

## DECENTRALIZATION, INTEGRATION AND TRANSPOSITION: THREE MODELS OF CONSULTATION IN THE GLOBAL LEGAL ORDER

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*The consultation of stakeholders in the global legal arena can be described in the light of three main attributes: first is the divergence – or dichotomy – between the hypothesis in which the position of stakeholders within the decision-making processes is clearly defined by the relevant norms, and the one in which (notwithstanding the provision of participatory rights) a clear definition of those civil society actors entitled to access the procedures in question is absent. The complexity and variety of the issues resulting from the absence of clear definitions of the actors involved – or, more generally, of “civil society” – within the global arena itself gives rise to the second attribute of global participation of stakeholders. From a general point of view, it is often uncertain which “group” of individuals is being addressed by global norms. When we talk of consultation of civil society, should we consider all of the non-governmental organizations, trade unions and/or political parties? Or perhaps single individuals, sharing a common interest, should be included? The third attribute relates to the different approaches developed by global institutions to deal with the consultation of private interests, which are driven by two related factors. The first is the highly fragmented nature of the global regulatory framework; the second resides in*

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*the extreme diversification of the interests potentially eligible to participate in its decision-making processes.*

*On the basis of the foregoing, this article has three purposes. The first is purely descriptive: three different global consultative models adopted in the supranational legal arena will be briefly described. The choice is not arbitrary; rather, the models have been selected having regard to the functions and the relevance of the institutions in the global legal order. The World Trade Organization model, which operates through decentralized management and shared responsibilities, will be explored for first. Next, the integration model, which is well represented by the World Bank Group, will be examined. Finally, the “transposition” model, provided by the Aarhus Convention, will be taken into account. The second goal of the paper is to provide a comparative analysis of the three models, emphasising both the differences and the similarities, with a view, ultimately, to drawing out the possible consequences of each for the democratic development of the global legal order. Lastly, on the basis of the foregoing analysis, this article will set out the various problems confronting each model of consultation, and suggest some potential ways in which they can be progressively developed.*

## I. INTRODUCTION

The supranational arena has undergone a significant transformation in the last fifteen years, progressively shifting from an acerb into a more mature and complex legal system. Due to a number of reasons collectively related to the crisis of the traditional state-centric approach to international policy-making, growing portions of decision-making authority have been relocated from national governments to International Organizations (IOs). As a consequence, not only IOs’ regulatory activities have increasingly affected, both indirectly and directly, single stakeholders and other civil society’s groups,<sup>2</sup> but also the presence of the latter at the supranational level has grown exponentially. Today, non-state actors are increasingly operating on a world-wide, rather than just a national stage. Business companies and multinationals lobby for the recognition of common standards in the administrative and regulatory frameworks under which they operate, in order to obtain stable conditions for investments in foreign countries. Other social actors, such as Non-governmental organizations (NGOs), trade unions, religious and social bodies, try to raise awareness and knowledge in the international community by lobbying towards IOs for a number of causes, including the protection of human rights, the acknowledgement of stronger environmental safeguards, or the reduction of poverty.<sup>3</sup>

So far, civil society's influence on IO's decision-making has proven to be not only erratic, but also its benefits have proven to be temporary, showing how rhetoric about democratization of the supranational legal space through civil society's involvement sometimes runs far beyond real achievements. More specifically, while a number of common practices and administrative standards for determining the reasonableness of regulatory action by IOs, including transparency, public liability, and judicial review, has been progressively acknowledged in consequence of the civil society's advocacy towards IOs,<sup>4</sup> the granting of adequate procedural rights to the parties affected by IO's decisions remains topical, constrained by as many boundaries as are the IOs' regulatory frameworks.

One may regard at the main attributes of the private stakeholders' participation in global policy-making to further understand these discrepancies. The first attribute consists of the dichotomy between the hypothesis in which the position of stakeholders within the global decision-making processes is clearly defined by the relevant norms, and the one in which (notwithstanding the provision of participatory rights) a clear definition of those civil society actors entitled to access the procedures in question is absent. As a matter of fact, participatory rights are deeply influenced by this dichotomy. On the one hand, a comprehensive definition of the position of relevant stakeholders results in a multiplication of consultative procedures; usually as many and diverse as are the interests involved. On the other hand, in the absence of such a definition, the participation of private interests in the decision-making procedures is forced to overcome a higher number of obstacles such as, for instance, the preliminary recognition of the right to be legally represented within the above procedures.

The complexity of the issues resulting from the absence of clear definitions of the actors involved within global decision-making gives rise to a second attribute of participation of civil society at the global level. This is the frequent uncertainty about which "group" of individuals is being addressed by the IOs' rules concerned with participatory rights. When we talk of consultation of stakeholders by IOs, should we consider all of the NGOs, trade unions, political parties, and more generally any organized groupings? Or, perhaps, single individuals sharing a common interest should be included as well? The answers are again variable, mostly depending on which IO's regulatory framework we observe. More often than not, however, the right to be consulted within the global decision-making processes is a right that *de facto* only organized groups – mostly NGOs are entitled to exercise.

The third, and last, attribute of the private stakeholders' participation in global policy-making relates more closely to the different approaches developed by IOs to deal with the consultation of such interests. As a rule of thumb, it might be safely argued that IOs' approaches towards inclusion of stakeholders within its decision-making processes are "moderate" – that is, approaches that do not tend to incorporate hard procedural rights into definitions – due to the extreme diversification of the interests potentially eligible for consultation. The World Trade Organization (WTO), for instance, does not provide a structure deliberately tailored to respond to the inclusion of the interests of civil society within its rule-making activities. This choice, however, is followed by the decentralization of consultative functions – and the related responsibilities – at the domestic level. Elsewhere, as in the case of the World Bank Group (WBG), the global sphere complements the results of domestic consultative procedures with further procedures and structures operating at the global level. In other cases still, the *locus standi* of the private actors is both national (although in respect of the standards set at the supranational level) and global. This happens, for instance, in the network established under the auspices of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, "the Aarhus Convention").

On the basis of the foregoing, this article's main trust is to analyze and compare a few different models of consultation of civil society's interests operating at the global level. Three models will be examined to support the analysis. The choice is not arbitrary; rather, these models have been selected having regard to the functions and the relevance of the concerned IOs in the global legal order. The WTO model, which operates through decentralized management of the consultative procedures and shared responsibilities, will be explored first. Next, the so-called "integration model," which is well represented by the WBG, will be considered. Finally, the "transposition model," provided by the Aarhus Convention, will be expounded.

This empirical account sets the stage for a comparative analysis of the civil society's participatory models at the global level, aimed at emphasizing both its differences and similarities, with a view, ultimately, to drawing out the possible consequences of each for the democratic development of the global legal order. This article will also seek to suggest potential ways in which the consultation of private stakeholders at the global level could progressively develop. On the one hand, it is possible that the net results of the efforts made by IOs in setting procedures and normative standards for regulatory decision-making, and the

increasingly convergent jurisprudence of various international courts and tribunals towards the recognition of a due process principle of global significance, may support a closer uniformity of participatory rights at the supranational level. On the other hand, however, the divergences in the global regulatory frameworks with regard to the issue of consultation seem to suggest that, for the time being, further fragmentation is the way forward.

## II. A DOUBLE-TRACK APPROACH TO EXPOUND THE WORLD TRADE ORGANIZATION MODEL

The first global model of consultation to be explored occurs in the framework of the WTO. This is named the model of “shared responsibilities and decentralized management.”

In what follows, the description of this model will be developed by using a “double-track approach.” That is, the empirical analysis of the norms and the procedures regulating the commerce at the global level will be complemented by a study of the relevant jurisprudence of the Appellate Body (AB). This choice is justified by the different interpretations of consultation that the General Council (GC) of the WTO, on one hand, and the jurisprudence generated by the dispute resolution panels and AB, on the other, has elaborated through the years. The former is the result of a strictly pragmatic approach. On more than one occasion, as we shall see presently, the GC has affirmed the relevance of the participation of civil society to the goal of encouraging the democratic development of the regulation of global commerce. At the same time, however, the GC has delegated to the national governments the primary responsibility for consulting the stakeholders, and more generally for rendering the entire decision-making processes regulating the global commerce more democratic and accountable to the national communities of stakeholders. Yet, the AB has recognized the existence of a core of due process principles – among which is the right to be heard – directly operating (and binding) at the global level. In the AB’s opinion, not only are private parties entitled to exercise the right to be heard within the global administrative procedures, but also the WTO is also responsible for determining (and then imposing) a uniform set of procedural standards at the domestic level.

