

# 3<sup>RD</sup> GLOBAL ADMINISTRATIVE LAW SEMINAR

*Public Participation in Global  
Administrative Organizations*

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## PUBLIC PARTICIPATION IN GLOBAL ADMINISTRATIVE ORGANIZATIONS

According to the drafters of the Global Administrative Law (GAL), “*in domestic settings, the rights of affected individuals to have their views and relevant information considered before a decision is taken is one of the classical elements of administrative law*”<sup>1</sup>. This observation deserves discussion. After a comparative analysis of administrative law in the Organisation for Economic Co-operation and Development (OECD) Member States, the OECD Public Management Direction, in a survey going back to 2001, notes that public participation in national administrative law is not only rare but also disparate<sup>2</sup>. Among the rare examples, American administrative law, with the *Administrative Procedure Act 1946*, is certainly the oldest to have required consultation of the private individuals that are targeted by the administrative regulations. The transposition of this decision making process into global institutions may thus confirm the theory that the GAL reflects the domination of particular national administrative law patterns<sup>3</sup>. The appearance of this decision making process in global institutions cannot however be understood as the mere transposition of a national model. The migration of public participation, which is certainly characteristic of American administrative law, towards global institutions is necessarily accompanied by some degree of adaptation to their peculiarities and their constraints. The global institutions have different positions as to the degree of individual participation that they will admit in their own rule-making process. Each institution still manages, in return, to compel national administrative proceedings to include a degree of public participation in the setting of administrative decisions, even in those destined to execute the rules and methods imposed by global institutions.

The concept of “ participation” should obviously be defined because it is frequently mingled with practices having a common ground but which are nevertheless not any less different. Participation and transparency are often brought closer: however, if it is true that participation is likely to contribute to the transparency of the decision making process, and this is not necessarily the case - participation of private individuals can be executed in such a way that it is far from transparent - ; in addition, transparency requires more than simple participation: namely, public information, access to documents, and so forth.

One can consider public participation according to either an extensive or a restrictive meaning, depending on whether it is addressed just to the recipients of the administrative decision, or, overall, to any interested person. The present study will consider public

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<sup>1</sup> B. KINGSBURY, N. KIRSCH, R. B. STEWART, “The emergence of global administrative law”, *Law and Contemporary problems*, vol. 15, op. cit., p. 37.

<sup>2</sup> « While information has increased over the past decade, there are large differences in consultation and active participation and efforts to engage citizens in policy-making are rare and confined to a very few OECD countries”, see OECD Public Management (PUMA) Policy Brief n°10, Engaging citizens in policy making : information, consultation and public participation », Paris, July 2001, p. 3.

<sup>3</sup> “Casting global governance in administrative terms might lead to its stabilization and legitimization in ways that privilege current power holders and reinforce the dominance of Northern and Western concepts of law and sound governance”, B. KINGSBURY, N. KIRSCH, R. B. STEWART, “The emergence of global administrative law”, op. cit., p. 27.

participation in the wider sense, including both consultations of targeted individuals and participative procedures involving each person considered to be interested at large. As such, private individuals associated with the normative process could just as well be economic agents that are directly concerned with the decision, as well as non-governmental organisations (NGOs), or academic experts having an interest in what the decision will enact.

The field of this study is limited to three global institutions: the European Union (EU), the World Trade Organisation (WTO) and the OECD.

The case of EU is interesting for at least two sets of reasons: first, because the concept of participation has acquired considerable importance with the development of the notion of new European governance, and second, because it concerns an organisation of integration, in which the rules settled at the community level are intended to be imposed on Member states, or, when the rules are applicable only at the community level, to inspire them.

The study of the WTO presents another point of interest. What the WTO considers as an institution with a global mission taking part in the construction of a global administrative law has already been fully analysed<sup>4</sup>. On the other hand, the method of production of the national administrative decisions prescribed by the WTO to ensure the execution of its (legislative) rules is seldom analysed. Literature more often echoes the criticism addressed to the WTO for neglecting the cooperation of NGOs in its production of rules of a legislative nature. However these rules, since they belong to a genre of "treaty making", are not directly related to the GAL. They can nevertheless be examined in light of the fact that they can fulfil an administrative function (in prescribing certain types of administrative regulation to Member States). In the same vein, there is plenty of literature concerning the opening of the WTO mechanism of disputes to private individuals, by way of *amicus curiae*, which only very rarely envisages relations between the WTO and private individuals within the framework of global administrative law. *A priori*, this position seems justified by the fact that the decisions emanating from the Disputes Settlement Body (DSB) have no administrative character but are jurisdictional, if not quasi-jurisdictional. That however amounts to ignoring the assumption that decisions adopted by the DSB may also have an administrative function intended to assist the Member States in their domestic implementation of the rules laid down by the WTO. From this angle, the consultation of private individuals, as *amicus curiae*, can be understood as an importation of the model of the *interest representation* derived from the American administrative law.

The study of the OECD is interesting for several reasons. In the first place, the OECD more and more frequently calls upon the participation of private individuals, even though it was initially created as a club of states. The OECD takes this opportunity to present an image of a certain transparency and responsibility (in the sense of accountability) of the organisation itself. For this reason, it relates directly to the global administrative law.

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<sup>4</sup> "General principles of administrative law have been recognized and enforced both by panels entrusting with the task of solving disputes among Members and by Appellate Body and these principles are not only binding on the quasi-judicial bodies of the WTO, but also on its contracting parties », G. DELLA CANANEA, "Beyond the State : the Europeanization and Globalization of Procedural Administrative Law", *European Public Law*, Volume 9, Issue 4, 2003, p. 573.

While being interested in the methods of the public participation practiced within these three organizations, the study will make it possible to show the absence of a unified conception of public participation. At most, it appears as a normative process to which the organizations resort freely and which they organize in their own way, with more or less transparency. The study will then examine the goals pursued by these three organizations. By doing this, the analysis will make it possible "to test" the prescriptive functions assigned to the global administrative law<sup>5</sup>. Among them, the democratic function seems particularly apt to be reviewed. As summarized by Sabino Cassese, the assignment of this function to the global administrative law derives from current reasoning. The State is the seat of democracy, the national administrative law participates in this democracy; if the administrative law is out of the hands of the State, such democracy is eroded and a global technocracy develops, and is able only to communicate with the national bureaucracies. Consequently, the global administrative law should be equipped with a democratic function in order to mitigate the "deficit" of democratic legitimacy of the institutions with a global mission<sup>6</sup>. If not granted by a higher institution through a process of world constitutionalization which has hardly started, legitimacy could be provided from the bottom-up through a process of participation of private individuals to the adoption of global administrative norms within the framework of global institutions. The analysis of the way in which the European Union, the WTO and the OECD conceive of public participation tends to minimize any democratic justification of public participation. The goal pursued seems less ambitious and is due to the quality, if not the effectiveness of the administrative decision made pursuant to such participation. As such, it would seem that in its migration towards global institutions public participation did not lose the ends which justified its adoption by the national administrative institutions<sup>7</sup>. If therefore the methods of public participation seem quite dissimilar according to the organisations (I), the goals pursued on the other hand seem at least to converge at the search for a sound administrative decision (II).

## I. Methods of public consultation

Whether it is within the European Union, the OECD, or the WTO, one can distinguish two dimensions of public participation. The first, which can be described as horizontal, refers to private individuals in the process of elaboration of the norms of the Organization itself. The second, which can be described as vertical, refers to private individuals in the elaboration of national norms responsible for ensuring the execution of the global norms made by the

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<sup>5</sup> According to Benedict Kingsbury, Nico Krisch et Richard B. Stewart, « *participants in either the study or the construction of a global administrative law recognize that these are normative projects, and not simply a taxonomical exercise of the promulgation of practical technical solutions to well-defined and accepted problems posed by global regulatory administration* », see B. KINGSBURY, N. KIRSCH, R. B. STEWART, "The emergence of global administrative law", *op. cit.*, p. 42.

<sup>6</sup> As explained by Steve Charnovitz, the democratic deficit at the international level can mean several things. "First, international organizations are in a democratic manner vis-à-vis participating states. Second, international law and treaties do not sufficiently mandate democracy within each state. Third, international organizations are not run in a democratic manner vis-à-vis the public". In our study, this is this last meaning which seems to be interesting in the framework of the global administrative law. See S. CHARNOVITZ, « The emergence of democratic participation in global governance », *Indiana Journal of Global Legal Studies*, 2003, pp. 45-77.

<sup>7</sup> « In public participation, the goal of the agency is to become informed over the concerns of the public and to learn any facts they believe are relevant », Philip HARTER, "Administrative law in the United States", *Administrative law of the European Union, its Member States and the United States*, Interstentia Utigever, Antwerpen, Groningen, 2002, p.324.

organisations. One should naturally study both dimensions from the point of view of global administrative law since, as Sabino Cassese has clearly shown, “between international law and internal law, there is no clear separation”<sup>8</sup>.

