Claims for a New Social and Legal Structure in the World Trade Organization and the Brazilian Experience

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Claims for a new social and legal structure in the World Trade Organization and the Brazilian experience

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I. Introduction: central concerns of the work

The work departs from the assumption that some new challenges instigated by the globalization process affected the multilateral trading system, especially the World Trade Organization (WTO) regulation. The thesis focuses on the increasing movement of non-state actors claiming for participation in the decision-making process of the multilateral trade system.

The WTO, as an inter-governmental organization admits the participation of non-state actors (or non-governmental organization – NGOs) in its structure. I have worked on a description of the forms of participation for non-state actors at the WTO and their increasing influence in the system, in an article published in 2002\(^1\). Taking that into account, the works for the thesis investigated the influence of non-state actors on the WTO system, since 1995 (when WTO launched its activities), and had the purpose to identify a new logic of work influencing the organization, beyond the standards of the International Law.

The statistics show a growing participation of non-state actors in the WTO system, for example: for the First WTO Ministerial Conference (1996), only 156 NGOs were enrolled and for the Fifth Ministerial (2003), there were 961 (almost six times more); the WTO Dispute Settlement System registered until today the receipt of around 71 amici curiae\(^2\). What those numbers mean for the multilateral trade system? Does it affect the structure of the WTO?

The increasing participation and claims by non-state actors for effective forms of participation at the WTO provoked the clash of two well-known opinions: on one side, some actors claiming for transparency, accountability and even the applicability of democratic principles on the activities of the international organization; on the other hand, a strong resistance to that discourse by the WTO Members, arguing that the WTO is a Member-driven organization, of an intergovernmental character. Those actors that are not considered as holders of personality by the International Law mainly take the first position: the non-state actors. States, especially the developing countries Members of the WTO – such as Brazil, has supported the second position.

The aforementioned context and, specially, those two contradictory points-of-view triggered off some concerns about the International Law system and the operandi status of the WTO in respect to non-state actors. The following questions put in evidence the steering concerns for the works of the


\(^2\) Updated until August 2005.
thesis:

(i) How is it possible to understand the existence of the appointed contradictory positions? Do they suggest tensions on the international system? (Section 1, Chapter 2)

(ii) Which are the elements of fact that support those positions? (Section 1, Chapters 2 and 3)

(iii) Which are the elements of law, especially of the international trade law, that supports them? (Section 1, Chapters 3, 4 and 5)

(iv) Which are the consequences for the multilateral trade system of the confrontation of those positions? (Section 1, Chapters 6 and 7)

(v) Which are the implications for a developing country such as Brazil and its civil society? (Section 2)

Based on such questions, the main objective of the thesis was to identify the reasons for the claims for a new social and legal structure at the WTO in order to promote effective participation of non-state actors.

II. Objectives and hypothesis

Taking into account the complexity of relations among different actors in the international system, again, the focus of the thesis is on the claims for a new social and legal structure in the WTO. In other words, on the claims for institutional structures recognizing new personalities and new sources of law in the multilateral trade systems, beyond the States and the States' practices.

The main hypothesis of the thesis is that if there are new actors in an intergovernmental forum like the WTO, they end up instigating other perceptions of space and time by the regulation of the system. Space and time are fundamental elements to define the law system, its principles, rules and rationale.

As the analysis goes beyond the principles of the International Law, the work was developed under the perspective of the Sociology of Law. This branch of the Law Studies is characterized by analysis of the impacts of a real situation or movement on the legal system and its rationale. For this reason researches on the Sociology of Law field certainly entail empirical analysis.

In order to confirm the hypothesis, the first section of the thesis examines how far non-state actors intend to achieve new forms of participation in the WTO and how much eventual amendments might transform the social and legal structure of the organization. In the second section, the same hypothesis is confirmed in a reference to Brazilian stakeholders in the trade foreign policy of the country and their performance before the WTO.

III. Structure of the thesis: methods and theories applied

3.1 An outline

As mentioned above, the thesis is organized into two main sections. In Section I, I made an analysis of the consequences of the claims for participation by non-state provoked in the WTO system and its regulation; in the Section II, the purposes were (i) to associate the conclusions of Section I to the knowledge by the Brazilian Government and civil society of such changes on the multilateral trade system, and (ii) to identify attitudes undertaken by Brazilian actors until now on that sense.

Section I is, then, divided into seven chapters. An introductory chapter presents the problematic and the hypothesis of the work. The second chapter points out the theoretical concepts and methodology applied, three following chapters (3, 4 and 5) describe the WTO system, its structure and the actors related to the international trade system, and a sixth chapter exposes concluding remarks on which sense the participation and the new claims for participation of non-state actors have influenced the regulation of the multilateral trade system. Finally, the chapter 7 appoints some conclusions to the Section I.

