hearing by the WTO be open to the public, and all briefs by the parties be made publicly available. To achieve this end, we must change the rules of this organization. But each of us can do our part – now. The United States today formally offers to open up every panel that we are a party to – and I challenge every other nation to join us in making this happen. Today, there is no mechanism for private citizens to provide input in these trade disputes. I propose that the WTO provide the opportunity for stakeholders to convey their view, such as the ability to file 'amicus briefs' to help inform the panels in their deliberations. Today, the public must wait weeks to read the report of these panels. I propose that the decisions of these trade panels be made available to the public as soon as they are issued.[1259]

The negotiations for review of the *DSU* have been going on since 1999 and have not reached a conclusion yet.[1260]

c- Institutionalizing national mechanisms related to WTO disputes

The most practicable solution for providing non-state actors with access to remedies is through national mechanisms for addressing WTO disputes.[1261] With

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Member, which if disclosed would substantially damage the legitimate business interests of a commercial business enterprise." See *Havana Charter*, *supra* note 104, art. 48(9).

[1258] The United States has made a proposal to make panel proceedings more transparent: permit private parties such as non-governmental organizations (NGOs) and real parties in interest (individuals and companies of the Member countries who will actually bear the consequences of a panel's decision) to attend oral proceedings before the panel. While there is opposition among certain members of the WTO, many activists have expressed concern that the dispute settlement process and the WTO in general are too secretive. Stewart & Karpel, *supra* note 643 at 608. See also United States Papers on Dispute Settlement online: USTR Website <http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/US_Papers_on_Dispute_Settlement/Section_Index.html> (date accessed 14 February 2008). A more conservative approach was adopted by the EU, which proposed public hearings to the extent that panel procedures become more professionalized through the creation of a permanent tribunal. See *Discussion Paper from the European Communities: Review of the Dispute Settlement Understanding (DSU*), Brussels, 21 October 1998, online: Official EU Website, <http://europa.eu.int/comm/trade/miti/dispute/0212dstl.htm> (date accessed 12 June 2002). EU further proposes that "private parties should not be granted rights in the proceedings which go beyond those of non-participating WTO Member States," and that "any involvement of non-participating Member States or private parties in proceedings should neither hinder nor delay the expeditious conduct of business by panels and the Appellate Body." *Ibid.*

[1259] "Statement H.E. Mr. William J. Clinton, President of the United States in the Geneva WTO Ministerial Meeting (18 May 1998)" in WTO, *50th Anniversary of the Multilateral Trading System* (Geneva: WTO, 1998) 16 at 17.

[1260] See "New Negotiations on the Dispute Settlement Understanding" online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations> (date accessed 1 April 2008).

sufficient remedies available to non-state actors at the national level, access to dispute settlement at the international level will be less urgent, if not unwarranted. However, the level and types of national mechanisms available to non-state actors are different from state to state. In the light of developments in relation to the position of non-state actors in international law, proposing a formal obligation under WTO treaties for states to ensure such national mechanisms are legally sound appears less controversial than other alternatives.

i- Formalizing diplomatic protection for non-state actors in relation to WTO obligations

To label the WTO dispute settlement system as "diplomatic protection" is not accurate. However, in the context of this thesis, this heading is meant to highlight the need for mechanisms at the national level through which non-state actors whose rights under WTO agreements are violated, after exhaustion of national remedies, can initiate a dispute at the DSB. Under classic theories of international law exercise of diplomatic protection is a discretionary right of the state. However, developments in the position of non-state actors and individuals in international law require a review of classic doctrines to ensure that rights of non-state actors and individuals are protected.

ii- Ensuring consultations with non-state actors and transparency at the national level

Members of the WTO can be required to conduct consultations at the national level regarding dispute settlements proceedings at the WTO. The procedures established by the United States' *Uruguay Round Agreements Act* can serve as a model for such consultations.[1262] According to this Act, whenever the United States is party to a dispute the USTR is required to consult with the appropriate congressional committees, the petitioner (if any), and the relevant private sector advisory committees at each stage of the proceedings. The USTR is also required to consider the views of representatives of

[1261] The International Law Association encourages WTO members to "strengthen the legal and judicial remedies of their citizens if the latter are adversely affected by violations of precise and unconditional WTO guarantees of freedom and non-discrimination, especially where such violation of WTO rules has been ascertained in a legally binding manner by rulings of the DSB." *Declaration on the Rule of Law in International Trade, supra* note 1218.

