THROUGH THE LOOKING GLASS: TRANSPARENCY IN THE WTO

MARIA PANEZI

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Abstract

This thesis discusses transparency as a rule and a principle in the World Trade Organization. Transparency is used in many contexts within the organization in order to describe phenomena ranging from Agreement provisions to soft law or general principle and from the obligation of member states to publish national trade laws to civil society participation in the WTO. I argue that they all these transparency variations are linked as they relate to the organization's democratization potential.

This thesis has three goals: First, it offers an overview of scholarship discussing legitimacy problems in the WTO. Second, it describes, assesses and offers ideas for improvement for the four different forms of transparency –internal, external, administrative and legal- in the WTO. Third, as a contribution to the debate on transparency and legitimacy in the WTO, the thesis proposes a theoretical framework combining composite democracy and transparency in the WTO to discuss the link between the two concepts.

I argue that the four transparency dimensions help make the WTO a more democratic organization. At the international level elections are currently impossible, but other governance rules and practices can advance the degree of democratization of international institutions. Under the theory of composite democracy, democratization is best explored not through the exclusive focus on elections but taking into account other factors, such as adherence to the rule of law, adequate representation, minority participation avenues and transparency. I will examine if and to what extent the WTO's "transparencies" correspond to the non-electoral composite democracy parameters.

My methodology is based on reviewing legal scholarship and WTO data analysis, focusing on treaties, case law, official speeches and website announcements. This thesis aims to ultimately explore how the democratizing potential of transparency can expand the WTO's normative space to become more inclusive and effectively address the organization's legitimacy problems. Improving all the different rules and practices that WTO scholars and diplomats call "transparency" can help with WTO's legitimacy issues: making the WTO more open and inclusive and trade regulation information easier to access and understand can make the WTO a more democratic institution, and therefore more legitimate. The normative conclusion of this thesis is that more transparent regimes are more democratic.

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Introduction

> *"Origin of the World Trade organization*
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> *They needed a god of trade. From his throne on Olympus, Zeus surveyed his family. He did not have to ponder long. Hermes was the god for the job. Zeus gave him sandals with little gold wings and put him in charge of promoting the exchange of goods, the signing of treaties, and the safeguarding of free trade. Hermes, who would become Mercury in Rome, was chosen because he was the best liar."*
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> *Eduardo Galeano, Mirrors*[1]

If it were ever to compete for an Oscar, transparency would probably be nominated in the 'best supporting actress' category.

Andrea Bianchi[2]

During the forty or so years of the GATT era, trade tariffs were negotiated among member states behind closed doors. The General Agreement on Tariffs and Trade[3] was not just an Agreement but an intergovernmental organization, whose exclusive mandate was the reduction of cross-border trade tariffs (it also extended progressively to a number of other trade barriers). Such tariffs were renegotiated every few years in short but intense negotiating sessions, collectively grouped as trade rounds, during which countries would offer reductions on export tariffs and curbing of other foreign trade-impeding measures. In between trade rounds, other negotiations among GATT members would offer steps of progress towards the professed ultimate goal of the treaty: the elimination of tariffs in trade. The main economic rationale behind the GATT was that collectively its

[1] EDUARDO GALEANO, MIRRORS: STORIES OF ALMOST EVERYONE 39 (Mark Fried trans., 2009).
[2] Andrea Bianchi, *On Power and Illusion: the Concept of Transparency in International Law*, in TRANSPARENCY IN INTERNATIONAL LAW 5 (A. Bianchi & A. Peters, eds. 2013).
[3] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]

members could lower the artificial price distorting mechanisms that are tariffs, reduce domestic protectionism and thus make trade more prolific and profitable for their countries. At least that was the idea behind GATT.

When one looks at the economic practices of GATT members during the GATT years, it is easy to identify a plethora of price distorting practices that did the opposite of what GATT was promising.[4] Practices of protecting domestic industries and subsidizing several sectors of production were common, especially among the stronger GATT constituents, namely the United States, the European Communities, Canada and Japan.[5] This paradox of commitment towards eliminating tariffs and other barriers while maintaining protectionist policies at will demonstrates that, although it was portrayed as such, the GATT mantra was never seen as a win-win strategy at least by many powerful GATT member states. We could say that the true mandate of the GATT was to eliminate tariffs *when and where* it was to the benefit of those who were better able to get their way during GATT negotiations.

The prevalent structure of negotiations during the GATT years, from 1947 to 1995 was one of concentric circles of negotiations: in the center were the GATT's top players: the US, the EC, Japan, and Canada.[6] Sometimes other strong external trade performers or major importers joined them but that circle never looked very different than an old-boy's club. The room where they met in was adjacent to the office of the GATT's top officer, the director general, and was painted "goat vomit green."[7] Similar to an "English

[4] See among many Nicolas Lockhart & Andrew D. Mitchell, *Regional Trade Agreements under GATT 1994: An Exception and its Limits*, in CHALLENGES AND PROSPECTS FOR THE WTO 217 (N. Lockhart & A. Mitchell eds. 2005). Frank Schoneveld, *The EEC and Free Trade Agreements–Stretching the Limits of GATT Exceptions to Non-Discriminatory Trade?* 26:5 J. WORLD TRADE 59-78 (1992).

[5] Also known as the Quad.

[6] THEODORE H.COHN, GOVERNING GLOBAL TRADE: INTERNATIONAL INSTITUTIONS IN CONFLICT AND CONVERGENCE (2002) Amrita Narlikar, *Law and Legitimacy: The World Trade Organization*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 294 (D. Armstrong ed... 2009). Michael Daly & Hiroaki Kuwahara, *The Impact of the Uruguay Round on Tariff and Non-Tariff Barriers to Trade in the 'Quad* 21:2 THE WORLD ECONOMY 207-234 (1998).

[7] Referring to a small conference room adjacent to the Director General's office in Geneva, see JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 103 (2006), and Amrita Narlikar & John S. Odell, *The Strict Distributive Strategy for a Bargaining Coalition: the Like Minded Group in the World Trade Organization* in NEGOTIATING TRADE DEVELOPING COUNTRIES 132 (J. Odell ed..., 2006), referring to officials who, in addition to being unfamiliar with the Green Room process,

gentlemen's club", the room smelled of cigars and cigarettes. When those who frequented the Green Room came to a decision on concessions, these results were then communicated to the lesser players, who would then need to quickly decide how to react.[8] More often than not, these pre-agreements were negotiated primarily in the Green Room, as smaller countries were always reminded of two things: first of all, agreeing on common frameworks and new products and lowering tariffs is like Vitamin C, it does nothing but good. Second, since the GATT decision-making structure was based on consensus, nobody really wanted to be blamed for being *the one* opposing what everyone else seems to be agreeing on. No trade minister or GATT diplomat wanted to be remembered as *the one who killed the Agreement, or the one who shot down the Round.* As Richard Baldwin put it, during the GATT, the developing countries' strategy was "don't obey, don't object."[9]

All of this changed immediately after the Uruguay Round. The Round itself was more extensive in what was agreed on than the collective results of the forty years of GATT negotiations. New Agreements were signed in various new areas of products. With minor exceptions, almost every conceivable area of international trade was put on the negotiating table. At the end, not only did the GATT members conclude agreements in Services, Intellectual Property and other issues, but they decided to re-launch the organization with a new name, that now truly corresponded to what the GATT always was: an intergovernmental organization. The godfather of the new beast was John Jackson and he named it "the World Trade Organization" or WTO.[10]

The WTO was not just the renovation of the GATT house. The negotiators of the Uruguay Round tore the house to the ground, and rebuilt it from scratch, keeping around

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did not have the necessary skills in English to participate. See also Debra Steger, *The Future of the WTO: the case for institutional reform*, 12:4 J. INT'L ECON. L. 803 (2009).

[8] For a comparison, see: WTO Website, Map of disputes between WTO Members http://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm?country_selected=none&sense=e , PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 28 (2009).

[9] Richard E. Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade* 29:11 THE WORLD ECONOMY 1451-1518 (2006).

[10] PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 31 (2009), see also *id*. how the New York Times at that time reported the name as MTO, or Multilateral Trade Organization before the decision for the name was finalized.

the GATT Agreement as amended. Keeping the GATT around was almost as if the only thing in an entire house that they kept was the couch, reupholstered. Developing countries in the newly built house got a breakthrough agreement signed, the Agreement on Agriculture. Not only were agricultural products their main exports, but most of their populations depended on better market access for these products as they were simultaneously the source of their income and food. The Agriculture Agreement was a reason to celebrate[11]: developing countries, routinely excluded from being taken seriously in the GATT, living in the basement, were now given their own room in the new house. Or so they thought. Soon enough they realized that the new Agreements still allowed the developed countries to control international markets. Using average instead of individual tariffs as a benchmark still allowed developed countries to support any agricultural products they desired. Moreover, in an increasingly globalized world, when products and services travelled a lot faster, the effects of essentially sustaining the pre-Agricultural Agreement status-quo were now felt a lot more. Slow trade in key products such as meat, crops and textiles became in the nineties even slower. Not only had the developing countries not gotten a room in the house. They were still living in a corner at its basement. And a crowded basement it was.