In spite of these differences, the GC’s and AB’s approaches, in the long run, converge. The AB’s interpretation is not, in fact, intended to reverse the official

position of the GC, but rather to integrate it within a more comprehensive approach. In the AB's interpretation, consultation should be understood as a broad process that takes place on two different levels, the national and the global, at the same time. At the domestic level, the stakeholders are entitled to exercise the right to be heard, according to the administrative procedures operating in each national system. As a consequence, national governments have the responsibility to respect and enforce minimum standards of transparency and democracy. Thus, when moving to the global level, the stakeholders' opinions are assumed to be already reflected in the official positions of the governments' representatives. This is why, according to AB's opinion, the primary responsibility of the WTO is not to guarantee full participatory status to the interested parties, but rather to ensure that minimum procedural standards have been respected at the national level, and only to a minor extent to provide the opportunity to stakeholders to be consulted within the global procedures.

### III. THE NOTION OF CIVIL SOCIETY AND THE CONSULTATIVE PROCEDURES IN THE FRAMEWORK OF THE GLOBAL COMMERCE

Having settled on a working definition of the model of "shared responsibilities and decentralized management," the following pages will illustrate the role of private stakeholders within the WTO's rule-making activities in more specific details, beginning with the definitions currently in use in the WTO's normative framework, and then moving to the analysis of the channels of consultation provided by the WTO.

Let us start by saying that in the official WTO documents the concept of civil society recurs frequently. After all, the relevance and the number of the interests involved by the regulation of commerce, together with the possibility that the decisions taken at the supranational level could directly affect private actors' interests, impose a need on the WTO to achieve accountability through, *inter alia*, transparency and consultation. Yet, in none of the official documents is a comprehensive definition of civil society is ever being given. This situation creates a certain degree of confusion: firstly, in the definition of the interests that are to be treated as relevant for the purposes of consultation; and secondly, in terms of their relation to global consultative procedures and structures.<sup>5</sup>

Albeit in a very general sense, the concept of consultation is mentioned in the Marrakesh Agreement, Article V (“Relations with other organizations”),<sup>6</sup> which entrusts the GC with a double task. First, the GC must seek to cooperate, through the conclusion of appropriate agreements, with all the inter-governmental organizations whose responsibilities are related to those of the WTO. Secondly, and for this article’s purposes more relevantly, the GC should make provision for consultation and cooperation with NGOs concerned with matters falling under the competence of the WTO.<sup>7</sup>

It might be useful to underline that also the guidelines and the rules for consultation contained in unofficial documents refer to consultation and civil society in very general terms, similarly to the Article V of the Marrakesh Agreement. Moreover, all references to consultation mention civil society’s organizations or NGOs directly, confirming that the WTO’s definition of civil society is essentially limited to NGOs, indirectly excluding single stakeholders from intervention in its decision-making processes.

Given the above, there are four main channels to consult NGOs. The first, and more important, consists of the possibility for NGOs to attend the “Ministerial Conferences,” the topmost body of the WTO under the governance structure set up by the Marrakesh Agreement.<sup>8</sup> However, the participatory status is granted to NGOs as long as two conditions are respected. In general, as provided by the Marrakesh Agreement, the NGOs in question should be involved in matters related with the topic of the Conference. Moreover, they need to apply and be registered through an electronic process. A second possibility for NGOs to take part into policy-making processes is through participation in the “Public Forums.” These are meetings organized annually or bi-annually. The same rules apply as for Ministerial Conferences. A third way to consult the interested parties is through the “*Colloquia*.” These meetings have been organized periodically since 2007 between the WTO’s representatives and different civil society organizations. In this case, the registration process is less formal than in the previous cases. Basically, all parties interested to attend a *Colloquium* are requested to send a letter (in electronic format) to the Secretariat of the WTO. The fourth and final means of consulting NGOs are through the *Symposia*, organized since 1996 by the GC on topics of particular relevance for the concerned NGOs, such as the protection of the environment, trade and sustainable development. These *symposia* have provided, on an informal basis, the opportunity for NGOs to discuss specific issues with representatives of WTO Member countries.

#### IV. SETTING THE GUIDELINES FOR THE CONSULTATION OF NON-STATE ACTORS: FROM THE GLOBAL TO THE DOMESTIC LEVEL

After having defined civil society according to WTO's official interpretation, and described the channels through which NGOs are consulted, a few references may be made at the GC's official position towards consultation and participation of civil society. There are two important decisions from GC regarding the consultation of private stakeholders within WTO's decision-making processes. The first one is decision n. WT/L/162. The second one is decision n. WT/GC/W/92. As we shall see presently, the two documents are almost entirely corresponding.

Decision n. WT/L/162 has been adopted in June 1996.<sup>9</sup> This document develops a set of guidelines concerned with the conclusion of agreements between the WTO, NGOs and all other organizations representing the interests of the civil society. The document begins by offering an explanation of the reasons which justify the conclusion of agreements with NGOs. According to the GC, the civil society's awareness of the activities of the WTO activities since 1996 has increased on a regular basis. This has brought the necessity to develop a more mature dialogue among stakeholders, relying upon the development of transparency and democracy in the decision-making processes. The document explains that there are, of course, different ways to increase democracy and transparency in the WTO's relations with stakeholders. One possibility relies on the modification of the norms operating at the supranational level. However, notes the GC, the right to be consulted within the global legal order meets a number of relevant limits. Access to information, for instance, is allowed, but there remains a high number of cases in which confidentiality prevails; the organization of the meeting with NGOs depends mostly upon the initiative of the WTO institutional bodies; and, in any event, even where NGOs are admitted to the official meetings of the committees, they are only granted simple observer status. This set of limits, in the interpretation given by the GC, is a consequence of the legal nature of the WTO, which is defined in the following terms:

“Both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations”<sup>10</sup>

In the GC's opinion, the special character of the WTO makes difficult, if not impossible, to ensure full and effective participation to civil society's representatives in WTO's rule-making. It is for this very reason that the national rather than the global level should be entrusted as the *locus* where to grant *prima facie* participatory rights. As explained in the decision:



“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 on trade policy-making.”

The meaning of this passage is clear. The “voice” of civil society, in the GC’s opinion, cannot be excluded from the elaboration of the decisions on global commerce, for reasons related to the institution’s accountability. Nevertheless, the WTO’s legal nature is a serious obstacle to the effective participation of private interests. In spite of the presence of a developed set of consultative procedures operating at the supranational level, the role of anything other than governmental interests remains purely marginal. However, thanks to the fact that the WTO is essentially a *forum* that relies on national governments as primary actors, the consultation process can be translated into their domestic arena. Hence, the primary responsibility for consulting interested private parties lies with national governments, who will later reflect the opinions of the private stakeholders in their official positions expressed in the Ministerial Conference and other official meetings. According to the GC, this is the best possible way to reconcile the legal nature of the WTO with the need to guarantee its accountability towards the global civil society.

The content of the decision n. WT/L/162 has been furthered by a second decision, n. WT/GC/W/92, adopted in July 1998, in which the GC gave a full explanation of the relation between consultation, transparency and accountability in the WTO decision-making process.

An adequate level of transparency – explains the GC in the decision – is essential in order to ensure that institutions are accountable for the decisions that they take. Transparency, in turn, can be successfully achieved through the consultation of stakeholders. The decision suggests two means of achieving this: either through the more effective use of the channels of communication already in existence, or through the development of new forms of dialogue between the WTO and the relevant stakeholders. In terms of the former, the GC makes reference to the *Symposia*. According to decision n. WT/L/162, in fact, the informal nature of these meetings is a useful tool in helping to construct a profitable dialogue between the parties involved. The decision explains that:

“The Secretariat has developed channels of communication with a large number of NGOs representing different interests in civil society. Of particular interest, as a means of fostering an interactive dialogue between WTO Members and the broad NGO community has been the

organisation of symposia on issues such as trade and the environment or trade facilitation. Their informal nature is particularly conducive to an open dialogue in which the particular interests and concerns of the broad NGO community can be communicated and discussed with WTO Members. Such open dialogue contributes not only to a better understanding of the role and activities of the WTO, but also enriches and strengthens the WTO by providing a means to draw on the expertise of organisations of civil society.”

In terms of the latter, the GC offers two different (although complementary) solutions. On one hand, it is important that all the institutions of the WTO – including the Director General and the GC itself – cooperate to guarantee the best possible interaction with civil society representatives. Nevertheless, the decision does not provide any further explanation on the practical ways in which this might be achieved. On the other hand, the GC proposes to delegate the responsibility for consultation to national governments, and explains why domestic *fora* are more appropriate to fulfil that task. Specifically, it is stated that national governments:

“Are supposed to represent their entire population. They have the primary responsibility to establish, at the domestic level, broad consultative processes with organisations of civil society, through which such organisations can have an input into the process of trade policy formulation, and to develop an effective communications strategy.”<sup>11</sup>

## V. DECENTRALIZATION AND SHARED RESPONSIBILITIES

Thus far the position of the GC towards the consultation of civil society actors has been analyzed. However, as already anticipated, account should be given also to the AB’s jurisprudence, which has partially modified the GC’s approach. The AB has confirmed, on one hand, the presence of a binding obligation upon national governments to ensure the consultation of private parties. Yet, on the other hand, it has recognized the existence of a nucleus of due process principles upon which interested parties can rely directly within WTO procedures themselves.

