

**OPENING THE CLUB - A LIBERAL APPROACH TO PRIVATE PARTICIPATION IN
THE WORLD TRADE ORGANIZATION'S DISPUTE SETTLEMENT SYSTEM**

by

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ABSTRACT

This thesis intends to provide an argument in favour of private participation in the dispute settlement system of the World Trade Organization (WTO) as an area of the world trading system most visible to but also most removed from the influence of private actors. Private participation is understood as the direct and formal involvement of non-governmental actors in dispute resolution. It will distinguish between passive and active participation, the former addressing the flow of information from the WTO to civil society (understood as the community of all Member societies affected by the world trading system), while the later is concerned with issues of access and standing.

As first step, I will develop an analytical framework for international dispute settlement systems based on the three elements of actors, material scope and procedures, as well as the underlying theoretical conceptions for each element. After having given an overview of the relevant features of the world trading system and its dispute resolutions mechanisms as set forth in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) of the WTO, I continue by subsuming the DSU under the analytical framework.

Based on the position of the DSU within the analytical framework, I will submit an argument in favour of private participation, drawing particularly from the international relations theory of liberalism. Parting from realist-institutionalist assumptions predominant in public international law, liberalism places the individual at the center of international and WTO law, opening the latter for new categories of international actors.

Finally, taking into account the liberal reliance on individual rights and democratic participation, I will suggest models to implement private participation in WTO dispute settlement. My aim is to promote meaningful involvement of private actors whose interests and objectives are affected by the world trading system, with varying procedural roles reflecting their relation to the WTO's trade regime, ranging from passive participation, to party status, to *amici curiae*.

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To
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“Es ist der *Handelsgeist* der mit dem Kriege nicht zusammen bestehen kann, und der früher oder später sich jedes Volkes bemächtigt. Weil nämlich unter allen der Staatsmacht untergeordneten Mächten (Mitteln) die *Geldmacht* wohl die zuverlässigste sein möchte, so sehen sich Staaten (freilich wohl nicht eben durch Triebfedern der Moralität) gedungen, den edlen Frieden zu befördern und, wo auch immer in der Welt Krieg auszubrechen droht, ihn durch Vermittlungen abzuwehren, gleich als ob sie deshalb im beständigen Bündnis ständen; denn große Vereinigungen zum Kriege können der Natur der Sache nach sich nur höchst selten zutragen und noch seltener glücken.“

Immanuel Kant*

“While governments often promote the theory that free and open societies will naturally emerge once minimum standards for economic growth and prosperity have been attained, history has shown that many additional measures have always been necessary to turn the market into a force that works for the benefit of the larger society. Those measures include human rights, social justice and equitable distribution of wealth. Therein lies the link between trade and human rights - a link that results from the inherent objective of both regimes: increasing quality of life.

In a world of uneven development and growing disparity between rich and poor, the level playing field is not achievable unless it is built on a foundation of respect for the principles that form the basis of the international human-rights system. Human rights, which comprise civil political, economic, social and cultural rights, are not goals to be scored on a level playing field of common tariffs and free markets. Human rights are not aspirational in nature, they are not privileges and they should never be the “trickle-down” effect of international trade. Human rights are actual legal rights that nations are bound to support at home and promote internationally, over other interests.

Warren Allmand†

* Immanuel Kant, *Zum Ewigen Frieden*. (Stuttgart: Philipp Reclam Jun., 1984) at 33. Translation in Carl J. Friedrich, ed. *The Philosophy of Kant. Immanuel Kant's Moral and Political Writings*. (New York: Random House, 1949) at 455: “It is the *spirit of commerce* which cannot coexist with war, and which sooner or later takes hold of every nation. For, since the money power is perhaps the most reliable among all the powers subordinate to the state's power, states find themselves impelled (though hardly by moral compulsion) to promote the noble peace and to try to avert war by mediation whenever it threatens to break out anywhere in the world. It is as if states were constantly leagued for this purpose; for great leagues for the purpose of making war can only come about very rarely and can succeed even more rarely.”

† Warren Allmand, “Global deals won't profit the poor.” *The Globe and Mail*, November 22, 1999, A 15.

INTRODUCTION

In its five short years of existence, the World Trade Organization¹ (WTO) has developed into one of the largest and most important international institutions. An organization set to promote global prosperity and peace, it has received media and public attention paralleled only by the United Nations. However, the recent “Battle of Seattle”, the protests during the Third Ministerial Conference forcefully reminds us that in the eyes of many people the WTO has also become a symbol of economic globalization and its perceived negative effects on areas like the environment, labour, culture, health care or education.

Moreover, the Seattle summit and its failure to launch the Millenium Round of Trade Negotiations has exposed beyond any doubt a crisis between WTO Members, marked by discords between the United States and the European Union on the one hand, and a deepening north-south divide between industrialized and developing countries on the other, raising “doubts about whether the WTO’s unwieldy structure and arcane procedures can cope with 135 member-countries all demanding their say”².

¹ The World Trade Organization was established by the *Final Act Embodying the Results of the Uruguay Round*, Multilateral Trade Negotiations Documents MTN/FA of 15 December 1993 and MTN/FA/Corr.1 of 15 December, 1993, adopted by the *Marrakesh Declaration* of 15 April 1994. It is reprinted in: Joseph F. Dennin (ed.) *Law & Practice of the World Trade Organization. Treaties, Binder 1* (New York: Oceana Publishing, 1995, loose-leaf Nov. 1999).

² “After Seattle. A global disaster.” *The Economist*, December 11th, 1999, 19.

Faced with image problems and internal difficulties, the WTO must seek ways to restore its credibility, disperse doubts about its legitimacy, and muster support from all walks of life, if it wants to achieve its objectives. As United States Trade Representative Charlene Barshefsky put it : “The World Trade Organization won’t survive until it sheds its image as a ‘businessman’s club’.”³ The answer to both problems may lie in opening the “club” to the people, particularly in the two areas most visible to, but also most removed from civil society: trade negotiations and dispute settlement. The former sets the course for the future of the WTO system, rewriting its laws and defining the issues within their scope, thus attracting public attention. On the other hand, the WTO dispute settlement system - with its power to force States to change domestic laws to conform with the rules of global trade - makes the effect of the WTO regime very concrete and palatable for their citizens, specifically their lack of involvement in the process of dispute resolution. They are concerned that their lives are controlled by a faceless international body that does not grant them any influence⁴. It is therefore not surprising that the area of WTO dispute resolution in particular has become the object of calls for future WTO reforms⁵. Joining these calls, this thesis will submit an argument in favour of private participation in the WTO dispute settlement system based on a redefinition of

³ Quoted in Barrie McKenna. “U.S. backpedals on goals for WTO” *The Globe and Mail*, September 30, 1999, B10.

⁴ See for example Ed Broadbent, Letter to the Editor, *The Globe and Mail*, December 3, 1999, A16: “One of the great developments in the past 25 years has been to pressure democratic governments into more open and accountable decision-making. This has entailed more transparent procedures, access to information legislation and regular NGO participation in the process of making new laws. These changes have been taking place within most developed democracies and international organizations. The WTO is the exception.”

⁵ The WTO’s own mandate to review and reform its dispute settlement system as part of the built-in agenda in the WTO agreements, has expired on 31 July 1999. See WTO. *Press Pack. World Trade Organization. 3rd Ministerial Conference. Seattle. 30 November to 3 December 1999*. Issued 28 November 1999. WTO Web Site, http://www.wto.org/wto/seattle/english/about_e/presspack_English.pdf at 5.

international law according to principles of liberal international theory that place the individual at the centre of analysis.

0.1 Defining Private Participation

Opening public international law and, in particular, international dispute settlement systems to non-governmental actors has been a familiar concept in reform debates during the second half of the 20th century⁶. In the area of international trade dispute resolution under the GATT/WTO multilateral trading system, proposals for increased access of private parties have been fielded almost from its beginnings⁷. Although promoting essentially the same idea, commentators have created a kaleidoscopic terminology, depending on the emphasis of their analyses. Examples are "individual participation"⁸, "direct access of individuals"⁹, "private party access"¹⁰, "participation by non-governmental parties"¹¹, "non-government party involvement"¹², or "public participation". Specifically the last phrase, introduced into the GATT legal

⁶ For example Philip C. Jessup, *A Modern Law of Nations* (New York: The Macmillan Company, 1948) Chapters II and V.

⁷ See *infra* note 316 on the International Trade Organization.

⁸ Meinhard Hilf, "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures." In: Ernst-Ulrich Petersmann and M. Hilf, eds. *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems* (Deventer: Kluwer Law and Taxation Publishers, 1988) 285 at 318 [hereinafter: Hilf, Comparative Analysis].

⁹ Miquel Montaña i Mora, "A GATT with Teeth: Law wins over Politics in the Resolution of International Trade Disputes" (1993) 31 *Columbia Journal of Transnational Law* 103 at 161 [hereinafter: Mora]

¹⁰ Donald E deKieffer, "GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law" (1980) 2 *Northwestern Journal of International Law & Business* 317 at 332 [hereinafter: deKieffer]; and Ronald A. Brand, "Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930" (1990) 24 *Journal of World Trade* 5 at 138, 141 [hereinafter: Brand, Private Parties].

¹¹ G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization." (1995) 44 *Duke Law Journal* 829 [hereinafter: Shell, Trade Legalism].

¹² Philip M. Nichols, "Extension of Standing in World Trade Organization Disputes to Nongovernment Parties" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 295 at 309 [hereinafter: Nichols, Extension].

vocabulary in a 1978 article by John H. Jackson¹³, one of the world's leading experts of international trade law, has been widely adopted, as it connotes openness, accessibility and (community) involvement¹⁴.

However, I find the term *private participation* preferable to represent the concept of non-state access to WTO dispute resolution¹⁵. In my opinion, this is not merely an exercise in semantics. Rather, employing the adjective "private" acknowledges the insertion of a non-governmental, non-state element into the traditional notion of *public* international law. The *public* area of international law is generally reserved to States and governmental forms of interaction with no or minimal involvement of private actors. Thus, the term *private* participation emphasizes the origin and character of new classes of international legal actors in WTO dispute resolution and beyond, whose increasing role in international affairs may one day overcome the public - private divide, and recognize the individual as the fundamental unit of *all* international law.

¹³ John H. Jackson, "The Crumbling Institutions of the Liberal Trade System." (1978) Volume 12 *Journal of World Trade Law* 93 at 101 [hereinafter: Jackson, Crumbling Institutions].

¹⁴ See for example: Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 331 at 331-2, 334-5 [hereinafter: Charnovitz]; Robert F. Housman, "Democratizing International Trade Decisionmaking" (1994) 27 *Cornell International Law Journal* 699 at 705 [hereinafter: Housman]; or the Center for International Environmental Law (CIEL) *Draft Agreement on Public Participation and Transparency within the WTO*, 1996, at II. (on file with author) [hereinafter: CIEL Draft].

¹⁵ Similar: Martin Lukas, "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements" (1995) 29 *Journal of World Trade* 181 at 181-2 [hereinafter: Lukas], and Glen T. Schleyer, "Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System." (1997) 65 *Fordham Law Review* 2275 at 2293 [hereinafter: Schleyer].

Before offering a positive definition for private participation, I will discuss a number of related forms of private involvement in international activities. For the purposes of this thesis, the scope of private participation will not include indirect forms of private participation, be it informal means such as political lobbying or formal administrative procedures¹⁶. In principle, private participation could take place through national courts in a decentralized dispute settlement system based on the direct applicability of the WTO agreements¹⁷. It could also occur in a centralized dispute resolution framework based on the present DSU. Instead of state representation of private and society interests, private actors would thus become *directly* involved in WTO dispute settlement.

This focus also implies the second limitation to the scope of private participation as understood in this thesis: it is not concerned with the possibility and forms of private contributions to WTO policy formation, to WTO decision-making, or to multilateral negotiations of new international legal rules in the WTO forum, but with direct private participation in *WTO dispute settlement*. In other words, private participation would remain restricted to rule interpretation and application within the boundaries of a specific dispute. On the other hand, rule creation and amendment would, at present, continue to be the exclusive domain of States. However, it will become obvious that private participation would also require considerable changes of substantive WTO law, and could lead to a complete re-conceptualization of the foundations of

¹⁶ For a detailed exposition of forms of private participation at the national level, see Schleyer, *supra* note 15 at 2296-2303; compare also Hilf, *supra* note 8 at 319.

¹⁷ See Schleyer, *ibid.* at 2301-3.

international (trade) law. Private participation could symbolize more than the only viable form of legally recognized private involvement in the WTO¹⁸. It could become a beachhead in the attempt to overcome State dominance in public international law, and to establish the individual at the center of the international legal order.

Thirdly, private participation will not include informal means of non-governmental involvement in WTO dispute resolution. Instead, the term will stand for the *formal*, that is legal recognition of private participants in WTO dispute settlement proceedings and the establishment of procedural rights and obligations for new classes of actors. Based on these three limitations and expressed positively, private participation may so far be defined as the *direct and formal involvement of non-governmental actors in WTO dispute resolution*.

The concept of private participation encompasses two principal forms of involvement that I refer to as *passive private participation* and *active private participation*¹⁹.

¹⁸ Compare Nichols, *supra* note 12 at 308-9: "[B]ecause negotiating trade policy inherently involves yielding of sovereignty, it is unlikely that member countries would be willing to entrust negotiations involving sovereignty to any other entity other than themselves. Thus, only dispute resolution remains as an area of nongovernment party involvement. Moreover, dispute resolution is the most visible point of contact between private parties and the functioning of the World Trade Organization [...]." The most progressive example for participation of non-governmental organizations in the negotiation and development of international legal instruments (i.e. in international rule-making) is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted on 25 June 1998 Aarhus (Denmark) at the Fourth Ministerial Conference of the "Environment for Europe" process. As Wiek Schrage, "United Nations Economic Commission for Europe (ECE)" contribution to the forthcoming (1999) *10 Yearbook of International Environmental Law* (manuscript on file), states: "The Aarhus Convention will very probably provide the main legal framework for strengthening citizens' procedural rights in the sphere of the environment in the ECE region for the foreseeable future. It may also serve as a useful model at global level, being the most far-reaching expression to date of Principle 10 of the Rio Declaration on Environment and Development." It may thus indicate future trends beyond the sphere of international environmental law.

¹⁹ A similar distinction is implied by Housman, *supra* note 14 at 705, who speaks of "public participation and transparency".

While the second form is primarily concerned with issues of access and standing for non-governmental actors to WTO dispute resolution, passive private participation addresses the flow of information from the WTO to civil society. It is associated with the transparency of WTO dispute resolution, and the opportunity for any and every member of civil society to understand, reproduce, and experience the substantive results of disputes, the process through which they were reached, and the underlying legal principles employed²⁰. Passive participation reflects the idea of “democratic rights of citizens to have knowledge of [WTO] decisions that will affect their interests”²¹. It is the means by which an international civil society – that is, the community of all Member societies affected by the WTO trading system – is able to determine *how* it is affected by WTO dispute settlement proceedings (and, as a necessary extension, by the WTO in general).

Private participation in its active variant, on the other hand, emerges from civil society. It is fed by and dependent on opportunities for *passive* private participation, which provides the causes and substance of individual agendas. Without its existence any attempts of active participation by non-governmental actors - for example, to

²⁰ Frederick Abbott, “GATT as a Public Institution: The Uruguay Round and Beyond” (1992) 18 Brooklyn Journal of International Law 31 at 47 [hereinafter: Abbott, Public Institution]; Jackson, John H. World Trade and the Law of GATT. A Legal Analysis of the General Agreement on Tariffs and Trade. (New York: The Bobbs-Merrill Company, 1969) at 768 [hereinafter: Jackson, World Trade]. See also WTO, “Guidelines for Arrangements on Relations with Non-Governmental Organizations” Decision adopted by the General Council on 18 July 1996 (WTO Document WT/L/162 – 23 July 1996) [hereinafter: Guidelines] at II and III: “In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.”(II.) “To contribute to achieve greater transparency Members will ensure more information about WTO activities [...]” (III.).

²¹ Housman, *supra* note 14 at 703, promoting the idea of “participatory democracy”.

fight their cases in the WTO dispute settlement system - would be ineffective at best. As any and every individual member of civil society may become affected by the diverse effects of the world trading system, passive participation means *that at any given time, at any given place, any given part of civil society must have access to any relevant information about WTO disputes, their legal and factual background, as well as related WTO activities*. On the part of the WTO, it requires the establishment of an appropriate infrastructure providing for easy worldwide availability and comprehensiveness of information, and mass surges of interest.²²

In contrast, active private participation stands for immediate involvement of non-governmental actors in WTO dispute settlement and their ability to influence the outcomes of proceedings. Active participation is to be understood as a formal, or legally established role of non-governmental actors in the process of dispute resolution. In principle, it may manifest itself in three varieties: standing, evidence, and neutral adjudicator; and although all three will be touched upon in this thesis, only the first will be understood as active private participation.

"Neutral adjudicator" is a generic term for the role of an independent and impartial third party who, depending on the method of dispute resolution, may fulfil functions

²² Compare also John H. Jackson, "Government Disputes in International Trade Relations: A proposal in the Context of GATT" (1979) 13 *Journal of World Trade Law* 1 at 9 [hereinafter: Jackson Government Disputes] discussing improvements of the predictability of the dispute settlement procedures and stating that "one of these [improvements] would be a firm rule that all decisions as to interpretation and application of previously agreed rules would be published and made available for the world of citizens, officials and scholars to examine, criticize and analyze."

ranging from assisting the parties to find a mutually agreeable solution, to investigating the factual and/or legal aspects of a dispute, to rendering a decision binding on the parties to the dispute. Neutral adjudicators may be recruited - in whole or in part - from non-governmental actors, but their primary function is to operate as an organ of the dispute settlement mechanism with no other obligations than to the respective dispute settlement system and the application of its principles or rules. In other words, the non-governmental origin of neutral adjudicators may pose an indirect influence, but it stands back in favour of the impartiality and independence of their procedural roles.

Given their recognition as sources of evidence, non-governmental actors may also contribute to the settlement of disputes, for example as witnesses or expert witnesses. Although their involvement may be a formal one, subject to extensive procedural rules, it is contingent on the will of the parties to the dispute or the neutral adjudicator to rely on their testimony for the purposes of dispute settlement. In this sense, private involvement is neither a permanent nor necessarily a regular occurrence.

The last variety, standing, refers to an involvement of non-governmental actors in WTO dispute settlement proceedings based on vested procedural rights. It is not limited in meaning to the right to initiate a settlement proceeding as a party to a dispute, but includes any other opportunities of formal participation, be it as observer, *amici curiae* or third party.

Taken together, I define public participation as the direct, formal, and rights-based access of non-governmental actors to the WTO dispute settlement system, taking the form of passive or active involvement in dispute settlement proceedings. Passive private participation is the right to open and transparent dispute resolution, including the right to be informed about and to attend WTO (dispute settlement) activities. Active private participation, on the other hand, is to be understood as the right of non-governmental actors to directly influence the outcome of a dispute through legally established procedural means. I will refer to this concept of meaningful private involvement and argue for its implementation in WTO dispute resolution in the chapters ahead.

0.2 Chapter Overview

In Chapter 1 I will develop an analytical framework for dispute settlement system based on their three essential elements, participants, the subject matter of disputes, and the procedures available for their resolution. I will examine the philosophical and theoretical approaches underlying each element and their influence on the shape of international dispute settlement systems. Moreover, I will explain how each element stands in correlation with the forms and extent of private participation. Finally, I will transfer the insights of this Chapter into a graphic representation, a dispute settlement matrix that visualizes the analytical framework and makes it possible to locate any

given dispute settlement system with regard to the three coordinates, participants, subject matter and procedures, in relation to any other dispute settlement system.

Chapter 2 will provide an introduction to the World Trade Organization, and the world trading system. I will give an overview of its theoretical foundations, its development, structure and organization, its scope, and most importantly, its dispute settlement system. Although the present WTO dispute settlement system is the result of more than 50 years of evolution, in step with the developments within the world trading system, I will concentrate on its present form as the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and its origin in the Uruguay Round.

The purpose of Chapter 3 is to subsume the WTO dispute settlement system under the analytical framework of the first chapter. It will examine the DSU and the agreements within its coverage from the viewpoint of its participants, its material scope and its procedural approach to dispute resolution, and place the DSU in the dispute settlement matrix.

Based on the position of the DSU within the analytical framework, Chapter 4 will submit theoretical and practical arguments in favour of private participation. It will suggest to exchange the predominant views of actors in public international law and particularly the WTO by a new, liberal paradigm, placing the individual at the centre

of international and WTO law. It will introduce the concept of individual and democratic rights to international trade relations and dispute resolution, opening the latter to new categories of international actors.

Chapter 5 will suggest how the introduction of private participation might be integrated into the world trading system in its present form. That is to say, it emphasizes a rights-based approach to private participation based on a liberal understanding of international law. But it will not promote changes that transform the WTO dispute settlement system from being essentially a regime for the resolution of trade disputes to become a new “world court”. Instead, the chapter will argue for the meaningful involvement of private actors whose interests and objectives are affected by the multilateral trading system, with varying procedural roles that reflect their relation to the WTO’s trade regime, ranging from passive participation, to party status to *amici curiae*.

Finally, Chapter 6 will give the conclusions of the thesis. It will summarize my arguments, put them into the wider context of the development of public international law and provide an outlook on future reform and areas of research.

CHAPTER 1

ANALYTICAL FRAMEWORK

1.1 Elements of Dispute Resolution Mechanisms and the Dispute Settlement Matrix

The following section suggests that an argument for private participation in the WTO dispute settlement system be placed within a general analytical framework that is capable of defining any international dispute settlement system. The framework comprises three distinctive elements: the first element (Who?) classifies the actors in a dispute settlement system, and in particular its parties; the second (What?) examines the objects of disputes, or, the substantive legal matters involved, including rights and obligations of the parties; and the third (How?) looks at the procedures according to which disputes are to be settled.

This practical systematization - underlying all modern legal systems - can be traced back to the Roman jurist Gaius and his *Institutiones*²³ who derived the distinction between *personae*, *res*, and *actiones* - the subjects, objects, and procedures of Roman civil law - from grammar and elementary philosophy²⁴. The system not only makes it possible to categorize the functions of dispute settlement mechanisms in relation to these three elements. It permits each element to be isolated and shows its effects on the existence, extent, and forms of private participation.

²³ Gai, *Institutiones or Institutes of Roman Law by Gaius with a Translation and Commentary by the late Edward Poste, M.A.* 4th ed, (Oxford: Clarendon Press, 1904). Gaius was active between ca. 117 and 178 A.D, see page liv.

²⁴ Max Kaser, *Roman Private Law (Römisches Privatrecht)*, translated into English by Rolf Dannenbring (Durban: Butterworth, 1965) at 20. The distinction of Gaius was adopted in the *Corpus Iuris Civilis* of Iustinian from 529 A. D.

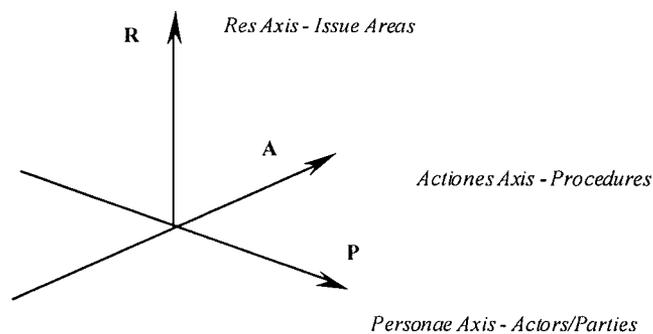
It is obvious that private participation cannot exist if individuals or other private entities are not recognized as participants in a dispute resolution mechanism. But although the remaining two elements are dependent on the first, both the substantive issues at dispute and the procedures employed in their settlement affect how private participation occurs. To put it differently, once private participation has been accepted in principle, it is the extent of the substantive issue areas covered by the respective dispute settlement mechanism that eventually decides which private parties may be involved in disputes and their settlement. For example, the dispute resolution system of an international labour regime will primarily invite the participation of individuals or groups with a corresponding agenda, such as employer and employee organizations, but not environmental activists. In addition, the procedures in place influence the form of active as well as passive private participation, and their success. As will be shown below²⁵, dispute resolution occurs between two poles: it may be power-based, following the relative strength of the disputing parties, or rule-based, creating formal equality between the parties. Given, for example, the tremendous difference in power between individuals and States, only dispute settlement systems that display a certain degree of rule-orientation can ensure an effective representation of non-governmental interests.

Based on the differentiation between actors, issues and procedures, the character of any given dispute settlement system and the interplay between its three analytical elements may be displayed in a three-dimensional matrix. Each axis in this matrix represents one of the elements

²⁵ *Infra* notes 117-67 and accompanying text.

that define a dispute settlement system. Paraphrasing the classic Roman distinction, the axes are called *personae axis* (p), showing the participants in the dispute settlement system; *res axis* (r), representing the substantive issues covered; and *actiones axis* (a), exhibiting the procedures employed, see Figure 1.1.:

Figure 1.1 Matrix for Dispute Settlement Systems



It should be noted that this approach has been inspired by Richard Shell's 1995 article *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*²⁶. His analysis of the WTO seems to be based on a conception similar to the distinction between actors, subject matter and procedure suggested in this chapter. In particular, he stresses the interrelation and interaction between the three categories: "Drawing on international relations, economic and legal theory, [Shell] conceptualizes [...] three competing normative approaches to, or

²⁶ Shell, *Trade Legalism*, supra note 11. See also See also, G. Richard Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization", (1996) 17 *University of Pennsylvania Journal of International Economic Law*: 359 [hereinafter: Shell, *Trade Stakeholders*].

models of, WTO trade legalism,²⁷ the "Regime Management Model"²⁸, the "Efficient Market Model"²⁹, and the "Trade Stakeholders Model"³⁰. The *tertium comparationis* between these models is the issue of participation in the WTO dispute settlement system, that is, who is granted standing as parties in the proceedings. The choice of actors utilizing a dispute resolution system alters both the purpose of the system and interests, goals and subject matters it has to accommodate.

The theoretical underpinnings of the "Regime Management Model" consist of the international relations theory of institutionalism and economic free trade theory³¹. The model portrays the WTO as a framework of international legal rules that is designed for the requirements of and restricted to State actors³². Within the limits of this framework States can adjust their trade relations and strike a balance between their free trade interests and their need to control domestic trade policy³³. Thus, dispute settlement is accessible only to States, and its mechanisms - while applying and enforcing binding norms - reflect their users' needs through the choice of adjudicators, procedural flexibility, etc.³⁴ This model "best describes the current, State-dominated structure of the WTO."³⁵

²⁷ Shell, Trade Legalism, *supra* note 11 at 834.

²⁸ *Id.* at 858-77.

²⁹ *Id.* at 877-94.

³⁰ *Id.* at 907-25.

³¹ Shell, *id.* at 858, uses the synonymous term of "regime theory". It is also known as Neoliberal Institutionalism, see Anne-Marie Slaughter, "Liberal International Relations Theory and International Economic Law", (1995) 10 *American University Journal of International Law and Policy* 717 at 724, note 25 [hereinafter: Slaughter, International Relations]. See also Robert Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy*, Princeton: Princeton University Press, 1984 [hereinafter: Keohane, After Hegemony], at 246.

³² Slaughter, *ibid.* at 864.

³³ *Ibid.* at 864-5.

³⁴ *Ibid.*

³⁵ Shell, Trade Stakeholders, *supra* note 26 at 365. Legalist proponents of the Regime Management Model are: Fred O. Boadu and E. Wesley F. Peterson. "Multilateral Agreements and Visions of the World" (1992) Volume 71 *Nebraska Law Review* 460 [hereinafter: Boadu/Peterson]; Jean-Gabriel Castel, "The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures" (1989) 38 *International & Comparative Law Quarterly* 834 [hereinafter: Castel]; William J. Davey, "Dispute Settlement in the GATT" (1987) 11 *Fordham International Law Journal* 51 [hereinafter: Davey]; Nichols, Extension, *supra* note 12; Jeffrey

Composed of the international relations theory of liberalism and free trade principles, the "Efficient Market Model" opens the world trading system to commercial entities in addition to State parties³⁶. The WTO is characterized as a system created by States, private traders and export-oriented producers to overcome domestic anti-free trade movements, motivated by economic protectionism or other causes³⁷. Correspondingly, trade adjudication should be open to States and private businesses and should operate both at the international and municipal level. Trade rules could then be enforced by States and individuals both through WTO dispute settlement and domestic courts due to their direct effect or incorporation in domestic legal systems³⁸. The "Efficient Market Model" works as an explanatory tool for certain existing tendencies in WTO reform proposals³⁹.

Richard Shell himself suggests a third model to overcome the participatory limitations of the two preceding approaches⁴⁰. The "Trade Stakeholders Model" has its conceptual roots in the international relations theory of liberalism and the ideas of civic republicanism⁴¹, and promotes

Waincymer, "GATT Dispute Settlement: An Agenda for Evaluation and Reform" (1989) 14 *North Carolina Journal of International Law and Commercial Regulation* 81 [hereinafter: Waincymer].

³⁶ Shell, Trade Legalism, supra note 11 at 885.

³⁷ Id. at 878-9. Other causes can be environmentalism or the protection of national culture.

³⁸ Id. at 885.

³⁹ Shell, Trade Stakeholders, supra note 26 at 370. Proponents of the Efficient Market Model are: Ronald A. Brand, "GATT and the Evolution of United States Trade Law, (1992) 18 *Brooklyn Journal of International Law* 101 at 128, 138, 141 [hereinafter: Brand, GATT]; deKieffer, supra note 10 at 332; Hilf, Analysis, supra note 8 at 318-9; John H. Jackson, Jean-Victor Louis, and Mitsuo Matsushita, *Implementing the Tokyo Round. National Constitutions and International Economic Rules* (Ann Arbor: The University of Michigan Press: 1984), [hereinafter: Jackson et al., Tokyo Round] at 208-9; John H. Jackson, *The World Trading System. Law and Policy of International Economic Relations*. (Cambridge, Massachusetts: The MIT Press, 1989) at 111 [hereinafter: Jackson, World Trading System]; Mora, supra note 9 at 161-2.

⁴⁰ Other commentators following a similar or related approach are: Charnovitz, supra note 14; Housman, supra note 14 at 703, 744-5; Schleyer, supra note 15; and Michael K. Young, "Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats" (1995) 29 *The International Lawyer* 389 at 407 [hereinafter: Young].

⁴¹ Shell, Trade Legalism, supra note 11 at 911-3 (liberalism) and 913-5 (civic republicanism).

access to all interested groups and individuals "with a stake in trade policy."⁴² Inspired by reform movements the fields of international environmental law and human rights towards increased private participation and the development of the E.C. justice system⁴³, the "Trade Stakeholders Model" creates a forum to accommodate trade and non-trade interests and their proponents. In terms of dispute settlement, States and all trade stakeholders would have standing in the proceedings, while the adjudicatory process would work both internationally and domestically, as in the "Efficient Market Model". For Richard Shell, this proposal may serve "as a blueprint for future reforms that is both normatively superior and more likely to result in long-run trade governance stability."⁴⁴

While I agree with Professor Shell's ultimate goal of a trade stakeholders model for WTO dispute resolution, policy- and rule-making, I prefer to limit his suggestions for reform to forms of private participation that would be supported by the structure and theoretical foundations of the WTO, as a regime predominantly concerned with trade. As will be seen, this more limited vision of private participation in WTO dispute resolution would still guarantee the involvement of a wide variety of both economic and non-economic actors and interests.

Returning to the analytical framework suggested for this thesis, the next three parts will expound on the axes of the dispute settlement matrix as well as their supporting theoretical conceptions. Each part will focus on the interrelation between the respective analytical element - actors,

⁴² Ibid. at 911.

⁴³ Ibid. at 912 and 917-9.

⁴⁴ Shell, Trade Stakeholders, supra note 26 at 370.

subject matter, procedures, and private participation. Taken together, they will make it possible to locate the WTO dispute settlement system within the matrix and provide a basis for an argument in favour of private participation.

1.2 An Actors-Based Framework for Dispute Settlement Systems: The *Personae Axis*

This section intends to set out a general framework that makes it possible to categorize international dispute settlement systems based on their participants: which groups of international actors may take recourse to a specific dispute settlement mechanism, may become parties to disputes, or may otherwise play an active role in their resolution. The section will examine, which categories of actors in the international system - classified according to their organizational structure, and not their vocations or goals⁴⁵ - may participate in international dispute settlement systems. It will propose models of dispute settlement systems that include different actor-categories, arranged visually on the *personae axis* of the dispute settlement systems matrix. Furthermore, the section will analyze the theoretical foundations, namely international relations theory, that influence the choice of participants in dispute settlement mechanisms.

1.2.1 International Relations Theory

In order to identify the different categories of actors that meet and interact in the global, and specifically the international trade arena, and to determine potential participants in a more accessible WTO dispute settlement mechanism, I will draw on the insights of international

⁴⁵ Such as materialistic or profit-oriented in transnational corporations or other private economic actors; altruistic in many NGOs; special interest or multi-purpose groupings, etc.; see also *infra* notes 55-66 and accompanying text.

relations studies. This branch of political science is concerned with the workings of the international system, its inherent power structures and rules, its actors and their interactions⁴⁶. Its aim is "to describe, to interpret, to explain, and if possible to predict the development of the processes"⁴⁷ within the international system. International relations theory (IR) allows students of international law to uncover the values, assumptions, and perceptions of the realities, which are underlying international legal regimes. It may also assist in the formulation of new rules of international law that reflect an improved understanding of world affairs.

Yet, during most of the 20th century the two disciplines have lead an uneasy co-existence. With the emancipation of international relations as an independent discipline after the Second World War, its leading scholars starting with Hans Morgenthau's *Politics Among Nations*⁴⁸ denounced international law as irrelevant for world politics⁴⁹. On the other hand, the majority of post war international lawyers took no account of international relations theory as an analytical tool for their works⁵⁰. In recent years, efforts by legal scholars like Anne-Marie Slaughter and Kenneth Abbott⁵¹ have prompted a rediscovery of international relations for the purposes of public international law⁵².

⁴⁶ Brian Hocking & Michael Smith, *World Politics. An Introduction to International Relations*, 2nd ed. (London: Prentice Hall, 1995) at 50 [hereinafter: Hocking/Smith].

⁴⁷ Ibid, at 16. Similarly, Kenneth Abbott, "Elements of a Joint Discipline", (1992) *The American Society of International Law, Proceedings of the 86th Annual Meeting 1992*, 167 at 168 [hereinafter: Abbott, Elements], defines the main aspects of international relations scholarship as descriptive, explanatory, normative and instrumental; instrumental refers to the aim of international relations to develop model for the improvements of the international system.

⁴⁸ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*. 5th ed. (New York: Alfred A. Knopf, 1978) first published in 1948, [hereinafter: Morgenthau].

⁴⁹ See Francis A. Boyle, "The Irrelevance of International Law: The Schism Between International Law and International Politics" (1980) 10 *California Western International Law Journal* 193. [hereinafter: Boyle].

⁵⁰ Abbott, Elements, supra note 47 at 167.

⁵¹ Slaughter, International Relations, supra note 31; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *The American Journal of International Law* 205

In the same vein, I will rely on international relations scholarship to determine categories of international actors. Following the basic division of IR schools of thought submitted by Anne-Marie Slaughter into "realism", "institutionalism", and "liberalism"⁵³, I will then evaluate their roles within the international system, as well as their eligibility as participants in WTO dispute resolution⁵⁴. With regard to the latter two aspects, it follows the basic division of IR schools suggested by Anne-Marie Slaughter. While the first two schools offer a state-centric view of international relations, liberalism takes a mixed-actor perspective of the international arena.

1.2.2 Identifying International Actors

Today's international playing field - and in the same manner, the international trade arena - is not exclusively limited to States as political or legal actors. A host of other groups, organizations, and individuals make the news with their activities on the international scene, and influence State

[hereinafter: Slaughter, Dual Agenda]; Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers (1989) 14 *Yale Journal of International Law* 335 [hereinafter: Abbott, Prospectus]; Abbott, Elements, supra note 47. For the first indications of efforts towards a "re-unification" of disciplines from the side of International Relations, see Boyle, supra note 49 at 217-9.

⁵² Slaughter, International Relations, supra note 31 at 719-21 contends that lessons drawn from the study of IR may help to understand the limitations of public international law within the international system, to determine how international legal rules are most effectively implemented, and to identify the principal actors in the international sphere as well as their motives; thus allowing international lawyers to locate the sources of international conflicts and to devise legal strategies for their resolution.

⁵³ Ibid. at 721-31. The descriptions of these categories, however, are no more than simplified generalizations that do not intend to completely reflect the complex and diverse panorama of international relations scholarship. Similar distinctions can be found in the works of other legal scholars drawing on international relations theory as an explanatory tool. See for example: Shell, Trade Legalism, supra note 11 at 855, 858, 877, 904 – 907, 911; Shell, Trade Stakeholders, supra note 26 at 364 – 367; Ernst-Ulrich Petersmann, "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization", (1995) 6 *European Journal of International Law* 161 at 182 – 186; Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (London: Kluwer Law International, 1996) at 14 -5 [hereinafter: Petersmann, GATT].

⁵⁴ In the same manner, IR theories, in particular realism and institutionalism, are helpful to elucidate assumptions of the international system underlying pragmatist and legalist conceptions of dispute settlement procedures. Compare infra notes 117-167 and accompanying text.

agendas. Among them are international governmental organizations like the United Nations or the WTO; non-governmental organizations (NGOs) representing a kaleidoscope of interests and objectives, such as the World Wide Fund for Nature, the Red Cross, or Amnesty International; transnational corporations (TNCs) like Exxon, Daimler-Chrysler, or Monsanto; liberation movements and people seeking self-determination, for example the PLO; criminal organizations like the Medellin Cartel or the Mafia⁵⁵; international terrorist groups; internationally active ethnic groups like the Kurds in Turkey, Iraq, Syria, and Iran; international political parties; so called epistemic communities of internationally organized scientists⁵⁶; or individuals like George Soros, Rupert Murdoch, Ted Turner or Salman Rushdie. In particular, since the end of the Second World War, the numbers of international organizations, both governmental and non-governmental have exploded, a development that is illustrated in Figure 1.2.

⁵⁵ Alex P. Schmid, "Non-State Actors: Organized Crime, Human Rights NGOs and the United Nations" in Theo C. van Boven et al, eds. *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors* (Utrecht: SIM, 1997) 125 et seq.

⁵⁶ See for example Fred Grünfeld, "The United Nations and Non-State Actors: Legitimacy and Compliance" in Theo C. van Boven et al, eds. *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors* (Utrecht: SIM, 1997) 11 at 14-8 [hereinafter: Grünfeld]. And Schmid, *ibid.* Peter Haas, "Knowledge, Power, and International Policy Coordination" (1992) 46 *International Organization* 1. Thomas Risse-Kappen, "Bringing Transnational Relations Back In: Introduction" in Thomas Risse-Kappen, ed. *Bringing Transnational Relations Back In. Non-State Actors, Domestic Structures and International Institutions*. (Cambridge, Cambridge University Press, 1995) 3 at 3-4 [hereinafter: Risse-Kappen, Introduction]; see also Phillip Taylor, *Nonstate Actors in International Politics. From Transregional to Substate Organizations*. (Boulder: Westview Press, 1984), particularly Chapter 15 on TNCs and Chapter 16 on Transnational Ethnic Groups.

Figure 1.2 - Proliferation of International Bodies in the 20th Century⁵⁷

	Conventional International Bodies*		Other International Bodies**		TOTAL
	IGOs	NGOs	IGOs	NGOs	
1909	37	176	---	---	213
1956	132	973	---	12	1107
1960	154	1255	---	13	1422
1977	252	2502	---	2653	5407
1981	337	4265	702	5133	10437
1990	293	4646	1563	11562	18064
1993	272	4830	1464	7929	14495
1996	260	5472	1570	9636	16938

As a consequence of the increase of international non-state bodies, IR scholars and practitioners began in the early 1970's to pay closer attention to the categories, forms of organization, and motives of international non-state actors and their role in international relations⁵⁸. And following

⁵⁷ Source: *Yearbook of International Organizations 1996/97*. ed. Union of International Associations at 1652-9.

* *Conventional International Bodies* are classified as "federations of international organizations; universal membership organizations; intercontinental membership organizations; regionally defined membership organizations."

** *Other International Bodies* are "organizations emanating from places, persons or other bodies; organizations having a special form, including foundations and funds; internationally oriented national organizations".

The table displays the social reality of intergovernmental organizations and non-governmental organizations co-existing in the international realm. For different approaches on how to measure existing international organizations, i.e. from a public international law perspective, or a perspective that includes independent, semi-autonomous or unconventional forms of international organization see Table1 *Yearbook of International Organizations 1996/97*. ed. Union of International Associations at 1658, including notes 1-5.

⁵⁸ The groundwork for a new conception of international relations in a mixed-actor system was provided in 1972 by Oran R. Young, "The Actors in World Politics" in James N. Rosenau et. al, eds., *The Analysis of International Politics* (New York: The Free Press, 1972) 125, particularly at 134-9 [hereinafter: Oran Young].

the end of the Cold War and the dramatic changes in Eastern Europe and other parts of the world this perspective was taken up with renewed vigour in the 1990s⁵⁹.

Based on the organizational structures of international actors, Richard Mansbach, Yale Ferguson, and Donald Lampert propose in *The Web of World Politics. Nonstate Actors in the Global System*⁶⁰ a framework of six different categories of internationally active entities: (1) interstate governmental actors, or international governmental organizations (IGOs), formed by governmental representatives of more than one State⁶¹; interstate nongovernmental actors, which include individuals, groups, or organizations from more than one State and do not represent governments of any State - this category includes so diverse forms as NGOs, TNCs, or religious orders⁶²; (3) nation-states, who are internationally represented by officials or agencies of a central government⁶³; (4) governmental noncentral actors, or sub-national entities, which comprise, provinces, States and other federal institutions, regions, and municipalities⁶⁴; (5) intrastate nongovernmental actors, who are rooted and active chiefly within one State, but exert international influence⁶⁵; and (6) individuals who are able to behave autonomously in the global arena⁶⁶.

⁵⁹ Hocking/Smith, supra note 46 at 8, and Risse-Kappen, Introduction, supra note 56 at 4-5. The American Society of International Law dedicated its 1998 annual meeting to the issue of non-state actors, see: The American Society of International Law, "The Challenge of Non-State Actors" *Proceedings of the 92nd Annual Meeting, April 1-4, 1998 Washington, D.C.* (ASIL: Washington, D.C., 1998).

⁶⁰ Richard W. Mansbach, Yale H. Ferguson and Donald E. Lampert, *The Web of World Politics. Nonstate Actors in the Global System*. (Englewood Cliffs, New Jersey: Prentice-Hall, 1976) at 39 et seq. [hereinafter Mansbach, *Web of World Politics*].

⁶¹ Ibid. at 39.

⁶² Ibid. at 39-40.

⁶³ Ibid. at 40.

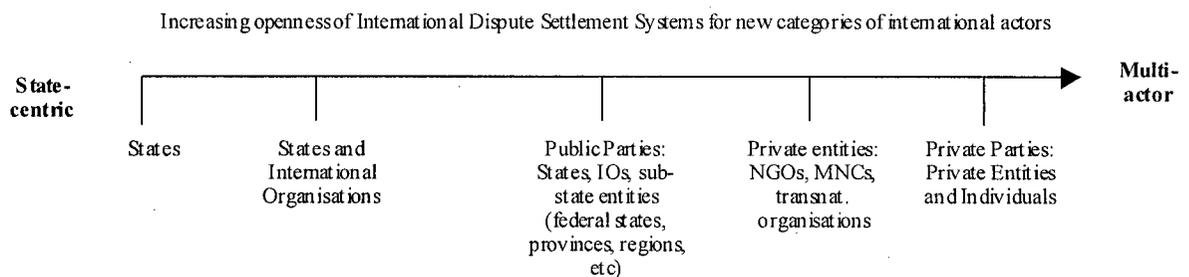
⁶⁴ Ibid. at 41.

⁶⁵ Ibid. at 41.

⁶⁶ Ibid.

With slight variations, this framework may serve as the basic model for the determination of participants in international dispute settlement procedures such as the WTO's Dispute Settlement Understanding. Instead of six groups of actors, it consists of five categories, namely States, IGOs, sub-national governmental actors, non-governmental organizations, and individuals, combining interstate and intrastate organizational forms of non-governmental activities. Its projection onto the *personae axis* of parties in the dispute system matrix, is shown in Figure 1.3.:

Figure 1.3 - Parties in Dispute Settlement Systems



Moving along the axis, the figure displays a linear development of increasing openness of international dispute settlement systems for different categories of actors: from regimes that are only accessible to States, like the International Court of Justice⁶⁷, towards dispute settlement mechanisms that recognize non-governmental entities and even individuals as parties to a dispute, as in the case of the European Court of Justice⁶⁸. In practice, a multitude of actor-

⁶⁷ See paragraph 1 of Article 34 of the Statute of the International Court of Justice.

⁶⁸ See for example Articles 170, 171 for actions of Member States against another Member State, and paragraph 3 of Article 175 of the Treaty Establishing the European Economic Community.

combinations within dispute settlement systems are conceivable. They may completely exclude certain categories of actors or limit access to some types of actors within a category, while other categories face no limitations⁶⁹. It poses the question of how to determine the importance of certain actor categories in the international system or any of its sub-systems, so that it justifies, or rather, demands formal acknowledgement of their involvement. In the particular context of the WTO dispute settlement system, the question would be how to decide in a general fashion which categories of actors may qualify as participants in WTO dispute resolution.

1.2.3 Selecting Actor-Categories

Although all three major schools of IR theory recognize the existence of a variety of non-state actors, they come to different assessments of their roles within the international system. As pointed out earlier, we may distinguish between the state-centric theories of realism and institutionalism on the one hand, and on the other multi-actor model forwarded by liberalists.

1.2.3.1 State-Centric Perspectives: Realism and Institutionalism

Realist theories, representing the traditional understanding of the international system⁷⁰, share three fundamental assumptions: first, States are regarded as the central protagonists in

⁶⁹ For example dispute settlement between host States and nationals of other States - i.e. international economic actors such as corporations and individuals under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 14 October 1966, United Nations, Treaty Series, vol. 575, 160, No. 8359 (1966).

⁷⁰ Realist concepts are traced back to Thucydides' *History of the Peloponnesian War*, 425 B.C., as proposed by Machiavelli, and after the WW II by scholars like Hans Morgenthau, Kenneth Waltz, or Robert Gilpin; compare Burley, *International Relations*, supra note at 721, and Joseph M. Grieco, "Realist International Theory and the Study of World Politics, (1995) *Cosmos* 11 at 12 [hereinafter: Grieco].

international relations; second, the system in which their interactions take place is anarchic in nature; and third, States act as rational, unitary egoists⁷¹.