In Section II, I applied the hypothesis to the Brazilian experience and, for this purpose, I focused the analysis on the results obtained from the data collected about the participation of Brazilian actors at the WTO and interviews made with major representatives of the Brazilian foreign trade policy (enrolled on the Appendix).

The thesis still counts with a number of appendixes expounding the methodology of the empirical research and consolidating the collected data (including the current regulations for the participation of non-state actors and lists of actors that have participated so far). The appendixes with the data are classified by reference to three main groups of non-state actors: (i) international non-governmental organizations, (ii) intergovernmental organizations, and (iii) Brazilian non-governmental organizations. The third group is also counted on the statistics of the first one. The purpose was to highlight the position of Brazilian actors at the WTO, to support the arguments developed on Section
II.

3.2 Methods applied

The methods applied to the works of the thesis involved both theoretical and empirical research. The main theories are related to a pluralistic view of the organization of society and law (quoted on item V below). Such theoretical support comes from many specialized areas of the Social Sciences, including the Philosophy, the Sociology and the International Relations, as well as Law. The interdisciplinary approach is due to the fact that the thesis aimed at an analysis of recent phenomena, not yet appropriately translated into the specialized area of Law, in this case, by the International Law.

Those theories elucidated some concerns appointed by the specialized literature about the multilateral trade system and its regulation, and not yet sufficiently appreciated by the orthodoxy of the International Law literature. In view of that, the theoretical research involved a wide-range list of authors analyzing the WTO functioning, its regulation and challenges, since the launch of its activities in 1995.

Besides that, a complementary – and fundamental – analysis was based on the empirical research. Such research counted with three primary sources: (i) collected formal and informal WTO rules concerning the participation of non-state actors; (ii) collected information of non-state actors complaining for participation at the WTO mechanisms; and (iii) some interviews with functionaries of the WTO, representatives of the Brazilian government (both Executive and Congress) and selected Brazilian institutions of a non-state character.

It was classified under formal rules those approved by WTO Members and so considered as of a binding character for WTO Members and their constituencies. Rules of such a character could be identified in the WTO Agreement, the WTO documents available on the Internet and other documents circulated at the WTO as restricted.

On the other hand, informal rules refer to those of a non-binding character, but with strong

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4 About the pluralistic analysis of society, v. HABERMAS, J (1996), *Between facts and norms* (translated by William Rehg), Cambridge-MA, MIT Press, pp. 331-2: "The sociological account of pluralism manage to link up with the normative model of liberalism by means of a simple substitution, namely, by replacing individual citizens and their individual interests with large organizations and organized interests. It assumes that all politically relevant collective actors enjoy roughly equal opportunities to influence the decision-making processes that concern them; that the members of the organizations determine the politics of pressure groups and parties; and that the latter in turn are pushed by multiple memberships into a readiness for compromise and the integration of interests. Under these conditions, pluralist democracies should project the social balance of power onto the distribution of political power in such a way that politics remain sensitive to broad spectrum of values and interests." (footnotes omitted). See also, FARIA, J.E. (1999), *O direito na economia globalizada*, São Paulo, Malheiros Editores, p.173.
influence over the daily procedures for the non-state actors participation at the WTO. Most part of such rules are released by the WTO Secretariat, except for the dispute settlement procedures over which the panelists and members of the Appellate Body have somehow the faculty of acknowledge the participation of non-state actors.

Most part of the formal and informal rules collected was quoted on the Appendix II to the thesis, some others were appointed on the subsequent Appendixes. Further details on the collected information are reported in item 3.3 below.

In order to obtain information about non-state actors demands for effective participatory mechanisms at the WTO, the research looked for manifestations of those actors either before the WTO mechanisms or on other related forums, as well as for their own publications.

The empirical research nourished the analysis of the multilateral trade system under the Sociology of Law methodology and it was limited to the period as from 1 January 1995 to 30 September 2003.

The criteria applied to the selection of institutions to be interviewed were the following: (i) for the WTO functionaries, the divisions most involved in the participation of non-state actors at the organization (namely, the External Relations Division and the Legal Affairs Division) and one specialized division – the Rules Division – was chosen as an example, (ii) for the Brazilian governmental representatives, the organs more closely related to the foreign trade policy of Brazil, and (iii) for the Brazilian institutions, all those that have participated in any of the WTO mechanisms and other actors with a clear leading role at the domestic level according to issue-areas of work at the WTO.

All interviews were made directly by myself, in the locus of the institution/organ selected (the only exceptions were the interviews with the responsible for the External Relations Division made by phone and with a few Brazilian non-governmental organizations not based in São Paulo, Rio de Janeiro or Brasilia). The list of institutions interviewed for the thesis is on the Appendix (attached hereto).