[1262] 19. U.S.C. s. 3501 (1994).

appropriate interested private sector and NGOs concerning the matter. [1263] The USTR is also required to publicize all non-confidential documents presented by the United States in dispute settlement proceedings, to request that other parties authorize the disclosure of their written submissions to the public, to request each party in a dispute to provide non-confidential summaries of its non-confidential written submissions, to make reports of the panels or the Appellate Body available to the public and to maintain a public file on each dispute settlement proceeding to which the United States is a party.[1264] All of these measures are intended to increase transparency in the dispute settlement proceedings and can be taken as a model by other states.

iii- Implementation of dispute settlement reports

Similar to the debate over direct application of WTO obligations at the national level, the ability to invoke panel or Appellate Body reports in domestic jurisdictions is subject to disagreement. Recognizing the right of non-state actors to rely on DSB report is another means of ensuring non-state actors rights in the WTO. This idea is supported by the view that non-state actors are the real beneficiaries of the trading system.[1265] Furthermore, when a losing party does not implement the dispute settlement decision it may be inflicting harm to private parties who have legitimate exception of compliance and should be able to claim damages.[1266] Finally invokability is in line with the idea of a more rule-oriented trading system.[1267]

[1263] Aceves, *supra* note 881 at 450-45. The USTR is also required to publish a notice in the Federal Registrar following its request to establish a dispute settlement panel or after receiving a request from another WTO member for the establishment of a panel. USTR is also required to take into account any advice received as a result of these consultations. URAA, Section 127 (b)(1), 19 U.S.C. s. 3537 (1994).

[1264] URAA Section 127(b)-(e), 19 U.S.C. s. 3537 (1994).

[1265] See Eeckhout, *supra* note 627 at 53.

[1266] See T. Cottier, & K. Nadakavukaren Schefer, "The Relationship Between World Trade Organization Law, National and Regional Law" (1998) 1 J. Int'l Econ. L. 83 at 85.

[1267] Opponents of invokability raise a number of arguments to support their position. One is that direct effect of WTO rules is a pre-condition for invokability of dispute settlement reports. But as some authors have pointed out, invokability is a separate issue from direct effect. See Cottier, & Schefer, *ibid.* at 84. Another argument is that invokability of the reports would upset reciprocity and the balance of power between trading partners, or would reduce the margin of discretion that WTO members enjoy in the implementation. See Eeckhout, *supra* note 627 at 48. It is also argued that dispute settlement reports are not binding but only one of the options available for implementation, and that the losing party can provide compensation instead of implementation. J. Bello, *supra* note 203 at 416.

d- Formalizing the amicus curiae *submission process*

The political debate surrounding the acceptance of *amicus curiae* submissions in the WTO dispute settlement proceedings should be resolved through acceptance and formalization of the process.[1268] It has been argued that *amicus curiae* participation "is a matter of public participation in the decision-making process, which can be justified because the decisions involve public interest."[1269] Beyond providing information, *amicus* participation "generates direct and independent legitimacy for the decision, the process, and ultimately the institution,"[1270] and can contribute to easing the tension between trade and non-trade policies.[1271]

In the context of the Doha Round negotiations on the review of the *DSU*, the EC has proposed to include an article 13bis in the *DSA* to address the question of unsolicited *amicus curiae* briefs.[1272] According to this proposal the WTO panels and the Appellate Body will have the competence to consider unsolicited *amicus curiae* briefs, under conditions that to a large extent reflect the *Additional Procedure* developed by the Appellate Body in the *EC-Asbestos* case.[1273] Another proposal by the African Group of the WTO members and India explicitly prohibits WTO panels and the Appellate Body from accepting and considering unsolicited *amicus curiae* briefs.[1274] Eventually, neither

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[1268] The Appellate Body's effort to formalize the *amicus curiae* submissions through procedural solutions is similar to the U.S. Supreme Court's decision to regulate judicial lobbying by formalizing the *amicus curiae* submission process. Padideh Ala'i taking note of the Appellate Body's failure to formalize the *amicus curiae* submissions through procedural solutions, attribute this failure to the absence of a legal tradition or legitimacy comparable to that of the U.S. Supreme Court. Ala'i, *supra* note 648 at 93-94.

[1269] Gélinas, "Dispute Resolution as Institutionalization," *supra* note 272 at 503.