For scholars adhering to political realism, the focus on States as the only relevant actor category is justified by their overwhelming role in shaping the international system. According to Kenneth Waltz:⁷²

States set the scene in which they, along with nonstate actors, stage their dramas or carry on their humdrum affairs. Though they may choose to interfere little in the affairs of nonstate actors for long periods of time, states nevertheless set the terms of the intercourse, whether by passively permitting informal rules to develop or by actively intervening to change rules that no longer suit them. When the crunch comes, states remake the rules by which other actors operate.

From a realist viewpoint States exist in an anarchical system. That is not to say that they find themselves surrounded by chaos; anarchy refers to the absence of a centralized authority with sufficient power to create and enforce an order binding on all international actors⁷³. The lack of hierarchic restraints entails a fundamental unreliability of State interactions. Thus, States are compelled to avoid cooperation and to struggle for the means to protect their survival and security independently; they become self-help actors⁷⁴.

⁷¹ Grieco, *ibid.*

⁷² Kenneth N. Waltz, *Theory of International Politics* (New York, Random House, 1979) at 94 [hereinafter: Waltz, Theory]. Similarly Stephen D. Krasner, "State Power and the Structure of International Trade", XXVIII *World Politics* 317 at 343 ("[I]t is the power and the politics of states that create order where there would otherwise be chaos or at best a Lockian state of nature. The existence of various transnational, multinational, transgovernmental and other nonstate actors [...] can only be understood within the context of a broader structure that ultimately rest upon the power and interests of states [...]"). See also Robert Gilpin, "The Politics of Transnational Economic Relations", (1971) 25 *International Organization* 398 at 418.

⁷³ Waltz, Theory, *ibid.* at 88-9.

⁷⁴ *Ibid.* at 91-2.

To be more precise, despite obvious differences in size, internal political organization, social structure and a multitude of other factors, all States are assumed to act as unitary, rational egoists, that is, in accordance with the same guiding principles⁷⁵. They appear to be unitary in the sense that they define and pursue national interests within the international sphere unaffected by influential domestic interest groups⁷⁶. Rationality, on the other hand, is understood as the ability of States to select and arrange their preferences in a consistent manner - based on experiences and observation - and to be receptive to the costs and benefits of different courses of action regarding the achievement of their goals⁷⁷.

For realists the struggle for survival and security that is common to all States means that the whole spectrum of preferences or goals can be reduced to a strife for power. For example, Morgenthau writes:⁷⁸

International politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim. Statesmen and peoples may ultimately seek freedom, security prosperity, or power itself. They may define their goals in terms of a religious, philosophic, economic, or social ideal. [...] But whenever they strive to realize their goal by means of international politics, they do so by striving for power.

In the face of wide-spread co-operation between States - through a variety of formal or non-formal organizations and arrangements, particularly after the Second World War and in areas like

⁷⁵ Compare Abbott, *Prospectus*, supra note 51 at 351, who notes that “[a]ll analysts recognize that assumptions like unity and rationality omit important real-world variables”.

⁷⁶ Grieco, supra note 70 at 13.

⁷⁷ Grieco, supra note 70 at 12-3.

⁷⁸ Morgenthau, supra note 48 at 29.

trade, technical standardization, or health care - the realist assumption that anarchy quasi-automatically directs State conduct towards a single-minded pursuit of power creating a climate of permanent conflict, has met with criticism and led to the proliferation of institutionalist conceptions⁷⁹. Institutionalism builds upon the realist assumptions of rational-egoist States as the main actors on the international stage, but attempts to account for the capacity of institutions to impose effective constraints on State behaviour⁸⁰. These international institutions or "regimes" can be defined as:⁸¹

[S]ets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choices.

As implied in this definition, institutionalists posit that international regimes are attractive to States because they facilitate co-operation by improving the predictability of State behaviour⁸². They provide long-term settings for negotiations and interactions; reduce the costs of collaboration; create networks between related issues and issue-areas; raise the quantity and quality of information available to States; and generate strong disincentives against deception⁸³.

⁷⁹ See for example Keohane, *After Hegemony*, supra note 31 at 14, who examines the reasons for the existence and continuance of co-operation that is not established through the domination of a hegemon, like the British Empire in the 19th early 20th century, and the United States in the first 25 years after the Second World War (at 31-46).

⁸⁰ Ibid. at 29-30.

⁸¹ Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in Stephen Krasner, ed. *International Regimes* (Ithaca: Cornell University Press, 1983) 1 at 2.

⁸² Keohane, *After Hegemony*, supra note 31 at 244. For introductions to the main strands of institutionalist analysis from a legal perspective, including game theory and theories on political market failures in the absence of regimes, see Abbott, *Prospectus*, supra note at 354 et seq., and Kenneth Abbott, "The Trading Nation's Dilemma: The Functions of Law in International Trade" (1985) 26 *Harvard International Law Journal* 500.

⁸³ Keohane, *ibid.* at 85-109 and 244-5.

To put it differently, regimes allow and require States to part with the power-orientation of their actions thus permitting and facilitating the pursuit of other national preferences. "By establishing legitimate standards of behaviour for States to follow and by providing ways to monitor compliance, they [regimes] create the basis for decentralized enforcement founded on the principle of reciprocity."⁸⁴ Thus, regimes have the capacity to transform the underlying system of anarchy, to create rules and to ensure their observation, even where they run counter to a State's immediate self-interest⁸⁵.

In terms of actors, both realism and institutionalism take a state-centric perspective. A dispute settlement system based on realist assumptions of the international system would limit participation to States as the only relevant category of actors. Institutionalism, due to its recognition of States and their institutionalized forms of cooperation, would also support mechanisms for the resolution of disputes between States and international governmental organizations.

1.2.3.2 Multi-Actor Perspectives: Liberalism

The family of IR theories labelled as liberalism counterpoint realist and institutionalist models in their principal assumptions. Rather than viewing States as the chief players in the international arena, liberalist scholars identify individuals and groups operating both at the domestic and international level as the primary objects of analysis⁸⁶. Moreover, States are no longer perceived

⁸⁴ Ibid. at 85-109.

⁸⁵ Compare Hocking/Smith, *supra* note 46 at 306-7.

⁸⁶ Burley, *International Relations*, *supra* note 31 at 729.

as unitary rational actors whose conduct is determined by the systemic constraints of the international arena. State preferences and actions become a social function expressing patterns of individual or group interests within domestic and international civil societies⁸⁷. With States as agents of dominant individual or group concerns, cooperation and conflict between States reflects their commonalities or opposing societal interests, instead of a struggle for power, whether or not it is mediated by the existence of regimes⁸⁸. "Based on these assumptions, the best way to resolve conflict and to promote cooperation in the service of common ends, either by changing individual and group preferences or by ensuring that they are accurately represented."⁸⁹ States remain major participants, but they are joined in the analysis by internationally active governmental and non-governmental organizations, and subnational groupings and individuals. The liberal model of international relations will be discussed in Chapter 5 in more detail arguing for an inclusion of non-state actors as parties in the WTO dispute settlement system.

Despite the uneasy co-existence of international relations and public international law, and their extensive terminological differences⁹⁰, there is a remarkable overlap of core assumptions between the two fields. Indeed, depending on the individual standpoint, public international law is either regarded to form a part of international relations, or to be founded on IR concepts⁹¹. This connection is particularly visible between public international law and institutionalist IR

⁸⁷ Anne-Marie Burley, "Law and the Liberal Paradigm in International Relations Theory" (1992) *The American Society of International Law: Proceedings of the 86th Annual Meeting* 180 at 183 [hereinafter: Burley, Liberal Paradigm]. See also Slaughter, Dual Agenda, supra 51 at 227.

⁸⁸ Ibid. at 227.

⁸⁹ Burley, International Relations, supra note 31 at 729.

⁹⁰ Slaughter, Dual Agenda, supra note 51 at 205-6.

⁹¹ Ibid. 207 et seq.

theories, where IR scholars and international lawyers have entered into an increasing scientific dialogue⁹².

Thus, in public international law, the present issue of identifying and formally recognizing relevant actors in international affairs is discussed in the context of subjecthood; but its principal structure reflects the state-centric model of realist-institutionalist IR theories.

1.2.4 Sharing Realist-Institutionalist Assumptions - Subjecthood in Public International Law

Public international law is traditionally defined as the law governing the relations among nations, between States and international governmental organizations – as an institutionalized form of State cooperation – and between international organizations themselves⁹³. As implied in this definition, subjecthood in the international legal system is limited in principle to States and international governmental organizations, in the sense that only these categories of international actors possess the capacity to have and maintain rights (active subjecthood / personality), and to be subject to specific duties (passive subjecthood / legal personality) under public international law⁹⁴. This general limitation parallels the state-centric focus of the realist/institutionalist schools of IR. However, there exist a handful of customary exceptions, non-state actors that

⁹² For a more detailed discussion of this issue from the IR and the public international law perspective, see the transcripts of the panel discussions (reported by Bardo Fassbender): "International Law and International Relations Theory: Building Bridges" (1992) *The American Society of International Law. Proceedings of the 86th Annual Meeting*, 167 et seq.

⁹³ See Ignaz Seidl-Hohenveldern, *Völkerrecht*. 8., neubearbeitete Auflage. Köln: Carl Heymanns Verlag, 1994, at marginal number 1 - 4.

⁹⁴ , Malcolm N. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997), at 137 [hereinafter Shaw].

have been recognized as subjects of public international law by parts of the community of States or in regional contexts⁹⁵. Examples are the Sovereign Order of Malta, the Holy See, the International Committee of the Red Cross, insurgents and belligerents, national liberation movements, and international public companies⁹⁶. Moreover, as the evolution of customary public international law illustrates⁹⁷, the existing classes of legal actors express the current consensus among States as the creators of the international legal order. This inherent flexibility and openness to change may therefore lead to the emergence of new classes of international legal subjects in the future⁹⁸. In this sense, Wolfgang Friedmann noted more than thirty years ago:⁹⁹

And if an international jurist of authority postulated a generation ago that only individuals were the true subjects of international law, this can be understood in a

⁹⁵ They have been vested with “*particular* legal personality” (partikuläres Völkerrechtssubjekt), that is to say, legal personality only exists in relation to those legal subjects who have explicitly or implicitly recognized the actor’s subjecthood under public international law, but not in relation to all other legal subjects. It is to be discerned from the concept of “*partial* legal personality” (partiellles Völkerrechtssubjekt), describing that a legal subject does not possess the *full* scope of rights and obligations that exists in public international law. In the international legal system, only States have full legal personality; all other legal subjects, including IGOs enjoy partial legal personality, limited by the extent of their recognition. Compare Seidl-Hohenveldern, *Völkerrecht*, supra note 93, at marginal numbers 603-7. The role of States in public international law as the only actors with full legal personality is based on the assumptions of States as the highest existing form of stable, lasting, and functioning social organizations capable of coherent, purposive, and effective action; and that international law can only develop in so far as States acknowledge its existence and make use of it in the regulation of their affairs. Public international law is thus conceived as a Lockean social contract between independent and equal States, establishing a binding international regime of rights and obligations, but also preserving a sphere of exclusive authority for each State contained in the concept of sovereignty; see Ronald A. Brand, “External Sovereignty and International Law”, (1995) 18 *Fordham International Law Journal* 1685 at 1687-8. In addition, it is another parallel with the realist-institutionalist premise of States as the chief actors in international relations.

⁹⁶ See Shaw, supra note 94 at 171-76. In his account Shaw recognizes transnational corporations as *potential future* international legal actors, at 177.

⁹⁷ Developing from a system strictly limited to States to the acceptance of international organization as legal actors in the 19th century and individuals as passive legal subjects in the 20th century. Compare Ian Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979) at 677, and Ignaz Seidl-Hohenveldern, *International Economic Law* (Dordrecht: Martinus Nijhoff Publishers, 1989) at 11 [hereinafter: Seidl-Hohenveldern, *International Economic Law*].

⁹⁸ The possibility of granting rights under public international law to non-state actors was first acknowledged by an international court in *Jurisdiction of the Courts of Danzig*, Permanent Court of International Justice, Advisory Opinion No. 15, Series B, No 15, 17 at 17.

⁹⁹ Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964) at 233-4 [hereinafter: Friedmann].

figurative and moral, rather than a legal and practical sense. The question is reduced in quantitative importance by the fact that of the thousands of millions of individuals, only a very limited number are concerned, actively and passively, with relations reaching beyond the frontiers and jurisdiction of the national state. Given this limitation, the present century has witnessed radical changes in the approach to the status of the individual in international law. The questions both of the rights and of the duties of the individual in international law has been reopened.

Thus, since the end of the Second World War¹⁰⁰, international treaties as for example in field of investment protection have already provided the first signs of change - and the adoption of liberal conceptions of IR. Numerous bilateral investment protection treaties (BITs)¹⁰¹ and multilateral agreements such as the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID-Convention)¹⁰² or Chapter Eleven of the *North American Free Trade Agreement*¹⁰³ have empowered investors with the exclusive right – that is to say without any legal interference of their home States - to take contracting States to international arbitration for breaches of their obligations under the respective treaties and the right of enforcement. Within the scope of these agreements, the stage of public international laws has opened its curtains for the appearance of virtually millions of private investors as new legal actors. In particular the dispute resolution mechanism of these and other multilateral arrangements may serve as convincing examples for the involvement of non-state actors in the settlement of disputes governed by public international law.

¹⁰⁰ Earlier examples from the inter-war period are discussed by Friedmanm, *ibid.* at 238-40. See also John H. Barton and Barry E. Carter "International Law and Institutions for a New Age" (1993) 81 *Georgetown Law Journal* 535 at 538-40.

¹⁰¹ Today there exist more than 1300 BITs according to the United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*, New York: United Nations Publication: 1997, at xviii.

¹⁰² *Supra* note 69.

¹⁰³ "North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America", Ottawa: Minister of Supply and Services Canada, 1993 [hereinafter: NAFTA].

1.2.5 Conclusion

The international system is not only shaped by States, but also by a variety of non-state actors. Depending on the underlying perceptions of the structure and operation of the international arena, its mechanisms to address and settle the conflicts of interests between different international players may be limited to disputes and participation of certain actor categories and the exclusion of others. Public international law being essentially a state-centric regime, illustrates such limitations. While parts of the international legal system incorporate elements of IR liberalism as far as the categories of legal subjects/actors is concerned, both customary public international law and the bulk of treaty law is still deeply rooted in realist-institutionalist maxims. And with regard to dispute settlement systems, the "law governing the relations of States" has shown a strong tendency towards the recognition of only States or IGOs as participants.

1.3 A Framework for Substantive Legal Issues: The *Res Axis*

1.3.1 Overlaps between Material Scope and Private Agendas

Having established the range of international actors who may be eligible as participants in dispute settlement systems, the following section will introduce a second dimension to their selection: the relationship between an actor's interests, objectives and agendas and the material scope of a dispute settlement system.

To put it differently, non-state actors are characterized as much by their purposes as they are by their forms of organization¹⁰⁴. In comparison to States, which are deemed to act in the international sphere as universal agents of all domestic interests, the goals of non-state actors are generally limited to one or a few related concerns. Therefore, if non-state participation has been accepted in principle, but the respective dispute settlement system does not (yet) provide a definition of its participants, material scope becomes a significant criterion for the extent of private participation. To be more precise, it is the overlap between the material scope of a dispute settlement system and the interests of non-state actors that defines the pool of international actors, who may be granted, as a whole or in part, access to the respective dispute settlement mechanism.

For example, an international regime and its dispute settlement system concerned with regulating the *Internet* may overlap with the agendas of software companies and hardware providers, media, advertisers, consumer groups, even of human rights advocates, but probably not with the goals an NGO fighting for the protection of endangered wildlife.

For reasons of generalization and simplification, it will be assumed that international regimes and their dispute settlement systems can be grouped according to the regulatory purposes of their underlying substantive regimes into categories that represent the key concerns in the international arena¹⁰⁵. Moreover, it will be assumed that the same categories are applicable to private activity

¹⁰⁴ See Hocking/Smith, *supra* note 46 at 85-6.

¹⁰⁵ For the purpose of this section it is sufficient to identify key concerns at a high level of abstraction, in order to show links between international legal regimes and private activities of an international scope. Each of the suggested key concerns should not be imagined as monolithic bodies of law; instead they begin to dissolve into numerous sub-fields when the level of magnification increases. The "issue area" environment may break down

in the international realm. Such key concerns, or "issue areas" of both governmental regimes and non-governmental agendas are, for example, the environment, humanitarian issues, human rights, labour, development, health, scientific cooperation, culture, investment, and trade¹⁰⁶. In reality, dispute settlement systems may cover only a special aspect of a certain issue area; they may apply to one or a multiplicity of issue areas, creating endless possibilities of combinations. The exact material scope, and in turn the possible extent of private participation is to be determined for each individual case by analyzing the international agreement establishing the dispute settlement system.

1.3.2 Material Scope and the Perspective of Dispute Settlement Systems

An overlap alone between the material scope of a dispute resolution mechanism and the agendas of non-state international actors is not sufficient to determine the forms and extent of private participation. In addition, it must be taken into consideration how far the respective regime and its dispute settlement system recognize potential links between issue areas within and outside its material scope.

into the protection of endangered species, climate protection, pollution issues, and so forth. Each of these sub-fields of international environmental law may stand as an issue area at its own right. In turn, these sub-categories can be divided further into even smaller areas, a process that may be continued to the "atomic" level of law, single provisions. At each level of analysis, it may be possible to show links to organized private activity in the same area. Yet, due to the present, decentralized character of the international legal order and the legal "isolation" of most international regimes, useful predictions concerning the possible scope of private participation should be made at regime level, that is, separately for each individual regime. Moreover, results may only be carefully generalized.

¹⁰⁶ Similar distinctions of substantive legal issues in public international law can be found in introductory treatises on international governmental organizations (see for example Ignaz Seidl-Hohenveldern and G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der supranationalen Gemeinschaften*, 5. überarbeitete Auflage (Köln: Carl Heymanns Verlag, 1992) at XV-VII [hereinafter: Seidl-Hohenveldern/Loibl]), and analyses of the fields of activity occupied by NGOs (see for example *Yearbook of International Organizations 1996/97*, ed. Union of International Associations) seems to support this interrelationship.

An international dispute may be composed of aspects that are related to a variety of different issue areas. Through its material scope, a dispute resolution mechanism creates an (artificial) boundary that severs aspects and issue areas that may be raised in a dispute settlement proceedings from those aspects and issue areas that cannot be addressed. Yet, the factual links between the aspects and issue areas inside the material scope and those outside continue to exist, and the latter may be considerably altered by the outcome of dispute settlement proceedings. The degree to which these factual links are taken into account by a dispute settlement system - that is, to which they are legally recognized as elements of a dispute - will be referred to as the "perspective" of a dispute settlement system. In practice¹⁰⁷, it is possible to distinguish three ideal types of perspective: a (1) one-way; (2) a reciprocal; and (3) an integrated perspective.

1.3.2.1 One-Way Perspective

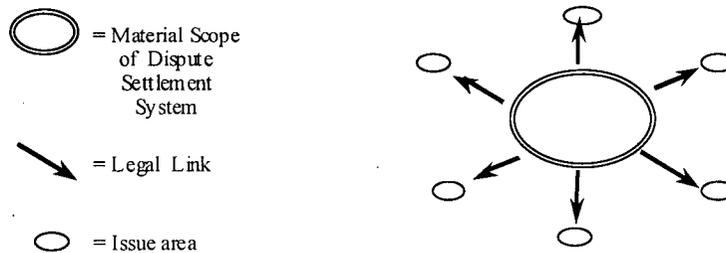
In a dispute settlement system that displays a one-way perspective, the boundary erected by its material scope is strict. First, disputes may only be submitted to dispute settlement based on aspects canvassed by the dispute settlement system. And second, its material scope, which provides the standard of review for the matter at dispute, does not acknowledge the existence of links between issue area(s) covered and those outside its scope of application.

As a consequence, measures by States whose central purpose is to regulate aspects in issue areas outside the dispute settlement system will be evaluated not according to their original regulatory

¹⁰⁷ Theoretically, it may be possible to discern a fourth category, displaying an *isolated perspective*, in which the material scope of a dispute settlement system can be clearly distinguished from any other issue area, so that factual links either do not exist or do not even indirectly surface in disputes. In practice, it is virtually impossible to find an example for this category. Compare also *supra* note 105.

intent, but according to their effect on the issue area(s) included in its material scope. The only question to be answered by the process is, whether or not the measure is compatible with the substantive rules provisions established by an international regime to govern the covered issue area(s). It seems that a variety of measures addressing outside issue areas may become objects of scrutiny under a dispute settlement system with a one-way perspective, based on their factual links with the matter at dispute. Yet, the appearance of these factual links is only incidental, and the classification of a disputed government measure as belonging to an outside issue area is not relevant for the dispute resolution process. This perspective is represented in Figure 1.4.:

Figure 1.4 - One-Way Perspective



To illustrate this type of perspective, let us assume an international regime that is located within one issue area, for example foreign investment protection. This regime would establish minimum standards for the protection of foreign investment in host States, but would not address issue areas that also define the investment environment, such as tax obligations, the labour market, or health, safety, and environmental standards. Regulations by the host State in these

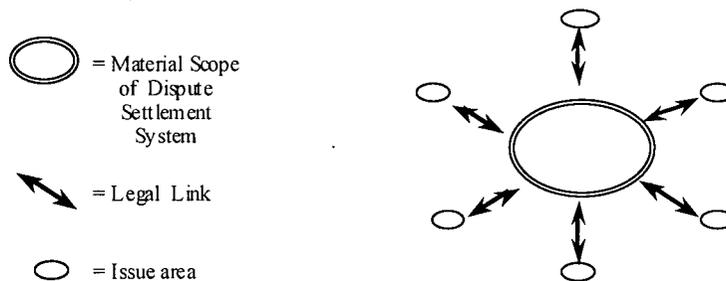
issue areas may affect the foreign investment and could lead to complaints that the host State violates its obligations under the international investment protection regime. When a complaint is raised under its dispute settlement provisions, the standard of review applied to the measure at dispute would only include the rules and provisions established under the regime. The purpose of the disputed measure - be it for environmental, labour, or safety purposes - would be of no influence on the outcome of the dispute, nor would it matter that the measure is deemed of vital importance by the host State. If it violated the substantive provisions of the investment protection agreement it would be found illegal, and the host State would be obliged to remove it. For private participation the one-way perspective means that only those non-state actors will be granted access to the dispute settlement system whose agendas cover the same issue area(s) as its material scope.

1.3.2.2 Reciprocal Perspective

A dispute settlement system taking a reciprocal perspective resembles the above perspective in the sense that it is activated by grievances covered by the issue area(s) within its material scope. That is to say, as far as the initiation of dispute settlement proceedings is concerned, the appearance of outside issue areas as the subject matter of a dispute remains incidental. The change in perspective occurs in the treatment of linked issue areas in the dispute settlement proceedings. In comparison to the one-way perspective they are recognized as legitimate regulatory interests and are taken into account in the settlement of disputes. The underlying regime does not only examine the effects of measures relating to outside issue areas on the material scope, but also considers the effects of the regime's regulations on outside issue areas.

The acknowledgement may take the form of exceptions to certain obligations under the regime or interpretations of provisions that include the concerns of related issue areas. Figure 1.5 gives a graphical representation of this perspective.

Figure 1.5 - Reciprocal Perspective



For example, the old GATT 1947 contained in Article XX a provision that granted general exceptions from the GATT trade rules for adoption or enforcement of measures necessary *inter alia* "to protect human, animal or plant life or health"¹⁰⁸ (environmental exception), or "for the protection of national treasures of artistic, historic or archeological value"¹⁰⁹ (cultural exception). As a consequence, regulations aiming at environmental and cultural protection when attacked under the GATT 1947 trade regime¹¹⁰ could create justifiable limitations to its rules.

¹⁰⁸ *General Agreement on Tariffs and Trade*, 30 October 1947, United Nations Treaty Series, vol. 55 No. 814 [hereinafter: GATT 1947], Article XX (b) GATT 1947.

¹⁰⁹ Article XX (f) GATT 1947.

¹¹⁰ See for example the panel decisions in *United States – Restrictions on Imports of Tuna* (GATT Docs. DS21 and DS29/R) which have been extensively criticized by environmental groups due to its being decided by trade experts. Trade experts are perceived to be inherently biased towards the trade aspects of trade and environment issues. For a detailed discussion of trade and environment issues, see Chris Wold, "Multilateral Environmental Agreements and the GATT: Conflict and Resolution?" (1996) 26 *Journal of Environmental Law* 841 at 853 et seq.

In addition to those non-state actors covered by the material scope of a dispute settlement system with a reciprocal perspective, private participation would include the representation of recognized outside issue areas. In correspondence with the subordinate rank of linked issues - for example as exceptions, the forms of their representation by private actors would be procedurally limited to roles like expert witnesses or *amici curiae*¹¹¹.

1.3.2.3 Integrated Perspective

If the dispute settlement system fully recognizes the existence of some or all links between issue areas as defining a disputed matter, it assumes an integrated perspective. Its material scope thus extends to more than one issue area, creating the situation that disputes may be raised not only on the basis of aspects relating to one, but on all covered issue areas¹¹². With issue areas not any more separated by the boundary of material scope, their combination also provides the review standard for State measures in dispute settlement proceedings. A measure will be found to violate the rules of the respective material regime if it is incompatible with any provision, no matter what issue area is addressed¹¹³.

In this sense, the integrated perspective describes the relationship of issue areas within the material scope. It shows that merging of issue areas as equal components of the material scope

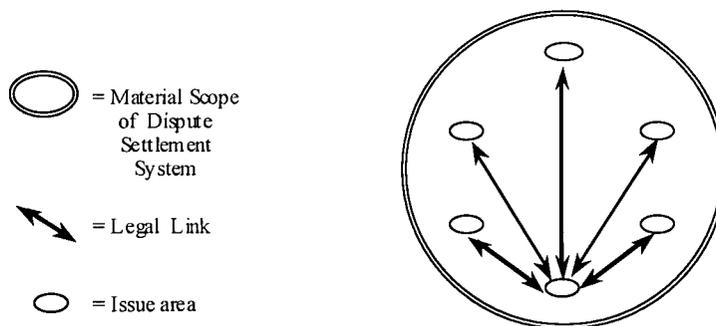
¹¹¹ See *infra* Chapter 5.

¹¹² An integrated perspective is the "normal" situation when the material scope of a dispute settlement system is extended to more than one issue area. The analytical tool of perspective, however, stresses the special relationship between issue areas as interconnected components of a dispute being fully recognized by law (i.e. the international regime).

¹¹³ With regard to issue areas outside the material scope, an integrated dispute settlement system may adopt either a one-way or a reciprocal perspective.

also extends the functions of dispute settlement systems. In addition to interpreting rules, and ensuring compliance, the extended scope of application creates the need to balance the covered issue areas and to reconcile their sometimes conflicting goals. Figure 1.6 illustrates the integrated perspective.

Figure 1.6 - Integrated Perspective



An example of the integrated perspective in dispute settlement systems is the European Court of Justice (ECJ). The jurisdiction of the latter includes disputes arising under the treaties establishing the three European Communities: the European Community (the former European Economic Community), the European Coal and Steel Community, and the European Atomic Energy Community as one coherent body of law¹¹⁴. But under the *Treaty Establishing the European Community*¹¹⁵, the ECJ reviews legal acts of the EC institutions and its Members in

¹¹⁴ See Articles 3 and 4 Agreement on Shared Organs for the European Communities, 25 March 1957. Compare also *European Coal and Steel Community v. Busseni SpA (bankrupt)* (No 221/88) Decision of 22 February 1990, [1990-I] C.J.E.C Rep. 495 marginal numbers 9-16.

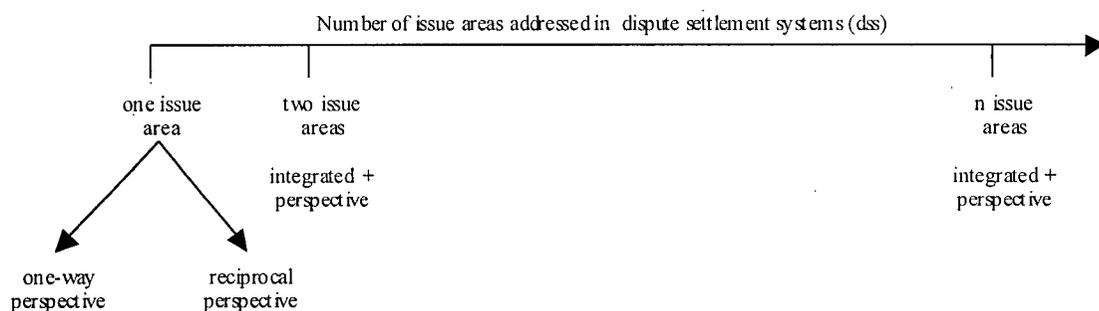
¹¹⁵ Of 25 March 1957, UNTS 298/11; as amended

issue areas like trade, agriculture, culture, health care, research and technological development, and the environment as well¹¹⁶.

As far as private participation is concerned, the integrated perspective means that participants may be recruited from all actors representing the issue areas within the material scope. It thus converges with the first criterion outlined above, the overlap between material scope and private agendas.

Projected onto the matrix for dispute settlement systems, conflict resolution mechanisms can be grouped along the *res axis* according to the issue areas covered, whereas the number of issue areas increases from left to right; see Figure 1.7.:

Figure 1.7 - Material Scope of Dispute Settlement Systems



¹¹⁶ See Titles I, II, XII, XIII, XVIII, and XIX of the ECT as amended by the *Treaty of Amsterdam*.

1.3.3 Conclusion

We have seen that the extent of potential private participation is determined by the material scope of dispute settlement systems. In order to identify international actors eligible as participants in international dispute resolution mechanisms, it is first necessary to delineate the material scope in terms of covered issue areas. And second we will have to take into consideration the perspective of a dispute settlement mechanism to determine the role of formally recognized issue areas within the material scope. Taken together these two criteria provide a map of issue areas that may be considered in the course of a dispute resolution process; a map that also serves to locate those non-state actors representing the issues involved.

1.4 A Framework for Dispute Settlement Procedures: The *Res Axis*

So far, the first two elements of the analytical framework have supplied the ingredients for international disputes: the determination of actors with their diverging interests, and the material scope of dispute settlement regimes. The third element, procedures, provides the tool for their resolution. The search for effective methods to settle disputes between international actors, specifically between States, has given rise to a legal-philosophical debate raging between two conceptual poles, for which Kenneth Dam coined the terms 'legalism' and 'pragmatism'¹¹⁷:

‘[L]egalism’ is used here to refer to an approach to the drafting of international agreements under which draftsmen attempt to foresee all of the problems that may arise in a particular area [...] and to write down highly detailed rules in order to eliminate to the greatest extent possible any disputes, or even any doubts, about the rights and obligations of each agreeing party under all future circumstances. By ‘pragmatism’ is meant an approach to the drafting and

¹¹⁷ Kenneth Dam, *The GATT. Law and International Economic Organization* (Chicago: The University of Chicago Press, 1970) at 3-4 [hereinafter: Dam].

administration of international agreements under which emphasis is placed on mutual agreement on objectives, and rules concerning rights and obligations are considered formalities to be avoided whenever possible.¹¹⁸

In an even broader sense, the dichotomy addresses the issue of developing an ordering principle for international relations and determines the role and importance of international law¹¹⁹. With regard to the methods of dispute settlement John H. Jackson has translated legalism and pragmatism into a distinction between a rule-oriented and a power-oriented approach¹²⁰ to describe the opposing ends between which any system of conflict resolution is situated. Power-oriented dispute resolution refers to the relative power status of the parties to a dispute and encompasses the threat or the use of political, economic or even military power to force a solution of the controversial issues in accordance with the position held by the more powerful contender¹²¹. A rule-oriented system of resolving disputes, on the other hand, is directed by the standards and rules agreed upon by the parties and as applied by an impartial third party¹²².

¹¹⁸ Id. at 4.

¹¹⁹ There exist a number of parallels between the concepts of pragmatism and legalism on the one hand, and the IR theories of realism and institutionalism on the other: Under a realist conception of international relations disputes between States would be settled according to the relative power of the parties involved, relying on power-oriented techniques like negotiations and ADR; an institutionalist understanding of international relations supports State interaction and dispute resolution according to commonly accepted rules and procedures as well as the reliance of international bodies to fulfill dispute settlement functions.

¹²⁰ Jackson, *Crumbling Institutions*, supra note 13 at 98-100; and Jackson, *Government Disputes*, supra note 22 at 3-4.

¹²¹ Ibid.

¹²² Jackson, *Government Disputes*, supra note 22 at 3. Commentators employ a variety of opposite pairs of terms to identify the two main philosophical trends underlying systems of dispute resolution: rule partisans – rule sceptics, Harold H. Koh, "The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement", (1987) 12 *Yale Journal of International Law* 193 at 196-7; legalism – diplomacy, Trevor Lawson, "WTO Dispute Resolution: The Promotion of Diplomacy within an Adjudicative Model", (1997) 6 *Dalhousie Journal of Legal Studies* 321 at 323 [hereinafter: Lawson]; juridical – antilegalistic, Lisa Sue Klaiman, "Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed with Caution", (1990) 11 *University of Pennsylvania Journal of International Business Law*, 657 at 676 notes 138, 139 [hereinafter: Klaiman]; legal – political, Davey, supra note 85 at 65.

The debate between legalists and pragmatists has also dominated the reform discussions of the GATT legal and dispute settlement system almost since the time of its conception. This aspect will be acknowledged by paying close attention to the positions taken in these discussions. The arguments, however, can be generalized for the settlement of disputes in other contexts.

Almost all legal commentators endorse dispute settlements to be based on generally applicable rules or guidelines. They try to create a balance between power-oriented and legalist methods of dispute resolution¹²³ in an effort to avoid the systemic dysfunctions inherent to either extreme: A strictly rule-based adjudication system might prove to be too rigid to cope with the complexities and problems of an ever-changing international environment, while a pragmatic position could lead to an erosion of any principled form of conflict resolution and revert itself into a pure power struggle between nations¹²⁴. The differences, however, appear in the role and character ascribed to these rules.

1.4.1 Pragmatism

Pragmatists follow the insight that a working rule-based dispute settlement system presupposes either consensus of its participants or an effective enforcement mechanism¹²⁵. Noting the absence of the latter in international relations¹²⁶, they conclude the need for as much flexibility as possible

¹²³ Compare Kenneth W. Abbott, "GATT as a Public Institution: The Uruguay Round and Beyond", (1992) 18 *Brooklyn Journal of International Law* 31 at 32 note 10 [hereinafter: Abbott, Public Institution]. Mora, supra note 9 at 103 at 109 speaks of an "artificial line" between rule-oriented and power-oriented theories.

¹²⁴ Compare Mora, id. at 111, and Olivier Long, *Law and its Limits in the GATT Multilateral Trade System*, (Hingham: Kluwer Academic Publishers, 1985) at 62 [hereinafter: Long].

¹²⁵ Klaiman, supra note 122 at 677.

¹²⁶ Judith Hippler Bello, "The WTO Dispute Settlement Understanding: Less is More", (1996) 90 *The American Journal of International Law* 416 at 417 [hereinafter: Bello], states that in WTO dispute settlement "there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas."

in order to build consensus. As a consequence, pragmatists while recognizing the usefulness of a framework of rules do not place great importance on its nature as law or *de facto* guidelines¹²⁷. Instead, they stress the fact that such a framework can be bent or even abandoned on a case-by-case basis in order to ensure its continuing existence and overall compliance by the States involved¹²⁸.

It is inherent in the pragmatist viewpoint that "nations will find a way to protect their vital interests, even if it means to break rules"¹²⁹. Specifically in the vibrant and politically sensitive field of international trade with its high potential for conflict, the pragmatist school perceives the limitations of binding rules to accommodate the diverging interests of trading countries¹³⁰. States are seen to respond with their trade policies to a complex stimulus of domestic political and economic pressures which eventually prove to be more powerful than any system based on rule-

¹²⁷ Long, supra note 124 at 63-4 speaks of GATT as a "legal framework" and "law". Klaiman, supra note 122 at 676, on the other hand, states that the "[r]ules are not legally binding." Compare also Georg M. Berrisch, "The Establishment of New Law Through Subsequent Practice in GATT", (1991) 16 *North Carolina Journal of International Law and Commercial Regulation*: 497 at 506 [hereinafter: Berrisch], citing Roessler, "Law, De Facto Agreements and Declarations of Principle in International Economic Relations"(1978) 21 *German Yearbook of International Law* at 46-50, registers the general "tendency in international law to develop non-binding rules rather than legally binding rules." Bello, *ibid.* at 416 characterises WTO panel rulings as "non-binding in the traditional sense". According to her analysis "the only truly binding [GATT/WTO] obligation is to maintain the balance of rights and obligations" agreed upon by the contracting parties (at 418). (For an extensive critique of Judith H. Bello's editorial comment, see John H. Jackson, "The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation", (1997) 91 *American Journal of International Law* 61.

¹²⁸ *Id.* at 498-9; Klaiman, supra note 122 at 478 speaks of strict rules and their flexible application; Long, supra note 124 at 62-3; Phillip R. Trimble, "International Trade and the 'Rule of Law'", (1985) 83 *Michigan Law Review* 1016 at 1017 [hereinafter: Trimble]. See also Schleyer, supra note 15 at 2288.

¹²⁹ Fred L. Morrisson, "The Future of International Adjudication", (1991) 75 *Minnesota Law Review* 827 at 838 [hereinafter: Morrisson].

¹³⁰ *Ibid.* See also Mora, supra note 9 at 110, Long, supra note 124 at 62.

adherence established on the international level¹³¹. Summing up the European standpoint at the time, a former Director of the EC Commission, Pha van Phi, wrote in 1986¹³²:

The EEC emphasises the need for conciliation and consensus in seeking a satisfactory solution to trade problems. It is based on the view that the rights and obligations of the contracting parties under the General Agreement [...] are the result of a delicate balance of economic interest reached after a process, often lengthy and difficult, of negotiation. This delicate balance cannot appropriately dealt with in a formalised legal framework.

Pragmatists consider the current world trading system created by the GATT/WTO agreements to comprise ambiguous rules concealing initial and also unnoticed disagreements of the negotiating parties, thus allowing them to approve of the treaties without changing their underlying positions¹³³. In this sense dispute resolution primarily appears as renegotiation of controversial issues postponed to a time when they become acute – or, more generally, as a typical function of the negotiation technique applied in crafting the agreement¹³⁴. In the words of one commentator, dispute settlement "must allow for the flexibility needed to identify the consensus of the moment"¹³⁵.

Adherents to pragmatism opine that a system displaying these features reflects the political realities of international relations¹³⁶. In contrast, an adjudication-based scheme of dispute resolution is seen to increase the differences between the contending parties as a set of formal

¹³¹ Compare Klaiman, *supra* note 122 at 677, 678.

¹³² R. Pha van Phi, "A European View of the GATT" (1986) 14 *International Business Lawyer* 150 at 151.

¹³³ Trimble, *supra* note 128 at 1030, Young, *supra* note 40 at 390; Berrisch, *supra* note 127 at 499.

¹³⁴ Berrisch, *ibid.*

¹³⁵ Klaiman, *supra* note 122 at 678.

¹³⁶ Morrisson, *supra* note 129 at 838.

procedures places them in an antagonistic arena. The adversarial nature of legalist mechanisms might not only negatively influence the disputing parties' motivation to work towards settlement, it might also affect their willingness to comply with unfavourable rulings¹³⁷. Faced with the lack of efficient enforcement mechanisms, member faith in the system would be eroded by each case of non-compliance¹³⁸. A return to consensual dispute resolution mechanism burdened with failed attempts of adjudication and enforcement within the anarchic system of inter-state relations would become a painstaking process of confidence-building¹³⁹. Therefore, "[t]he proper and most effective approach [...] is to submit disputes to patient and thorough 'consultations' which will examine all the relevant facts and search for all possible avenues toward 'practical' solutions consistent with the 'realities' of the case."¹⁴⁰ Up to the Uruguay Round this has been the traditional position held by the European Community and Japan¹⁴¹.

In brief, dispute settlement procedures inspired by a pragmatic approach aim for the common ground between the disputing parties and attempt to reach mutual agreements based on compromises¹⁴². Their goal is to end deviations from concrete rules and dissents over their

¹³⁷ T. Dillon Jr., "The World Trade Organization: A New Legal Order for World Trade?" (1995) 16 *Michigan Journal of International Law*: 349 at 396 [hereinafter: Dillon]. See also John H. Jackson, *World Trade and the Law of GATT*, (New York: The Bobbs-Merrill Company, 1969) at 764 [hereinafter: Jackson, World Trade].

¹³⁸ Klaiman, supra note 122 at 679, also compare Long, supra note 124 at 62, 71.

¹³⁹ Lawson, supra note 122 at 325.

¹⁴⁰ Robert E. Hudec, *Adjudication of International Trade Disputes* (London: Trade Policy Research Centre, 1978) at 26 [hereinafter: Hudec, Adjudication], summing up the pragmatist arguments against reforms towards a more legalist dispute settlement system.

¹⁴¹ Mora, supra note 9 at 131-3, notes as reasons for the E.C. position: (1) the doubtful legal compatibility of the E.C. with GATT provisions, (2) the fact that E.C. interests could not influence the drafting of GATT rules as it came into existence after GATT, (3) more diplomatic internal decision-making procedures in the E.C., (4) a usage of trade policy instruments varying from GATT, (5) the protection of the E.C. Common Agricultural Policy. According to Davey, supra note at 67, Japan, places high importance on consensus owing to its domestic traditions. See also Hilf, supra note 8 at 290-4 for the European Community and at 297 for Japan.

¹⁴² Compare Lawson, supra note 122 at 325. Long, supra note 124 at 61 – 62, has distinguished two forms of pragmatism: First, the consensual flexible implementation of GATT provisions in order to remove frictions from the system, especially with regard to key issues; and second, tolerance of unilateral deviations without

interpretation as quickly as possible through (re-)definition, thereby keeping intact the support for the system as a whole¹⁴³. Appropriate techniques include consultations, mediation and conciliation¹⁴⁴, conveying the underlying principle of pragmatism: as much flexibility as possible, as few rules as necessary.

1.4.2 Legalism

In comparison, legalist approaches take a more normative stance towards dispute settlement. Legalists believe that international regimes should be based on rule-of-law principles¹⁴⁵ in order to allow international actors, to plan and act in a stable international environment¹⁴⁶. Particularly with regard to the world trading system, legalists promote concepts of security, clarity or predictability, and fairness as preconditions of international trade. For this reason, they favour a dispute resolution system based on a set of binding rules, interpreted and applied by an impartial third party through adjudicative procedures. In this sense, legalism could be read as a near reversal of the pragmatist epitome: As many rules as possible, as much flexibility as necessary.

The cornerstone of the legalist model is legal security¹⁴⁷. On the one hand it refers to the operation of a rule-based system, on the other it addresses the behaviour of participants acting

prior consent of the Contracting Parties. The latter can become the subject matter of dispute settlement procedures aiming for the re-establishment of consensus.

¹⁴³ Schleyer, supra note 15 at 2288; Young, supra note 40 at 390; Klaiman, supra note 122 at 678. See also Kendall W. Stiles, "The New WTO Regime: The Victory of Pragmatism", (1995) 4 *Journal of International Law and Practice* 3 at 5-6 [hereinafter: Stiles], who contends that non-compliance with past agreements should be considered as a contribution to the on-going development and negotiation of GATT rules.

¹⁴⁴ Petersmann, GATT, supra note 53 at 68-9.

¹⁴⁵ See Jackson, World Trade, supra note 20 at 757 and Berrisch, supra note 127 at 500.

¹⁴⁶ With regard to a world trading system, countries, private traders and producers are particularly affected, compare Trimble, supra note 128 1017; Jackson, Crumbling Institutions, supra note 13 at 100; Petersmann, GATT, supra note 53 at 85, Schleyer, supra note 15 at 2291.

¹⁴⁷ Petersmann, *ibid.*, Waincymer, supra note 35 at 88.

within the system. In order to warrant legal security, the system must create predictability and stability, that is to say, it must consist of rules that are uniformly interpreted, applied, and followed:

Such a system in the international context aims at achieving stability and standardization as the two key elements of the concept of certainty. Stability means that rules are not changed without proper notice and that interpretations are not changed arbitrarily. Standardization ensures that public goods are available and rules are created and applied with as much consistency between nation states as possible¹⁴⁸.

In particular the work of neutral adjudicatory bodies resolving conflicts according to a common set of rules is considered to fill gaps in these rules, discover and remove contradictions, balance conflicting goals, and thus create a more consistent legal system¹⁴⁹. This, in turn, adds to the clarification of rules, rights and obligations, which define the conduct of members within the system¹⁵⁰. As a consequence, the rate of disputes between international actors is likely to diminish as each ruling may serve as a precedent – in the widest sense of the word – for future disputes; or, as one commentator puts it, "provide a short cut to the solution of similar problems in the future."¹⁵¹

These uniform rules according to which disputes are evaluated and resolved not only incorporate the consensus of their drafters on how the system can achieve its goals to the long-term benefits of

¹⁴⁸ Waincymer, *ibid.* at 88.

¹⁴⁹ Compare Petersmann, GATT, *supra* note 35 at 86; Castel, *supra* note 35 at 841.

¹⁵⁰ Young, *supra* note 40 at 390, Trimble, *supra* note 127 at 1017-8.

¹⁵¹ Jackson, *World Trade*, *supra* note 20 at 766. See also Ernst-Ulrich Petersmann, "Strengthening the GATT Dispute Settlement System: on the Use of Arbitration in GATT." In Ernst-Ulrich Petersmann and M. Hilf, eds., *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems* (Deventer: Kluwer Law and Taxation Publishers, 1988) 323 at 339 [hereinafter: Petersmann, Arbitration].

all participants, they also spell out the collective expectations concerning member behaviour¹⁵². These expectations are measured in terms of rule compliance. For example, a country not living up to its treaty obligations risks being publicly "labelled as a violator"¹⁵³ producing adverse effects on its credibility and reputation. This will impair its position in future relations with other States, such as the negotiation of new agreements¹⁵⁴. Clear, unambiguous rules make it easier to identify violations of the letter and the spirit of international regimes¹⁵⁵ and thus increase the risk for the violator to incur a loss in status. Furthermore, if the short-term pay-off of a country's rule-violation is neutralized by retaliatory or rule-enforcement mechanisms as an integral part of an effective adjudication process¹⁵⁶, the material incentive for non-compliance disappears. Anticipating such an outcome, participants in a rule-based system will be more inclined to abide by the rules. Specifically in the trade context, an effective rule-based system is believed to help governments domestically to justify their respect for their international obligations and to overcome pressures from rent-seeking¹⁵⁷ interest-groups to pursue short-term protectionist goals to their favour¹⁵⁸.