The questionnaires, though employed to different groups of actors, had some similar questions. The structure of the questionnaire sketched out for Brazilian non-state actors was organized under the following topics: (i) international trade and the WTO; (ii) the institution and its involvement with international trade issues; (iii) participation in the WTO system through the interstate logic; (iv)
participation in the WTO system through the cosmopolitan logic\(^5\); and (v) general questions.

The questionnaires for the representative of the Brazilian Government maintained the groups of questions under the topic (i) appointed above, in addition to two other topics called: "the relationship of the Government with Brazilian non-state actors on international trade issues" and "Brazil as a WTO Member and the enlargement of the cosmopolitan logic within the WTO system".

The questionnaires prepared for the interviews with WTO representatives had a different structure. They were organized under the following topics: (i) WTO relationship with non-state actors, (ii) non-state actors claims for mechanisms of participation, (iii) WTO reaction and answers over the last 10 years, and (iv) WTO structure for answering to non-state actors claims.

The collection of data is aimed at (i) identifying the degree of knowledge about the institutionalized mechanisms for non-state actors participation at the WTO, (ii) evaluating how much non-state actors participate in the WTO structure, and (iii) recognizing claims for new mechanisms, either those already incorporated by the WTO institutional structure or those that still remain as claims. The ultimate objective in the collection of data was to enable the analysis of the tensions between an interstate and an emerging cosmopolitan logic in the WTO.

Throughout the empirical research the prevailing concern was with qualitative information on the participation and claims for participation. Some statistics were geared up and used in the thesis just to synthesize part of the collected data. The results of the interviews were used to give evidence to certain assertions and to support some conclusions of the thesis. The interviews with Brazilian actors provide a large part of the material for the analysis developed in Section II.

3.3. Descriptive analysis of the main chapters of the thesis and the collected data

As mentioned above the thesis is divided into two sections; the first one comprehending seven chapters. Below, I intend to point out some further notes on their content.

The first chapter of Section I introduces the objectives, the hypothesis, the methodology and the structure of the thesis. The second chapter aims at identifying a normative structure for the whole thesis, trying to answer the following question: how to identify a logic for the interactions beyond state relations in the international system? Boaventura Santos' analysis of the capitalist society\(^6\) was chosen

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\(^5\) This concept will be explained on item 3.3 below.

as the steering normative theory for the thesis. The main reason for adopting such a theory is that it deals with the idea of a pluralistic society, enabling the identification of some important characteristics of different logics operating simultaneously.

Santos' theory identifies six modes of production under the capitalist system: the domestic space, the space for production, the market space, the space for the community, the citizenship space and the world space. Each space is composed by specific elements that define its unity of practice, prevailing institution(s)/actor(s), rationality, form of exercise of power, form of regulation and an epistemological code. The structure of modes of production proposed by Santos is also promising to the analysis aimed by the thesis because it emphasizes the relationship between a multiplicity of actors, their rationality and forms of regulation.

Looking forward to answer the central questions for the thesis, Santos' theory, however, had to be amended as to incorporate into world space the contemporary movements beyond states relationship. In order to develop that investigation, other theories analyzing the current changes in international relations and in its rationale were employed. High importance was given to those theories considering the emergence of a cosmopolitan order. A combination of these theories enabled the revision of the modes of production of the capitalist society as delineated by Santos. The space then defined as world space split into two distinct logics: the interstate and the cosmopolitan. Below the main characteristics of these logics are in evidence:

<table>
<thead>
<tr>
<th>Space</th>
<th>Unity of practice</th>
<th>Integrating institution</th>
<th>Rationality</th>
<th>Form of power</th>
<th>Form of regulation</th>
<th>Epistemology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interstate</td>
<td>Nations</td>
<td>States, IGOs, treaties</td>
<td>Efficiency</td>
<td>Unequal exchange</td>
<td>Systemic Law</td>
<td>Science, progress, mass culture</td>
</tr>
<tr>
<td>Cosmopolitan</td>
<td>World perspective</td>
<td>Polycentric and instable* (States, IGO, NGOs, enterprises, individuals)</td>
<td>Synergy</td>
<td>Communication</td>
<td>Reflexive Law</td>
<td>Cosmopolitan culture, diversity, mobility, common resources</td>
</tr>
</tbody>
</table>


The final part of chapter two examines the main forms of regulation of international trade, as from the Treaty of Westphalia days. The purpose of this historical portray was to identify the level of

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7 I named two main groups on the analysis of an emergent cosmopolitan order: the centrics and the polycentrics. The centrics are those to whom cooperation prevails in the international system based on shared interests and values; the polycentrics strengthen cooperation as a practice to solve common difficulties. Further information about these theories and the authors related to each stream are appointed on item V below.
interference of the state in regulating and operating the domestic economy, in the different periods, and to check how much the state centralizes the representation of domestic economic interests at the international level.