The frustration on these take-it-or-leave it Green Room deals did not only come from the populous group of the WTO developing member state representatives. It also came from their peoples, who now experienced harsher realities and had to downgrade the lifestyle, which they could afford through earning 1.5 US dollar per hour.[12] Frustration of farmers in Asia, Latin America and Africa soon turned into despair. Also crammed in the basement were various interest groups such as the consumers of hormone injected beef, pharmaceutical conglomerates, epidemics' patients, labor unions and advocates against marine species extinction. A very diverse group was still being left out of the much

[11] Donna Roberts, *Implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures: The First Two Years*. NO. 14588. INTERNATIONAL AGRICULTURAL TRADE RESEARCH CONSORTIUM (1998). See also the critique a few years later from Carmen G. Gonzalez, *Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security, and Developing Countries* 27 COLUM. J. ENV. L. 433 (2002). Clive Potter & Jonathan Burney, *Agricultural Multifunctionality in the WTO—Legitimate Non-Trade Concern or Disguised Protectionism?* 18:1 J. RURAL STUD. 35-47 (2002).

[12] See PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 236 (2009) for one such example.

bigger organization, the WTO, as they were during the GATT, and they were not happy.[13] The new Agreements resulted in a proliferation of industries, consumers, traders and producers affected by the WTO. The basement was jam-packed.

It took the basement denizens only four years before they started to shake the entire house. The next negotiations' round about to be launched in Seattle in 1999 went down in flames. It was eventually launched in Doha, Qatar, shortly after September 11.[14] As this round continues, academics and economists have agreed that the reason for its premature launch was the September 11th momentum, summarized in a Pink Floyd mentality of "united we stand, divided we fall." The series of failed ministerial conferences that followed the launch of the round prompted many commentators to say that the round should have already been declared dead. Yet the representatives of coalitions of stronger countries together with WTO top officials insist on trying for years now to resuscitate the chances of eventually agreeing. To date, this has not happened.

The first question for the legal academics who identify this legitimacy crisis as worthy of discussion should be the following: does the answer to the problem, the shaking WTO house, lie in finally having a serious discussion about how to move its basement inhabitants upstairs and give them better, nicer rooms? In other words, is a fundamental rethinking of current policies and negotiating strategies enough to assist the WTO out of its legitimacy crisis, help conclude the Doha Round, or at least help launch a new, successful round? Or, are the house tremors that we are witnessing not the product of the wall banging of the frustrated basement inhabitants, but instead, a problem with the very foundations of the house, which, in addition, was there to begin with, even during the GATT? Are legitimacy disparities in the WTO due to the growing gap between the

[13] Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly*, 72:1 JOURNAL OF INT'L ECONOMICS 151-175 (2007): 151-175. WILL MARTIN, THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (1996).Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations* in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 285-300 (D. Kennedy, J. Southwick eds. 2002). Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment* 8:2 J. INT'L ECON. L. 405-424 (2005).

[14] See for a more contextual perspective on the trade rounds and Ministerials launched after Uruguay Robert Wolfe, *Crossing the river by feeling the stones: where the WTO is going after Seattle, Doha and Cancun* 11:3 REV INT'L POLIT. ECON. 574-596 (2004).

Global North and the Global South, or the Agreements and the philosophy of the organization itself? This is not an easy question to answer.

Ideas on where the WTO should go from here have come from many directions. Those who over the years occupied the post of the Director General of the WTO have insisted that negotiating just a bit more, staying around the table just a day longer can and should produce the desired results.[15] Many trade ministers and other high-ranking officials, including former Director General Mike Moore, insisted on results-oriented strategies, such as concluding another agreement and launching another round, motivated sometimes by an insatiable desire for personal success.[16] The former US Trade Representative Bob Zoellick decided that when the WTO does not work as intended and consensus is difficult to come by, the best route is for the United States to conclude Preferential Trade Agreements, treaties on one-to-one or in groups of countries that are willing to move forward with trade liberalization. John Jackson, a legal academic and the WTO's godfather, contends that the solution lies in refocusing on the WTO rules, and its dispute settlement process, the crown jewel of the organization in order not to let the old school diplomatic processes destroy what was built after years of negotiations.

Martin Wolf, chief economist of the Financial Times, purports that, although there may be some distributional and other practical problems with liberal policies of International Financial Institutions including the WTO, overall standards of living continue to be raised, so we should keep at what we are doing. Because of such institutions life is getting better as time goes by. At the same time, he suggested that pursuing trade governance without forcing more trade rounds is a better strategy for moving forward.[17] Dani Rodrik, an economist from Harvard, argues that the better performers amongst the

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[15] See Kevin P. Gallagher, *Understanding Developing Country Resistance to the Doha Round* 15:1 REV. INT'L POLIT. ECON. 62-85 (2007), Giovanni Anania & Jean-Christophe Bureau, *The Negotiations on Agriculture in the Doha Development Agenda Round: Current Status and Future Prospects*." 32: 4 EUR. REV. AGRICULTURAL ECONOMICS 539-574 (2005). See also for a more detailed account: KENT A. JONES, THE DOHA BLUES: INSTITUTIONAL CRISIS AND REFORM IN THE WTO (2010).

[16] See PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS passim. for examples of such desire for success (2009).

[17] See Dani Rodrik, *Martin Wolf: Doha is Weakening the WTO*, blog entry April 15 2011 http://rodrik.typepad.com/dani_rodriks_weblog/2011/04/martin-wolf-doha-is-weakening-the-wto.html.

poor nations are the ones who did not adopt the WTO rhetoric wholesale, but rather followed an anti-WTO path to their current relative prosperity, for example by adopting quotas and subsidizing their infant industries and weaker sectors until they can stand on their own feet in the global markets. Rodrik further notes that the ability of trade liberalization, as is presented by WTO proponents as a cure for development, has been largely exaggerated as it is unequipped to assist least developed and developing countries to take the first step out of their state of poverty.[18] Finally, he suggests that the world trading system has to allow for diversity in national institutions and standards, permit the protection of nation-specific social arrangements and not insist on a "one-size-fits-all" approach to national trade approaches.[19]

Representatives of Oxfam, a confederation of NGOs against worldwide poverty and injustice, argue that smaller developing countries and least developed countries should insist on a hardline approach in order to find space in global markets for their agricultural products.[20] Developing countries, despite their significantly diverse positions on many products and agreements, decided during the Cancun Ministerial Conference to form a joint front to deal with developed country coalitions, mostly the EU-US alliance.[21] Their national constituencies, similarly to those of the developed countries, are usually prepared to stand in support of any policies that will make their products more competitive in global markets. Usually, for citizens of poorest nations this means that they are in opposition to the WTO and its policies. Unions coming from developed countries want the WTO to adopt labor standards in order to allow for domestically produced goods to compete with manufactured by cheap labor in Latin America, Asia (especially China) and Africa to a lesser extent.[22] Workers from the last three continents

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[18] DANI RODRIK, THE GLOBAL GOVERNANCE OF TRADE: AS IF DEVELOPMENT REALLY MATTERED: REPORT SUBMITTED TO THE UNDP 3 (2001) "In this vision, the WTO would no longer serve as an instrument for the harmonization of economic policies and practices across countries, but as an organization that manages the interface between different national practices and institutions."

[19] Dani Rodrik, *A Plan B for Global Finance*, THE ECONOMIST, GUEST ECONOMICS FOCUS COLUMN (March 12th 2009).

[20] See PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 145, 198, 206 (2009).

[21] Known as the G-20. See Pedro da Motta Veiga, *Brazil and the G-20 Group of Developing Countries* https://www.wto.org/english/res_e/booksp_e/casestudies_e/case7_e.htm.

[22] Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001).

want the exact opposite: for the WTO to refrain from establishing such labor standards. Finally, there are those who express an extreme political message and would like the WTO to "just die." [23]

Many of these positions, even if they are not helpful in solving the legitimacy problems of the WTO, allow us to at least get a better glimpse at what is at stake when trade rules are being negotiated and adopted. This thesis aspires to add to those viewpoints that purport that solving common problems in a collective manner and through multilateral institutions is always superior than its opposite. As such, having a multilateral trading regime is a worthwhile cause, since through negotiations and cooperation trade can help raise standards of living *when transactions are fair and equitable*. The WTO *can be* a strong organization that provides a forum for permanent negotiations, trade monitoring and dispute resolution. John Jackson's favorable attitude towards the WTO legal system is a position adopted by this thesis.[24]

Many of the WTO rules and practices can be revised to work better and help the WTO with its extant problems. Revisions through multilateral negotiations may not always be feasible, but the interpretation and implementation of the rules can still make a difference in improving the WTO legal system. This thesis will focus on one set of such rules, which in the WTO appear under the same "name" but have varying content and importance: transparency. Upon initial observation, transparency appears to be an overarching theme that member states and their representatives as well as the WTO Secretariat and its numerous committees and divisions reiterate with considerable frequency. Transparency has been used in the WTO by diplomats, lawyers, scholars, NGO representatives and judges to describe four different phenomena: participation of non-state actors in WTO processes; effective participation of developing countries in WTO decision-making; one of the operating principles for the WTO's small

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Wilkinson, Rorden, and Steve Hughes. "Labor standards and Global Governance: Examining the Dimensions of Institutional Engagement." GLOBAL GOVERNANCE 259-277 (2000).

[23] WTO Dying a Slow Death, http://www.zerohedge.com/news/2014-08-04/wto-dying-slow-death, Forget Doha, it's the WTO that must change or die, http://europesworld.org/commentaries/forget-doha-its-the-wto-that-must-change-or-die/#.VY1i-6Y77SI

[24] JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006) introduction.

administration, resulting in the frequent publication of GATT and WTO documents; and the obligation of WTO member states to publish their trade rules and maintain judicial review mechanisms for their implementation.