One of these principles is the participation of Non-State actors within the WTO’s decision-making processes.<sup>12</sup> In the opinion of the AB, the idea that national governments have the primary responsibility to consult civil society is valid as long as one condition is respected: that this responsibility is not entirely

decentralized. Beside the obligations of nation-states, there must also be certain duties in this regard upon supranational institutions.

There are four cases worth mentioning at this regard. The first, known as the *Malleable cast iron tubes* case, was resolved by the AB in 2003.<sup>13</sup> This decision has underlined for the first time the presence of procedural rights that private parties could rely upon in the domestic towards the supranational level. A brief summary of the case may be helpful to clarify the interpretation provided by the AB. On 21 December 2000, the government of Brazil requested consultations with the European Communities (EC) as regards definitive anti-dumping duties imposed by Council Regulation (EC) No. 1784/2000 concerning imports of malleable cast iron tube or pipe fittings originating, *inter alia*, in Brazil. The Brazilian government considered that the EC's evaluation of the facts was not unbiased and objective, both at the provisional and definitive stage, particularly in relation to the initiation and conduct of the investigation. While the Compliance Panel which was originally created to deal with the case had denied that the EC had a duty to provide information to a Brazilian company affected by its trade measures, the AB reversed this opinion. The AB's interpretation of the WTO Anti-dumping Agreement focused on the presence of some procedural guarantees that national authorities must observe before the adoption of any restrictive measure. The decision explained that one of these guarantees is contemplated by Article VI of the Agreement ("evidence"):

"All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

In consequence, the AB explained that the EC's refusal to transmit a particular document to the *Indústria de Fundação Tupy*, the Brazilian company in question, had negatively affected the company's efforts to organize a proper defence.

Over time, the AB has also held that stakeholders are entitled to participate directly in WTO decision-making processes, displacing the original centre of gravity of participatory rights set by the GC directly on the WTO. In such cases it is no longer the simple responsibility of the supranational institution to guarantee the respect for certain procedural rights at the domestic level to be discussed; instead, the AB addresses the content and the limits of participation in the global arena itself. Three cases should be considered at this regard. The first, known as the *Shrimp/turtle* case, originated in a complaint by Pakistan,

Mali and Thailand against the U.S. embargo on the importation of shrimps (the three complainants, in the US government's opinion, had not fully enforced relevant measures to protect turtles during their fishing operations).<sup>14</sup> One of the questions that the judges were asked to solve addressed the admissibility of observations lodged by certain NGOs as *amicus curiae* briefs. Previously, the Panel appointed to solve the dispute had affirmed that NGOs were admitted to present their observations only within the defensive written memories of the parties. The AB opted for a constructive dialogue with the United States on a potential reconsideration in the relationship governing trade and environment. Even if time-consuming, in the end the accommodation of environmental concerns and the compliance to the trade regime was successful. More importantly, the decision of the AB maintained that it was admissible to:

“...allowing any party to the dispute to attach the briefs by non-governmental organisations, or any portion thereof, to its own submissions”

Even if, as a matter of principle, the *amicus curiae* role is not the same as a formal legal right to participate in decision-making processes, it is nonetheless a way to engage civil society interests' within the judicial proceedings, raise awareness in the public opinion, and influence the decision-making processes held at the supranational level.<sup>15</sup>

The second decision, rendered in the *Carbon steel* case, follows a similar pattern.<sup>16</sup> In this case, the EU had presented a complaint regarding the imposition of countervailing measures by the United States on certain hot-rolled lead and bismuth carbon steel products produced in the United Kingdom. The AB was requested to decide, among other things, the admission within the dispute of two US companies as *amici curiae*. This was contested by the EU, recalling article 13 of the procedural rules, for which private parties are allowed to present documents that might be useful for the judges to solve the case in question, but not to express their opinions thereupon.<sup>17</sup> Although the judges ultimately agreed with the EU position, they did not address the problem of the relevance of the contributions, nor the interpretation of article 13. They simply affirmed that the decision to admit or not any observations to the proceeding was a matter for their own discretion.

The last decision, of 2001, dealt with the appeal of the Canadian government against the Panel that had rejected its complaint against the French *Décret n. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*. In this case the AB consented to take into consideration the views of two NGOs, giving the following reasons:

“We recognized the possibility that we might receive submissions in this appeal from persons other than the parties and the third parties to this dispute, and stated that we were of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only, pursuant to Rule 16(1) of the Working Procedures, to deal with any possible submissions received from such persons.”

In setting out the additional “appropriate” procedures, the judges explained which conditions allowed non-state actors to present their opinions within dispute settlement proceedings. In general, they explained that:

“Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body”

The judgment also explained the ways in which any such application must be presented, establishing both quantitative and qualitative limits. In terms of the former, they set a maximum number of pages for possible admission; while, in terms of the latter, they explained that the applicant must have a direct interest in the controversy in question, and that all the observations must be relevant thereto.

Finally, the AB explained that, notwithstanding the duty to take into account the content of the observations, this does not mean that their content is binding. In fact:

“The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.”

## VI. THE INTEGRATION MODEL AND ITS VARIANTS: A GENERAL OVERVIEW

The second global model of consultation – the “integration” model – is adopted by the WBG.<sup>18</sup> As with the WTO, the WBG policies operate on the premise that the achievement of transparency and accountability needs the effort of both the global and the domestic institutions. Yet, this proposition does not result in the simple decentralization of the consultative process to the various national levels, nor does it consist of the transposition of national procedural guarantees from the domestic to the global level (as it happens in the Aarhus Convention’s model). Rather, the integration model relies on two different consultative

systems, one operating at the global level, and the second at the domestic level. Although independent, the two systems are integrated for two main reasons. First, due to the global structures and procedures which provide for the direct consultation of private interests; and second, due to the development of binding global standards for all governments who receive international financial aid from the WBG.

All three main institutions composing the WBG adopt this model. However, a closer analysis reveals the presence of some variations that is worth mentioning. Both the approaches adopted by the World Bank (WB) and the International Finance Corporation (IFC) fit the description of the general model. The main difference between the two is the presence of the Compliance Advisory Ombudsman (CAO) within the IFC, which has no counterpart in the WB (if we exclude the Inspection Panel, which private actors are not entitled to address). Through granting to individuals (as well as to NGOs) the opportunity to present a complaint, the CAO helps to achieve greater interaction between the global and the domestic levels. Although non-binding, its decisions have *de facto* often influenced the elaboration of future IFC's policies. Instead, the main difference with regard to the Multilateral Investment Guarantee Agency (MIGA) is that the MIGA adopts a less developed definition of civil society. Indeed, the official documents of this institution do mention the participation of private interests but, contrary to the previous cases, they do not make clear distinction among them.

In the following pages the content of some of the most important official documents of the WBG on consultation will be briefly summarized, and the composition and activity of the WBG's consultative structures will be subsequently addressed. The analysis of each of these aspects will be developed through examining some relevant case studies, in order to better understand how the problems that have arisen have been dealt with in concrete terms.

## VII. A DEFINITION OF PRIVATE INTERESTS IN THE OPERATIONAL POLICIES OF THE WORLD BANK GROUP

Let us begin by describing which definitions of the term "stakeholders" the WB, the IFC and, lastly, the MIGA adopt.

Compared to the WTO, the WB's procedures and structures dealing with the issue of consultation are characterised by a much higher level of complexity. It might be useful to note that, since 1981, when the Board of Directors firstly

elaborated a set of operational policies regarding its partnership with NGOs, there has been a constant implementation of the structures and the resources.<sup>19</sup>

More specifically, two documents need to be considered. The first is the 2007 sourcebook titled “Consultations with Civil Society.” The book defines separately “civil society organizations,” “stakeholders,” and “civil society.” According to the sourcebook, every civil society organization presents two main characteristics: a not-for-profit orientation and a private legal status.<sup>20</sup> On the contrary, the term “civil society” is used to denote the entire body of citizens in a State. At the same time, both notions are distinguished from the definition of stakeholder, which refers to:

“Those parties interested in or affected by Bank policies and work. They can be individuals, communities, and organizations such as governments, business and donor agencies. Primary stakeholders are those ultimately affected, either positively (beneficiaries) or negatively (for example, those involuntarily resettled). Secondary stakeholders are the intermediaries in the aid delivery process. This definition of stakeholders includes both winners and losers, and those involved or excluded from decision-making processes.”