[1270] *Ibid.*

[1271] See *supra* note 1110 and accompanying text.

[1272] Dispute Settlement Body, *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, Communication from the European Communities, EU/TN/DS/W/1 (13 March 2002). [hereinafter *EC Proposal on DSU*]

[1273] *Supra* note 677. However, EC proposal does not copy the *Additional Procedure. E.g.* unlike the *Additional Procedure* which the EC proposal provides that "[a]ny person, whether natural or legal, other than a party or third party to the dispute, wishing to make an amicus curiae submission to the panel or the Appellate Body, must apply for leave to file such a submission from the panel or the Appellate Body within 15 days from the date of the composition of the panel or within 5 days from the date of the notice of appeal, respectively." *Ibid.* at para. 10.

[1274] *Negotiations on the Dispute Settlement Understanding. Proposal by the African Group* TN/DS/W/15, (25 September 2002) [hereinafter *African Group Proposal on DSU*], and Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe - TN/DS/W/18, 7 (October 2002). According to the *African Group Proposal on DSU*

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of these proposals was retained in proposals for reform of the WTO dispute settlement system, and the negotiations are still ongoing.[1275]

In spite of the ongoing debate regarding *amicus curiae* briefs, one of the recommendations of the Consultative Board of the WTO on the future of the organization agreed with the procedure adopted by the dispute settlement system for acceptance and consideration of *amicus curiae* briefs.[1276] However, the same report noted the "need to develop general criteria and procedures […] to fairly and appropriately handle *amicus* submissions, balancing worries about resource implications with fairness and general recognition that such submissions can in some instances improve the overall quality of the dispute settlement process."[1277] Accordingly elements of a process that takes into account the considerations of due process have to be elaborated upon. It is also important to note that *amicus curiae* is characterized by its informal and soft qualities, which make for a flexible legal framework.[1278] With these considerations in mind, conditions for *amicus* participation can be listed as follows: participants should demonstrate their interest in participation; their participation should be authorized by the relevant body; and their submission should meet certain formal requirements.

i- Ratione materiae and Ratione personae

The first criterion for *amicus* participation is related to the subject of intervention. An "interest" is deemed sufficient for participation.[1279] This interest is seen more from the

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> It is the view of the African Group that the use of the expression "amicus curiae" in the context of Article 13 is inappropriate. Article 13 concerns "the right to seek information" and for clarity that expression should be maintained and used within the framework of the intention in Article 13. "Amicus curiae" translates in common parlance as "friends of the court" and is ordinarily understood to refer to respected experts that the court may request for additional advice and guidance on issues of law and interpretation and issues requiring expert knowledge. The term is not ordinarily used in reference to the adducing of factual evidence in support of a party's case.

Ibid. at para. 11:b.

[1275] Special session of the Dispute Settlement Body, TN/DS/W/9, TN/DS/W/10, TN/DS/W/11.

[1276] WTO, Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: WTO, 2004) at 57, para. 260 [hereinafter *The Future of the WTO*].

[1277] *The Future of the WTO, supra* note 1276 at 57-58, para. 260.

[1278] Ascensio, *supra* note 914 at 911.

[1279] Ascensio, *supra* note 914 at 912. The notion of "interest" could be understood broadly go beyond "legal interest" to include an abstract interest in justice being carried out, as opposed to general participation in dispute settlement which should be open to the person who has a specific legal interest in the case and whose subjective rights are affected by the ruling. *Ibid.* This is in line with several international

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perspective of the dispute settlement body than from that of the intervener. The second criterion is related to the quality of the participant, who should have a *locus standi* in the jurisdiction dealing with the case. In the case of WTO dispute settlement, *amicus curiae* provides a possibility for participation of persons who normally do not have access to the dispute settlement procedure, even though their rights may be directly affected.[1280]

ii- Authorization to participate

The two-level procedure of accepting *amicus curiae* participation, adopted by the Appellate Body, addresses the concerns related to feasibility and efficiency of this process.[1281] In several domestic and international jurisdictions the judge has discretion to authorize submission of *amicus curiae* briefs,[1282] and the Appellate Body also adopted this approach in the *EC Hormones* case.[1283] This discretion is deemed necessary to avoid an influx of *amicus curiae* submissions.[1284]

iii- Procedures and conditions of participation

Finally, it is important to outline the procedures for *amicus* participation. The procedures should address both the request for participation and the form and content of submissions. Like other dispute settlement procedures, in order to ensure due process, the procedure should provide clear deadlines and indicate the length of submissions, as well as information that should be provided. The *Additional Procedure* adopted by the Appellate Body in the *Asbestos* case set clear conditions for leave to submit an *amicus* brief. The application must:

> (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;

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administrative procedures, where subjective right is defined as a special legal interest of the person who participates in the proceedings. See C.F. Amerasinghe, *The Law of the International Civil Service (as Applied by International Administrative Tribunals),* 2nd ed. (Oxford: Clarendon Press, 1994) at 589.