Transparency and participation have been closely linked in international trade regulation ever since the WTO's creation in 1995.[25] In the last three decades, the WTO and, to a certain extent, its predecessor, the GATT, has opened up and now provides a vast quantity of data to governments, industries and individuals seeking information on the administration of international trade. The website of the WTO attracts 1.4 million visits a month[26], and during the course of 2013 alone, over 2,000 pages on wto.org were created or updated. In addition, the organization even has over 100,000 "likes" on Facebook.[27] Concomitant with this increase in information dissemination, the number of disputes brought before the Dispute Settlement Body that involve violations of transparency obligations in the Agreements has increased significantly over the last twenty years.[28] Especially after the Cancun Ministerial, increased emphasis has also been given to rectifying developing country participation problems in WTO negotiations, otherwise known as internal transparency. Finally, transparency has been linked to the WTO Secretariat in the context of discussions on the so-called "good governance" principles.

The choice of this particular norm (which appears either as a contractual obligation, a guiding principle or a desideratum) was due to the stance of WTO member states and officials towards transparency. Their attitude towards transparency is saturated with a considerable amount of controversy. The obligation of WTO member states to publish their laws has been hailed as the "best insurance policy against protectionism" by a

[25] See Steve Charnovitz, *Transparency and Participation in the World Trade Organization* 56 RUTGERS L. REV. 927(2003).
[26] *WTO Annual Report 2013* http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_e.pdf 123-131.
[27] In fairness, Facebook has yet to create a "dislike" button. It is not clear how many hits the WTO would get if such a button existed.
[28] The numbers here are in fact quite striking. 58 cases involve Article X of the GATT 31 cases Article X:1, 9 cases article X:2, 35 cases Article X:3, 26 cases Article X:3 (a), 3 cases on Article 3 GATS, 6 cases for Article 63 of TRIPS, 2 cases on article 63.1 and 2 cases on Article 63.3, *Disputes by Agreement* .http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm

former WTO Director General.[29] At the same time, requests for direct access (even through a controlled closed-circuit video system) to the works of the decision-making bodies or the adjudicatory process in the WTO have been met with strong resistance from all but very few member states. The WTO frequently publishes an overwhelming amount of documents, almost impossible to decipher without proper training in law and economics of trade, but the first stage of negotiations of such documents has been for years restricted to the representatives of no more than ten member states. The latter is extremely troublesome in an organization that has 160 member states and accounts for more than 99% of global trade.[30] As citizens we are either provided with a huge portion of transparency, impossible to metabolize, or none at all.

In this dissertation, transparency is not used in the traditional sense. Section C in Chapter I will further explain the analytical categories transparency refers to as a keyword. Overall, it is used to discuss a wide spectrum of issues, ranging from secrecy to openness, and including power asymmetries and participation. The reason transparency is used in this particular manner is first, because the official WTO rhetoric refers to transparency in this manner, in the GATT Agreement, in the Doha Ministerial Declaration, in official speeches from the WTO Director General and other WTO officials, and finally, in the minutes of the General Council, reflecting the WTO member states' attitude towards the term. Such expansive use of the term aspires to contribute to a better understanding on the context that affects WTO's legitimacy, as well as to illuminate different aspects of the WTO's legitimacy problems.

As we will examine, the term "transparency" is used in a number of different contexts within the organization in order to describe phenomena of varying normative weight and meaning, ranging from Agreement provisions to soft law or general principle and from the obligation of member states to publish national trade laws to civil society participation in the WTO. These contexts in which transparency appears are rather

[29] *Lamy hails transparency as the best insurance policy against protectionism* at http://www.wto.org/english/news_e/news13_e/trdev_19jul13_e.htm best insurance policy against protectionism.
[30] See *Trade and Tariff Data* at https://www.wto.org/english/res_e/statis_e/statis_e.htm .

fragmented and do not seem as organically connected to each other. However, I argue that they are all linked as they relate to the organization's democratization potential. In that respect, I argue that there is a reason why improving all the different rules and practices that WTO scholars and diplomats call "transparency" can help demonstrate more aspects of the WTO's legitimacy issues. Moreover there can be a loose linkage between democracy, transparency and legitimacy. In abstract, the three concepts can be seen as overlapping circles. My working hypothesis will be that a discussion on various transparency forms in the WTO can illuminate various aspects of the organization's legitimacy problems and that attention to the WTO's transparency processes can clarify the relevance of openness and participation in the WTO.

This thesis is partly a critical response to the extant debate on legitimacy in the WTO and partly a continuation of the debate in a new direction. This book has mainly three ambitions: First, I would like to offer an overview of scholarship discussing legitimacy problems in the WTO, with a particular emphasis on scholarship that discusses legitimacy and transparency. Second, I would like to describe, assess and offer ideas for improvement for the four different forms of transparency in the WTO. As my research will show, the organization's track record on transparency is not optimal. Despite this focus on transparency, there remain deficiencies with respect to full participation in the WTO by several integral parties, namely developing countries and citizen-consumers. On one hand, the majority of developing countries have yet to fully enjoy the benefits of joining in the WTO model because the "Green Room" remains inaccessible for a large number of WTO member states due to negotiating asymmetries and resource constraints, and their usage of the dispute settlement system is more limited than their developed counterparts.[31] On the other hand, the desire of the citizen-consumer to participate in the business of the WTO has been frustrated by a lack of external transparency. Although there have been over one hundred attempts by individuals and associations (representing organized consumers, professional unions, environmental groups, industry representatives and academics) to affect the outcome of WTO disputes through the

[31] For a comparison, see *Map of disputes between WTO Members* http://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm?country_selected=none&sense=e

submission of *amicus curiae* briefs for the Panels' and Appellate Body's consideration, only very few have been considered. The failure in administrative transparency in the form of access to reasoned decision making, with respect to these failed attempts, stains the organization and strains its relations with its constituents.

Finally, I would like to contribute to the debate that discusses transparency and legitimacy in the WTO and argue for a theoretical framework to discuss the link between the two concepts. I argue that the four transparency dimensions mentioned above are not unrelated but can be understood under a single overarching theme. All the different transparencies can contribute to make the WTO a more democratic organization. At the international level elections are currently impossible, but other governance rules and practices can advance the degree of democratization of international institutions. Under the theory of composite democracy, democratization is best explored not through the exclusive focus on elections but taking into account other factors, such as adherence to the rule of law, adequate representation, minority participation avenues and transparency. I will examine if and to what extent the WTO's "transparencies" correspond to the non-electoral composite democracy parameters.

The theoretical approach for the examination of transparency through composite democracy *sans* elections, is based on Montesquie's and Madison's governance paradigms of separation of powers and checks and balances. My methodology is based on reviewing legal scholarship and WTO data analysis, focusing on treaties, case law, official speeches and website announcements. Thus, this thesis aims to ultimately explore how the democratizing potential of transparency can expand the WTO's normative space to become more inclusive and illuminate more aspects of the organization's legitimacy problems. Making the WTO more democratic can be linked to the improvement of rules that fall under WTO's "transparency" definitions in order to ensure that: developing countries will not continue to be systematically excluded during the first step of negotiations, the Green Room; civil society participation in the WTO will not be treated as a nuisance; the WTO's administration will function in a better way; and product rules will be communicated usefully to traders and consumers who want to make informed

decisions. This can make the organization, its administration, diplomats, and the citizens of the countries that are members to the WTO be in a more favorable position to negotiate, implement and discuss these rules at a national and international level better.

The normative conclusion of this thesis is that more transparent regimes can be more democratic. By exploring transparency in all its manifestations, this thesis aspires to provide a model of analysis of composite democracy at an international level, and a case for comparison with other international organizations, which also lack direct electoral legitimacy. Democratization does not directly address the extant problems with trade rules, such as the treatment of subsidies or quotas or tariffs on agricultural products, nor the fact that the WTO Agreements are laden with references to a commitment towards a "liberal" trading system. When better decisions on trade rules are not possible, we can at least focus on improving the process of decision-making in hopes that keeping all avenues of communication open and political discourse more informed, better rules *might follow*. In a sense, this is a process-oriented argument, arguing that legitimation results from process, or emphasizing "through-put" legitimacy[32]. There is also a derivative content-oriented aspect in the democratizing potential of transparency. When concessions and rules that are negotiated in a more transparent manner, it may be more difficult to reach consensus, but when consensus is achieved, the rule will be more representative of the interests of more countries, and that may decrease its violation potential.

Furthermore, promoting transparency as a means of democratization can act as a substitute for the lack of direct democratic legitimation at the international level. Transnational regimes, or regimes of transnational governance such as the WTO affect a very large number of stakeholders, member and non-member governments, multinational corporations, other organizations, numerous unions such as trade and labor unions and the global civil society, the aggregate of all citizens affected either directly or indirectly by trade policies. The WTO, similarly to other transnational regimes, lacks direct legitimation through elections at it is the case for national democracies. However, such

[32] Vivien A. Schmidt, *Forgotten Democratic Legitimacy: "Governing by the Rules" and "Ruling by the Numbers" in the Euro Crisis* in THE FUTURE OF THE EURO" (M. Blyth & M. Matthijs eds. forthcoming, 2015 Final Draft for Chapter on file with the author).

regimes can exhibit other democratization elements, especially through meaningful commitment to principles such as openness and the establishment of platforms for transnational actors' participation. [33]

A number of very important issues are linked to the major themes discussed in this dissertation. First, the Global South position towards transparency and participation in the WTO remains a very crucial dimension on the issue. In particular, legal scholarship, political discourse and public opinion in the Global South have expressed their stance towards the WTO and its legitimacy problems, often extending this analysis to the concept of openness, transparency and participation. The Global South in and of itself is a very diverse legal and political terrain and cannot be discussed under a single rubric. The position of India and Brazil for example in the WTO is markedly different than that of smaller economies, such as for example Colombia, Vietnam or Nepal. As such, the discussion of Global South perspectives needs to be tuned to the differences across and within states in Asia, Africa and Latin America. This analysis is crucial to international trade regulation but remains outside the scope of this dissertation.