The second document addressing the issue of consultation is the 2005 “Issues and Options for Improving Engagement Between the World Bank and Civil Society Organizations,” drafted after the decision of the Board of Directors to review the operational strategies on consultations with civil society actors.<sup>21</sup> The document may be differentiated from the sourcebook under two main aspects, both caused by the fact that it has been adopted earlier than sourcebook. First, the idea of dialogue with civil society always addresses organizations, never single individuals. Moreover, the distinction between the primary and secondary interests of civil society, which is clearly underlined in the sourcebook, in the 2005 document is more rudimentary.<sup>22</sup>

In a manner similar to the WB, the IFC has also adopted a broad definition of “civil society.” In “Listening to our stakeholders,” a document published in 2006,<sup>23</sup> the IFC assumed as a starting point its legal nature: a global financial institution whose activity impacts on a wide range of interests. This in turn makes it necessary to adopt a generic definition of the term “stakeholders.” These are conceived not only as the local communities concerned with the realization of a project and the NGOs, but also as the whole civil society. There is, however, a distinction between the latter and the first two. The Civil society as a whole benefits from the IFC’s activities in terms of economic growth, the

development of industry, the reduction of unemployment, and, often, from increasing levels of literacy. However, because local communities and NGOs are both organized into a structure, they could – differently from the civil society as a whole – be eligible for the status of interlocutors with the IFC, as clients or partners in the realization of a project.

Finally, in the MIGA the definition of civil society is less developed than that operative in the previous two institutions. The MIGA Convention (hereinafter, “the Convention”),<sup>24</sup> lists among its goals the following:

“...to encourage the flow of investments for productive purposes among member countries, and in particular to develop member countries, thus supplementing the activities of the International Bank for Reconstruction and Development..., the International Finance Corporation and other international development finance institutions.”

The framework is almost as complex as in the previous cases. In particular, it must be noted that MIGA interventions on civil society are highly variable, depending on the kind of activity which is going to be exercised: financing, or collaborating with public and private actors. As a consequence, the range of actors involved is large. Both governments, as official members of the institution, and the whole of civil society, as a beneficiary of the financed projects, are involved. Moreover, in some particular hypothesis, the MIGA is entitled to collaborate with actors that, although formally public, are directly linked with local communities. The Article 19 of the Convention, for example, explicates the obligation on the Agency to cooperate with any national or regional entities the majority of whose capital is owned by the member States, and that carry out activities similar to those of the MIGA (that is, the contribution to increased flows of foreign investment). Elsewhere, the same Convention provides for the possibility for the MIGA to enter into arrangements with both private national (such as insurers in member countries) and international institutions.

## VIII. THE PROCEDURES FOR THE CONSULTATION OF CIVIL SOCIETY

The complexity of the definitions of private actors entitled to participate in decision-making processes provided by the three WBG institutions has a direct effect on their consultative procedures. This paragraph will summarize the basic aspects of each, beginning with the WB.



The consultative procedures contemplated by the WB have three common characteristics. First, they all define participation in terms of a “technical dialogue” between the concerned stakeholders and the WB. Second, they all pursue the adoption of a decision as their primary goal. Third, the *locus* of consultations can be global, regional or local. Global consultations, on one hand, have a global starting point – usually a consultative *forum* – and are consequently developed at the regional or national level. Immediately after the global consultations we find the regional or multinational consultations. These can take one of two forms: either as a “second step” of the global consultations; or autonomously, when the global decision is addressed to more countries.<sup>25</sup> Finally, when the realization of a project involves the action of a single government, we find the national/local consultations. There is one big difference between this last situation and the previous two. While at the global and regional levels the participation of national governments in consultations is allowed, but not strictly necessary, in the local consultation the intervention of national governments is considered to be essential. In other words, because local consultations are defined as “consultations owned and driven by the State,” the governments are forced to use their national administrative procedures to consult the opinion of the communities affected by a project, and after send the results to the WB, who will make the final decision.

Let us move to the IFC. Here, the main form of consultation, which basically consists of the possibility for the stakeholders to express their opinions and views on the realization of a project, is activated every time that a new decision has to be made. The target of the actors can vary depending upon the type of decision. In 2004, for instance, during the process of review of IFC environmental policies, there were no limits on the type or number of private actors who could participate.<sup>26</sup> In the so called “topic-specific meetings,” however, typically only a few actors have the right to be consulted. Depending on the topic, those invited might include human rights organizations, representatives of indigenous communities or trade unions.

Similarly to the WTO, in the IFC’s framework participation is considered as a tool to improve the accountability rate. Whenever financing for a project is approved, the IFC imposes obligations upon the beneficiaries in order to ensure that they are accountable to the international community. Moreover, both private actors and NGOs are entitled to bring complaints before the CAO, which is required to verify that beneficiaries have respected their obligations, and report to the Management Board of the IFC with its recommendations.

The approach adopted by the MIGA is broadly similar. In general, the 2007 “Performance Standards on Social and Environmental Sustainability” guarantee:

“Effective community engagement through disclosure of project-related information and consultation with local communities on matters that directly affect them.”<sup>27</sup>

This “community engagement” is truly considered as a long-term process, beginning with the disclosure of information and ending with the discovery of the opinions of interested parties. The disclosure is intended to enable the affected community to understand the risks, impacts and opportunities of the project; at which point the consultation process allows those involved to express their opinion with regard to the financed project and possibly obtain some changes in it.

## IX. THE COMPLIANCE ADVISORY OMBUDSMAN AND THE INSPECTION PANEL

As explained previously, the high variability of the interests involved and the subsequently broad definitions adopted are both relevant factors that influence the number and the quality of consultative procedures. A further consequence is that each of the three global institutions has a complex structure through which the various relevant interests and actors are managed.

The most complex structure, organized in three concentric circles, is provided by the WB. There are approximately eighty “Civil Society Country Staff” (CSC), operating at the domestic level; a single “Civil Society Group” (CSG), which is in charge of the relations between the centre and the local branches; and finally, the “Civil Society Team” (CST), established at the global level and tasked with the coordination of the entire structure. Each of the three circles is related to civil society, although the operational structure (decentralized for the CSC, centralized for the CSG and the CST) and the activities in which they are involved (only the CST has a coordinating function, while the CSG and the CSC are mostly responsible for actually consulting with the parties) may vary.

Beside the CSC, the CSG and the CST, there are two more structures which have some relevance with regard to the consultation of the stakeholders. The first is the Speaker’s Bureau, the “entry point” to the WB. Anyone who is interested in approaching the institution has to address the bureau. The second structure is the IP, created in 1993 by the Directors of the International Bank for Reconstruction and Development and the International Development

Association. The IP, which is composed of three members elected by the Board of Directors, is in charge for:

“Address the concerns of the people who may be affected by Bank projects and to ensure that the Bank adheres to its operational policies and procedures during design, preparation and implementation phases of projects”

The role of the IP is basically to ensure that all administrative activity in which the Bank is involved is conducted in accordance with its policies. In any event, the IP is only allowed to intervene when all efforts have been made to bring the matter to the attention of the WB Management using other available mechanisms. Moreover, any complaints regarding actions which are the responsibility of other parties (such as the borrower) and which do not involve any action or omission on the part of the Bank, that are filed after the closing date, or that are addressing a matter over which the IP has already made its recommendations (unless justified by new evidence) are rejected.

Two examples help to further explain the IP's activities and relevance to the subject of consultation. In January 2006, the IP dealt with a complaint related to a land administration resettlement in Honduras<sup>28</sup>. The IP initially acknowledged the complaints filed by some Honduran NGOs questioning the effectiveness of the “*Mesa Regional*” (MS), a *forum* where conflicting local interests were represented since the project's start-up. In the requesters' claim, the *forum* lacked legitimacy. In their opinion, it was created in spite of the disagreement of the local indigenous community, the Garífuna people, and has never represented them efficaciously. The IP considered the request eligible and in 2007 drafted an investigation report. The strategy suggested, as a first step, to bolster the MS's consistency. At such regard, the report pointed to intensifying the cooperation between the MS and the leading representative bodies of the Garífuna. Subsequently, the IP advised that a closer supervision of the MS and up-to-date knowledge by WB staff would have been beneficial to limit further endangering of Garífuna's survival. The third step concerned the project's implementation. In short, the IP put forward the necessity to involve in future consultations the national “Inter-Sectoral Commission for Protecting Land Rights of Garífuna and Misquito Communities.” This governmental agency might have played a significant role in helping to address the concerns that have been raised and promote dialogue between local communities and the government. The fourth and last step addressed the different types of conflict resolution procedures, judicial and extra-judicial, available to solve the land conflicts. On the merits, the IP argued that a better coordination between the different procedures

would have been definitive. Therefore, the arbitration procedures provided in the project should be harmonized with the local resolution procedures. The MS was indicated as the device through which harmonization could be achieved. Also, an increase in budget allocations for training conciliators and arbitrators was deemed as a further useful step.