## **A. Public participation in the European administrative area**

The question of public consultation presents, in community law, certain specificities that must be underlined from the start, even if one will come back to that in the second part of this paper. First of all, and contrary to what occurs within the framework of international organizations based on an inter-governmental model, community law is based on a certain participation of citizens. Treaties are subject to ratification procedures, which in many countries involve a referendum. The community standards must, for the most part, be adopted by the European Parliament, which represents citizens in community affairs. The issue is therefore quite different in the European area than that which one encounters within the WTO and or the OECD.

That being said, the democratic legitimacy of community law has often created reserves, which no doubt explains why the community institutions are becoming increasingly concerned to ensure public participation in the community decision making process. The principle of participation is thus one of the principles of « good governance » identified by the European Commission, as well as the opening, responsibility, effectiveness and coherence. In its white book on European Governance<sup>9</sup>, the European Commission presents it in the following way:

*« The quality, relevance and effectiveness of EU policies depend on ensuring wide participation of citizens at all stages, from conception to implementation of policies. Improved participation is likely to create more confidence in the end result and in the institutions that produce such policies. Participation depends in a determining way on the adoption by central administrations, for the development and implementation of EU policies, of an approach calling precisely upon the participation of all ».*

This definition shows, in the analysis of the principle of participation, two aspects covered in community law: a “horizontal” dimension, where participation is a given of the community decision making process (1), and a “vertical” dimension, where participation plays an important role, by the same token, in reports that maintain the community legal system and the systems of Member States (2).

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<sup>8</sup> Sabino CASSESE, *Dr. Adm.*, juin 2007. Certain organizations, like the WTO, can be deprived of executive tools and, consequently, frame the administrative functions ensured by States so that their decisions respect a certain number of procedural principles. In this case, there is international regulation and national administration.

<sup>9</sup> Com (2001) 428. D. Gadbin, « Principles of European good governance », Mél. G. Isaac, Presses universitaires de Toulouse, p. 589.

## **1. The horizontal dimension**

Since the concern with good governance principles has become a major preoccupation of the European Union and the dimension relating to public participation was regarded as playing a key role in this concept, the European Union had to develop instruments for such participation. A distinction can be made from this point of view between formalized participation and abstract participation, even if one must immediately since there exist variations in the methods of public involvement in community decision-making mechanisms.

### **a) Formalized participation**

The involvement of civil society passes first, in community law, by specific organs that were instituted in order to represent interests which are distinct from state interests, strictly speaking.

That is the role of the Economic and Social Committee (ESC), which constitutes, to take an expression that it uses to present itself as, « *a bridge between Europe and organized civil society* ». The composition of the ESC must ensure representation, « of the various components of an economic and social nature from organized civil society, especially producers, farmers, transporters, workers, dealers and craftspeople, professionals, consumers and the general interest » (TCE, article 257).

The participation of the Economic and Social Committee in the decision making process is organised by the Treaties: such consultation is obligatory in a certain number of cases<sup>10</sup>, it may, in addition, be consulted if the community institutions consider it necessary, but it also has the power to issue an opinion on its own initiative « in cases in which it considers such action appropriate »<sup>11</sup>. The role played by the Economic and Social Committee is therefore limited, since it does not have the capacity to block a decision nor to require that an act be adopted, but it fulfils without question a warning function: to the community institutions, which are thus informed of the concerns of civil society, and to the members of civil society who are thus informed of the texts in preparation and the positions adopted by the community institutions.

Alongside the Economic and Social Committee, European agencies have developed at a very impressive pace, whose characteristic is to contain within themselves representatives of civil society, and more precisely the relevant professional background<sup>12</sup>. These agencies are not formally envisaged by the Treaty, but they are instituted by acts of law derived so well that one could consider that they emanate from formalised institutional participation. For the most part they have administrative powers, because they most often have the task of assisting

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<sup>10</sup> In matters such as social policy, public health, consumers protection ...

<sup>11</sup> TEC, art. 262. This power of initiative is quite new, it has been entrusted to the European economic and social committee by the Maastricht Treaty.

<sup>12</sup> O. Blin, « Les structures des agences de l'Union européenne », in « Les agences de l'Union européenne. Recherche sur les organismes communautaires décentralisés », dir. J.-F. Couzinet, PU Toulouse 2002, p.79.

the Commission in its execution role, and in order to carry out this task well, a decision making power is often transferred to them, in particular regarding technical questions. Thus there is, through these agencies, a real participation of private individuals in the taking of administrative decisions in the community legal order. Admittedly, the composition of these agencies leaves limited space to the representatives of the professionals concerned or to specialists in question, but the fast expansion of these structures leads one to question their compatibility with the transparency principle that is one of the main principles of European governance<sup>13</sup>. The same kind of questions arise about the different committees that are often composed of professionals, who are supposed to represent the member States, but also represent the interests of the economic branch they are related to.

Beyond this institutionalized participation, community law has put in place other instruments that permit the involvement of the public in administrative decision-making.

Certain policies require therefore the intervention of civil society: this is the case with measures adopted with regard to social policy, because the Treaty requires the Commission, before presenting propositions, to consult social partners “on the possible orientation of community action”, then, should it decide to go further, on the content of the envisaged proposition<sup>14</sup>.

Moreover, the European Community is a party to the Aarhus Convention, which, one will come back to, provides for the principle of public participation in decision making in environmental matters. Mainly this has effects on Member States because they are authorisations that are likely to have environmental impacts which are concerned initially, but the convention also targets the plans and programmes regarding the environment which, for them, are likely to come from community competence. This is the reason why a specific regulation has been adopted, specifying the methods of application of the principles set down by the Aarhus Convention for community institutions and bodies<sup>15</sup>. The field of application of this text is very broad because it targets “any institution, any body, any agency or any public office created by virtue of or on the basis of a treaty, except when it acts in the exercise of judicial or legislative powers”<sup>16</sup>. Public participation is envisaged during the entire preparation phase of the environmental plan or programme and the regulation imposes a deadline of at least eight weeks for receiving comments. In addition, the final decision must be elaborated, « *only after having taken due account of the result of public participation* »<sup>17</sup>. The formula is vague, since the notion of « due account » is not armed with precise legal significance: without a doubt, one requires at this stage, the motivation of the party chosen compared to the observations collected at the participation phase.

Public participation in the Community decision-making process is therefore formally

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<sup>13</sup> M. Blanquet, Agences de l'Union et gouvernance européenne, in « Les agences de l'Union européenne. Recherche sur les organismes communautaires décentralisés », préc., p.43.

<sup>14</sup> TEC , art. 138.

<sup>15</sup> REGULATION (EC) No 1367/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJEU 25/09/2006.

<sup>16</sup> Regulation n° 1367/2006, art. 2.1.c)

<sup>17</sup> Regulation n° 1367/2006, art. 9.5

organized, but some informal methods of participation have also developed in parallel, some of which are so elaborate that they are almost formal mechanisms.

## **b) Informal participation**

One will retain the expression “informal participation” to indicate the methods of involvement of the public in community decision-making which are not organised by Treaties. That does not necessarily mean, as one will see, that there is a lack of transparency in participation; on the contrary, the institutions, especially the Commission, have sought to reconcile participation and transparency. The European juridical system is an administrative system that gives as much scope as possible to transparent and participative proceedings<sup>18</sup>. The Community legal system offers, from this point of view, an example of an "administrative system which gives the widest space to procedures of transparency and participation in the decision-making mechanism".

The Commission, holding the power of initiative, is the one that first developed these participative administration mechanisms. One can even find on its website a page entitled “Your Voice”, where EU citizens can express their opinions on different matters<sup>19</sup>. There, the Commission launches calls for public consultations on diverse topics, with « target groups » being invited to take part.<sup>20</sup> The concrete methods of participation are specified for each topic, with an indication of the closing date. The same website comprises the results of the closed consultations, as well as the follow-up by the Commission.

To these *ad hoc* consultations are added more formalised procedures, which takes the form of « green papers »<sup>21</sup>. The green paper is a practice developed by the Commission to both inform interested citizens about a project of text and to collect their opinions and suggestions<sup>22</sup>. The desired developments are presented by the Commission, which then solicits, to the widest extent possible, a reaction to its proposals<sup>23</sup>. The green paper is

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<sup>18</sup> J.-B. Auby, « Droit administratif et démocratie », Dr. Adm. 2006, étude 3. One can recall, on this matter, Jean Rivero's analysis : « *without a procedure of organized participation, those who have the will and the means to corrupt know how to find such an occasion* » (« A propos des métamorphoses de l'administration d'aujourd'hui : démocratie et administration », Mél. Savatier, 1965, p. 821).

<sup>19</sup> [http://ec.europa.eu/yourvoice/consultations/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/index_en.htm)

<sup>20</sup> Those target groups are very diverse, and they can be more or less precisely delimited. For example, in recent public consultations, the target groups have been: « public » in general, « stakeholders », or, more precisely, « individuals. Business », « economic operators », or even more precise: « consumers, retailers, producers », « Associations/ chambers of commerce/ companies, Trust operators/e-business platforms, e-market operators »...

