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Sur - Human Rights University Network
Rua Pamplona, 1197 - Casa 4 São Paulo/SP - Brasil -
CEP: 01405-030 Tel.: (5511) 3884-7440 - Fax (5511) 3884-1122
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MICHELLE RATTON SANCHEZ

Professor at the São Paulo Law School, Getulio Vargas Foundation (DireitoGV). Researcher for the Law and Democracy Group of the Brazilian Center for Analysis and Planning (CEBRAP). Holder of a Bachelor's Degree and Doctorate from the University of São Paulo Law School.

ABSTRACT

The structures of the multilateral trade system, redefined during the Uruguay Round (1986-1994), have advanced demands for participation by non-state actors, among them non-governmental organizations. This article analyzes World Trade Organization regulations on direct participation by these actors and their evolution in recent years, with brief critical observations on the topic. (Original in Portuguese.)

KEYWORDS

World Trade Organization (WTO) – Non-governmental organizations (NGOs) – Participation.



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BRIEF OBSERVATIONS ON THE MECHANISMS FOR NGO PARTICIPATION IN THE WTO *

Michelle Ratton Sanchez

Introduction: Why talk about participation of non-governmental organizations in the WTO?

The World Trade Organization (WTO), as an inter-governmental organization, recognizes the predominance of States in its deliberative process. Following this logic, employees of the State bureaucracy of its Members negotiate and make decisions within the scope of the WTO. For the international community, these employees are considered representatives of the government of each Member State. For the internal community of each State, these employees act, by and large, as auxiliary bodies of the Executive or Legislative Branch, exercising a popular indirect mandate grounded in either a prior mandate or an *ex post* control. This is a linear structure of representation, one in which there is a “national filter” in internal/international relations.¹ It was and still is a highly valid structure for relations structured under the inter-state concept of international relations.

* This article is based on research presented in the thesis *Demandas por um novo arcabouço sociojurídico na Organização Mundial do Comércio e o caso do Brasil* (Demands for a new socio-juridical framework in the World Trade Organization and the case of Brazil), for which the author obtained her Ph.D. from the São Paulo University Law Faculty in April 2004. Preliminary versions of this text were presented at the *Meeting of the Knowledge Development Group on Trade and Human Rights*, organized by SUR/IDCID in April 2005, and to the course *The case of access to medicine in Brazil*, organized by SUR in November 2005. The research has been updated and supplemented with data on participation up until December 2005.

See the notes to this text as from page 116.

Nevertheless, recent changes have prompted the emergence of a new logic in international relations, extending beyond the inter-state order: a cosmopolitan logic.² One of the most striking elements of this cosmopolitan logic is that while the State remains one of the key actors in the international system, it welcomes participation by other actors that bring with them other structures, forms of action (“non-state”) and, consequently, other forms of regulation for the system.

Among the changes shaping this cosmopolitan logic are: (i) the emergence of new forms of social organization, in virtue of both increased cross-border interaction and the changing role of the State; (ii) a greater interdependence of States, which, in turn, requires a greater regulatory capacity by inter-governmental organizations; and (iii) the consolidation and expansion of certain principles in the game of politics, such as democracy, legitimacy, transparency, accountability and participation, on both national and international levels. These elements constitute a new reality and have prompted significant transformations in the coordination between governmental, non-governmental and inter-governmental organizations.

In the case of the WTO, some of the characteristics of its institutional structure and its *modus operandi* have caused this new logic to be incorporated into the multilateral trade system, among them: the nature of its agreements and its expansion into different areas governing social life; the dynamics and intensity of WTO work, with daily meetings to negotiate and monitor the process of implementing multilateral trade rules; the availability of a dispute settlement mechanism, with the combination of public and private interests; and the possibility for accession of new Members, under alternative rules.³ These characteristics also promote a more “judicialized” system,⁴ in which the culture of observing rules may always be invoked by Members and prevail in trade relations.

In this context, some important questions can today be raised about the relation of inter-state and cosmopolitan logics in the WTO, particularly concerning: (i) the exercise of representation by States in the inter-governmental forum; (ii) the extension of this representation (due to the reduction in the capacity to coordinate all relations on an international level by the “national filter”) and (iii) the possibility of enlisting and/or intensifying the participation of non-state actors in the deliberative process of these kinds fora.⁵ I have already examined the first two points in previous articles⁶ and here I shall examine point (iii).

Given the disparity between the inter-state and cosmopolitan logics and the confluence of these logics in the structure of the multilateral trade system (which throughout its history has centralized decision making among few of its Members), it becomes important to question the channels of direct participation

open to non-governmental organizations (NGOs)⁷ in the WTO. Furthermore, I shall also examine how these channels of participation have evolved over the years, since the creation of the WTO in 1994.

Before embarking on the intended examination, it should first be pointed out that, traditionally, the negotiation and application of multilateral trade system rules used to involve mainly only trade organizations (i.e., representatives of producers, dealers and distributors of goods). But once WTO agreements came into effect and its institutional structure was implemented, for the reasons cited above, this scenario changed and a growing interest has developed among other NGOs in the WTO's decision making process. Within this group, special attention should be paid to those that concern themselves with sustainable development, which are in contrast to the sterile rhetoric of trade liberalization. Included in this category are NGOs working in defense of human rights and the environment. Consequently, growth in not only the presence, but also the profile of NGOs in the WTO's decision making process has, in recent years, triggered important demands to evolve the mechanisms for direct participation by NGOs that have penetrated the legal and social structure of the Organization, as I will point out in the pages ahead.

Direct participation by NGOs in the WTO: Implementation and new demands

General provisions for participation

The provisions for direct participation by NGOs in the WTO are contained in the Marrakesh Agreement⁸ and other documents and decisions adopted in the workings of the organization either by Members or by the Secretariat. According to the provisions for participation and the demands presented for their improvement, influences on WTO governance can be seen in three levels: making rules, implementing rules and the process of interpreting rules, with a view to settling disputes.⁹ In this subitem, I shall present the cross-cutting provisions that influence all three levels, and, in the other subitems, those specific to each level.

One of the first provisions on direct participation by NGOs in the WTO is contained in Article V.2 of the Marrakesh Agreement. This article determines that the WTO General Council *may* make appropriate arrangements for *consultation and cooperation* with NGOs concerned with matters related to those of the WTO.