[1280] As Ian Brownlie pointed out in 1962, "[e]ven if the individual is not to be given procedural capacity a tribunal interested in doing justice effectively must have proper access to the views of individuals whose interests are directly affected whether or not they are parties as a matter of procedure." "The Individual before Tribunals Exercising International Jurisdiction" (1962) 11 I.C.L.Q. 701 at 719 [hereinafter Brownlie, "The Individual before International Tribunals"].

[1281] Marceau & Stilwell, *supra* note 1040 at 186.

[1282] Shelton, *supra* note 919 at 617-618; Ascensio, *supra* note 914 at 914.

[1283] *EC Hormones Appeal Report*, *supra* note 256 at para. 147.

[1284] Ascensio, *supra* at 916.

> (b) be in no case longer than three typed pages;
>
> (c) contain a description of the applicant, 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;
>
> (d) specify the nature of the interest the applicant has in this appeal;
>
> (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
>
> (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and 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; and
>
> (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.[1285]

Given the extensive information requested, the 3-page limit for submissions may be considered too short, and in case of confidentiality of the panel proceedings fulfilling condition (f) may be impossible. Nonetheless, this procedure addresses the main concerns relating to due process, and ensures both the objectivity and independence of interveners.

In terms of the form of participation, a written submission, as opposed to oral pleading, is the current practice of the WTO dispute settlement and perhaps the only practicable solution. In the *Asbestos* case the Appellate Body required that written briefs filed by an applicant granted leave to file such a brief:

> (a) be dated and signed by the person filing the brief;
>
> (b) be concise and in no case longer than 20 typed pages, including any appendices; and
>
> (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.[1286]

[1285] *Additional Procedure*, *supra* note 677, at para. 3.

[1286] *Ibid.* at para. 7.

These requirements ensure due process in the submission of briefs. The question remains, however, as to the possibility of *amicus curiae* presenting suggestions and recommendations.[1287]

The responsibility to adopt rules regarding *amicus* participation ultimately rests with the WTO membership, and is necessary to terminate the current uncertainty regarding admissibility of *amicus* briefs in the dispute settlement procedures.[1288]

e- A more comprehensive approach to members' obligations under international law

As was demonstrated in this thesis, WTO dispute settlement panels or the Appellate Body are called upon to adopt a more comprehensive approach to members' obligations under international law. The delicate side of the question is that the WTO dispute settlement system should not get involved in interpretation of other obligations of member states. However, as extensively demonstrated in recent years, conflict of WTO law with other rules of international law can be resolved without the WTO dispute settlement system independently interpreting other obligations of its members.[1289]

Weiler argues that the profile of panelists does not match the new reality of WTO dispute resolution.[1290] Participation of panelists with expertise in fields that overlap between trade and non-trade policies can improve the quality of reports and protect non-trade interests.[1291] The language of the *DSU* allows for such practice,[1292] and expertise of

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[1287] C. Tomuschat, holds that "NGOs are authorized to make suggestions and recommendations as amici curiae." See "International Law: Ensuring the Survival of Mankind on the Eve of a New Century—General Course on Public International Law" (1999) 281 Rec. des Cours 1 at 157.

[1288] see Marceau & Stilwell, *supra* note 1040 at 185.

[1289] Pauwelyn, *Conflict of Norms*, *supra* note 87.

[1290] He elaborates that "[t]he life experience, professional background of Panellists have to be commensurate with the evident gravity and profundity of the issues decided in a globalized world." "The Rule of Lawyers," *supra* note 337 at 202.

[1291] Reinisch, & Irgel, *supra* note 726 at 146. See also R.E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years" (1999) 8 Minnesota J. Global T. 1 at 31-45 [hereinafter Hudec, "New WTO DS: An Overview"] (including proposals to streamline and professionalize the WTO dispute settlement process).