<sup>21</sup> D. Dero-Bugny, « Le livre vert de la Commission européenne », RTDE 2005, p. 81

<sup>22</sup> According to the definition given by the Commission web site: « Green papers are discussion papers published by the Commission on a specific policy area. Primarily they are documents addressed to interested parties - organisations and individuals - who are invited to participate in a process of consultation and debate. In some cases they provide an impetus for subsequent legislation »

<sup>23</sup> Usually, the green book contains precise questions, to which the people taking part in the consultation should answer. This is not a closed list of questions, but the Commission can be sure, with the questions, that



frequently followed by a “White Paper”, which draws of the lessons learned from the different opinions expressed in the public consultation. This practise of the Commission deserves all the more to be highlighted in this study on global administrative law, because it originates from English law, which developed at the end of the 1960s “Green papers”, whose object is the same as that of the community green papers. It is therefore by a kind of imitation of a mechanism which functioned well in the English legal system, that the Commission has adopted this particular method of involvement of those administered at the time of decision-making. As it will be seen, the Community practice has in turn encouraged certain States, in particular France, to put in place similar mechanisms.

In these cases, *ad hoc* consultation or green papers, public participation in the decision making process is real: whoever wants to formulate an opinion can do so, and in a simple and relatively transparent way. However, the concrete effects of this participation remain limited. First, because recourse to these methods of consultation is never obligatory one is not faced with formalised procedures. Next because, even if the Commission decides to use this path, it will not be bound by opinions formulated by private bodies. The participation of private individuals is related therefore to a consultation, of which the effects include both the transparency of the standard setting mechanism and its effectiveness, and expands to substance only if the Community institution wishes to.

Like any normative power, the community institutions also employ more official modes of involving private individuals in the decision making process. The special interest groups play, in the community legal system, the same role as in every legal system, with this important nuance close to what the community institutions have attempted to ensure is a certain transparency in their intervention. However, contrary to what takes place in most countries, Community institutions have acknowledged the phenomenon, and they try to make it more transparent. Strictly speaking, lobbying is not regulated, but each institution has tried to establish some rules to make it more transparent. The lobbying, to be strictly accurate, is not regulated but is framed by rules elaborated by each institution. The European Parliament is the institution which opted for the most rigorous regulation of the special interest groups since it makes their registration obligatory: people wishing to benefit from a pass to enter the Parliament buildings in a regular way, in order to bring information for their account or that of another must be accredited. This forces them in particular to “declare to the deputies, to their personnel or to the civil servants of the institution the interest or interests that they represent”<sup>24</sup>. The Commission had not adopted very clear rules on the matter, but had decided in 2006 to launch a public consultation, through a Green Paper, on the manner of regulating the role of lobbies<sup>25</sup>, thus each person was requested to work out rules intended to govern the participation of the special interest groups, transparency being present at its height<sup>26</sup>. The objectives of the Commission were to reinforce both the control which it was likely to bring to bear on the lobbies<sup>27</sup>, and the automatic regulation of the latter. Nothing has

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sensitive issues will be addressed. The Commission will then have a stronger position when the project will be discussed by the Council.

<sup>24</sup> Rule 9(4) of the Rules of procedure of the European Parliament, completed by ANNEX IX : Provisions governing the application of Rule 9(4) - Lobbying in Parliament.

<sup>25</sup> May 3rd 2006, COM(2006)194.

<sup>26</sup> Even if one should undoubtedly not wait too long for this exercise in transparency. V. notamment, F. Mariatte, « La transparence optimiste ou Candide face aux lobbies européens : l’initiative européenne de transparence », Europe 2006, Focus n°28.

<sup>27</sup> Until now, the Commission has not set up procedures of accreditation or registration of "official" special interest groups; there is only one data base, which is maintained in an optional and voluntary manner.

been decided yet and it will be interesting to see what will come out from this consultation regarding the consultation.

## **2. The vertical dimension**

The principle of participation, pillar of the new European governance, does not only have scope to apply within Community institutions. It is also a question of causing or imposing on Member States a requirement of greater public participation in the administrative decision making process. The influence of the Community law traditionally consists of reports that maintain the community legal order with that of the Member States, of two orders: they can be direct, in that the particular texts impose a requirement of participation; or they can be indirect, the Member State being inspired by the procedures existing at the Community level.

### **a) The direct influence: the obligation of public participation required by Community law**

Public participation in decision-making has appeared necessary in areas where citizens were eager to take part in the debate and that the applicability of the standard would be facilitated by such participation. It is not therefore surprising that it is in the realm of the environment that such evolution has been made most quickly and that the Community knew to impose on Member States a certain number of constraints<sup>28</sup>.

In the directive dated 27 June 1985, the principle of preliminary evaluation and public information for projects likely to have an effect on the environment was posed<sup>29</sup>. Public participation was not a primary concern, but was nonetheless present since the information had to aim to permit the relevant public to give an opinion before the realisation of the project. The signature by the Community of the Aarhus Convention in 1998 and its approval in 2005<sup>30</sup>, subsequently reinforced in a considerable manner the relevant obligations. The Convention, which entered into force on October 30, 2001, distinguishes three types of obligations incumbent upon the signatories: to ensure public access to information on the environment which is held by public authorities, to support the participation of the public in decision making which affects the environment, and to extend the conditions of access to justice regarding the environment. Information and participation are therefore clearly dissociated, even if they are complementary; more precisely, information is not sufficient in order to ensure participations; it is necessary to put in place particular mechanisms allowing this involvement of the public in the decision making process.

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<sup>28</sup> R. Hostiou, « Le principe de « participation du public » au processus décisionnel en matière d'environnement », Mél. J. Raux, Ed. Apogée 2006, p. 285.

<sup>29</sup> Directive n°85/337, June 27th 1985.

<sup>30</sup> Council Decision, 2005/370/CE, 17 February 2005.

The Aarhus Convention was implemented by a directive dated May 2003, which concerns obligations imposed on States regarding public participation in environmental procedures<sup>31</sup>.

The right of participation imposed on Member States is broader than that imposed on Community institutions, which can be explained by their respective fields of competences. This right is not only applicable for the development of plans and programmes relating to the environment, but also, especially in practice, when the authorisation of a specific activity that is potentially dangerous for the environment is in question<sup>32</sup>. The States are held to an obligation to provide information sufficiently early so that the public may formulate observations and opinions before the relevant decision is taken. At the time of the adoption of the decisions, the opinions expressed must be taken into account, and the competent authority should inform the public of the reasons for which such decision was finally adopted. In addition, and in accordance with the provisions of the Aarhus Convention, the directive requires that public participation be jurisdictionally protected: States must organise a process of access to a judge in order to dispute any non-compliance with the rules relating to participation. Also, the directive specifies that “these procedures must be *«fair, equitable, timely and not prohibitively expensive»*. It will be noted that the non-governmental organisations in favour of environmental protection are considered as having an interest to act within the framework of this dispute.

In the environmental field therefore, Member States are obliged by Community constraints to put in place participation mechanisms. It is however an area in which much had already been implemented in this respect. The French case is, in this respect, interesting in that the principle of public participation for projects which are likely to have environmental consequences was enacted in 1983, i.e. before the directive of 1985, and that it was recently made the object of constitutional recognition. The Charter of the Environment, which is part of the French constitutional order, states in Article 7 that : *« every person has the right, under such conditions and limits as defined by law, to have access to information relating to the environment which is held by the public authorities and to participate in the development of public decisions affecting the environment.»*. This participation takes the form of public investigations, which are the subject of a very precise textual framing, but which do not have much of an effect. Public bodies are never bound to follow the opinions expressed by the people who took part in the consultation, nor are they required to consider the opinion expressed by the independent expert designated to lead the inquiry<sup>33</sup>.

Therefore, consulting procedures play an important role in environmental matters, but even though they contribute without question to public information and undoubtedly also to a larger acceptance of the decisions in such matters, they do not give any powers of decision to the people consulted.

## **b) Indirect influence: participation by mimicry**

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<sup>31</sup> Directive 2003/35/CE, of the European Parliament and of the Council, May 23rd 2006, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

<sup>32</sup> A list of activities that are considered as dangerous for the environment is provided by the directive.

<sup>33</sup> Article 7.

European administrative law is mainly comprised of circular and reciprocal influences, from the Union to Member States and from Member States to the Community legal system. Convergence is found in the question of public participation in administrative decision-making.

One already mentioned the case of the green papers, which had been directly inspired by an English practice. Besides, in a general way, the United Kingdom developed many consulting procedures, so that it could be presented as the only European country "which imposes at times public participation, especially that of representative organizations, without so much as a text envisaging it"<sup>34</sup>. The participation of private individuals in administrative decision-making actually exists in many countries, but it is, most often, organized by specific texts<sup>35</sup>.

It is however possible to support this participation in cases that were not formally envisaged. *Ad hoc* consultations can thus be organized on the model of those carried out by the European Commission. It is what one might find in French law where the participation of relevant persons is sometimes solicited, before the intervention of a text, in order to collect opinions and to avail itself of relevant professional groups. The drafting of recent texts relating to public contracts, by Order dated 2004 on the Private-Public Partnerships, Public Market Code of 2006, thus gave rise to public consultations<sup>36</sup>, strictly identical to those organized by the Commission: including publication of the project on Internet site of the Ministry of Finances and a call for reactions of the relevant people with a closing date for the consultation. One may think that this practice, which is not envisaged by any text, should tend to develop: it indeed allows, and one will come back to this, the elaboration of texts, to make decisions, which are more easily accepted by those interested. This kind of procedure doesn't have much to do with transparency – after all, they are very informal and offer no guarantee of transparency to citizens -, the purpose is rather to reach a decision that will efficiently be implemented.