¹⁵² Jackson, *Crumbling Institutions*, supra note 13 at 99; Waincymer, supra note 35 at 94; see also Klaiman, supra note 122 at 677.

¹⁵³ Davey supra note 85 at 66

¹⁵⁴ Ibid. at 76-7. Generally, see Louis Henkin, *How Nations Behave. Law and Foreign Policy*. 2d ed. (New York: Council on Foreign Relations, 1979) at 52.

¹⁵⁵ Castel, supra note 35 at 841.

¹⁵⁶ Waincymer, supra note 35 at 94, 99. According to Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem: Buttersworth Legal Publishers, 1993) at 360 [hereinafter: Hudec, *Enforcing Trade Law*] "[t]he main function of enforcement proceedings, therefore, is not the outcome of the proceedings themselves, but the impact of those outcomes on the effectiveness of the institution's rules generally. In other words, the main function of enforcement procedures is to establish credibility." See also at 363.

¹⁵⁷ Petersmann, GATT, supra note 53 at 10 note 12 defines "rent-seeking" as "directly unproductive, resource-using activities (such as lobbying for governmental market distortions by means of tariffs, quantitative restrictions, antidumping measures and subsidies) which do not produce new goods or services but redistribute income (e.g. monopoly rents) towards the rent-seekers at the expense of consumers, tax-payers and society at large. [...] Rent seeking- is economically and politically harmful because it reduces consumer welfare and favours corporatist structures of interlocking political and private interest groups and interest group politics detrimental to the general interest (e.g. of consumers in non-discriminatory liberal trade)."

¹⁵⁸ Petersmann, ibid. at 86; Waincymer, supra note 35 at 87; Davey, supra note 85 at 74; Young, supra note 40 at 390-1.

In the legalist equation increased rule-compliance corresponds to a reduced role of power in member relationships and as means of dispute resolution¹⁵⁹. Ideally, a rule-based dispute settlement system decoupled from fluctuations of the balance of power underlying State relations can produce more predictable outcomes. As it is not concerned with the re-allocation of rights and obligations in accordance with the current power positions of the disputants, but with the application and preservation of a previously agreed upon balance cast into rules, the results of any particular dispute may be inferred from these rules¹⁶⁰.

Less reliance on power, and consistent rule-application thereby add to the fairness of the system. For instance, in a state-centric dispute settlement mechanism of legalist provenience, smaller and thus weaker countries do not perceive themselves to be at the mercy of the more powerful States. Instead, they find that they are treated on the basis of equality both by its rules and by the independent and impartial bodies responsible for their application¹⁶¹. As their willingness to have recourse to the dispute settlement system increases, each successful case contributes to strengthening its credibility and reliability. Contrary to the pragmatist perception, it is the equality and certainty inherent to a rule-based approach, which are assumed to nurture friendlier relations among States instead of poisoning the international atmosphere¹⁶².

¹⁵⁹ Petersmann, *ibid.* at 85; Jackson, *Crumbling Institutions*, *supra* note 13 at 100; Jackson, *World Trade*, *supra* note 22 at 766.

¹⁶⁰ Compare Dam, *supra* note 117 at 4; Klaiman, *supra* note 122 at 676.

¹⁶¹ Jackson, *Crumbling Institutions*, *supra* note 13 at 100; Jackson, *Government Disputes*, *supra* note 22 at 4; Waincymer, *supra* note 35 at 88; Castel, *supra* note 35 at 842.

¹⁶² Davey, *supra* note 85 at 72-3; Schleyer, *supra* note 15 at 2291.

It is at this point that legalist assumptions intersect with the prerequisite for private participation in international dispute settlement systems. The establishment of formal and procedural equality within a legalist dispute settlement system neutralizes factual differences between international actors for the purposes of conflict resolution. Ideally, States would meet non-governmental actors on a levelled playing field, one that acknowledges only the existence of legal arguments, and is immune to the dissimilarities in size and organization and the effects of political, economic, or even military power.

Concerning the subject matter of a dispute, legalists contend that rules function to structure the relationships between international actors and serve to provide focal points for potential sources of disagreement¹⁶³. In this manner, they partition multi-layered interactions of members into manageable pieces of controversy and isolate them from non-controversial matters¹⁶⁴. If the conflict is prevented from infesting so far undisputed issues, parties can concentrate their attention on the solution of the problem at hand:¹⁶⁵

Legal norms, and compliance with them, can provide the framework – the woof and warp of international economic relations, so that particular problems that arise can be dealt with in relative isolation by judging them in the context of the legal norms associated with them. [...] To put this another way, what is necessary in international economic relations is the development of procedures and techniques that will ‘chip off’ bits and pieces of the amorphous complex totality of commercial relationships and find solutions to those chipped-off pieces so that they are not an issue in every new negotiation that occurs in the future.

¹⁶³ Jackson, *World Trade*, supra note 20 at 766.

¹⁶⁴ *Ibid.* at 767.

¹⁶⁵ *Ibid.*

In the GATT/WTO history, a legalist model has been supported by the United States¹⁶⁶, smaller developed countries and developing countries¹⁶⁷.

At a glance, legalism intends to provide stability and predictability through rules, formal procedures and procedural equality. Based on prior and general member consent, legalist dispute settlement systems minimize, de-politicize, and overcome conflicts in certain, predefined areas. In order to do so, legalist approaches rely on dispute resolution methods such as arbitration and adjudication.

1.4.3 Pragmatism and Legalism on the Dispute Settlement Matrix

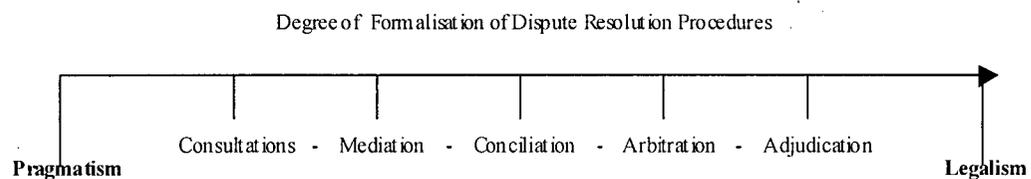
When displayed in the dispute settlement matrix, conflict resolution mechanisms can be arranged along the *actiones* axis according to their incorporation of pragmatic or legalist techniques. As shown in Figure 1.8., the movement from pragmatism in the left to legalism in the right represents an increasing degree of formalisation of procedures, or conversely, a loss of flexibility for the parties to a dispute. The further to the right a dispute settlement system is located, the more procedural aspects become predetermined by general rules applicable to every dispute; in addition, the role of independent third parties increases giving them more investigative, and decision-making competences. This progression is expressed in typified forms of dispute resolution: consultations,

¹⁶⁶ Mora, *supra* note 9 at 129-131 lists the following reasons for the U.S. preference for a legalist system: (1) the legal / litigious culture of the U.S., (2) constitutional conditions – GATT/WTO rule-enforcement in exchange for negotiation mandate for the administration by U.S. Congress, (3) the fact that GATT rules had been designed according to U.S. trade policy needs.

¹⁶⁷ In particular for the reasons described *supra* note 139-140 and accompanying text. See also Robert E. Hudec, "GATT Dispute Settlement after the Tokyo Round: An Unfinished Business", (1980) 13 *Cornell International Law Journal* 145 at 152-3 [hereinafter: Hudec, Tokyo Round]; Hilf, *supra* note 8 at 297. For the Canadian position, see Hugh J. Cheetham, "The Federal Government Proposals for Reform of the GATT Dispute Settlement System: Continued momentum for a Rules-oriented Approach to Dispute Settlement in International Trade Agreements. (Canada)." (1991) 22 *Revue General de Droit* 431.

mediation, conciliation, arbitration and adjudication. The level of formalisation, however, grows continuously, so that these techniques merely serve to provide focal points. Furthermore, it is important to keep in mind that a dispute settlement system may provide a variety of methods. In these cases, the overall appearance of the dispute settlement system, the actual choice of methods and the relation between them, among other factors, will be an indicator of the dispute settlement system's character.

Figure 1.8 - Scope of Dispute Settlement Mechanisms



1.4.4 Conclusions

The preceding sections have established an analytical framework for private participation in dispute settlement systems. The framework consists of three elements, the actors, the subject matter and the procedures of dispute settlement. Each element affects the extent of private participation in international dispute settlement systems. That is to say, even where public participation does not yet exist in a dispute settlement system, the combination of the remaining elements, namely subject matter and procedures, allows predictions of future forms of private involvement. Moreover, the framework allows for comparisons between its predictions and existing range of private participation, recording and classifying divergences so that an

examination of their reasons and causes is facilitated. In addition, the analytical framework may be employed to show entry points for and to give structure to arguments in favour of private participation.

CHAPTER 2

THE WORLD TRADE ORGANIZATION AND ITS DISPUTE SETTLEMENT UNDERSTANDING

2.1 Introduction

The World Trade Organization (WTO) was established on 1 January 1995 as a result of the Uruguay Round of Multilateral Trade Negotiations¹⁶⁸. It succeeded the *General Agreement on Tariffs and Trade* that had governed international trade relations since 1947. As expressed by its preamble, the WTO is committed to realizing the benefits of a multilateral trading system¹⁶⁹:

[R]aising the 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 [...].

The WTO continues to pursue the goals of the first *General Agreement on Tariffs and Trade* (GATT 1947)¹⁷⁰ and expands its principles far beyond the international exchange of goods. The organizational and substantive legal framework erected for this purpose is extensive, covering more than 26.000 pages of text¹⁷¹. Yet, it is founded on only a few key principles: the reduction

¹⁶⁸ See Section 3 of the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Marrakesh, 15 April 1994.

¹⁶⁹ First recital, *Preamble Agreement Establishing the World Trade Organization* (WTO Agreement).

¹⁷⁰ Compare the first recital, Preamble of the GATT 1947. The GATT 1947 is legally distinct from the new *General Agreement on Tariffs and Trade 1994* (GATT 1994), although its provisions are very similar; paragraph 4 of Article II WTO Agreement. For a discussion of the policy reasons for this approach, see Jeffrey S. Thomas and Michael A. Meyer, *The New Rules of Global Trade. A Guide to the World Trade Organization* (Scarborough: Carswell, 1997) at 32, 52-4 [hereinafter: Thomas/Meyer].

¹⁷¹ This includes the WTO Agreement, its annexed agreements and the accompanying schedules of concessions.

of tariffs and other trade barriers; the prevention and elimination of discrimination; reciprocity; and transparency, all of which have their roots in the economic doctrine of free trade. Since 1995, the disputes inevitably arising under the multilateral trading system are resolved through a comprehensive dispute settlement mechanism contained in the DSU.

In this chapter, I will sketch the economic assumptions underlying the WTO multilateral trading system, namely free trade theory. I provide an introduction to the WTO, its origins, its functions, institutional framework and its substantive agreements. Finally, I will give an overview of the major features and procedures of WTO dispute settlement, including development during the Uruguay Round of Trade Negotiations.

2.2 The Doctrine of Free Trade

What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it from them with some part of the produce of our own industry [...].¹⁷²

These words, written more than two centuries ago by the great Scottish economist Adam Smith reflect his insights on the contributions of international trade to the wealth of nations, which found expression in his forceful promotion of liberalized trade¹⁷³. Smith and other leading economists of the late eighteenth, early nineteenth century, like David Ricardo and John Stuart

¹⁷² Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations*, Edwin Cannan (Chicago: The University of Chicago Press, 1967), Volume I at 478 [hereinafter: Adam Smith], first published 1776.

¹⁷³ *Ibid.*, Volume II at 199.

Mill, developed the theoretical underpinnings of free trade in reaction to mercantilist policies that were predominant in absolutist Europe¹⁷⁴:

Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically: by increasing the general mass of productions, it diffuses general benefit, and binds together by one common tie of interest and intercourse, the universal society of nations throughout the civilized world.

Since then, the doctrine of free trade - that is, the exchange of goods and services across national borders without government intervention¹⁷⁵ - has been accepted as one of the fundamental concepts of macroeconomics. The beneficial effects of free trade as measured both by economic cost-benefit analysis and in dynamic spillovers, reiterated by economists and politicians in public debates, have become a commonplace theme in public debates¹⁷⁶.

The removal of tariffs and non-tariff barriers to trade eliminates distortions of demand for and supply of goods and service, potentially increasing national incomes and therefore promoting a higher standard of living¹⁷⁷. Not only do consumers profit from lower commodity prices and a

¹⁷⁴ Pierro Sraffa and M. H. Dobb, eds., *The Works and Correspondence of David Ricardo. Volume I. On the Principles of Political Economy and Taxation.* (Cambridge: University Press, 1951) at 133-4 [hereinafter: Ricardo]. Ricardo alludes to Adam Smith's image of the "invisible hand", (Volume I at 477).

¹⁷⁵ Jackson, World Trading System, supra note 39 at 8.

¹⁷⁶ See for example Peter Cook, "Free trade free-for-all" *The Globe and Mail*, November 22, 1999, B2; or: Pierre-Marc Johnson and André Beaulieu, "The road to a better world" *The Globe and Mail*, December 30, 1999, A13.

¹⁷⁷ Compare Jackson, World Trading System, supra note 39 at 8 quoting Paul Samuelson.

greater variety of local and imported products to choose from. Economic actors may also gain from free trade in two directions; first by sourcing internationally for supplies and second by accessing new export markets for their products. The latter leads to economies of scale, but also to increased competition. Thus, open trade provides incentives for competitiveness, technological innovation, specialization, and greater efficiency. In addition, free trade contributes to economic growth and can instill positive impulses to labour markets¹⁷⁸. And finally, on a political level, dedication to free trade prevents interest groups from gaining influence on national trade policies with protectionist demands and rent seeking at the cost of societies as a whole, while promoting international cooperation¹⁷⁹.

2.2.1 The Theories of Absolute and Comparative Advantage

Adam Smith devised his arguments for free trade by applying insights concerning the division of labour and the exchange of goods at the microeconomic level to the economic relations between States; known as the theory of absolute advantage¹⁸⁰. It posits that a country will concentrate on the production of those goods and service, which it can provide more efficiently (i.e. using less resources) than any other country, that is to say, in which it enjoys an absolute advantage in

¹⁷⁸ Paul R. Krugman and Maurice Obstfeld. *International Economics. Theory and Policy*, 4th ed. (Reading: Addison-Wesley, 1997) at 220-1 [Krugman/Obstfeld].

¹⁷⁹ *Ibid.* at 222. Compare also Adam Smith, *supra* note 172 Volume II at 179 ("In the restraints upon the importation of all foreign commodities which can come into competition with those of our own growth, or manufacture, the interest of the home-consumer is evidently sacrificed to that of the producer. It is altogether to the benefit of the latter, that the former is obliged to pay that enhancement of price which this monopoly almost always occasions.")

¹⁸⁰ Adam Smith, *supra* note 172 Volume I at 479. Giancarlo Gandolfo, *International Trade Theory and Policy* (Berlin: Springer-Verlag, 1998) at 9-10 [hereinafter: Gandolfo].

comparison to other States. It will use this absolute advantage to trade its products for goods that are produced more efficiently - and therefore at lower costs - by other countries¹⁸¹.

Goods are purchased from abroad "with a part only of the commodities, or, which is the same thing, with a part only of the price of the commodities, which the industry employed by an equal capital would have produced at home"¹⁸². Trade thus is beneficial in two respects. First, it may be regarded as a form of indirect production. Instead of producing the good itself, it is cheaper to import it from another country in exchange for goods manufactured at home. And secondly, trade increases consumer choices by making available a greater range of products at cheaper prices¹⁸³.

Developing Adam Smith's propositions the English economist David Ricardo showed that international trade may be both possible and beneficial for the countries involved, even if one of them has an absolute advantage in the production of all trade commodities¹⁸⁴. Known as the theory of comparative advantage, it has since become the theoretical foundation of international trade.

¹⁸¹ For example, a country like Canada that is rich in natural resources such as its vast forests may be more efficient in cutting and processing timber than Japan. On the other hand, the electronics industry in Japan may manufacture electronic devices at a higher cost-efficiency than Canada. In other words, Canada has an absolute advantage in manufacturing timber products such as two-by-fours with regard to Japan, while the latter holds an absolute advantage over Canada in electronic goods like television sets. According to Adam Smith's theory, Canada will therefore specialize in the production of two-by-fours and trade them against Japanese TV sets; for Japan the situation is reversed. As a consequence, lumber wood and TVs will be available in both countries and at lower costs than under the absence of trade.

¹⁸² Adam Smith, *supra* note 172 Volume I at 479.

¹⁸³ Krugman/Obstfeld, *supra* note 178 at 21-2.

¹⁸⁴ Elaborated in David Ricardo, *Principles of Political Economy and Taxation*, first published in 1817.

In its simplest form¹⁸⁵, the Ricardian model examines trade in a global economy of two countries that can both manufacture two goods by employing labour as the only factor of production; moreover the labour input (i.e. the production cost) for each product in each of the countries is assumed to remain constant. The model posits that international trade depends on the productivity differences between the countries involved, expressed in a difference in comparative costs. In addition, the rate of exchange for the traded goods, or, the international price of one good in terms of the other - the "terms of trade" - must lie between the comparative costs of their production in the countries under examination. If these terms are met, each country will specialize in the production and exportation of the good in which it is comparatively efficient and import those goods in which it is comparatively inefficient¹⁸⁶. Ricardo thus postulated that it is

¹⁸⁵ Ricardo, supra note 184 at 133-49. See also Gandolfo, supra note 180 at 11-17, and Krugman/Obstfeld supra note 178 at 14-34. The model postulates that foreign direct investment, which seeks returns from lower production costs due to lower wages, does not exist as capital cannot freely move from one country to another, i.e. direct foreign investments do not influence production and trade, Ricardo, supra note 184 at 136.

¹⁸⁶ Suppose, for instance, a global economy consisting of Japan and Canada, in which each country can produce both rice and beer. Suppose further that Japan needs two hours of labour to produce one kilogram of rice and four hours of labour to produce one litre of beer, while it takes ten hours of work in Canada to grow the same amount of rice, and five hours to brew a litre of beer:

Figure 2.1 - Comparative Advantage

	JAPAN	CANADA
RICE	2	10
BEER	4	5

As the table illustrates, Japan has an absolute advantage over Canada in both the production of rice and beer. In Japan, the costs for the cultivation of rice are 80% lower, and the production costs for beer are 20% lower than in Canada. Under these conditions, Japan has a relatively greater advantage over Canada in the production of rice than in the production of beer, that is to say Japan has a comparative advantage in relation to Canada in the cultivation of rice. Conversely, the production costs for rice in Canada are 400% higher and for beer 25% higher than in Japan, which gives Canada a comparatively smaller disadvantage in beer brewing.

In Japan, the costs for one kilo of rice in terms of beer are $2/4 = 0.5$, and in Canada they are $10/5 = 2$. Thus, in the absence of trade, it would cost two kilos of rice in Japan to obtain one litre of beer, while in Canada, a kilo of rice would be available only at the price of two litres of beer. As long as the terms of trade lie between 0.5 and 2, that is to say, as long as one kilo of rice is exchanged against more than half a litre of beer and less than two litres of beer, Japan will specialize in the production of rice and trade it against beer while Canada will use its resources to brew beer and exchange it against rice.

Assume the terms of trade are 1 (one kilo of rice is exchanged against one litre of beer). By trading rice against beer with Canada, Japan could obtain the latter at a cost of one kilo of rice in comparison to the cost of two kilos

the existence of comparative, not of absolute advantage that gives rise to international trade. The principal predictions of the Ricardian model have since been validated in empirical studies¹⁸⁷. Its counter-intuitive logic is graphically illustrated in the following example of legal scholar and economist Jagdish Bhagwati¹⁸⁸:

[E]ven if I can do both Economics and Law better than you, I should not do both like Marx's complete man. Instead, I should specialize in Economics, leaving Law to you, since my superiority in Economics is comparatively greater than my superiority in Law. That way, we get better Economics and better Law.

Subsequent generations of economists have modified the Ricardian model of comparative advantage to account for the influences of other factors on trade patterns like the unequal distribution of resources and technology, and to explain the effects of international trade on national economies in accordance with new evidence¹⁸⁹. Since the end of the Second World War, the free trade doctrine has been the theoretical engine driving efforts to establish international

at home. Likewise, Canada could buy one kilo of rice from Japan at the cost of one litre of beer, in comparison to the home price of two litres per kilo of rice. The example shows how both countries profit from specialization in and trade with the good that they produce relatively more efficiently.

¹⁸⁷ Krugman/Obstfeld, *supra* note 178 at 32-4.

¹⁸⁸ Jagdish N. Bhagwati, "Challenges to the Doctrine of Free Trade" (1992) 25 *New York University Journal of International Law and Politics* 219 at 219 [hereinafter: Bhagwati].

¹⁸⁹ Specifically two other models have formed our understanding of international trade: the first is the "Specific Factors Model" by Nobel laureate Paul Samuelson, which shows how trade affects income distribution within a country (see Gandolfo, *supra* note at 101-18). The second is the "Theory of Factor Proportions" developed by the Swedish economists Heckscher and Ohlin. It identifies differences between countries in the endowment with resources such as minerals, land or capital as the only determinant of comparative advantage, predicting that an economy will be more efficient at manufacturing goods that demand a high input of factors that are abundant in a country than at manufacturing products that depend on scarce resources. Generally, economists will rely on a combination of the three basic models presented above to explain the realities of trade. In this sense, each model is considered to be a special case of a general or "neoclassical" theory of international trade (Gandolfo, *supra* note 180 at 62).

regimes for the exchange of goods and services¹⁹⁰. Over a period of fifty years, these efforts have led the multilateral trading system administered by the World Trade Organization.

¹⁹⁰ However, the free trade doctrine has not been without criticism. Bhagwati, *supra* note 188 at 219ff, recounts economic arguments against free trade such as market failures that demand regulatory interventions; the use of tariffs to exploit monopoly power; infant industry protection; the theory of imperfect competition and its effects on markets; optimal policy intervention for non-economic objectives. Newer challenges are demands for fair trade, understood as a levelling of the regulatory playing-field between countries in areas like environmental protection or labour; and effects of trade on income distribution between industrialized and developing countries, leading to the impoverishment of the latter. For an example of criticism with a legal perspective of and alternative approaches the prevailing "myths" of free market concepts both at the international and national level, see Daniel K. Tarullo, "Logic, Myth and the International Economic Order" (1985) 26 *Harvard International Law Journal* 533; and Daniel K. Tarullo, "Beyond Normalcy in the Regulation of International Trade" (1987) 100 *Harvard Law Review* 546, in particular 557ff. As an example for calls for a less simplifying theory to explain international trade, see Winfried Ruigrock "Paradigm Crisis in International Trade Theory" (1991) 25 *Journal of World Trade* 77, who argues that it is necessary to take into account post-fordist modes of production and other phenomena of globalization.

2.3 Free Trade in Practice: The WTO - Origins, Organization and Scope, Dispute Settlement

2.3.1 Origins

Today's world trading system is a fairly recent child of public international law. It was conceived by the United States and its Allies under the impression of the Second World War and evolved out of plans to maintain and promote peace through an international economic system that would be characterized by monetary stability and a reduction of trade-barriers¹⁹¹. In 1944, negotiations during the Bretton Woods Conference resulted in the establishment of the International Monetary Fund and the Bank for Reconstruction and Development (World Bank) creating the financial and monetary foundations of the post-war economic order¹⁹². As a consequence of its limited negotiating mandate, the conference left the issue of trade regulation unresolved. It expressed, however, the widely shared belief that the new international economic system would be incomplete without an international trade regime administered by an international organization and based on non-discrimination, reciprocity, and the removal of tariff and non-tariff restrictions¹⁹³.

Taking up Anglo-American proposals, the United Nations Social and Economic Council convened a *Conference on International Trade and Employment* in 1946, in order to negotiate

¹⁹¹ Thomas/Meyer supra note 170 at 2.

¹⁹² Ibid. at 3.

¹⁹³ Schleyer supra note 15 at 2278-9; and Raymond F. Mikesell, "Antecedents of the ITO Charter and their Relevance for the Uruguay Round" (1994) 14 *Northern Illinois University Law Review* 323 at 324 [hereinafter: Mikesell].

new rules for world trade and the establishment of an International Trade Organization (ITO)¹⁹⁴. After a series of preparatory sessions¹⁹⁵, a *Charter for an International Trade Organization* (Havana Charter) was signed in Havana on 24 March 1948¹⁹⁶.

During the second preparatory meeting in Geneva, from April to August 1947, a group of 23 countries initiated negotiations parallel to the talks regarding the creation of the ITO for an agreement on tariff-reductions, leading to the conclusion of *the General Agreement on Tariffs and Trade* (GATT). The main reasons for a separate understanding to precede the entry into force of the Havana Charter were threefold: first, an agreement to introduce reciprocal tariff reductions was covered by the U.S. President's authority under the 1934 Reciprocal Trade Agreements Act, and thus did not necessitate ratification by U.S. Congress; second, the general willingness of the negotiating parties to make substantial tariff concessions; and finally, the fact that the negotiations on the ITO proved to be more protracted than originally expected¹⁹⁷. The GATT contained key elements of the substantive provisions of the prospective ITO, in particular of its chapter on "Commercial Policy"¹⁹⁸. Based on a Protocol of Provisional Application, the GATT became effective on 1 January 1947. As implied in the protocol's title, the GATT was designed to be only of a temporary nature, later to be integrated into the ITO framework¹⁹⁹.

¹⁹⁴ Pär Hallström, *The GATT Panels and the Formation of International Trade Law* (Stockholm: Juristförlaget, 1994) at 23 [hereinafter: Hallström], and Thomas/Meyer, supra note 170 at 3.

¹⁹⁵ See Jackson, World Trade supra note 20 at 42-46 for an overview of the ITO preparatory sessions.

¹⁹⁶ "Havana Charter for an International Trade Organization", reprinted in Michael Hart, ed., *Also Present at the Creation. Dana Wilgress and the United Nations Conference and Trade and Employment at Havana* (Ottawa: Centre for Trade Policy and Law, 1995) 171 [hereinafter: Havana Charter].

¹⁹⁷ Compare William Diebold, "Reflections on the International Trade Organization" (1994) 14 *Northern Illinois University Law Review* 335 at 336 [hereinafter: Diebold].

¹⁹⁸ Havana Charter, supra note 196 at 184-204.

¹⁹⁹ *Ibid.* at 184-204.

The Havana Charter, however, never entered into force. Its failure to gain approval by U.S. Congress implied the withdrawal of its most important prospective member and precipitated a loss of interest by the remaining negotiating parties that rang the death-knell of the ITO²⁰⁰. Yet, its vision of an international trade regime - embedded in an elaborate institutional and procedural framework - continued to be a yardstick for the evolution of the GATT and its descendant, the *World Trade Organization* (WTO). It was established on 1 January 1995 as a result of the *Uruguay Round of Multilateral Trade Negotiations*, the eighth round of trade talks under the GATT²⁰¹.

2.3.2 Functions and Structure of the WTO

The WTO is an international governmental organization, established to provide a common institutional framework for more than twenty trade agreements and the trade relations between its 135 Members²⁰². Its cardinal functions are enumerated in Article III WTO Agreement:

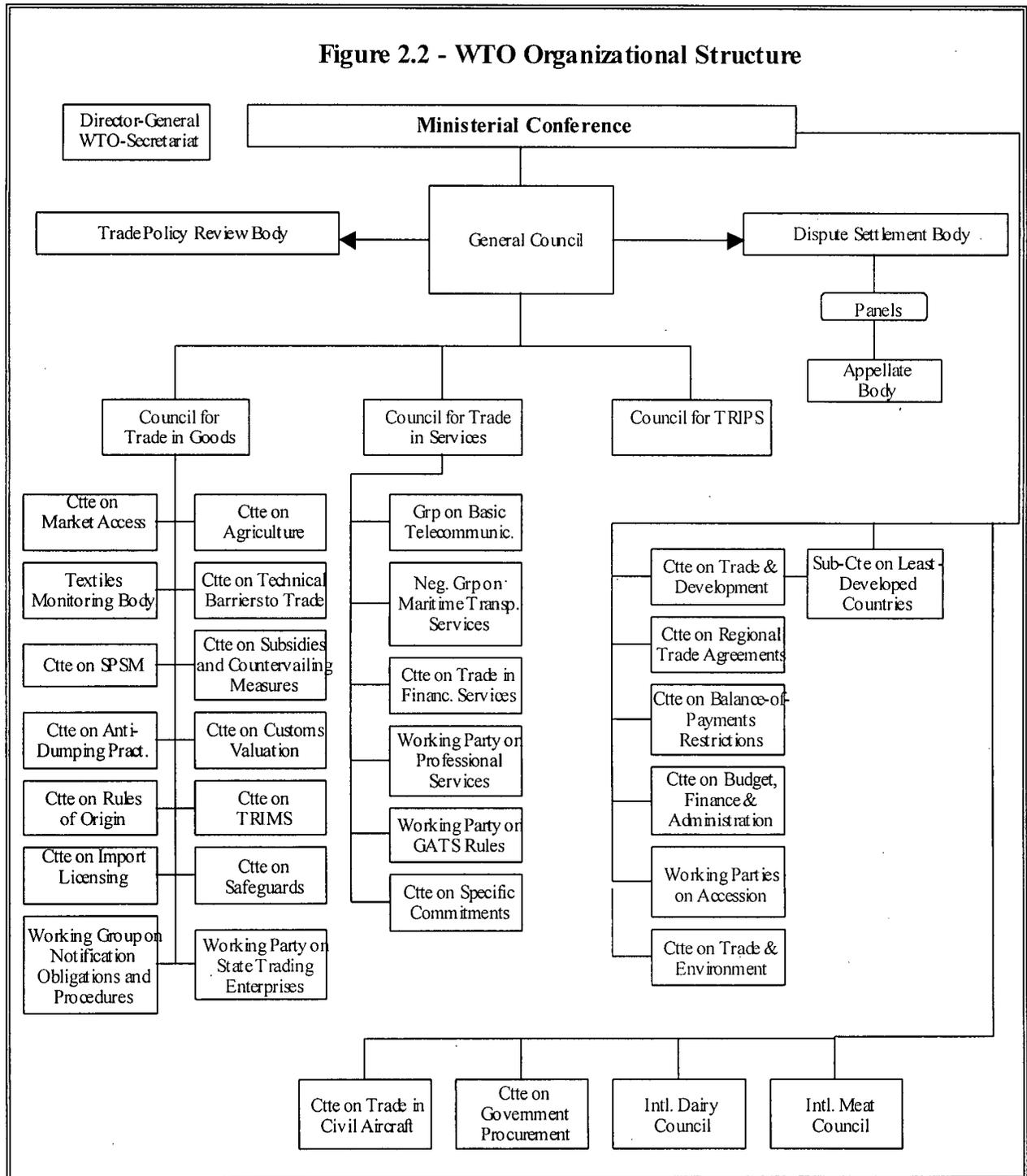
Facilitate the implementation, administration and operation, and further the objectives of the WTO Agreement and its annexed agreements,
 Provide a forum for negotiations for its Members with regard to their trade relations,
 Administer the Understanding on Rules and Procedures Governing the Settlement of Disputes, the WTO's uniform dispute settlement system,
 Administer the Trade Policy Review Mechanism,
 Cooperation with the IMF, the IBRD, and other international governmental organizations with WTO-related functions.

²⁰⁰ Thomas/Meyer, supra note 170 at 5. Diebold, supra note 197 at 339 points out, that the main reason for the failure of the ITO bill to pass the U.S. Congress lay in the lack of support it experienced from the business community.

²⁰¹ For an overview of the Uruguay Round negotiations, see Thomas/Meyer, supra note 170 at 16-25.

²⁰² Paragraph 1 of Article II WTO Agreement. Number of Members as of 21 December 1999, see WTO web site at <http://www.wto.org/wto/about/organsn6.htm>.

As Figure 2.2²⁰³ illustrates, the organizational structure in place to perform these functions is elaborate.



²⁰³ Adapted from: WTO, Focus Newsletter, No. 13, October-November 1996, at 3.

The main body of the WTO is the Ministerial Conference, which consists of representatives of all Members and meets at intervals of at least once every two years²⁰⁴. In the interim periods, the work of the Conference is conducted by the General Council, formed by representatives of all Members, who meet as required²⁰⁵. Additionally, the General Council convenes in form of the Dispute Settlement Body and the Trade Policy Review Body to exercise the functions set forth in the DSU and the Trade Policy Review Mechanism respectively²⁰⁶.

In administering the multilateral trading system, the General Council is assisted by a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS). Where needed, each of the sector-specific Councils is authorized to set up subsidiary bodies.²⁰⁷ Pursuant to paragraph 7 of Article IV WTO Agreement, the Ministerial Conference has three organs to address particular aspects of the multilateral trading system: a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration. They have been joined by the Committee on Trade and Environment²⁰⁸ and the Committee on Regional Trade Agreements²⁰⁹. The work of all WTO bodies is supported by the WTO Secretariat. Its

²⁰⁴ Paragraph 1 of Article IV WTO Agreement. The first meeting was held in Singapore from 9 to 13 December 1996; the second session took place in Geneva from 18 to 20 May 1998. The next Ministerial Conference is scheduled for 31 November to 3 December 1999 in Seattle.

²⁰⁵ Paragraph 2 of Article IV WTO Agreement.

²⁰⁶ Paragraphs 3 and 4 of Article IV WTO Agreement.

²⁰⁷ Paragraphs 5 and 6 of Article IV WTO Agreement.

²⁰⁸ The Committee on Trade and Environment has been established according to the *Marrakesh Ministerial Decision on Trade and Environment* which formed part of the *Final Act*, see supra note 1.

²⁰⁹ Established in February 1996 by a General Council Decision: WTO, General Council, "Committee on Regional Trade Agreements - Decision of February 6 1996", WTO-Documents: WT/L/127.

head, the Director-General, is appointed by the Ministerial Conference and represents the WTO in its outside relations²¹⁰.

2.3.3 Material Scope and Key Principles of the WTO Agreements

2.3.3.1 Material Scope

The substantive rules of the multilateral trading system, which form an integral part of the WTO Agreement, are found in its first annex²¹¹. It is completed by the *Trade Policy Review Mechanism*²¹², and the DSU²¹³. As the organizational structure of the WTO indicates, the multilateral trading system covers three major areas of trade, the international exchange of goods, of services, and the protection of trade-related intellectual property rights. Each area is regulated by a series of agreements, decisions, and annexes.

International trade in goods is governed by the GATT 1994, which has replaced the GATT 1947²¹⁴, and provides the fundamental rules for the exchange of goods across borders. A number of agreements regarding particular aspects - like agriculture, health requirements for agricultural products, textiles, technical barriers to trade, trade-related investment, subsidies and

²¹⁰ Article VI WTO Agreement. The first Director-General from 1995 to 1999 was Mr. Renato Ruggiero. He has been succeeded on 1 September 1999 by the former prime Minister of New Zealand, Mike Moore for a term of three years; WTO, General Council "Appointment of the next Director-General" *Decision of 22 July 1999*, WT/L/308.

²¹¹ Paragraph 2 of Article II WTO Agreement in combination with the *List of Annexes*.

²¹² Annex 3 of the WTO Agreement, *ibid*.

²¹³ Annex 2 of the WTO Agreement. In addition, a fourth annex contains the Plurilateral Trade Agreements on Trade in Civil Aircraft, Government Procurement, Dairy and Bovine Meat, which are part of the WTO Agreement for those Members that have accepted them, see paragraph 3 of Article II WTO Agreement.

²¹⁴ See *supra* note 168-169.

countervailing measures, or safeguards²¹⁵ - specify, amend, and extend the basic GATT rules, or create exceptions. Individual Member commitments to improve market access are listed in Schedules. The WTO regime for services repeats this three-part structure. The legal foundations for the international provision of services are defined in the *General Agreement on Trade in Services* (GATS)²¹⁶. Its annexes deal with specific service sub-sectors such as movements of natural persons, air transport, financial services, shipping, or telecommunication. Separate Member obligations and exceptions are contained in the GATS Schedules. The third area is covered by the *Agreement on Trade-Related of Intellectual Property Rights* (TRIPS)²¹⁷. As the name suggests, the agreement links minimum standards of protection for copyrights, trademarks, patents and other IPRs to international trade.

2.3.3.2 Key Principles of the WTO Multilateral Trading System

First developed under the GATT 1947, the substantive treaties under the WTO multilateral trading system share a number of key concepts and legal principles, that spin a red thread through the extensive regulatory "labyrinth" of agreements and decisions: trade liberalization, non-discrimination, reciprocity, and transparency.

2.3.3.2.1 Trade Liberalization

The most extensive contribution to trade liberalization of the eight GATT Rounds of Trade Negotiations leading to the WTO has been the permanent reduction of tariff barriers. It means that each Member agrees to lower tariffs levied on goods entering the country and to "bind"

²¹⁵ For a complete list, see Annex 1A: Multilateral Agreements on Trade in Goods.

²¹⁶ Annex 1B of the WTO Agreement.

²¹⁷ Annex 1C of the WTO Agreement.

customs duties at a certain level according to its own Schedule of Concessions²¹⁸. In consequence, Members are generally prohibited for the future to raise tariffs above the bound rate. By the end of the Uruguay Round in 1994, industrialized countries had bound 99% of their tariffs, compared to 73% in developing countries²¹⁹. The substantial lowering of customs duties relatively increased the distortive effects of non-tariff barriers - such as quantitative restrictions on imports²²⁰, subsidies and countervailing duties, dumping, import-licensing, differences in customs valuation, or technical barriers - on trade. Since the mid-1970s these measures have taken the center-stage of trade negotiations²²¹.

2.3.3.2.2 Non-Discrimination

The reduction of trade-barriers is flanked by the principle of non-discrimination. This restriction for Members to give differential treatment to other trading nations distinguishes two obligations: most-favoured-nation (MFN) treatment and national treatment.

²¹⁸ Article II GATT 1994, Annex 1A of the WTO Agreement

²¹⁹ WTO. *Trading into the Future. Introduction to the WTO*, 2nd ed. (Geneva: World Trade Organization, 1998) at 6.

²²⁰ Addressed in Article XI GATT 1994 and 1947. One of the goals of GATT 1947 - continued in GATT 1994 - is to increase the transparency of trade restrictions by translating non-tariff barriers into customs duties, and to eventually reduce tariff rates to lowest possible level. Tariffs make the total costs of protection visible, and allow for comparisons between trading nations.

²²¹ For trade in goods: Agreement on Subsidies and Countervailing Measures; Article VI GATT 1994 and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, concerning dumping; Agreement on Import Licensing Procedures; Article VII GATT 1994 and Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, concerning customs valuation; Agreement on Technical Barriers; all included in Annex 1A of the WTO Agreement. These agreements have their origin in the Tokyo-Round Codes addressing non-tariff trade barriers, see Thomas/Meyer supra note 170 at 9-10. For another type of protectionist barrier erected through national regulations (French language requirements for products in the context of free trade within the European Community), see Stacy Amity Feld, "Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade" (1998) 31 *Vanderbilt Journal of Transnational Law* 153.

Paragraph 1 of Article I GATT 1994 defines MFN treatment with regard to customs duties, taxes and other charges on traded goods that "any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members."²²² It means that a Member must extend trade-concessions granted to one country to all other Members, providing the most advantageous conditions to all its trading partners within the WTO. For example, if Canada entered into an obligation with Japan to lower its tariff rate on microprocessors from a fictitious level 4% to 2%, microchips from other WTO Members could be automatically imported to Canada at the same rate as processors from Japan.

National treatment, on the other hand, ensures that imported goods, once they have entered a national market, are treated no less favourable than domestic products as concerns taxation and regulations (Article III GATT 1994). Respectively, national treatment is accorded to the supply of services by nationals from other WTO Members, and guarantees of intellectual property rights to nationals of other Members²²³. In the case of the exemplary Japanese micro-processors being imported to Canada, national treatment would mean that as soon as they had cleared customs they could not be subject to, for example, more elaborate safety regulations than Canadian-built chips, or a special tax only applied to foreign electronic devices.

²²² The principle knows a number of exceptions, see for example paragraph 2 of Article I, Articles XX, XXI, and XXIV GATT 1994. Similar definitions accompanied by several exceptions are found for trade in services in Paragraph 1 of Article I GATS (Annex 1B of the WTO Agreement), and for intellectual property rights in Article 4 TRIPS (Annex 1C of the WTO Agreement).

²²³ Paragraph 1 of Article XVII GATS, and paragraph 1 of Article 3 TRIPS.

2.3.3.2.3 Reciprocity

The WTO multilateral trading system comprises a number of "reciprocal and mutually advantageous arrangements"²²⁴. Ernst-Ulrich Petersmann discerns three functions of reciprocal trade liberalizations: economic, political, and legal²²⁵. In addition to the economic benefits of free trade mentioned above, the promise of reciprocity politically operates as a bargaining chip to gain access to foreign markets. Domestically, it mobilizes export-oriented businesses to support international trade liberalization agreements, thus providing a political counter-force against the demands for protectionist measures by import-competing industries. And from a legal perspective, reciprocity makes rule-compliance more attractive, and the risk of losing its long-term advantages works as a disincentive to pursue short-lived economic gains²²⁶.

In essence, the principle of reciprocity characterizes an approach to negotiations under the GATT/WTO framework rather than functioning as a term of law. Each obligation entered into by one party during negotiations is accompanied by a corresponding obligation or level of obligation by the others, conceptualizing the cooperative nature of international trade liberalization.

²²⁴ Preamble, WTO Agreement. The preamble of GATT 1947/94 contains an identical phrase. Similarly, paragraph 2 of Article XXVIII GATT 1994 with regard to modification of schedules of concessions, and paragraph 1 of Article XXVIII bis GATT 1994 concerning future tariff negotiations both stress the principle of reciprocity. The preamble of the GATS aims at "promoting the interests of all participants on a mutually advantageous basis";

²²⁵ Petersmann, GATT, *supra* note 53 at 36-8.

²²⁶ Game theory describes this phenomenon as "Prisoners' Dilemma".

2.3.3.2.4 Transparency

On several occasions, the WTO agreements refer, both explicitly and implicitly, to transparency as one of the key principles of the multilateral trading system²²⁷, albeit in a limited, technical sense. Transparency obligations are directed against Members and aim for improved clarity and accessibility of domestic trade regimes and measures²²⁸. Greater transparency, in turn, increases rule adherence and renders the multilateral trading system more predictable to States and commercial actors²²⁹. What is missing from the legal framework of the WTO Agreement and its annexes is an external dimension of transparency. In its relations with civil society, the WTO may have made factual progress towards transparency²³⁰, but legal manifestations of WTO obligations to give public accounts of its activities are scant.

2.4 The WTO Dispute Settlement System

Based on free trade theory, the WTO agreements have established an international legal regime administered by an extensive organizational framework that covers wide areas of foreign trade. Yet, a thriving multilateral trading system does not exist without disputes between its Members over the multitude of rules and obligations. These disputes are resolved according to the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, the comprehensive dispute settlement mechanism of the WTO.

²²⁷ For example: Article 7 Agreement on the Application of Sanitary and Phytosanitary Measures; Articles 25 and 26 Agreement on Subsidies and Countervailing Measures in connection with Art. XVI:1 of the "General Agreement on Tariffs and Trade 1994"; Article III and III bis GATS; paragraph (i) of Article A and Article B Trade Policy Review Mechanism.

²²⁸ For example by means of regular reviews of national trade laws and policies (Trade Policy Review Mechanism), or by imposing obligations on Members to notify changes of certain trade sensitive regulations. Ibid.

²²⁹ Compare paragraph (i) of Article A Trade Policy Review Mechanism.

²³⁰ See infra notes 331 et seq. as well as accompanying text.

2.4.1 Historical Roots of the WTO Dispute Settlement System

Due to its original design as a temporary tariff regime, the GATT 1947 did not advance an elaborate or comprehensive framework for the settlement of disputes. Instead, many substantive provisions arranged for mandatory negotiation procedures or compensatory schemes to resolve differences of opinion between contracting parties²³¹. Aside from these inherently political means of conflict resolution, GATT dispute settlement rested on the procedures established by two provisions, Article XXII GATT on Consultation, and Article XXIII GATT on Nullification and Impairment. These Articles reproduced the dispute settlement provisions of the 1947 Geneva draft for an International Trade Organization - thus reflecting the GATT negotiating history as closely intertwined with the preparatory work for the ITO²³².

Lacking the Havana Charter's refinement, but faced with the task of filling the gap in international trade regulation that was left behind by the stillborn ITO, GATT dispute settlement learned to adjust to a more permanent role in the trade relations of its contracting parties.

Waning and waxing over time, the system – by a series of reform decisions that alternated with periods of evolution through practice²³³ - grew to meet both the demands for effective dispute

²³¹ Jackson, *World Trade*, supra note 5 at 164-5, notes 1 and 2 identifies nineteen GATT provisions that contain obligations for consultations and seven provisions that foresee some form of suspension of concessions as compensatory means.

²³² *Ibid.*, at 167, 169 and compare Hallström, supra note 194 at 29.

²³³ The reforms of the GATT dispute resolution process until 1989 are captured in the following documents: "Organizational and Functional Questions. Report adopted on 28 February, 5 and 7 March, 1955." (L/327) in *General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents* (Geneva: GATT, 1952) 3rd Supplement/231 (1955) at 250-1 [hereinafter: GATT, BISD Supplement No./Document No. (year)]; "Procedures Under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties Adopted on 10 November 1958", GATT, BISD 7S/24 (1959); "Entry into Force of the Amendment Protocols. Decision of 18 November 1960, 9S/17 (1961) at 19-20; "1966 Report on Trade and Development", GATT, BISD 14S/139 (1966); "Procedures under Article XXIII. Decision of 5 April 1966", GATT, BISD 14S/18 (1966);

resolution brought forward by the contracting parties and the economic as well as ideological changes affecting trade relations²³⁴. According to Robert E. Hudec's seminal analysis, the history of dispute resolution under GATT may be divided into four phases, each lasting roughly for a decade²³⁵. After a promising start (1948-58), the system nearly broke down during the sixties economic changes (1959-72). The rediscovery of GATT dispute settlement mechanisms during the Tokyo Round of Trade Negotiations (Tokyo Round) and the early eighties (1973-85) was followed by a decade of increasing use and far-reaching reforms (1986-94). With the inception of the World Trade Organization²³⁶ and its comprehensive *Understanding on Rules and Procedures Governing the Settlement of Disputes*²³⁷, this process has come to a temporary climax and achieved a new legal quality.