[1292] Nichols, "Extension of Standing in WTO Disputes," *supra* note 175 at 328. The *DSU* states that "[p]anels shall be composed of well-qualified governmental and/or nongovernmental individuals, *including* ..." as oppose to "limited to." *DSU,* art. 8:1.

non-state actors can contribute to composition of the panels to the quality of information available to the panelists.[1293]

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While the interactional theory of international law does not provide recipes for participation, it does make a case for broad participation of different stakeholders on the international scene. In the context of the WTO, due to asymmetry of power between different non-state actors formal channels of participation proposed in this section are appropriate and ensure representation of different interests and agendas.

Comparison of participation in the WTO with other international organizations in this thesis revealed that WTO, whilte it has institutional capacities to accommodate increased participation, is lagging behind on historical developments that have led to creation of formal channels of participation. The proposals in the last two section drew, to a large extent, on experiences of other international organizations that have provided formal channels of participation for non-state actors during the past several decades, and attempted to address the policy concerns which warrant more participation in the WTO. Most notably, these proposals purport to create more balanced representation of actors and interests, reinforce the rule-oriented system and increase transparency, increase legitimacy in the WTO and address the tension between trade and other policy areas.

[1293] It is also suggested that other institutions should be empowered to provide substantive expertise (*e.g.* World Health Organisaiton on issues related to pharmaceutical compulsory-licensing issues)to which panels will be bound. L. Wallach, "Transparency in WTO Dispute Resolution" (2000) 31 Law & Pol'y Int'l Bus. 773 at 777.

Conclusion

> For 50 years, trade decisions were largely the province of trade ministers, heads of government and business interests. But now, what all those people in the street tell us is that they would also like to be heard, and they're not so sure that this deal is working for them.
> William J. Clinton[1294]

This thesis highlighted the failure of public international law in two areas. First, "international law orthodoxy"[1295] is clearly lagging behind the reality of international relations when it comes to recognizing the role of non-state actors. Second, international lawyers have failed to provide a theoretical framework for international trade and WTO law that incorporate this body of law into the broader corpus of international law. As a result of these failures, the WTO legal system does not properly address the question of participation of non-state actors in its processes.

Ian Brownlie's conclusion in 1962, that "[a] significant number of governments are reluctant to assent to any arrangement which might seem to confer international personality on individuals, even if the capacity involved is very restricted and specialized" holds true today.[1296] However, as was demonstrated in this thesis, realities of international relations and very important developments in the past decades point in a direction different than does that conclusion. With a move from reciprocity to multilateralism in the international arena, including in trade, and new realities of international relations canvassed in this thesis, participation of non-state actors became increasingly important and is no longer a new phenomenon. In certain ways, participation

[1294] "Remarks by the President to the Luncheon in Honor of the Ministers Attending the Meetings of the World Trade Organization", online: United States Mission in Geneva <http://www.usmission.ch/press1999/122clin.html> (date accessed: 3 January 2007).

[1295] Term used by Charnovitz. "NGOs and International Law," *supra* note 371 at 360.

[1296] Brownlie, "The Individual before International Tribunals," *supra* note 1280 at 719.

during the League of Nations was even broader than it is today in many international institutions. For example, the ILO's tripartite system, which dates back to 1920's, is still one of the most progressive systems of representation among international organizations. The ITO, the failed predecessor of the WTO, would have had a more advanced mechanism for participation of non-state actors in its activities. Even during the 1946 United Nations Conference on Trade and Employment for establishing an ITO the role of non-state actors was much more substantial than their role during the Uruguay Round that resulted in the establishment of the WTO.

During the Cold War international relations was overshadowed by the rivalry between the West and the East which, coupled with the end of the Colonial era, bolstered the notion of sovereignty and dominance of states in international relations. The end of the Cold War brought an era of intense globalization which, by contrast, provided an opportunity for more international cooperation and for presence of global networks of non-state actors in different spheres of international activities.

The WTO, itself a product and a generator of greater globalization, could be seen as indirectly empowering non-state actors. Within the organization itself, while different Directors-General have adopted a rhetoric supporting broader participation of non-state actors, their words are not matched by the realities of the WTO legal system. According to a former Director-General of the WTO, for instance, "[t]he strong dynamism of NGOs makes them increasingly influential in all areas and they should be given an appropriate role to play in the constructive formation of our New World Economic Order."[1297] The current Director-General of the WTO also holds a positive view of the current state of affairs stating that the organization "has been able to adapt and adjust to increased demands from the civil society and NGOs."[1298] Nonetheless, and despite many improvements during its first 12 years of activities, the WTO is still subject to sharp

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[1297] Panitchpakdi, *supra* note at 34.