## **B. Public participation within the WTO and the OECD: between minimalism and maximalism**

Putting side by side the methods of public participation of the WTO and the OECD, their view of the participation of private individuals in the taking of rules (of which the function is administrative) is enlightening for two reasons. In the first place, a contrast appears with the analysis of the two institutions because where the WTO resists any opening of its method of normative production to private actors, the OECD seems to find a redeeming virtue in repairing the damage caused by the famous "crisis of the Multilateral Agreement on

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<sup>34</sup> M. Fromont, « Droit administratif des Etats européens », Thémis, PUF 2006, p. 288. M. Fromont cites a case in which the House of Lords judged that a city could not modify the number of taxis without a preliminary hearing of the organization representing taxi drivers (R. v. Liverpool Cpn ex p. Liverpool Taxi Fleet Operator's Association, 1972, 2 QB 299).

<sup>35</sup> V. here again, the examples cited by Mr. Fromont in the aforementioned article. The case of Spain is particularly interesting because a 1997 law imposes, before government regulations, consultation of citizens whose rights and legitimate interests will be affected by the dispositions in preparation.

<sup>36</sup> To date, the consultations are open as to the CCAG differentials that are going to be modified, v. le site internet du ministère des finances :

[http://www.finances.gouv.fr/directions\\_services/daj/marches\\_publics/ccag/acces\\_ccag.htm](http://www.finances.gouv.fr/directions_services/daj/marches_publics/ccag/acces_ccag.htm).

Investments”<sup>37</sup> (MAI). In the second place, there is an important difference between the dimensions in which these organisations consider public participation. The OECD privileges the horizontal dimension (2) whereas the WTO registers public participation in the vertical dimension (1). Naturally, the fact that the vertical dimension is favoured by the WTO is explained by the intermediation at the national level made necessary by the application of a right to a global mission which is not only lacking in any executive authority (if this is not that of DSB) but also of any derived dimension.

## **1. The WTO’s minimalism**

The absence of a horizontal dimension of public participation is explained by (A) the “state-centric” dimension of the right of the WTO and (B) why the vertical dimension, preferred over the horizontal dimension, is considered with minimalism and is apparently due to a limited transposition of the American *interest representation model* in the administrative law conveyed by the WTO.

### **a. The absence of horizontal participation**

According to article V:2 of the Marrakech Agreement instituting the WTO, “*the General Council shall make appropriate arrangements for consultation and co-operation with the nongovernmental organizations concerned with questions related to those of the WTO*”. This provision seems extremely permissive and comparable to that of article 71 of the Charter of the United Nations, which made it possible to confer consultative status on more than 2000 NGOs<sup>38</sup>. For the moment, the WTO General Council has only adopted a Decision entitled « *Guidelines for arrangements on relations with Non-Governmental Organizations* » on 23 July 1976. These guidelines are extremely clear, particularly in their sixth paragraph which states:

« *Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the*

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<sup>37</sup> One should recall briefly the eruption of international civil society in the secret negotiation on the Multilateral Agreement on Investments negotiated at the OECD which is no stranger to misfortune. The failure of MAI is however not exclusively due to the opposition of international civil society who saw there a carte blanche given to multinational enterprises. The confrontation between the positions of the Member States and the OECD also explains in large part the failure of MAI. See on this point P. JUILLARD, « L’accord multilatéral sur les investissements : un accord de troisième type ? » in *Un accord multilatéral sur les investissements : d’un forum à l’autre*, Journée d’études de la Société Française de Droit International, 1999, pp. 47-49.

<sup>38</sup> According to the article 71 of the United Nations Charter, “*the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations, which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned*”. See S. CHARNOVITZ, « WTO cosmopolitics », *New York University Journal of International Law and Politics*, Winter 2002, p. 322 and J. JACKSON, “The WTO constitution and the proposed reforms : seven mantras revisited”, *Journal of International Economic Law*, 2001, p. 77.

*WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at national level where lies the primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making ».*

No need for glossing over here: the law of the WTO is prisoner to a state-centric process which, in many regards, seems opposed by the destination of the rules imposed by the WTO<sup>39</sup>. It is indeed fully recognized, including by the DSB, that the rules of the WTO concern individual economic operators – which would justify the participation of Business NGOs (BINGOs) in the normative process - as certain public goods – which would justify this time the participation of certain NGOs. The revision of the Guidelines is not however on the agenda and the state-centric design of the "rule making" defended by the Member States remains intact. On the constitutional level however, there is nothing in the constitutive charter of the WTO that prevents the involvement of private individuals in the negotiation of rules. Therefore, if there is an obstacle to overtaking of state-centrism it resides only in the domain of Member States.

Private individuals can thus be consulted in an informal manner either by the Secretariat, or by specific committees of the WTO. Regarding the secretariat, the Guidelines encourage it "to play a more active role in its direct contacts with NGOs which, because they are a valuable resource, can contribute to the accuracy and richness of the debate"<sup>40</sup>. This invitation was heard by the Secretariat which, in addition to the various *symposia* organized with NGOs<sup>41</sup>, had created on several occasions a Consultative Committee composed of university experts and representatives of NGOs. One of the committees created by the Secretariat was even engaged in the task of making proposals in order to enhance the relations between the WTO and international civil society<sup>42</sup>. Although it discharged some, its efforts did not produce any effect<sup>43</sup>. The relations developed by the current Secretariat and the NGOs would seem to show a general will for change. Thus, at the time of the forum organized in 2006 with NGOs on the reform of the WTO's normative process, it was asked in the form of an interrogation: "Decision Making in the WTO: medieval or up-to-date?"<sup>44</sup>. The forum however raised questions in vain, and no valid institutional answer was ever given.

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<sup>39</sup> « It would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to members which are means to flow as a result of the acceptance of the various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and the global market places" and thus "the multilateral trading system is, per force, composed not only of the States but also, indeed mostly, of individual economic operators", Panel Report, 22 December 1999, WT/DS/152/R, §7.72 et 7.76.

<sup>40</sup> Paragraphe 4 of the Guidelines for arrangements concerning relations with nongovernmental organisations, WT/L/162, 23 juillet 1996.

<sup>41</sup> The first symposium organised with NGOs took place in 1998, it was on commercial facilitations. The second on relations between commerce, the environment and sustainable development. On this point, see Kein R. GRAY, « How the symposia actually impact negotiated outcomes is undetermined », in *Civil society and the World Trade Organization*, on [www.worldtradelaw.net/articles/graycivilsociety.pdf](http://www.worldtradelaw.net/articles/graycivilsociety.pdf).

<sup>42</sup> It comprised the Committee created by Michael Moore and was composed of professors of economics and law (Robert Baldwin, Jadish Bhagwati, Patrick Messerlin, Victor Halberstadt, Koichi Hamada, Konrad Wvon Motke, Sylvia Ostry, Ademola Oyejide, Manmohan Sinfgh) of NGO presidents (Peter Eigen of Transparency International, Leroy Trotman, former President of the « International Confederation of Free Trade Unions and General Secretary of the Barbados Workers' Union »).

<sup>43</sup> The WTO has refused to transmit to authors the said report which remains confidential. The anecdote is eloquent for a report which proposes expansion towards civil society...

<sup>44</sup> See the questions of the program of this forum:

The WTO is thus satisfied to accredit certain NGOs, increasingly numerous, to attend (and not to take part in) the ministerial conferences of the WTO and to take part in an annual forum. No power of proposal is recognized for NGOs, nor do they have even the capacity to address an official statement to the Ministerial Conference. The summary character of the accreditation illustrates the low importance which is attached to NGOs in the normative process. Three criteria are observed. NGOs must first of all be distinct from international organizations created by an international agreement. The NGO must then be able to show its expertise or its interest in one of the fields concerned by WTO and, finally, to show that it does not serve the interests of any government, by expressing independent positions. In reality, the recent ministerial conferences revealed that the accredited NGOs could make a united stand with certain developing States<sup>45</sup>.

The absence of any participation of NGOs in the normative process of the WTO, essentially due to the resistance of the Member States, should not conceal the participation of private actors in the “administrative” implementation of the rules of the WTO. From the point of view traced by the school of global administrative law, it is also on this aspect that the analysis must be focused. The rules negotiated within the ministerial conferences appear in fact to be equipped with a traditional “legislative” function, that of the treaty-making, rather than that of an administrative office. However, the multilateral commercial system has the effect of investing its Member States in the task of ensuring the administrative application of its rules all the while imposing a certain number of procedural constraints. Thus it is now advisable to analyze whether, among these constraints, figure the participation of private persons in the administrative execution of the legislative rules set down by the WTO.

## **b. The vertical dimension of the public participation in the law of the WTO**

The vertical dimension of the participation of private individuals in the law of the WTO results from certain rules set down by the WTO agreements relating to national administration of WTO disciplines. Those are not however so numerous as to impose the participation of private individuals.