While the DSU is the product of an evolutionary process of almost 50 years, its immediate roots begin in 1985. Following the invitation of the GATT Director-General, a group of seven independent experts under the chairmanship of Dr. Fritz Leutwiler published a report on "Trade

"Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Adopted on 28 November 1979" (L/4907), GATT, BISD 26S/33 (1980); "Ministerial Declaration. Adopted on 29 November 1982." (L/5424) GATT, BISD 29S/9 (1983) at 13 "Dispute Settlement Procedures"; "Action Taken on 30 November 1984. Dispute Settlement Procedures." (L/5752), GATT, BISD 31S/9 (1985).

²³⁴ For an overview of the changes in the modes of production, distribution and consumption, of economic actors, and of economic policies, see for example Daniel Drache, "From Keynes to K-Mart. Competitiveness in a corporate age." in Robert Boyer and Daniel Drache, eds., *States Against Markets* (London: Routledge, 1996) 31 at 31-51.

²³⁵ Hudec, *Enforcing Trade Law*, supra note 156 at 11. The time periods in this paper differ to some extent from the divisions chosen by Professor Hudec.

²³⁶ The World Trade Organization was established on January 1, 1995 with the entry into force of the Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994.

²³⁷ Hereinafter: DSU or Understanding. The Understanding included is in the *Agreement Establishing the World Trade Organization (WTO-Agreement)* as Annex 2.

Policies for a Better Future: Proposals for Action”²³⁸, that suggested far-reaching reforms to the GATT legal system. Regarding dispute settlement, the report recommended *inter alia* more expeditious panel work, permanent rosters for governmental and non-governmental panelists, third party rights, and improved implementation and surveillance mechanisms²³⁹. These suggestions provided the basis for the reform discussions during the *Uruguay Round of Multilateral Trade Negotiations*, which was launched on 26 September 1986.

With respect to dispute settlement, the 1986 *Ministerial Declaration on the Uruguay Round* set forth the following goals for the reform negotiations²⁴⁰:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

With this mandate, a *Negotiating Group on Dispute Settlement* began to review the current GATT dispute settlement mechanisms. Its work can be roughly divided into two phases. First, during the discussions preparing the 1988 *Montreal Midterm Review* the group concentrated on those aspects of procedural reform that would find consensus. By decision of the CONTRACTING PARTIES, the proposed enhancements to GATT dispute resolution were put

²³⁸ The so called Leutwiler Report, as quoted in Terence P. Stewart and C.J. Callahan, eds., *The GATT Uruguay Round: A Negotiating History*” (1986 – 1992) – *Dispute Settlement Mechanisms* (Boston: Kluwer Law and Taxation Publishers, 1993) at 2721-2 [hereinafter: Stewart].

²³⁹ Stewart, *supra* note at 2721-2.

²⁴⁰ Declaration of 20 September 1986 (Min. Dec), GATT, BISD 33S/19 (1987) at 25.

into effect on trial basis starting on 1 May 1989 until the end of the Uruguay Round²⁴¹. Secondly, in the years after the Midterm Review the negotiating group worked to resolve the contentious matters of old and to consolidate the established reforms with new suggestions for improved mechanisms. Thus, its agenda listed issues such as alternatives to the consensus practice; the implementation and enforcement of panel reports as well as compensation for non-compliance; reforms in consideration of least-developed countries; and special procedural treatment for non-violation complaints²⁴².

By December 1991 the group's work had taken the shape of two draft agreements, which were included in the *Dunkel Draft Final Act*. The first, called the *Understanding on Rules and Procedures Governing the Settlement of Disputes under Article XXII and XXIII of the General Agreement on Tariffs and Trade*, was an updated version of the 1989 improvements. The second draft, or *Elements of an Integrated Dispute Settlement System*, meanwhile suggested institutional and procedural reforms – such as the introduction of a centralized dispute settlement body and cross-sector compensation/retaliation²⁴³. Both suggestions have been combined to form the 1994 DSU as the comprehensive and integrated dispute resolution mechanism of the WTO.

2.4.2 The Understanding on Rules and Procedures Governing the Settlement of Disputes

Dispute settlement in the WTO represents an evolutionary leap far beyond long-standing GATT practice. The DSU embraces the 1989 improvements to the GATT dispute settlement system as

²⁴¹ "Improvements to the GATT Dispute Settlement Rules and procedures. Declaration of 12 April 1989" (L/6489), GATT, BISD 36S/61 (1989) at A.2. [hereinafter: 1989 Decision].

²⁴² Stewart, *supra* note 238 at 2763-4.

²⁴³ *Ibid.* at 2793.

permanent²⁴⁴, but it also captures the continued willingness of the negotiating parties during the second half of the Uruguay Round to overhaul the old regime. These later reforms crystallize around several key procedural and institutional aspects, and the main features of the Understanding are discussed below²⁴⁵.

2.4.2.1 Scope of the Understanding

The DSU provides the principal mechanism for the resolution of disputes arising between Members²⁴⁶: it covers conflicts concerning rights and obligations established by the WTO Agreement, complaints under the Multilateral Trade Agreements²⁴⁷, and - to the extent that the parties to each treaty agree on the adoption of the DSU - to the Plurilateral Trade Agreements²⁴⁸, but also to disputes arising out of the application of the Dispute Settlement Understanding itself. Thus, the DSU introduces a single, harmonized dispute settlement regime that unites the various rules and procedures, which had existed as a consequence of the Tokyo Round reforms²⁴⁹. Nevertheless, a large number of special or additional rules and procedures continue to exist in the

²⁴⁴ Ibid. at 2779.

²⁴⁵ In addition to the changes discussed in more detail in this section, the DSU also introduced special procedural rules for least-developed countries which complement the improved roles of developing countries in dispute settlement proceedings (Article 24 DSU); and for non-violation complaints, which rely on compromise, recommendations and non-binding procedures (Article 26 DSU).

²⁴⁶ See paragraph 1 of Article 1 DSU.

²⁴⁷ For a listing of the covered Agreements, cf. Appendix 1 to the DSU - Agreements Covered by the Understanding.

²⁴⁸ See the explanation at (C) Plurilateral Agreements. Appendix 1 - Agreements Covered by the Understanding.

²⁴⁹ The Tokyo Round had introduced substantive codes for non-tariff measures in areas like anti-dumping or subsidies, which contained their own specific dispute resolution provisions. Variations between the procedures of the original GATT and the Tokyo Round Codes made the dispute settlement system not only more complex and consequently less accessible. It also encouraged forum shopping by parties with enough resources to exploit these differences (See Ivo van Bael, "The GATT Dispute Settlement Procedure" (1988) 22 *Journal of World Trade* 67 at 72-73). The resulting practice in conflict resolution has been graphically described as the "balkanization" of the GATT dispute settlement regime (Mora, supra note 9 at 125).

substantive agreements²⁵⁰. Taking into account the particularities of these agreements, their dispute settlement provisions take precedence over the general regulations of the Understanding in cases of conflict²⁵¹.

2.4.2.2 Exclusivity

The wide coverage of the Understanding pairs up with another achievement of the Uruguay Round reforms, the “Strengthening of the Multilateral System”, as it is called in Article 23 DSU. Its provisions compel Members to adhere to the WTO dispute settlement regulations in two distinct ways: first, it establishes the primacy of the DSU over any other form of dispute resolution, stating that Members “shall have recourse to, and abide by the rules and procedures of this Understanding”²⁵²; secondly, it prevents them from undertaking any unilateral move to redress an alleged nullification or impairment by another State, except in the forms and according to the procedures of the Understanding²⁵³.

²⁵⁰ Appendix 2 of the Understanding enumerates the “Special or Additional Rules and Procedures Contained in the Covered Agreements”. For an analysis and detailed overview over the special and additional procedures, see Edwin Vermulst and Bart Driessen, “An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements – Nice on Paper but Too Much Stress for the System?” (1995) 29 *Journal of World Trade* 131 at 148 – 151 and at 155 – 159, Annex 1 Overview of Special Rules. Special and additional rules or procedures in the Plurilateral Trade Agreements are also included after notification to the DSB by the competent bodies.

²⁵¹ See paragraph 2 of Article 1 DSU, which is designed after the Roman law principle of *lex specialis derogat legi generali* – the special rule takes precedence over the general rule. But it also lays down binding procedures for cases, when contradicting special or additional dispute settlement provisions of more than one agreement are applicable at the same time and the parties to the dispute cannot agree which regulation is to be applied.

²⁵² Paragraph 1 of Article 23 DSU.

²⁵³ See paragraph 2 of Article 23 DSU. Young, *supra* note 40 at 400-1 draws attention to the fact, that these obligations are not intended to prevent alternate approaches to dispute settlement, such as consultations, mediation or conciliation. (“Nonpanel resolution of disputes is permitted, even encouraged in some forms, but the range of possible alternatives to which the parties can have recourse and the substantive rules the parties can apply are all limited.”)

2.4.2.3 Dispute Settlement Body

One of the major institutional changes brought to the GATT/WTO dispute settlement system is the establishment of a Dispute Settlement Body (DSB)²⁵⁴, which administers the rules and procedures of the Understanding. The DSB is an institutionalized forum for the WTO General Council to discharge its responsibilities regarding dispute settlement²⁵⁵. It is formed by all WTO Members²⁵⁶, and has the authority to establish panels, to adopt panel and Standing Appellate Body reports, to oversee their implementation and - on request - to authorize the suspension of concessions and obligations²⁵⁷. In order to ensure speedy and efficient dispute resolution, the DSB is required to meet as often as necessary during the settlement proceedings²⁵⁸.

2.4.2.4 Negative Consensus

Under the GATT 1947, decisions by the CONTRACTING PARTIES regarding dispute resolution proceedings - in particular concerning the adoption of panel or working party reports and recommendations - were to be made by consensus. Consensus was reached if none of the contracting parties or GATT Council members present explicitly opposed the motion brought forward for decision²⁵⁹. The consensus practice prevailed as an alternative to the politically negative impact of voting and out of respect for the sovereignty of the GATT contracting parties. But it effectively vested each country - and specifically a responding party to a dispute - with the

²⁵⁴ Paragraph 1 of Article 2 of the Understanding.

²⁵⁵ Paragraph 3 of Article IV WTO Agreement.

²⁵⁶ In case of disputes arising under any of the Plurilateral Trade Agreements, membership in the DSB, however, is limited to the contracting parties of the particular agreement, paragraph 1 of article 2 of the Understanding.

²⁵⁷ Paragraph 1 of Article 2 DSU.

²⁵⁸ Paragraph 4 of Article 2 DSU.

²⁵⁹ See Norio Komuro, "The WTO Dispute Settlement Mechanism. Coverage and Procedures of the WTO Understanding (World Trade Organization)" (1995) 29 *Journal of World Trade* 5 at 29-30 [hereinafter: Komuro].

power to veto any disadvantageous decision. That is to say, it allowed them to delay the progress of the dispute resolution process indefinitely²⁶⁰.

In sharp contrast to the GATT consensus practice, key decisions taken by the DSB that had been susceptible to blocking or delay are now based on the principle of “negative consensus”. While formally adhering to the consensus rule as the principal form of decision-making under the WTO agreements²⁶¹, the process is “turned on its head”²⁶² with regard to important procedural decisions like the establishment of panels²⁶³, the adoption of panel or Standing Appellate Body rulings and recommendations²⁶⁴, and the authorization of suspensions of concessions²⁶⁵. The DSB is deemed to accept a motion unless it decides otherwise by consensus. Whereas a single, uncompromising contracting party - for example the defendant in a dispute - was able to delay the entire process under the GATT 1947 by opposing a decision of the GATT Council, the situation is now reversed. WTO dispute resolution will proceed quasi automatically to a binding ruling and its implementation, if not *all* WTO Members - including the complainant - decide otherwise by consensus. Thus, the procedural position of the complaining party is considerably strengthened, influencing in turn the willingness of the defending party to rectify violations of WTO agreements.

²⁶⁰ Ibid. and see also Young, *supra* note 40 at 402.

²⁶¹ See paragraph 4 of Article 2 DSU and its footnote 1; in general paragraph 1 of Article IX and footnote 1 WTO Agreement. The footnotes set down, for the first time a definition of consensus: “The DSB [body concerned] shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”

²⁶² Shell, *Trade Legalism supra* note 11 at 846.

²⁶³ Paragraph 1 of Article 6 DSU.

²⁶⁴ Paragraph 4 of Article 16 DSU.

²⁶⁵ Paragraph 6 of Article 22 DSU.

2.4.2.5 Time Frames

Another distinct feature, characterizing the new dispute settlement process, is the introduction of binding time frames. Continuing along the lines of the 1989 Decision, the DSU allocates general time-frames to each stage of the dispute settlement process and the process as a whole, thus ensuring that every dispute, from the notification of a request for consultations until the complete implementation of an adopted ruling, will be resolved within three years²⁶⁶. It also provides for timelines in cases of urgency, and allows for time extensions under exceptional circumstances²⁶⁷. In order to make these time frames effective, specific decisions, actions, or agreements within the phases of the dispute resolution process are coupled with deadlines. If the requirements for these decisions, actions or agreements are not met within the given time period, they are substituted by binding default procedures²⁶⁸. It remains to be seen, whether this combination of time frames,

²⁶⁶ The consultation phase, including alternative dispute settlement procedures such as good offices, mediation and conciliation amount to a minimum of 60 days; paragraph 7 of Article 4 and paragraph 4 of Article 5 DSU. The time between the establishment of a panel and the adoption of a report by the DSB is limited to 15 months, Article 20 DSU. Another three months are allocated for the establishment of a reasonable period of time to implement an adopted report; sub-paragraph (c) of paragraph 3 of Article 21 DSU. The same sub-paragraph also indicates that the Understanding expects the party concerned complete implementation within 15 months after the adoption. These general time-frames are supported by obligations for the DSB (paragraph 3 of Article 2 DSU), and for panels (paragraph 3 of Article 12 DSU) to meet as often as necessary to remain within the me-frames; and recommendations to the panels to establish timelines for party briefs and interim review, cf. paragraph 5 of Article 12, paragraphs 1 and 2 of Article 15 DSU and paragraph 12 of Appendix 3 of the DSU.

²⁶⁷ Paragraph 9 of Article 12 DSU for the panel procedure, and paragraph 5 of Article 17 DSU for appellate reports. The wording of Article 20 and paragraph 4 of Article 21 DSU of the Understanding support the interpretation that only one extension is possible for each dispute settlement procedure. It is “[...] *either* the panel *or* the Appellate body [...]” that can extend the time necessary to draft a report (emphasis supplied). This limitation is corroborated by the sum of the time frames for the different procedural stages, given in Article 20 and paragraph 4 of Article 21 DSU.

²⁶⁸ The Understanding knows three categories of substitute procedures:

- (1) automatic implementation of default rules, for example paragraph 1 of Article 7 DSU for the terms of reference; paragraph 5 of Article 8 DSU for the number of panelists; paragraph 4 of Article 16 and paragraph 4 of Article 17 DSU on the adoption of reports;
- (2) decision-making by a neutral body, for example paragraph 2 of Article 1 DSU by the Chairman of the DSB concerning the rules applicable to a dispute; paragraph 7 of Article 8 DSU by the Director-General in consultation with the Chairman of the DSB and the relevant Council or Committee Chair for the selection of the panelists;
- (3) authorization of one party to move to the next stage of the procedures, for example paragraph 3 of Article 4 DSU on the request of a panel after failed consultations; paragraphs 2 and 6 of Article 21 DSU on the request of countervailing measures by one party.

recommendations and deadlines (see Figure 2.3) will help to increase the overall speed of the dispute settlement process²⁶⁹.

²⁶⁹ For a comparison of the length of cases under the GATT 1947 and the regulations of the Understanding, see the case studies on the WTO web site on the tuna-dolphin dispute (GATT 1947) *United States – Restrictions on Imports of Tuna* (GATT Doc. DS29/R) (<http://www.wto.org/wto/about/beyond5.htm>) and *United States - Standards for Reformulated and Conventional Gasoline, complaints by Venezuela (WT/DS2) and Brazil (WT/DS4)* - (<http://www.wto.org/wto/about/dispute3.htm>).

Figure 2.3 - Time Frames in the DSU

Consultation Phase		60 days
Request for Consultations		
• Answer to request within	10 days	
• Enter consultations / mediation / conciliation / good offices within	30 days	
• Request for establishment of a panel no sooner than	60 days	
Panel Process		12 / 15 months
Request for establishment of a panel		
• Establishment of panel no sooner than	15 days	
• Time for Agreement on size of panel	10 days	
• Time for Agreements on terms of reference and on panelists	20 days	
• Selection of panelists by Chairman after party request, within	10 days	
Panel operational within		45 days

Issuance of final panel report to parties after panel is operational, approximately		6 months*
Circulation of final panel report to DSB members after issuance to parties		20 days
Adoption of panel report by DSB after circulation, no more than		60 days

<i>Panel Process without appeal approximately</i>		<i>12 months</i>
Appeals process since notification of appeal, no longer than		90 days
Adoption of SAB report by DSB after circulation, no more than		60 days

<i>Panel process with appeal, approximately</i>		<i>15 months</i>
Implementation Phase		15 months
Adoption of panel/SAB report		
• Information of DSB on implementation plans within	30 days	
• Determination of reasonable period of time for implementation within	90 days	
<i>Reasonable Period of time should not exceed</i>		<i>15 months</i>

Approximate time for dispute settlement from request for consultations to enforcement measures		32 months (2 years and 8 months)

* For details of the approximate time frames for panel procedures, see *Appendix 3 to the DSU, Working Procedures*, paragraph 12.

2.4.3 Dispute Settlement Procedures

The procedures established by the DSU follow the three-stage pattern familiar from GATT dispute resolution: a consultation phase, a panel process and an implementation stage. As an alternative to or in combination with this formalized and highly structured process, the disputing parties may also rely on arbitration²⁷⁰. Where a Member believes that measures taken by another Member nullify or impair any benefits accruing to her under the agreements covered by the DSU, it may initiate dispute settlement proceedings by requesting consultations²⁷¹.

2.4.3.1 The Consultation Phase

2.4.3.1.1 Consultations

Consultations²⁷² constitute an integral part of the WTO dispute settlement system. From a procedural perspective, they are a prerequisite for the complaining party to carry the dispute to the quasi-adjudicatory stage²⁷³. The main function of consultations, however, is to encourage the

²⁷⁰ The DSU promotes arbitration for specified issues “as an alternative means of dispute settlement” in lieu of the panel process (paragraph 1 of Article 25 DSU). In arbitration, the dispute is resolved by a decision binding for the parties and issued by a neutral third party, an arbitrator or an arbitral tribunal (compare paragraphs 3 and 4 of Article 25 DSU). Even so, the parties to a dispute effectively control procedural issues. The parties agree to submit a matter to arbitration (paragraph 2 of Article 25 DSU), agree on the precise contents and extent of their controversy (paragraph 1 of Article 25 DSU), and enjoy almost complete freedom in designing the arbitration procedures. The major exception is that the disputing parties are limited in their selection of criteria by which their dispute is to be judged. Arbitrators must measure the conflict at issue according to WTO law and regulations.

²⁷¹ Article 4 DSU.

²⁷² Consultations form a sub-category of negotiations sharing its main qualities. Negotiations are the means most frequently employed by States to settle international disputes. *Handbook on the Peaceful Settlement of Disputes between States* (New York: United Nations, 1992) at paragraph 23-4 [hereinafter: Handbook]. The same is true in the GATT/WTO context, where until 1988 roughly half of the disputes had been settled without panel procedures. See Hilf, *supra* note 8 at 302.

²⁷³ Paragraphs 3 and 4 of Article 4 DSU. The complaining party must make a request for consultations to the offending Member pursuant to a covered agreement and notify the DSB of it in order to raise a matter formally under the DSU. “If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days [...], then the Member that requested the

parties to reach a mutually agreeable solution early in the dispute²⁷⁴, or, if an agreement is impossible in this phase, to help the parties identify the controversial aspects of their dispute, and lead them to more specialized modes of settlement²⁷⁵. Consultations are a highly flexible tool of conflict resolution providing the parties with extensive control over issues, forms, and procedures²⁷⁶. But in order to be successful, they require compatible party positions concerning the issues at dispute – that is to say common ground for an understanding - and the willingness to compromise. The DSU thus attempts to create an atmosphere conducive to consultations establishing a rudimentary framework of rules and by setting the tone for the process²⁷⁷.

2.4.3.1.2 Good Offices, Mediation, and Conciliation

To facilitate their efforts, the disputing parties may also take recourse to good offices, mediation and conciliation²⁷⁸, which belong to a group of consensual dispute resolution methods also known as alternative dispute resolution (ADR)²⁷⁹. They are characterized by the intercession of an impartial third party²⁸⁰. In general, a progression towards a greater degree of third party

holding of consultations may proceed directly to request the establishment of a panel.” (Paragraph 3 of Article 4 DSU).

²⁷⁴ Paragraph 5 of Article 4 and paragraph 7 of Article 3 DSU.

²⁷⁵ United Nations. *Handbook on the Peaceful Settlement of Disputes between States* (New York: United Nations, 1992) at paragraph 28-9 [hereinafter: Handbook]; and J.G. Merrills, *International Dispute Settlement*, 3rd ed. (Cambridge: Cambridge University Press, 1999) at 19 [hereinafter: Merrills].

²⁷⁶ See Handbook, *ibid.* at paragraph 22 and Merrills, *ibid.* at 17.

²⁷⁷ All Members are resolved to “strengthen and improve the effectiveness of the consultation procedures.” (Paragraph 1 of Article 4 DSU) The Member which is requested to engage in consultations shall “accord sympathetic consideration” to and “afford adequate opportunity requests for consultations”. (Paragraph 3 of Article 4 DSU). Consultations are to be undertaken “in good faith”, (paragraph 3 of Article 4 DSU, and generally paragraph 10 of Article 3 DSU) and are not to be “intended or considered as contentious acts” (paragraph 10 Art 3 DSU). Moreover, parties “*should* attempt to obtain satisfactory adjustment of the matter.” (paragraph 5 of Article 4 DSU; emphasis added).

²⁷⁸ Article 5 DSU.

²⁷⁹ Handbook, *supra* note 275 at paragraph 101; Merrills, *supra* note 275 at 27. Accordingly, the DSU states that parties engage in ADR on a voluntary basis; paragraph 1 of Article 5 DSU. ADR can also be offered by the Director-General in his *ex officio* capacity, paragraph 6 of Article 5 DSU, yet the decision to undertake ADR remains with the parties to a dispute.

²⁸⁰ *Handbook*, *supra* note 275 at paragraph 101, 123, 140; Merrills, *supra* note 275 at 27.

participation and formality can be observed from good offices to conciliation, with mediation in the middle²⁸¹. Good offices serve to encourage negotiations and to provide parties with an additional or new channel of communications²⁸². If the neutral party takes a more active stand in the dispute by making proposals to the parties or by discussing, interpreting, and transmitting their representations, he performs as a mediator²⁸³. If the parties aim for an impartial but non-judicial investigation of their dispute that includes an evaluation of its factual and legal aspects and suggestions for a mutually agreeable solution, they will refer to conciliation²⁸⁴. As in consultations, emphasis is given to party autonomy and flexibility.

In the DSU, ADR is instrumental in two distinct ways: on the one hand, it serves as an extension of consultations, supplying the disputants with third party assistance²⁸⁵. On the other, parties may take recourse to ADR at any point of time during the dispute settlement procedures, if they see an opening for a mutually agreeable solution²⁸⁶. If the disputants are unable resolve their differences by mutual agreement within a certain period of time or if they agree that consultations failed, the complainant may request the establishment of a panel²⁸⁷.

²⁸¹ Merrills, *supra* note 275 at 27. Definitions of the three concepts vary from author to author. Some commentators understand as conciliation what is defined here as mediation, and vice versa. Considering the order of enumeration in the headline of Article 5 DSU "Conciliation, Mediation and Good Offices", seems to support that the DSU follows this understanding. For a substantially different distinction between mediation and conciliation, see Rudolf L. Bindschiedler, "Conciliation and Mediation" in: Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (Amsterdam: North-Holland Publishing Company, Instalment 1, 1981) 47.

²⁸² *Handbook*, *supra* note 275 at paragraph 102.

²⁸³ *Handbook*, *supra* note 275 at paragraph 102, 123.

²⁸⁴ *Handbook*, *supra* note 275 at paragraph 140.

²⁸⁵ This necessitates regulations regarding the relations between consultations, ADR, and the panel stage. Paragraph 4 of Article 5 DSU provides for an extension of the consultation deadlines if dispute resolution by ADR is sought within 60 days after the request for consultations. See also Lei Wang, "Some Observations on the Dispute Settlement System in the World Trade Organization" (1995) 29 *Journal of World Trade* 173 at 175 on conciliation.

²⁸⁶ Paragraphs 3 and 5 of Article DSU.

²⁸⁷ Paragraph 7 of Article 4 DSU for consultations, and paragraph 4 of Article 5 DSU for ADR.

2.4.3.2 The Panel Process - Panels and the Standing Appellate Body

The panel process provides the cornerstone of the WTO dispute settlement system. Though most matters may be resolved prior to the establishment of a panel²⁸⁸, the legal framework for the panel process accounts for most of the Understanding's provisions²⁸⁹. In contrast to pre-WTO practice - and due to the introduction of negative consensus decision-making, a complaining party is effectively granted the right to request the establishment of a panel if consultations to settle a dispute between the parties concerned fail within a certain time period²⁹⁰.

As under GATT, A panel is an independent body²⁹¹ established on an ad-hoc basis and comprised of three or five experts who examine the dispute either under standard terms of reference or those drawn up by the parties²⁹². The panel will hear the parties, consider their written submissions, consult experts²⁹³, and work towards a mutually acceptable solution²⁹⁴. If

²⁸⁸ The information published in the "Overview of the State-of-Play of WTO Disputes" of February 1, 2000, by the WTO Secretariat, WTO web site at <http://www.wto.org/wto/dispute/bulletin.htm> (document on file) shows the following picture: of 188 consultation requests under the DSU, 67 cases are still pending consultations, 31 cases are settled or inactive, 23 cases are still going through the panel process, while 31 cases have completed it.

²⁸⁹ Out of the 27 articles of the DSU, Articles 6 to 19 are *directly* concerned with the panel process.

²⁹⁰ Paragraph 1 of Article 6 and paragraph 7 of Article 4 DSU. The parties have 60 days after the notification of a request for consultations over a possible nullification or impairment of rights, before the complaining party can demand the establishment of a panel. In case the parties take recourse to the dispute settlement mechanism provided for in Article 5 DSU, the complaining party may demand the establishment of a panel no earlier than 60 days after the receipt of the request for consultations. ADR may continue during the panel process, paragraph 5 of Article 5 DSU.

²⁹¹ Paragraphs 1 to 3 of Article 8 DSU.

²⁹² The parties to a dispute can draw up specific terms of reference within 20 days after the establishment of a panel (Paragraph 2 of Article 6 and paragraph 1 and 3 of Article 7 DSU). Without agreement, the panel will automatically make its examinations of the dispute according to standard terms of reference (paragraph 1 of Article 7 DSU). As to the selection of panelists, the Secretariat proposes well-qualified governmental or non-governmental individuals (paragraphs 1 and 6 of Article 8 DSU) from a list of suitable candidates it maintains. The selection of the secretariat can only be opposed by the parties to the dispute for compelling reasons (paragraph 6 of Article 8 DSU). If parties cannot agree on the composition of a panel within a limited time, paragraph 7 of Article 8 DSU enables the Director-General in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee to make the final decision.

²⁹³ Articles 12, 13 DSU.

the parties cannot reach an understanding under the guidance of the panel, it will draft a report, which is made available to the parties for comments during an interim review stage²⁹⁵. After that the panel will issue its final report to the DSB for adoption²⁹⁶.

One of the most fundamental innovations in the DSU is the introduction of a right to appeal panel decisions²⁹⁷ and the creation of a permanent court-like body to administer the appeals process, the Standing Appellate Body (SAB)²⁹⁸. Seven members of recognized authority with expertise in legal and trade issues related to the WTO form the SAB²⁹⁹. An appeal must be based on the claim that the legal findings and conclusions of the panel are erroneous³⁰⁰. The SAB may uphold, modify or reverse the legal findings and conclusions of panels³⁰¹. Reports issued by the SAB and adopted by the DSB are unconditionally binding on the parties of the dispute.

From a legal perspective, both panels and the SAB represent institutionalized functions of the DSB. They assist the DSB in discharging its responsibilities to resolve conflicts between

²⁹⁴ Article 11, and paragraph 7 of Article 12 DSU.

²⁹⁵ Article 13 DSU.

²⁹⁶ Article 16 DSU.

²⁹⁷ Paragraph 4 of Article 16 DSU.

²⁹⁸ Article 17 DSU; see also the revised "Working Procedures for Appellate Review", WT/AB/WP/3 of 28 February 1997.

²⁹⁹ Paragraphs 1 and 3 of Article 17 DSU. For details on the composition of appellate panels, length of terms, etc., cf. Paragraphs 1, 2, 3, and 8 of Article 17 DSU and the Working Procedures for Appellate Review, supra note 189. The members of the Standing Appellate Body are Mr. James Bacchus (United States), Mr. Christopher Beeby (New Zealand), Mr. Claus-Dieter Ehlermann (Germany), Mr. Said El-Naggar (Egypt), Mr. Justice Florentino P. Feliciano (Philippines), Mr. Julio Lacarte-Muró (Uruguay), and Mr. Mitsuo Matsushita (Japan). The three members of the SAB whose terms expired after two years according to paragraph 2 Article 17 DSU are Mr. Claus-Dieter Ehlermann, Mr. Florentino P. Feliciano and Mr. Julio Lacarte-Muró. They have been reappointed for a final term of four years by decision of the DSB: Dispute Settlement Body, "Minutes of the Meeting Held in Centre William Rappard on 25 June 1997", WTO Document WT/DSB/M/35, 18 July 1997, at 6.

³⁰⁰ Paragraph 6 of Article 17 DSU limits the appeal to "issues of law covered in the panel report and legal interpretations developed by the panel."

³⁰¹ Paragraph 12 of Article 17 DSU.

Members by preparing solutions to disputes through a formalized, quasi-adjudicative process. The decision-making power, however, remains with the DSB. While it is important to note, that the new principle of negative consensus³⁰² will almost certainly strengthen the *de facto* independence of panels and the Standing Appellate Body, they still remain in a subordinate relation to the DSB.

2.4.3.3 Implementation Phase

Under the GATT 1947, the lack of effective monitoring and enforcement mechanisms - particularly due to the consensus requirement³⁰³ to authorize the suspension of concessions or other obligations - left the implementation of adopted panel reports to the discretion of the defending party. In the light of these experiences, the DSU states that “[p]rompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefits of all Members.”³⁰³ In order to translate this principle into action, the Understanding sets forth detailed surveillance and enforcement procedures.

In a first step, the Member obliged to comply with a DSB decision is to present its implementation plans to the DSB³⁰⁴. Depending on the nature and complexity of the necessary measures, compliance may require “a reasonable period of time³⁰⁵”, while the progress of

³⁰² Paragraph 4 of Article 16 DSU for panels, and paragraph 14 of Article 17 DSU for the SAB.

³⁰³ Paragraph 1 of Article 21 DSU.

³⁰⁴ Within thirty days after the adoption of a panel or SAB report; see paragraph 3 of Article 21 DSU.

³⁰⁵ Paragraph 3 of Article 21 DSU. The paragraph also provides for an elaborate mechanism of subsidiary procedures to establish the period of time needed for implementation that is considered to be reasonable, ranging from a proposal of the Member concerned and approved by the DSB [sub-paragraph (a) of paragraph 3 of Article 21 DSU], over an agreement by the parties to the dispute [sub-paragraph (b) of paragraph 3 of Article 21 DSU], to the determination of the reasonable period of time by binding arbitration [sub-paragraph (c) of paragraph 3 of Article 21 DSU].

implementation is monitored by the DSB³⁰⁶. After the time limit for the implementation has elapsed, the complaining party may request negotiations on voluntary compensation for the nullification or impairment of benefits³⁰⁷. Following the failure to negotiate a compensatory agreement, the DSB may grant a temporary suspension of concessions or other obligations upon request of the complainant³⁰⁸.

Reflecting the increased substantive scope of the WTO agreements and the comprehensiveness of the WTO dispute settlement system, suspensions are limited neither to specific sectors nor to the treaty under which a nullification or impairment of benefits occurred³⁰⁹. As long as the level of suspensions is equivalent to the losses incurred³¹⁰, the complaining party may seek out sensitive trade areas for counter-measures - so called "cross-retaliation" - with a view to both restoring the balance of concessions and to force compliance.

Figure 2.4 shows the dispute settlement system as amended by the DSU:

³⁰⁶ Paragraph 6 of Article 21 DSU. For disputes concerning the consistency of implementation measures with the WTO agreements, the dispute resolution process is available to the parties concerned; paragraph 5 of Article 21 DSU.

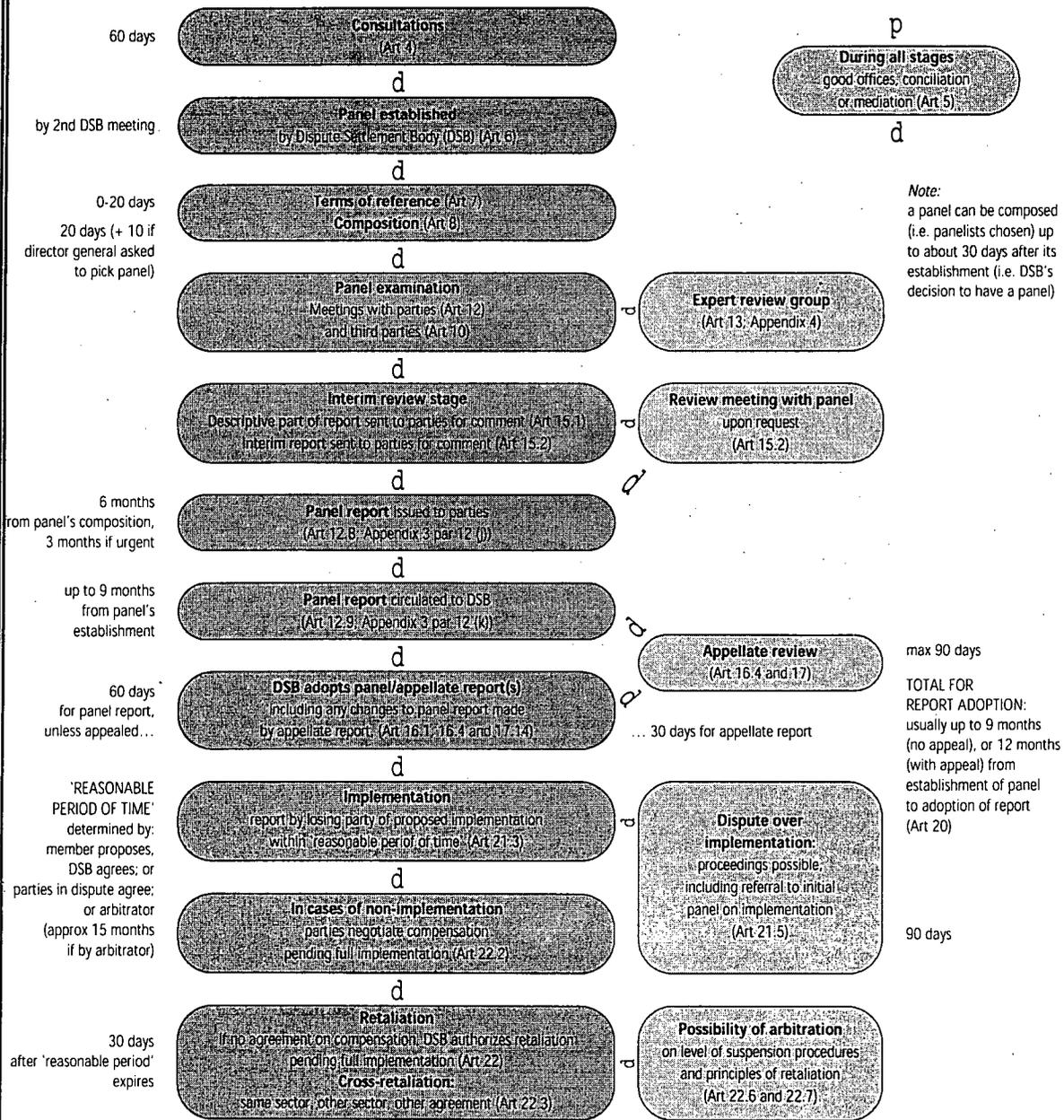
³⁰⁷ Within twenty days; paragraph 2 of Article 22 DSU.

³⁰⁸ Paragraph 2 in connection with paragraph 1 of Article 22 DSU.

³⁰⁹ Paragraph 4 of Article 22 DSU.

³¹⁰ Paragraph 3 of Article 21 DSU. According to paragraph 6 of the same article, both the level of suspension and the choice of counter-measures can be contested by the defendant on the grounds that an imbalance exists between the suspension and the nullification or impairment, or that the principles and procedures for the establishment of the counter-measures have been violated. The issue will be settled by binding arbitration.

Figure 2.4 – DSU Dispute Settlement Procedures*



*Source: World Trade Organization, *Trading into the Future*. 2nd ed. (Geneva: World Trade Organization, 1998) at 41.

2.5 Conclusions

In this Chapter I have introduced the World Trade Organization and its theoretical underpinnings. Moreover, I have given an overview of the WTO dispute settlement system with its institutional and procedural characteristics, and identified the various mechanisms offered by the DSU to resolve international trade disputes. The purpose of this introduction is to create a basis for the subsumption of the WTO dispute settlement system under the analytical framework developed in Chapter 1. In the following chapter, I will thus approach the WTO dispute settlement system from the perspective of actors, material scope and procedures, establishing the conditions for an argument in favour of private participation.

CHAPTER 3

LOCATING THE WTO DISPUTE SETTLEMENT SYSTEM WITHIN THE ANALYTICAL FRAMEWORK

3.1 Introduction

In this chapter, I will measure the Dispute Settlement Understanding against the analytical framework developed in Chapter 1. Following its three analytical perspectives on dispute settlement mechanisms, I will examine the DSU in terms of actors, material scope and procedures. Specifically with regard to actors, I will measure present forms of (active and passive) private involvement in WTO dispute resolution against the definition of private participation established in the Introduction. Moreover, for each perspective, I will locate the position of the DSU on the respective axis of the Dispute Settlement Matrix, thus giving a graphic representation of its character. Establishing the position of the DSU and its theoretical foundations within the analytical framework, will then help to identify the necessary elements of an argument in favour of private participation.

3.2 Actor Categories in WTO Dispute Resolution: The DSU on the *Personae Axis*

As illustrated earlier³¹¹, international dispute settlement systems may recruit participants from a number of various actor categories populating the global arena. These categories range from States, to international governmental organizations, to sub-national governmental entities, non-

³¹¹ Supra notes 55 et seq. as well as accompanying text.

governmental organizations, and finally to individuals. The participation of any actor category other than States in an international legal regime - and its dispute settlement system - depends on the formal recognition of its members as subjects of public international law, or at least as subjects of the regime in question.

According to paragraph 1 of Article 1 DSU only "Members" of the WTO may take recourse to the dispute settlement mechanisms established by the Understanding. By using the term "Members", the DSU refers to provisions in the WTO Agreement, which regulate membership in the World Trade Organization and thereby define, for our purposes, the categories of international actors formally recognized by the WTO. Paragraph 1 of Article XI WTO sets forth, that original membership of the WTO comprises those contracting parties to the General Agreement on Tariffs and Trade of 1947, and the European Communities, which accept the WTO Agreement and its annexes. Article XII WTO, addressing accession to the WTO, offers membership to "[a]ny State or separate customs territory possessing full autonomy in the conduct of its external relations and of the other matters"³¹² within the scope of the WTO agreements.

In other words, States and customs territories acting independently within the international sphere - that is, specific forms of international governmental organizations and sub-national governmental entities³¹³ - may become WTO Members, assuming rights and obligations under its agreements. As of today, the European Communities are the only actors to both fulfil these

³¹² Paragraph 1 of Article XII WTO.

³¹³ For example Hong Kong.

requirements and to become a WTO Member³¹⁴. Apart from these two provisions, no other WTO agreement establishes rights or duties (in the sense of active or passive subjecthood under the regime) for another category of international actors³¹⁵.

3.2.1 Movements Towards Active Participation?

However, paragraph 2 of Article V WTO acknowledges the importance of certain non-state actors for international trade relations:

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

This provision - an almost identical adaptation of a clause in the draft ITO Charter, the conceptual grandparent of the present WTO³¹⁶, leaves it to the discretion of the General Council whether and how to collaborate with NGOs. The General Council has used its decision-making

³¹⁴ Compare WTO, *Regionalism and the World Trading System* (Geneva: WTO, 1995) at 55. For an overview of the postwar development of Regional Integration Agreements, which may one day qualify as WTO Members, see *ibid.* at 25-42.

³¹⁵ Even Articles 42 to 49 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which require Members to establish civil judicial and administrative procedures for holders of intellectual property rights to protect and to enforce their rights, only establish rights and obligations in domestic legal systems. If a Member violates the obligations under TRIPS, the affected rights-holders who are nationals of other Members have to rely on the willingness of their home states to pursue the issue through the WTO.

³¹⁶ Paragraph 2 of Article 87 of the Havana Charter, *supra* note 196: "The Organization may make suitable arrangements for consultations and co-operation with non-governmental organizations concerned with matters within the scope of this Charter." A preparatory report for the first ITO Conference, drafted by the Interim Commission Secretariat, allows some insights on the forms and conditions of NGO participation under this provision (Proposed Report of the Interim Commission to the First Conference of the International Trade Organization (1949), at 59, cited in Steve Charnovitz and John Wickham, "Non-Governmental Organizations and the Original International Trade Regime" (1994) 29/5 *Journal of World Trade* 111 at 120-1). Relying on an analysis of this document and its reception by Member States, Steve Charnovitz and John Wickham have concluded that the ITO would have built extensive channels of communication with organizations rooted in civil society (*ibid.* at 121-2). Indeed, it would have allowed for immediate contributions to ITO decision-making, as the proposal suggested *inter alia* that NGOs might be invited to Conference sessions.

power to establish guidelines for the relations between the WTO and NGOs³¹⁷. Article VI of these guidelines encapsulates the WTO position concerning an increasing involvement of non-state actors:

Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations its Members and a forum for negotiations. *As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.* Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear trade policy-making.

For the DSU it follows that its limitation to Members (i.e. States and certain customs territories) forecloses the dispute settlement system for non-governmental actor categories as parties to a dispute, third parties, or any other form of direct involvement by their own right.

Short of formal recognition, the DSU provides three entry points for non-governmental involvement - in the widest sense of the word - in dispute settlement procedures. The first related to the composition of panels, whose members are to be "well-qualified governmental and/or *non-governmental* individuals"³¹⁸. While panelists may thus be recruited from any international actor category in order to guarantee "a sufficiently diverse background and a wide spectrum of experience"³¹⁹, they are chosen due to their individual capacity, independent of their belonging to or working for an international actor³²⁰.

³¹⁷ Guidelines, supra note 20.

³¹⁸ Paragraph 1 of Article 8 DSU, emphasis added.

³¹⁹ Paragraph 2 of Article 8 DSU.

³²⁰ Along this line, Nichols, Extension, supra note 12 at 328, proposes to make extensive and continuous use of paragraph 1 of Article 8 DSU: the inclusion of non-governmental individuals in WTO panels. These individuals

The second opening is provided by the right of panels "to seek information or advice *from any individual or body it deems appropriate*"³²¹ and the right to consult experts³²². The wording of the provision indicates that panels may rely on non-governmental actors as expert witnesses in their field of expertise, but it means nothing more than their recognition as *valid sources of information*³²³. In addition, the involvement of non-governmental actors as experts remains in the discretion of the panels; it does not establish any procedural rights for actor categories other than States and customs territories.

Finally, Members may give individuals the opportunity to appear in hearings before panels or the SAB as part of their delegations³²⁴. So far Members have availed themselves of this option in order to enlist private counsel with expertise in international trade law to argue their cases before WTO dispute settlement bodies. The practice has been recognized by the panel in the *Indonesia - Certain Measures Affecting the Automobile Industry* case, which noted that "all members of parties' delegations -- whether or not they are government employees -- are present as representatives of their governments [...] and therefore that the governments are responsible for

would introduce and personify non-trade values ranging from social issues to the environment. Taking this approach further, similar criteria could be applied to the selection of members of the Standing Appellate Body (compare Shell, Trade Legalism, supra note 11 at 378). Panels and an SAB specifically composed to address link issues may be one avenue towards more balanced decision-making.

³²¹ Paragraph 1 of Article 13 DSU, emphasis added.

³²² Paragraph 2 of Article 13 DSU.

³²³ Nevertheless, expert witnesses from non-governmental actors represent a deviation from a strictly state-centric understanding of public international law, which entails that the only source of information thus would be States or intergovernmental organizations. Yet, traditional conceptions continue to exist, albeit in a mitigated form: panels have to inform a Member if they seek information from individuals or bodies within its jurisdiction, paragraph 1 of Article 13.

³²⁴ Lukas, supra note 15 at 192 with further references in notes 105-6.

the actions of their representatives.”³²⁵ The form and degree of involvement of non-governmental individuals remains a matter of discretion for the respective Member. Thus, their mandate of participation is limited by the purposes and interests as defined by the Member governments and the procedural rights and obligations of the latter³²⁶.

Non-governmental actors presently involved in WTO dispute settlement have in common that their participation is based on their capacity as individuals providing knowledge and experience that is required or useful for the resolution of disputes, and not due to their membership in a specific actor category. Whether they act as panelists, SAB members, expert witnesses, or counsel, they fulfil clearly defined procedural functions within the institutions administering the WTO dispute settlement system or in support of its Members. In these functions, they may not act on their own behalf or on behalf of other non-governmental actors in pursuit of private interests.

To put it differently, the three entry points for private actors in the DSU do not offer any formal or informal means to effectively utilize the WTO dispute settlement system in order to protect or promote private interests covered by the agreements. Moreover, non-governmental involvement will be sporadic and eventually dependent on the discretion of Members and the dispute settlement bodies³²⁷. It follows that at present, neither form of private contributions to the dispute

³²⁵ *Indonesia - Certain Measures Affecting the Automobile Industry*, Report of the Panel, 2 July 1998, WTO Document WT/DS54/R, WT/DS/55/R, WT/DS/59/R, WT/DS64/R at paragraph 14.1.