As concluding remarks the second chapter appoints to the following questions: how the changes on the international system affect the WTO system? How does WTO coordinate those changes? If the WTO and its Members intends to preserve the role of the WTO in coherence with the idea of governance at the global level, two different routes may be taken in dealing with those changes (i) if WTO is an organization limited to the interstate logic, it must keep the regulation of the international trade system based on the idea of frontiers; or (ii) if the WTO follows the cosmopolitan logic, it must harmonize its regulation with and have a institutional structure responsive to a pluralistic idea of the international trade system.

Accordingly, chapter three look up for answering those questions. The chapter analyzes the WTO structure and its agreements, identifying if theirs contents and goals are more related to the interstate logic or to the cosmopolitan one. The WTO figures – upon the application of Santos’ theory – as the space where the interactions between different actors and different logics may take place.

WTO is undoubtedly an intergovernmental organization, set out by Member-states, represented by their Governments, as per the words of the Agreement establishing the organization. However, the Sociology of Law methodology goes further on the analysis, combining the formal structure of the organization with its current practices, as per the collected data by the empirical research. Moreover, according to the normative theory developed on the second chapter, it is not only the integrating institutions that define the coordinating mode of production of the space. There are also the unity of practice and the constellations of power, regulation and epistemology⁸ that shall be taken into account.

The analysis of the relations of power, regulation and epistemology at the WTO space has as the point of departure the path of regulation attested in the WTO agreements. Two important evolutions must be taken into account when comparing the WTO system to the previous regulation of the multilateral system: firstly, the organization is now composed by organs to perform its watchfulness role (including the system for dispute settlement and the trade policy review mechanism); and,

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⁸ Epistemology as per the liasons between the active participant and the object of analysis. These are considered the two main parts of the cognitive process of comprehension, which establishes the limits for a coherent action and interaction between the participants in a certain space. Cf. SANTOS, B.S. (1995), Toward a new common sense: law, science and politics in the paradigmatic transition, New York/London, Routledge, p. 438.
secondly, its regulation, differently of GATT rules, is far beyond the strict regulation of customs barriers to trade, it also advances over its Members domestic regulation and stroke public policy and social concerns. Such current characteristics of the WTO drive the multilateral trade system out to a more legalized system, as appointed on the schema below:

**Levels of legalization of the WTO system**

<table>
<thead>
<tr>
<th>Obligation</th>
<th>Non-legal Conventions</th>
<th>Binding Legal Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Precision</td>
<td>General Principles</td>
<td>Precise Legal Rule</td>
</tr>
<tr>
<td>Delegation</td>
<td>Diplomacy</td>
<td>International courts, international organizations</td>
</tr>
</tbody>
</table>

![Schema of Levels of Legalization of the WTO System](image)


It is important to note the imbalance that those different levels of legalization may cause to the WTO system when performing its functions of supervising the multilateral system, of being a forum for negotiation and promoter of the international economic coherence. This issue will be better addressed in the brief description of chapter six below.

This medium level of legalization of the multilateral trade system affected: (i) the entire international trade system; (ii) the process of formulating the multilateral trade system; (iii) the organization of the international economic policy; and, consequently (iv) the process of formulation and organization of the domestic trade policy of its Members. All these changes conducted to, along with the process of legalization, a process of re-politization of the multilateral trade system. Such re-

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10 Cf. JACKSON, J. H. (1998), "Global economics of international economic law", *Journal of International Economic Law*, v. 1: "But with a post-cold war shift to 'geo-economics' and with developing fears among citizen groups about the influence of globalization on their personal and family well being the 'politization' of international economic policy issues, and therefore of legal issues related to them, has led to various studies by different groups on IEL issues (...).". On the same line, v. HOWSE, R. (2002), *From politics to technocracy - and back again: the fate of multilateral trading system*, paper prepared for the Seminar *The boundaries of the WTO*. Available at <http://faculty.law.umich.edu/rhowse>, last access on January 2003.
politization, involving a plurality of constituencies, moves the WTO system from an exclusive interstate logic towards the cosmopolitan logic, as per the schema below:

**Interstate logic**

**Cosmopolitan logic**

*Source: Author.*

Once the context of changes in the international system and the multilateral trade system has been described, in chapter four I focus on the participatory mechanisms available to non-state actors at the WTO. Two unities of practice, as per Santos' theory, were identified: the internal and the external. Both are related to the decision-making process. The former encompasses the unity of practice where the participatory mechanisms have a binding character. On the other hand, the latter includes the unity of interference on the decision-making process, though not binding.