Yet in other cases, the IP has pursued the review by directly strengthening the local framework of civil society actors. Serving as an illustration in this regard is a 2004 complaint on a WB financed urban transportation project in Mumbai. The project consisted of three components: the improvement of Mumbai's rail transport system, the improvement and extension of the road-based transport system, and the resettlement and rehabilitation of the affected communities. In total, four requests for inspections were filed to the IP.<sup>29</sup> All of them, however, pertained to similar concerns: the inadequacy in the restoration and resettlement of the affected people. Thus, the strategy designated a two step process of review. In the earliest, the IP opted for improving the local NGOs' credibility. According to the project design, in fact, almost all direct responsibility for field operations was delegated to two local NGOs. To strengthen their accountability, the IP targeted the sub-sequential expansion of their institutional capacity and expertise. In the latest, once an effective institutional framework had been established, the IP pointed to the conversion of the NGOs into small administrative agencies cooperating in close contact with the "Mumbai Metropolitan Regional Development Authority." Furthermore, the IP suggested two additional corrective actions. As for the first, the IP insisted on promoting a well-structured grievance system to sustain the renovation of the institutional framework. In the second place, the WB was requested to increase the number of staff members on the project, improve transparency in its processes, and control closely the future project's evolution.

The complexity of the IFC's consultation structures is, by comparison, less developed. On one hand, we note the absence of a multi-level structure: the consultation process is entirely managed at the global level. On the other, thanks to the presence of the CAO, this difference partially disappears. The CAO, whose task is to handle the complaints and verify that the applicable global standards have been enforced, has frequently developed innovative solutions relying upon further domestic consultations, favouring the interaction between the global and the domestic level. It is worth noting also that the CAO has jurisdiction over the MIGA too; as such, all of the following considerations apply equally to both institutions.

The CAO's Operational Guidelines specify its dual nature, endowed with a compliance role and an advisory role. The following pages will focus on the first one of these, in which the so called "affected parties" (individuals, groups of people, or organizations that are affected by IFC/MIGA projects) are entitled to bring a complaint and receive adequate explanations on the reasons behind any IFC/MIGA decision. Subsequently, after the conclusion of an informal inquiry, the CAO may suggest different solutions to the respective global and/or local authorities.

In June of 2000, for instance, following the accidental loss of toxic waste throughout the Peruvian highway connecting Lima to Choropampa, several mining companies involved in a local IFC's financed project filed a complaint to the CAO. The complainants sought an independent investigation of the case. In particular, they pointed to the local authorities' negligent response to the incident as the main cause of the acute poisoning suffered by the local communities. Notwithstanding the appointment of an independent commission of experts who were brought in to file a report on the event's responsibilities, two new extensive complaints were filed to the CAO shortly afterwards. Complainants were, respectively, three neighbouring communities and a local NGO. The spectrum of allegations ranged from the shareholders' and government's lack of managerial competence to the environmental, social and economic unsustainability of the project. Therefore, in its 2001 final report the CAO suggested the creation of a consultative forum where a collaborative problem-solving process could take root. The forum, named "*Mesa de Dialogo y Consenso*" (MDC), would have been composed of NGOs, representatives of local communities and government officials. The proposal suggested that a finite number of participants would join the MDC. This solution would have encouraged a more meaningful and positive dialogue and guaranteed the effectiveness of its operations. In addition to the forum's meetings, however, a number of individual consultations would have been held to guarantee the participation of the number of stakeholders not officially represented in the MDC. Eventually, the MDC was created. Between 2001 and 2003 the forum successfully operated, generating several relevant documents, and progressively remodelled the dialogue between the civil society and the shareholders involved in the project. Later, between 2005 and 2006, its activity was reviewed by an independent commission. Finally in 2006, after the publication of the CAO's exit report, the parties unanimously proposed to renew the MDC's mandate or even transform it into a conflict resolution body.

Ultimately, in specific events the CAO has entrusted the local government in the choice of pertinent solutions. Most notably in this regard is, for instance, a

complaint recently handled by the CAO on a mining project in Guatemala. In 2003, the government of Guatemala, following a neo-liberal political program aimed at attracting capitals from abroad, issued a digging concession to exploit some gold and silver strip mines. The project was granted IFC financial support. Between January 2005 and June 2006 some local and international NGOs complained to the CAO about the negative impact of the project on the environment and the adoption of inadequate consultations with the local indigenous communities. In its assessment report, the CAO recommended that a high-level delegation from the Honduran government, the mining company and a representative of the complainants should consider engaging in dialogue to establish the acceptable next steps towards achieving the resolution of the dispute. In fact, the absence of clear government regulations on participation and disclosure had resulted in uncertainty for local people regarding the extent to which they should have been informed and consulted. Accordingly, the government of Guatemala was suggested to stimulate the participation in the manner that, under the circumstances, it considered more appropriate. On the merits, the CAO's only suggestion was the indication of the mining company as the ideal interlocutor in undertaking enhanced consultations with local community groups. Following these requests, the Guatemalan government committed itself in the endeavour of ameliorating the project's governance, mainly through participation. Hence, the government established a "High Level Commission" (HLC) to review and address mining issues. This Commission consisted of members of the Catholic Church, the government, industry and NGOs. In addition, local communities were consulted through a referendum.<sup>30</sup>

## X. THE TRANSPOSITION OF DOMESTIC ADMINISTRATIVE GUARANTEES IN THE GLOBAL ARENA: THE MODEL OF THE AARHUS CONVENTION

The last global model of consultation to be analyzed is provided by the Aarhus Convention. In this model consultative mechanisms are transposed directly from domestic systems to the global level. This solution has one main benefit and two disadvantages. Regarding the former, it is evident that entitling the stakeholders to gain direct access to the global procedures and granting them the chance to obtain judicial review of the decisions taken at that level creates a situation in which consultation with private actors is no longer subject to the discretion of the global institutions. Consequently, the equilibrium between public and private interests is better balanced than in the WTO's or the WBG's systems.<sup>31</sup>

At the same time, however, this model presents two relevant problems. In general, the coordination between the global and the national spheres is not straightforward as it appears at a first sight. For instance, on occasion national courts have displayed an inadequate knowledge of the global procedural rights. Or they have not assumed a common interpretation of the integration issue.

The second problem, related to the first, regards the number of signatory States of the Convention. When compared to the WTO or the WBG, the Aarhus Convention's framework has achieved a much lower level of support. This may depend upon the absence of immediate economical advantages after the ratification, while, on the contrary, the obligations that each government is requested to adopt and, consequently, the relevant reduction of the range of discretionary power is noteworthy. Whatever the causes, this situation induces a higher level of fragmentation. In the absence of a solid base for the elaboration and diffusion of common standards – and subsequently of the development of common principles – uniform access to the consultative procedures for the stakeholders is more difficult to achieve.<sup>32</sup>

## XI. THE CONSULTATION OF NGOs

The three main pillars on which the Convention is based are transparency of the procedures, participation in environmental policy-making, and the compliance mechanism. In what follows, the description will firstly focus on the second (and main) pillar, and it will subsequently develop the analysis of the first and third pillars.

The concept of participation of civil society actors in environmental decision-making is perhaps the most important aspect of the Convention. Since before the ratification of the Convention, the process of consultation have involved a large number of NGOs working in the environmental field. During the negotiations for the ratification of the Convention, the government representatives decided that non-governmental interested parties should be given the opportunity to express their opinion and ideas. The invitation to participate in the negotiations was then extended to all the NGOs concerned with environmental issues.<sup>33</sup> In order to be more influential, the NGOs which adhered to the invitation melted into a single coalition: the *ECO Forum*. At present, the *Forum* is in charge of coordinating the civil society interests with the Meeting of the Parties (MOP) in which the Member States of the Convention officially meet. Every NGO which operates within the United Nations Economic Commission for Europe region, and shares the goal of promoting sustainable development, is a potential eligible member in the *ECO Forum*. Acceptance of the coalition's agreement is also

requested. Membership can be applied for by a simple letter to the Secretariat of the coalition or by registration for the Plenary. Accordingly, membership can be cancelled by a letter without need to indicate reasons.<sup>34</sup>

After the entry into force of the Convention, NGOs can be consulted in two different ways. The first one consists of the possibility to participate in the MOP's meetings. The second is related to the compliance procedures. In terms of the first method of consultation, article 10 of the Convention expressly states that:

“Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.”