Another important issue that does not fall within the scope of this thesis is civil society empowerment and the legitimacy concerns with respect to organized civil society and NGOs in particular. Accountability and representativeness of NGOs have been questioned extensively. More specifically, it is not clear who is represented by NGOs, that have the potential of becoming elite institutions whose mandates only in theory embody noble causes, while in practice they engage in lobbying with tactics similar to those of for-profit institutions. Finally, the credibility of organized civil society has been put in question due to many scandals, especially economic in nature, that have been revealed throughout the last three decades. All these large issues will not be discussed in this thesis. Rather, the discussion will only briefly focus on the organizations that have submitted amicus curiae briefs and have participated in WTO Ministerial Conferences and insofar this is relevant to the WTO's external transparency.

[33] In this dissertation I adopt the position expressed by ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 8 (1973).

Finally, this thesis will not discuss the very crucial for international trade regulation issue of national performance with respect to Article X transparency. As with the two aforementioned issues, national transparency mechanisms at the border as well as within domestic markets are essential to the function of cross-border trade. However, a comprehensive survey of national Article X mechanisms, while a worthwhile project, can also be in and of itself the topic of a dissertation (or an even larger project). It requires, first and foremost, a familiarity with domestic legal systems of the 160 WTO member states and an analysis of de jure and de facto administrative and judicial practices and mechanisms and publication of laws at the national level. Thus, it will not be examined in the context of this dissertation.

Methodology

Transparency as a norm and an administrative principle has been explored both in the field of international law, and more specifically within WTO law. The normative parameters of transparency have been discussed in an illuminating manner and scholarship has produced a number of thought-provoking accounts, both at the level of rule formation and at the level of rule compliance.

The following matters are discussed under the term "transparency" in the WTO: less effective participation of developing countries in WTO decisionmaking ("*internal transparency*"), openness, publications and participation of non-state actors, civil society and individuals in the WTO ("*external transparency*"), transparency as an administrative principle invoked in the selection and operations of various WTO bodies, such as the Secretariat, the Dispute Settlement Body and the General Council ("*administrative*" or "*institutional transparency*"), and transparency as an obligation to publish national laws and maintain judicial remedy mechanisms for traders, assumed by WTO member states in Article X of the GATT and its equivalent in other WTO Agreements ("*legal transparency*"). Moreover, transparency in the WTO normatively takes the form of: *soft law*, as part of the organization's operational dogma and as an administrative principle; *general principle of international law* in the meaning of Article 38 para.1 c) of the ICJ

Statute;[34] and, *treaty obligation*, in the meaning of Article 38 para.1 a).[35] It remains unclear whether transparency at any level has acquired customary law status. Such a theory has neither been articulated nor has it been tested during adjudication.

The emergence of normatively relevant transparency with the participation of civil society is mostly discussed under the auspices of Global Administrative Law (GAL) and its theoretical counterparts, as well as rationalist and realist approaches. Many legal scholars have elaborated on both external and administrative transparency in the WTO, such as Steve Charnovitz and Panagiotis Delimatsis.[36] Some of these accounts integrate a socio-legal perspective to explain global governance, institutional evolution and preferences and look upon civil society contributions and the emancipation of developing countries within the world trading system under a favorable light. However, their analysis is restricted to soft law aspects of transparency, as well as a more traditional understanding of the principle that directly links transparency to either publication of documents or civil society participation.

Scholarly work that discuss internal transparency exclusively in the context of WTO law and development[37] moves away from positivism and seeks a better understanding of development and the needs of developing countries in the WTO context. This internal transparency debate and the discussion on the developing countries' position, which has produced a deadlock for the organization's negotiations, has been explored under the lens of "law and development." Such approach can benefit a lot from becoming more WTO-specific. Once this discussion is more exclusively focused on the WTO, similar problems to those described under "internal transparency" can be found in the analysis of Preferential Trade Agreements and Accession Protocols. Some WTO scholars have elaborated separately on WTO Plus accession agreements, and more particularly the

[34] Statute of the International Court of Justice, art. 38, para. 1.
[35] Statute of the International Court of Justice, art. 38, para. 1 (a).
[36] Panagiotis Delimatsis, *Transparency in the WTO Decision-Making*, TILEC Discussion Paper No. 2012-006 http://ssrn.com/abstract=2001919 (2012) and Steve Charnovitz, *Transparency and Participation in the World Trade Organization*" 56 RUTGERS L. REV. 927(2003).
[37] Weak cognitivism discussed in ANDREAS HASENCLEVER ET AL EDS., THEORIES OF INTERNATIONAL REGIMES passim, esp. 8-23 and 211 et seq. (1997).

Chinese Accession Protocol and transparency issues.[38] Preferential and regional trade agreements are not generally discussed within the internal transparency paradigm.

Finally, legal transparency, Article X and equivalents and Article X case law is mostly discussed from a positivist perspective, often sidestepping sociological elements, which are discussed in other contexts (more often in economics' studies and sometimes in Third World Approaches in International Law- or TWAIL scholarship) but not as elaborately.[39]

Within the WTO, the dominant neoliberal pro-trade ethos on one hand refutes the significance of internal and external transparencies. WTO officials and Global North diplomats and trade ministers have stubbornly ignored the former for decades, until having reached a veritable deadlock in Cancun, a deadlock whose effects are felt until today; and reducing the latter to a non-issue during internal meetings. Administrative and legal transparencies on the other hand are generally perceived as conducive to the acceleration of trade liberalization and are promoted with the proliferation of relevant case law and trade monitoring bodies.

The international trade regime dates formally to the 1940's and has long legal, political and economic histories. The legitimacy problems that the organization is facing cannot be discussed only from a legal perspective without consideration of the political and economic histories. The quest for a structured understanding of the three different perspectives has led mostly the GAL scholars to find a sanctuary in familiar territory: constitutionalism. The constitution in the national context is the framing document, which combines economic programs and political aspirations in a higher-level contract among the people (or the people and their government). Thus, although not optimal, the constitutionalism turn is understandable.

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[38] Julia Ya Qin, *"WTO Plus" Obligations and Their Implication for the World Trade Organization Legal System: An appraisal of the China Accession Protocol*, 37:3 J. WORLD TRADE 483-522 (2003).

[39] See for example Bhupinder Singh Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004), *id*, *Co-Option and Resistance: Two Faces of Global Administrative Law* 37 NYU J. INT'L. L. & POL. 799 (2004) 799 and Gerhard Loibl, *Contribution in* B. S. Chimni et al. (2003). *Theme III: Global Governance: Institutions* 16 LEIDEN J. INT'L L. 897-913 at 900-901 (2003).

My argument is premised on the understanding that transnational regimes, or regimes of transnational governance such as the WTO include multiple levels of exercise of authority and affect a very large number of stakeholders either directly or indirectly with trade rules and policies. They do so with both contractual rules and soft law principles or guidelines. As such, the WTO as a transnational regime exhibits two fundamental characteristics: it is a *polyarchy,* a relative but incomplete regime with few democratic elements, describing itself as "popularized and liberalized […],inclusive and […]open to public contestation"[40] and its normative reach can be described as *polynormative*, ranging from guidelines to contractual obligations. The numerous forms of transparency in the WTO also display these two characteristics: polyarchy in the sense that transparency appears at various levels of governance and involving numerous actors, and polynormativity because of the varying legal nature of transparency forms.

Moreover, the different forms of transparency in the WTO appear to have a common thread that runs through all of them. Their side-by-side comparison shows certain shared properties. First, the current inconsistencies with respect to each of the transparency forms do not become obvious in the debate that discusses each one separately, but when examined alongside. For example, Canada's legal transparency record is one of the best in the WTO: Canada provides very detailed access to information on trade tariffs to traders and has a user-friendly process in place online for the reporting of trade distorting practices. However, before we give Canada a high score for transparency performance, it might be relevant to know that Canada has always been a member of the Quad, and has taken a very long time to publish the text of CETA, its most recent and very important Preferential Trade Agreement with the European Union.[41]

Second, a direct comparison of how different forms of transparencies has evolved shows common histories that coincide with the emancipation of global civil society, the refinement of their arguments and the systematic push for accountability of national governments and international organizations, the lack of tolerance for exclusionary

[40] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 8 (1973).
[41] Stuart Trew, *Is Canada Legally Bound to Release the CETA Text?* COUNCIL-OF-CANADIANS'S BLOG (Nov.8 2013).

tactics and the expansion of democratic discourse space at a global level to match that which may exist at the national level in many countries. Not only global civil society protested the WTO's policies during the Seattle Ministerial, but simultaneously NGOs and groups of academics were submitting *amicus curiae briefs* and shortly thereafter, in the Cancun Ministerial, developing countries assumed an equally strong stance against practices compromising internal transparency.

Third, demonstrating the interconnectedness of different transparency forms and their relationship to democratization gives developing countries more terrains to pursue fair and meaningful integration of their economic needs at the WTO level. Effective strategizing to end the pervasiveness of the Green Room negotiation process can be directed both towards more powerful member states, as it happened in Cancun, and towards the WTO Secretariat who facilitates such meetings.