In both the internal unity and the external one, four forms of participation were identified: (i) access to information, (ii) consultation; (iii) cooperation; and (iv) deliberation. Information corresponds to a unilateral process, by which there is a manifestation of one institution in relation to another. Consultation, cooperation and deliberation, on the other hand, are based on the active performance of all actors involved. Consultation is a two-sided relationship conducted for specific topics or questions. Cooperation involves a more permanent and intense degree in the interaction. Finally, deliberation, *stricto sensu,* has a direct relation with the right to vote, which in WTO system is restricted to States and Customs Territories.

These forms of participation at the WTO were identified, for the internal unity, in the WTO Agreements and the binding official decisions taken inside the organization (all dispositions were quoted on the Appendix II to the thesis). And, for the external unity, I considered the informal mechanisms with relevant influence in the decision-making process, mostly related to the practice of lobbies and daily activities promoted by the WTO Secretariat in Geneva. In this chapter is also appointed some critical points in the functioning the forms of participation for non-state actors – especially for the internal unity –, considering proposals for reform by experts and non-state actors.

The purpose in chapter five was to outline the profile of the groups integrating the decision-making process at the WTO. According to Santos' theory it must be considered as "integrating institutions" those actors that organize, on a regular basis, the flow of information inside the space,
through allowed forms and procedures. As a result, each space recognizes as many institutions as active actors are present, with the capacity of organization and influence. Thus, the concept of “integrating institutions” is not limited to actors with legal personality under the International Law. As a result, besides the States (and Customs Territories), all other integrating institutions were classified by their rationality, as: (i) non-state commercial institutions, (ii) non-state advisory institutions, and (iii) non-state demanding institutions. Such classification was developed as tool for a better understanding of the aspirations and interests when non-state actors participate at the WTO system, as well as of the claims for increase participation and the challenges to the multilateral trade system.

Chapter six might be considered the core of the thesis. At this stage, the main hypothesis is to be confirmed: the influence of the new actors in changing the regulation of the WTO system. The portion of the WTO system analyzed concerns the institutional framework of the WTO for non-state actors participation; though not ignored the possibility of those actors to influence the regulation of the international trade issue-areas. In this chapter an important part of the collected data about non-state actors participation at the WTO mechanisms was used to exemplify the changes promoted on the multilateral trade system.

Most part of the data recorded was used, then, to evidence the challenges to the legal constellation of the WTO in its three levels: (i) creation of rules, (ii) application of rules, and (iii) the dispute settlement. The influence of the participation of non-state actors and of the claims for new mechanisms vary according to: (i) the degree of importance attributed by the non-state actors to the mechanisms, (ii) the institutional sensitiveness in each of the three levels, and/or (iii) the responsiveness of the WTO mechanism. Here, I recall the attention to the debate about the imbalance on levels of legalization; what might influence the access to, the sensitiveness and responsiveness of the mechanisms responsible for the creation and application of rules and dispute settlement.

The general provision for non-state actors participation at the WTO is established by Article V of the Marrakech Agreement, besides specific regulations and interpretations for each mechanism as fostered since 1995.

In the WTO system, the process of negotiation for the creation of rules takes place during the Ministerial Conferences (each two years). If the Uruguay Round had no mechanism for non-state actors participation, for the Ministerial Meeting in Singapore (1996) special mechanisms were established. Since then, some further amendments during the last years intended to face the increasing demands for more participation and new mechanisms, as per the graphic below.
Non-state actors participation in the WTO Ministerial Conferences


*Obs:* Only non-state institutions with a non-governmental character are considered in the graphic.

Even if the most important moment for the creation of rules is settled as the Ministerial Conferences, Members handle daily meetings in Geneva where an important part of the negotiation takes place. Non-state actors are aware of that *modus operandi* of the negotiations; therefore they request update information on the decisions made throughout the daily activities of the WTO. For that reason, the WTO Secretariat, with the approval of all Members, has organized Symposia somewhat related to issues under discussion by Members at the WTO forum. Complete information concerning the participation of non-state actors in the Symposia – either as speakers or as participants – is not available to the public access. Below, the graphic appoints the information available:
Non-state actors in the Symposiums (S) organized by the WTO Secretariat

It was possible to verify that the measures adopted so far, for the participation of non-state actors in the process of creation of rules, were – to a certain extend – no more than the implementation of the provisions of Article V. And, still today, great part of the demands related to the institutional aspects directly related to the creation of rules process has per objective to implement that article and finally promote consultations and cooperation between WTO and non-state actors.

Concerning the application of rules, the main mechanism in the WTO is the Trade Policy Review Mechanism. In addition to this, there is also the permanent work developed by the Councils and Committees of the organization. Until today, however, there is no specific regulation for non-state actors participation in these mechanisms. And, the few demands presented by non-state actors are also based on the consolidation of Article V, as to promote mechanisms for consultation and cooperation to this form of regulation.