In general, the forms of participation in inter-governmental forums can be classified in four categories: (i) information, (ii) consultation, (iii) cooperation, and (iv) deliberation.¹⁰ In the Marrakesh Agreement establishing the WTO,

forms (ii) and (iii) are expressly mentioned. Since the WTO is an inter-governmental forum, actual deliberation (i.e. the right to vote) is restricted to the governments of Member States. Concerning information, it should be noted that, for consultation and cooperation to be possible, the principle of transparency must be considered a fundamental principle of the organization.¹¹

The degree of transparency can be evaluated by the exposure given the information, activities and decisions originating from the WTO, and also by the degree in which the organization uses the information and positions submitted by NGOs. The purpose of transparency is to guarantee a degree of predictability to both the proceedings and the results of the deliberative process – from the creation to the application and interpretation of rules.¹² This principle is applicable not only to relations between Members (internal transparency), but also to public opinion in general (external transparency). The majority of the provisions of WTO agreements treat transparency as internal transparency;¹³ although, as long as exposure is given, external transparency is often achieved as a consequence.¹⁴

The first WTO document in which the guarantee of external transparency can be identified is Decision WT/L/160/Rev.1 (1996), relating to procedures for the circulation and derestriction of WTO documents. Under the terms of this decision, the question of timeliness for internal transparency is very different to that for external transparency. This is because, as a general rule, WTO documents, once discussed and negotiated among Members in the Councils and Committees, may only be released to the public after six months.¹⁵

Bowing to pressure from some quarters of public opinion, including NGOs, and as an important landmark following the collapse of the Seattle Ministerial Conference in 1999, the WTO began a process to review Decision WT/L/160/Rev.1. In 2002, Decision WT/L/452 was approved, reducing the inconsistency in the time it takes to derestrict documents and establishing a rule that WTO documents would be automatically made public.¹⁶ This rule applies to all documents submitted by Members and support material produced by the Secretariat. Exceptions to the rule of immediate publication apply to the minutes of Council and Committee meetings and to documents relating to renegotiation or modification of concessions or the accession of new Members. An exception may also be granted should one be requested by one of the Members or the Dispute Settlement Body.¹⁷

As an instrument for publishing WTO documents and information, the General Council approved the use of the WTO website, including a section of the site reserved for information specifically for NGOs (*For NGOs*).¹⁸ This instrument enables information to be accessed by the public in general, which, among other actors, includes NGOs.¹⁹

Besides this virtual format, the General Council also approved, at its WT/

GC/W/29 meeting in 1998, that the Secretariat submit to NGOs the information and reports it regularly distributes to the media. When organizing briefings for NGOs, the General Council recommended that the Secretariat focus on topics of interest to this community.

However, criticism continues to be directed at the current system of information and there are still demands for change, particularly in virtue of its online concentration²⁰ and its reproduction. Objections have been raised over the way information is reproduced, since only Members and the Secretariat have access to meetings and the responsibility for reproducing the information falls on the Secretariat. This casts doubts on the freedom and the impartiality of the Secretariat to (re)produce the information.

Generally speaking, consultation as a form of participation is provided for only in specific cases and it cannot be said that, like with information, it reaches the public in general. Consultation is provided for in Article V.2 of the Marrakesh Agreement, while guidelines were established by General Council Decision WT/L/162 (1996) and the topic was again addressed in meeting WT/GC/M/29 (1998)²¹ and Secretariat Paper WT/INF/30 (2001).²²

Decision WT/L/162 states that the Secretariat should work more closely with NGOs to enhance the debate on topics related to WTO Agreements. However, the document does not define procedures. Therefore, given the loose wording of Decision WT/L/162, based on the terms “increased dialogue” and “be open”, the Secretariat understands that it has a mandate to define the forms of interaction necessary to comply with the prescribed objectives.²³ If, on the one hand, the positive aspect of this “mandate” is that the Secretariat is more sensitive to the demands of NGOs; on the other hand, the negative aspect is that the forms of interaction employed by the Secretariat may be subject to political pressure, even from one or more Members of the WTO.²⁴

Some procedures for participation were defined and clarified in 2001, in Secretariat Paper WT/INF/30, and what occurs today in the WTO is that interactions with NGOs have taken on different formats, ranging from the promotion of longer events (such as courses and symposia) to debates with WTO representatives on a daily basis. But these mechanisms are organized, generally, on an *ad hoc* basis, following no pre-defined agenda and not necessarily being in any way related to negotiations between Members. The organizations involved claim that these forms of participation, rather than lending a contributive character to the negotiation and application of Agreements, are really just another series of specialized events, irrespective of being organized by the WTO Secretariat. This is why there is currently a demand to consolidate these forms of participation in the WTO structure, with well-defined, permanent mechanisms for participation and the least possible amount of interference from Members in the workings of these mechanisms.

Also under criticism is the fact that these events take place only in Geneva, which hampers WTO Secretariat contact with the plurality of NGOs, considering their thematic and regional diversity.²⁵ Aware of this, some NGOs with the available resources have set up shop or transferred their offices to Geneva in search of this personal proximity with the Secretariat and Member delegations at the WTO.

In addition to this role played by the Secretariat, the General Council Decision recognizes that the coordinators of the work of WTO Councils and Committees may also participate in events promoted by NGOs, although this must always be done in a personal capacity.²⁶ This has led NGOs to complain that this representation is not institutional.

NGOs may also, in the form of consultation and under the terms of WT/L/162 and WT/GC/M/29, submit position papers on topics being negotiated or on the agreements in force directly to the WTO Secretariat. In this case, the Secretariat receives the papers and, provided they comply with certain formalities,²⁷ posts them on the *for NGO* section of the WTO website. The Secretariat also prepares a monthly list of all the material that is submitted for the information of all Members, in line with the terms of WT/GC/M/29.

Aware of what little influence these position papers have on the WTO and its Members, NGOs are now calling for these papers to be better organized on the website and, moreover, for the Secretariat to take a more active stance, proposing topics on which to present papers, with more pre-defined timescales and standards.²⁸ The establishment of a procedure would also help NGOs monitor what happens to their papers and, as such, promote a greater correlation between the work produced by NGOs and the deliberative process coordinated by WTO Members. If this were the case, these mechanisms could progress from the category of information (from NGOs to the WTO and its Members) and be treated as a consultation.

Just as NGOs keep pressure on the WTO to obtain information, they also do so to claim their right to access WTO Council and Committee meetings. Moreover, they request the right to be heard at these meetings, or at least at some of them, and the opportunity to submit written documents. For these demands, proposals have been made to define a single and transparent procedure to enable participation by any and all organizations wishing to do so.²⁹

Some proposals also recommend that criteria be presented to distinguish between NGOs engaged with trade issues and those that are not. Although NGOs looking to get involved in WTO activities must be 'concerned with matters related to those of the WTO' to qualify for participation, it is important to make a distinction between organizations that pursue commercial interests (representatives of producers, dealers and distributors of goods) and those that are non-commercial, not only because of the former's direct involvement in

international trade, but also because these organizations (namely trade and services associations) are often able to devote more resources (human and financial) to exercising their participation and they also exclusively represent private interests.

Cooperation, by nature, conveys the idea of steady interaction between the WTO and NGOs and, theoretically, it can be applied both to the stage of joint discussion and analysis for making rules, and to the stage of joint action to implement international commitments. Although it, too, is provided for in Article V of the Marrakesh Agreement, even today there are no instruments in place making this cooperation viable.³⁰

The only examples of cooperation mechanisms with NGOs in the WTO are the Advisory Bodies, which have been set up by WTO Directors. To date, three initiatives to create these Bodies have been submitted, two during the mandate of Director General Supachai Panitchpakdi (both in 2003) and one by Director General Mike Moore (in 2001). While an official WTO report was released on the creation and composition of the Informal Council established in 2001, for the two created in 2003 there is no official WTO information available for the public.³¹ For this reason, some NGOs, such as Oxfam International and Friends of the Earth, refused the invitation to take part in the Body; both organizations claiming they were not representative enough of civil society to participate in such a restricted group.³²

With the exception of the Consultative Board created in 2003 that was formed by professionals considered experts in the multilateral trade system, the results of the work of these Advisory Bodies and their opinions have not been published by the WTO.³³ Therefore, not only does this mechanism go unregulated, with no breakdown of the resources spent to contract the professionals and their responsibilities, but also there is no transparency in the conduct of their work, which makes it difficult for interested parties to participate in the selection process, and for NGOs themselves to participate in the different levels of direct participation in the WTO.