Beyond discussing all transparencies in unison in order to get a better picture and find more ways of improving the WTO's and its members' transparency performance, the four transparency dimensions are linked through a single thread, an overarching concept: their democratization potential. A sociological approach in law that refocuses the transparency analysis in the WTO from constitutionalism to democratization seeks to not limit participatory platforms to those allowed by the GATT and other normative forms. Instead, an analysis that includes both legal and other transparencies in the context of democratization will allow multiple and innovative participatory forms to emerge and be proposed by developing country members outside the "rigidness" of an analysis based on constitutional consolidation. Instead, the fluid notion of democratization is proposed as the main analysis framework.

All the phenomena labeled as transparency in the WTO carry a number of characteristics prevalent in democratic regimes, such as participation and meaningful information. Whether these amount to constitutional principle is a derivative point: first we have to understand the democratizing potential of transparency and how it can expand the WTO's normative space. In other words, if there exist principles that have emerged above the

WTO Agreements, first we must understand how these principles add to the existing normative framework, and then assess their possible constitutional quality. The appropriate framework has to steer clear from nationally embedded public law and national notions of the constitution. In the absence of elections at the global level, composite or compounded democracy offers a full list of other potential democratic functions in governance. It extends beyond voting, for example into the executive representation, horizontal mutual control, associative and expert representation, and legitimacy based on individual rights. My argument stems from theory of deliberative and participatory polyarchy.[42] At the supranational level the main case-study for such polyarchy is the European Union. Democratic elements that increase legitimacy of decision-making in the European Union are traced across different processes and organs. The WTO is a very different case for such elements. In the WTO they are all found under the concept of transparency.

By definition, transparency as a concept implies a higher degree of visibility, access and openness. This allows for the evaluation, and to some extent the measurability of the democratization of the WTO. Transparency is a prominent principle in Madisonian or composite democracy analysis, as it enables the flourishing of a system of checks and balances. When evaluating a model of governance that is labeled as "democratic", these models of composite democracy look at election processes, representation in government, good governance, observance of rule of law principles, good administration and access and participation opportunities for citizens. As a result, modern democracies are aggregates of numerous elements that extend above and beyond voting. Vertical legitimation through national elections is only one of numerous democratic legitimation elements. Legitimacy in a compounded, composite, Montesquieian or Madisonian democracy needs to extend beyond voting, into the executive representation, horizontal mutual control, associative and expert representation, and legitimacy based on individual rights. I argue that in the WTO, four out of these five elements of composite democracy currently exist under the rubric of transparency in its four different forms, internal, external, legal and institutional.

[42] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 8 (1973).

To each of the four forms of transparency corresponds to a different facet of composite democracy. There are very few links between vertical legitimation and external transparency as well as intermediate democratic legitimation (or secondary vertical legitimation) to the extent that governments of democratic member states represent the interests of their citizens periodically legitimized through national elections. Internal transparency parallels horizontal control (mutual at a political level and structural at the permanent review bodies). The participation of NGOs and experts in the WTO relates to both secondary vertical legitimation and associative or expert representation present in composite democracy. Finally, Article X, directly assigning informational and adjudicatory resources for traders exhibits elements of individual-rights based legitimacy.[43]

Among intergovernmental organizations, the WTO is a model example to discuss transparency and composite democracy. It remains outside the United Nations system, has a unique structure and a very active dispute settlement system. The WTO manages international trade, and issue-specificity allows a better examination of international regime consolidation into more democratic forms. Its unique history of transition from the GATT to the WTO adds an additional layer in a composite democracy analysis, since its evolution has been visible in a legal and institutional level, by the conclusion of new agreements and the creation of a new organization. Another similarly unique organization is the European Union, with the difference that it is regional and not global and it conducts periodic elections, which most, if not all intergovernmental organizations do not do. The WTO an intergovernmental organization in the sense of traditional Public International Law and according to its constitutive documents, and is distinct from the plethora of UN-based organizations. Finally, the WTO Agreements have several transparency provisions similar to Article X and a substantial amount of case law discussing the transparency obligations, another unique feature of the WTO for the examination of transparency.

[43] See Chapter II parts D and E infra.

The working thesis of my dissertation is that large asymmetries (or deficits) exist with respect to each of the four transparency forms after evaluating each one in the WTO. The WTO as an organization as well as its member states suffer overall by transparency shortages, despite the robust institutional discourse that argues the opposite. Transparency has strong democratic and transnational capacity through the inclusion of non-state stakeholders such as NGOs, corporations, scientists, trade unions and individuals in the WTO. Additionally, developing country participation is at the heart of the debate for the WTO's future and resolution of the development issue is essential to the survival of the WTO. But the WTO falls short in a meaningful integration of transnational aspects and a direct confrontation with the needs of developing countries in its normative impetus and largely foregoes the democratization potential that transparency offers.

Through this analysis, this thesis aspires to provide a model for application of composite democracy at an international level, and a case for comparison with other international organizations, which also lack direct electoral legitimacy. At a larger scale, the normative conclusion of this dissertation is that global governance as exhibited in international organizations can be more democratic even in absence of elections and transparency is a key feature of democratization without direct legitimation. More transparent regimes can be linked to democracy and legitimacy. This legitimacy can be substantive (resulting in better rules- also known as output legitimacy), procedural or "through put"[44] legitimacy (ensuring at least a proper participatory and deliberative decision-making process), but also a substitutive legitimation element, in the absence of input (direct democratic) legitimacy.

Such a composite democracy analysis cannot solely rely on a collection of previous theoretical accounts on transparency, since none of them has evaluated the aggregate democratizing potential of transparency, nor have they provided a full account on the transnationalizing effects transparency has had on the WTO as an intergovernmental

[44] Vivien A. Schmidt, *Forgotten Democratic Legitimacy: "Governing by the Rules" and "Ruling by the Numbers" in the Euro Crisis* in THE FUTURE OF THE EURO" (M. Blyth & M. Matthijs eds. forthcoming, 2015 Final Draft for Chapter on file with the author).

organization (focusing instead at the constitutionalizing effect). Such analysis directly picks up from Deborah Cass, and Howse and Nicolaides.[45] Cass in her work briefly alludes to transparency in the democratization context, while Howse and Nicolaides focus on democratization in a more abstract way.

Transparency is analyzed as a norm within the legal, political and economic frameworks in the WTO. My analysis extends beyond the traditional sources of international law and I argue that normative impetus can potentially be traced in transparency forms that have not distilled to *any* form of law (not even soft law). In an evaluation of democratization of transnational regimes, phenomena such as the proliferation of regional agreements that *de facto* exclude non-parties WTO member states, and WTO Plus-Minus Accession Protocols are as relevant as *amicus curiae* briefs, publication of documents and formal trade openness monitoring. Each of those WTO transparencies is relevant to an aspect of composite legitimization. Thus the WTO as a transnational regime at some levels has the potential to become a polyarchy[46], a relative but incomplete democratic regime, "popularized and liberalized […], highly inclusive and extensively open to public contestation."

Outline

This thesis begins in the introduction with a brief description of the legitimacy challenges that the WTO is currently facing, further elaborating on the notion of the WTO as a house whose foundations are shaking. Chapter I reviews transparency as a concept in law generally before offering an overview of the WTO-specific transparency definitions, which depart from traditional understandings of the word. Chapter I continues by summarizing the focus of the Sutherland Report on transparency. The Sutherland Report has been, to date, the most comprehensive WTO-initiated account on legitimacy

[45] Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far Efficiency, Equity, Legitimacy—The Multilateral Trading System at the Millennium* 227-252 at 228 (2001), Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?* 16.1 GOVERNANCE 73-94 (2003), Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade* 12.1 EUR. J. INT'L L. 39-75 at 73 (2001).
[46] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1973).

concerns. Transparency is prominently featured in the report, yet, analyzed in a fragmented manner. However, the Sutherland Report provides an initial map of the different transparency forms in the WTO.

Next, Chapter I examines the relevant to transparency and global governance literature from International Law and International Relations, extending the discussion to Positivism in international Law, Global Administrative law, International Public Law, Constitutionalism in WTO, Critical International Law and Societal Constitutionalism. Chapter II introduces composite democracy as a framework of analysis for transparency in the WTO. This chapter focuses on the concepts of composite democracy and legitimacy in international regimes. It traces each of the elements of composite democracy in the various transparency forms in the WTO- both transparency parameters discussed in the Sutherland Reports, but also others, appearing in WTO political discourse, and WTO legal scholarship.

Chapters III, IV, V and VI offer an in-depth analysis on each of the various forms of transparency. These chapters describe the history and current state of each of the four transparency forms, and they offer an evaluation of their performance with respect to their democratizing potential. Chapter III discusses internal transparency deficits *stricto and lato sensu.* "Internal transparency" originally referred to developing countries' participation problems in the WTO. However, the types of asymmetries that cause the systematic exclusion of developing countries appear in other areas of WTO law, and in particular the proliferation of preferential trade agreements among WTO member states and the varying degrees of commitments that candidate members are asked to assume during their accession process. This I will call transparency *lato sensu* and it will be explored in the last two parts of Chapter III.

Chapter IV shifts towards external transparency, information for and participation in the WTO of non-state actors, NGOs, corporations, and individuals that constitute civil society at-large. Here, I examine participatory platforms, both formal and informal, at the

various WTO fora as well as, most importantly, during the dispute settlement process through the submission of *amicus curiae* briefs.