Regarding the dispute settlement system, since WTO creation, this is the most innovative and perhaps the most notorious body of the organization. Nowadays, it is the constituent that upholds the highest degree of legalization within the organization. Influence by non-state actors in this mechanism may be taken either by actions under the provisions of the WTO Agreements or by actions through non-officials mechanisms. In the former case, the Panel may demand technical information to


Obs: There were no data available on the 4th Symposium, neither about the speakers of the 1st and 2nd Symposiums and the speakers of the 5th and 6th Symposiums.
intergovernmental and non-governmental organizations; and in the latter, non-state actors participate and put pressure to increase their participation by informal mechanisms (as the *amicus curiae* example).

Statistics on *amicus curiae* submitted to the WTO dispute settlement proceedings, and accepted by the Panel and/or the Appellate Body as per an extensive interpretation of article 13 of the WTO Dispute Settlement Understandings, may be found below:

*Amici curiae submitted to the DSB*

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>5</td>
<td>1</td>
<td>5</td>
<td>2</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>1</td>
<td>11</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
</tbody>
</table>

- WT/DS18- Australia: Import prohibition of salmon from Canada
- WT/DS58- United States: Import prohibition of certain shrimp and shrimp products
- WT/DS122- Thailand: Anti-dumping duties on angles, shapes & sections of iron or non-alloy steel & H-beams
- WT/DS135- European Communities: Measures affecting asbestos and products containing asbestos
- WT/DS138- United States: Imposition of countervailing duties on certain hot-rolled lead & bismuth carbon steel products originating from the United Kingdom
- WT/DS141- European Communities: Anti-dumping measures on imports of cotton-type bed-linen from India
- WT/DS160- United States: Section110(5) of the US Copyright Act
- WT/DS212- United States: Countervailing measures concerning certain products from the EC
- WT/DS231- European Communities: Trade Description of Sardines
- WT/DS236- United States: Preliminary Determinations with Respect to Certain Softwood Lumber from Canada
- WT/DS257- United States: Final countervailing duty determination with respect to certain softwood lumber from Canada

*Source: Author based on the reports of the disputes. All available at <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.*

The lack of ruling for Article V.2 provisions, which support the participation on the creation
and application of rules mechanisms, in contrast with the "over"-ruling by the dispute settlement system reinforce the idea that the most legalized mechanisms are more sensitive and responsive to the claims for new forms of participation by non-state actors.

The analysis shows that non-state actors are influencing the implementation and the creation of new mechanisms at the WTO, pushing the multilateral trade system closer to the cosmopolitan logic. However, it is worth to note that those claims for a new social and legal structure at the WTO may increase the imbalance between the mechanisms for the exercise of WTO functions. If this tendency persists the stability of the multilateral trade system might be disturbed.

Chapter seven, as a concluding chapter, outlines some final remarks to the first section of the thesis (which are highlighted on the following item of this paper).

In Section II, the hypothesis was confronted against the Brazilian reality. For this purpose, I focused the analysis on the results obtained from interviews to major representatives of the Brazilian foreign trade policy, including the Government and non-governmental organizations.

Based on the interviews and the data recorded, I noted that the participation of the Brazilian civil society increased substantively as from 2003. Notwithstanding, when compared their ties with the interstate space to those with the cosmopolitan space, I noted that a strong dependency remains from Brazilian civil society to the State's positions before the WTO forum.

As per the results obtained from the interviews with civil society representatives, 90% did not aim to increase their participation in the cosmopolitan space. Those institutions gave the impression that they recognize their aims in the politics promoted by the Brazilian government. I consider that there might have three possible reasons for that belief: (i) due to the fact that they are quite powerful in influencing the politics at the domestic level, or (ii) because they do not acknowledge neither the multilateral trade negotiations agenda nor its technical contents, or (iii) even for reasons of no interest about international issues granting their trust to the representativeness and skills of the Brazilians negotiators.

The 10% left from the Brazilians institutions interviewed pointed to a definition of diplomacy by the cosmopolitan space. In this case, the institutions reported independent actions beyond the government when they are not able to participate at the domestic level. However, these institutions, especially by their claims for a change of the status quo, do not consider the WTO as an alternative forum to acquaint their proposals.
IV. Some conclusions

From the analysis developed in the two main sections of the work, it was possible to find that:

(i) The establishment of the WTO favored an increase legalization of the multilateral trade system, including that of the participatory mechanism for non-state actors. However, the regulation about the forms of participation and the ways in which it should be developed appears in a variety of documents as *soft law* and it varies significantly from one mechanism to another.

(ii) Throughout the period analyzed, I noted an increasing participation of non-state actors in the mechanisms of participation. But, even if the legalization process of the multilateral trade system has favored the re-politization of the system itself, there is a wide range of pending claims from the part of those actors. This points out to the fact that in the WTO there is no mechanisms of participation able to recognize the claims of the actors in interaction and that, in this sense, there will be claims for changes in the institutional structure.