These conditions closely mirror the requirements for participation at the WTO Ministerial Conference. As in the case of the WTO, the role of observer is particularly limited because it does not guarantee any right of direct intervention within the procedures. Furthermore, the veto power held by governments puts its representatives in a preferential position with respect to NGOs.

In order to circumvent these limits, over the years the *ECO Forum* has launched many informal initiatives aimed at examining whether citizens of the Member States who signed the Aarhus Convention are given the opportunity to adequate and effective access to environmental justice. The findings of these initiatives have been widely published. Recommendations to the concerned governments have followed.<sup>35</sup> The *ECO Forum* also distributes a monthly newsletter among its member and the general public. The use of such newsletter is aimed at revealing the current state of the negotiating processes with the Convention and at helping to clarify certain diplomatic issues to the public.

The second form of participation is related to the compliance procedures. During the second MOP, in fact, it was decided that NGOs would be entitled to appoint their own experts inside the Compliance Committee (CC). Although debated, the final decision thus introduced an extensive interpretation of article 15 of the Convention (“review of compliance”).<sup>36</sup> Not only in such hypotheses, individuals, NGOs, and other civil society actors are allowed to bring complaints against states which have ratified the concerned agreement, but also, and more relevantly, the possibility to appoint experts can be considered as an informal source of leverage to influence policy outcomes.<sup>37</sup>



The examples are many. In 2004, after Ukraine had begun the construction of a navigable canal between the Danube River and the Black Sea to facilitate the passage of vessels, two submissions were filed to the CC of the Aarhus Convention. The first complainant was a local NGO concerned with environmental and participatory matters. The second submission was filed by the Romanian government, with whom Ukraine shares the Delta. The submissions pointed to the Ukrainian lack of compliance with the Convention, addressing the untimely and partial information given to the public, particularly on environmental concerns. In its conclusive report to the MOP, the CC recommended that Ukraine submit a strategy containing a time schedule on the Convention's transposition within the national law. In the CC's report, Ukraine was explicitly requested to set up a number of capacity-building activities directed toward the judiciary and, more specifically, the public officials involved in the environmental decision-making processes in operation.<sup>38</sup>

Also in 2004 a Kazakh NGO submitted to the CC a communication alleging the non-compliance of the Kazakh government with the Aarhus Convention.<sup>39</sup> The communication lamented the violation of the right to information in relation with the governmental decision to import and dispose of radioactive waste. A request for information to Kazatomprom, the Kazakh national nuclear authority, has remained unanswered. Subsequent instances and appeal procedures in courts of various jurisdictions have failed. In the MOP decision following the CC report, the Kazakh government was requested to adopt a strategy, including a time schedule, for transposing the Aarhus Convention's provisions into national law. What is of particular significance here is that the MOP requested the strategy to include capacity-building activities for the judiciary, the public officials, and any other person having public responsibilities involved in the environmental decision-making. The judiciary, in particular, should have been trained on the implementation of the Convention and the compliance procedures.<sup>40</sup>

## XII. THE CONSULTATION OF PRIVATE STAKEHOLDERS

With specific regard to the consultation of private stakeholders, three hypotheses have to be taken into account. The first is related with the participation in the compliance mechanism described above. It is important not to confuse the participation to this mechanism with the third pillar of the Convention, regarding access to judicial review of the governmental decisions about the environment. Article 9 of the Aarhus Convention, in fact, provides the right to all citizens to have a judicial protection when they claim the violation of one of the two other pillars. As a rule of thumb, the stakeholders are legitimated

to choose between jurisdictional or quasi-judicial forms of protection. In this second case, however, the decisional body entitled to solve the dispute has to guarantee its impartiality.<sup>41</sup>

The differences between the two hypotheses reside both in the level at which the complaints are solved, and in the objectives of the participation. With regard to the former, although it is possible the involvement of the national judges (especially when the complainants have not exhausted all domestic remedies prior to bringing the complaint before the CC), the final decision is always handed down by the MOP. On the contrary, in the case of the third pillar are the national courts that are entitled to decide about the case. Also the objectives diverge. The compliance mechanism can be portrayed as a mechanism based on the classical approach followed in international treaty law. The role of the CC is to force the States that are still not enforcing the Convention to adopt the necessary measures. Within the third pillar, on the other hand, the allegations consist specifically of the violation of a procedural guarantee.

The second form of consultation for private stakeholders is mentioned by Article 6 and 7 of the Convention. Article 6 gives to all the citizens the right to take part to any decisional procedure that has a possible negative impact on the environment. At this regard, national authorities have the duty to respect and implement specific standards regarding the models and the timing of the procedures. Moreover, Article 7 of the Convention entitles private actors to take part to the elaboration of plans and policies about the environment. The article states that:

“...to the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment”

The difference between Article 6 and 7 consists of the different level of discretionary power given to the national governments. The higher discretionary power provided by Article 7 – where the Convention gives to the single governments the power to define the adequacy of the adopted measures – is explained by the not-binding nature of the policy documents,<sup>42</sup> and by the necessity to avoid to put excessive limits on the discretionary power of national governments on the regulation of general environmental issues.

In the conclusion, according to Article 4 of the Convention:

“Each Party shall ensure that...public authorities, in response to a request for environmental information, make such information available

to the public, within the framework of national legislation, including...copies of the actual documentation containing or comprising such information: (a) Without an interest having to be stated; (b) In the form requested unless: (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or (ii) The information is already publicly available in another form.”

Evidently, the disposition tries to get a better balance between the necessity to assure to everyone the access to relevant environmental information, the protection of confidentiality (the Convention establishes which reasons may justify a temporary restriction to the access to information) and the necessity to avoid excessive delay of the administrative action.<sup>43</sup>

### XIII. CONCLUSION: TOWARDS GLOBALIZATION OR FRAGMENTATION?

This article has described three models of consultation operating in the global legal space. In the attempt to analyze the channels through which global civil society is consulted within IOs’ decision-making processes, the investigation has focused on the WTO, the WBG and the Aarhus Convention, respectively. A few problematic aspects, the same that have been briefly introduced in the introduction of this article, have emerged. Before concluding, there is a last question that needs to be addressed. Are participatory rights at the global level developing towards further fragmentation or closer harmonization?

The first aspect has to be discussed in order to answer the above question which is related to the high degree of variability which characterizes the consultative processes that are currently in existence in the global legal space. As a matter of fact, the normative frameworks, the structures, the procedures and the definitions in use may vary depending upon the presence and the interaction of several factors. The first of these factors consists of the objectives pursued by each IO, such as the protection of the environment, the regulation of the commerce or the provision of financial aids to developing countries. While it is undoubtedly true that the civil society is directly involved in each of these regulatory frameworks, it is also true that political, economic and social interests are given different weight depending upon which of these sectors we consider. The consideration given to social interests may be differently counterweighted by reasons of economic rather than financial or environmental nature. This may explain why the openness to civil society’s

interests provided by the Aarhus Convention is not equated in the WTO's and the WBG's cases.

The second factor to be considered relies on the presence of judges and quasi-judicial bodies operating at the supranational level. The cross-fertilization of the jurisprudence of the handful of courts and tribunals that currently reside and operate in the international legal space plays a crucial role for the recognition of the participatory rights of the parties involved. Indeed, the jurisprudence on similar arguments in different courts has helped the circulation of legal ideas and has influenced the linkages between different legal systems.<sup>44</sup> Yet, not every IO has developed a complete and mature judicial system. While the model of transposition is the only one in which the domestic judges have assumed a "global" role, influencing with their decisions the governments and the functioning of the Aarhus Convention itself, in the WTO and the WBG, respectively, the AB and the CAO have only contributed to define which are the consultative rights and their limits. Moreover, not every judicial body has the same powers and operates in the same conditions of independence. Take, for instance, the AB. Here the adoption of the final decision is preceded by a discussion in the Dispute Settlement Body, the WTO's "political arm." Since its origin, then, the AB has favoured a literal approach in interpretive matters. The choice has been pursued to secure its own existence and guarantee an easier acceptance by the disputing parties. Just occasionally, when the literal interpretation has shown to be inadequate and a decision has to be taken nevertheless, the introduction of moderate creativity has been used as a loophole.<sup>45</sup>

The third and last factor is concerned with the typology of the interests involved. The main difference relates to the participation of NGOs or individuals. While the former have generally achieved recognition at the international level, the participation of the latter is admitted only on occasion. Therefore NGOs are the actors who are entitled to access the consultation, unlike single individuals, that are usually not allowed to express their opinions within the procedures.