³²⁶ At present, Members could invite nationals whose complaint they have endorsed and taken to WTO dispute settlement to participate in the proceedings as a member of their delegations. However, they would not act on their own behalf, but represent the Members whose rights under the covered agreements are allegedly violated.

³²⁷ Even the inclusion of non-governmental panelists depends on the suggestions of Members for indicative lists maintained by the Secretariat, compare paragraph 4 of Article 4 DSU.

settlement process would meet the requirements of active participation, that is direct and formal involvement of non-governmental actors in WTO dispute resolution. Or, as summarized by the Standing Appellate Body:³²⁸

It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties before that panel.

3.2.2 Passive Participation: Between Transparency and Confidentiality

It is only consequential that the state-centric ideology underlying the world trading system denies civil society any right to passive participation in WTO dispute resolution. Thus, neither the WTO Agreement nor the DSU contain an explicit legal obligation for the WTO or its Members - and neither a non-binding statement of intent³²⁹ - that would secure access to information on dispute resolution and other WTO activities for non-governmental actors.

The DSU itself refers in two instances to the possibility of an informal involvement of civil society. Paragraph 2 of Article 18 DSU leaves it to the discretion of the parties to a dispute to disclose "statements of [their] own position to the public." In the same paragraph parties to a dispute are obliged upon request to supply to Members non-confidential summaries of the

³²⁸ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WTO Document WT/DS58/AB/R at paragraph 101.

³²⁹ Compare Housman, *supra* note 14 at 714, commenting on the availability of WTO documents to the public: "The Final Agreement is silent as to whether the public may have access to the reports of dispute panels and the appellate body."

information contained in their written submissions for the purpose of publication. In other words, Members are entitled to gain knowledge on the parties' positions in the dispute for the sake of keeping their citizens informed³³⁰. From the viewpoint of passive participation, both provisions illustrate that the availability of information on WTO dispute settlement activities depends on the willingness of Member governments to keep their citizens informed.

3.2.2.1 The WTO Commitment to Transparency

Yet, since its establishment in 1995, the WTO has experienced a change in attitude that makes it worthwhile to enter into a separate analysis of opportunities and forms of passive involvement. The catchword in the official WTO parlance is "transparency", however this development transcends the technical meaning referred to in the previous Chapter³³¹, and points rather to a more extensive inclusion of civil society.

³³⁰ Paragraph 2 of Article 18 DSU states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." Thus, the disclosure by other Members of confidential parts of a brief would constitute a breach of their obligations under the DSU. A Member's discretion to define the extent of confidentiality of its briefs is offset by paragraph 3 of the Panel Working procedures. It sets forth: "Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public." However, by being charged with providing a summary of its submissions, the ability of the respective Member to substantially control the flow of information to civil society remains intact. Paragraph 2 of Article 18 DSU is based on the assumption that the summaries of the parties to a dispute, in combination with to other sources of information available to Members - such as the notification of the request for consultations by a Member, which must to contain the factual and legal grounds for the request (paragraph 4 of Article 4 DSU, and the reports of panels and the Appellate Body, which contain the facts of the dispute and the legal arguments presented by the parties (paragraph 7 of Article 12; paragraphs 2, 3 of Article 15; paragraphs 6, 12 of Article 17 DSU) - are sufficient to create a clear picture of the issue at dispute and the parties' positions.

³³¹ See supra notes 227-230 and accompanying text. Obligations of rule transparency at the national level support passive participation, though more by effect than intent.

The shift was tentatively acknowledged by the WTO Members in the 1996 *Guidelines for Arrangements on Relations with Non-Governmental Organizations*³³². They state that “Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency”³³³ and in order “[t]o continue to achieve greater transparency [that] Members will ensure more information about WTO activities.”³³⁴ The same aspect is addressed in the Ministerial Declaration of the Second Session of the Ministerial Conference in 1998³³⁵:

We recognize the importance of enhancing public understanding of the benefits of the multilateral trading system in order to build support for it and agree to work towards this end. In this context we will consider how to improve the transparency of WTO operations.

³³² Supra note 20. But see also paragraph VI of the Guidelines: “As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies the primary responsibility for taking into account the different elements of public interest which are brought to bear on trade-policy-making.”

³³³ Ibid. paragraph II.

³³⁴ Ibid. paragraph III. Other relevant WTO documents with regard to transparency issues are, the DSU; Appendix 3, “Working Procedures” for panels [hereinafter: Panel Working Procedures] and Appendix 4 “Expert Review Groups” [hereinafter: Expert Review], which are annexed to the DSU; WTO, “Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes. Communication from the Appellate Body”, 22 January 1997, WTO Document WT/DSB/RC/2, [hereinafter: Rules of Conduct]; the Working Procedures for Appellate Review, WTO Document WT/AB/WP/3, 28 February 1997 [hereinafter: Appellate Review Procedures]; and the “Minutes of Meeting” of the DSB, WTO Document Series WT/DSB/M. These guidelines and procedures are not intended to change the existing rights or obligations of Members, see Art 3:2 and 19:2 DSU and Rules of Conduct, paragraph II:1. See further the “Procedures for the Circulation and Derestriction of WTO Documents” by the General Council, WTO Document WT/L/160/Rev.1, 26 July, 1996 [hereinafter: Derestriction Procedures].

³³⁵ WTO, “Ministerial Declaration adopted on 20 May 1998” of the Ministerial Conference, Second Session, Geneva, 18 and 20 May 1998, WTO Document WT/MIN(98)/DEC/1 [hereinafter: Ministerial Declaration 1998]. The Director-General could thus announce: “We are making progress toward improving our information exchange and consultation with civil society. These measures are the first step in our enhanced co-operation and represent the start of an on-going collaboration with partner NGOs, which we fully expect will offer important benefits for all parties concerned.” See WTO, “Ruggiero Announces Enhanced WTO Plan for Cooperation with NGOs”, Press Release, 17 July 1998, WTO Document: WT/Press/107.

The main mechanism in support of transparency and informal involvement of civil society has thus been established outside the DSU by the *Procedures for the Circulation and Derestriction of WTO Documents*³³⁶, based on a General Council decision from 18 July 1996. The Derestriction Procedures determine time frames and procedural rules for the disclosure of WTO documents, however they only cover documents which belong to a formal document series. These are, in particular, all notifications to the DSB, panel and SAB reports, and DSB decisions. The actual dispute settlement process, including all documents exchanged in it, “such as submission[s] to a dispute settlement panel, or an interim report of a dispute settlement panel submitted to the parties thereto”³³⁷ lies beyond the scope of application of the Derestriction Procedures.

As a general rule, documents shall be circulated as unrestricted³³⁸. On request of a Member³³⁹ or by recommendation of the Secretariat, documents with restricted status may be considered for derestriction either by the Ministerial Conference or the General Council³⁴⁰. If no Member objects within 60 days after notification of the suggestion or request for derestriction, the restriction will be lifted. Otherwise, the documents concerned will be reconsidered for derestriction no more than two years³⁴¹.

³³⁶ Supra note 334.

³³⁷ The enumeration in note 1 Derestriction Procedures (supra note 334) is not exhaustive.

³³⁸ Ibid. paragraph 1.

³³⁹ Ibid. sub-paragraph (b) of paragraph 2.

³⁴⁰ Ibid. paragraph 4.

³⁴¹ Ibid. paragraph 5.

Of the exceptions to the general rule, two are relevant for the WTO dispute settlement system. The Minutes of meeting of the DSB³⁴² and reports of panels circulated according to DSU provisions³⁴³ are subject to restrictions. Minutes may be first considered for derestriction half a year after their circulation³⁴⁴. Panel reports are circulated among all Members as unrestricted documents unless a party to the particular dispute requests a delay. In this case, the restriction shall be lifted within 10 days after circulation³⁴⁵. As a consequence of these rules and their interplay with paragraph 1 of Article 16 DSU, panel reports are, in theory, accessible for the public at least 10 days before they are considered for adoption by the DSB.

The bulk of documents on dispute settlement, like notifications of consultations, mutually agreed solutions, and arbitration awards, requests for the establishment of panels, SAB reports³⁴⁶, are circulated according to the general rule as unrestricted documents.

The decision on derestriction provides the legal foundation for a pronounced WTO public information and outreach policy. The cornerstone of these activities is the WTO web site maintained by the Secretariat³⁴⁷. According to a decision of the General Council it serves to

³⁴² Ibid. paragraph 1 in connection with Appendix (c), which covers the Minutes of meeting of all WTO bodies except for minutes of the Trade Policy Review Body. The DSB Minutes report on procedural issues of dispute settlement, such as requests for panels or surveillance of the implementation of DSB decisions, selection of candidates for the indicative list of panelists, etc.

³⁴³ Ibid. paragraph 1 in connection with Appendix (h).

³⁴⁴ According to the "Working Practices Concerning Dispute Settlement Procedures" by the DSB, 6 June 1996, WTO-Document WT/DSB/6, the "date of circulation" in the DSU and its additional and special rules, is "the date printed on the WTO document to be circulated with the assurance of the Secretariat that the date printed on the document is the date on which this document is effectively put in the pigeon holes of delegations in all three working languages."

³⁴⁵ Derestriction Procedures, supra note 334, Appendix (h).

³⁴⁶ These documents are filed under the document series "WT/DS".

³⁴⁷ The WTO web site became publicly accessible by the internet on 26 September 1995, see "WTO Information Service on the Internet", FOCUS: WTO Newsletter, August/September 1995, at 12. The URL of the WTO web site is: <http://www.wto.org>.

achieve greater transparency of WTO activities by making available “material which is accessible to the public, including derestricted documents,”³⁴⁸ on an online computer network. For this reason, the web site accommodates a Document Dissemination Facility (DDF)³⁴⁹ that makes accessible all information disclosed according to the derestriction procedures as online documents or downloadable files. The web site also hosts special sites for different areas of WTO activities, including dispute settlement.³⁵⁰ The dispute settlement site provides news and background information on the DSU and related issues, overviews of the state-of-play of disputes, relevant legal texts, and all adopted GATT/WTO panel and SAB reports. With easy and decentralised accessibility, continuous updates, and user-friendly navigability, the WTO web site represents the most important information resource for civil society³⁵¹.

The Derestriction Procedures has opened a vast archive of on-line information to the public. However, given the minimal procedural requirements for amendments in the WTO Agreement³⁵², any means of informal involvement of civil society based on a piece of

³⁴⁸ Guidelines, *supra* note 20, paragraph III.

³⁴⁹ At <http://www.wto.org/wto/ddf/ep/a.htm>. As an example, notifications are available to the public through the DDF in less than a month after they were issued to the Secretariat, depending on the length and language of the document. See the “Request for consultations by the European Communities concerning India’s Measures affecting the Automotive Sector”, dated October 6, 1998 which was made accessible on October 12, 1998; (WT/DS146/1), or the “Request to Join Consultations by Cameroon concerning the European Communities Regime for the Importation, Sale and Distribution of Bananas”, dated September 14, 1998 and made available also on October 12, 1998 (WT/DS27/29).

³⁵⁰ At <http://www.wto.org/wto/dispute/dispute.htm>.

³⁵¹ According to WTO statistics for October 1998, 57,823 computers from 141 countries logged on the WTO web site, downloading 20 million pages of text. Dispute settlement reports account for 26 % of the material downloaded, while the DDF downloads represent 16 %. 12 % of the users were from private companies, 7 % from universities, and 3 % from NGOs. WTO, Press Release, “WTO Web Site sets new record”, <http://www.wto.org/wt/new/website.htm>. (Article on file with author.) Apart from that, information on the WTO, documents, etc. in the form of publications, and other media, such as CD-ROMs and videos, is available directly from the WTO.

³⁵² See paragraph 1 of Article IX WTO Agreement: the General Council generally decides by consensus. The establishment of rules and procedures for the WTO is based both on the unwritten competence of any international organization to regulate organizational and procedural matters within and arising out of its scope of

secondary, intra-organizational legislation is susceptible to change. Moreover, neither the Derestriction Procedures nor any other act of secondary legislation may alter the rights or obligations of Members under the WTO agreements³⁵³. Hence, without amendments at the treaty level, the flow of information from the WTO to civil society based on transparency will remain limited in effect.

3.2.2.2 Confidentiality in WTO Dispute Settlement

The most important limitation of transparency within the DSU grows out of its commitment to principle of confidentiality - a recurring motif in WTO dispute resolution³⁵⁴. It embraces all stages of the dispute settlement system, from early consultations³⁵⁵ to the resolution of disagreements over the enforcement of rulings³⁵⁶. Confidentiality excludes non-participating Members³⁵⁷ and the public alike from the dispute at hand and leaves the impression of a bulwark of secrecy and isolation³⁵⁸.

During the consultation stage, both consultations and ADR shall be confidential and without prejudice to the rights of Members in further proceedings³⁵⁹. The parallels between both

activities Seidl-Hohenveldern/Loibl supra note 106 at marginal number 1522 [hereinafter: Seidl-Hohenveldern].) and the explicit authorizations in Art. IV WTO Agreement.

³⁵³ See paragraph 3 of Article X WTO Agreement.

³⁵⁴ See *inter alia* Arts. paragraph 6 of Article 4, paragraph 2 of Article 5, Article 14, paragraph 10 of Article 17 DSU.

³⁵⁵ Paragraph 6 of Article 4 DSU.

³⁵⁶ Sub-paragraph (c) of paragraph 3 of Article 21, and paragraphs 6, 7 of Article 22 DSU.

³⁵⁷ That is, Members who are not parties to the dispute or have joined the dispute resolution process as third parties with substantial interests in the matter at dispute: confer Art. 4:11 DSU for consultations, Article 10 DSU for the panel process, paragraph 4 of Article 17 DSU for the Appellate Body procedures, and paragraph 3 of Article 25 DSU for arbitration.

³⁵⁸ Young, supra note 40 at 407.

³⁵⁹ Paragraph 6 of Article 4 DSU for consultations; paragraph 2 of Article 5 DSU for ADR. With regard to ADR, paragraph 2 of Article 5 DSU expressly covers positions taken by the parties during the proceedings. It extends the obligation not so much in substance but in personal scope, given the fact that the views of the Members at

categories of dispute settlement mechanisms also extend to the role of confidentiality in the proceedings, which is apparent in the similar structure and wording of the applicable provisions. Their scope is not defined, but a contextual interpretation of the DSU shows two structural limitations to confidentiality. Notification requirements ensure that Members have knowledge of the initiation of consultation or ADR procedures and of the subject matter of a dispute³⁶⁰. Likewise, a settlement reached at the consultation stage must be notified to the DSB and other bodies concerned in order to give Members the opportunity to comment on mutually agreed solutions³⁶¹. Confidentiality therefore protects the actual process of consultations and ADR including all documents and opinions exchanged in it³⁶².

With regard to confidentiality during the panel stage, the relevant rules are dispersed in several WTO documents³⁶³. In the DSU, Article 14 is entitled “Confidentiality” but its provisions only address details of the panel deliberations. That is to say, the decision-making and drafting of reports is confidential and is done only “in the light of the information provided and the statements made [by the parties]”³⁶⁴ – or, without any outside influence. According to paragraph 10 of Article 17 DSU, the proceedings of the SAB shall equally be confidential. This standard is comparable to other international and domestic or international adjudication procedures, as

dispute normally pass through the third party. In other words, neutral parties providing good offices, mediation, or conciliation are directly bound to confidentiality.

³⁶⁰ Paragraph 4 of Article 4 DSU: “All such *requests* for consultations shall be notified to the DSB [...]. Any *request* for consultations shall be submitted in writing and *shall give reasons for the request including identification of the measures at issue and an indication of the legal basis for the complaint.*” (emphasis added).

³⁶¹ Paragraph 6 of Article 3 DSU.

³⁶² This protection is comprehensive in the sense that the applicable provisions leave no room for a mutual agreement between the parties to release any material beyond the exceptions established by the DSU. Compare also Abbott, *supra* note 20 at 121.

³⁶³ See the Panel Working Procedures, Expert Review, Rules of Conduct, Appellate Review Procedures, all *supra* note 334.

³⁶⁴ Paragraph 2 of Article 14 DSU.

confidential deliberations serve to ensure the independence and impartiality of the decision-making body³⁶⁵.

Paragraph 2 of Article 18 DSU extends the scope of confidentiality to all written submissions to panels and the SAB. However, as stated above, the provision does not affect the right of parties to disclose their own statements or the rights of Members to demand non-confidential summaries of the parties' submissions³⁶⁶. In order to protect effectively the confidentiality of party briefs and other documents presented to the panels, it is seen as necessary to prevent any open discussion of their contents. Hence, panels "shall meet in closed session."³⁶⁷ Members as interested parties, and even parties to a dispute may participate only upon invitation³⁶⁸. This scope of confidentiality is mirrored in the personal obligations of panelists and SAB Members, which are described in the Rules of Conduct³⁶⁹, and also includes expert review groups that support the panel work³⁷⁰.

³⁶⁵ Compare Paul Reuter, "Le Droit Au Secret et les Institutions Internationales" (1956) II *Annuaire Français De Droit International*: 46 at 47, note 2.

³⁶⁶ See supra notes and accompanying text. In releasing their submissions to the public, a party must respect the right to confidentiality of its contender. More specifically, parts of submissions which refer to or shed light on information that has been designated as confidential by a party (or Member) cannot be published without risking a breach of confidentiality. See also Patti A. Goldman, "Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles", (1992) 49 *Washington and Lee Law Review*: 1279 at 1285, note 27 on the practice of the Office of the United States Trade Representative in this context.

³⁶⁷ Paragraph 2 Panel Working Procedures, supra note 43. Paragraph 3 Panel Working Procedures restates the DSU regulations that "[t]he deliberations of the Panel and the documents submitted to it shall be kept confidential.

³⁶⁸ Paragraph 2 Panel Working Procedures, supra note 43.

³⁶⁹ Paragraph 1 of Section IV and paragraph 1 of VII Rules of Conduct, supra note 334: "Each covered person [i. e. panel Members] shall at all times maintain the confidentiality of dispute settlement deliberations and procedures [...]." The Rules of Conduct are also incorporated into the Appellate Body Working Procedures.

³⁷⁰ Paragraph 2 of Article 13 DSU, paragraph 5 Expert Review Groups, and Sections III:2, IV:1, and VII:1 Rules of Conduct, supra note 43.

In other words, confidentiality envelops almost every step of the panel stage of dispute settlement, from party briefs to panel and SAB investigations, to hearings conducted by panels and the SAB. Only when the reports by panels and the SAB – the *results* of the process – are communicated to the DSB can Members take full notice of the subject matter of the dispute³⁷¹.

3.2.2.3 Between Transparency and Confidentiality

All in all, the DSU applies the principle of confidentiality neither comprehensively nor homogeneously. Primarily, it addresses the relationship between participants of a dispute on the one side, and non-party Members on the other, hiding the actual dispute settlement procedures from the view of the latter. Nevertheless, Members are kept informed of the subject matter of the dispute and the results of the (successful) settlement proceedings through notifications to the

³⁷¹ In contrast to other forms of dispute resolution, the DSU provisions do not explicitly arrange for confidentiality in arbitration. Instead, the DSU leaves it to parties to “agree on the procedures to be followed” (paragraph 2 of Article 25 DSU), which encompasses the question of confidentiality. Several aspects, although circumstantial in nature, indicate that confidential arbitration is considered by the WTO dispute settlement system to be the rule rather than the exception. (This is in line with various arbitration conventions, in which confidentiality is widely considered to be a key component of arbitration. Compare for example Mauro Rubino-Sammartano, *International Arbitration Law* (Deventer: Kluwer Law and Taxation Publishers, 1989) at 377-8 and for commercial arbitration in particular, Kenji Tashiro, “Quest for a Rational and Proper Method for the Publication of Arbitral Awards”, (1992) 9 *Journal of International Arbitration* 97 at 97-8, both with numerous references.) First, the DSU imposes the same standards of transparency on arbitration as on consultations and ADR, embedding the proceedings in a framework of preceding and subsequent control by Members. Parties who agree to take recourse to arbitration must notify all other Members beforehand (*ibid.*); the awards issued by the arbitrators must be notified to the DSB and other relevant WTO institutions (paragraph 3 of Article 25 DSU). Yet, the DSU regulations on arbitration do nothing more than prepare the grounds for confidentiality. They are supplemented by the Rules of Conduct, which include arbitrators in their scope of application (paragraph 1 of Section IV in connection with Annex 1 (a) of the Rules of Conduct, *supra* note 334). Arbitrators are obliged to “maintain the confidentiality of dispute settlement deliberations and proceedings [...]” (*ibid.*, paragraph 1 of Section VII). Arguably, this provision is not binding on arbitrators if the parties have agreed to conduct the proceedings in the open. The governing principle of the Rules of Conduct states in this respect, that “[e]ach person covered by these Rules [...] shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism.” (*ibid.* paragraph 1 of Section II) Reference is made to the “dispute settlement mechanism” created by the DSU, but it remains without legal consequence, as the DSU provisions on arbitration do not set forth the confidential nature of proceedings. Taken together, the rules governing arbitration underscore the preference of the DSU for the settlement of disputes in private, but do not create a binding standard of confidentiality.

DSB as well as panel and SAB reports. Additionally, the quasi-adjudicatory proceedings are made more transparent to Members by their right to request summaries on party submissions to panels and the SAB, while the parties themselves are free to publicize their briefs.

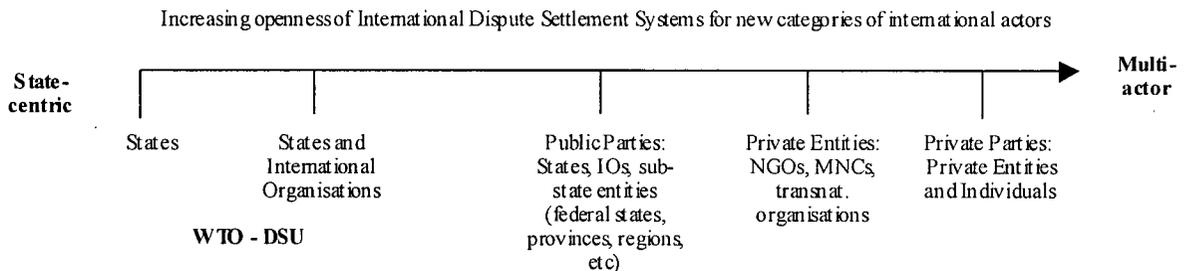
In this respect, the analysis of the present state of passive participation in the WTO dispute settlement system shows that even the present informal means of passive involvement lack a coherent and comprehensive legal foundation and application within the WTO framework. While its need seems to be accepted by Members, its existence is based on a few scattered rules. The DSU and other relevant legal texts provide civil society with a detailed idea of the workings of the WTO dispute settlement system at the forefront, while its results are made available through the derestriction and publication of WTO documents. But the confidentiality of proceedings blocks the intermediate stage, the dispute settlement procedures in practice, from public view. Both issues - the establishment of a firm legal basis for the future involvement of civil society, and means to fill the vacuum created by confidentiality need to be addressed to ensure that at any given time, at any given place, any given part of civil society must have access to any relevant information about WTO disputes, their legal and factual background, as well as related WTO activities.

3.2.3 Conclusions: The DSU on the Personae-Axis

As the preceding analysis has illustrated, the WTO resolution is accessible only to governmental actors, in particular States. With regard to the recognition of international actors it follows - despite indications of increasing openness to civil society - that the WTO and its dispute

settlement system adhere to the traditional notion of public international law as a law by and for States. The state-centrism of WTO dispute resolution reveals an underlying view of international relations that is best captured by the realist-institutionalist school of thought. If projected to the *personae axis* in the dispute settlement matrix, the DSU would thus be located towards the left end of the axis, as displayed in Figure 3.1.:

Figure 3.1 - The WTO - DSU on the *Personae Axis*



3.3 The Material Scope of WTO Dispute Settlement: The DSU on the *Res Axis*

Having identified the categories of international actors with access to WTO dispute resolution, I will now approach the DSU from the perspective of material scope, the second element of the analytical framework. As established in Chapter 1, this analysis will comprise two steps. First, I will determine the DSU's material scope as expressed in issue areas covered by the substantive WTO agreements. And second, I will examine the perspective - one-way or reciprocal - adopted by the WTO dispute settlement system towards factually linked issue areas. Assuming an opening of WTO dispute resolution to private participants, the two factors of scope and perspective make it possible, on the one hand, to infer future candidates for active participation

in terms of their agendas. Only if the goals and purposes of private international actors overlap with the material scope of the DSU could they expect to gain access to its dispute settlement mechanisms. On the other hand, the two factors will also allow predictions on the procedural roles to be played by private actors according to their agenda.

3.3.1 Scope and Perspective of the DSU

As illustrated by Chapter 2, the WTO dispute settlement system covers disputes arising under the organizational, procedural, and substantive provisions of the world trading system³⁷², whereas the last category is of particular importance for determining the material scope of the DSU. The substantive agreements of the WTO establish a regulatory framework for three major aspects of international trade, the exchange of goods and of services, and the protection of trade-related intellectual property rights³⁷³. Not surprisingly, the name “World Trade Organization” is thus programmatic for the material scope of its dispute settlement system: it is concerned first and foremost with disputes concerning national and international rules of *trade*.

Turning towards the perspective of the DSU, a look at the preamble of the WTO Agreement shows its concern with issues beyond the trade agenda. The goals of the world trading system include raising living standards, ensuring full employment, promoting sustainable development, and preserving the environment³⁷⁴. In other words, the WTO acknowledges links between consumer, labour, and environmental interests on the one side, and its trade regime on the other;

³⁷² Supra notes 221 et seq. as well as accompanying text.

³⁷³ Including special regimes for certain goods or services like textiles, agricultural products, telecommunication, etc.; see *ibid*.

³⁷⁴ First recital of the Preamble WTO Agreement.

one may therefore expect these links to become the subject matter of dispute settlement proceedings.

However, the explicit acknowledgement of links between trade and the issue areas in the WTO preamble has only been partially translated into the world trading system. At the institutional and policy level under the heading "Trade and ...", the WTO has begun to integrate link issues such as environment, development, competition, investment and health³⁷⁵. They are reflected in the work of the Committee on Trade and Environment, and the Committee on Trade and Development³⁷⁶, form part of the WTO's built-in agenda, or have been introduced by the Ministerial Conference³⁷⁷. Although the importance of other link issues, as for example trade and labour, is reiterated in WTO Declarations, they have not yet been addressed at the policy or even the legal level³⁷⁸.

Link issues are even less represented in the substantive *legal* provisions of the world trading system³⁷⁹. In the case of international trade in goods, the general exceptions of the GATT 1947

³⁷⁵ During the 1999 Ministerial Conference in Seattle, Members have agreed to establish a working group on biotechnology that will define the rules on trade in genetically modified food, addressing *inter alia* connected health concerns, see Heather Scoffield, "Ottawa pleased by EU course change on modified foods" *The Globe and Mail*, December 2, 1999, A11.

³⁷⁶ *Supra* notes 207-208 and accompanying text.

³⁷⁷ For example, Article 9 of the TRIMS Agreement calls on the Council for Trade in Goods to review its provisions by the year 2000 and to decide whether not to complement the agreement with provisions on investment policy and competition policy. In its Singapore Declaration of 1996, the Ministerial Conference also established a working group on trade and competition policy, see WTO, "Singapore Ministerial Declaration. Adopted on 13 December 1996." WTO-Document: WT/MIN(96)/DEC at paragraph 20 [hereinafter: Singapore Declaration].

³⁷⁸ Compare Singapore Declaration, *ibid.* at paragraph 4. During the 1999 Ministerial Conference in Seattle, developing countries have opposed attempts of the Clinton administration to include labour issues in a new round of trade negotiations, see Heather Scoffield, "Trade officials, NGOs meet in Seattle", *The Globe and Mail*, November 30, 1999, A8; and Heather Scoffield, "Summit delegations burn up hotel phone lines" *The Globe and Mail*, December 1, 1999, A10.

³⁷⁹ In comparison, the Havana Charter as the constitutional document of the ITO already shows a comprehensive understanding of world trade at the level of substantive law, stressing the interconnectedness of trade with link

mentioned earlier have been carried over into Article XX of GATT 1994³⁸⁰. As long as they do not amount to arbitrary or unjustifiable discrimination or disguised restrictions of international trade in goods³⁸¹, WTO Members may introduce measures necessary *inter alia* to protect human, animal or plant life or health (environmental exception)³⁸², treasures of artistic, historic, or archeological value (cultural exception)³⁸³, and the conservation of exhaustible and natural resources (sustainable development exception)³⁸⁴. The GATS has introduced similar exceptions to the trade-in-services sector. They address the *ordre public*³⁸⁵, human, animal or plant life and health³⁸⁶, and a general exemption of all laws regulating trade in services, which are consistent with the GATS³⁸⁷.

issues and making references to employment (Articles 2 and 3 Havana Charter, *supra* note 196), social and economic progress and development (Article 1 Havana Charter, *ibid.*) and fair labour standards (Article 7 Havana Charter, *ibid.*). Reflecting on this aspect of the Havana Charter, Professor Mikesell noted: "I am quite sure that had environmental protection, the conservation of natural resources, and global sustainability been major concerns 50 years ago, they would have been included among the major objectives of the ITO." (Mikesell, *supra* note 193 at 328).

³⁸⁰ The evolution of GATT/WTO case law under Article XX GATT 1947/94, with particular emphasis on the rulings of the SAB (including its recognition of the need for balancing trade with competing issues), see Padideh Ala'i, "Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization" (1999) 14 *American University International Law Review* 1129.

³⁸¹ Article XX GATT 1994. By means of reference, the exceptions of Article XX GATT 1994 are also applicable to the provisions of the *Agreement on Trade-related Investment Measures* (TRIMS), which addresses the restrictive and distortive effects of foreign investment on international trade. (Article 3 TRIMS Agreement reads: "All exceptions of the GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.")

³⁸² *Ibid.*, *litera* (b). For food and agricultural production, the environmental exception in Article XX (e) GATT 1994 is interpreted and expanded in the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPSM Agreement), one of the Multilateral Agreements on Trade in Goods (Annex 1A to the WTO Agreement). The SPSM Agreement does not address specific measures but establishes general requirements for SPSMs (Article 1 SPSM Agreement) and establishes a framework to harmonize their application by WTO Members (Article 3 SPSM Agreement).

³⁸³ *Ibid.*, *litera* (f). However, an integrated approach for the protection of cultural industries, is not in sight for the near future; see Heather Scoffield, "Deal to protect culture unlikely" *The Globe and Mail*, December 3, 1999 at A10.

³⁸⁴ *Ibid.*, *litera* (g).

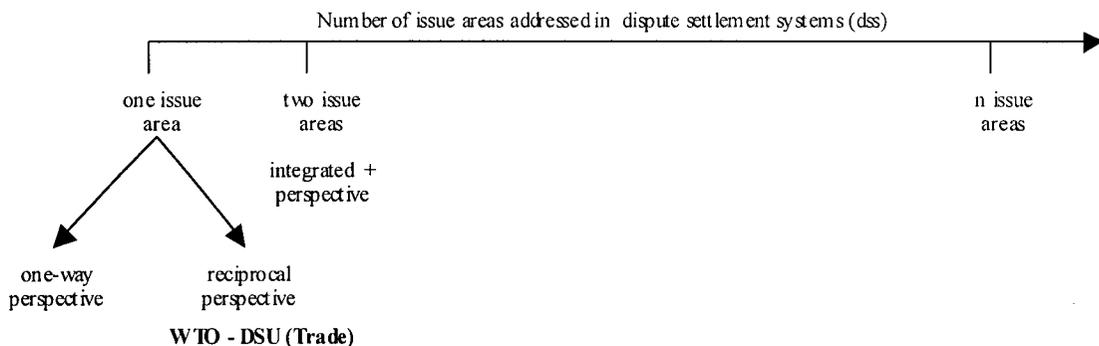
³⁸⁵ Article XIV (a) GATS.

³⁸⁶ Article XIV (b) GATS.

³⁸⁷ Article XIV (c) GATS.

In sum, the role of legally recognized link issues within the world trading system is that of exceptions to the substantive rules of international trade. From a procedural viewpoint, link issues are limited to serve as means of defence and justification for laws, regulations and other governmental measures that have become the object of a WTO dispute. Within the WTO dispute settlement system, concerns like environmental protection and sustainable development, health, or cultural integrity therefore only have a reactive function. A dispute would always be initiated from a trade perspective, only incidentally touching upon links with other issue areas; while adjustments between trade and link issues would be possible, the structure of WTO dispute settlement establishes the pre-eminent role of the former. Although it incorporates into its material scope only a fraction of the conceivable issues linked to international trade, the DSU thus adopts a reciprocal perspective. In terms of the dispute settlement matrix, the DSU therefore covers a single issue area, trade, but shows a reciprocal perspective with regard to some related issue areas, see Figure 3.2.:

Figure 3.2 - The DSU on the *Res Axis*



3.3.2 Consequences for the Selection of Future Participants

Based on the material scope and the perspective of the WTO dispute settlement system, it is to be expected that its opening-up to new actor categories would invite a diverse mix of participants in terms of substantive concerns and agendas. The DSU's scope would obviously overlap with the interests of the *international* business community, including export-oriented producers and traders as well as importers of foreign goods and services. Through its coverage of certain link issues, the DSU would embrace the participation of consumer protection movements (for example on health and safety issues of imported goods), environmentalists, or organizations in the field of economic aid and development. Moreover, it may extend participation to international governmental organizations whose mandates (i.e. material scope) covers link issues recognized by the substantive law governing the world trading system.

Furthermore, the DSU's perspective anticipates a procedural distinction between those actors whose agendas lie within the regulatory objectives of the world trading system - specifically the international business community, and those who are associated with the above-mentioned substantive exceptions. While the former group might play an active role in WTO dispute resolution, the latter would be confined to supportive forms of participation within the limits of an applicable exception. The practical implications of this distinction will be examined in a later Chapter.

3.4 Legalism in WTO Dispute Settlement: The DSU on the Actiones Axis

Finally, the procedural perspective of the analytical framework determines the principal approach of the DSU to dispute resolution. The question is whether WTO dispute settlement gravitates towards pragmatist conceptions of power-oriented methods, or whether it is situated at the legalist end of the scale, favouring rule-oriented procedures. In six decades of GATT/WTO history, its dispute settlement system would have offered different answers. In retrospect, however, it is fair to speak of a gradual progression towards a formalization of its dispute resolution mechanism, as the realization that legalist principles form the basis of a predictable and effective world trading system conquered more and more ground among participating States.

With the advent of the WTO and its *Understanding on Rules and Procedures Governing the Settlement of Disputes*, dispute settlement seems to have taken a quantum leap towards legalism. As Chapter 2 shows, pragmatist forms of dispute resolution have not been discarded by the WTO; they were even extended in scope, including various forms of ADR. And by establishing consultations as a prerequisite for entering into the panel stage, the DSU expresses its intention to resolve conflicts at an early stage. But these methods of dispute settlement have been embedded in a legal framework of binding deadlines, default procedures, notification requirements and the right of parties to a dispute to neutral third-party decision-making. In other words, consultations and ADR now take place in the shadow of the law.

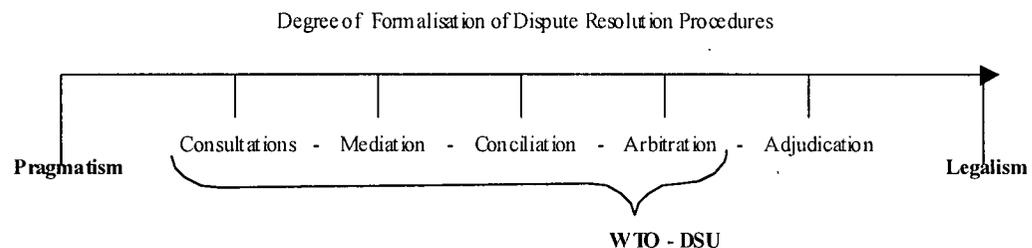
Moreover, the panel process has been strengthened as a quasi-adjudicatory mechanism at the heart of WTO dispute resolution. It features detailed procedural rules, an appeals stage, a

commitment to high-quality rulings, and third party rights. Most importantly, the concept of negative consensus resulting in quasi-automatic adoption has removed the pragmatist need for unanimous acceptance of panel and SAB reports. Decisions, which are now enforceable through an extensive mechanism that includes inter-sectoral sanctions. Although the development of WTO dispute resolution will continue in the future³⁸⁸, even the proponents of pragmatism are compelled to agree with one commentator's observation³⁸⁹:

Taken together, these changes make the WTO dispute resolution system look much more like a courtroom than like a negotiating table.

Looking again at the dispute settlement matrix, the DSU found at the right end of *actiones axis*, including, however, other forms of dispute resolution, as expressed by the brace in Figure 3.3.

Figure 3.3 - The DSU on the *Actiones Axis*



³⁸⁸ Compare the prediction of Shell, *Trade Legalism*, supra note 11 at 834: "The creation of the WTO dispute resolution system opens a new stage in the debate regarding trade legalism. This debate will now focus on the normative differences among legalists that have been largely submerged while legalist advocates have pressed for the creation of a global trade adjudication system. The coming debate will center [...] on efforts to reform the WTO [...]. These debates will not be merely matters of academic interest within international law circles; as global trade accelerates, billions of dollars and thousands of jobs may hang on the way this discussion evolves."

³⁸⁹ Schleyer, supra note 15 at 2291.

With regard to private participation in the WTO dispute settlement system, the commitment of the DSU to the goals of predictability and stability of rule interpretation and application, and the formal equality of the parties to a dispute - specifically in the panel process, ensure a levelling of the playing field. In its present state the quasi-adjudicatory stage of WTO dispute resolution therefore not only neutralizes differences in power between large and small WTO Members, but would also be able - at least in principle - to accommodate increased involvement of private actors in a centralized dispute settlement mechanism be it as parties to a dispute, third parties, or in other procedural roles.

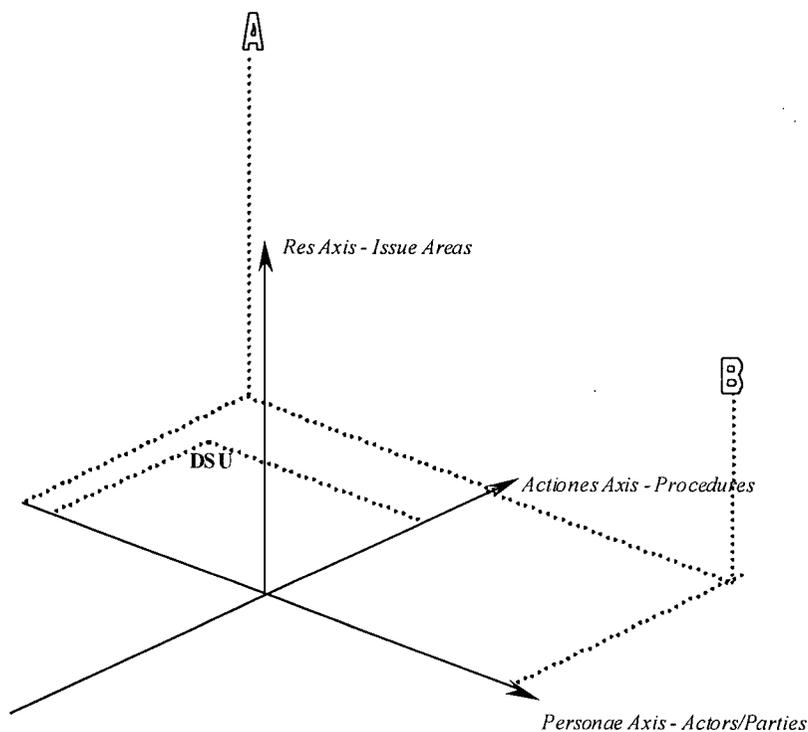
3.5 Combining the Elements: The DSU in the Dispute Settlement Matrix

Combining the results for each element of the analytical framework, participants, material scope, and dispute resolution procedures, the DSU presents itself as an essentially state-centric dispute settlement system, with the legal recognition of customs territories as the proverbial exception to the rule. As far as its material scope is concerned, the DSU covers one extensive issue area, international trade, but has formally accepted the existence of links between trade and other issues. This acceptance is pronounced with regard to other economic sub-fields of international law as illustrated by the TRIMS and TRIPS agreements. Linkages with non-economic issues, on the other hand, are reduced to their role as legal exceptions to the rules of international trade. Procedurally, the DSU steers clearly towards legalist principles of dispute resolution, in particular its panel stage, which shows great resemblance with an adjudicatory system.

Transforming these results into co-ordinates for the dispute settlement matrix, the DSU is located as displayed in Figure 3.4. In order to make the DSU position within the matrix comparable, the Figure shows two other dispute settlement models named "A" and "B". Model A is a dispute settlement mechanism limited to State participants. The mechanism is open to any legal dispute that parties decide to submit, or, to put it differently, it is not limited in its coverage of issue areas. These disputes are resolved through adjudication, that is according to strictly legalist principles. The International Court of Justice may pose as a real-life example for model A³⁹⁰. The second model, B, is accessible to States and non-state actors alike. Its material scope extends to a variety of issue areas, although not as far as model A; and similar to the first model, B takes an adjudicatory approach to dispute resolution. In this case, the European Court of Justice provides the closest existing equivalent.

³⁹⁰ Compare the *Statute of the International Court of Justice*, Annexed to the Charter of the United Nations, signed at San Francisco, June 26, 1945, reprinted in Manley O. Hudson, ed., *International Legislation*. Volume IX 1942-1945 (New York: Carnegie Endowment for International Peace, 1950) No. 651 at 510; in particular Articles 34 and 36.

Figure 3.4 - The DSU in the Dispute Settlement Matrix



3.6 Conclusions - Forming an Argument for Private Participation

For the purposes of this thesis, private participation has been defined as the direct, formal, and rights-based access of non-governmental actors to the WTO dispute settlement system, taking the form of passive or active involvement in dispute settlement proceedings. However, looking back at the previous chapters leads to the conclusion that such direct, formal, and rights-based involvement of non-governmental actors in the DSU does not exist. Therefore, an argument in favour of private participation - both in its passive and its active variety, must begin with the contention that non-governmental actors should be legally recognized in principle as participants in WTO dispute

resolution. This requires the redefinition of actor categories in a principal area of public international law (Chapter 4).

Once, non-governmental actors - independent of their legal quality as natural or legal persons - have been recognized in principle, the theoretical assumptions of my analytical framework predict the creation of diverse forms of private participation in WTO dispute resolution, as indicated by the scope and perspective of the DSU. Chapter 5 provides a template for different degrees involvement of private parties, depending on whether they represent core issues of the world trading system or linked issue areas. While the scope of this thesis does not allow more than a few cursory remarks on changes in the material scope and perspective of the WTO, and its dispute settlement system, the suggested template is capable of integrating those changes, once they occur. It will consider ways to ensure a permanent flow of information from WTO dispute resolution to civil society, forms of standing, and procedural safeguards to guarantee that the WTO dispute settlement mechanism continues to function effectively.

CHAPTER 4**CHANGING THE PARADIGM: LIBERALISM AND PRIVATE PARTICIPATION IN
WTO DISPUTE SETTLEMENT****4.1 Introduction**

In this Chapter I intend to develop an argument in favour of private participation in WTO dispute resolution based on a liberal conception of international law. I will first examine liberal international relations theory to the extent that it addresses the role of the individual in the international sphere, and suggest a transformation of public international law according to principles of liberal internationalism. In the context of WTO dispute settlement, private participation will advance the liberal goals of establishing and protecting individual rights, of democratizing the world trading system, improving its legitimacy and transparency. In addition, I will look at arguments stressing that private participation will increase the effectiveness of WTO dispute resolution and the world trading system as a whole. Although these arguments are presented in the context of a liberal theory of international law, they may be considered independently, potentially attracting the support of (non-liberal) States, leading to a *de facto* proliferation of liberal values, and of liberal legal concepts in the state-centric world of public international law.

As Richard Shell's analysis shows³⁹¹, supporters of private participation in WTO dispute resolution are divided into two major camps: The first seeks to promote an extension of standing to the international business community. That is to say, private participation would be limited to actors within the traditional scope of GATT/WTO legal activities, trade and trade-related economic issues³⁹². The second group proposes to extend standing to all those private actors with a stake in international trade, emphasizing "broader participation in trade adjudication, democratic processes for resolving trade conflict, and open dialogue regarding the goals of economic trade."³⁹³ Various arguments presented to back either version of private participation are very similar as they relate to the advantages of private involvement in general. This body of reasoning will be examined independent of its origin in either camp. Where differences exist, they usually appear along the line of economic/non-economic actors and interests, and will be highlighted in the course of the examination.

4.2 Liberal International Theory

For almost four hundred years, liberal conceptions of national governance and international relations have influenced western political and legal thinking. In contrast to its realist rival,

³⁹¹ See Shell, Trade Legalism, supra notes 26-44 and accompanying text.

³⁹² As captured in Shell's "Efficient Market Model", *ibid.* Commentators belonging to this camp are: Brand, GATT, supra note 49 at 139; Marco C. E. J. Bronckers, "Non-Judicial and Judicial Remedies in International Trade Disputes: Some Reflections at the Close of the Uruguay Round" (1990) 24 No. 6 *Journal of World Trade* 121 at 122 [hereinafter: Bronckers]; deKieffer, supra note 10 at 332; Jackson et al. Tokyo Round, supra note 39 at 208-9; Jackson, World Trading System, supra note 39 at 111; Waincymer, supra note 35 at 113. For a trade in services perspective: Tycho H. E. Stahl, "Liberalizing International Trade in Services: The Case for Sidestepping the GATT" (1994) 19 *The Yale Journal of International Law* 405 at 439 et seq. [hereinafter: Stahl].

³⁹³ *Id.* at 837. Concepts similar to Shell's "Trade Stakeholders Model" are developed, for example, by Steve Charnovitz, supra note 14 at 331; Housman, supra note 14; Schleyer, supra note 15; Andrea K. Schneider, "Democracy and Dispute Resolution: Individual Rights in International Trade Organizations" (1998) 19 *University of Pennsylvania Journal of International Economic Law* 587 [hereinafter: Schneider]; Thomas J. Schoenbaum, "WTO Dispute Settlement: Praise and Suggestions for Reform" (1998) 47 *International and Comparative Law Quarterly* 647 [hereinafter: Schoenbaum].

liberalism is domestic in origin, first arguing for reforms of the absolutist state that included the rule of law, representative government, individual rights, and the protection of private property³⁹⁴. However, liberal thinkers believe "that if we can tame the struggle for power domestically, we can also do it in the realm of international relations"³⁹⁵.