Processes of rule-making

In the WTO system, it could be said that the Ministerial Conferences, held every two years, are most closely associated with the rule-making process, as are the talks either leading up to or following these conferences to prepare the agenda or lend continuity to negotiations.

In the Ministerial Conferences, while there may have been no participation mechanisms available in the Uruguay Round, from Singapore onwards a need was noted to establish specific procedures for NGO participation.³⁴ Besides the original requirement that NGOs develop activities related to those of the

WTO, the list of NGOs selected in advance by the Secretariat must be approved by the General Council (a meeting in which all WTO Members have a seat). An important landmark was the 3rd Ministerial Conference in Seattle (1999), when WTO relations with NGOs started to become clearer and alterations in the forms of regulation started to be realized with more clarity.³⁵

Since 1996, participation by NGO representatives has been permitted in the plenary sessions of Ministerial Conferences, while since the 4th Ministerial Conference (2001), it was emphasized that these organizations would not have the right to a voice in the session.³⁶ Furthermore, since 1998, the General Council has allowed the WTO Secretariat to organize informative meetings (or briefings) for NGOs during the Conference on the progress of the negotiations.³⁷

After 1999, additional measures were adopted in response to the intensified demands for participation. Since the 4th Ministerial Conference (2001), closer activities have been developed between the Secretariat and NGOs, notably during the preparatory stage in the run-up to the Ministerial Conference. Among these forms of activities are: (i) briefings, in Geneva, by the Secretariat after meetings between Members; (ii) small debate panels; (iii) the organization of working sessions; and (iv) the possibility of the Secretariat accepting written positions.³⁸

These new measures prompted an increase in the activities surrounding the Ministerial Conferences, such as the Symposia organized by the WTO that are open to the general public. During the WTO's first five years, only two Symposia were held, while since 2001 there have been nine. The qualitative difference between those before and those after 2001 is not only in their size, but also in the relation between the discussion topics and the negotiations underway ahead of the Ministerial Conferences.³⁹ Furthermore, since 2005, the Symposia have begun to be organized almost in partnership with other NGOs, which are responsible for organizing the panel and setting the theme.

In addition to the formal provisions for NGO participation in the WTO, we should not overlook the influence these organizations have had through other informal mechanisms. This is because these mechanisms can also have an impact on the rule-making process. Among them, we can cite the participation of NGOs in the official delegations of Members, either from their country of origin or from another (for attendance at the Ministerial Conferences and also at the preparatory meetings for the Conferences, in Councils and Committees) and in the promotion of parallel events to the Ministerial Conferences for discussion (and criticism) of the multilateral trade system.⁴⁰

Based on this brief description, note that the measures for NGO participation in the rule-making process are restricted to the terms of Article V.2 of the Marrakesh Agreement. It is worth pointing out, however, that this regulatory provision defining procedure (for participation) was introduced

effectively due to pressure from NGOs. Bear in mind, then, that the active character afforded the General Council by Article V.2 only came as a reaction to pressure from NGOs.

Considering that this has been the trend for implementing participation mechanisms, it can be concluded that while this reaction, on the one hand, points to institutional sensitivity, on the other hand it is also capable of causing new mechanisms to be implemented in a way that is not systematized in relation to the structure and the work developed in the WTO.

Processes of implementation of the rules

Within the institutional structure of the WTO, the main mechanisms for the application of rules are the periodic work of the Trade Policy Review Mechanism⁴¹ and the daily work of the WTO Councils and Committees. None of the bodies involved in the application of rules officially provide for NGO participation.

What actually happens is that some NGOs, particularly those with representation in Geneva, manage to get informal access to specific Council and Committee meetings.⁴² Another indirect form of NGO influence are the specific studies they prepare on the application of commitments assumed within the WTO and their high-exposure campaigns. Some of this knowledge is expressed in the position papers submitted to the WTO and posted on its website, and also through the participation of NGO representatives in specific WTO activities (such as seats in official meetings guaranteed NGOs during the Ministerial Conferences, for example).

It can also be said that the daily contact with the WTO Secretariat, the debates held by the organization (in Symposia and working groups) and the work of the Advisory Bodies are also mechanisms that promote the involvement of NGOs in the application of rules, even though this occurs indirectly.

Along these brief lines, the analysis of NGO influence on the application of WTO rules demonstrates how little formal influence there has been since the constitution of the WTO in this form of regulation. Instead, their influence is more informal, and there have been few demands for these influences to be formally recognized and made binding.

Three hypotheses may be raised to explain this situation: (i) lack of demand; (ii) less responsiveness of the WTO to this form of regulation; and/or (iii) a certain convenience on the part of the most influential NGOs with this informality. Based on results obtained in prior field research,⁴³ all three hypotheses can be confirmed, so little future repercussion is expected in this form of participation; even though important mechanisms of ongoing participation by NGOs could be developed at this very level of regulation.

The dispute settlement mechanism

Within the three levels of regulation identified, the WTO Dispute Settlement Body (DSB) is the most “judicialized” of bodies in the organization. This is why it generates so many questions and analysis and draws so much attention from NGOs.⁴⁴

There is no express provision allowing for the possibility of NGO participation in WTO dispute settlement procedure. But, since 1998, some NGOs have submitted, either to the panel or to the Appellate Body, position papers on the topic under analysis in the dispute (called *amicus curiae* briefs). *Amicus curiae* briefs, as applied in common law procedure, contain the views of any individual or body with a strong interest in the case, but not party to the dispute (views relating to a “public interest”).⁴⁵

The acceptance of *amicus curiae* briefs in the DSB is based on the right of the Panels to information, guaranteed in Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁴⁶ This article allows Panels to seek information and/or technical advice from: (i) any individual or body, provided it informs the authorities of the WTO Member in advance, and (ii) any relevant source, in accordance with procedures set forth in Appendix 4 of the DSU.

In 1998, two NGOs submitted the first *amicus curiae* briefs before a DSB Panel set up to analyze case WT/DS58 – Shrimp/Turtles. The Panel only recognized the material when the United States (party to the dispute) attached the positions to its submission and endorsed the positions of the *amicus curiae* briefs in its oral statement.⁴⁷

Upon appeal of this decision, the Appellate Body accepted three more *amicus curiae* briefs and reviewed the Panel’s interpretation of Article 13 of the DSU. According to the interpretation of the Appellate Body, there is a distinction between being “obliged” to accept a position and being “authorized” to accept a position.⁴⁸ Therefore, a joint examination of both Articles 12 and 13 of the DSU and of Appendix 3 of the DSU, determined the possibility of accepting *amicus curiae* briefs submitted directly to the Panel or the Appellate Body.⁴⁹ This conclusion by the Appellate Body went beyond the literal interpretation of the Panel and made it easier for the dispute settlement mechanism to accept information submitted by NGOs, even though unsolicited.