(iii) Great part of the proposals related to the institutional aspects of the WTO turns to the incorporation of elements with a cosmopolitan character in the decision-making process of an interstate forum. Though, it does not aim at a transformation of the interstate nucleus of the organization.

(iv) The degree of influence of non-state actors claims changes in the measure of the degree of interest of those actors in the mechanisms established, the identification of one or another mechanism as the most efficient, the institutional sensitiveness of each of the forms of regulations and, finally, according to the WTO capacity of answering.

(v) The incorporation of the proposals for changes disrupts the system nowadays, as there is no systemic integration. This leads to an uncertainty about the transformations of the social and legal structures in the WTO and the functionality in integrating the new elements.

The challenges for the WTO end up being, therefore, to create new mechanisms of organizing the interaction with non-state actors without desfunctionalizing those already existing and to define mechanisms with an institutional sensitivity related to the new demands without provoking a chaotic instability. Facing the challenges to incorporate the different forms of organization of interests
and their demands for a new social and legal structure, the tendency in the WTO seems to be the integration of these turbulences, based on the experiment of the forms of governance, on an *ad hoc* basis.

The conclusions of Section II indicate that, in face of the changes in the social and legal structure in the WTO, the Brazilian civil society and State are not ready to recognize and promote such changes. Today, there is no perspective for a diplomacy in Brazil with a pluralistic character with respect to the international trade field. If the current diplomacy remains and the changes in the social and legal structures in the WTO continue, there might be an increasing deficit of representativeness of Brazilians actors in participatory mechanisms of the multilateral trade system.

V. Bibliography: main interlocutors and sources of information

As highlighted above, the main interlocutor of the thesis is Boaventura Santos\(^{11}\). His theory on modes of production supports the recognition of two logics in the international system: the interstate and the cosmopolitan. The theory also inspired the methods for classifying the many constituents the multilateral trade system according to modes of production. Jose Eduardo Faria is one of the Brazilians professors who devote his works on the Sociology of Law field to Santos methodology\(^{12}\). For that reason, he must be included as an important interlocutor on the works for the thesis either.

Other authors from the philosophy and Sociology of Law, especially those who work with the idea of the pluralism, complemented the analysis undertook by Santos. Both theories for the cosmopolitism classified as centric – in which I include David Held, Jurgen Habermas and Danilo Zolo\(^{13}\) – and for those more polycentric – namely Ulrich Beck, Dirk Messner, James Rosenau and Günter Teubner\(^{14}\) – might be appointed as important interlocutors. (See footnote 7 for the definition of

\(^{11}\) For the relation of the main works of this author used on the thesis, see footnote 5 supra.


\(^{14}\) ROSENAU, J. (1998), "Governance in a globalizing world", in ARCHIBUGI, D. *et alli* (ed.), *Re-imagining political
centric and polycentric cosmopolitism).

The work organized by Judith Goldstein on the legalization process of international law systems, published together with other authors in the periodical *International Organization*, (volume 54, number 3, 2000) was of fundamental importance to the comprehensiveness of such process in the WTO system.

As per the interdisciplinarity of the thesis, other interlocutors, on specific areas of research, besides the Philosophy and Sociology of Law, were also important. Firstly, I would mention, those authors working on the multilateral trade issues. John Jackson and Robert Hudec were the handbooks for the analysis of the evolution from the GATT into the WTO system\textsuperscript{15}. Other critical analyses of the WTO evolution since its establishment were very important to the thesis, namely the works of Ernst-Ülrich Petersmann, Sylvia Ostry, Gabrielle Marceau and Robert Howse\textsuperscript{16}. Part of this literature


enhanced my comprehension about the principles of democratic governance at the WTO system.

Brazilian authors about the WTO system were fundamental for the elaboration of the Section two. I would highlight the works of Alberto Amaral Junior and Vera Thorstensen. Other important issue-area for the development of the thesis consists on the literature about civil society/ NGOs/ non-state actors in the international system. On this sense, I appoint the importance of the works of Jan Aart Scholte and the works developed by the Centre for the Study of Global Governance of the London School of Economics, concerning Global Civil Society.

Finally, the Brazilian perspective of non-state actors in the Brazilian foreign policy and NGOs at the international level was one of the pillars of the Section II. Not to be exhaustive, I would point out the importance of the works of Ricardo Tavares, Pedro da Motta Veiga and Amaury Souza.

Though not considered as academic works the access to some papers of international intergovernmental organizations and non-governmental organizations were very helpful for a better understanding of the dynamics of the system and the concrete problems faced by those actors.