From the enlightenment philosophers like John Locke, Jeremy Bentham, and Immanuel Kant, to Woodrow Wilson's visions of liberal peace in the early decades of our century, liberalism has probed the relationship between democracy and peace, ethics and international politics. It has argued for international security through international organizations and institutions, and has suggested the possibility of progress towards a system of international relations that creates greater human freedom, welfare, justice, and human rights³⁹⁶. Support for liberal approaches faded in the aftermath of the Second World War and the ensuing cold war period, giving way to realist alternatives. Yet, since the collapse of the Soviet Empire in the early 1990s, liberalism has experienced a new upswing, seriously challenging realist dominance³⁹⁷.

Liberal international theory covers a wide and diverse spectrum of philosophical, political, and legal concepts, which have so far evaded a concise description. Thus, Michael Doyle compares liberalism to "a family portrait of principles and institutions, recognizable by certain

³⁹⁴ Michael W. Doyle, *Ways of War and Peace. Realism, Liberalism, and Socialism*. (New York: W. W. Norton & Company, 1997) at 208 [hereinafter: Doyle].

³⁹⁵ Michael Joseph Smith, "Liberalism and International Reform" in Terry Nardin and David Mapel, eds., *Traditions of International Ethics* (Cambridge: Cambridge University Press: 1992) 201 at 202 [hereinafter: Michael Smith].

³⁹⁶ See Mark W. Zacher and Richard A. Matthew, "Liberal International Theory: Common Threads, Divergent Strands" in Charles W. Kegley Jr., ed., *Controversies in International Relations Theory. Realism and the Neoliberal Challenge* (New York: St. Martin's Press, 1995) 107 at 111-7 [hereinafter: Zacher/Matthew].

³⁹⁷ Compare Charles W. Kegley Jr. "The Neoliberal Challenge to Realist Theories of World Politics: An Introduction" in Charles W. Kegley Jr., ed., *Controversies in International Relations Theory. Realism and the Neoliberal Challenge* (New York: St. Martin's Press, 1995) 1 at 8-10, 14-5 [hereinafter: Kegley].

characteristics"³⁹⁸. Indeed, commentators discern as many as three to seven strands of liberalism³⁹⁹. But these strands are not contending, they highlight different aspects of the same theoretical body⁴⁰⁰. Moreover, recent years have witnessed increased endeavors to extract the core assumptions shared by all liberal theories and to develop a coherent and universal framework, as a new "paradigm" of international relations⁴⁰¹.

As outlined in Chapter 1⁴⁰², these core assumptions are:

Individuals are the primary actors in international relations and thus the primary units of analysis.

State agendas are functions of dominant individual and group interests in domestic and international civil societies, determined through internal political processes.

Conflicts and cooperation between States do not reflect a continuous strife for power, but differences or commonalities in societal interests, as expressed in State preferences.

In order to understand the importance of liberalism for the case of private participation in WTO dispute resolution, these assumptions require a more thorough discussion. The first, positing individuals as primary international actors illustrates liberalism's fundamental concern with

³⁹⁸ Doyle, *supra* note 394 at 208.

³⁹⁹ For example Doyle, *ibid.*, recognizes (1) liberal institutionalism, at 213 et seq.; (2) commercial pacifism, at 230 et seq., and (3) liberal internationalism, at 251 et seq. Robert O. Keohane, "International Liberalism Reconsidered" in John Dunn, ed., *The Economic Limits to modern Politics* (Cambridge: Cambridge University Press, 1990) 165 at 176 et seq. [hereinafter: Keohane, Liberalism] distinguishes (1) republican liberalism, (2) commercial liberalism, (3) regulatory liberalism, and (4) sophisticated liberalism. Finally, the analysis of Zacher/Matthew, *supra* note 396 at 121-2, showed the following strands: (1) republican liberalism, (2) interdependence liberalism with the sub-divisions commercial and military liberalism, (3) cognitive liberalism, (4) sociological liberalism, (5) institutional liberalism, and (6) ecological liberalism.

⁴⁰⁰ Zacher/Matthews, *ibid.* at 122.

⁴⁰¹ *Ibid.* at 140. See also Slaughter, *Dual Agenda*, *supra* note 51 at 227; Slaughter, *International Relations*, *supra* note 31 at 727; and Doyle, *supra* note 394 at 285.

⁴⁰² With an emphasis on their cardinal differences to the realist assumptions, see *supra* notes 86-89 and accompanying text.

individual freedom and welfare⁴⁰³. Ideally, this double goal will be achieved through inalienable rights that divide into three groups⁴⁰⁴:

Liberalism calls for freedom from arbitrary authority, often called *negative freedom*, which includes freedom of conscience, a free press and free speech, equality under the law, and the right to hold, and therefore exchange, property without fear of arbitrary seizure. Liberalism also calls for rights necessary to protect and promote the capacity and opportunity for freedom, the "*positive freedoms*". Such social rights as equality of opportunity in education and such economic rights as health care and employment, necessary for effective self-expression and participation, are thus among Liberal rights. A third Liberal right, *democratic participation or representation*, is necessary to guarantee the other two.

Recognizing individuals and groups of individuals (i.e. non-governmental actors) as the primary unit of analysis also implies that it is individuals not States, who ultimately shape international relations by pursuing their personal interests⁴⁰⁵.

The second fundamental assumption of liberal international theory clarifies this assertion by providing the causal link between individual concerns on the one hand, and cooperation and conflict between States on the other⁴⁰⁶. In a liberal model of international relations, States remain the most important composite international actors, but their preferences and actions represent interests prevalent in domestic society. In other words, State behaviour is a function of internal political and societal processes and structures that define the extent of individual or group interests represented by governments⁴⁰⁷. State preferences are manifold and change in

⁴⁰³ Zacher/Matthew, *supra* note 396 at 118.

⁴⁰⁴ Doyle, *supra* note 394 at 207 [emphasis added].

⁴⁰⁵ See Slaughter, *Dual Agenda*, *supra* note 51 at 227.

⁴⁰⁶ *Ibid.* at 228.

⁴⁰⁷ *Ibid.* and also Zacher/Matthew, *supra* note 396 at 119.

time, depending on varying influences of different non-governmental actors at the national level and changing individual goals⁴⁰⁸. Differences in domestic representation, in turn, account for the diverse patterns of State conduct found in world politics. Disputes among States may arise where preferences collide, and cooperation may occur where they overlap⁴⁰⁹.

This explanation stands in stark contrast to the realist position that state action is motivated solely by pursuit of power and limited by the systemic constraints of international relations⁴¹⁰. For liberals, cooperation is likely to increase, and conversely conflicts may diminish through the identification, coordination, and eventually harmonization of State preferences⁴¹¹. Given the sources of a State's international agenda, two ways are conceivable to prompt changes in its priorities.

The first draws on the liberal belief, that States with political systems based on liberal principles of individual rights and democratic representation develop similar or compatible values and interests, which enable them to enter into a special relationship of cooperation, leading to a "separate peace"⁴¹². If liberal States guarantee that all individual interests are protected and accurately represented at the international level, and if forms of representation immanent to liberal States leads to more compatible State preferences, then international relations may be

⁴⁰⁸ Zacher/Matthew, *ibid.* at 118.

⁴⁰⁹ Slaughter, *Dual Agenda*, *supra* note 51 at 228, and Slaughter, *International Relations*, *supra* note 31 at 729.

⁴¹⁰ Doyle, *supra* note 394 at 211.

⁴¹¹ Burley, *International Relations*, *ibid.*

⁴¹² The dividing line thus runs between "liberal" and "non-liberal" States. Only the former sufficiently protect individual freedom and welfare through negative and positive rights, as well as democratic representation, see Doyle *supra* note 394 at 211, and also at 258 et seq. for a detailed discussion of the "separate peace" hypothesis. A critique of this position can be found in John MacMillan, *On Liberal Peace. Democracy, War and the International Order* (London: I.B. Tauris Publishers, 1998), at 13 et seq. [hereinafter: MacMillan].

improved by altering the domestic political conditions defining these preferences (i.e. promoting the spread of individual rights protection and democratic governance abroad⁴¹³). Secondly, the interdependency between non-governmental interests and State agendas (as stated in the second assumption) entails that State preferences may be transformed by changing individual interests.

Above all, the potential for change in State preferences indicates the deep liberal conviction of the possibility of progress in international relations. The international system can be improved over time through cooperation, international institutions, scientific, technical and not the least intellectual progress, creating an international environment that guarantees and promotes individual freedom and welfare⁴¹⁴.

Not surprisingly, adherents of realism have heavily attacked liberal assumptions about the nature of the international system⁴¹⁵. Liberal trust in inevitable progress towards a state of international relations in which war as a means of conflict resolution becomes extinct - following the proliferation of liberal States and based upon a natural harmony of their interests - has been declared a naive and utopian dream⁴¹⁶. For realists, the international realm, by its very nature a place of continuous struggle for power, would not sustain change, let alone progress. Moreover,

⁴¹³ David P. Fidler, "Libertad v. Liberalism: An Analysis of the Helms-Burton Act from within Liberal International Theory" (1997) 4 *Indiana Journal of Global Legal Studies* <http://www.indiana.edu/glsj/glsj.html> at notes 49-52 and accompanying text.

⁴¹⁴ Zacher/Matthews, *supra* note 396 at 117, 119; Kegley, *supra* note 397 at 4; MacMillan, *supra* note 412 at 10, quoting John Gray; Keohane, *Liberalism*, *supra* note 399 at 174.

⁴¹⁵ An extensive body of realist writing takes issue with liberal tenets. Most critics reiterate the basic line of attack taken by Edward Hallett Carr's *The Twenty Years Crisis. 1919-1939*, 2nd ed. (London: Macmillan & Co Ltd., 1946), who particularly targeted Wilsonian liberalism; Morgenthau, *supra* note 48, and Kenneth Waltz, *Man the State and War. A Theoretical Analysis*. (New York: Columbia University Press, 1959), specifically Chapter IV at 80 et seq.

⁴¹⁶ Carr, *ibid.* at 80 et seq.; Waltz, *ibid.* 102 et seq., 122.

a natural convergence of interests between States as the foundation for cooperation and lasting peace seemed not warranted by experience⁴¹⁷. Liberals themselves have shed some of the more idealistic aspects of their assumptions under the influence of empirical data, and the rigorous criticism of their realist opponents. As shown, the concept of natural harmony between human, and in extension, State interests has been replaced by the possibility to expand the scope of compatible State preferences and actions through changes of domestic representation or of individual interests. Analogously, the international system has the *capacity* for progress towards increased human freedom and welfare.

Liberal thinkers are aware of the expectations, a rejuvenated liberal internationalism will have to meet, if it is to provide a viable alternative to realism. Having rediscovered liberalism as a paradigm for international relations *and* for public international law, Anne Marie Slaughter formulated the standard against which the theory's utility must be tested:⁴¹⁸

Liberals operating within this framework must be able to deduce substantive theoretical propositions from its core assumptions. The leading example of such a proposition is the claim that liberal states do not go to war with one another. [...] Nevertheless, Liberal international relations theorists using this framework will be required by their Realist and Institutionalist colleagues to demonstrate its utility in generating a wider range of more specific propositions. To the extent they succeed, they will produce coherent empirical research programs from which international lawyers working with the same analytical framework stand to profit.

One such proposition is the adoption of mixed-actor systems of international relations that recognize the role of individuals and private organizations. Explanations and predictions derived

⁴¹⁷ It has been questioned, whether the "natural harmony" principle was widely supported by liberals in the first place, see MacMillan, *supra* note 412 at 13 quoting Keynes.

⁴¹⁸ Slaughter, *Dual Agenda*, *supra* note 51 at 237.

from realist and institutionalist insights proved to be insufficient to capture the dynamics of international relations created by non-state activities. For example, the end of the Cold War and of Soviet domination over Eastern Europe were anticipated by neither realist nor institutionalist scholars. As James Lee Ray points out, the dramatic upheavals in Eastern Europe and their effects on the international arena were based upon changes in the national political systems of the East Bloc countries⁴¹⁹. An international relations theory that blocks its view to domestic factors and non-governmental actors, must be surprised by changes in the international arena that do not originate in its systemic or institutional features, providing "a strong basis for an argument that, at the very least, the predominant paradigm in international relations is in need of important modifications to which neoliberalism can contribute."⁴²⁰ As a consequence, IR scholars pay more and more attention to the networks of communication, information and political influence, both at the national and international level, that non-governmental actors have created due to modern technological progress⁴²¹.

⁴¹⁹ James Lee Ray, "Promise or Peril? Neoliberalism, and the Future of International Politics" in Charles W. Kegley Jr., ed., *Controversies in International Relations Theory. Realism and the Neoliberal Challenge* (New York: St. Martin's Press, 1995) 335 at 349.

⁴²⁰ Ibid. at 350.

⁴²¹ An example for areas of international relations and public international law, in which a liberal analytical perspective including non-state actors already bears fruits, is international environmental protection and regulation. In a collection of case studies on international environmental institutions, so renowned members of the institutionalist school of IR theory like Robert Keohane or Peter Haas conceded the influence of nongovernmental activity on the form and substance of international regimes, a circumstance that is not accounted for under institutionalist and regime theories. See Robert O. Keohane, et. al. "The Effectiveness of International Environmental Institutions" in Peter M. Haas, Robert O. Keohane, and Marc A. Levy, eds., *Institutions for the Earth. Sources of Effective International Environmental Protection*. (Cambridge: The MIT Press, 1993) 3 at 14. As a conclusion following case studies on environmental protection in the Baltic and North Seas (at 133 et seq.), international fisheries management (at 249 et seq.) pesticide controls in developing countries (at 309 et seq.), as well as population institutions (at 351 et seq.), the authors admit: "If there is one key variable accounting for policy change, it is the degree of domestic environmentalist pressure in major industrialized democracies, not the decision-making rules of the relevant international institution." See also the book review by Linda C. Reif, "Multidisciplinary Perspectives on the Improvement of International Environmental Law and Institutions" (1994) 15 *Michigan Journal of International Law* 723 at 737-9, who specifically refers to liberalist conceptions as an appropriate analytical framework for this phenomenon.

Both, the theoretical tenets of liberalism and empirical evidence thus support a model of international relations that factors in individuals and their collective forms of activity - the plethora of non-governmental organizations, in the widest sense of the word⁴²². In accounting for the domestic influence of non-governmental actors as well as their role in the international arena, liberalism intersects with and draws on the sub-field of international relations concerned with the study of international actors and their interactions⁴²³. Beginning with Oran Young in 1972, students of this sub-field have submitted proposals to substitute the predominant state-centric model favoured by realists with "world systems that are heterogeneous with respect to types of actors (i.e., mixed actor systems)"⁴²⁴. For multi-actor approaches, States are not the fundamental units of world politics, so that the analysis of inter-state relations is replaced by new non-hierarchical patterns of interaction between qualitatively different actor categories⁴²⁵. These models would be highly dynamic in terms of rapidly changing actors and actor-relationships⁴²⁶. "In such a system, questions concerning political stature, competencies, rights, obligations, and so forth [...] must be worked out on some *ad hoc* basis with different results for different

⁴²² Compare also Kegley, *supra* note 397 at 11.

⁴²³ Peter Willetts, "Transnational Actors and International Organizations in World Politics" in John Baylis and Steven Smith, eds. "The Globalization of World Politics" (Oxford: University Press, 1997) 287 at 287 calls this approach "Pluralism" in comparison to "Statism". The different varieties of pluralist theories are described in James N. Rosenau, *The Study of Global Interdependence: Essays on the Transnationalization of World Affairs* (London: Pinter, 1980) at 16-7. The book also represents a rich source for analytical approaches to multi-actor systems. It should be noted that pluralism and liberalism are overlapping but not congruent. That is to say, liberalists endorse pluralist perspectives with regard to actors, but not all pluralists are liberals. For example, among the major strands of IR, institutionalists recognize the existence of international institutions and organizations as important actors in world politics, thus modifying the strictly state-centric approach of realists. However, these international organizations are governmental in character; in other words, despite their status as independent actors they are emanations of State interaction. Therefore, for the purpose of this paper, institutionalism is categorized as state-centric.

⁴²⁴ Oran Young, *supra* note 58 at 136. Mansbach, *Web of World Politics*, *supra* note 60 at 42 speak of a "complex conglomerate system". See also Richard W. Mansbach and John A. Vasquez, *In Search of Theory. A New Paradigm for Global Politics* (New York: Columbia University Press, 1981), at 158 et seq.

⁴²⁵ Oran Young, *ibid.*

⁴²⁶ Oran Young, *ibid.* Mansbach, *Web of World Politics*, *supra* note 60 at 42 detects alliances of various actors with complementary objectives, lacking forma structure, and being flexible and ideologically diffuse. Similarly,

relationships."⁴²⁷ Endorsing this insight, liberal international theory suggests a normative framework for an international system of multiple actor categories. To quote once more Anne Marie Burley:⁴²⁸

And above all, they [i.e. international relations scholars and international lawyers] will want a theoretical framework that takes account of increasing evidence of the importance and impact of so many factors excluded from the reigning model: *individuals, corporations, nongovernmental organizations of every stripe*, political and economic ideology, ideas, interests, identities and interdependence.

4.2.1 A Liberal Conception of International and WTO Law

Under a liberal paradigm, public international law is bound to undergo fundamental conceptual changes. At present, public international law is essentially the law of nations and *by* nations⁴²⁹. That is, as States are the original source of public international law, there is little doubt that they can extend its application to "any entity they see fit to admit to the realm of the international legal system"⁴³⁰ or to secure "to individuals and international public bodies access to international courts and tribunals"⁴³¹. Thus, it is already within the scope of public international law to recognize new categories of actors as its subjects. The introduction of private participation in WTO dispute settlement could therefore be understood as a function of State

although from a power-oriented viewpoint: Seyom Brown, *New Forces, Old Forces and the Future of World Politics*. Post-Cold War Edition (New York: Harper Collins, 1995) at 140.

⁴²⁷ Oran Young, *ibid.*

⁴²⁸ Slaughter, *Dual Agenda*, *supra* note 51 at 227 [emphasis added].

⁴²⁹ Compare *supra* notes 93 et seq. as well as accompanying text.

⁴³⁰ Georg Schwarzenberger, *International Law. Volume 1* (London: Stevens & Sons Limited, 1945) at 62.

⁴³¹ So in the classic article on the subject by Hans Lauterpacht, "The Subjects of the Law of Nations", Part I: (1967) 63 *The Law Quarterly Review* 438, Part II: (1968) 64 *The Law Quarterly Review* 97; at 451; see also at 112 [hereinafter: Lauterpacht]. This view is generally accepted legal doctrine today; see Albrecht Randelzhofer, "The Legal Position of the Individual under Present International Law" in Albrecht Randelzhofer and Christian Tomuschat, eds., *State Responsibility and the Individual. Reparations in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 231 at 232 [hereinafter: Randelzhofer].

authority to create new international legal rules. But such legal subjecthood is merely derivative; States may change the conditions of its existence or revoke it completely at any time in accordance with the procedural requirements set forth in public international law⁴³². Philip Jessup wrote on this matter⁴³³:

It is true to say that states themselves operate by virtue of the will of individuals and that the individual is thus the ultimate source of authority. Yet, so firmly rooted is the international state system that we are accustomed to think in terms of the state itself as the ultimate authority and sole actor.

A liberal conception of international law, however, turns this state-centric doctrine on its head. Based on the first liberal assumption, which recognizes individuals as the primary actors of international relations, it establishes the individual not only as the *ultimate*⁴³⁴, but also as the *original* subject of international law⁴³⁵. Instead of repeating the standard mantra found in almost every introductory treatise to public international law that its purpose is to enhance the welfare of individuals, liberal international lawyers rebuild the international legal framework with the individual as its foundation. Like domestic law, international law is derived from the individual, and it gains its legitimacy from protecting the rights and interests of individuals rather than those of their States⁴³⁶. The normative commitment of liberal international law to the individual does

⁴³² Randelzhofer, *ibid.* at 242 concludes: "The role of the individual in public international law has not changed in substance. Whether and to what extent the individual is a subject of international law still depends on the corresponding will of States.

⁴³³ Jessup, *supra* note 6 at 18.

⁴³⁴ Compare the quotation from Wolfgang Friedmann, *supra* note 99 and accompanying text.

⁴³⁵ See Shell, *Trade Legalism*, *supra* note 11 at 837 and 877-8.

⁴³⁶ Ernst-Ulrich Petersmann, "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction" in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997) 3 at 8 [hereinafter: Petersmann, *International Trade Law*]; Fernando R. Tesón, "The Kantian Theory of International Law" (1992) 92 *Columbia Law Review* 53 at 54 [hereinafter: Tesón, *Kantian Theory*]; and Fernando R. Tesón, *A Philosophy of International Law* (Boulder: Westview Press, 1998) at 1, 3 [Tesón, *Philosophy*]. Developing Kant's treatise *Zum Ewigen Frieden*

not denote a fall for "the alluring simplicity of formulas designed simply to privilege the individual against the state"⁴³⁷. On the contrary, liberal theory of international law respects the State as the most powerful and most comprehensive form of individual organization, and as the main collective actor in the international legal sphere. But the individual as the original subject of international law is endowed with inalienable rights and freedoms. In other words, these individual and participatory rights place the protection of individual freedom and autonomy beyond the grasp of States and permeate all international legal regimes.

However, a liberal reform of international law may not rest with the recognition of individuals as (the primary) subjects of international law. Hans Lauterpacht reminds us of the fine distinction between subjecthood international law and the procedural capacity to enforce their rights as international legal actors⁴³⁸:

(On Perpetual Peace) Tesón takes the conception of liberal international law to its logical conclusion: "Respect for states is merely the derivative of respect for persons. In this way, the notion of state sovereignty is redefined: the sovereignty of the state is dependent upon the state's domestic legitimacy; and therefore the principles of international justice must be congruent with the principles of internal justice (Tesón, *Kantian Theory*, *ibid.*) As a consequence of his stringent monism, Tesón limits membership in the international community to liberal States, characterized by democratic governance and respect for individual rights (*Ibid.* at 101; and Tesón, *Philosophy*, at 2). Although other liberal scholars also develop hypothetical models of an international law for liberal States, but they also warn of the present dangers inherent to a distinction along the lines suggested by Tesón. Thus, Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 *European Journal of International Law* 503 at 506 [hereinafter: Slaughter, *International Law*] warns for the present: "The very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall 19th century distinctions between 'civilized' and 'uncivilized' States, rewrapped in the rhetoric of Western political values and institutions. Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal/non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern a world of liberal and non-liberal States. Exclusionary norms are unlikely to be effective in regulating that world." Compare also Anne-Marie Burley, "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine" (1992) 92 *Columbia Law Review* 1907 at 1914-27, with an emphasis on "transnational legal relations", defined "to include relations among individuals across borders and between individuals and foreign states" (at 1916-7).

⁴³⁷ Anne-Marie Burley, "Towards an Age of Liberal Nations" (1992) 33 *Harvard International Law Journal* 393 at 405.

⁴³⁸ Lauterpacht, *supra* note 431 at 455; Randelzhofer, *supra* note 431 at 234 stresses the same point.

The existence of a right and the power to assert it by judicial process are not identical. In the municipal sphere there are persons, such as minors and lunatics, who though endowed with rights are unable to assert them by their own action. If States were to declare, solemnly and without equivocation, that they recognise certain inalienable rights of the individual - as they have done to some extent in the Charter of the United Nations - that declaration would amount to constituting individuals subjects of international law even if it were not accompanied by a concession to individuals of the faculty of independent action to enforce these rights.

A right without a remedy is an imperfect and an ineffective right⁴³⁹. Even if States continue as international agents for individual claims, it meant the continued mediation of individuals in the enforcement of their newly found substantive international rights. The latter should therefore be backed by a right of access to international judicial remedies.

What is more, during the last 150 years, public international law has been changing its character from a set of rules ordering intergovernmental relationships to a legal system addressing problems of modern international interdependences across borders. The multiplication of specialized legal regimes and IGOs exhibits the increasing global interaction of non-governmental actors in all aspects of life, and the need for international minimum standards. The more substantive rule-making and enforcement in areas of originally purely domestic import is transferred to the international realm, the more urgent becomes the liberal call to bind international regimes to standards of individual rights and autonomy, as well as democratic participation.

⁴³⁹ See for example the *Golder Case*, European Court of Human Rights, 21 February 1975, 57 *International Law Reports* 201 at 217-8: "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice." See also Schneider, *supra* note 393 at 600.

Thus, with regard to the WTO multilateral trading system, several commentators have argued that not only does it have a direct effect - in a non-technical sense - on individuals, and that individuals are the ultimate beneficiaries, but that the existence of the WTO is recognition of the importance of international trade *conducted by private parties*⁴⁴⁰. From a liberal perspective it appears contradictory to grant to States the fundamental rights of the world trading system like equal access and national treatment. Instead, these and other substantive rights should be located at the individual level, and should be protected by a right of both passive and active participation in the WTO dispute settlement and rule-enforcement mechanisms.

4.2.2 Democratizing WTO Dispute Resolution through Private Participation

Although the proliferation of democratic processes and structures at the international level is one of the central tenets of liberal international law⁴⁴¹ only a few commentators have explicitly established a link between liberalism and democracy in the WTO context⁴⁴². But democratic reforms of the world trading system, or the recognition of a "democratic right of citizens to have knowledge of and participate in decisions that will affect their interests"⁴⁴³ are fundamental objectives of trade stakeholder models⁴⁴⁴. Setting aside the many diverging conceptions of governance by the people⁴⁴⁵, proponents of the democratization of the WTO agree on the need to

⁴⁴⁰ Mora, *supra* note 9 at 162; Lukas, *supra* note 15 at 197; Schleyer, *supra* note 15 at 2293.

⁴⁴¹ See *supra* notes 41 et seq. as well as accompanying text.

⁴⁴² Shell, *Trade Legalism*, *supra* note 11 at 837; Schneider, *supra* note 393 at 591-3.

⁴⁴³ Housman, *supra* note 14 at 703.

⁴⁴⁴ For example; Charnovitz, *supra* note 14 at 342; Housman, *ibid.* at 710-1.

⁴⁴⁵ See David Held, *Democracy and the Global Order* (Stanford: Stanford University Press, 1995) at 11-6, who discerns three main branches of participatory, representative, and one-party democracy. He also provides a model of democratic cosmopolitan governance at the international level.

increase the transparency of WTO rule- and policy-making as well as dispute resolution, and greater direct representation and participation of civil society in these processes⁴⁴⁶.

As in the case of inalienable individual rights, calls for democratization build on the observation that growing international cooperation and progressive formation of international legal standards have transferred originally domestic powers to the international realm. Thus, within its scope of application the WTO harnesses national law- and policy-making, at least for the duration of a State's membership. During the last 50 years the world trading system has expanded from trade in goods, to services, intellectual property protection and certain investment measures, and is likely to extend its scope in future rounds of trade negotiations⁴⁴⁷. In addition, the present focus of WTO law on the removal of trade barriers - the reciprocal perspective of the WTO legal system⁴⁴⁸ - entails that any and every domestic measure pursuing trade or non-trade objectives may be scrutinized and may be deemed illegal by a WTO ruling for its violation of obligations under WTO law.

This foreclosure of various regulatory and administrative tools may not only be aggravated by an extension of the world trading system, it may also entail that governments feel increasingly incapable of fulfilling their popular mandate to provide common goods like health care,

⁴⁴⁶ See Schneider, *supra* note 393 at 589 footnote 5, defining democracy as referring to "representative and participatory aspects of international organization"; Housman, *supra* note 14 at 703 and note 15, noting that the right to participate is located at the individual level.

⁴⁴⁷ Although the Third Ministerial Conference in Seattle, WA, could not agree on an agenda, a new round of trade negotiations could expand the world trading system to the following areas: investment, competition, government procurement, intellectual property, electronic commerce, non-agricultural products, subsidies, state-trading enterprises and regional trade agreements; see Heather Scoffield, "WTO to Order Dropping of Tariff Barriers with Poor Nations" *The Globe and Mail*, October 13, 1999, B1 at B25.

⁴⁴⁸ Compare See *supra* Section 1.3.2.2.

education or environmental protection⁴⁴⁹. As the power of the people to address social issues through domestic processes and institutions seems to diminish, this loss should be compensated by the evolution of democratic structures within the emerging structures of international governance.

With regard to the formation of WTO law and policies, the answer given by the proponents of democratization is twofold: on the one hand, a "modern conception of the liberal trading system recognizes that attaining progressive social goals may take precedence over the free movement of goods and services"⁴⁵⁰; on the other hand, the WTO is in need of more direct representation of civil society⁴⁵¹. Steve Charnovitz contends that the democratization of the WTO may also remedy inherent weaknesses of domestic systems of democratic representation⁴⁵². He believes

⁴⁴⁹ Naomi Roht-Arraza, "Precaution, Participation, and the 'Greening' of International Trade Law" (1992) 7 *Journal of Environmental and Litigation* 57 at 95 [hereinafter: Roht-Arraza]. (The inclusion of health, environmental, and similar issues within the purview of GATT dispute resolution raises serious questions of public accountability and institutional consequence."). See for example Heather Scoffield, "Trade Deal Seen Hurting Health System" *The Globe and Mail*, October 29, 1999, B7.

⁴⁵⁰ Frederick M. Abbott, "Trade and Democratic Values" (1992) 1 *Minnesota Journal of Global Trade* 9 at 34. See also Shell, Trade Legalism, supra note 11 at 913.

⁴⁵¹ Schneider, supra note 393 at 591-3 illustrates the 'democracy deficit' argument by the debates surrounding reforms of the EC institutions, particularly by extending the competences of the EC parliament. With regard to the WTO, see also Charnovitz, supra note 14 at 340 et seq.; Housman, supra note 14 at 743-4.

⁴⁵² Charnovitz, supra note 14 at 342. On a similar note, *ibid.* at 352 he suggests with regard to NGOs that truly transnational non-governmental actors, who do not form allegiances with any particular WTO Members as their nationals, cannot rely on their protection through the WTO dispute resolution mechanism. As a consequence they would be defenceless against violations of WTO law affecting their interest, and need direct access to the WTO dispute settlement system. (For the same argument from the perspective of transnational service providers, see Stahl, supra note 392 at 439-40.) This argument, however, seems to be flawed. Legally, "truly transnational" actors are still a vision of the future. Whether TNCs or NGOs, both organizational forms still rely on national law to obtain legal personality. Instead of having only one national base, they even have multiple points of legal contact. Every national sub-organization, every subsidiary could attempt to win the support of its home state. The head organizations themselves may be powerful domestic actors in the countries of their seat. As there exists no international legal obligation of States to represent the interests of their nationals (including legal persons), and due to the lack of other alternatives international TNCs and NGOs will have to use informal channels of influence - and do so - in the same way as solely national actors do (This strategy to seek the widest possible diplomatic protection is already applied by a variety of international actors; see for example the case of French import restrictions on US-manufactured Honda cars described by Brand, GATT supra not 39 at 136). A "truly transnational" non-governmental actor will not come into existence until its recognition as a legal actor is founded on international law alone.

that governments often fail to represent the interests of even a majority of their constituencies⁴⁵³. For one part, domestic political processes may be captured by influential interest groups, so that extension of standing in WTO policy formation and dispute resolution involving various groups and non-trade interests in civil society would provide an alternative avenue to ensure adequate representation of domestically marginalized concerns, but⁴⁵⁴:

The case for policymaking participation of national NGOs in international organizations is not premised on the incompetence of national governments to balance domestic interests. It may be that governments do the best possible job of balancing conflicting interests. Instead, the contention is that international organizations will perform more effectively if they have the input of interest groups. The *exact* same argument justifies NGO involvement in domestic rulemaking. Why should NGOs be involved in the creation of national, but not of international law?

Steve Charnovitz's argument forms part of an intensive debate between him and Richard Shell on the one side and Phillip M. Nichols on the other. It was kindled by Professor Shell's trade stakeholder model as the touchstone for WTO reforms⁴⁵⁵. Professor Nichols - drawing on the work of scholars like Robert Dahl, and Daniel Verdier - has raised an important question with regard to any attempt to democratize the WTO: Could the WTO better ensure an accurate

⁴⁵³ Charnovitz, *supra* note 14 at 342.

⁴⁵⁴ *Ibid.* (footnotes omitted). Compare also Jeffrey Atik, "Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade" (1998) 19 *University of Pennsylvania Journal of International Economic Law* 229, particularly at 259 et seq.

⁴⁵⁵ The debate includes the following articles in chronological order: G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 *Duke Law Journal* 829; Philip M. Nichols, "Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 295; Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 331; G. Richard Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 359; Philip N. Nichols, "Realism, Liberalism, Values, and the World Trade Organization" (1996) 17 *University of Pennsylvania Journal of International Economic Law* 851 [hereinafter: Nichols, Realism].

representation of private interests than presently achieved through national governments⁴⁵⁶? The theoretical and practical difficulties of democratic participation in the formulation of WTO law and policies are manifold and await solution in the future⁴⁵⁷; however, they lie beyond the scope of this paper.

Andrea Schneider has pointed out that the state of democratization of international trade organizations should be evaluated not only based on the representation of civil society in legislative processes⁴⁵⁸. It is equally important to "examine who has the power to compel judicial change"⁴⁵⁹. And even more fundamentally, the democratic rights of citizens also include an effective mechanism to review and enforce compliance with a legal regime (national or international) that they have created either directly or by giving a mandate to their elected representatives - at least to the extent that they are directly affected. With respect to WTO dispute settlement, the solution is therefore (passive and active) private participation of all individuals or groups with a stake in the world trading system. In comparison to participation in trade negotiations, the problems arising out of the democratization of the DSU, measured in terms of broader and equal access of civil society appear to be more technical than conceptual. As I have explained earlier, the extent of active participation⁴⁶⁰ is defined by the material scope and perspective of a dispute settlement mechanism, and thus by the substantive legal scope of the underlying legal regime. The selection of non-governmental international actors to participate in

⁴⁵⁶ Nichols, Extension, supra note 12 at 312.

⁴⁵⁷ As Nichols points out, the best answer to democratic governance at the WTO level seems to be found in representative forms democracy. These new democratic processes would have to take into account the existence of non-democratic countries, and they could equally be captured by influential or wealthy interest groups.

⁴⁵⁸ Schneider, supra note 393 at 593.

⁴⁵⁹ Ibid.

⁴⁶⁰ The aspect of passive participation is discussed under the heading of transparency, infra notes 466 et seq. as well as accompanying text.

WTO dispute settlement procedures therefore depends on whether or not their agendas overlap with the areas of law enshrined in the WTO agreements, and the translation of the latter into substantive legal rights for non-governmental actors. Correspondingly, the forms of participation would be circumscribed by the nature of these substantive rights. With the expansion of WTO law to new areas of trade and economics, or link issues such as trade and environment, labour, health, etc., the groups of actors eligible for active participation in WTO dispute settlement - or the range of rights of individuals protected by the WTO agreements - would grow proportionally⁴⁶¹. Within these limits, broad and equal participation of all non-governmental actors with a formally recognized stake in the world trading system then relies on the procedural mechanisms to be developed for this purpose.

In a series of critical remarks on private participation, Philip Nichols also drew attention to the sore spot of equal access to WTO dispute resolution⁴⁶². The resources, know-how, and time, necessary to bring a complaint to the WTO or participate in DSU proceedings suggest that only a small number of well-positioned and well-monied special interest groups or individuals would effectively have access to the dispute settlement process⁴⁶³. In response, Steve Charnovitz has argued that many smaller and developing countries face the same problem of disparate resources limiting their activities within the WTO to areas of special concern⁴⁶⁴. While this observation is true, it is not conducive to a solution of the problem. The argument seems to imply that

⁴⁶¹ The expansion would occur, for the time being, in the traditional form of treaty negotiations between governments, with the input of private actors at the national level.

⁴⁶² Nichols, Extension, supra note 12 at 318.

⁴⁶³ See also Schneider, supra note 393 at 621 and note 121, explaining that while private participation can overcome politically induced governmental inactivity, there exists a real danger that the international adjudicatory process in question is captured by special interest groups.

⁴⁶⁴ Charnovitz, supra note 14 at 343.

differences in resources between potential international actors does not support the conclusion that certain categories of actors should not participate in general; instead all who can participate should do so 'as much as they can'.

Understood in this way, Steve Charnovitz's point anticipates one possible solution to the problem. Individuals and domestic groups may form or join national or transnational head organizations, which they could enlist as counsels to represent their interests and cases in the WTO dispute settlement system. These new categories of non-governmental actors would provide individuals with a viable alternative to State representation and a *choice*, depending on whom they trust to adequately promote their interests. States would not vanish as complainants on behalf of interests of their nationals. Instead they would play an important role acting as agents for those individuals or groups that cannot or do not want to use their individual rights of participation, or to act through non-governmental organizations. Moreover, States would continue to file claims in those areas of WTO law not creating private rights for citizens⁴⁶⁵.

In short, the democratization of the WTO dispute settlement mechanism aims at a more direct, comprehensive and equal representation of societal interests at the international level. It envisions an effective mechanism to protect and enforce an international legal regime that has

⁴⁶⁵ Compare Lukas, *supra* note 15 at 203. Such an arrangement would also fulfill the requirements of a liberal theory of international law. While the emphasis lies on the individual and her decisions, States remain the most important collective actors at the international sphere, covering all those interests of individuals and sub-national groups, they cannot adequately represent themselves. Professor Nichols' critique of liberalism as being blind on one eye by "excluding nations as significant international actors" (Nichols, *Realism*, *supra* note at 877) thus does not hold good.

been sanctioned by political processes at the domestic level. The means to realize this standard of representation is private participation.

4.2.3 Transparency and Passive Participation

A second way to improve the democratic character and legitimacy of the WTO is to increase the transparency of its operations, and in particular of its dispute settlement system, and to create Robert Housman's "democratic right of citizens to have knowledge of [...] decisions that will affect their interests"⁴⁶⁶, a right to passive participation.

Within the legalist framework of WTO dispute resolution, the movement towards increased transparency - in the sense of improved accessibility for civil society analyzed in the previous chapter - adds an effective control mechanism to the existing checks and balances of the dispute settlement system⁴⁶⁷. But the process of rule confirmation through public application and enforcement also strengthens the general trust in the system.⁴⁶⁸ The presence of passive participation has an educational facet attempting to prevent and overcome mistrust and opposition in civil society. Improved understanding of the workings of the WTO in general and

⁴⁶⁶ Housman, *supra* note 14 at 703.

⁴⁶⁷ Compare Abbott, *Public Institution*, *supra* note 123 at 49; Shell, *Trade Stakeholders*, *supra* note 26 at 376.

⁴⁶⁸ Compare Robert E. Hudec, "'Transcending the Ostensible': Some Reflections on the Nature of Litigation between Governments", (1987) 72 *Minnesota Law Review* 211 at 211-2 commenting on the weaknesses of international litigation in comparison to domestic litigation and the continued attempts to improve procedures: ("The weaknesses of international litigation tend to be a constant source of concern. These weaknesses have political as well as practical significance, for they can have a fairly substantial impact on public confidence in the international institution in question and thus the political support that will exist for a government's policy of working through that institution.").

the dispute settlement mechanism in particular can lead to a wider acceptance of and identification with its activities and create popular support⁴⁶⁹. In the words of Robert Hudec:⁴⁷⁰

The existence of an international legal institution provides a focus for the continual education, expansion and refinement of domestic political forces who favor it and growing domestic political support in turn makes the institution more effective.

In addition, ensuring transparency through rights-based passive participation in WTO dispute resolution may influence individual opinion and ultimately change State preferences, extending the basis for international cooperation⁴⁷¹.

The strongest counter-argument against transparency, and a rights-based approach to passive participation, comes in the form of the doctrine of confidentiality enshrined in the DSU⁴⁷². In international conflict resolution, confidentiality is based on mutual agreement. Whether agreed upon *ad hoc* by the parties to a dispute or in advance as a governing principle of dispute resolution, confidentiality exists because it is sought after by the potential participants of a dispute as an essential element to support its resolution⁴⁷³. That is to say, the principal objective of confidentiality is to improve the effectiveness of dispute settlement.

⁴⁶⁹ Charnovitz, *supra* note 14 at 351; Jackson, *World Trade*, *supra* note 20 at 768; Schleyer, *supra* note 15 at 2294; Abbott, *Public Institution*, *supra* note 123 at 47.

⁴⁷⁰ Hudec, *Enforcing Trade Law*, *supra* note 156 at 359.

⁴⁷¹ Paraphrasing Schneider, *supra* note 393 at 629, liberalism assumes that passive participation, to an even wider extent than active participation, may affect how governments order preferences, and which segments of society are represented. Increased passive participation internationally would contribute to broaden the spectrum of society represented nationally.

⁴⁷² See *supra* notes 354 et seq. as well as accompanying text.

⁴⁷³ Merrills, *supra* note 275 at 70; Hendrik van der Merwe, "South African Initiatives: Contrasting Options in the Mediation Process" in *New Approaches to International Mediation*, C. R. Mitchel and K. Webb, eds., (New York: Greenwood Press, 1998) 180 at 189 [hereinafter: Merwe].

Confidentiality functions to protect the dispute settlement process from disruptive influences, whether direct or indirect. It serves to confine procedures to the contentious issues and to its immediate participants⁴⁷⁴. To be more precise, in the DSU context, the matter at dispute is a measure, or a number of measures, by a Member, which might impair the benefits accruing to another Member under the WTO agreements⁴⁷⁵. The immediate participants – depending on the dispute settlement techniques applied – are the parties to a dispute, interested Members, Third Parties, mediators, conciliators, arbitrators, panels, the SAB, expert review groups, the Secretariat⁴⁷⁶, the Secretary-General⁴⁷⁷, and also the DSB.

Accordingly, disturbances of the dispute settlement process can originate from non-party Members⁴⁷⁸, individuals or interest groups, but also from the participants themselves raising unrelated issues or by introducing an element of publicity to the process. Commentators agree that the intricate and complex nature of disputes, in particular in international trade, demands a calm, reasonable atmosphere for dispute resolution⁴⁷⁹. Public attention may seriously impair these conditions either by its mere existence or by provoking attempts to actively influence the stance taken by the parties to a dispute.

⁴⁷⁴ “Direct” is meant in the sense that they perform a procedural role in the dispute settlement process.

⁴⁷⁵ See paragraph 3 of Article 3 DSU.

⁴⁷⁶ Article 27 DSU, see also paragraph 6 of Article 8 DSU.

⁴⁷⁷ For example paragraph 6 of Article 5, or paragraph 7 of Article 8 DSU.

⁴⁷⁸ Generally, Fred C. Iklé, *How Nations Negotiate* (New York: Harper & Row Publishers, 1964) at 134-5 [hereinafter: Iklé].

⁴⁷⁹ Jean-Pierre Cot, *International Conciliation* (London: Europa Publications, 1971) at 159 [hereinafter: Cot]; Merrills, *supra* note 473 at 70; F. S. Northedge and M. D. Donelan, *International Disputes: The Political Aspects*, (The David Davies Memorial Institute of International Studies, London: Europa Publications, 1971) at 338 [hereinafter: Northedge/Donelan].

When confronted with publicity, States tend to evaluate each and every step they take, as well as the manner in which it is taken with a view to public reactions⁴⁸⁰. They might feel the need to constantly justify their moves and shrink away from following up all possible avenues of compromise; some concessions could be domestically unpopular and therefore politically inadvisable⁴⁸¹. Secondly, domestic constituencies, pressure groups, and lobbyists with an interest in the issue at dispute might try to influence their governments' positions in the settlement procedures⁴⁸². Numerous and diverse interests and opinions could enter the dispute resolution process which are to be accommodated by the parties. Conversely, parties to a dispute might feel inclined to doubt the motives and seriousness of an offer or statement, if it is made in the light of the public⁴⁸³.

Public awareness and media attention can also work as a magnifier for problems encountered in the process of dispute resolution⁴⁸⁴. Obstacles to compromise like misunderstandings, errors in judgment, and imprecise or inept phrasing of statements might be harmless in effect or easily correctable in a closed group. But where such disruptions arouse public feelings and shape public opinion, the issue may easily move beyond the control of the participants and produce serious repercussions for the dispute settlement process⁴⁸⁵.

⁴⁸⁰ Compare for consultations and ADR: Merrils, *supra* note 275 at 15; Northedge/Donelan, *ibid.* at 280.

⁴⁸¹ Cot, *supra* note 479 at 160; Iklé, *supra* note 478 at 134; Northedge/Donelan, *supra* note 479 at 338-9; H. G. Darwin, "Mediation and Good Offices" in *International Disputes: The Legal Aspects*, Humphrey Waldock, ed., (The David Davies Memorial Institute of International Studies, London: Europa Publications, 1972) 87 at 87 [hereinafter: Darwin, Mediation].

⁴⁸² Cot, *supra* note 479 at 159; Merrils, *supra* note 275 at 15, 70; Darwin, Mediation, *ibid.* at 87; Northedge/Donelan, *supra* note 479 at 280, 338.

⁴⁸³ Merrils, *ibid.*; Northedge/Donelan, *supra* note 479 at 280.

⁴⁸⁴ Iklé, *supra* note 478 at 133-4; Northedge/Donelan, *ibid.* at 338; see also Cot, *supra* note 479 at 166 – 168, for an example of the negative effects produced by an infringement of confidentiality and subsequent passive participation.

⁴⁸⁵ Merwe, *supra* note 473 at 190.

Confidentiality, on the other hand, serves to concentrate the attention of the participants on the controversial matters at hand. Within the confines of confidentiality parties are not only protected from outside interventions, they are also not tempted to regard publicity as an end in itself⁴⁸⁶. In general terms, dispute resolution becomes more attractive to States if their interests beyond the immediate subject matter of the dispute are protected. A party's readiness to discuss the issue at dispute frankly, without reservations, and in a broader context, depends on the trust it invests in the other side and in mediators, arbitrators, or panels to respect its wish to keep its positions and political objectives out of public view⁴⁸⁷.

A special manifestation of this concern, the danger of prejudgment, comes into play in dispute settlement systems composed of progressive stages of dispute resolution, as in the case of the DSU⁴⁸⁸. Consultations and ADR imply the possibility of failure. A mutually agreeable solution might not be negotiable between the parties under the given circumstances. Yet, these methods of dispute settlement are only fully effective, if the parties can follow up every conceived possibility of an agreement. This may necessitate the disclosure of information and material to

⁴⁸⁶ Cot, supra note 479 at 160; Iklé supra note 478 at 128. This is the case if a State considers the gains from propaganda activities and public self-representation higher than those from the actual resolution of the dispute. To a lesser degree, if public attention is not an option, a party to the dispute cannot utilise it to strengthen its negotiating position by causing public pressure on its opponent. In the context of mediation and conciliation, the issue is usually discussed in relation to moves by the impartial third party to go public. This usually happens to increase the willingness of the parties to compromise or to attract the attention of interested States or individuals who might be able to provide useful expertise and support to solve the dispute at hand. However, such a move bears the high risk of jeopardising the whole process, as the parties might find themselves not only in dispute with each other, but also with the impartial third party. For a more detailed discussion, see: Darwin, *Mediation*, supra note 481 at 87, and Merwe supra note 473 at 189.