It is interesting to note that, even after this interpretation by the Appellate Body in the WT/DS58 – Shrimp/Turtles case, some years later, in an analysis of the same dispute, the Panel, concerning the application of measures to observe the recommendations and decisions of the DSB (Recourse to Article 21.5 of the DSU), resumed its initial interpretation of Article 13 of the DSU and only accepted *amicus curiae* briefs attached to the submissions of the parties.⁵⁰

Subsequently, in the Appellate Body ruling on Recourse to Article 21.5 of the DSU, the Appellate Body once again accepted the submission of *amicus curiae* briefs. Procedure for the acceptance *amicus curiae* briefs in this case has swung back and forth, generating insecurity among NGOs over whether or not *amicus curiae* briefs will be accepted in the DSB.

Nevertheless, since it pioneered the analysis, from all the different angles of interpretation listed above, on the submission of unsolicited briefs by NGOs to the WTO dispute settlement mechanism, the WT/DS58 – Shrimp/Turtle dispute became a reference for later dispute decisions. In particular because the number of *amicus curiae* briefs submitted before the DSB has increased significantly over the years.⁵¹

Since then, the experience with *amicus curiae* briefs in the DSB has prompted the development of some specific procedures for their acceptance. Panels, for example, have adopted as a rule that they will accept positions submitted prior to the hearing with the parties. The Appellate Body even went so far as to define procedure in detail, on deadlines and methods, for the acceptance of *amicus curiae* briefs in its analysis of the WT/DS135 asbestos dispute.⁵²

Amicus curiae briefs not only enable NGOs to play a part in the dispute settlement mechanism, they also allow for the introduction of new interpretations of WTO agreements.⁵³ Concerning the *amicus curiae* briefs presented to date, it is possible to note a strong presence of NGOs that represent interests related to consumption, labor and the environment.

From the provisions of Article 13 of the DSU emerge practices and interpretations, at times influenced by NGOs that for some enhance and, for others, go beyond the provisions of the WTO Agreements. This has probably occurred due to the higher degree of “judicialization” of the WTO dispute settlement system, particularly when compared to the nature and evolution of direct NGO participation in the other levels (making and application of rules).

Another important point concerning direct NGO participation in the dispute settlement system is the demand for participation in the hearings. Recently, in September 2005, in the WT/DS320 Hormones and the WT/DS321 Hormones disputes, the Panel decided to publicly broadcast the audience with the parties to the dispute, in accordance with previously defined proceedings⁵⁴. However, the initiative was not considered successful by the Secretariat, since for the 400 seats set aside for the public, the Secretariat received only 207 registrations and there were only 65 attendees.⁵⁵

It should be stressed that, currently, in the process of reviewing the dispute settlement system, demands have been made both to reform Article 13 – either for the purpose of expressly permitting the submission of *amicus curiae* briefs and establishing specific procedure for doing so,⁵⁶ or to prevent this practice⁵⁷ – and to come up with proposals for holding public hearings. Demands for a

regulation to enshrine participation mechanisms in the DSB have come mainly from the United States and the European Communities.⁵⁸ This is, therefore, one of the levels of WTO regulation in which direct participation was on the negotiating agenda of Members. And, as such, it has more chance, at the current time, of being institutionalized and regulated.

Final remarks: Limitations of the WTO structure to the incorporation of new demands for participation

Note that, in the three levels of WTO regulation, the influence from the demands of NGOs fluctuates in accordance with the degree of interest of the actors involved, the identification of one or another of the mechanisms as more efficient by non-state actors (that exert the pressure), the institutional sensitivity of each of the forms of regulation and, finally, in accordance with the responsive capacity of the mechanism in the WTO.

Note also that the more “judicialized” the mechanism, the more responsive it is to the demands of NGOs. While this demonstrates a permeability of the WTO to the changes in the international environment, there are some limitations in its very system that could undermine the process or even cause discord within the organization. These limitations result either from the very institutional composition of the WTO (internal) or from its integration with the elements of the international system (systemic).

Concerning the internal limitation, the first thing to point out is the different degree of “judicialization” among the three levels of WTO regulation. While the dispute settlement structure is more responsive, the executive and legislative bodies (for making and application of rules) are more prone to the political influence of Members.⁵⁹

Another point is that the provisions for participation and the procedure for participation have been defined basically by *soft law*, that is, provisions characterized by a lack of clarity in the definition of obligations and/or the precision of rules and/or the delegation of authority.⁶⁰ Besides causing uncertainty over procedure for participation, this also sparks instability since there is no way of enforcing compliance with these forms of participation, should they not be implemented.

The concentration of the vast majority of mechanisms, particularly for the process of making and implementing rules, in one division of the Secretariat also undermines and limits the effective development of the mechanisms for NGO participation in the WTO. Recognition of this possibility for participation requires institutionalization in the WTO structure and a better structured body, with a larger number of people and a greater volume of resources to enshrine the provisions and procedures for NGO participation, as well as to promote technical reports and prospective analyses.⁶¹

Finally, while not wishing to belabor the point, a third critical aspect of the

system is that recognition of NGO participation requires an increasingly more proactive role by the WTO, including the responsibility to promote a balance in the representation and participation of NGOs, from different regions and sectors, in the WTO's different levels of regulation. The definition of participation mechanisms has a direct relationship with the most present NGOs and their demands.

The systemic limitations refer basically to the tension between the inter-state and cosmopolitan components within the WTO. The inter-state logic, previously guaranteed by a coherent and more stable system, is invoked by the majority of Members to restrict the possibility of NGO participation in the WTO. There are some misgivings over how NGOs may influence the deliberative process, i.e., how the cosmopolitan dynamic is organized and combined with the inter-state logic.⁶²

Even though there is resistance from a good many Members, NGO participation in the WTO has occurred either through formal structures or the traditional informal channels. The current precarious regulation of participation has prompted contradictory reactions from Members in discourse and in practice, depending on convenience. In other words, when it comes to deliberation and expression of the inter-state concept of international relations, some Members oppose participation by NGOs, while in the day-to-day game of negotiations and dispute settlement, the same Members adopt a more cosmopolitan approach and accept the working partnership with NGOs in the WTO. This conduct undermines the transparency of the deliberative process (who effectively supports one or other decision) and also undermines the direct co-relation between the rights and duties of the different actors effectively involved in the process.

This is why, today, reflection on NGO participation needs to be broadened and involve more of the actors that want to increase their direct participation in the WTO, as well as those non-state actors that oppose the institutionalization of these mechanisms. It would also be interesting for the debate on whether to institutionalize the mechanisms of direct participation to be grounded on (i) a comparative analysis with other international organizations, and their successes and failures; (ii) concrete data on the participation of non-state actors in the WTO to date and their influence on the organization's decision making process; (iii) the principles applied in the institutionalization and in the workings of the mechanisms for direct participation in the WTO; and, primarily, (iv) a systemic perspective about what the implications of implementing these mechanisms will be for the integration of the inter-state and cosmopolitan logics, and the impact on the international system as a whole.

NOTES

1. The legal arrangement of Brazilian foreign policy, for example, follows the constitutional provision stating that it is the duty of the President of the Republic (Art. 84, Item VIII, of the 1988 Constitution) to represent the country in international negotiations and decision making processes. This responsibility to participate in inter-governmental forums is typically delegated to employees of the Ministry of Foreign Relations (MRE), in accordance with Decree 99.578/90 and Provisional Measure 813/95. The President, just like the National Congress (Art. 49, Item I, of the 1988 Constitution), exercise an *ex post* control on a national level ("national filter").