VI. Contributions of the thesis

There is no other academic works in Brazil dealing with the issues of non-state actors participation on the WTO and how they influence the regulation of the intentional trade system. From my point-of-view the following aspects may be considered as contributions of the thesis:


19 Available at <http://www.lse.ac.uk/Depts/global/>, last access on February 2003.

1) The construction of a theory for new forms of interaction on the international level: the separation of the interstate system and its logic from the cosmopolitan order.

2) The compilation of the regulation for non-state actors in the WTO, in a systematic manner.

3) To elucidate how the increasing participation of non-state actors changed the nature of the WTO system influencing its principles of organization and regulation.

4) The organization of database about the participation of non-state actors in the WTO, drawing attention to Brazilian non-state actors role on the system.

5) To put on view the position of important actors in Brazil, including the Government (Executive and Congress), concerning the participation of non-state actors in the multilateral trade system (counting also with the setting up process for the foreign trade policy of the country).

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## Appendix

### WTO Functionaries by Division

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<tr>
<th>Division</th>
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<tbody>
<tr>
<td>External Relations Division</td>
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<td>Legal Affairs Division</td>
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<td>Rules Division</td>
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### Brazilian Government

<table>
<thead>
<tr>
<th>Ministry of Foreign Affairs</th>
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<tbody>
<tr>
<td>- Minister of Foreign Affairs (2001-2002)</td>
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<tr>
<td>- Division of Economic and Technological Affairs</td>
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<tr>
<td>- Division of Economic Organization</td>
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<tr>
<td>- Division for Dispute Settlement</td>
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<tr>
<th>Brazilian mission in Geneva before the WTO</th>
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<tr>
<td>Inter-ministerial Group on International Trade Issues</td>
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<tr>
<td>Commission for Foreign Affairs and National Defense of the Senate</td>
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<td>Commission for Foreign Affairs and National Defense of the House of Representatives</td>
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### Brazilian institutions of non-state character

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<tr>
<th>Institution</th>
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<tbody>
<tr>
<td>Associação Brasileira da Indústria Têxtil e de Confecção- ABIT</td>
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<tr>
<td>Associação Brasileira de Propriedade Intelectual – ABPI</td>
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<tr>
<td>Associação Interamericana de Propriedade Industrial- ASIPI*</td>
</tr>
<tr>
<td>Central Única dos Trabalhadores– CUT*</td>
</tr>
<tr>
<td>Centro de Estudos de Cultura Contemporânea- CEDEC*</td>
</tr>
<tr>
<td>Confederação da Agricultura e Pecuária do Brasil- CNA*</td>
</tr>
<tr>
<td>Confederação Nacional da Indústria – CNI*</td>
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<tr>
<td>Cooperativa dos Produtores de Cana, Açúcar e Alcool do Estado de São Paulo (COPERSUCAR)*</td>
</tr>
<tr>
<td>Federação de Serviços do Estado de São Paulo – FESESP</td>
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<tr>
<td>Força Sindical*</td>
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<tr>
<td>Greepeace-Brazil*</td>
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<tr>
<td>Grupo Incentivo pela Vida- GIV</td>
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<tr>
<td>Instituto Brasileiro de Comércio Internacional, Tecnologia da Informação e Desenvolvimento- CIITED*</td>
</tr>
<tr>
<td>Instituto Brasileiro de Direito do Comércio Internacional- IBDCI*</td>
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<tr>
<td>Internacional de Serviços Públicos (ISP Brasil)*</td>
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<td>Instituto de Defesa do Consumidor– IDEC*</td>
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<td>Instituto Socioambiental- ISA</td>
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<tr>
<td>Instituto Terrazul*</td>
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<tr>
<td>Serviço Brasileiro de Apoio a Micro e Pequena Empresa – SEBRAE</td>
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<td>Sociedade Rural Brasileira*</td>
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<tr>
<td>Ordem dos Advogados do Brasil – OAB</td>
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<td>União da Agroindústria Canavieira de São Paulo – UNICA*</td>
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<td>Rede Brasil*</td>
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<td>Rede Brasileira pela Integração dos Povos– REBRIP</td>
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<tr>
<td>Rede Internacional de Gênero e Comércio</td>
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<tr>
<td>SBDIMA*</td>
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<tr>
<td>Universidade de São Paulo*</td>
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<td>Warã Instituto Indígena Brasileiro</td>
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<td>World Wide Fund for Nature– Brazil*</td>
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(*) Institutions that have participated in the WTO mechanisms available for non-state actors.  
**Obs:** There were four other institutions that did not answer to the request for interview: ActionAid Brasil, Confederação Nacional dos Trabalhadores em Seguridade Social, Federação Nacional dos Urbanitários (FNU) and Fundação Getulio Vargas. All of them participated in WTO mechanisms.