The few provisions of the WTO agreements relating to the national administration of WTO rules mainly inherit the logic which presided over the creation of the (stillborn) International Organization of Trade. The logic of article 38 of the Havana Charter (founder of the former Organization for Trade) continues in effect to mark that of the WTO. Let us look at the terms of article 38 which required that “*each Member State will establish in a uniform, impartial and equitable manner all the regulations, laws, court and administrative decisions which are cited in paragraph one. Suitable facilities shall be afforded for traders directly affected by any of those matters to consult with the appropriate governmental authorities*”. It should be noted that the private individuals targeted here are not even granted the right to

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“- How does the system work? What are the effects of existing decision-making rules such as consensus-searching and the single package approach?

- How does “decision-making” perform in lights of concepts such as participation, transparency, accountability and legitimacy?

- Can the WTO face current and upcoming challenges with the existing decision-making apparatus?

- What should be (and what could be) changed (if at all)?”

<sup>45</sup> We can remember that in closing remarks, Brazilian Ambassador Celso Amorin thanked civil society for their support to the G 21.

participate in the adoption of the regulations or administrative decisions that concern them. The logic of the *Administrative Procedure Act of 1946* which, as it is known, is always at the base of the American administrative law, was not therefore imposed at the time of the institutionalization of the International Organization of Trade. No procedure of *notice-and-comments* was envisaged by the charter, only an obligation to inform private individuals. Article X of the General Agreement on Trade and Tariffs (GATT), the equivalent of article 38 of the Havana Charter, also shown by the GATT 1994 integrated into the Marrakech Agreements, show the substance of article 38. As such, article X:3b) of the GATT 94 requires that Member States institute or maintain independent administrative or arbitration legal procedures, which make it possible to require the revision or correction of administrative decisions which are referred to customs questions. In particular, the courts or referees responsible for such files must be independent of the customs authorities and make it possible to review administrative decisions in an impartial and objective way. One sees that the WTO, just like the GATT and the International Chamber of Commerce, preferred the path of "*judicial review*" to that of public participation before the taking of a decision. The *interest representation model* is thus not integrated.

In addition, one will note some snippets of the *interest representation model* in the framing of national procedures of investigation leading to the imposition of trade protection measures. As is known, the Agreement on Anti-dumping and the Agreement on Subsidies and Countervailing Measures contain precise rules relating to each phase of the national inquiry making it possible to lead to the imposition of compensatory or anti-dumping laws. These rules impose real procedural constraints on the national administrative procedures in order to respect the principles of transparency, loyalty and non-discrimination. Among these constraints, the Agreement on Anti-dumping and the Agreement on Subsidies and Countervailing Measures force the national authorities to allow industrial users some products targeted by the investigation as well as consumer associations to express their views and to present, if necessary, elements of pertinent facts for the investigation<sup>46</sup>. This obligation must thus make it possible for the national investigation authorities to examine the broader implications resulting from the investigation and the commercial battle that indulges the complaining industries and the producers-exporters<sup>47</sup>. However, only the Agreement on Subsidies and Countervailing Duties contains a provision requiring the national authorities to truly keep account of the submission of the users or the consumers of the products<sup>48</sup>. The Agreement specifies next that the interested national parties must include the consumers and the industrial users of the imported product which is the subject of the investigation<sup>49</sup>. The participation of private individuals targeted by these two agreements therefore fits into a primarily commercial perspective: it is a question, in fact, of taking into account the commercial interests related to the purchase of products rather than more general considerations. By taking again the distinction in American administrative law between

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<sup>46</sup> Article 12:10 of the Agreement on Subsidies and Countervailing Measures and Article 6:12 of the Agreement on Anti-dumping.

<sup>47</sup> D. LUFF, *Le droit de l'Organisation Mondiale du Commerce, analyse critique*, Editions Bruylant, Bruxelles, Editions LGDJ, Paris, collection de la faculté de droit Université Libre de Bruxelles, 2004, p. 430.

<sup>48</sup> The article 19:2 states that: « *it is desirable that ...procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty* ». In the footnote 50, the Agreement specifies, "*for the purpose of this paragraph, the term domestic interested parties shall include consumers and industrial users of the imported product, subject to investigation*".

<sup>49</sup> See footnote on page 50 de l'Accord SMC.



participation and consultation, it is advisable to discuss consultation procedures<sup>50</sup>. By envisaging a broader participation, the Agreement on Safeguards can be isolated from two other measures of trade protection while envisaging, at article 3:1, that the arguments of the interested parties can relate, *inter alia*, to the question of knowing if the measures foreseen would be in the public interest.

Except the case of trade protection measures, one does not find provisions by which the WTO imposes public participation, looking at the national administrative decisions necessary to the application of its disciplines. The provisions of the General Agreement on Services or the Agreement on Trade-Related Aspects of Intellectual Property Rights, concerning primarily private operators, frame the national procedures uniquely by requiring the putting into place of effective judicial recourses for the profit of operators, thus privileging the logic of "*judicial review*"<sup>51</sup>. As such, private individuals are taken into account as defendants instead of being informed in good time of the measures which could be taken against them.

With regard to WTO law, the vertical dimension of the participation of private individuals in administrative decision-making thus proves extremely minimized. It is however advisable to continue the analysis by taking into account the jurisprudence of the Disputes Settlement Body. This could indeed, by interpretation of the provisions of the WTO Agreement, result in exceeding this minimalism of private individuals' participation. More precisely, article X:3 of the GATT 1994 in its subparagraph a) appears sufficiently broad to allow an interpretation facilitating the participation of private people in national administrative procedures leading to the imposition of particular decisions. It is in any case on the basis of this article that the Appellate Body in the well commented upon case of *Shrimps II* could establish the discriminatory character of a national administrative measure (in this instance, a decision refusing to grant certification). According to the Appellate Body, "*article X:3 of the GATT 1994 establishes certain minimum standard for transparency and procedural fairness in the administration of trade regulations*"<sup>52</sup>. However, the respect of these minimum criteria can imply, as the Appellate Body considered it, "*the formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made* ». One will note however here that if this case presents indisputably

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<sup>50</sup> Again the precision that these consultative procedures instituted by the WTO regarding subventions and compensatory rights are not distinguishable from those that were instituted by its predecessor in the framework of the *Tokyo Round*. The Agreement on Anti-Dumping resulting from the Tokyo Round foresaw that « *each signatory would see to it that its authorities responsible for investigations respect all interested signatories and give all interested parties a reasonable possibility to take note, at their request, of all the pertinent information that would not be confidential and that the said authorities use in the investigation, and a reasonable opportunity to present in writing and, upon justification, orally their views to the responsible authorities* », see Article 2 :5 de l'Accord relatif à l'interprétation et à l'application des articles VI, XVI et XXIII de l'Accord général sur les tarifs douaniers et le commerce.

<sup>51</sup> According to the GATS article VI, the measures of general application affecting trade in services should be administered in a reasonable, objective and impartial manner. This manner, according to the second paragraph of this article, depends on « practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified appropriate remedies for, administrative decisions affecting trade in services ». Similarly, the Agreement on Trade-Related Aspects of Intellectual Property Rights requires the Member States to provide for opportunity for review by a judicial authority of final administrative decisions (article 41 §4).

<sup>52</sup> Appellate Body Report, *WT/DS58/AB7/R*, 12 October 1998, §183.

great interest from the point of view of global administrative law<sup>53</sup>, it does not make it possible to validate the assumption according to which article X:3 a) of the GATT 1994 formally imposes the right of private individuals to participate in national administrative procedures (before the taking of an administrative decision). What the Appeal Board did not like, in effect, in this case concerned only the absence of participation of States in the national procedure but not that of private individuals concerned with the decision...

Ultimately, in view of the texts and jurisprudence of the WTO, the participation of private individuals in the decision-making process is far from seeming like a dedicated law. The WTO, as a decisive actor of in global administrative law, will participate therefore only a little in the generalization of the participation of private individuals in the global administrative decision-making process. The same conclusion can be made concerning OECD, but for different reasons.

## **2. The maximalism of the OECD**

At the time of its creation, the OECD appeared completely foreign to the principles contained in the global administrative law<sup>54</sup>, it notes at this time its position as a leader among the responsible international organizations<sup>55</sup>. In particular, the OECD did not fail to reproduce on its site the title of "*top performer*" which was given to it by the British NGO *One World Trust* regarding the participation of private bodies in its decision-making process. The horizontal dimension of the participation of private individuals truly deserves to be analyzed in that it ranks as particularly developed in the landscape of international organizations (A). This dimension should not however conceal the vertical dimension of the participation of private individuals that the OECD develops in a more recent manner in the direction of national administrative procedures (B).

### **a. The horizontal dimension**

Historically, the involvement of people individuals in the decision-making process of the OECD began with the institutionalization of relations with two NGOs specifically dedicated to the task of representing the business world and trade unions of Member States of the OECD, the BIAC<sup>56</sup> and the TUAC<sup>57</sup>. Both these nongovernmental organizations are used as

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<sup>53</sup> See B. KINGSBURY, N. KIRSCH, R. B. STEWART, "The emergence of global administrative law", *op. cit.*, pp. 37-38 et G. DELLA CANNANEA, "Beyond the State: the Europeanization and Globalization of Procedural Administrative Law", *op. cit.*, pp. 573-574.