Chapter V explores administrative transparency, namely the different formations of the General Council, the highest permanent executive organ of the WTO as well as the selection and operations of the Secretariat, the Panelists, the Appellate Body members and experts participating in the dispute settlement process.

Finally, Chapter VI focuses on the treaty-based requirement for member states to publish their trade-related laws and regulatory measures and to maintain administrative and judicial mechanisms to resolve and remedy any trade related issues both at the border and in the domestic market. More specifically, this chapter discusses the legal obligations of member states to disclose their legislation and other trade affecting measures and maintain transparent national trading regimes, the various monitoring mechanisms in the WTO that are geared towards supervising market openness and rule compliance of WTO member states and the dispute settlement reports that have been issued after claims for transparency obligation violations.

The last chapter offers a thorough evaluation of the four different forms of transparency and their contribution to democratization. Although a number of innovative and very useful steps have been taken within the WTO, they still fall short of addressing the pressing problems surrounding international trade regulation, and in particular the lack of direct legitimation through elections, that is, democratic legitimacy and the failure to provide for a viable normative platform for developing countries in order to benefit from international trade. The discussion then returns to the merit of democratization as a more useful framework of analysis for global governance principles. Finally, keeping in mind current legitimacy problems, this chapter offers a diagram for the way forward for the WTO, on how to improve its transparency record and commitment to pluralistic governance that will bring the organization closer to a democratic paradigm.

A closer look into the WTO's legitimacy problems, or The WTO at 20, the GATT at 68: a teenager or a golden-ager?

The larger context in which this doctoral dissertation is situated relates to the most fundamental pillars in international law: the degrees of sovereignty erosion, the ensuing legitimacy deficits and the patterns of transnational regime formation. By looking at transparency in different forms with varying normative weight within the WTO I hope to offer an insight into the origins and sources of modern international law. The question of the roots of contemporary international law is closely coupled with that of its legitimacy. It is essentially a history of transition from the "Old World" to the "New World."

In the "Old World" exists the Westphalian-centric understanding that only agreements among sovereigns could bind them and all their citizens. International law, the only law beyond national law, was reduced to treaty law or, exceptionally, custom understood as binding and emerging from state practice.[47] The central question in the Old World understanding was: why should international law subjects follow rules?[48] The answer was almost exclusively traced in sovereign will, or a version of the idea of "justice" or "humanity" which legitimized norms. In the "New World", law emerges from layered, multidimensional, polycentric normative "hubs", including but absolutely not limited to the nation-state. In this poly-normative world, the focal point of legitimacy shifts. Countries no longer form the entire mosaic; they are mere pebbles. The source of normativity is fragmented, scattered among actors who utilize formal and informal, usually cross-jurisdictional avenues to find solutions to legal questions and to regulate themselves and others.

A number of different narratives have been used to describe the transition to the New World. Some are positive (sometimes almost naively so), as is for example Fukuyama's *End of History and the Last Man*, or Friedman's *The Lexus and the Olive Tree*. Thomas

[47] Statute of the International Court of Justice Article 38.
[48] For a discussion on naturalist and positivist discourse in the 19th and 20th century see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 131-132 and 164 (2006), WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 503-515 (2000).

Friedman chronicles the success stories of the New World, he marvels on the speed of it and its methods, its "golden straightjackets"[49], while he identifies that there are some "emotions" and "anxieties" that triggered a backlash. However, modern capitalism as he describes it has built-in internal mechanisms to deal with the problems that it creates: Friedman observed that the South Jersey beefsteak tomatoes were replaced with waxy pink ones because they can ship better and last longer, but the solution is for the farmers to simply set up a website and buy them online with a credit card. Zambian cotton farmers however, whose cotton is of superior quality to that of their US counterparts don't have computers readily available- nor FedEx to deliver it.[50] In fact, the absolute lack of infrastructure prohibits producers to source their products to the markets of their neighboring countries.[51] Such problems with capitalism were identified, among many, in Naomi Klein's *The Shock Doctrine,* Ulrich Beck's *What is Globalization* and Eric Hobsbawm's *The Age of Extremes*. As Hobsbawm posits, the western world in the nineties was not only in depression, it was also in denial about it.[52] An idea very popular in the 1970s and 1980s was that transferring employment to new places (geographically) because of industrialization would free up resources and direct labor towards new, possibly better sectors. Instead, as both Beck and Hobsbawm observe, the new industrialization of the nineties created "rust belts" when industries moved out.[53] Such rust belts continue to exist both in the developing and the developed world. The new paradox (which has now ceased to be a paradox) is that Colombian textile workers and auto-industry employees in Detroit are jobless due to the same international disease: Globalization.

Globalization is a word that has been used most frequently in all contexts where powerful changes have occurred. Globalization is seen as a process and as a state of affairs of a world order. For many disciplines in the humanities globalization, or the events that set it in motion began roughly during the early eighties. Since then, certain key historical

[49] THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 101 et seq. (2000).
[50] PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 49-50 (2009).
[51] Id. page 212, PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 53-64 (2007).
[52] ERIC J. HOBSBAWM, , THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991 408-409 (1996).
[53] *Id*. at 412-413, ULRICH BECK, WHAT IS GLOBALIZATION, 18-19, 159 (2000).

events have been referenced to pinpoint and describe globalization more. As a substantial amount of ink has been used to discuss globalization, here we will briefly summarize very few events and developments that have been relevant to the evolutionary trends in international law and international trade regulation.

The proclaimed triumph of western government structures was initially coupled with a theory of the victory of permanent peaceful coexistence. Hobsbawm says, the crisis was boiling underneath the euphoric surface: soon came the realization that the end of the Cold War did not mean the end of conflict. The UN intervention in Yugoslavia conveyed clearly that the post-1989 end-of history narrative was misled. The nature of conflict moved from being inter-border to progressively becoming intra-border. As a result, many more forms of internal turmoil or dissent, even peaceful protests, became newsworthy. International organizations were confronted with many humanitarian catastrophes, in Somalia, Rwanda and Yugoslavia and a lack of sufficient legal tools to reach decisions on how to address the crises. In a true battle of Old versus New, deadlocks in the UN Security Council stemming from the Cold War divide were coupled with new understandings of humanitarian intervention.[54]

In the nineties we also witnessed the emergence of a global civil society steered not from affiliation with political camps but a widespread sharing of information. Citizens became "netizens"[55]. Further, the communication boom brought by the expansion of global media and the internet called attention to the disproportionate distribution of power and wealth, which withstood the fall of the Berlin Wall. The awareness of a worldwide rich/poor divide coincided with the transformation of industrial capitalism to a "new capitalism" coupled with record-high rates of unemployment. [56] Since the late 80s "money, technologies, commodities, information and toxins cross frontiers as if they did not

[54] See for example the debate between Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10: 1 EUR. J. INT'L L. 1-22 (1999): 1-22 and Antonio Cassese, *Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?* 10:1 EUR. J. INT'L L. 23-30 (1999).
[55] The term is from the article *The death of an icon*, THE ECONOMIST U.S. ed. 91 (24 Oct. 1998).
[56] ULRICH BECK, WHAT IS GLOBALIZATION 6 (2000).

exist."[57] Globalization also resulted in the normative and fiscal depletion of the welfare state, so that it could no longer cushion employment supply and demand asymmetries. [58]

The expansion of the global media and the growth of Internet access did not only inform the world of its inequalities. The Internet is "more than just a cheap and immediate form of communication" since it "offers a solidarity in cyberspace that may be hard to achieve geographically." [59] It enables the civil society to network and mobilize using the new communication potential.[60] As Ulrich Beck rightly notes "things which used to be negotiated and decided by managers and academics behind closed doors and with no attempt at justification, must now suddenly have their consequences justified in the biting wind of public debate."[61] The internet and the global media made this public debate possible.[62] Social movements and NGOs utilized this potential like "spiders uniting and tying down lions." [63]

The two major events that framed this era were the fall of the Berlin Wall (11/9) and the terrorist attacks of September 11 (9/11). The world in less than twenty years moved from celebration to grief and back to celebration quite a few times. International law was challenged in unique ways as a result. However, this was hardly the first stress test for the field during the last century. The two World Wars had contributed a fair amount to enormous changes in the international law landscape, as did for example environmental degradation and satellite technology: the proliferation of international organizations, the emergence, establishment and consolidation of human rights' law, arms control treaties,

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[57] *Id*., 20.
[58] JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1998) see in particular, Chapter 9, Paradigms of law and more specifically, pages 430-436 on the difficulties that extended national administrations face in dealing with "a growing set of tasks that are qualitatively new". See also Jürgen Habermas, *The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies* (Ph. Jacobs trans.) 11:2 PHILOSOPHY & SOCIAL CRITICISM 1-18 (1986).
[59] *Arachnophilia* THE ECONOMIST U.S. ed... 28 (10 Aug. 1996).
[60] Elizabeth Smythe & Peter J. Smith, *Legitimacy, Transparency, and Information Technology: The World Trade Organization in an Era of Contentious Trade Politics*, 12:1 GLOBAL GOVERNANCE 31, 38 (2006).
[61] ULRICH BECK, WHAT IS GLOBALIZATION 42 (2000).
[62] Maria Perez Esteve , *Civil Society and WTO Accountability WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations*, Working Paper Draft Prepared for the IISD- Entwined Workshop available at http://www.iisd.org/pdf/2011/wto_accountability_rules_transparency.pdf 6 (May 2011). For example the WTO website visits averaged at one million per month in 2010.
[63] *Arachnophilia* THE ECONOMIST U.S. ed. 28 (10 Aug. 1996).

fields like environmental and space law are all products of major events of the last century.