These divergences notwithstanding, a few common aspects occur in all forms of consultation held at the global level. The first factor consists of the relation between accountability, transparency and consultation. As the WTO and the WBG systems demonstrate, the goal of introducing higher degree of accountability towards the civil society can be achieved through implementing transparency and, as a direct consequence, through elaborating solutions which enable closer dialogue with civil society's actors. Both the WTO and the WBG

have worked on the connection between the “democratization” of its regulatory frameworks and the citizens’ perception of its accountability. In the case of the Aarhus Convention, the process of democratization has been implemented at both levels, global and domestic. By transposing the domestic administrative guarantees in the global level, the intention is not only to provide a better accountability of the global environmental network of institutions, governments and public actors, but, more generally, to provide for a consequential acknowledgment of accountability in the domestic regimes. It is for this reason that, contrary to the previous models, in the model of transposition citizens’ rights are acknowledged and enforced in the global arena. This is in fact the best way to assure that the national governments will respect and enforce the rules set at the global level.

A second common aspect that emerges from the above analysis is related with the achievement of global accountability. In this case, the cooperation between the global and the domestic level has often (if not always) the same relevance of transparency and consultation. The quest for better cooperation is pursued in all of the three models, although in different ways. In all the models described before committees or bodies are created in order to operate with the express purpose of implementing the collaboration between the actors involved. This is the case, for example, of the *ECO Forum* which has been involved in the activities of the MOP before and after the ratification of the Aarhus Convention. Another example can be found in the *Mesa Group*, created by the CAO to develop the consultation of private parties at the domestic level.

The role of the judges, which has been underlined before, is also a third relevant common factor.

A fourth common aspect is related to the limits that civil society faces in the global arena and more particularly the non binding nature of the consultation. This is the biggest difference between the global models of consultation and the domestic consultative models, where the stakeholders have the right to intervene in the administrative proceedings and the administrations are always demanded to give reasonable motivations if the decisions they take diverge from the opinions expressed by the stakeholders. The only exception to this is given by the model of transposition (where, in fact, the attempt is to give a global dress to domestic rights).

Given these divergences and similarities, this article suggests that an evolutionary process in the acknowledgement of harmonious civil society’s participatory rights at the global level is already under way, at the end of which

both NGOs and single individuals are likely to enjoy stronger administrative guarantees towards IOs. The empirical picture confirms this: the IOs' quest for accountability is increasingly pursued by allowing submissions by third parties in its decisional proceedings. Besides, in the multi-leveled systems of global governance, administrative guarantees operating at the domestic level are going to be transposed at the global level with increased frequency.

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1. To map the broad contour of individuals, organizations and institutions operating beyond the confines of national societies, this article will use the definition of “global civil society.” See M. Kaldor, *The Idea of Global Civil Society*, 79 *International Affairs*, 583 (2003).
2. The most prominent role among the panoply of non-state actors operating at the international level is played by NGOs. Described as the tip of the iceberg of the international civil society, NGOs have widely increased in number over the last thirty years. Their leverage on the international stage has grown accordingly, to the point that it has been described in terms of “global associational revolution.” See generally L. SALAMON, H. ANHEIER, *THE EMERGING NON-PROFIT SECTOR*, Manchester 1996; M.E. KECK, K. SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS*, New York 1998; R. KRUT, *GLOBALIZATION AND CIVIL SOCIETY: NGO INFLUENCE IN INTERNATIONAL DECISION MAKING*, Geneva 1997; D. HELD, *DEMOCRACY AND THE GLOBAL LEGAL ORDER*, Stanford 1995; M. SHAW, *GLOBAL SOCIETY AND INTERNATIONAL RELATIONS*, Cambridge 1995; R. FALK, *ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS*, Cambridge 1995; H.J. STEINER, P. ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, Oxford 2000; H. Cullen, K. Morrow, *International civil society in international law: The growth of NGO participation*, 1 *NON-ST. ACTORS & INT’L L.*, 7 (2001); R.D. Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society*, 21 *Millennium: Journal of International Studies*, 389 (1992); D. Otto, *Non-governmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 *HUM. RTS. Q.*, 107 (1996); S. Charnovitz, *Two Centuries of Participation: NGOs and International governance*, 18 *MICH. J. INT’L L.*, 183 (1996-1997); P. Ghils, *International Civil Society: International Non-governmental Organizations in the International System*, 44 *The International Journal of Science in Society*, 417 (1992); D. Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 *CHI.- KENT L. REV.*, 61 (1993). For more specific discussion on NGOs’ variations in purposes, sizes and functions See B. Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 *CHI. J. INT’L L.*, 183 (2002); M.J. Peterson, *Transnational Activity, International Society, and World Politics*, 21 *Millennium*, 371 (1992); K. Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 *HARV. ENVTL. L. REV.*, 537 (1997); G.A. Christenson, *World Civil Society and the International Rule of Law*, 19 *HUM. RTS. Q.*, 724 (1997); S.E. Eizenstat, *Non-governmental Organizations as the Fifth Estate*, 5 *WHITEHEAD J. DIPL. & INT’L REL.*, 15 (2004); M. EDWARDS, *NGO RIGHTS AND RESPONSIBILITIES*, London 2000, at 8.
3. The identification and description of these standards has become known as *global administrative law*. See B. Kingsbury, N. Krisch, R.B. Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1; N. Krisch, B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT’L L.*, 13 (2006); S. Cassese, *Il diritto globale*, Torino 2009; S. CASSESE *et al. (eds.)*, *GLOBAL ADMINISTRATIVE LAW. CASES AND MATERIALS*, New York 2008; S. Cassese, *The Globalization of Law*, 37 *N.Y.U. J. INT’L L. & POL.*, 973 (2005); S. BATTINI, *AMMINISTRAZIONI SENZA STATO*, Milano 2003; G. Della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 *EUR. PUB. L.*, 563 (2003); A.C. Aman, *Administrative Law in a Global Era*, 54 *ADMIN. L. REV.*, 409 (2002); J. Charney, *Universal International Law*, 87 *AM. J. INT’L L.*, 529 (1993). Occasionally, the definition of “global administrative space” has been used to describe the space in which administrative functions are performed in interplays officials and institutions

on different levels. *See*, for instance, N. Krisch, B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 1 EUR. J. INT'L L. (2003).

4. It is for this reason that the AB, when called upon to define *incidenter tantum* which actors were entitled to participate in the process before them, has relied upon an extensive interpretation of the existing WTO definitions complemented by a close observation of the framework addressed by its decisions. A few relevant cases will be addressed in the following pages. *See generally* S. Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. INT'L L. & POL., 299 (2002).
5. The full version of the document is available here: [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).
6. The distinction between the two hypotheses is not, however, always clear. The two forms of cooperation are in fact at risk of overlapping. This is because the traditional interpretation that separates the private from the public sphere used in traditional systems of governance does not make sense in the global legal space, where purely public players and private actors does not exist anymore.
7. As it is explained on the website of the WTO: Immediately after adopting the guidelines for relations with NGOs, WTO Members agreed on procedures for such organizations to attend the Singapore Ministerial Conference. Hence, it was decided that (i) NGOs would be allowed to attend the Plenary Sessions of the Conference and (ii) NGO applications to register would be accepted by the WTO Secretariat on the basis of Article V:2. It is important to underline that the participatory status for NGOs is common in many IOs. The *Conference of International Non-Governmental Organisations*, for example, provides a venue where all the NGOs that have been awarded the participatory status by the Council of Europe can make their initiatives considered. Participatory status is granted by the Council of Europe to international NGOs which are particularly representative at European level and in the fields of their competence. In addition, NGOs with participatory status should be capable of supporting the achievement the Council of Europe's goals by contributing to its activities and by making its work known among the European public. Similar rules apply in the U.N regulatory framework.
8. The full version of the decision is available here: [http://www.wto.org/english/forums\\_e/ngo\\_e/guide\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/guide_e.htm).
9. *See* point VI of the decision.
10. *See* Point IV ("Consultation and Co-operation with Organization of Civil Society").
11. *See* A. Battaglia, *Il giusto procedimento dinanzi all'organizzazione mondiale del commercio*, 1 *Rivista Trimestrale di Diritto Pubblico*, 91 (2004); J. Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 *COLUM. J. INT'L ENVTL. L. & POL'Y*, 61 (2001).
12. *See* European Communities – Anti-dumping measures, casting iron, No. DS219.
13. *See* United States – Import Prohibition of Certain Shrimp Products, No. WT/DS58/AB/R. *See also* S.M Spracker, D.C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 28 *COLUM. J. ENVTL. L.*, 385 (1993); A. Areias, *The GATT: Tuna, Dolphins, Diapers and You*, 16 *ENVIRONS: ENVTL. L. & POL'Y J.*, 8 (1992-1993); S. Cassese, *Global Standards for National Administrative Procedures*, 68 *LAW & CONTEMP. PROBS.*, 109 (2005).
14. On the submission of *amicus curiae* briefs before the WTO DSU, *See* A. Appleton, *Amicus curiae Submissions in the Carbon Steel Case: Another Rabbit From the Appellate Body's Hat?*,