<sup>54</sup> By the same token, James SALZMAN opens his study on the observation that, "traditionally, the OECD has expressly avoided the hallmarks of administrative law : transparency, responsiveness and public accountability", see J. SALZMAN, *Decentralized administrative law in the Organization for Economic Cooperation and Development* », *Law and Contemporary Problems*, 2005, n°68, p. 189. Salzman explains, with reason, why the OCDE has not welcomes principles of global administrative law: « *This was not surprising since the OECD was initially created to administer economic aid and to promote capitalism, not to promulgate standards or engage non state actors* ».

<sup>55</sup> As such, the results of the study by the British NGO *One World Trust* on International Organisations are given precedence on the website of the OCDE.

<sup>56</sup> The BIAC (Business Industrial and Commercial Advisory Committee), founded in 1962 as an independent organization is the officially recognised representative of the OECD business community. As

an interface between the national trade unions with which they establish their positions according to the agenda of the OECD. It results in a double movement: ascending, on the one hand, for that which concerns national positions which can, thanks to the BIAC and the TUAC, make information and proposals increase towards the OECD, and descending on the other hand, concerning the national affiliates which are thus informed of the rules and disciplines which are discussed at the OECD.

Each year, the BIAC and the TUAC prepare the Ministerial Conference of the OECD and produce a declaration for the Conference. The declaration enumerates the positions, critiques, and proposals which the national affiliates defined together within the BIAC and the TUAC. This declaration, as its name indicates, does not possess an obligatory legal value. As such, it has the merit to be recognized as an official declaration, emanating from representative organizations that which is far from being the case, as we saw, within the WTO. In particular, the TUAC and the BIAC can participate on an *ad hoc* basis in the various working groups established by OECD directives. As such, the TUAC has participated in a very active manner in the OECD working group on corporate government in view of the adoption and revision of principles<sup>58</sup>.

In addition to the institutionalization of the relations between the OECD and private individuals through the BIAC and the TUAC, the OECD has started to widen the field of consultation by involving other nongovernmental organizations. Since 2000, a forum is organized annually by the OECD, at the fringes of the Ministerial Conference. This makes one consider the many regards in which that is organized by the WTO. It is presented in effect more as a forum of discussion than a decision-making conference. The OECD however distinguishes itself from the WTO by the public consultation of NGOs in the process of adoption or revision of its instruments<sup>59</sup>.

Concerning the adoption of instruments, one must mention in particular the *Framework of Action for Investment* (PFI) of May 2006. The negotiation of this instrument was the subject of a double consultation. Firstly, all the preparatory conferences for this instrument involved separately and equally the Member States of the OECD, the non Member States and especially NGOs and enterprises. Among the NGOs, the BIAC and the TUAC naturally took part but also a network of NGOs called *OECD Watch*<sup>60</sup>. The participation of NGOs was not

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explained on its website, the BIAC's primary objectives are to positively influence the direction of OECD policy initiatives, ensure business and industry needs are adequately addressed in OECD policy decision instruments, and provide members, with timely information on OECD policies and their implications for business and industry. The BIAC represents the main federations of business and industry of the 30 Member states of OECD (8 millions companies).

<sup>57</sup> The TUAC (Trade Union Advisory Committee) has its origins going back to 1948 when it was founded as a trade union advisory committee for the European Recovery Programme – the Marshall Plan. When the OECD was created in its current form in 1962, TUAC continued its work of representing organised labour's views to the new organization. The large majority of the TUAC affiliates consist of over 58 national trade union centres in the 30 OECD countries, which together represent some 66 million workers.

<sup>58</sup> Interview with Rainer Geiger, Directorate for Financial and Enterprise Affairs of OCDE.

<sup>59</sup> Among the revision of OECD instruments, we must note the revision of the Guidelines for Multinational Enterprises, which associated beyond the BIAC and the TUAC, Oxfam, Friends of the Earth...

<sup>60</sup> OECD Watch was originally created to facilitate the activities of NGOS in matters concerning the Guiding Principles of the OCDE at the intention of multinational enterprises. This network was founded at the time of a meeting in Amersfoort in Holland from 20-22 March 2003. The participants of this network thought it would be good if it were created in order to improve cooperation between the global functioning of NGOS concerning collective responsibility and social responsibility of enterprises, to employ the Guiding Principles of the OECD as a basis for this cooperation between NGOs, and to test whether the voluntary Guiding Principles of the OECD for enterprises are an efficient mechanism to improve collective behaviour in the world, to monitor

decorative but gave space for true discussions on the content of the instrument. Next, an online public consultation was organized once the project of the instrument was finalized in order to collect the comments of civil society. These comments did not truly influence the instrument that was finally adopted, not because they were not analyzed and synthesized but because they were scarcely plentiful. It will be noted that the participative method of the negotiation of this instrument on investment is contrary to that which characterized the negotiation of the Multilateral Agreement on Investments. The putting online of the draft of the instrument by the OECD itself was indeed intended to collect the comments of civil society in order to affect the Draft Multilateral Agreement on Investments by the NGO *Public Citizen*<sup>61</sup>. Another radical difference separates the two instruments relating to investments, one was to have an obligatory range; the other has only a simple recommendatory scope and is intended to play the function of "*benchmarking*" national policies relating to investment. This formal difference begs an important remark. The consultation of civil society is not at all conditioned on the absence of value required by the instrument whose contents are negotiated. And if to this day, the recourse to consultations online took place only because of the adoption and/or revision of non-constraining instruments<sup>62</sup>, it is more because the OECD opted for a massive recourse to *soft law*, especially with regard to the regulation of the behavior of multinational companies. As such, it is important to understand that even if the instrument being negotiated were to have an obligatory value (either a decision of the OECD or a convention negotiated under its auspices), constitutionally nothing prevents the organization from consulting private bodies<sup>63</sup>. The constitutive charter of the OECD does not prohibit, any more than it does not authorize, the directors of the OECD to consult private individuals, including on a decision or a convention negotiated under the auspices of the OECD. On the other hand, private persons will not be able to proceed to a vote of the text because the charter does not envisage such a vote, only in direction of the States.

*A priori*, the recourse to online consultations and, in the lull the choice to proceed to the adoption of non-judicially required instruments, seems promised with a beautiful future. As witness to the recently adopted recommendations and governing the consultation procedure online, one cannot however infer from this text a generalization of the practice of these consultations in all directions of the OECD. The administrative law of the OECD is in effect largely decentralized to the benefit of various directives of the Organization<sup>64</sup> and the online consultation remains an optional working method, often guided by the spectacular character if not controversial matter subjected to regulation. In addition, when the method of online consultation is adopted, the result of the consultation is by no means constraining. According to the sixth recommendation from the online consultations, the department which carries out the consultation is simply held to "*implement everything so that the discussion takes into account the opinion of the public*". One can see there that there is only a simple

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the activities and the policies of the OECD with regard to multinational enterprises and to investment, to inform the NGO community at large regarding the work of the Investment Committee of OECD, to ensure that the members participate in all the ad hoc meetings and relate to the network. The active participation in such meetings by southern NGOs must be encouraged when funds permit, see [www.oecdwatch.org](http://www.oecdwatch.org)

<sup>61</sup> On recalls in effect that putting the MAI online rendered modifications to the project by the States party to the Agreement in the sense that national public opinion already gave an opinion as to the unacceptable character of the Agreement.

<sup>62</sup> This was the case of the Framework of Action for Investment, it was also the case of the Guidelines on the government enterprise, and it is also the case now with consultations managed with respect to the Guidelines regarding genetic testing.

<sup>63</sup> The constitutional opportunity for the OECD to involve private individuals in the negotiation of a Convention was very clearly seized at the time of the negotiation of the OECD Convention on the fight against corruption and the role played by the NGO Transparency International.

<sup>64</sup> See on this point the cited article which is enlightening by James SALZMAN.

recommendation (and not an obligation) regard such behavior. For as much, the simple faculty to keep account of the results of the online consultation is counterbalanced by the other recommendation made by the OECD, namely that *"it is important to present the end product within the framework of the debate, and, if, possible, to explain the possible impact that the public opinion could have on the discussion"*. To date, it seems that the implementation of this recommendation was followed with effects since the departments resorting to the online consultations endeavored to produce a document in which the comments received were synthesized. Thanks to this synthesis, it is easier to determine how the remarks of the public influenced the final contents of adopted instruments. To this end, and to take again the terms of the OECD on the subject of public consultation that it encourages at the national level (the vertical dimension), the OECD seems to have taken the measure from the need for private individuals consulted to at least be able to verify that their consultation produced effects, if not simply to note that it was not without follow-up<sup>65</sup>.

Let us now look at how the OECD tries to influence national administrations so that they develop participatory procedures integrating the relevant parties into their decision.