⁴⁸⁷ Compare Cot, supra note 479 at 160, 162; Iklé, supra note 478 at 128; Merrills, supra note 473 at 15; Northedge/Donelan, supra note 125 at 280.

⁴⁸⁸ The dispute moves on from consultations and ADR to the quasi-adjudicatory panel stage. See supra note 62. Generally, *Handbook*, supra note 275 at para. 29; Cot, supra note 479 at 160.

the other side that is considered to be too sensitive for public debate. It may also lead to concessions, which could worsen the respective legal positions of the parties in subsequent proceedings if they become widely known. Specifically, the members of the neutral body that might have to decide the matter at dispute upon failure of consensual means of settlement shall not be influenced by any statement or concession made in previous attempts to resolve the conflict. For panels and the SAB, the DSU has codified this principle by combining two obligations: the confidentiality of consultations and ADR, and the provision that these forms of dispute resolution are “without prejudice to the rights of either party in any further proceedings under these procedures.”⁴⁸⁹

In dispute resolution mechanisms relying on decision-making by an impartial third party, the need for compromise, and as such the role of confidentiality, is generally diminished. A party’s unwillingness to support the resolution process can be countered by default procedural rules⁴⁹⁰, allowing for the unhindered progression of the proceedings. However, in the WTO dispute settlement system, the quasi-adjudicatory stage, not only functions to provide the DSB - through panel and SAB reports - with a factual and legal basis for its decisions on disputes. Rather, *panels* should give the parties “adequate opportunity to develop a mutually satisfactory solution”⁴⁹¹. And only “[w]here the parties have failed to develop a mutually satisfactory solution the panels shall submit its findings [...] to the DSB”⁴⁹². With respect to this strong consensual component, confidentiality creates the protection described above.

⁴⁸⁹ Paragraph 2 of Article 5, see also paragraph 6 of Article 4 DSU.

⁴⁹⁰ See for example paragraph 1 of Article 7 DSU.

⁴⁹¹ Article 11 DSU.

⁴⁹² Paragraph 7 of Article 12 DSU; see also Paragraph 7 of Article 3 DSU.

Moreover, the decision-making bodies have a vital interest in establishing their independence and impartiality in order to add moral authority to their rulings. The public debate of an ongoing dispute could involuntarily prejudge results or create the harmful impression that the adjudicatory body decides according to popular opinion and not in the light of the facts of the disputes and by adhering to the applicable rules. These fears are not unfounded in the context of the WTO: in 1997, the representative of Norway drew the attention of the DSB to the fact that “the leaking of panel and Appellate Body reports had become a rule rather than an exception”⁴⁹³, and that it:⁴⁹⁴

[W]ould not be unreasonable to expect these leaks might have a negative impact on the work of panels and the Appellate Body. Thus, it was possible that a panel, which adjusted its conclusions as a result of comments by parties at the interim review stage, might fear that these changes would be seen as responding, not to the comments of the parties but rather from external sources.

All things considered, the DSU and its predecessors, as dispute settlement systems between States, have evolved up to the present day in the search for more effective rules and techniques of conflict resolution. In its current form, passive participation is an instrument contributing to the effectiveness of the DSU by increasing rule-adherence and depoliticization. In the same way, the confidentiality of proceedings is a manifestation of the aim for more effective dispute settlement. The clash of passive participation and confidentiality therefore illustrates a conflict of means to a

⁴⁹³ Dispute Settlement Body “Minutes of Meeting. Held in the Centre William Rappard on 12 June 1997”, WTO Document WT/DSB/M/34, at 3.

⁴⁹⁴ Ibid. See also the warning of the Director-General in this context that “such premature disclosure caused two fundamental problems. First, they threatened the credibility and the image of the WTO as an institution and, second, they undermined the dispute settlement system.” General Council Annual Report (97), 8 May 1998, WTO-Document WT/GC/10/Add. 1, at 13. And Goldman, *supra* note 366 at 1286.

common overarching objective, the workability and effectiveness of the WTO dispute settlement system.

However, under a liberal conception of international law, a shift in perspective occurs, formally accepting passive participation in WTO dispute resolution as an end in itself. It would not only forward the democratization of the dispute settlement system, and increase its (systemic and empirical) legitimacy. It would also mean an essential step closer to a world trading system that reflects in its procedures a commitment to work first and foremost for the benefits of civil society. As an end, the degree of passive participation in the DSU will determine the effectiveness of the WTO dispute settlement system, and not vice versa. Confidentiality would not become obsolete, but it could not generally trump passive participation; its procedural role would have to be adapted to the new hierarchy of values suggested by a liberal international law.

4.2.4 Improving WTO-Legitimacy through Private Participation in the DSU

Arguments to democratize the world trading system and increase its transparency through private participation are closely connected and partly overlapping with submissions that extension of standing in the DSU to non-governmental actors would improve the legitimacy of the WTO as a whole. To assume a link between democratization, private participation and legitimacy presupposes a specific understanding of the latter concept. It is therefore necessary to first define the different meanings of legitimacy in order to evaluate their interrelation with private participation in WTO dispute settlement.

In this respect, Eric Orts has discerned three different "levels" or "dimensions" of legitimacy: "legal validity", "systemic legitimacy", and "empirical legitimacy"⁴⁹⁵. He defines the first level of legal validity as legitimacy "refer[ring] to whether specific actions or behaviors conform to the rules of a society"⁴⁹⁶. Applied to the WTO context, this form of legitimacy has an international and a domestic component. First, the organization is legitimate according to public international law if the international agreement establishing the WTO has been concluded in compliance with the applicable international legal rules. And second, legitimacy is extended to the national legal systems of its Members if they have ratified the WTO agreement following the procedures envisaged by the respective domestic laws. Given that these conditions are met, the introduction or denial of private participation could neither add to nor diminish the legitimacy of the World Trade Organization.

The next dimension, "systemic legitimacy" qualifies the use of power within a society⁴⁹⁷:

[L]egitimacy, as many contemporary social and political theorists use the term, refers to the extent to which 'power is acquired and exercised according to justifiable rules, and with evidence of consent.' Habermas refers to this kind of legitimacy when he speaks of the necessity of procedural rationality and democratic government.

This interpretation of legitimacy incorporates the cornerstones of a new theory of a liberal international law, and motivates proponents of the democratization of WTO dispute resolution to

⁴⁹⁵ Eric W. Orts, "Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas" (1993) 6 *Ratio Juris* 245 at 267 [hereinafter: Orts]; Orts draws on the work of David Beetham. Very similar, Schneider, *supra* note 393 at 589 note 5 defines legitimacy as a composite of "the lawfulness and appropriateness of [...] international organizations, as well as the perceived fairness and justice resulting from these agreements".

⁴⁹⁶ Orts, *ibid.*

⁴⁹⁷ *Ibid.*

argue that private participation, to the extent that it denotes an increase of democratic structures in the world trading system, improves its legitimacy⁴⁹⁸. A state-centric international organization would far less be able to meet the standards of rule-formation based on democratic principles and equal rights of participation than one that has internalized these elements of systemic legitimacy in the form of more direct representation⁴⁹⁹.

Commentators often do not explicitly distinguish systemic legitimacy from the final dimension of "empirical legitimacy". For Orts, this dimension of legitimacy means "the extent to which people in a society "believe" as an empirical matter, in the basic structure and organization of power in society"⁵⁰⁰. In other words, legitimacy is determined by looking at the support an international legal regime is able to generate in civil society. Specifically, the level of "popular" support for the WTO is dependent on the predominant societal notions of whether the issues within the scope of the organization should be dealt with at the international level, how the WTO should function, and who should participate in its activities, to give a few examples.

Obviously, the distinction between theoretical conceptions of governance and empirical support is made only implicitly by authors, living in societies that have adopted the standards of "systemic legitimacy" as societal values: Legitimacy in terms of civil society's support for and faith in the WTO depends on its meeting the standards set by the second dimension systemic legitimacy. For this reason, Richard Shell may safely claim that the exclusion from WTO processes of wide parts of society whose interests are affected by trade not only raises concerns

⁴⁹⁸ See for example Housman, *supra* note 14 at 710; Schneider, *supra* note 393 at 627-9.

⁴⁹⁹ Compare Orts, *supra* note 495 at 269-70.

⁵⁰⁰ *Ibid.* at 267.

of procedural justice, but will potentially alienate those whose interests are not given a voice in the international trading system⁵⁰¹.

Philip Nichols, however, expects the opposite to happen: private participation in the WTO dispute settlement mechanism would mobilize protectionists and other special interest supporters who fear to suffer from free trade, leading to potentially disastrous effects for the world trading system⁵⁰². He regards the state-centric nature of the WTO as a "buffer" ensuring that "bureaucrats are free to cooperate with other governments to maximize national and global welfare without the intrusion of special interests"⁵⁰³. Private participation would not only tear down the veil of governmental privacy, it would also create a Catch-22 situation with negative outcomes to free trade⁵⁰⁴:

Proceedings before dispute panels would present enticing avenues for blocking trade liberalization. Success before a panel could result in an immediate scaling back of trade liberalization, and thus would be worthy of special effort by a protectionist interest group. Even if protectionist groups were unsuccessful, however, the panel proceedings themselves would evoke the emotional commitment inherent in a trial. Whereas victories by special interest groups would immediately impede trade, losses might become rallying cries for later - and much more extensive damage to the international trading system.

Yet, it seems unlikely, that free-trade opponents would dominate private participation in WTO dispute resolution. Business interests that favour trade liberalization, consumer organizations,

⁵⁰¹ Shell, Trade Legalism, supra note 11 at 908. Compare also Amelia Porges, "The WTO and the New Dispute Settlement", (1994) *The American Society of International Law: Proceedings of the 88th Annual Meeting* 131 at 136.

⁵⁰² Nichols, Extension, supra note 12 at 314-5, and 320-1.

⁵⁰³ Ibid. at 320.

⁵⁰⁴ Ibid. at 321.

national and international NGOs promoting issues linked to trade, but not incompatible with it, would also make use of new rights of standing, and probably more than offset protectionist activities⁵⁰⁵. Moreover, using the WTO dispute settlement system, just as any other judicial system, means learning to understand its capabilities and limitations. Some cases may be won, and some may be lost. But if the dispute settlement process and the resulting decisions are perceived as fair, taking into account and balancing all relevant interests at stake, it will rally support in society and find people willing to cooperate and comply with panel or SAB rulings⁵⁰⁶. Meaningful, visible, and active participation in the WTO dispute settlement process of individuals or groups widely identified with these interests thus provides a response to the challenge of legitimacy⁵⁰⁷.

4.3 Private Participation Increases the Effectiveness of the World Trading System

Recasting WTO law and dispute resolution in a liberal mould also entails visible improvements in the effectiveness of the world trading system. However, the practical effects of private participation on monitoring, rule-clarification, compliance, enforcement, and depoliticization may persuade States to endorse formal extensions of private involvement in WTO dispute

⁵⁰⁵ See Shell, Trade Stakeholder, *supra* note 11 at 376-7, who also provides a convincing argument against protectionist capture of the WTO dispute settlement mechanism. In his opinion, protectionists have difficulties to gain support for their policy goals internationally, making them dependent on domestic political mechanisms. Moreover, with private participation in WTO dispute resolution it seems more realistic that laws and regulations in violation of WTO law that have been introduced under protectionist pressures will be identified and overturned.

⁵⁰⁶ Charnovitz, *supra* note 14 at 351; Schleyer, *supra* note 15 at 2293. Given that these interests are recognized in the substantive scope of WTO law.

⁵⁰⁷ Shell, Trade Legalism, *supra* note 11 at 910 note 361, concedes that NGO participation alone does not create legitimacy (or, for that matter, participation of economic actors). They all follow their specific agendas which may not be shared by civil society as a whole. But where some form of access to dispute resolution is guaranteed to all actors with a stake in the world trading system, the result would be perceived to come closer to an accurate representation than it exists at the present.

resolution without adopting the full canon of liberal international law. Indeed, the ICSID and hundreds of bilateral investment treaties seems to indicate that the attractiveness of benefits derived from international economic arrangements outweighs reservations - even of non-liberal countries - to agree to dispute settlement mechanisms involving civil society and private parties⁵⁰⁸.

To understand the contributions of private participation in dispute resolution to effectiveness of the world trading system, let us first recall the role of the DSU within the WTO framework. As set forth in Paragraph 2 of Article 3 DSU "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." The WTO relies on essentially legalist techniques to ensure these two goals, aiming at rule-clarity, consistency of rule-interpretation and application, particularly in a judicial context, and surveilling rule-adherence of its Members⁵⁰⁹. In comparison to the Trade Policy Review Mechanism, which takes a periodical and systematic look at the Members' records of compliance, the DSU is the one instrument readily available to immediately address violations of WTO agreements⁵¹⁰.

⁵⁰⁸ Compare Schneider, *supra* note 393 at 632-5. An example to the contrary is the conduct of France (no doubt, a liberal state) during the negotiations for a Multilateral Agreement on Investment between the OECD countries. France was unhappy with the direction in which the negotiations were heading and left the negotiating table, over concerns for its national sovereignty. See Nicola Liebert and Beate Willms. "Frankreich brems die Globalisierer." *TAZ* Nr. 5660 vom 15.10.1998, page 7; OECD. "Informal Consultations on International Investment." News Release, Paris: OECD, 3 December 1998.

⁵⁰⁹ See *supra* Section 3.4.

⁵¹⁰ Paragraph 2 goes on by stating: "Members recognize that it [the DSU] 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 public international law." This provision has lead some commentators to argue that the DSU is continuing along the old course of pragmatism, aiming only to protect or re-establish the balance of concessions enshrined in the WTO agreements (see *supra* note 127. Indeed, Members only feel the full force of the DSU, if benefits accruing to them under the WTO agreements are nullified or impaired, i.e., if the balance of concessions is disturbed (See paragraph 3 of Article 3 DSU, and also Article 26 DSU). Yet, these concessions have been cast into legal rules and obligations, some as general as the MFN or national treatment

Thus, rule-adherence is an important concern for the effectiveness of the world trading system. It is particularly important for those members of the business community - importers, exporters, service providers, and investors - operating by its rules on a day-to-day basis and relying on it for their economic decisions. Member violations of WTO law has an immediate, and usually negative impact on their activities, which are eventually passed on to consumers, and society as a whole⁵¹¹. Proponents of private participation therefore argue, that economic actors are in a superior position to evaluate the effects of violations of WTO law, and to decide whether or not to file a complaint under the WTO dispute resolution mechanisms⁵¹². In addition, their profit-orientation creates a continuous incentive to fight for the removal of trade barriers due to their adverse business effects⁵¹³.

But more potential claimants will not only increase the volume of complaints and eventually overall rule-adherence. As Meinhard Hilf has pointed out, they will multiply WTO case law, interpreting and clarifying existing rules, offering a better understanding of Member obligations and more detailed guidelines for Member policy-making. This, in turn, will improve the

rules, some as detailed and specific as the binding schedules of concessions. This is illustrated, for example, by the legal presumption in paragraph 8 of Article 3 DSU, according to which an infringement of obligations is "considered *prima facie* to constitute a breach of nullification or impairment".

⁵¹¹ Schleyer, *supra* note 15 at 2277, 2293; see also Lukas, *supra* note 15 at 197, and Schneider, *supra* note 393 at 629.

⁵¹² Schneider, *ibid.*

⁵¹³ Lukas, *supra* note 393 at 197. In this context, David A. Wirth: "Reexamining Decision-Making Processes in International Environmental Law (1994) 79 *Iowa Law Review* 769 at 790 [hereinafter: Wirth] also pointed at the efficiency gains achieved through private participation: "Limited participation by nonstate actors in appropriate cases could reduce the risk of subsequent duplicative proceedings involving private parties in municipal fora or international arbitral tribunals in which nonstate entities have standing." As an example for such duplications, see the Akzo-case, (*United States - Section 337 of the Tariff Act of 1930*, Panel Report of 23 November 1988, GATT, BISD 36th, 1990, 345); Brand, GATT *supra* note 39 at 134 et seq.

reliability of the world trading system as a framework for the decisions of private economic actors.⁵¹⁴

To rephrase the argument in a more general form, what separates private actors who have a stake in the legal system created by an international treaty from states is *determination* or "single-mindedness" in the pursuit of their various goals. They are in a position to concentrate their resources, including the legal means at their disposal on the protection and promotion of their interests in an international forum like the WTO. Private actors operate independently, directing their attention only to those state actions that are potentially harmful to the success of their undertakings. The cumulative effect of the sheer number of private actors is to create a *decentralized* monitoring network that encompasses virtually all activities of Members, *including those of their home States*.

In contrast, Members may not or not adequately pursue violations of WTO law. At least three reasons are conceivable for Member inactivity. First, a Member may have no knowledge of a violation of WTO obligations that negatively affects its nationals. It seems impossible to expect Members to keep track of the activities of 133 other countries or customs unions⁵¹⁵. Second, and related to the first reason, even if Members have knowledge of occurring violations they may lack the personnel, money, or other resources to fight against any more than major violations,

⁵¹⁴ Compare Hilf, supra note 8 at 320; see also Stahl, supra note 392 at 440. However, Trimble, supra note 128 at 1031 points at the danger that private actors in dealing with States may be "bought out" before the case is decided, thus removing the complainant without removing the violation of the world trading system. Similar compromises "beside the law" may also be found in a statist dispute settlement system. And although there will be no perfect protection against buy-outs, the sheer mass of potential claimants would hopefully make such a strategy too costly.

⁵¹⁵ Schneider, supra note 393 at 627.

which may cause extensive damages to their national economies⁵¹⁶. And third, governments may be unwilling for domestic or international political considerations to start an action against violations of WTO law.

Regarding the latter aspect, States have to bear in mind the effect of complaints on the diplomatic relations with their trading partners. Despite the legal emphasis of WTO dispute resolution, a dispute could cause political repercussions on the long-term relationship with the offending Member areas of cooperation or interaction beyond trade. Conceivable scenarios for politically motivated inactivity are as numerous as they are diverse⁵¹⁷: a complaint may appear inopportune because it negatively affects the reputation of one or all of the parties involved; a potential claimant may fear that its domestic regulatory regimes relating to the subject-matter of a dispute would not survive the scrutiny of a counter-claim⁵¹⁸; a Member may be bought off pursuing a claim by promises of favourable treatment in non-trade areas. Richard Shell also assumes that the "negative consensus" required preventing the adoption of panel or SAB rulings would make Members more prudent about carrying cases forward to the panel stage⁵¹⁹.

⁵¹⁶ Ibid. and Mora, *supra* note 9 at 161.

⁵¹⁷ Compare Shell, *Trade Legalism*, *supra* note 11 at 901; Schneider, *supra* note 393 at 628-9; Schleyer, *supra* note 15 at 2277.

⁵¹⁸ A similar constellation was the subject matter of the WTO disputes *Canada - Measures Affecting the Export of Civilian Aircraft*, Report of the Panel, 14 April 1999, WTO Document WT/DS/70/R; Report of the Appellate Body, 2 August 1999, WTO Document WT/DS/70/AB/R; and *Brazil - Export Financing Programme for Aircraft*, Report of the Panel, 14 April 1999, WTO Document WT/DS/46/R; Report of the Appellate Body, 2 August 1999, WTO Document WT/DS/46/AB/R, which saw Canada and Brazil embroiled in a battle about export subsidies given to their domestic aircraft builders (the Canadian Bombardier and the Brazilian Embraer; both companies compete in the market for regional aircraft). Brazil answered Canada's recourse to WTO dispute resolution for alleged violations of the Subsidies and Countervailing Measures Agreement (SCM) with a counter-claim under the same agreement. Both countries were found in violation of their obligations under the SCM, by the subsequent panel and appellate body reports.

⁵¹⁹ Shell, *Trade Legalism* *supra* note 11 at 901. Robert E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years" (1999) 8 *Minnesota Journal of Global Trade* 1 at 15 et seq., has analyzed the cases filed under the DSU from 1995 to May 1998 with regard to the identity of complainants and defendants and the frequency of panels and panel rulings. In comparison with the time period 1980-89, during

"Moreover, free rider problems are likely to plague enforcement, because all states will enjoy the benefits of litigation that eliminates trade barriers while the diplomatic costs of bringing any specific WTO complaint will fall on only a few states."⁵²⁰

In other words, Members would prefer to settle their disagreements before a decision -with its benefits of rule-clarification - is delivered through the panel process⁵²¹. Concerning domestic politics, Andrea Schneider has argued that government actions, to various degrees, are tied to well-organized special-interest groups that are able to capture political processes for their purposes, which are not necessarily reflective of society interests in general⁵²². As a consequence, they may press for cases to be pursued that favour their interests and to drop those damaging their positions.

which 53 % of all GATT cases entered into the panel stage, panels had been appointed in only 44 % of the complaints under the DSU (Professor Hudec allows for a variation of one or two per cent as some slow-moving cases may still reach the panel stage, *ibid.* at 25-6). He finds these results "somewhat surprising. One might have anticipated that, with the greater automaticity of the new WTO procedure, it would be easier for complaining governments to obtain the appointment of panels, and thus would see more rather than fewer panels being appointed." (*ibid.* at 26) In trying to explain this discrepancy, he submits two hypotheses: first, that Member compliance with WTO rules has increased under the impression of the stronger and more legalistic DSU procedures; or, second, that Members use complaints as a negotiating instruments, to exert additional pressure on their trading partners, yet without the intention of carrying the complaints any further (*ibid.*). Although it is still too early to predict, whether Richard Shell's fears will come true, the present situation indicates that they are not unfounded and demand further attention.

⁵²⁰ Shell, *ibid.* at 901-2. Hudec's analysis shows here, that in the 1980-94 period the United States (26%) and the European Communities (19%) accounted for 45 % of all complaints. This figure increased in the 1995-98 period to 54% (32% for the United States, and 22% for the E.C.); Hudec, *ibid.* at 22. With regard to the identity of the defendants, the United States (36%) and the E.C. (28%) combined accounted for 64% of all the cases between 1980 and 1994; while their share has shrunk to 41% under the DSU (United State: 21%, E.C.: 20% between 1994 and 1998); Hudec, *ibid.* at 24.

⁵²¹ Schneider, *supra* note 393 at 628-9.

⁵²² *Ibid.* at 595. Compare the assumptions of liberal international relations theory. Charnovitz, *supra* note 14 at 353, has pointed out a related aspect of government behaviour in the United States or similar systems of presidential democracy, namely willingness of governments to lose certain cases that attack pieces of domestic legislation, which do not conform with governmental policies. As a result of such tactics, the WTO becomes a scapegoat for the abolishment of laws and regulations that the government is unable to revoke or where it shies away from the political costs.

Private participation, on the other hand, promises a depoliticization of WTO disputes, domestically and internationally. With respect to the former, giving private actors standing to monitor compliance with the WTO agreements would reduce the role now played by States. With Members taking a backseat to private actors in policing the world trading system, the potential influence of domestic pressure groups would diminish proportionally, making way for a more even and coherent enforcement and application of WTO law.⁵²³ Internationally, private participation provides a personalized version of the legalist argument for a rule-based trading system: In general, non-governmental actors do not need to pay attention to the wide range of political issues that define interstate relations⁵²⁴. Just as legal provisions assist in isolating contentious elements of Member trade policies and in reducing disputes to sizable portions, which are resolved one by one, the involvement of a non-governmental actor as a party to a dispute strips its subject matter of the political baggage associated with State actors. they generally In addition, most conflicts would not have to rise to the highest echelons of government but could be resolved between the private parties and State agencies directly involved.

Opponents of private participation fear that it would complicate the political environment in the WTO by undermining the Member authority, and particularly by limiting their ability to negotiate new trade agreements with a unified voice⁵²⁵. Private parties arguing cases or fighting for the recognition of political goals that contradict their country's official positions would call

⁵²³ Ibid. at 595, footnote omitted.

⁵²⁴ Compare Jackson et al, *supra* note 39 at 209; Lukas *supra* note 15 at 203; Schleyer, *supra* note 15 at 2277. However, some of the more influential and continuously active non-governmental actors may face long-term political constraints similar to those of States in attaining their goals.

⁵²⁵ Nichols, Extension, *supra* note 12 at 317-8.

into question the presumed government mandate to represent all its people at the negotiating table⁵²⁶.

These fears invite two comments, one practical, the other procedural. The assumption that States could not discern official views of fellow Members and individual concerns - after having agreed to an extension of private standing - seems far-fetched⁵²⁷. It is based on the realist notion of States as opaque, hard-shelled units and ignores that for the last 40 years States had to operate in a more and more versatile community of international actors, as well as under the influence of a blurring political distinction of domestic and international. With regard to dispute resolution, private involvement will be limited in substance to submissions on trade or non-trade complaints and arguments covered by the scope and perspective of the DSU. Attempts to use cases for the judicial recognition of new issues as WTO law are blocked by the limited mandate of panels and the SAB to interpret and the provisions applicable to a dispute in accordance with customary rules of interpretation of public international law⁵²⁸.

A final point in favour of private participation relates to the improvement in quality of panel and SAB rulings. Private actors can contribute arguments, information and expertise that Members are unable or unwilling to submit⁵²⁹. Defending their individual interest beyond any political considerations, private parties are not only less reluctant than States to file complaints, they would also present arguments of law or fact that States may avoid for strategic considerations⁵³⁰.

⁵²⁶ Ibid.

⁵²⁷ Shell, Trade Stakeholder, supra note 26 at 374.

⁵²⁸ Paragraph 2 of Article 3 DSU.

⁵²⁹ Compare Heather Scoffield "U.S. assails Canada over Secrecy" *The Globe and Mail*, May 29, 1999, B2.

⁵³⁰ See Schleyer, supra note 15 at 2294.

While a complainant affected by a Member's trade policies can give a first-hand account of the direct effects of measures under judicial scrutiny; business organizations could provide data on the economic consequences of the measure; interest groups may provide expertise on trade influence on link issues⁵³¹. An extension of standing would therefore turn the DSU into a forum for *direct* interaction between the parties closest to the subject matter of disputes and provide panels and the SAB with the most efficient access to all information necessary for their settlement. An extension of standing thus entrenches that panel and SAB decisions are made on the basis of all information available and necessary for an adequate settlement of disputes.

So far, any traditional, state-centered approach of monitoring and enforcing international rule compliance has been incapable of producing a system of comparable coverage, density, penetration and efficiency, tapping a vast pool of resources "just-in-time" to discover and address possible violations of international obligations. By empowering private parties to take actions individually and independently from their home States, time each of them is inadvertently set to watch Member compliance with WTO law on behalf of the organization and all other Members. Like Argus, the hundred-eyed guardian of Io in ancient Greek mythology, private actors will be watchful in all directions and will never sleep.

4.4 Conclusions

A liberal conception of international law would recognize the individual not only as the ultimate beneficiary but also as the principal normative unit of international law. It would establish

⁵³¹ Lukas, *supra* note 15 at 202; Charnovitz, *supra* note 14 at 351. See also Roht-Arraza, *supra* note 449 at 95, see also Wirth, *supra* note 513 at 790. The importance contributions of non-state actors to the quality of decisions is indirectly acknowledged in Article 13 DSU - Right to Seek Information.

inalienable individual rights and rights of democratic participation at the international level, and arm these rights with effective judicial protection. Within the scope of the WTO non-governmental actors would gain substantive rights, protected by active and passive private participation within the framework of its dispute settlement system. But private participation, by providing new means of democratic discourse and control, as well as by increasing the transparency of decision-making will also improve the legitimacy of the WTO measured by liberal standards.

Particularly from a democratic perspective, the introduction of private participation in dispute settlement (and beyond) will not be the end of the story. As indicated in trade stakeholder models, the WTO will have to become more responsive to link issues not only on a policy level, but also in the form of substantive legal provisions⁵³². Whether the WTO will extend its present reciprocal perspective, or whether it will eventually take an integrated approach to trade and its link issues remains to be seen. The liberal model of private participation, however, creates a flexible template that will accommodate the expansion of WTO law to new issues and the inclusion of new categories of non-governmental actors. It will require an extensive revision of the foundations of international and WTO law, but it will provide in return a more accepted, more effective and more stable world trading system.

⁵³² See for example the Recommendations in House of Commons, Canada, *Canada and the Future of the World Trade Organization: Advancing a Millenium Agenda in the Public Interest*, Report of the Standing Committee on Foreign Affairs and International Trade, June 1999 (Ottawa: Public Works and Government Services Canada - Publishing, 1999), Rec-8 - Rec-10, Recommendations 35 - 40.

Incorporating liberal values into the WTO may reach beyond the international realm into the spheres of domestic law, spread acceptance and support for international standards of individual and participatory rights, and call into question the rightfulness of non-liberal governments:

If international guarantees of freedom and non-discrimination, such as those in the worldwide GATT rules are construed as rights of citizens, they can serve "constitutional functions" for the limitation of abuses of foreign policy powers and for the protection of individual liberty and legal equality also *within* countries.⁵³³

With this prospect in mind, it is not surprising that international regimes, incorporating elements of the liberal agenda like private participation and democratic structures, are successful primarily between liberal States: the European Convention on Human Rights, NAFTA Chapter 11, MERCOSUR⁵³⁴, the Nordic Convention⁵³⁵ and particularly the European Communities. Nor is it unexpected that liberal reforms of public international law will meet considerable resistance, particularly from non-liberal States. At present, a reform of the multilateral trading system based on liberal principles of international law, including the introduction of private rights and remedies to the WTO dispute settlement process needs the consent of all Members in accordance with the amendment procedures in the WTO Agreement and customary rules of international law. The road towards these changes will be long, arduous, and full of backlashes and failures,

⁵³³ Petersmann, *International Trade Law*, supra note 436 at 8. Petersmann intensively studied the constitutional functions of international economic regimes in his Habilitationsschrift: Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Laws and Foreign Trade Policy in the United States, the European Community and Switzerland* (Fribourg: University Press, 1991). See also Ernst-Ulrich Petersmann, "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?" (1998) 20 *Michigan Journal of International Law* 1.

⁵³⁴ *El Mercado Común del Sur* [Treaty Establishing a Common Market, 26. March 1991 (Argentina, Brazil, Paraguay, Uruguay)], (1991) 30 I.L.M. 1041. The MERCOSUR dispute-settlement system is part of the Brazilia Protocol, 17. December 1991.

⁵³⁵ *Convention on the Protection of the Environment*, 19 February, 1974, U.N.T.S. vol. 1092 No. 16770 (Nordic Convention).

as the recent Third Ministerial Conference in Seattle has vividly displayed⁵³⁶. Ernst-Ulrich Petersmann thus observes⁵³⁷:

The focus of WTO Member governments on their own prerogatives, and their fear of limiting their trade policy discretion through direct citizen rights, illustrate how far away international and domestic trade law are from the Kantian ideal of international and domestic guarantees of freedom and non-discrimination enabling the greatest possible individual liberty, legal equality and citizens' participation in the democratic exercise of government powers.

But *de lege ferenda* it should not be forgotten that the WTO by subscribing to the principles of free trade and economic liberalism, is itself an international organization founded on liberal international theory. The fathers of free trade, Adam Smith, David Ricardo, John Stuart Mills, and others after them fought for the removal of trade barriers not as an end in itself, but as means to raise individual and national welfare and to promote international peace⁵³⁸. The WTO remains dedicated to these fundamental goals⁵³⁹, values that are shared by the world's most important trading nations⁵⁴⁰. Considering the progress made from the early days of the GATT to the WTO at the eve of the Millenium Round⁵⁴¹, in terms of the liberalization and the legalization⁵⁴² of

⁵³⁶ Heather Scoffield, "Delegations Pick up Pieces after Failure in Seattle" *The Globe and Mail*, December 6, 1999 at A8.

⁵³⁷ Petersmann, *International Trade Law*, supra note 436 at 10.

⁵³⁸ See Doyle, supra note 394 at 230 et seq., who calls this strand of international liberalism, concentrating on trade liberalization as a means to promote liberal goals, "commercial pacifism".

⁵³⁹ Compare supra notes 191 et seq. as well as accompanying text.

⁵⁴⁰ Although the weight of liberal in comparison to non-liberal trading nations is to change considerably with the accession of the People's Republic of China to the WTO: Miro Cernetig, "Trade Deal Opens China to the World" *Globe and Mail*, November 16, 1999 at A1. However, the article stresses as well expectations by government officials and human rights watchdogs that WTO membership "could increase pressure for greater openness, more press freedom, enhanced rights for workers and an independent judiciary", at A13.

⁵⁴¹ Despite the failure of the Third Ministerial Conference in Seattle to agree on an agenda for the next Round of Multilateral Trade Negotiations, it will only be a matter of time before the so-called Millenium Round gets underway.

⁵⁴² The GATT/DSU's continuing evolution towards a legalist dispute settlement system is congruent with the liberal demand for the rule of law in international relations.

international trade, the time is coming for the introduction of another set of liberal values: the legal recognition of the individual as the subject of the world trading system, and its reflection in a right to private participation.

CHAPTER 5

FORMS OF CHANGE: SUGGESTIONS FOR THE IMPLEMENTATION OF PRIVATE PARTICIPATION

5.1 Introduction

In the preceding chapter, I have introduced a liberal vision of international law, the world trading system and specifically WTO dispute settlement. The recognition of individuals as the principal subjects of international law signifies an opening of the WTO and other international regimes to the panoply of private international actors identified in Chapter 1. After having endorsed legalism as the principled approach to dispute resolution, new forms of private involvement in WTO dispute resolution and beyond would spring from accepting the remaining liberal principles of individual rights and the democratic right to participate and to be informed. Particularly the latter provides the foundation for rights-based forms of passive participation in dispute settlement under the DSU; it would be addressed in the first part of this chapter.

In the second part, I will then proceed to consider active private participation. From the reciprocal perspective WTO law and dispute settlement, which formally recognizes the relationship between the multilateral trading system and various link issues, it is possible to derive a template for active private involvement in dispute settlement. It would introduce full standing and *amicus curiae* status for private actors with a stake in the world trading system. In developing this template, I will draw from examples of dispute resolution mechanisms with

elements of active private participation in other, predominantly international economic regimes, like ICSID, NAFTA Chapter Eleven, or the OECD draft for a Multilateral Agreement on Investment.

With this chapter, I do not intend to develop a complete, comprehensive, or flawless solution to the practical problems surrounding private participation in WTO dispute settlement. Rather, I try to catch a glimpse of conflict resolution in a future, truly liberal world trading system, and to suggest possible mechanisms of its realization.

5.2 Passive Participation

Argued from the viewpoint of liberal international law, passive private participation not only means that any given part of civil society must have access at any given time, at any given place to any relevant information about WTO disputes, their legal and factual background, as well as related WTO activities. Based on the assumption of a democratic right to participate passively in international processes, which may affect their interests, would be established as an enforceable right extended to all natural and legal persons who are nationals of WTO Members. In substance, modifications to the current dispute settlement mechanism should occur in three key areas:

- Documents related to dispute settlement should be generally unrestricted and published on the Internet or in other accessible forms. They should be made available in a timely manner, preferably when they are circulated⁵⁴³.

⁵⁴³ Compare the reform proposals of Canada, the United States and the European Communities for the derestriction of WTO documents: "Transparency in WTO Work. Procedures for the Circulation and Derestriction of WTO

- Civil society could be granted general access to dispute settlement proceedings, in particular panel and SAB hearings⁵⁴⁴.
- Information flow to civil society could be enhanced by supporting the work of the media through regular and timely updates on all dispute settlement activities, progress reports on disputes, the release of background information, and by allowing media coverage.

While the first two are fundamental for passive participation, the third would provide an improvement of its effectiveness and could be protected by specific rights of the press⁵⁴⁵. A right of access to dispute settlement proceedings and to documents would be restricted only under exceptional circumstances such as reasons of national security, the protection of proprietary information⁵⁴⁶, or certain stages of dispute settlement. In weighing these legitimate interests of parties to a dispute against the importance of a right passive participation, the confidentiality of proceedings and documents should be limited to extent necessary. Taking into account the differing character of dispute settlement procedures created by the DSU, the degree of passive participation may thus vary.

Documents. – Proposal by the United States”, 14 July 1998, WTO-Documents WT/GC/W/88; “Transparency and Derestriction. Communication from Canada”, 22 September 1998, WTO-Documents WT/GC/W/98; “Transparency in WTO Work. Procedures for the Circulation and Derestriction of WTO Documents. Revised Proposals by the United States and Canada”, 14 October 1998, WTO-Documents WT/GC/W/106; WTO, “Improving the Transparency of WTO Operations. Communication from the European Communities.” 15 July 1998. WTO Document: WT/GC/W/92 at 6-7.

⁵⁴⁴ Shell, Trade Legalism, *supra* note 11 at 836, note 28 – referring to statements of the former U.S. Trade Representative, Mickey Cantor; Housman, *supra* note 14 at 744-5.

⁵⁴⁵ The same principles could be implemented with regard to aspects of the world trading system beyond dispute settlement. Just as the present Derestriction Procedures already documents originating from all WTO bodies, changes in private access should be extended step by step to all documents, all meetings of WTO organs, and eventually even to new trade negotiations in the WTO forum.

⁵⁴⁶ Compare Housman, *supra* note 14 at 745, addressing in particular party brief submitted to panels.

5.2.1 Consultations and ADR

For consultations and ADR, confidentiality – and conversely, the absence of passive participation – creates an atmosphere favourable for compromise and prevents prejudgements of any subsequent dispute settlement efforts⁵⁴⁷. To some extent, the DSU already compensates for the lack of transparency of consultations and ADR by the rules on notification of requests for consultations and solutions agreed upon by the parties. Yet, these rules address rights and obligations between the parties to a dispute on the one side, and the remaining Members – joined in the DSB – on the other. To overcome strictly intergovernmental character of the WTO, the existing rules should be supplemented by an obligation in the DSU to make publicly available all notifications to the DSB concerning the beginning of consultations or ADR or their successful conclusion at the same time that they are circulated to Members⁵⁴⁸. Moreover, settlement agreements should include explanatory notes describing the issues at dispute, the factual background, and the contents and intended effect of the settlement found by the parties.

5.2.2 Arbitration

Regarding arbitration, Article 25 DSU should be clarified on the subject of confidentiality. At the least, the DSU should define a uniform standard for all disputes resolved by arbitration, as it has done for consultations and ADR. In comparison to these consensual forms of dispute settlement, arbitration offers a wider opening for passive participation for two reasons: first, the dispute is decided by an independent third party, rendering the proceedings a legalist character

⁵⁴⁷ See supra notes and accompanying text.

⁵⁴⁸ Following the establishment of active private participation in the WTO dispute settlement system, this would allow private actors to take recourse to a modified paragraph 10 of Article 4 DSU, and request to join the consultations between the parties to a dispute.

and neutralizing the need for compromise. Secondly, as arbitration in the DSU stands outside the panel process as an alternative branch of dispute resolution, the danger of prejudgement of other dispute settlement procedures does not exist. Thus, with the positive effects of confidentiality greatly neutralized, hearings of the arbitral tribunals could be opened to the public. Furthermore, notifications of the agreements to arbitrate, party submissions to the tribunals, and awards could be subject to the same standards of private access as consultations and ADR⁵⁴⁹.

5.2.3 Panel and SAB Proceedings

Of the different DSU dispute settlement mechanisms, the panel stage could accommodate passive participation with the least difficulty. The quasi-adjudicatory structure with elaborate procedural rules based on fair trial principles, neutral third-party decision-making, reproducible results with decisions that are independent of Member influence, has provided, for the last five years, a stable environment for dispute settlement not easily upset by more immediate attention of civil society. Passive participation could embrace virtually every procedural step from establishing of panelists and terms of reference, party briefs and panel and SAB hearings⁵⁵⁰, to final reports⁵⁵¹, allowing for exceptions under special circumstances⁵⁵². A party to a dispute

⁵⁴⁹ One problem arising out of consultations, ADR, and arbitration as highly flexible and individualized forms of dispute settlement is the difficulty of comparability. The fact that the rules and procedures governing the settlement attempts are designed by the parties and need only fit in a very minimal regulatory framework can lead to extensive differences in procedures and results. While it might be hard to make such differences understandable to the interested public, it would be even harder to do so, when these proceedings are not transparent.

⁵⁵⁰ The rules of paragraph 1 of Article 14 and paragraph 10 of Article 17 DSU would remain unchanged as far as deliberations of the respective bodies are concerned.

⁵⁵¹ The proposals listed supra note maintain the restricted nature of panel reports until their final versions are circulated to all Members. Interim reports would therefore continue to be confidential, leaving the risk of leaks at this stage of the proceedings with its potential dangers for the credibility of the DSU in existence. A way to resolve the problem would be to remove the incentive for leaks by circulating interim reports to all Members as unrestricted documents. The right to comment on them would remain solely with the parties. As the panels are supposed to discuss precise aspects of their reports raised by the parties during the interim review stage,

applying for an exclusion of civil society from the proceedings before a panel, or to restrict or to redraft documents for publication to protect information deemed confidential should carry the burden of proof. Decisions to extend confidentiality to parts of the proceedings or to certain documents should be subject to appeal⁵⁵³.

In addition, access of civil society to quasi-adjudicatory panel and appellate process could include the meetings of the DSB as the institution that administers the resolution of disputes under the DSU by adopting reports, authorizing their enforcement against non-complying Members. The work of the DSB is also of particular interest to civil society due to two of its functions outside the actual dispute settlement process: the selection of candidates for the indicative list of prospective panelists, and the selection of members of the Standing Appellate Body. The expertise, professional background, and experience of the panelists and SAB members chosen by the DSB define the quality of reports drafted by the bodies of the quasi-adjudicatory stage and thereby of the WTO dispute settlement system as a whole. By defining in considerable detail the standards and qualifications the panelists and SAB Members are required to meet, the DSU recognizes the importance of these decisions.

paragraph 2 of Article 15 DSU, potential public pressure would be channelled through parties and towards specific issues.

⁵⁵² Apart from a national security exception, or a protection of proprietary information, panels may also establish the confidentiality of proceedings if they try to negotiate a settlement between the parties to a dispute.

⁵⁵³ As long as States continue to be the only active parties in the WTO and the DSU in particular, they would act as agents of the right of their citizens, in appealing decisions entailing a limitation of private participation. However, in a fully developed liberal dispute settlement system with active private participation, private actors would exercise the right to appeal themselves.

In terms of passive participation, the factual basis for the decisions - such as curricula vitae and recommendations⁵⁵⁴ - could be made available in advance to allow an open assessment of the candidates suggested, while the selections should be made in open DSB meetings. With regard to potential members of the SAB, the present decision-making process could also be supplemented by public hearings of the candidates⁵⁵⁵. The publicity of hearings would underline the prominent role the SAB plays in guarding the law of the WTO⁵⁵⁶.

5.2.4 Establishing Passive Participation in the DSU

The importance of a new, rights-based form of passive participation in WTO dispute settlement should be reflected by its establishment within the "constitutional" framework of the world trading system. That is to say, a new regime defining the right of civil society to partake passively in dispute settlement procedures should not be based on a mere amendment of the existing Council Decision on Procedures for the Circulation and Derestriction of WTO Documents; instead, it should be entrenched at the treaty level.

⁵⁵⁴ Charnovitz, *supra* note 14 at 333, has suggested that the basic biographical information of panelists should be released in order to assess their qualifications or potential conflicts of interest. In the meantime the Secretariat has arranged for the curricula vitae of the persons contained in the indicative list to be available through the Document Dissemination Facility, "Minutes of Meeting. Held in Centre William Rappard on 25 June 1997", Dispute Settlement Body, WTO-Document WT/DSB/M/35, at 7.

⁵⁵⁵ The hearings would take place in two-year intervals, when the terms of office of either three or four Members of the SAB end. Given the small number of positions to be filled and the rarity of the hearings, they would not involve too much of an expenditure.

⁵⁵⁶ The additional *de facto* weight of the Appellate Body gained by the selection of its Members in a public process might be raised as an argument against public hearings. The SAB has no competence to issue generally binding interpretations of WTO law, paragraph 2 of Article IX WTO Agreement. The additional weight of Appellate Body rulings and interpretations might be feared to lead to a slow but constant change of rights and obligations of the Members.

The obvious place for a clause delineating the principles of passive participation would be Article 3 of the DSU, which sets forth the general provisions of WTO dispute resolution⁵⁵⁷. Apart from the higher degree of procedural protection in comparison to the existing secondary organizational law on derestriction procedures⁵⁵⁸, private participation would also benefit in non-legal terms from an inclusion in the DSU. Independent of its concrete legal manifestation, passive participation would gain both factual and moral weight due to the foundational character of the DSU. Passive participation embodied at the constitutional level would set a benchmark for other agreements and secondary organizational rules and create a need for justification if this standard is not met. More specific provisions regarding the various alternatives and stages of the dispute settlement mechanism, following the general considerations outlined above, would supplement the existing DSU rules. Based on these forms of passive participation, which guarantee first-hand information about the workings and results of WTO dispute resolution, private actors would also be enabled to contribute actively and meaningfully to the effectiveness and development of WTO law.

⁵⁵⁷ With the recognition of passive private participation in all areas of the world trading system, its principle would be entrenched in the WTO Agreement itself. Possible steps in introducing the passive participation would be: (1) Its establishment as an objective of the WTO in the Preamble. Without changing the substantive legal content of the WTO Agreement, its existing provisions would be interpreted in the light of the new objective added to the treaty (See Art. 31:1 of the *Vienna Convention on the Law of Treaties*, concluded at Vienna on 23 May 1969, U.N. Treaty Series, vol. 1155, 331, at 340: "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." And Art. 31:2: "The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its *preamble* [...]"). (2) Ensuring passive participation would be recognized as one of the primary functions of the WTO in Article III WTO Agreement. And (3) this general clause would be flanked by provisions on the right of passive participation in the various WTO bodies (for example in paragraphs 2 - 7 of Article IV WTO Agreement) and on the availability of WTO documents.

⁵⁵⁸ The procedural requirements for amendments of the DSU are: consensus decision of all Members and approval by the Ministerial Conference, paragraph 8 of Article X WTO Agreement.

5.3 Active Participation

The liberal argument proposed in the previous chapter moves the DSU along the personae axis of the dispute settlement matrix towards a multi-actor system that adds private actor categories to the traditional panorama of States and customs unions as active participants in WTO dispute settlement resolution. Combined with the two other axes - addressing the material scope and perspective (res axis) of the DSU, and the procedural character (actiones axis) - we may determine the procedural roles of private actors in WTO dispute resolution. The roles are functions of the basic distinction between issue areas within the material scope of the DSU, and issues covered by its perspective, as indicated by the reciprocal nature of the WTO dispute settlement system.