Treaty proliferation, the fragmentation of International Law and more elaborate accounts on international institutional law are some of the areas where International Law focused in the last twenty years. After having signed a considerable amount of treaties in the nineties, now it is time to carefully examine whether extant cross-border problems can be better solved through new agreements, or we need to find sophisticated ways of better implementing the old ones. In international trade regulation, this question is progressively becoming one of the key themes in analyzing how will the international community move forward and out of the current crisis. Before describing the problems the WTO is facing in more detail, we will explain the title of this chapter: is the international trading system a mature and sophisticated treaty regime that dates back to the end of World War II? Or was 1995 a rupture moment, and the WTO has started on a clean sleight its own history?

The *ad hoc* dispute settlement process of the GATT Panels was more diplomatic in nature, as was the GATT as an organization as a whole. It focused on products (not services, nor intellectual property, sanitary and phytosanitary regulations, nor rules of origin, or agriculture like the WTO) and the elimination of tariffs on the products covered in the GATT was extensive.

In the early 1980s, after the Tokyo Round of negotiations, proposals for the legalization of the diplomatic aspects of the GATT were placed at the forefront at the negotiating agenda. More specifically, three major pillars were discussed: first, the formalization of the dispute settlement process, including an appeals process and the creation of a permanent Appellate Body was proposed (and later, adopted). Panel and Appellate Body reports would be adopted automatically, unless there was consensus to the opposite (unlike the GATT, where any member, including the ones to the dispute, could veto the decision). Second, trade monitoring would no longer be conducted in an informal basis, but by the Trade Policy Review Body, under the Trade Policy Review Mechanism, and in periodic fashion, depending on the size of each member's economy. Finally, a long list of

non-covered products were being negotiated, and these negotiations resulted to a series of new Agreements, such as the Agreement on Agriculture, the GATS on Trade in Services, the TRIPS on Intellectual Property products, and numerous others.

The GATT never ceased to exist, it is still one of the main WTO Agreements and its rules are applied as they were since 1947. However, the system has transitioned from being based on diplomatic ethos and informal processes to one of formal mechanisms. The Agreements of the WTO's legal architecture create a labyrinth. The "Final Act" of the Uruguay Round concluded the trade negotiations and stated the agreement to create the WTO. [64] The WTO was then created through the "Agreement Establishing the World Trade organization." Annexed to the WTO Agreement are more than fifty agreements, among which is the GATT 1994. The GATT 1947 is incorporated in the 1994 GATT. This structure is anything but straightforward and the complex landscape of the WTO Agreements have been discussed in the literature.[65]

Currently, most of the legal aspects of transnational trade fall within the jurisdiction of the WTO for its member states. It currently has 160 member states, with another 23 countries on an accession track. The total membership potential of 183 countries is almost global: over 99% percent of world trade, world GDP and world population are represented in the WTO. Considering the inescapable nature of cross-border trade, the reach of the WTO is impressive. The organization is committed to the growth of international trade, while adhering to various trade-related principles such as the commitment to sustainable development, inclusion of developing countries in the world economy, raising standards of living and allowing for the optimal use of the world's resources. Its scope is "to provide a common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated

[64] JOHN JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); Gerald A. Bunting, *GATT and the Evolution of the Global Trade System*, 11:2 ST. JOHN'S J. OF LEGAL COMMENTARY 505-521, esp. 519-521 (1996); John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1-23 (1998); WTO-SECRETARIAT, FROM GATT TO WTO (2000).

[65] Patrick M. Moore, The Decisions Bridging the GATT 1947 and the WTO Agreement, 90 AMER. J. OF INT'L L. 1996 317-328; David Palmeter & Petros Mavroidis, *The WTO Legal System: Sources of Law* 92 AMER. J. OF INT'L L. (1998) 398; E. Montaguti & M.Lugard , The GATT 1994 and other Annex 1A Agreements: Four Different Relationships? 3 J. INT'L ECON. L. 2000, 473-484

legal instruments."[66] The WTO preamble mentions the organization's direction towards "the elimination of discriminatory treatment in international trade relations."[67] More specifically, its mandate is to

> "facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements[…], provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements[…], provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement […],provide a forum for further negotiations among its Members concerning their multilateral trade relations[…], administer the Understanding on Rules and Procedures Governing the Settlement of Disputes, […] administer the Trade Policy Review Mechanism […]. [68]

Considering that the overwhelming majority of countries is either already a member of the organization[69] or has applied to become one, one can argue that more the majority of international trade regulation is performed under the WTO umbrella.

The General Agreement on Tariffs and Trade, which was the WTO's predecessor, began in 1947 as a platform for the extension of bilateral agreements on tariffs in trade to all of its members.[70] The GATT emerged from the failed International Trade organization

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[66] Agreement Establishing the World Trade Organization, Article II Para. 1.
[67] *Id.,* Preamble, 3rd recital.
[68] *Id.* Article III.
[69] The WTO currently has 160 members: *Yemen to become 160th WTO member* at https://www.wto.org/english/news_e/news14_e/acc_yem_27may14_e.htm , as well as 26 candidate members: *WTO members and Accession Candidates* (June 2012). www.wto.org/english/thewto_e/acc_e/members_brief_e.doc. Tajikistan and Laos have almost concluded the accession process. Thus, if we take the UN member state list as a foundation (at http://www.un.org/en/members/index.shtml), then out of 193 sovereign countries, 157 are members to the WTO, which translates to 81 percent of world countries, and 183 are the total number of countries who either are members of the organization or aspire to become members, which percentage-wise is 94 percent of world countries.
[70] In fact, the delegations that were negotiating the GATT at the time refused to call it an organization, in fears that the US Congress would refuse to sign off part of its foreign trade jurisdiction to an international organization. "Congress insisted that the 1945 RTAA did not authorize the creation of any international trade-related institution or U,S. participation in any trade-related organization. Hence, the GATT was envisioned as an interim arrangement, not an organization, until the ITO charter could be formally approved by Congress. The GATT was not a treaty or an organization, but merely a trade agreement put into effect by executive order. As a result, participants were not "members" but "contracting parties" and

(ITO) negotiations with twenty-three founding members.[71] It was originally called an agreement and not an organization in order for the US Congress to approve the participation of the United States in the Agreement. Progressively, it evolved to include institutional structures that made discernable that it was not a simple contract among states but the constitutive document of an organization. In the five decades of its existence before the founding of the WTO, the GATT was reviewed periodically in seven negotiation rounds. In 1995, the Uruguay Round resulted to the emergence of a new international organization. The creation of the WTO happened in a rather unique and unusual fashion in international law. The organization became the surrogate of the GATT, but the original GATT (GATT 1947) remained in force.

Table 2 GATT and WTO Negotiation Rounds

Duration	Name/Location	Main area of negotiations
1947	Geneva	Tariffs
1949	Annecy	Tariffs
1951	Torquay	Tariffs
1956	Geneva	Tariffs
1960-1961	Dillon Round	Tariffs
1964-1967	Kennedy Round	Tariffs and anti-dumping
1973-1979	Tokyo Round	Tariffs, non-tariff barriers to trade
1986-1994	Uruguay Round	Tariffs, non-tariff barriers to trade, rules, services, intellectual property, dispute settlement, textiles, agriculture, the creation of WTO, WTO Agreements
2001-current date	Doha Development Round	Agriculture, Development, Intellectual Property and others

State Department officials invented the Protocol of Provisional Application to bring it to effect." DOUGLAS A. IRWIN ET. AL., THE GENESIS OF THE GATT 96 (2008).

[71] *Id.* 98-122.

The basic GATT legal principles did not change for five decades, with some exceptions such as the addition of the section on Development. Moreover, some plurilateral agreements (with less than full GATT membership) were signed under the auspices of the GATT. Progress in international trade negotiations is usually achieved during extensive periods of high-level trade negotiations called "Rounds". These rounds last for years. Negotiations are not done on an issue-by-issue basis but progress is made in packages. Thus, the negotiation Rounds introduce an all-or-nothing single undertaking approach to negotiations. Agreements are concluded through trade-offs among GATT and WTO member states. Both political and economic considerations affect the outcomes of negotiation rounds.

The trade negotiation rounds from 1947 until 1995 had as a main goal to reduce tariffs. In addition to tariff reduction and/or elimination, the Kennedy Round included discussions on the Anti-Dumping Agreement, the Tokyo Round discussed non-tariff barriers to trade and the Uruguay Round, the longest GATT Round, resulted in the creation of the WTO and the adoption of the WTO Agreements. The Uruguay Round in a sense achieved the impossible: agreements were procured in a large number of areas, and the emerging organization was a structure that the 23 original GATT members could not have envisioned. Almost the entire agenda of this negotiation round was concluded successfully. The Agreements of the WTO's legal architecture created a labyrinth. The "Final Act" of the Uruguay Round concluded the trade negotiations and stated the agreement to create the WTO. [72] The WTO was then created through the "Agreement Establishing the World Trade organization." Annexed to the WTO Agreement are more than fifty agreements, among which is the GATT 1994. The GATT 1947 is incorporated in the 1994 GATT. This structure is anything but straightforward and has been discussed in the literature.[73]

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[72] JOHN JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); Gerald A. Bunting, *GATT and the Evolution of the Global Trade System*, 11:2 ST. JOHN'S J. OF LEGAL COMMENTARY 505-521, esp. 519-521 (1996); John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1-23 (1998); WTO-SECRETARIAT, FROM GATT TO WTO (2000).