[1298] Lamy, "Humanising Globalization," *supra* note 1073. Lamy states that

> Now the WTO has learned to engage civil society in a variety of different ways. Through the annual Public Symposia that it organizes, governments, the WTO Secretariat, academia and civil society all have the opportunity to interact. There are also regular WTO briefings and we circulate to Members a list of all papers submitted by NGOs to the WTO.

Ibid.

criticism in the area of participation and as demonstrated in this thesis formal participation of non-state actors in its processes remains unjustifiably low. The WTO's *NGO Guidelines* cite the "special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations" as the reason for "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."[1299] Given the range of non-state actors' modes of participation in other international organizations—including financial, economic or development agencies—the argument that WTO has a special character is not convincing.

Two main arguments were made in this thesis to address the failures of mainstream international law and to provide a framework for participation of non-state actors in the WTO.

First, as demonstrated in Chapter One, the WTO and its law have to be understood in the context of international law. The 50-year delay in the creation of a global trade organization led to a disconnect between international trade law and public international law, and as a result international trade law and the GATT were ignored by international lawyers for a long period. The *de facto* development of GATT law resulted in an unnatural growth and occasionally the misconception that GATT law is not part of public international law. The creation of the WTO has rectified this situation to a certain degree, but in 1995 the momentum that existed in 1945 for understanding trade in the context of peace and the then-new system of global governance had been lost. The new developments were based on a formal notion of legalism and institutionalism which was already outdated, and as a result it did not go far enough in placing the WTO in the broader context of global governance. Seen in a broader context, the WTO has to address the shortcomings of globalization. Allott refers dramatically to the risk of a system which does not take a comprehensive approach to administering globalization:

> In particular, and above all, international society now contains the potentiality of a human future in which the globalising of economic and governmental social systems will be merged with a rudimentary international social system inherited from the past, a system which has been the cause of so much social evil, local and global. It is a social system in which the highest value continues to be the

[1299] *NGO Guidelines, supra* note 493, para. VI.

> maximizing of the advantage of the particular social formations known as 'states', and in which the maximizing of the survival and prospering of each human individual and of all-humanity is conceptually secondary, in practice and in theory. It is an international system which, with the overwhelming political and economic energies generated by globalisation, is perfectly designed to maximise the risk of every form of social evil.[1300]

It was argued, in Chapters Three and Four, based on other experiences in international relations, that non-state actors can contribute to increased coherence among international actors and can help position the WTO in the broader system.

Second, as outlined in Chapter Four, a framework based on an interactional theory of international law can help justify and ensure broader participation in the process of norm making in the WTO and help susta the legitimacy of its results. This framework builds on Fuller's theory of law, which explains law as a "purposive enterprise" which is shaped by human interaction, and the constructivist theory of international relations, which highlights the practices of actors, identities and their interaction. This heuristic theory, which was presented as a developing sketch, justifies broader participation of non-state actors in international law generally, and in the WTO in particular. This participation can be through formal or informal channels.

Through informal participation those among non-state actors that have more access, resources, and influence have an advantage over other non-state actors. This is contrary to the goal of participation of non-state actors, which is to create a balance between private and public interest in the WTO and integrate non-economic with economic values. The proposals in Chapter Four, therefore, focused on formalizing the participation of non-state actors in the WTO drawing on lessons from other areas of international law. Details and technicalities of participation of non-state actors can be subject to more consultation and elaboration.

As the WTO will be faced with new challenges related to the overlap between trade and non-trade issues it will be more important to rely on information and input from non-state actors. Non-state actors will thus help the WTO move further away from the *realpolitik* of international trade and find its place in a system of global governance. John Maynard Keynes famously observed "[t]he political problem of mankind is to combine

[1300] Allott, *The Health of Nations, supra* note 16 at 93-94.

three things: economic efficiency, social justice and individual liberty."[1301] While combining the three is certainly a challenging task, a system of global governance has to strike a balance between these three, as well as new global challenges such as protection of environment. Broader participation of non-state actors at the international level is indispensable in reaching that balance.

[1301] *The Collected Writings of John Maynard Keynes*, vol. 9: Essays in Persuasion (London: Macmillan, 1971) at 311.

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