2. On this subject, see M. R. Sanchez, *Demandas por um novo arcabouço sociojurídico na Organização Mundial do Comércio e o caso do Brasil*, Thesis submitted to the São Paulo University Law Faculty (Tutor: J.E.C.O. Faria) in 2004. For other related articles, see J. Habermas, *The Postnational Constellation: Political Essays* (translated, edited and with introduction by Max Pensky), Cambridge, Polity Press, 2001; J. Habermas, *L'intégration républicaine: essais de théorie politique* (translated by Rainer Rochlitz), Paris, Fayard, 1998; D. Archibugi, D. Held (org.), *Cosmopolitan democracy: an agenda for a new world order*, Cambridge, Polity Press, 1995; Daniele Archibugi et al (org.), *Re-imagining political community*, Cambridge, Polity Press, 1998; J. Rosenau, *Along the domestic-foreign frontier: exploring governance in a turbulent world*, Cambridge, CUP, 1997; G. Teubner (org.), *Global law without a state*, Hants, Ashgate Publishing Ltd/ Dartmouth Publishing Co. Ltd., 1997; P. Kennedy, D. Messner, F. Nuscheler (org.), *Global trends & global governance*, Sterling-VA, Pluto Press/ Development and Peace Foundation, 2002.

3. On the same subject, see M. R. Sanchez, *op. cit.*, 2004, pp. 57-90. For examples of some of these elements and their direct relation with the topic of human rights, see C. Dommen, "Trade and Human Rights: Towards coherence", *SUR International Journal on Human Rights*, no. 3, 2005.

4. Enshrined in the doctrine of international trade is recognition of the transformation from a eminently diplomatic system (GATT) to a system in which the legal aspect prevails (WTO). For articles on these concepts, see E.U. Petersmann, "The dispute settlement system of the World Trade Organization and the evolution of the GATT dispute settlement system since 1948", *Common Market Law Review*, v.31, no.1, 1994, pp.1157-244; A. Reich, "From diplomacy to law: the juridicization of international trade relations", *Northwestern School of Law Journal of International Law & Business*, v.17, 1996-1997, pp. 775-849; R. Shell, "Trade legalism and international relations theory: an analysis of the World Trade Organization", *Duke Law Journal*, v.44, 1995, pp. 829-927; J. Weiler, "The rule of lawyers and the ethos of diplomats: reflections on the internal and external legitimacy of WTO dispute settlement", *Harvard Jean Monnet*, no.09/00, 2000 <www.jeanmonnetprogram.org>; J. Dunoff, *Mission impossible: resolving the WTO's trilemma*, 2003 <www.law.berkeley.edu>.

5. See G. Marceau, "Is the WTO open and transparent?", in The Heinrich Böll Foundation (org.), *On the road to the WTO ministerial meeting in Seattle*, Washington, Heinrich Böll Foundation, 1999, pp. 25-44: "The most important point at this juncture of the evolving relationship between the WTO and civil society is that the debate no longer seems to focus on whether NGOs should be involved but rather on how they are indeed given an appropriate role within the WTO."

6. On this subject, see M. R. Sanchez, *op.cit.*, 2004; M. R. Sanchez, *Mudanças nos paradigmas de*

participação direta de atores não-estatais na OMC e sua influência na formulação da política comercial pelo Estado e pela sociedade brasileiros (mimeo), 2006 <www.edesp.edu.br>.

7. In this article, for the sake of methodological simplicity, I shall use the formal term “NGO”, as does the WTO, to define the group of actors to which the organization applies a specific treatment. In other articles, I have challenged this classification, on the grounds that it is insufficient to convey the complexity of interests represented in these mechanisms. This is because, in the case of the WTO, many of the actors present in the mechanisms established for participation by “NGOs” do not actually have exclusively “non-governmental” characteristics; for example, also represented in these mechanisms nowadays are associations of members of Parliament, subnational governments, companies and individuals. For an analysis of this debate, see M. R. Sanchez, op. cit., 2004; M R. Sanchez, “Atores não-estatais e sua relação com a Organização Mundial do Comércio”, in AMARAL JUNIOR, A. (org.), *Direito do Comércio Internacional*, São Paulo, Editora Juarez de Oliveira, 2002, pp. 151-70.

8. Approved in Brazil by Decree 1.355/94.

9. Concerning these three forms of participation in the WTO, see F. Roessler, *Are the judicial organs of the WTO overburdened?* (mimeo) (a modified version of “The institutional balance between the judicial and political organs of the WTO” (n/d), in M. Bronckers, R. Quick (org.), *New Directions in International Economic law: essays in honor of John H. Jackson*, Hague/London/Boston, Kluwer Law International, 2001, pp. 325-345). For a more extensive analysis of the influence of NGOs on the creation and application of international rules, see P. Kohona, “The role of non-state entities in the making and implementation of international norms”, *The Journal of World Investment*, v. 2, no. 3, 2001, pp. 537-78.

10. This classification originates from the one proposed by the OECD for civil participation in defining policy at a national level. See OECD – Organization for Economic Co-operation and Development, *Emerging citizens in policy-making: information, consultation and public participation*, Public Management Policy Brief n. 10, Paris, July, 2001. For a more detailed examination of these forms of participation in the WTO, see M. R. Sanchez, op. cit., 2004.

11. We can see here that the principle of transparency is, in the case of the WTO, presented as a responsibility of the international organization. This obligation may be presented as complementary to the one considered a constitutional right in the vast majority of democratic countries, as is the case in Brazil. (see Art. 5, Item XXXIII, of the 1988 Constitution). This is because international negotiations take into consideration the positions presented by all the States involved, while each State, internally, may guarantee the right to information for, and only for, the positions presented by it (since most of this information could be considered worthy of secrecy; in the case of Brazil, see Art. 23 of Law No. 8.159/91 and Art. 5 of Decree 4.553/02). It should also be noted that the principle of transparency in international organizations is related to the debate on the application of democratic principles in these organizations. See R. Howse, “The legitimacy of the World Trade Organization”, in J. Coicaud, V. Heiskanen (org.), *The legitimacy of international organizations*, Tokyo, United Nations University Press, 2001, pp. 355-407.

12. On the topic of transparency and accountability in the WTO, see S. Panitchpakdi, “Balancing competing interests: the future role of the WTO”, in G. Sampson (org.), *The role of the World Trade Organization in global governance*, Tokyo, United Nations Press, 2001, pp. 29-35; P. Sutherland, J.

Sewell, D. Weiner, "Challenges facing the WTO and policies to address global governance", in SAMPSON, G. (org.), *op.cit.*, 2001, pp. 81-111; S. Ostry, "External transparency: the policy process at the national level of the two level game", material prepared for the *WTO Advisory Group*, 2002 <www.utoronto.ca/cis/ostry.html>. In relation to international organizations, see the debate promoted by ASIL, *Proceedings of the 92th Annual Meeting: The challenge of non-state actors*, "The accountability of international organizations to non-state actors", ASIL, Washington, 1998, pp. 359-73.

13. Among the provisions expressed in the Multilateral Agreements, the general principle of transparency is protected in Article X of GATT-1994, which establishes a commitment for WTO Members to make public all the forms of regulation, as well as administrative procedures related to trade.