- 3 J. INT'L ECON. L., 91 (2000); S. Dinah, *The Participation of Non-governmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L., 611 (1994); P.C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01, available at <http://centers.law.nyu.edu/jeanmonnet>. On *amicus curiae* briefs' in international courts See generally D. Shelton, *The Participation of Non-governmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L., 611 (1994); N. Leroux, *NGOs at the World Court*, 8 INT'L COMM. L. REV., 203 (2006).
15. See J.P. TRACTHMAN, *Decision of the Appellate Body of the World Trade Organization. United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, 11 EUR. J. INT'L L., 733 (2000).
  16. See point 36 of the AB Report n. WT/DS138/AB/R: "The European Communities notes that Article 13 of the DSU does not apply to the Appellate Body and that, in any case, that provision is limited to factual information and technical advice, and would not include legal arguments or legal interpretations received from non-Members. Furthermore, the European Communities contends, neither the DSU nor the Working Procedures allow *amicus curiae* briefs to be admitted in Appellate Body proceedings, given that Article 17.4 of the DSU and Rules 21, 22 and 28.1 of the Working Procedures confine participation in an appeal to participants and third participants, and that Article 17.10 of the DSU provides for the confidentiality of Appellate Body proceedings."
  17. See <http://www.worldbankgroup.org/>.
  18. The World Bank Group, since the 1970s CONSULTS AND COLLABORATES with thousands of members of civil society organizations throughout the world, such as community-based organizations, social movements, labour unions, faith-based groups, foundations, and NGOs. The co-operation between the World Bank Group and civil society actors has brought to crucial changing in the Group's policies, including the encouragement of greater community participation, increased transparency and publicity, and the creation of review mechanisms. See A. FOX, L.D. BROWN (eds.), *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS*, Cambridge MA 1998; C. CAUFIELD, *MASTERS OF ILLUSION: THE WORLD BANK AND THE POVERTY OF NATIONS*, New York, 1997; F.R. MIKESSELL, L. WILLIAMS (eds.), *INTERNATIONAL BANKS AND THE ENVIRONMENT: FROM GROWTH TO SUSTAINABILITY, AN UNFINISHED AGENDA*, San Francisco 1992; K.W. Simon, *World Bank Wants a New Approach to Consultations with Civil Society*, 1 INT'L J. CIV. SOC'Y L., 41 (2003).
  19. In reality, there are no official regulations under international law governing the legal status of NGOs. See K. Martens, *Examining the (Non-)Status of NGOs in International Law*, 10 IND. J. GLOBAL LEGAL STUD., 1 (2003). As a consequence, the sourcebook draws from the common interpretation that attributes private legal status to NGOs and other civil society's groupings.
  20. See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20413156~pagePK:220503~piPK:220476~theSitePK:228717,00.html>.
  21. *There are few other documents of minor interest. One is "The civil society engagement reviews," firstly adopted in 2004 to review the operational guidelines and reviewed every two years. Since now, there are two reports available (<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:21061023~pagePK:220503~piPK:220476~theSitePK:228717,00.html>). A second one is the "Partnership for Development: Proposed Action for the World Bank," that was published for the first time in 1998, and which has a content largely similar to the sourcebook (<http://www.worldbank.org/html/extdr/pfd-discpaper.pdf>).*

22. The full document can be consulted here: [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p\\_2005SustReport\\_4/\\$FILE/Listening.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_2005SustReport_4/$FILE/Listening.pdf).
23. The Convention can be consulted here: [http://www.miga.org/quickref/index\\_sv.cfm?stid=1583](http://www.miga.org/quickref/index_sv.cfm?stid=1583).
24. In 1999, for instance, has been introduced the so called “Regional Nile Based Initiative,” a partnership between the WB and the States surrounding the Nile basin. The initiative has brought to a creation of a new structure: the Nile Basin Discourse Body.
25. See <http://www.ifc.org/ifcext/policyreview.nsf/Content/Stakeholder+Outreach>.
26. See [http://www.miga.org/documents/performance\\_standards\\_social\\_and\\_env\\_sustainability.pdf](http://www.miga.org/documents/performance_standards_social_and_env_sustainability.pdf).
27. Request No. RQ 06/01.
28. Requests No. RQ 04/03 and RQ 04/04. The case is fully illustrated in S. CASSESE ET AL., GLOBAL ADMINISTRATIVE LAW. CASES AND MATERIALS, *New York*, 129 (2008).
29. See S. CASSESE *et al.* (2008), *supra note 29*, at 133.
30. More widely on the relationship between the Aarhus Convention and international environmental law See T.S Mullikin, N.S Smith, M.T. Champion, *Inextricably Intertwined – Environmental Management and the Public*, 17 GEO. INT’L ENVTL. L. REV., 421 (2004-2005); S. Atapattu, *The Public Health Impact of Global Environmental Problems and the Role of International Law*, 30 AM. J. L. & MED., 291 (2004); C. Noteboom, *Addressing the External Effects of Internal Environmental Decisions: Public Access to Environmental Information in the International Law Commission’s Draft Articles on Prevention of Transboundary Harm*, 22 N.Y.U. ENVTL. L.J., 246 (2003).
31. See N.A Robinson., *Enforcing Environmental Norms: diplomatic and Judicial Approaches*, 26 HASTINGS INT’L & COMP. L. REV., 409 (2002-2003).
32. Later in time, the parties to the Convention sought to further enlarge the number of the actors involved. So, for example, the citizens of the different countries that were involved in the process of ratification were informed and asked about their opinion during some “open days” organized by the national Parliaments.
33. See generally [www.eco-forum.org](http://www.eco-forum.org). See also S. Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 1 COLUM. J INT’L ENVTL L. & POL’Y, 7 (2007).
34. The participation of coalition of NGOs in the enforcement of international treaties is particularly established in the environmental and human rights fields. See P. ALSTON, J. CRAWFORD (eds.), THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, Cambridge 2000; S. Jasanoff, *NGOs and the Environment: From Knowledge to Action*, 18 THIRD WORLD Q., 579 (1997); R. Charlton, R. May, *NGOs, Politics, Projects and Probity: A Policy Implementation Perspective*, 16 THIRD WORLD Q., 2 (1995); J. Smith, R. Pagnucco, G.A. Lopez, *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s*, 20 HUM. RTS. Q., 379 (1998).
35. The article states that: “The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.”
36. See S. Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 1 COLO. J. INT’L ENVTL. L. & POL’Y, 7 (2007); M. Stallworthy, *Whither Environmental Human Rights?*, 7 ENVTL. L. REV., 14 (2005).

37. Report No. ECE/MP.PP/C.1/2005/2/Add.3.
38. Communication No. ACCC/C/2004/01.
39. Decision II/5a, Doc. ECE/MP.PP/2005/2/Add.7.
40. At this regard, article VI of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms states that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society"
41. See M. Stallworthy, *Whither Environmental Human Rights?*, 7 ENVTL. L. REV., 14 (2005).
42. As a practical consequence, any national administration is entitled to deny the access of information in certain situations. Like, for instance, when the requests are too generic, or an answer was already provided, or there is another source where the same information can be acquired.
43. Among the most recent and known judgements are the *Kadi* case, and the 2004 *Juno Trader* ruling, in which the International Tribunal for the Law of the Sea claimed that all parties of the UN Convention on the Law of the Sea are expected to respect the principle of procedural fairness. More generally on the judicial cross-fertilization See A. DEL VECCHIO, *GIURISDIZIONE INTERNAZIONALE E GLOBALIZZAZIONE*, Milano 1992; R.P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC., 160 (2000); P.S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV., 311 (2002); J.I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL., 697 (1999); T. TREVES, *Judicial Lawmaking in an Era of Proliferation of International Courts and Tribunals. Development of Fragmentation of International Law?*, in R. WOLFRUM, V. ROEBEN (eds.), *DEVELOPMENT OF INTERNATIONAL LAW IN TREATY MAKING*, BERLIN, 2005, at 587; A.M. Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J., 191 (2003). Some authors have pointed at the problems raised by the proliferation of judicial bodies at the international level. See Y. SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS*, Oxford 2004; R. Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 22 INT'L & COMP. L. Q., 791 (2006).
44. An illustration of the phenomenon can be found in the "completing the analysis" technique developed in the 2002's *Omnibus Appropriation Act* case. See Appellate Body, United States – § 211 Omnibus Appropriations Act of 1998, No. WT/DS176/AB/R, 2 January 2002.