Private actors with stakes in the world trading system covered by the first group of issue areas would find their interests reflected in the substantive individual rights introduced by a liberal conception of WTO law. These rights correspond with existing obligations of Members in the world trading system. Procedurally, substantive individual rights would be protected through direct access to the WTO dispute settlement system in the form of full standing. In other words, importers, exporters, producers, investors, intellectual property right holders, etc. would have the status of parties to a dispute to defend their rights against violations by Members.

The second group would be comprised of private actors identified with issues legally recognized for their links to the world trading system. These actors, however, would derive their involvement in WTO dispute resolution not from substantive individual rights. Instead, their

participation would be an extension of a democratization process in the international trade regime inherent to a liberal reform of international law⁵⁵⁹. Access for individuals and groups representing link issues to dispute would be limited to disputes with non-trade dimensions⁵⁶⁰. In procedural terms, their role would be supportive, aiming to clarify aspects of fact and law with regard to the relationship between trade and link issues and arguing for a proper representation of non-trade concerns in the decision-making; they would therefore partake in dispute settlement as *amici curiae* or even as third parties.

5.3.1 Party Status for Private Actors

Party status, or full standing for private actors would guarantee effective protection of their substantive rights under a WTO Agreement based on principle of liberal international law. In principle there exist two alternatives to enable private actors to challenge Member actions for violation of WTO law (i.e. their individual rights). One is the direct access to a centralized

⁵⁵⁹ As pointed out before, the democratization of the WTO may extend to other aspects of the administration and formation of the world trading system, in the double sense of including other societal concerns beyond economics, and the involvement of actors representing these concerns. As a consequence, substantive individual rights in a future world trading system may eventually relate to issues that are presently only recognized as link issues, or have not yet found legal recognition.

⁵⁶⁰ In this context, Phillip Nichols has suggested to create exceptions to judicial review by WTO bodies of national laws that express core societal values. In order to protect such exceptions against protectionist abuse, he proposes to place a strict burden of proof on the Member claiming an exception that the challenged law serves a valid societal value. The mechanism applied to prove the existence of a specific societal value could be the same as is used in public international law to give evidence to the existence of customs [Phillip M. Nichols, "Trade without Values" (1996) 90 *Northwestern University Law Review* 658; Nichols, Extension, *supra* note 12 at 298-302; Nichols, Realism, *supra* note 455 at 880-881]. This approach has been criticized by Shell, Trade Stakeholder, *supra* note 26 at 379 for its inherent risk of being captured by special interest groups to press for protectionist legislation under the guise of national values. The principle of Professor Nichols proposal, however, seems to bear some merits. But a multilateral approach may appear more feasible than employing diffuse legal terminology that requires unilateral interpretation by a defendant Member, or would force panels and the SAB to judge over the existence or non-existence of national values - with obvious negative effects on Member reactions and public opinion. Instead Members could negotiate and agree upon new categories of exceptions added to those already existing in the WTO agreements during future rounds of trade talks. Using the WTO forum to delineate the scope and application of these exceptions would ensure backing by all Members. Moreover it could serve as a substantive law blueprint for the inclusion of new groups of international actors.

dispute settlement system administered by a WTO dispute settlement body, in other words, to allow private actors to take recourse to the dispute settlement mechanisms in the DSU. The other alternative entails a decentralized approach that integrates national courts into the WTO dispute settlement system.

5.3.1.1 Decentralized Dispute Resolution

A fully evolved liberal model of dispute resolution that grants private actors judicial protection of their substantive rights under WTO law would most likely rely on national courts to create an integrated and decentralized system for the application and enforcement of the WTO agreements⁵⁶¹. Private actors, whose rights and interests are affected by measures of a Member or its agencies in violation of WTO obligations, could then seek redress in the municipal courts of the latter. The TRIPS Agreement establishing domestic legal regimes for the protection and enforcement of intellectual property rights through national courts or administrative bodies⁵⁶² shows the viability of this concept in the WTO context, and may provide the germ for future reforms in this direction.

In order to function effectively, a decentralized liberal dispute settlement system would have to address several key aspects of its operation in international and national legal spheres. The WTO

⁵⁶¹ Slaughter, *International Law*, supra note 436 at 532-4 believes that decentralized dispute settlement through domestic courts is the most probable enforcement system for international agreements among liberal States, whose widely homogenous domestic political systems creates trust in the independence and impartiality of municipal courts to apply and enforce the respective agreement. She also acknowledges the direct involvement of private parties at the international level as a viable alternative. Compare also Shell, *Trade Legalism*, supra note 11 at 903.

⁵⁶² See supra note 315. Compare also the standards set forth in Article 6 *Agreement on the Implementation of Article VI of GATT 1994* (Antidumping Agreement), and Article 12 *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).

agreements would have to be incorporated into the national legal orders of all Members as the law of the land so as to make individual rights and Member obligations under WTO law directly applicable in municipal courts⁵⁶³. Moreover, the relationship between domestic law and WTO law would be characterized by the supremacy of the latter, empowering national courts to quash domestic measures including legislative acts that violate individual rights or obligations of the respective Member under WTO law⁵⁶⁴. Further, the DSU would have to set forth uniform and universal standards of procedure, of equal access for national and foreign natural and legal persons to domestic courts, and of rule application and interpretation in order to prevent a patchwork of differing domestic applications of WTO law, or differing levels of judicial protection for individuals⁵⁶⁵. With domestic courts in 134 - ideally liberal - countries ruling on the application of WTO law in disputes between private actors and Members, the risk of diverging interpretations and implementation of WTO rules becomes very real⁵⁶⁶. To assure coherence and uniformity in administering WTO law in all Member jurisdictions, it would be also be advisable that the final authority to interpret WTO law resides with the competent WTO dispute settlement body⁵⁶⁷.

⁵⁶³ Compare J. A. Winter, "Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law" (1972) IX *Common Market Law Review* 425 at 428, where he stresses the difference between incorporation and direct applicability: "[I]t is a matter for the constitutional law or practice of each State to determine the conditions for introducing a treaty into its domestic order, but [...] the question of direct applicability of treaty rules is primarily, if not exclusively, a problem of international law. If under international law a treaty provision is directly applicable [i.e. self executing], municipal law cannot change this character. It can, however, prevent such a provision from being directly applied in its national legal order [...]. (Footnotes omitted).

⁵⁶⁴ Compare Schneider, *supra* note 393 at 609, 611-3.

⁵⁶⁵ For example, experiences with investment disputes have shown that these standards will have to overcome the danger that foreign nationals seeking judicial relief for violations of their rights under WTO law face judicial bias, government interference, or other forms of discrimination; compare Matthias Herdegen, *Internationales Wirtschaftsrecht*, 2nd ed. (München: C.H. Beck 1995) at 18.1.

⁵⁶⁶ Compare for example, Lukas, *supra* note 15 at 202-3.

⁵⁶⁷ Compare Hilf, *supra* note 8 at 319. Similarly, DSB rulings on the interpretation of WTO law should be given precedential effect for reasons of coherence and efficiency. At present "panels are not bound by previous decisions of panels or the Appellate Body even if the subject-matter is the same. *India - Patent Protection for*

The most developed example to date of a liberal international dispute settlement system exists in the European Communities administered by the European Court of Justice. The European solutions for integrated and decentralized resolution of disputes relating to an international economic regime, including the direct applicability and supremacy of EC law⁵⁶⁸, the protection of the individual and her (fundamental) rights⁵⁶⁹, and procedural mechanisms to ensure the coherence and uniformity of EC law⁵⁷⁰, may serve as ideas for WTO dispute resolution among liberal States.

5.3.1.2 Centralized Dispute Resolution through the DSU

The introduction of a decentralized and integrated dispute settlement system may depend on the existence of a relatively homogenous group of liberal States - as assembled in the EC. Short of it, the centralized approach to party status for private actors may provide a more immediate alternative. It could draw on the experiences in public international law with other dispute settlement mechanisms between individuals and States, particularly in the investment sector.

Pharmaceutical and Agricultural Chemical Products, Report of the Panel, 24 August 1998, WTO Document WT/DS79R, at 7.30, see also 7.25 et seq. for an overview of the GATT/WTO case law on the binding nature of precedents.

⁵⁶⁸ *N. V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration* Case 26/62 Common Market Reporter (1961-1966) 8008. *Flaminco Costa v. Ente nazionale Energia elettrica impresa già dela Edison Volta (E.N.E.L.)*, Case 6/64 Common Market Reporter (1961-1966) 8023.

⁵⁶⁹ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70 [1970] E.C.R. 1125, 1134. For a review of modern developments in EC law concerning the protection of individuals, see: David O'Keeffe, "Judicial Protection of the Individual by the European Court of Justice" (1996) 19 *Fordham International Law Journal* 901.

⁵⁷⁰ Compare Article 234 ECT (ex Article 177 ECT), which requires domestic courts of last instance and permits to lower domestic courts to submit questions on the interpretation of EC law to the European Court of Justice for a preliminary ruling, in cases where the application of EC law is relevant. As is the case with the ECJ, both private actors and Members could submit briefs or appear before the competent WTO body regarding the interpretation of WTO law.

An obvious consequence of granting private actors access as parties to WTO dispute resolution is that the system would face a considerable increase in complaints. The decentralized approach sketched above would channel the additional caseload to national courts, leaving the competent WTO dispute settlement body only with the added burden of preliminary rulings on the interpretation of WTO law. On the other hand, opening the current centralized WTO dispute settlement mechanism to private parties bears the risk of flooding and drowning the system in the influx of private claims. As the functioning of the world trading system and meaningful private participation both depend on effective dispute resolution, it would become necessary to install institutional and procedural floodgates.

5.3.1.2.1 Institutional and Procedural Floodgates

For Thomas Schoenbaum a suitable starting point would be to strengthen the institutional framework of the WTO dispute settlement system. His suggestions range from "creating a permanent roster, enlarging the Appellate Body, and giving its members full-time status as judges of a court of international trade, and expanding the DSB secretariat"⁵⁷¹. Taken further, panels could lose their *ad hoc* character and act as chambers of a permanent WTO court of first instance, each chamber with jurisdictions for specific groups of claims under the covered agreements⁵⁷².

⁵⁷¹ Schoenbaum, *supra* note 393 at 655. A proposal by Phillip Nichols, Extension, *supra* note at 328, made as an *alternative to party status for private actors* falls into the same category: the regular inclusion of non-governmental individuals in WTO panels according to paragraph 1 of Article 8 DSU. Nichols rightly believes that an extensive use of the provision would enable these individuals to introduce and personify non-trade values ranging from social issues to the environment. Taking this approach further, similar criteria could be applied to the selection of members of the Standing Appellate Body. While panels and an SAB specifically composed to address link issues promise to be a desirable move towards more balanced decision-making,

⁵⁷² Permanent panels would require that Members either take a new approach to the nationality issue and apprehension of bias with regard to the selection of panelists in favour of choosing the most qualified experts as

Procedurally, the threshold for private complaints could be set to exclude cases of potential or imminent damage to private actors, limiting claims to violations of individual rights resulting in actual damage⁵⁷³. As long as the WTO does not extend its material scope, thus restricting in principle party status to economic actors, rights violations could be quantified in monetary losses and as such rectified in retrospect by awarding damages. Another restriction of private complaints could be to require the claimants to exhaust domestic remedies where these are made available⁵⁷⁴. Its caveat is, however, that it creates inequality in access to WTO dispute resolution, connected with higher costs, years in waiting for justice, and potential attrition strategies by Members. A feasible alternative to relieve WTO dispute resolution would therefore be to give private parties a choice between domestic proceedings where they exist, and WTO dispute resolution⁵⁷⁵.

permanent panelists, or to design complicated procedural rules to continue to prevent nationals of parties or third parties to become members of the competent panel, compare paragraph 3 of Article 8 DSU.

⁵⁷³ For a similar approach, compare NAFTA, supra note 103, Art. 1116 (1) (a), (b) and Art. 1117 (1) (a), (b) NAFTA, and Schleyer, supra note 15 at 2307. Generally, see Robert K. Paterson, "Private Access to Remedies Enforcing the Provisions of the North American Free Trade Agreement." (manuscript on file). Although less attractive, the number of cases between private actors and Members could also be controlled by limiting the scope of individual rights under WTO law, and thus defining the classes of disputes admissible to WTO dispute resolution, compare Schoenbaum, supra note 393 at 657.

⁵⁷⁴ See Hilf, supra note 8 at 319; also Jackson et al., supra note 39 at 208.

⁵⁷⁵ Compare, for example OECD. *The Multilateral Agreement on Investment. The MAI Negotiating Text (as of 24 April 1998)*. Paris: OECD, Directorate for Financial, Fiscal and Enterprise Affairs, 1998 [hereinafter: MAI], Article D.2. MAI. Theoretically, investors could have chosen between three different procedures: In host states where MAI provisions have direct effect, an investor may take recourse to domestic adjudication (Art. D.2.a. MAI and OECD. *The Multilateral Agreement on Investment. Commentary to the MAI Negotiating Text (as of 24 April 1998)*. Paris: OECD, Directorate for Financial, Fiscal and Enterprise Affairs, 1998 at 38 [hereinafter: MAI Commentary]). Where a special agreement on the form dispute resolution between investor and host state exists prior to the dispute, an investor can also opt for these proceedings (Art. D.2.b. MAI. The provision complements Art. D.1.b.ii. MAI). In any event, an investor may submit his claim to MAI investor-state arbitration (Art. D.2.c. MAI).

Marco Bronckers has argued against private party complaints concerning legislative acts. His concern is that "it does not seem appropriate that a private petitioner can call into question the legitimacy of trade policy measures which have passed national democratic control."⁵⁷⁶ Although this limitation might reduce the workload of WTO dispute settlement bodies, its implications militate against this procedural measure. Following Bronckers' argument to its logical conclusion would derogate the existence of public international law and oppose any external limitations to State actions, leading back to the 19th century concept of "absolute sovereignty" and a Hobbesian state of nature⁵⁷⁷. Why, one may ask, should a parliamentary statute be exempted, but not administrative or judicial acts based on and conforming with the statute in a chain of legitimacy? For reason of its effective implementation WTO law does not distinguish Member actions according to their domestic legal nature⁵⁷⁸. The standard of review for WTO dispute settlement is whether or not a measure infringes a Member's obligations under WTO law⁵⁷⁹. Scope and substance of these obligations does not change, no matter who initiates dispute settlement proceedings; on the other hand, restricting private complaints to administrative or judicial domestic acts would greatly reduce the benefits of private monitoring. *A fortiori*, a judicial protection of individual rights recognized by WTO law⁵⁸⁰ operating under

⁵⁷⁶ Marco C.E.J Bronckers, "Private Response to Foreign Unfair Trade Practices - United States and EEC Complaints Procedures" (1984) 6 *Journal of International Law and Business* 651 at 754, as quoted by Lukas, supra note 15 at 203. The argument is a scaled-down variation of a common theme threading the reasoning of opponents to international (trade) regimes, namely that other States or international bodies should not be given authority to review domestic legislative acts; the democratic authority of national legislatures should be beyond the grasp of any international mechanism to implement and enforce international law.

⁵⁷⁷ See Lassa Oppenheim, *International Law. A Treatise. Volume I - Peace*. 8th ed., edited by H. Lauterpacht (London: Longmans, Green and Co., 1955) at 122.

⁵⁷⁸ See Lukas, supra note 15 at 203-4.

⁵⁷⁹ See paragraph 8 of Article 3 DSU.

⁵⁸⁰ The creation of individual rights and the extension of standing to private actors in WTO law must be ratified by Members in accordance with their domestic (*democratic*) procedures before such changes would enter into force as binding obligations under public international law. Although these obligations could not be unilaterally changed by a parliamentary act without constituting a violation of international law, Members will have the

these or similar exclusions would be porous, ineffective, and an open invitation for circumvention.

Other commentators believe that - at least for a transition period - Members should either be empowered to veto complaints of their citizens⁵⁸¹, or should first espouse complaints before they are submitted to WTO dispute settlement⁵⁸², in order to prevent spurious and vexatious claims from clogging the WTO dispute settlement system. The downside of these ideas is that they re-open WTO dispute resolution and the protection of individual rights for an element of State politics that the introduction of active participation seeks to prevent.

However, an institutionalized screening mechanism to weed out claims which are clearly unfounded, do not indicate a *prima facie* violation of individual rights, or are otherwise spurious, would offer a practicable compromise between effective private access to the WTO dispute settlement system and its efficient functioning⁵⁸³. Given the function of the DSB to administer the rules and procedures of WTO dispute resolution, the body would be an obvious choice to

opportunity to (*democratically*) sanction the initiation by private actors of reviews of legislative acts by international tribunals.

⁵⁸¹ Jackson et al., *supra* note 39 at 209.

⁵⁸² Schoenbaum, *supra* note 393 at 657, who also analyzes the legal problem of determining the Member with the authority to espouse private claims under WTO law. As Schoenbaum illustrates, this question is already of importance, given the close identification of WTO cases with the interests of corporations, *ibid.* at 655 et seq.

⁵⁸³ Current suggestions for such a screening mechanism draw on the successful example of the European Commission of Human Rights as part of the institutional framework of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 XI 1950, ETS No. 5, before the institutional reform with the entry into force on 1 November 1998 of *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 V 1994, ETS No. 155 [hereinafter: European Convention]. See for example Schleyer, *supra* note 15 at 2309-10; Lukas, *supra* note 15 at 204.

perform screenings. As an organ comprised of all Members it would ensure their participation, but avoid the pitfalls of government discretion⁵⁸⁴

Once, private complaints have been admitted to WTO dispute resolution, Article 9 DSU provides another procedural tool for the management of increased caseloads: the consolidation of claims. Consolidation serves both as a means to increase the comparability, fairness, and efficiency of dispute resolution and to prevent "procedural harassment"⁵⁸⁵. As an extension of the screening process, the DSB could thus bundle complaints, which share questions of law or fact⁵⁸⁶. The difficulty drafters will face is to develop the existing consolidation procedures so that they afford effective procedural protection of individual rights, the procedural equality of the parties and the procedural independence of the complainants, while still guaranteeing the efficient and timely resolution of disputes.

The various stages of conflict resolution in the DSU have been developed to settle disputes between Members. Granting party status to private actors in a centralized WTO dispute

⁵⁸⁴ Compare Lukas, *ibid.* An important precondition for the successful operation of such a screening mechanism through the DSB would be the reform of its decision-making procedures. The current principle of negative consensus would make it difficult to exclude spurious complaints, while a return to the consensus rule would probably prevent the majority of private claims from passing the screening stage - lacking the consent at least of the defendant Member. Alternatives would be negative consensus decisions under the exclusion of all Members directly or indirectly concerned with the dispute, or a form of majority voting.

⁵⁸⁵ Jonathan T. Fried, "Two Paradigms for the Rule of International Trade Law", (1994) 20 *Canada-United States Law Journal* 39 at 49.

⁵⁸⁶ Compare Art. 1126 NAFTA, *supra* note 103 and Art. D.9. MAI *supra* note 575; MAI Commentary, *supra* note 575 at 39. In investor-state dispute under the MAI draft, only the host state may request the consolidation of multiple proceedings. As a counterweight, the concerned investors are given the right to withdraw the dispute from arbitration in case of a consolidation request (Article 9.e. MAI). Yet, withdrawal creates a bar for further action, except for cases in which the investor can also rely on a separate dispute settlement agreement with the host state or take recourse to judicial remedy under the law of the host state (*ibid.*). In other words, where both exceptions are non-existent, the investor either has to accept the consolidation or loses his only available judicial remedy.

settlement mechanism therefore begs the question whether the present system is equally appropriate for disputes between private parties and Members. To give one example, the usually extensive differences between private actors and Members regarding political influence, financial means, and other aspects defining their relative negotiating strength, may imply a limited usefulness of the DSU consultation stage⁵⁸⁷. The present structure of the WTO dispute settlement system would enable private parties to file suit against Member actions infringing individual rights and interests under WTO law indiscriminate of their origin in the legislative, administrative, or judicial branches of government, or their legal nature. Consultations and ADR may be well suited for disputes between private parties and Member, which have their roots in contractual relationships⁵⁸⁸. However, the issue in all disputes of this new category will be, whether or not the impugned Member action violates individual rights or not, probably best addressed in (quasi-) adjudicatory proceedings that also emphasize the procedural equality of the parties.

On the other hand, several multilateral models for centralized dispute settlement mechanisms between private and State parties foresee informal dispute settlement techniques before submitting the dispute to third party proceedings⁵⁸⁹. Furthermore, the liberal concept of

⁵⁸⁷ The factual differences between private parties and Members obviously exceed those between WTO Members themselves, which *inter alia* inspired the legalist reforms of the DSU stressing the formal equality of the parties to a dispute.

⁵⁸⁸ Informal means of dispute resolution may play a role in disputes between private actors and Members with regard to a clarification or limitation of the issue at dispute. For an examination of similar issues in the context of national administrative law, see Rafael Benitez, "Alternatives to Litigation between Administrative Authorities and Private Parties, the Pan-European Approach" Conference Paper presented at *Best Practices In Administrative Justice - Alternative Processes Session*, Vancouver, October 10-12, 1999 at 10 (on file).

⁵⁸⁹ *Supra* note 69, Art. 28 (1) and 36 (1) ICSID. The Conciliation Committee may only help the parties to clarify the issues at dispute and make suggestions for a mutually agreeable settlement, Art. 34 (1) ICSID. The procedural rules on conciliation are contained in Chapter III, Art. 28 – 35 ICSID.

substantive rights for private actors under the WTO agreements implies their freedom to choose the means of dispute resolution. Hence, the DSU would have to strike a balance between the party autonomy to negotiate a settlement, and protection against buy-out of private parties, the risk of hollowing-out individual rights and their invalidating effects on objective legal standards inherent in these rights⁵⁹⁰. This balance may be kept up by amending the present procedures in the DSU insofar that the private complainant is given the choice between entering into consultations with the Member defendant, or to take recourse directly to the panel process⁵⁹¹. In addition, the full contents of amicable settlements would have to be notified to the DSB⁵⁹² for review, and could be revoked or amended by the DSB if the mutually agreed solutions do not conform with WTO law⁵⁹³.

5.3.1.2.2 Rulings and Enforcement

Finally, the value of a private right to seek redress for Member violations through WTO dispute resolution depends on the legal nature and contents of a ruling in their favour, and their

NAFTA: Although arbitration is the chosen settlement technique for investment disputes under NAFTA Chapter Eleven, the disputing parties are encouraged to resolve their differences first by negotiations and consultations, Art. 1118 NAFTA. Procedurally, this encouragement is emphasized by a delay period of six months between the occurrence of loss or damages and the submission of the claim, Art. 1120 (1) NAFTA, supra note 103.

MAI: In the MAI, investors may choose between three different forms of dispute settlement after failure to settle the dispute through negotiations or consultations (Art. D.2. MAI, supra note 575). In host states where MAI provisions have direct effect, he can take recourse to domestic adjudication (Art. D.2.a. MAI and MAI Commentary, supra note 575 at 38); where a special agreement on the form dispute resolution between investor and host state exists prior to the dispute, an investor can also opt for these proceedings (Art. D.2.b. MAI); in any event, an investor may submit his claim to MAI investor-state arbitration (Art. D.2.c. MAI). The MAI thus also offers a combination between centralized and decentralized dispute settlement.

See also Shell, Trade Legalism, *supra* note 11 at 903.

⁵⁹⁰ Compare *supra* note 514.

⁵⁹¹ Compare also Schoenbaum, *supra* note 393 at 657 who wants to put the emphasis on non-judicial forms of dispute resolution.

⁵⁹² See paragraph 6 of Article 3 DSU and compare Section 5.2.

⁵⁹³ E.g. collusive behaviour of the parties; The DSB could rely on the SAB or panels to for assistance in administering this new function. Compare Schleyer, *supra* note 15 at 2310.

enforcement possibilities. At present, aiming to contribute to the security and predictability of the world trading system, but also to protect benefits accruing to Members under the WTO agreement against nullification or impairment, DSB rulings and their implementation in the enforcement stage fulfill three functions: deciding whether a Member action violates its obligations under WTO law, creating an obligation under public international law to end the violation, and providing relief for losses caused by the Member action, either through negotiations or through authorized suspensions of concessions⁵⁹⁴. The effective protection of private party rights would require the same three functions, albeit on a more limited scale.

Thus, apart from determining a Member's breach of, and ordering compliance with its WTO obligations, a DSB ruling should also award monetary damages to private actors, which could include their dispute settlement costs⁵⁹⁵. In my opinion, neither private actors, nor the world trading system would be well served if a Member's violation of WTO law were publicly announced⁵⁹⁶, but went without material sanctions. On the one hand, awarding some form of restitution or compensation to private parties, will put a price tag on non-compliance and make it more costly for Members; on the other hand, there can be no doubt that private parties suffer economic losses from illegal trade policy measures for which they should be indemnified. It may be true, as Martin Lukas fears, that the prospect of damage awards would "trigger litigation

⁵⁹⁴ Compare Article 22 DSU, particularly paragraphs 2 and 3.

⁵⁹⁵ For possible approaches, compare Article 1135 (1), (2) NAFTA, supra note 103 and Article D.16.a. MAI, supra note 575. With regard to the restitution of property - an important concern for foreign investors - both models, NAFTA Chapter Eleven and the MAI draft, allow host States to opt for paying restitutory damages instead of restitution in kind; thus the factual consequences of a breach of international obligations are perpetuated, protecting the underlying policy goals that the measure served.

⁵⁹⁶ Lukas, supra note 15 at 205, and to a lesser extent, Jackson et al., supra note 39 at 208-9, believe that a public announcement of panel decisions with its potentially negative effects on a Member's reputation would be sufficient to ensure rule-compliance.

which is not entirely fuelled by the private party's motivation to remove trade barriers"⁵⁹⁷. Yet, there is no need that a liberal world trading system with its respect for individual rights should only employ altruism to enhance its effectiveness, particularly if obviously unfounded complaints would be filtered out by a screening mechanism.

The enforcement stage, two principal options are conceivable for DSB rulings settling disputes between private parties and Members. Given their nature as acts of public international law, they could be enforced through an international mechanism, like the one contained in Articles 21 and 22 DSU. Or private parties could take DSB rulings to domestic courts for enforcement⁵⁹⁸. The international enforcement alternative, however, combines several disadvantages.

The retaliatory suspension of concessions with its effects on consumers, importers and exporters, who were not involved in the original dispute, may be too broad, and too indiscriminate a means of enforcement for DSB rulings between Members and private actors. Moreover, the prevailing private party would rely on their home States espouse a claim at the enforcement stage, which would not only re-introduce an element of discretion, which active participation attempts to avoid. It would also take the dispute back into the political realm of inter-state relations with all the problems attached to it.

⁵⁹⁷ Lukas, *ibid.* in note 211.

⁵⁹⁸ This approach has been chosen by the three multilateral models of centralized dispute resolution, ICSID, NAFTA Chapter Eleven, and the MAI draft: According to Article 54 (1) ICSID, States shall grant awards by ICSID tribunals as to final judgements made by their domestic courts. It is, however possible for States to invoke the rules on sovereign immunity. NAFTA relies on the New York Convention, the ICSID Convention, and the Inter-American Convention for the enforcement of its Chapter Eleven awards, that is to say, it makes awards enforceable in domestic courts, see Article 1136 (5) and (7) NAFTA, *supra* note 103. The MAI also sought enforcement of its awards through the means of the New York Convention, Article D.18. MAI, *supra* note 575. Compare also Shell, *Trade Legalism*, *supra* note 11 at 903.

On the other hand, States are even more reluctant to agree to the direct enforcement of international awards or judgments than they are with regard to making international treaties directly applicable, in particular where these rulings may require courts to quash domestic legal acts⁵⁹⁹. Although this reluctance may fade with the continued evolution of a liberal system of international law, a more immediate solution may be to create a combination of both enforcement options, each applicable to different components of DSB rulings. Parts of the rulings ordering a Member to comply with its WTO obligations, which are of general interest (i.e. for the functioning of the world trading system, for all Members and for private actors) could be enforced through the existing DSU mechanism. Parts, which only relate to the relationship between private complainants and a Member, like awards of damages would be enforced through domestic courts.

5.3.1.2.3 Entrenchment in the DSU

Active private participation, for analogous reasons as discussed for its passive counterpart should be entrenched in the DSU. Given the numerous amendments to the WTO dispute settlement system necessary to implement party status for private actors, it may appropriate to envisage a procedure independent of the existing State vs. State dispute settlement mechanism and adjusted to the special requirements of Member - private party dispute resolution.

⁵⁹⁹ Compare Schneider, *supra* note 393 at 611-2.

5.3.2 Private Actors as Amici Curiae

A liberal system of WTO dispute resolution committed to active participation would go beyond guarding individual rights by granting party status to private actors. Not all cases before the DSB would address violations of private rights; there may be disputes that concern private actors, although their rights have not been violated; or there would be proceedings of particular importance to private actors who do not enjoy substantive rights under WTO law. Liberal notions of dispute resolution are specifically concerned that the last group of cases is represented in dispute settlement proceedings, as they involve societal interests affected by the world trading system and captured as link issues within the perspective of the DSU. Private actors identified with these link issues would thus gain access to the WTO dispute settlement system, albeit in more limited procedural roles. In its present form, the DSU contains the seeds for active private involvement beside party status: *amici curiae*.

Amici curiae, Latin for friends of the court, without being parties to a dispute contribute to its settlement by submitting to a (quasi-) adjudicatory body information and arguments of law or fact within their knowledge that may have otherwise escaped its attention. Their motivation may vary from representing a general, societal concern, supporting a party to the dispute, protecting a specific private interest, to assisting the (quasi-)adjudicatory body in making a proper

decision⁶⁰⁰. As summarized by Dinah Shelton, the multifarious procedural functions of *amici curiae* are⁶⁰¹:

First, they often supplement or provide detailed analysis of points of law, including discussion and citation of authority not contained in the parties' arguments. Second, they can supply detailed legislative or jurisprudential history, a scholarly exposition of the law. Amici may present arguments the parties are unable or unwilling to make because of political pressure or other tactical considerations. Amici frequently discuss the broader implications of decisions that the main parties have either purposefully or inadvertently failed to address. Finally, they assist when courts are expanding into areas of novel and complex litigation. They may assemble expert knowledge and expertise. In such cases, amici may help to explain complex issues and perhaps deal with the broader implications of a decision, beyond the particular interests of the parties.

Internationally, the potential contributions of *amici curiae* participation to well-informed judicial decision-making that reflects concerned societal interests are recognized by its inclusion in several multilateral dispute settlement mechanisms⁶⁰². And since the SAB report in *United States - Import Prohibition of Certain Shrimp and Shrimp Products*⁶⁰³ (the *Shrimp Turtle Case*) the WTO dispute settlement mechanism seems to evolve into the same direction.

⁶⁰⁰ Compare f. e. Steven H. Gifis, *Law Dictionary*, 3rd ed. (Hauppauge, N.Y.: Barron's Educational Series, 1991) at 21-2. *Amicus Curiae* participation in WTO dispute resolution is also supported by Charnovitz, *supra* note at 348 et seq.; Housman, *supra* note 14 at 745; Schleyer, *supra* note 15 at 2304-5; Shell, *Trade Legalism*, *supra* note 11 at 902

⁶⁰¹ Dinah Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 *The American Journal of International Law* 611 at 618 [hereinafter: Shelton].

⁶⁰² For the European court of Justice: paragraph 2 of Article 34 *Protocol on the Statute of the Court of Justice*, Brussels 17 April 1957, last amended by the *Treaty of Amsterdam*, 2 October 1998, *supra* note 115; for the European Court of Human Rights: paragraph 2 of Article 36 *European Convention*; for the Inter-American Court of Human Rights, see the case-law discussed by Shelton, *supra* note at 638 et seq.

⁶⁰³ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WTO Document WT/DS58/AB/R [hereinafter SAB, *Shrimp Turtle*]. The *Shrimp Turtle* case concerned U.S. legislation prohibiting the importation of shrimp and certain shrimp products from countries that failed to introduce programs equivalent to U.S. standards to promote shrimp harvesting technologies preventing accidental catches of sea turtles protected under the U.S. *Endangered Species Act*. At the request of Thailand, Malaysia, Pakistan, and India a WTO panel was established to investigate whether the U.S. measures violated Articles XI:1 and XIII:3 of GATT 1994 regarding quantitative restriction. The United States contended that the measures were covered the exceptions in Article XX GATT 1994, paragraphs (b), concerning the protection of animal health, and (g), regarding the protection of exhaustible natural resources. Compare *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, 15 May 1998, WTO-Documents WT/DS/58/R at paragraphs 1 - 29 [hereinafter: Panel, *Shrimp Turtle*].

During the proceedings before the Shrimp Turtle panel, two briefs were submitted to the panel by non-governmental organizations that also sent copies to the parties to the dispute⁶⁰⁴. While the complainants requested that the panel disregard the briefs, the United States argued that the panel should include the information contained in the NGO submissions based on its right to seek information under Article 13 DSU⁶⁰⁵. The relevant passages of Article 13 DSU state:

1. Each panel shall have the right to seek information and technical advice from any individual or body, which it deems appropriate. [...]
2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. [...]

The panel decided not to take into consideration the NGO briefs, but took the view that the parties to dispute were free to submit the briefs as part of their own submissions to the panel⁶⁰⁶.

The panel reasoned⁶⁰⁷:

We had not requested such information as was contained in the above-mentioned documents. We note that pursuant to Article 13 of the DSU, the initiative to seek

⁶⁰⁴ One brief was submitted by the Center for Marine Conservation and the Center for International Environmental Law, the second by the World Wide Fund for Nature, Panel, Shrimp Turtle, *supra* note 603 at paragraph 3.219.

⁶⁰⁵ Panel, Shrimp Turtle, *ibid*.

⁶⁰⁶ *Ibid.* at paragraph 155. The United States followed this advice and submitted to the panel parts of the briefs as attachments to its written statements. To the extent, that the United States included the NGO documents in its submissions, the panel found that they agreed in essence with the U.S. position (*ibid.* at paragraph 160) and concentrated on the arguments presented by the United States. In its appeal before the SAB, the United States availed itself of the same method to submit NGO brief to the SAB (Compare SAB, Shrimp Turtle, at paragraphs 79 - 91, in particular paragraph 89: "We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. On the one hand, it is of course for a participant in an appeal to determine for itself what to include in its submission. On the other hand, a participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.") The SAB found this approach in concordance with the DSU and admitted the briefs as part of the U.S. submissions (SAB, Shrimp Turtle, *supra* note 603 at paragraph 91.)

⁶⁰⁷ Panel, Shrimp Turtle, *ibid.* at paragraph 7.8.

information and to select the source of information rests with the Panel. In any other situation, only parties and third parties are allowed to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied.

In its subsequent appeal of the *Shrimp Turtle* panel report, the United States argued *inter alia* that the panel had erred in its interpretation of Article 13 DSU⁶⁰⁸. After having noted that panels are only obliged to accept and consider submissions made by Members that are parties or third parties in a panel proceeding,⁶⁰⁹ the Appellate Body reviewed its interpretation of Article 13 DSU in earlier rulings in connection with panel competences under Article 12 DSU, and their function to "make an objective assessment of the matter before [them], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[...]"⁶¹⁰. Thus, the SAB found that Article 13 DSU gives panels broad authority to seek or not to seek information, to accept or reject information it has sought and received, and to determine its need for information and advice, their acceptability and relevancy, and what weight, if any, to ascribe to such information⁶¹¹, and concluded⁶¹²:

Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word "seek" must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word "seek" is unnecessarily formal and technical in nature becomes clear should an "individual or body" first ask a panel for permission to file a statement or brief. In such an event, a panel may decline to grant the leave requested. If, 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. The exercise of the panel's discretion could, of course, and perhaps should, include

⁶⁰⁸ SAB, *Shrimp Turtle*, supra note 603 at paragraph 98.

⁶⁰⁹ Ibid. at paragraph 101.

⁶¹⁰ Article 11 DSU. And SAB, *Shrimp Turtle*, supra note 603 at paragraphs 102 - 106.

⁶¹¹ Ibid. at paragraph 104.

⁶¹² Ibid. at paragraph 107-8.

consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between "requested" and "non-requested" information vanishes.

In the present context, authority to *seek* information is not properly equated with a *prohibition* on accepting information, which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself bind the panel to accept and consider the information actually submitted. The amplitude of the authority vested in panels to shape processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.

The Appellate Body ruling in the *Shrimp Turtle Case* has been hailed as paving the way for *amicus curiae* participation in WTO dispute resolution⁶¹³. Private actors may thus seek leave from a panel to submit information or arguments regarding the facts and the law of a dispute. And it lies within the authority and capacity of each panel to decide whether such leave should be denied or granted⁶¹⁴. In case of the latter, *amici* could be permitted to communicate information in form of written statements or, where deemed necessary, during an oral hearing before the panel. However, *amici* would not receive any party submissions or other documents relating to the case, and would not be otherwise involved in the proceedings⁶¹⁵.

⁶¹³ Former Director-General of the WTO, Renato Ruggiero, in his opening remarks to a group of US non-governmental organizations, WTO, "The WTO and Civil Society. Comments by the Director-General to US NGOs", WTO Web Site, <http://www.wto.org/wto/ng/ngotranscript.htm>: "Fourth, and very significantly for the NGO community, the issue of amicus briefs to Panels was addressed in the ruling of the Appellate Body on Shrimps and Sea-turtles. It is now clear that panels should accept amicus briefs and then decide how to treat this information." Compare also Kim Van der Borcht, "The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate" (1999) 14 *American University International Law Review* 1223 at 1229.

⁶¹⁴ Compare also Housman, *supra* note 14 at 745, who counters criticism that *amici curiae* participation would see panels being overflowed by worthless documents by stating that panels who have the ability to deal with sophisticated factual and legal matters are also able to discern useless from helpful *amici curiae* contributions.

⁶¹⁵ Compare Shelton, *supra* note 501 at 612.

According to the Appellate Body ruling, two factors guide and delimit the broad discretion of panels: on the one end - and potentially in favour of *amicus curiae* participation - stands the objective of high-quality panel reports, while on the other end - possibly speaking against *amici* involvement - lies a panel's responsibility not to unduly delay the panel process⁶¹⁶. In other words, the panel process offers room for, and should rely on *amici curiae* in the interest of the proper administration of justice, and should be restricted only when their participation threatens to interfere with the world trading system's need for timely, efficient, and economical dispute resolution.

At present, there is no guarantee that panels will interpret their discretionary guidelines in the suggested manner, signalling frequent and regular interaction between private actors representing the concerns of civil society and individual panels.⁶¹⁷ In order to ensure a coherent application of panel discretion, it may be advisable to develop additional procedural and material standards for *amici curiae* participation. These standards could require *amici* to demonstrate their interest in, expertise, and potential contributions to the case, to show these interests are not adequately represented, restrict *amici* to present novel information and arguments, and oblige *amici* with similar positions could be obliged to submit joint briefs⁶¹⁸. *De lege ferenda*, the principle of

⁶¹⁶ SAB, Shrimp Turtle, supra note 603 at paragraph 106, and paragraph 2 of Article 12 DSU.

⁶¹⁷ As a matter of fact, panel discretion seems so broad that it parties would have difficulties or no interest to prove that a panel disregarded vital information in violation of its discretionary powers under Article 13 DSU. Given that parties are free to adopt submissions by private actors as part of their own briefs, it seems unlikely that any party will appeal a panel decision to disregard *amicus* briefs. Panels would only consider those parts of *amici* submissions, which the parties find in concordance with their own arguments. One of the major contributions of *amici curiae* - making available to the panel arguments or information that parties fail to submit for political or tactical reasons - would thus be lost. The extent and effectiveness of *amici curiae* participation thus depends on the willingness of each individual panel to look at the broader implications of a dispute as addressed in the covered agreements, and to enter into a dialogue with civil society, or to take narrow, state- and trade-centric view of the disputed issues.

⁶¹⁸ Compare Wirth, supra note 513 at 791; Shelton, supra note 501 at 618; Housman, supra note 14 at 746.

amicus curiae participation should be expressly rooted in the DSU, for example, as an additional provision of Article 13 DSU, and further expounded in the working procedures for panels. And whereas the Appellate Body Report in the *Shrimp Turtle Case* only addressed the panel process, *amici curiae* could also play a role before the Appellate Body itself, albeit limited to submissions regarding the legal aspects of a dispute.

5.4 Conclusions

In this Chapter I have tried to give the liberal concept of private participation a practical dimension. I have sketched the principal changes to the WTO dispute settlement mechanism necessary to establish private participation, drawing from existing models of international adjudication involving private actors. I have shown that once the WTO and its Members accept the liberal paradigm and open the world trading system to the private actors it is meant to serve, the WTO dispute settlement mechanism already provides the fundamental framework for new forms of private participation and its material scope would allow the involvement of many important interests and their non-governmental stakeholders. Based on the two liberal tenets of individual rights and democratic participation, in combination with the material scope and present perspective of the DSU, I have proposed a basic distinction between two classes of active private participants, one may become parties to a dispute and the other would be limited to *amici curiae*.

However, these two forms of private participation would not be the end of the story, they would only mark the beginning. Once it has become visible that private actors are able to contribute

constructively to the resolution of WTO disputes and the development of WTO case law, once it is widely accepted that not only Members, but also private actors, not only economic actors, but also representatives of other societal concerns have "a substantial interest" in the world trading system, various other forms and degrees of private participation could evolve. Thus, today's *amici* may be tomorrow's third parties, and next week's parties to a dispute. The WTO has taken the first small, tentative steps towards meaningful private participation. And the road ahead will be long and arduous, but it will by no means be impossible. It will require a lot of convincing, compromises along the way, and most of all, patience. But already the WTO has gone farther in the first six year of its existence than the GATT in the fifty years before.

CHAPTER 6**CONCLUSIONS: OPENING THE CLUB**

After only five years of existence and under the impression of the foundered Millenium Round of Trade Negotiations, the World Trade Organization faces numerous challenges as to its future course of evolution. It is plagued by structural and procedural short-comings, the continuing and deepening North-South divide, and growing opposition from civil society to name a few. Particularly the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* - remote, secluded and seemingly bureaucratic, but highly visible in its effects on the policy choices of Member States - has fostered this opposition and has created wide-spread doubts about the legitimacy of WTO rule- and decision-making.

In my thesis I have proposed the introduction of private participation, based on liberal international relations theory and understood as direct and formal involvement of non-governmental actors in WTO dispute resolution, as an avenue of reform restoring confidence of civil society in the advantages of the world trading system, but also as a model of change in other areas of WTO activity and as a source of ideas and direction for future developments of the organization. The analytical framework of Chapter 1 has exposed the theoretical conceptions underlying international dispute settlement mechanisms with respect to their three main elements, actors, material scope and procedures. Supported by our understanding of the historical and philosophical origins and workings of the WTO world trading system and

specifically its dispute settlement system (Chapter 2), we have been able to extract the theoretical underpinnings of the DSU in relation to an argument for private participation.

Concerning the *actiones axis* of the dispute settlement matrix, the DSU marks a decisive shift of GATT/WTO conflict resolution towards legalist procedures, effectively neutralizing factual differences between parties to a dispute and potentially allowing for the resolution of disputes between states and non-state actors under the shadow of WTO law. Moreover, its material scope and perspective is extending along the *res axis* beyond core trade issues transposing new issue areas to the international realm and effecting more and formerly exclusive domains of domestic policy and law. From the participatory perspective, however, the DSU - and the WTO in general - remains within the traditional bounds of public international law. Informed by realist-institutionalist theories of international relations, WTO law virtually ignores the existence and increasing importance of non-governmental international actors for the world trading system. Apart from informal and indirect means of participation and the first tentative steps towards mechanisms of passive participation, WTO dispute settlement is conceptually and hence procedurally limited to State actors (Chapter 3).

In recognizing the importance of non-state actors and the liberal roots of the world trading system, I have suggested to abandon realist-institutionalist concepts. Instead, I have based my argument for private participation in WTO dispute settlement on a liberal understanding of international law. Following the assumptions of liberal international relations theory, I have placed the individual at the center of the world trading system (and the international legal order),

to be protected by substantive and participatory rights beyond the reach of States. By recognizing the individual and her collective forms of action not only as the ostensible and ultimate beneficiary of WTO law and public international law (and ideally all law), but also as the original subject of all law, I have proposed to directly incorporate in the legal texture of the world trading system and eventually all international law the fundamental principle underlying the international legal order: the freedom and welfare of the individual. Based on the twin liberal pillars of individual rights and democratic participation and its positive effect on the performance of the DSU, I have argued for opening the exclusive club of the WTO dispute settlement system for non-governmental actors and to entrench their participation in the constitutional fabric of the WTO legal system (Chapter 4).

And finally, I have projected means of practical application for a liberal concepts of active and passive private participation in the WTO dispute settlement system. Inspired by manifestations of liberal approaches in other international dispute settlement mechanisms, particularly in the economic sector, I have proposed to principal solutions to private participation: one a decentralized model involving and relying on municipal courts; the second a centralized scheme based on an amended DSU. Drawing on the conclusions offered by the DSU's location within the analytical framework, and specifically its material scope and perspective, I have continued to propose three basic categories of active private participants: full standing as parties to a dispute for non-governmental actors with agendas covered by the material scope of the DSU and expressed in new private rights; *amici curiae* and third party status for private actors within the perspective of the WTO dispute settlement system (Chapter 5).

In other words, this thesis has, applying a liberal understanding of international law, established a basic framework for private participation in WTO dispute settlement with the key elements of transparency of procedures, access of civil society to relevant information, hearings and other dispute settlement-related activities, rights-based access of non-governmental actors to WTO dispute settlement and enforcement mechanisms distinguished according to categories of standing from parties to *amici curiae*. Future research would have to connect these elements by examining each of the substantive WTO agreements with regard to the inclusion of individual rights. Following the approach taken under the *res axis* of the dispute settlement matrix, it would have to delineate categories of non-governmental actors covered by those rights, and develop other substantive and procedural floodgates. Furthermore, the conditions for participation as third parties, *amici curiae* or other appropriate forms of active involvement would have to be clarified, not forgetting a definition of procedural rights and obligations within the WTO dispute settlement system.

Once private participation has been introduced to WTO dispute resolution, its liberal tenets may be applied to other areas of WTO activity, in particular policy- and rule formation. In addition, the successful creation of an international conflict resolution mechanism integrating non-governmental actors and based on a liberal understanding of international law in an organization as significant as the WTO may very well influence the development of public international law in general. The liberal approach suggested in this thesis and its promotion on non-governmental involvement may eventually spill over to other international organizations altering our

understanding of the role of individual and the State in international law. An unqualified endorsement of liberal international theory by WTO law would transform international trade not only into a harbinger of welfare, but also of individual freedom and democracy.

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