14. See S. Ostry, "WTO: institutional design for better governance", preliminary version of an article for the seminar *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Kennedy School, Harvard, Boston, June 2-3, 2000 <www.utoronto.ca/cis/ostry.html>: "There has been some discussion about "transparency" and the opacity of that word has now been significantly increased by distinguishing between internal transparency (WTO-speak for adapting the traditional negotiating process to include more developing countries) and external transparency (improving access to documents etc. and dealing with demands of the NGO's for more participation)."

15. For the publication of a document to be restricted, the information it contains does not necessarily have to be considered confidential in the WTO. Generally speaking, information is considered confidential when it contains non-public strategies and data of Members and their nationals, technical reports from experts and specialized centers submitted to the dispute solution mechanism and trade information of private entities.

16. See *WTO moves towards a more open organization* <www.wto.org>: "The recent decision, resulting from constructive government cooperation, is indicative of WTO's continuous and progressive efforts to improve our outreach to stakeholders, parliamentarians, civil society, the private sector and media".

17. For a detailed comparison of the two documents WT/L/160/Rev.1 (1996), *Procedures for the Circulation and Derestriction of WTO Documents* – Decision adopted by the General Council on 18 July 1996 – Revision, 26 July and WT/L/452 (2002), *Procedures for the Circulation and Derestriction of WTO Documents* – Decision of 14 May 2002, 16 May; see M. R. Sanchez, *op.cit.*, 2004, Appendix 2. To access the full texts of these decisions, and all the other WTO documents mentioned in this article, see <docsonline.wto.org>.

18. Cf. WT/L/162 (1996), Decision adopted by the General Council on 18 July 1996 – *Guidelines for arrangements with non-governmental organizations*, 23 July; WT/GC/M/29 (1998); General Council – *Minutes of Meeting Held in the Centre William Rappard on 15, 16 and 22 July 1998*, 30 September.

19. See One World Trust, a British organization that produced the first report on accountability in inter-governmental organizations. It ranked the WTO website very highly, in virtue of both the volume of available information and the ease of finding what you are looking for. For more details, see One World Trust (2003), *Global Accountability Report*, 20 January <www.oneworldtrust.org>.

The concept of accountability in the report consists of Member control of governance structures and access to online information.

20. This criticism is due largely because the majority of the population of the 149 Members does not possess the technological resources to consult the information online. See UNCTAD – United Nations Conference on Trade and Development, *E-commerce and development report 2003*, UNCTAD/SDTE/ECB/2003/1, 2003, p. 5, only 10% of the world's population has access to the Internet. Furthermore, only 3% of the population of developing countries have access, while in the developed world this figure rises to 32%.

21. See WTO – World Trade Organization, *Annual Report*, Geneva, 2002, p. 4: “the existing guidelines on external relations were designed by Members to give the Secretariat an appropriate degree of flexibility to allow responsible NGOs a voice in the dialogue”.

22. See WT/INF/30, *WTO Secretariat Activities with NGOs*, 12 April, 2001. WT/L/162 and WT/GC/M/29, *supra*.

23. On this, G. Marceau, *op. cit.*, 1999, p.28, confirms the extension of the mandate: “The adoption of fairly broad guidelines left the Secretariat a relatively free hand in defining its relationship with NGOs and has allowed it to become increasingly pro-active in its undertakings with civil society [...]”.

24. It has often been asked to what degree this aspect downplays the importance of the WTO Secretariat, particularly given the recurring argument of Members that the WTO is an organization for, and at the service of, Members (only States as they are represented in their diplomatic delegations). P. Willetts, in “Civil society networks in global governance: remedying the World Trade Organization's deviance from global norms”, an article presented to the *Colloquium on International Governance*, Palais des Nations, Geneva, 20 September 2002 <www.staff.city.ac.uk>, notes that beyond being a restricted mandate, what carries the most weight is the rhetoric applied in the WTO to undermine the Secretariat's ability to carry out the functions attributed to it: “[...] there is a culture of affirming the Secretariat are no more than administrators: ‘Since decisions are taken by members only, the Secretariat has no decision-making powers’. People at the WTO also like to assert that it is ‘a membership-driven organization’. Neither of these points differentiates the WTO in any legal manner from the UN, but their assertion does matter politically, by limiting the leadership role of the Secretariat.”

25. On this regional subject, there is the dilemma of an over-representation from NGOs from the Northern Hemisphere in relation to the South (estimated at 75% from the North and 25% from the South by an official at the *External Relations Division*, in an interview in November 2003). To reduce this disparity, according to information provided in the same interview, the Secretariat has sought to provide travel financing for NGOs from the Southern Hemisphere. The official also explained that it is difficult to know which NGOs from the South to invite, since little is known about them and how they work. Furthermore, since Members from the South have shown the most resistance to increasing NGO participation, they do nothing to help the *External Relations Division* make its selection.

26. See WTO News, *External Transparency*, from November 22 2002 <www.wto.org/english/news_e/news00_e/gcexternaltrans_nov00_e.htm>, the WTO and its Secretariat have pursued initiatives to improve these participation mechanisms: “Since the Third Ministerial Conference in Seattle the

Director-General and his Deputies have kept up a comprehensive programme of participation in international meetings with the public and private sectors and NGOs. [...]”

27. Among the formalities: papers should address a topic considered to be related to trade (the selection is conducted by the Secretariat) and the title should be submitted in the three official WTO languages – English, French and Spanish <www.wto.org/english/forums_e/ngo_e/pospap_e.htm>.

28. On this subject, see P. Willetts, *op.cit.*, 2002.

29. P. Willetts, *op.cit.*, 2002, claims that, as a first step, the WTO should accept all NGOs that have been approved for consultative status by the UN Social and Economic Committee; thereafter, a commission comprised of NGO representatives should define a Code of Conduct for NGOs participating in WTO mechanisms. For an initial period of five years, the WTO should authorize registered NGO representatives to attend meetings of Councils and Committees and the Ministerial Conference. After this period, the General Council, in consultation with NGO representatives, should codify the rules into a WTO Statute for consultative relations with NGOs. On the same subject, see the proposal of the German NGO ECOLOGIC (2003), *Participation of non-governmental organizations in international environment governance: legal basis and practical experience*, an article prepared by Sebastian Oberthür *et al.* It should be noted that these proposals generally draw on the experience of the criteria that applies for participation in other international organizations, which are also currently questioning the mechanisms for permitting direct participation of NGOs, such as, for example, in the UN <www.un.org/reform/civilsociety.html>.

30. The wording of Article V.2 was based on Article 87 of the Havana Charter for an International Trade Organization (ITO). However, the generic provisions of the Havana Charter were analyzed by an Executive Committee that specified the forms of cooperation. Chief among them is the possibility for NGOs to attend ITO Council meetings and have the right to address these meetings. For an historical account of the provisions for interaction of NGOs with the ITO and the WTO, see S. Charnovitz, J. Wickham, “Non-governmental organizations and the original international trade regime”, *Journal of World Trade*, v. 29, no. 5, 1995, pp. 111-22.

31. On the creation of the Informal Council in 2001, see WTO News, Press/236 (2001). In addition to certain academic institutions, the following NGOs were also part of the 2001 Council: Transparency International, International Institute for Sustainable Development and International Federation of Free Trade Unions. Part of the 2003 Council, in the *NGO Advisory Body* (set up in parallel to the *Business Advisory Body*), were: Consumers International, Consumers Unity and Trust Society, International Federation for Agricultural Producers, WWF International, Third World Network, Christian Aid, International Federation of Free Trade Unions, Public Services International, International Centre for Trade and Sustainable Development and International Institute for Sustainable Development.