## 2. The vertical dimension

The "doctrine" of the OECD on the appropriateness of public consultation at the national level scarcely presents any ambiguities. According to the Management of Public Governance and Territorial Development (GOV) regrouping the Board of Public Management of the OECD (PUMA) and the Committee of Territorial Development Policies (TDPC), public consultation is a central element of good governance. In addition one should note the paradox nourished by the working methods of this Board. Advocating the participation of private individuals in national administrative decision-making, this Board scarcely seems to apply this requirement concerning the adoption of its own instruments. There is a remarkable hiatus which is not moreover unique, the WTO requiring transparency of national administrations where it obviously ridicules the practice of what one might call the *"green rooms"*<sup>66</sup>.

In addition let us take again the terms of a synthesis note written by the Board of Public Management in 2001 on information, consultation and participation of the public in the process of decision-making:

*"To invest in a policy of reinforcement of the relations between administrations and citizens allows the improvement of the quality of decision-making. It is a central*

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<sup>65</sup> According to the OECD itself, *"ill conceived or inappropriate measures to promote information, consultation, active participation of the public in the decision making process, can drown relations between the administrations and citizens. Therefore the aim of such measures must be to improve the quality, creditibility and legitimacy of the decisions of public authorities, which is the opposite effect which risks to be obtained if citizens discover that their efforts to stay informed, give their opinion and participate actively in the political process are neglected, has no effect on the decisions or remains without follow-up"*, see Note de synthèse de l'OCDE sur la gestion publique, in [www.oecd.org/dataoecd/24/15/2384248.pdf](http://www.oecd.org/dataoecd/24/15/2384248.pdf).

<sup>66</sup> According to Steve Charnovitz, *"there is often criticism of « green room » practice in the WTO wherein the officials leading a negotiation will invite selected governments into a room to hammer out a deal that is later presented to the entire membership as a fait accompli"*, S. CHARNOVITZ, "The Emergence of Democratic Participation in Global Governance (Paris 1919)", *Indiana Journal of Global Legal Studies*, 2002, vol 10, p. 49.

*element of good governance. It makes it possible to collect new relevant currents of ideas and useful information as much for decision-making as for the implementation of the public policies. It also contributes to the reinforcement in the civic sense and confidence in the administration as well as the improvement of democracy*"<sup>67</sup>.

The doctrines of the OECD are thus very clear regarding the vertical dimension of public consultation. In addition, PUMA adopted ten guiding principles making it possible to frame the national consultation procedures. Those remain however lacking of any obligatory force and no mechanism of follow-up is available to reinforce its effectiveness. It seems thus difficult to consider that through this instrument, the OECD could (still?) influence the national administrative function.

Nevertheless, one may note in this study two justifications for public participation: the quality of the decision on the one hand and democracy on the other. These are the justifications for public participation that should now be analyzed, not in comparison with national administrative laws (it is in fact frequently admitted that national administrative laws have a democratic function) but with regards to the global administrative law. Are the justifications for public participation relevant for the European Union, the OECD and the WTO? Are these international organizations adapting their methods of administrative decision making to be more democratic?

## **II. Purpose of public participation**

Global administrative law is not merely a concept resulting from the study of the substantive law – it is also a prescriptive concept to which the authors assign several functions, including that of democracy.

The idea that private individuals should participate in the democratization of legal systems merits discussion. Indeed it is not certain that the topic of "participative democracy", or rather the way in which this one functions in the administrative system of the European Union, the OECD and the WTO, really serves to mitigate what it is agreed to call the "democratic deficit" of these structures (A). Rather, it is because such consulting procedures enable administrative entities to reach a more adequate and/or more efficient decision, that it is necessary to seek why such participative procedures were put in place (B).

### **A. Public participation and democracy**

The relationships between democracy and national administrative law are necessarily complex relationships<sup>68</sup>. The more difficult question arises regarding the relationship between democracy and the global administrative law. The risk may be more important, as pointed out by Sabino Cassese, to see the development of what one would call "global technocracy", that is a global administration completely separated from the States and from the citizens.

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<sup>67</sup> See note 36.

<sup>68</sup> J.-B. Auby, *Droit administratif et démocratie*, Dr. Adm. 2006, étude n°3.

Why indeed, as Sabino Cassese raises, should the global institutions adapt to democracy? Is it not rather up to the States themselves to adapt their democracy to Global organizations? The roles reversal posed by such a question seems to be particularly well perceived by successive secretariats of the WTO (contrary to the literature on the participation of NGOs in the multilateral commercial system where the democratic justification is often advanced<sup>69</sup>). According to authors', the participation of private individuals would be made necessary by the fact that the multilateral commercial system is inclined to affect "*international public goods*". It is even sometimes advanced that such participation would make it possible to make good the lack of legitimacy of national governments which take part in the negotiations with the WTO<sup>70</sup>. From the literature, one may observe a transposition of the official theory of the capacity within the institutions with a global mission, from its most extreme variation: the power exerted by the WTO must be legitimized by granting to private individuals a right of participation<sup>71</sup>. Conversely, the "*official doctrine*" of the WTO corresponds to a theory of a reductionistic-type power. The governments negotiating with the WTO are the only ones entitled by the Marrakech Agreements to adopt standards, and consequently the WTO, by providing a forum of negotiation to such States, is exerting a legitimate power. Moreover, the issue had already been posed at the hour of the GATT by its Director General, Arthur Dunkel. According to Dunkel, "*it is governments which negotiate in institutions like the WTO, and governments are accountable to their citizens*". The same position was officially defended by the Secretary-General in 2001: "*Citizens are expected to be represented at the WTO through their governments*"<sup>72</sup>. The Presidency of Pascal Lamy does not seem to indicate any particular mark of change but the dialogue, on the other hand, is changing. Perhaps the passage of Pascal Lamy to the management of external trade at the European Commission has meant that the negotiations carried out at the WTO could move away from the interests of national citizens who are supposed to be represented by their governments within the Community structures<sup>73</sup>. It seems that the very cosmopolitan dialogue of Pascal Lamy

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<sup>69</sup> One will note in addition the presence of many other justifications like the improvement of the normative process of the WTO because of NGO expertise. "A regularized channel of information that flows from NGOs to the WTO would also be beneficial, especially insofar as it might strengthen the WTO's decision-making capacity", Daniel C ESTY, "Non-Governmental Organizations At the World Trade Organization: Co-operation, Competition gold Exclusion ", Newspaper of International Economic Law, 1998, p. 133. This justification, as we will see it, seems better filled by acceptance by the Body of call of the role of amicus curiae of NGOs. Another justification is also brought by some concerning the role of NGOs in the control even of the application by the national governments of the disciplines imposed by the WTO: "Non-governmental organizations also provide year additional oversight and to that the mechanism", to still see Daniel C ESTY, op cit., p. 134. This justification does not seem more convincing to us for the reasons than we will examine in the last paragraph.

<sup>70</sup> " *The participation of NGOs in WTO debates also help to compensate for deficient representativeness at the national level. In many countries, weak democratic institutions and other public choices flaws mean that national government policies do not fairly and accurately represent the citizen's views*", Daniel C. ESTY, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion", *Journal of International Economic Law*, 1998, p. 132.

<sup>71</sup> The relationship between legitimacy and legality is a complicated one: for some, power, to be fair, must be both legal and legitimate. For others, power can be legitimate without being legal, or legal without being legitimate. And, for some others, who defend a minimal vision of the theory of power, a power, if legal is necessarily legitimate.

<sup>72</sup> See « a guide for officials, legislators, civil society and all those interested in international trade and global governance » at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/wto\\_matters\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/wto_matters_e.pdf) h. According Robert Hudec: "*the World Trade Organisation is a member-driven organisations and the focus of its orders is the product of a process in which the governments agree to participate and ultimately control*", Robert E. HUDEC, Comment, Roger B. Porter, et al., eds, *Efficiency, Equity, Legitimacy: the Multilateral Trading System at the Millenium*, Brookings Institution Press, Washington DC, 2001, pp. 295-300.

<sup>73</sup> Concerning the Member States of the Union, one knows that the negotiations carried out at the WTO utilize the European Commission which, itself, represents the Member States which delivered a negotiation brief voted at the Council. However, the vote of this negotiation brief can take place in the majority qualified (if the

remains (for the moment?) purely incantatory<sup>74</sup>. At the WTO, the democratic justification of the participation of private individuals does not convince States. We can observe the same reluctance of the States concerning the proposals of creation of a parliamentary assembly within the WTO<sup>75</sup>.

The case of the European Union is, for reasons which have already been explained, slightly different. The question of democratic legitimacy is an important issue, but it has been partly solved by the development of instruments of representative democracy, the first of which would increase the role of the European Parliament. The problem as far as administrative law is concerned, is that representative democracy does not appear to be sufficient<sup>76</sup>: acts of execution do not often require the intervention of Parliament<sup>77</sup>, which makes it difficult to link the administrative act to the will of the citizens. Moreover, the Community decision-making process appears obscure to citizens, who are eager to introduce elements of participative democracy.

The Treaty establishing a Constitution for Europe responded to this wish by dedicating an entire chapter to "The Democratic Life of the European Union", including article I-47 on the principle of participatory democracy. The principle of participation of private individuals was posed in various aspects, since the possibility was also foreseen for European citizens to require the Commission to adopt an act on a given topic<sup>78</sup>.