32. See article *WTO Chief Sets Up Advisory Bodies With Business, NGOs to Boost Dialogue* <www.geocities.com/ericshire/articles/wto/wr030617.htm>. In one of the working groups for NGOs organized by the Friedrich-Ebert-Stiftung Foundation at the 5th Ministerial Conference, *Making Voices Stronger! Global civil society and democracy in international institutions*, Oxfam once again justified declining the invitation with the argument: “(i) if the WTO intends to have close contact with civil society, it should have started the process to constitute the Council democratically (since

this is one of civil society's main criticisms of the WTO) and exemplified this by launching an open invitation on the Internet; and (ii) in the format that was constituted, the Informal Council would play a relatively ineffective role."

33. The report of the Consultative Board is published in *The future of the WTO: addressing institutional challenges in the new millennium* <www.wto.org/English/thewto_e/10anniv_e/future_wto_e.htm>. Comments reacting to the proposals presented in the report may be found in *Bridges Weekly*, v. 9, no. 2, 26 January, 2005 <www.ictsd.org/weekly/05-01-26/story3.htm>.

34. On the subject, see. WT/L/161 (1996), Decision adopted by the General Council – *Rules of procedure for sessions of the Ministerial Conference and meetings of the General Council*, 25 July; WT/L/162 (1996), *supra*.

35. In Seattle, the number of NGOs registered to participate in the official space of the Ministerial Conference increased almost fivefold in relation to participation in the previous conference (Geneva, 1998); for details of the NGOs registered in each of the Conferences, see M. R. Sanchez, *op. cit.*, 2004, Appendix A.3(a); for updated statistics, see M. R. Sanchez, *op. cit.*, 2006. See S. George, *The global citizens movement. A new actor for a new politics*, 2001 <www.tni.org/issues/wto>: "Seattle is now seen as a watershed first because the media finally accepted there was another voice out there besides governments and business. Citizens might actually have something important to say and say it forcefully [...] From the protestors' side, as opposed to the media's, Seattle can also be seen retrospectively to have marked a turning point. Simply put, we are no longer on the defensive. Just as this mobilization did not start with Seattle, so it will not end with some other singular event like the police-riot in Genoa. It will assume different forms in different places but it is an increasingly international phenomenon, it has taken on a life of its own and is now an organic, permanent presence on the world stage. Although still very young, the movement is fast moving towards maturity and its participants are gaining in knowledge and confidence." See R. Keohane, J. Nye, *The Club Model of Multilateral Cooperation and the WTO: Problems of Democratic Legitimacy*, an article presented to the Center for Business and Government, Harvard University, 2000 <www.ksg.harvard.edu/cbg>, in which they claim that the role of NGOs in Seattle was symbolic of the abandonment of the GATT model: "The failure of the Seattle meetings of the WTO, on several levels is indicative of the reasons for the weakening of the old club system of trade politics." For further remarks, see Ostry, *op. cit.*, 2000; and J. Dunoff, "International law weekend proceedings: civil society at the WTO: the illusion of inclusion?", *ILSA Journal of International & Comparative Law*, v. 7, 2001, pp. 275-84.

36. See WT/GC/M/13, General Council – *Minutes of Meeting Held in the Centre William Rappard on 18 July 1996*, 28 August 1996; WT/GC/M/27, General Council – *Minutes of Meeting Held in the Centre William Rappard on 2, 14 April and 17 May 1998*, 22 September 1998; WT/GC/M/65, General Council – *Minutes of Meeting Held in the Centre William Rappard on 8 and 9 May 2001*, 18 June 2001; WT/GC/M/78, General Council – *Minutes of Meeting Held in the Centre William Rappard on 10 February 2003*, 8 March 2003.

37. Cf. WT/GC/M/29, 1998, *supra*.

38. See WT/INF/30, 2001, *supra*. These measures were taken specifically for the 4th Ministerial Conference, but they were repeated for the organization of 5th and 6th Ministerial Conferences (in 2003 and 2005).

39. The topics of the Symposia were: *Global problems, multilateral solutions* (2005), *Cross-Border Supply of Services* (2005), *Trade and Sustainable Development* (2005); *Multilateralism at a crossroads* (2004), *IT Symposium* (2004); *Challenges ahead on the road to Cancún* (2003); *The Doha Development Agenda and Beyond* (2002); *WTO's 5th Ministerial Conference* (2002); *Symposium on issues confronting the world trade system* (2001); *WTO Trade and Environment Symposium* (1998); *Joint WTO/UNCTAD NGO Symposium to prepare for the High-Level Meeting on Least-Developed Countries* (1997).

40. With a view to identifying some degree of permeability in these mechanisms for participation, note that some points of the WTO agenda today coincide with NGO campaigns; for example, the cases of the Doha agenda for development and the declaration on TRIPS and public health. See Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (2001) and the Declaration on the TRIPS agreement and public health, WT/MIN(01)/DEC/2 (2001).

41. The Trade Policy Review Mechanism is included as Annex 3 of the Marrakesh Agreement establishing the WTO. This mechanism is designed to monitor/supervise the implementation of the commitments assumed by Members within the WTO. Although there are no specific provisions for NGO participation in this mechanism, a good many of the reports are written by agencies of the government of the country under analysis. Accordingly, participation in domestic policy, together with the various Ministries and bodies involved, can be a complementary factor in influencing the process.

42. This, for example, is the case with the Committee on Trade and Environment, which has a fairly close relationship with the NGOs that are most active in the WTO.

43. See M. R. Sanchez, *op. cit.*, 2004, pp. 91 ff and 193 ff.

44. Concerning this judicialization compared with the WTO's other regulatory bodies and its risks, see C. D. Ehlermann, "Six years on the bench of the 'world trade court': some personal experiences as member of the Appellate Body of the World Trade Organization", *Journal of World Trade*, v.36, no.4, 2002, pp.605-39; F. Roessler, *op. cit.*, (n/d); E. U. Petersmann, *op. cit.*, 1994.

45. BLACK'S Law Dictionary, (1990), p. 82: "Amicus Curiae. Means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; e.g. civil rights cases. Such may be filed by private persons or the government. In appeals to the U.S. courts of appeals, such briefs may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof."

46. For analyses of *amicus curiae* procedure in the DSB, see P. Mavroidis, "Amicus curiae briefs before the WTO: much ado about nothing", *Jean Monnet Working Paper* no. 2/01, 2001 <www.jeanmonnetprogram.org>; J. Dunoff, "The Misguided Debate over NGO Participation at the WTO", *Journal of International Economic Law*, vol. 1, no. 3, 1998, pp. 433-56; P. Nichols, "Participation of non-governmental parties in the World Trade Organization: extension of standing in World Trade Organization disputes to non-governmental parties", *University of Pennsylvania Journal of International Economic Law*, v. 17, 1996, pp. 295-329; D. Esty, "Linkages and

governance: NGOs at the World Trade Organization", *University of Pennsylvania Journal of International Economic Law*, v. 19, no. 3, 1998, pp. 709-30; D. Esty, "Non-governmental organizations at the World Trade Organization: cooperation, competition, or exclusion", *Journal of International Economic Law*, v. 1, 1998, pp. 123-48; R. Shell, "Trade legalism and international relations theory: an analysis of the World Trade Organization", *Duke Law Journal*, v. 44, 1995, pp. 829-927.

47. On this subject, see WT/DS58/R, Dispute Settlement Body - *United States - import prohibition of certain shrimp and shrimp products* – Report of the Panel, 15 May 1998, par.3.129 and 7.8, in which the Panel concludes: "Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. [...] If any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so." Comments on the dispute and the interpretation may be found in Mavroidis, op. cit., 2001; E. Hernández-López, "Recent trends and perspectives for non-state actor participation in the World Trade Organization disputes", *Journal of World Trade*, v. 35, no. 3, 2001, pp. 469-98, p. 485; M. Laidhold, "Private party access to the WTO: do recent developments in international trade dispute resolution really give private organizations a voice in the WTO?", *Transnational Lawyer*, v. 12, no. 2, 1999, pp. 427-50, p. 440.

48. WT/DS58/AB/R, Dispute Settlement Body – *United States – import prohibition of certain shrimp and shrimp products* – Report of the Appellate Body 12 October 1998, par.101: "[...] under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU." (emphasis added)

49. WT/DS58/AB/R, 1998, *supra*, par.105: "It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that "[p]anel procedures should provide *sufficient flexibility* so as to *ensure high-quality panel reports while not unduly delaying the panel process*." An interpretation that, in its full extent, P. Mavroidis, op. cit., 2001, describes as "acrobatic".

50. See WT/DS58/RW, *United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia* – Report of the Panel, 15 June 2001, par.5.14-5.16.

51. For a list of the disputes that analyzed the subject, see. M. R. Sanchez, op. cit., 2004, Appendices A.2 and A.4(d), with updated information in M. R. Sanchez, op. cit., 2006., Appendix I.

52. To accept an *amicus curiae* brief in this dispute, the Appellate Body grounded its interpretation on Rule 16(1) of the *Working procedure for appellate review*, which contains the working procedure of the Appellate Body, see WT/DS135/AB/R, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* – AB-2000-11 – Report of the Appellate Body, 12 March 2001,

par.50. Under the terms of this rule, the Body may adopt appropriate procedures for the proper analysis of a dispute. See the procedures in place at the time in WT/AB/WP/3, Appellate Body – *Working Procedures for Appellate Review*, 28 February 1997 [the wording of Rule 16(1) remains the same for procedures currently in force, cf. WT/AB/WP/7, *Working Procedures for Appellate Review*, 1 May 2003]. This interpretation seems more plausible, since Article 13 of the DSU explicitly mentions the right of the Panel to seek information they deem appropriate, without making any reference to the Appellate Body.

53. P. Mavroidis, *op.cit.*, 2001, presents the reasons for submitting *amicus curiae* briefs: “These caveats notwithstanding, why would anyone send an *amicus curiae* brief to the WTO? Essentially for two reasons: to provide some information (an opinion how to interpret facts established by others) on the one hand, and to sensitize a court about the interest that a particular case might have for the wider public on the other. This second ground is in fact the bridge between a court and the society.”

54. See WT/DS320/8, *US – Continued Suspension of Obligations in the EC – Hormones Dispute*, 2005, and WT/DS321/8, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, 2005. On the broadcast of the hearing and the proceedings, see <www.wto.org/english/tratop_e/dispu_e/public_hearing_e.htm>.

55. For a description of these proceedings and some critical observations, see <subscript.bna.com/SAMPLES/itr.nsf/f6e265388fc7082185256b57005bfe23/04faee4809b58c578525707c007d58e7?OpenDocument>.

56. On the proposals for reform with this objective, see the document submitted by the European Community for reform: TN/DS/W/1, Dispute Settlement Body – Special Session – *Contribution of the European Communities and its member states to the improvement of the WTO dispute settlement understanding* – Communication from the European Communities, 13 March 2002; and the proposal of the United States: TN/DS/W/13, Dispute Settlement Body – Special Session – *Contribution of the United States to the improvement of the WTO dispute settlement understanding* – Communication from the United States, 28 August 2002, and TN/DS/W/46, Dispute Settlement Body – Special Session – *Negotiations on the Dispute Settlement Understanding, Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO*, Communication from the United States, 11 February 2003. The European Community, in its proposal, reproduces the proceedings pre-established by the Appellate Body in WT/DS135/9, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* – Communication from the Appellate Body, 8 November 2000, and proposes its incorporation into Article 13 of the DSU, under the title Article 3 *bis* – *Amicus curiae submissions*. The United States also support the possibility of submitting *amicus curiae* briefs, although they maintain that a reform of Article 13 of the DSU is not required.

57. For the proposals against the acceptance of unsolicited documents in the DSB, see, in particular, the documents of the African Group: TN/DS/W/15, Dispute Settlement Body – Special Session – *Negotiations on the Dispute Settlement Understanding – Proposal by the African Group*, September 25, 2002; from Kenya: TN/DS/W/42, Dispute Settlement Body – Special Session – *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations – Communication from Kenya*, January 24, 2003; and from India (also representing Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia): TN/DS/W/47, Dispute

Settlement Body- Special Session – Dispute Settlement Understanding Proposals: Legal Text – *Communication from India on behalf of Cuba, Dominican Republic, Honduras, Jamaica and Malaysia*. February 11, 2003.

58. TN/DS/W/1, TN/DS/W/13, TN/DS/W/46, *supra*; and TN/DS/W/25, Dispute Settlement Body – Special Session – *Contribution by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Doha Mandated Review of the Dispute Settlement System*, 27 November 2002; TN/DS/W/41, Dispute Settlement Body – Special Session – *Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding – Communication from Canada*, 24 January 2003.

59. See S. Ostry, “Civil society: consultation in negotiations and implementation of trade liberalization and integrated agreements: an overview of the issue”, article prepared for the seminar *Good practices and social inclusion: a dialogue between Europe and Latin America and the Caribbean*, Milan, March 21-22, 2003 <www.iadb.org>; S. Ostry, *op. cit.*, 2002.

60. See K. Abbott, D. Snidal, “Hard and soft law in international governance”, *International Organization*, v. 54, no. 3, 2000, pp. 421-56, p. 422.

61. As an example, the difficulty of holding events in the form of consultations in locations outside Geneva and, also, of sending representatives to events organized by other organizations is due, largely, to the fact that the *External Relations Division* does not have the budget necessary for travel. As evidence of the lack of budget funds, a limit on travel expenses for 2003 was set at CHF2,500 by the *External Relations Division*. Ostry, *op. cit.*, 1998, p. 29, criticizes the current structure of the Secretariat by comparing it to the institutional structure of other international organizations: “The WTO is au fond like the GATT in being a member-driven organization without a significant knowledge infrastructure, i.e. a secretariat of highly qualified experts able to undertake research directed at policy analysis as in the OECD, the IMF and the World Bank. This analytic deficit virtually precludes policy discussion, and the important peer group pressure it generates, on the issues described above such as regulatory convergence, the role of legal systems, the trade-off between domestic and international objectives and the crucial issue of the state-market frontier, i.e. all the basic aspects of the new agenda.”

62. On this tension, see J. Rosenau, *op. cit.*, 1997, in which the author identifies these relations as the hallmarks of a period of turbulence in the redefinition of the concepts of subjects and forms of organization and regulation of the international system.

Translation by Barney Whiteoak