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negotiations do not relate to the sectors excluded by article 133 of the EC Treaty) and, thus to exclude certain national citizens from any representation. When the unanimity is necessary for the negotiations concerning the field of significant sectors (culture, health, social policy, education), the national governments have the possibility to express their instructions at the Commission. But here still, those can be far from the concerns of citizens. In this last case however one could not blame the lack of democratic legitimacy on the WTO but rather on the national governments themselves. In both cases however it is possible to blame the Community structures itself because the external marketing policy does not require more of the European Parliament.

<sup>74</sup> As pointed by Steve Charnovitz or Robert Howse, there is Kantian inspiration in the statements of Pascal Lamy. See S. CHARNOVITZ, WTO Cosmopolitics, *New York University Journal of International Law and Politics*, Winter 2002, pp. 299-354 and R. HOWSE, "For a citizen's task force on the future of the World Trade Organization", *Rutgers Law Review*, Summer 2004, pp. 877-884. We can quote the statement made by Pascal Lamy at the NGO forum in 2006: « *This year I call upon to join hands with WTO Members in reflecting the type of WTO that we would like to see in the XXIst Century. Should WTO look like the organization that we already know? If not, then what changes can we usually make? **The WTO is designed to serve your interests; it is to you that it must answer. I therefore urge you, as members of civil society, to come share your ideas with us at the WTO Public Forum 2006. **The Multilateral trading system is yours, please help us in shaping it your way***** ».

<sup>75</sup> On the parliamentary dimension to the WTO, see Gregory SHAFFER, « Parliamentary oversight of WTO rule-making », *Journal of International Economic Law*, 2004, Vol.7, No3, pp. 629-654. The author explains the difference between the US congress and the EU Parliamentary or Commission in their positions relating to this parliamentary dimension. The approach of almost all US congressional representatives is to focus only on the national level. The European Commission's trade commissioner, Pascal Lamy, in contrast, together with European parliamentarians, have called for inter-parliamentary meetings at the WTO.

<sup>76</sup> V. en ce sens, J.-B. Auby, *Droit administratif et démocratie*, préc.

<sup>77</sup> V. Cl. Blumann et L. Dubouis, « *Droit institutionnel de l'Union européenne* », *Litec* 2005, n°380.

<sup>78</sup> 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.



However, given the current state of the law, and the lack of ratification of the constitutional treaty in all Member States, the tools of participative democracy remain those studied in the first part of this paper. They have limited legal effects, first, because they are seldom compulsory, and, even when they are, the results of public consultation is never binding for the administrative power. Whatever the expressed opinions may be, Community institutions retain the sovereign power of appreciation regarding the contents of the standard. Moreover, those consultations are not always organized in a very transparent way, which, as we shall see, undermine their role in the democratization of the administrative system.

Why, then, are such mechanisms put in place? Undoubtedly because they enable the administrative authority to elaborate rules that are both fairer and more efficient, and because they are more easily accepted by its recipients.

## **B. Participation and administrative regulations effectiveness**

If, as we shall see, the participation of private individuals is more justified at the OECD by consideration of the quality of the negotiated standard than by considerations of the legitimacy of its power, the participation authorized by the Appellate Body for private individuals, by the way of *amicus curiae*, can claim same justification. First, one should reconsider the nature of the decision imposed by the DSB, which adopts the report of the Appellate Body or the Panels. This decision can indeed be regarded as an administrative decision that aims to assist States in the internal execution of disciplines and rules imposed by the WTO<sup>79</sup>. As frequently commented upon, it is henceforth possible for the Panels and the Appellate Body to use *amicus curiae* briefs presented by private individuals having an interest in the case<sup>80</sup>. This proposal raised a number of oppositions within the community of the Member States of the WTO. The majority perceived an intrusion of such policy in the disputes settlement mechanism, otherwise it is likely it to be undermined by purely economic considerations of private individuals<sup>81</sup>. The majority doctrine saw a means making up for "the democratic deficit" characterizing the adoption of the WTO rules. Besides, it seems that there is another possible analysis, which is interesting from the point of view of global administrative law and the theory of such rule with which it can be brought closer. One can indeed defend the idea that while allowing private individuals, operators and NGOs to file *amicus curiae* briefs in a case which interests them, the Appellate Body introduced with the disputes settlement system a subdued version of the model of *interest representation*<sup>82</sup>.

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<sup>79</sup> See Carlo SANTULLI, « Qu'est-ce qu'une juridiction internationale ? », *Annuaire Français de Droit International*, 2000, pp. 70-81.

<sup>80</sup> See the reports of the Appellate Body, United States – Imposition of compensatory rights on certain products of carbon, lead, bismuth heat laminated originating from the UK, *WT/DS138/AB/R*, 10 May 2000 and the European Communities – Measures affecting l'amiante et les produits en contenant, *WT/DS135/AB/R*, 12 March 2001, where the Appellate Body put in place, using the internet a call for NGO contributions.

<sup>81</sup> The United States, for its part, showed themselves to be the lone defenders of the call for a contribution by the Appeal Board to NGOs in the case of *Amiante*, see the different State reactions in S. CHARNOVTIZ, « WTO cosmopolitics », *New York University Journal of International Law and Politics*, winter 2002, p. 349.

<sup>82</sup> See the Appellate Body Reports – United States – Imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom, *WT/DS138/AB/R*, 10 May 2000 and European Communities – Measures affecting asbestos and asbestos-containing products, *WT/DS135/AB/R*, 12 March 2001.

Private individuals can present their views at disputes settlement bodies as for the content of the decision which is on the point of being made. The aforementioned bodies thus have all the necessary elements before making their decision (having an administrative function) for the correct national execution of the WTO rules. By doing this, the Appellate Body relies on a theory of the rule which leans toward a theory of legitimate power<sup>83</sup>. The rare decisions of the Appellate Body relating to *amicus curiae*, in spite of their laconic nature, clearly show that considering *amicus curiae* briefs is not justified by considerations of democratic legitimacy but rather by good administration. The "*interest representation model*" is still important however according to a toned down version because the acceptance of *amicus curiae* briefs by disputes settlement bodies is far from automatic.

On its side, the OECD, far from the incantatory dialogue on democratic legitimacy, justifies the involvement of private individuals in a fully pragmatic way. The MAI crisis brought to light the importance not only of the transparency of the normative process but also of the support of civil society in its normative projects. Moreover, such support counts before as well as after finalization of the regulation since the OECD more and more frequently involves private individuals in the implementation of its standards. By such involvement, the OECD is not looking for democracy but rather the most effective standard. The participation of private individuals prior to finalization of the standard, i.e. at the stage of its negotiation and adoption, in addition to reinforcing the transparency of the global normative process, is accompanied therefore by a (post-modern?) conception of the standard which relies less on its obligatory nature than on the support of the people.

Finally, the European Union undoubtedly associates public participation in "the democratic life" of the Union with the concept of "good governance". It appears however that the search for a broader involvement of private individuals in decision-making mechanisms rests moreover on the observation that the administrative decision will be more easily accepted by its recipients if had been permitted to voice their opinions at the time of its development. The multiplication of informal consultation procedures transforms this search for effectiveness: the Commission thus considers the expectations of professionals, which it can choose to respond to or not, while giving the relevant persons the impression that they were heard. The limit of these procedures remains, however, that they do not participate in democratization, or in each case the transparency of taking of a strictly framed administrative decision. It reacts from a battle of influences, powers, and administrative authorities, which can be more or less resistant. In other words, only the organized participation makes it possible to ensure a certain democratization and the search for the best possible administrative decision.

Ultimately, if, as shown by Habermas, democracy is first a procedural affair, it is on the condition that the procedure contains constraints and rules. On this point, public participation in the three global institutions that were examined still needs changes in order to

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<sup>83</sup> It will be noted, by citing the remarkable article by Norberto Bobbio, that "*compared to the theory of capacity, legitimacy and legality have the same function that justice and validity have compared to the theory of legal rule: the terms are interchangeable. As justice is the legitimization of the rule, thus, on the contrary, its validity is its legality; as legitimization is the justice of the capacity, legality is on the contrary its validity*", to see N BOBBIO, "On the principle of legitimacy", in *Annals of political philosophy*, the idea of legitimacy, international Institut of political Philosophy, Paris, PUF, 1967, p. 51.

achieve democratic ends. It is especially the case for the WTO: the transformations necessary will not however be adopted without difficulty since the deeply etatomorphist rejection of any serious direct consultation of private individuals by the Organization seems anchored in the Member States' positions. It is nevertheless interesting to note how the WTO Appellate Body managed to circumvent this rejection by relying on its own research of good decision-making. The democratization of the WTO would seem thus enriched by the (quasi-jurisdictional) procedure of the DSB than by "*treaty making*" and *a fortiori* constitutionalization. The OECD, for its part, has foreseen another connection. Whereas it does not show any will to be democratized, its research of good decision-making and the involvement of civil society in its implementation, and especially the increasingly precise framing that it proposes to conduct this research well, mean that the OECD is experimenting with participative democracy. The observation is not without interest for the European Union: because while persevering with the procedural framing of the public consultation prior to finalizing the decision-making, the European Union could be persuaded to use participative democracy, without even having to require it by constitution.

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