[73] Patrick M. Moore, *The Decisions Bridging the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L L. 317-328 (1996); David Palmeter & Petros Mavroidis, *The WTO Legal System: Sources of Law* 92 AM. J. INT'L L. 398 (1998); E. Montaguti & M.Lugard , *The GATT 1994 and other Annex 1A agreements: Four Different Relationships?* 3 J. INT'L ECON. L. 473-484 (2000).

The complexity of the new organization, and the proliferation of multilateral (binding to all member states) and plurilateral (binding amongst a subset of the member states) agreements into a large number of new areas such as trade in services, agriculture, investment and technical barriers to trade demonstrates that the WTO is not merely an improved version of the GATT. This idiosyncratic legal system exists entirely outside the United Nations umbrella, unlike the overwhelming majority of intergovernmental organizations. Over the years it has grown, both in the tariff amount reductions, the number of concessions, the amount and types of products regulated, the types of regulations and practices that it characterizes as trade-distorting and the countries involved. In the 1980s it became evident that the 1947 structure was insufficient to deal with this growing body of commitments and emerging legal questions. The Uruguay Round of negotiations, out of which emerged the successor to the GATT, the WTO, became the most visible example of the transition from the Old to the New World: the diplomatic ethos and the informal dispute settlement of 1947 was replaced by a system priding itself on its dispute settlement process, including a permanent Appellate Body- hailed as the crown jewel; numerous trade monitoring bodies became institutionalized; the agreements on trade no longer included only commodities but extended to services and intellectual property, specialized agreements were concluded on sanitary and phytosanitary measures, customs, antidumping and more.

Although the size of the WTO secretariat has doubled in size and the WTO delegations have proportionately increased, it is still an elite administration of less than six hundred employees[74] and another six hundred or so liaison officers and representatives to WTO[75] located in the same building since 1977 in Geneva, which manages international trade.

[74] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 135 (2008). Today its staff consists of 629 people. See *Overview of the WTO Secretariat* http://www.wto.org/english/thewto_e/secre_e/intro_e.htm.

[75] Interestingly enough, it is very difficult to find an approximate number of the liaison officers and representatives to the WTO. In any event an accurate number could be found in the internally published annual phone directory. In 1999 C. Michalopoulos, based on this directory, reported that the number of member-state representatives was 540. We assume that the entry of China and Russia to the organization must have changed this number, to bring it closer to 600. See Constantine Michalopoulos, *The Participation of the Developing Countries in the WTO*, MIMEOGRAPH (1999).

The institution of the Director-General was maintained. The Panels became formalized in the Dispute Settlement Process, with compulsory jurisdiction and a permanent Appellate Body was established. Many elements remained the same, but an even larger number of things changed fundamentally.

It became evident very quickly however, that the New World roses were packed with thorns: developing countries' interests were finally taken more seriously into account through the conclusion of the Agriculture Agreement. However, tariff reductions were agreed on a basis of averages. This gives the opportunity to still protect certain sectors with high tariffs and quotas, while completely liberalizing others that are of significantly less importance. The textile industries of many developing countries began to suffer as soon as Chinese products, in significantly more competitive prices hit the global markets when the Textiles Agreement came into force. As the world became more globalized and knowledge began to travel with great speed across the globe, it also became evident that not only was poverty not eliminated by participation in the world trading system but also the gap between the rich and the poor still seemed unbridgeable.[76]

Dispute Settlement also took time and resulted in retaliatory rights within the winner's domestic market. This meant that the breaching state could continue to disregard WTO rules during litigation, and the decision would not have retroactive effect. Violations could go on for years at a time. Smaller countries who managed to survive the long litigation process and win, as it happened with Antigua and Barbuda, then were given the right to retaliate against their opponents, but only in the domestic market. Antigua and Barbuda, who won a case regarding gambling services, [77] could only retaliate against US products in its domestic market. Such a result hardly made a dent in the US economy. Having lost was rendered meaningless.

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[76] See PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT (2007); JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT: HOW TRADE CAN PROMOTE DEVELOPMENT (2005); WALLACH LORI & PATRICK WOODALL, WHOSE TRADE ORGANIZATION?: THE COMPREHENSIVE GUIDE TO THE WTO (2004).

[77] Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/R (Nov. 10, 2004) and Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/AB/R (Apr. 7, 2005).

The political, legal and economic position of developing and least-developed countries in the WTO has not improved at all from their participation in the world trading regime. Developing countries were promised by joining the GATT and the WTO *de minimis* to be included as equals in the organization's organs and processes and to be able to better, through free trade, their peoples' living conditions. Developing counties' treatment was originally a direct result of the history of colonialism but also the *de facto* position of developing countries which accessed only limited resources of wealth, comprising mainly of primary products. Later on, with the formation of the G77 group, and the negotiations of UNCTAD and the New International Economic Order, the GATT Contracting Parties, partly responding to almost two decades of pressures from their developing members, partly due to concerns of progressive replacement by UNCTAD, chose to adopt Part IV of the GATT, under the title "Trade and Development." The next major step regarding development in the GATT was the adoption of the Generalized System of Preferences, which was made permanent through the adoption of the Enabling Clause during the Tokyo Round. However, the efforts of developing countries to achieve meaningful to their economies trade concessions that would enable them to benefit from participating in the international trading system have not produced any significant results to date.

The Green Room negotiations continued to take place after the creation of the WTO and developing countries continued to be confronted with prefabricated take-it-or-leave it agreements. These legitimacy issues furthered the idea that the organization suffered from a significant compositional flaw: a very small number of diplomats and international technocrats, working within the legacy of the original architects of the WTO, namely a handful major WWII-era neoclassical economists, are now the key actors of the international financial system. This "elite administration" has not been elected and remains unaccountable for advancing normative changes in the area of international trade that affect the lives of a very significant fraction of the world population. Moreover, the negotiating asymmetries and diverse needs of member states cannot be synchronized with the very rigid consensus rule with respect to decision-making. It was time for developing countries to utilize the consensus rule and block further decision making en masse.

This happened first in the Seattle and then in the Cancun Ministerial Conference.[78] In Seattle, the impasse was reached when the US government attempted to put labor standards on the table. US President Bill Clinton, during an interview right before he arrived to Seattle for the Ministerial said that he was going to push the agenda of labor standards in the WTO, which he repeated when he addressed the WTO trade ministers the next day. The "trade and labor" scenario alienated almost all developing nations who still counted on cheap labor as a means to remain competitive in the global economy. It was bad enough that the case of Shrimp-Turtle had put fishing nets under scrutiny. Developing countries could not afford more production methods to become an impediment to their export trade. The Ministerial was intended as the launching pad for the next negotiations round, and it failed. In Cancun, developing country representatives took their frustration one step further when they met with Quad ministers and more specifically the US Trade Representative as a united front. The Doha Round, officially called "the Doha Development Round" was eventually (and- as it appears in retrospect, prematurely) launched in 2001 in Doha. Negotiations have reached a stand-still, and until today, there is still a rift in at least three important areas (Agriculture, Intellectual Property, the framework of Special and Differential Treatment).[79] The Doha Round is still ongoing and many commentators have argued that it is *de facto* terminated, due to the continuing inability of WTO member states to reach any agreement.

Another important event of the late nineties was China's accession. China, which withdrew from the GATT in the 1950s, applied to accede to the WTO and its accession negotiations became the center of attention for the largest trading countries.[80] Its accession protocol was to become the most complex accession document to an international organization to date.[81] The accession of China, a country with a very strong

[78] Many of the facts in this part are from the excellent account by PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS (2009).
[79] See *Subjects treated under the Doha Development Agenda* http://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm.
[80] Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469 (1999).
[81] See Raj Bhala, *id.* Julia Ya Qin, *"WTO Plus" Obligations and Their Implication for the World Trade organization Legal System: An Appraisal of the China Accession Protocol*, 37:3 J. OF WORLD TRADE 483-522 (2003), and Ljiljiana Biukovic, *Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan*, 11:4 J. INT'L ECON. L. 803-825 (2008).

trade profile, a large national and cross border economy and population, revealed many of the negotiation imbalances that existed within the organization. In addition to China, another 23 countries acceded to the organization since 1995. Recently, Russia also completed its accession negotiations.[82] The accession of China and Russia changed the dynamics between developed and developing countries in the WTO.

Brazil, Russia, China and India continue claim developing country status in the WTO. Due to large parts of their populations living in poverty, these countries, despite their high GDP claim that developing countries' privileges should extend to them. Giving the same treatment to the BRICs group as the Least-Developed Countries (LCDs) hardly makes any sense in terms of the dynamics of international trade. The two groups have neither comparable trade volumes nor similar critical products. China's and Russia's accession also shifted the WTO dynamics by re-aligning the negotiating blocs. In the WTO, the Quad used to dominate the negotiations for many decades, something that is clearly reflected in WTO rules. Most Favored Nation is a great rule for the West, but leaves the rest virtually without any tools to protect infant industries and essential domestic commodities. With China and Russia acceding, this picture changed: two large countries with a strong negotiating presence in the WTO joined Brazil and India, and together with the Middle income countries can block agreements that are catering to the Quad, and request for treatment of commodities that is more sensitive to less industrialized societies and markets not directly following a capitalist model.

A small step was taken when the Quad was replaced by the so-called Five Interested Parties. The change was highly symbolic: Japan was ousted from the group and was replaced by India and Brazil. Also, India and Brazil decided to put aside their diverging trade interests and join forces with other developing countries to oppose their exclusion from the Green Room. This larger group was called the G-20.[83] Originally, this seems like a move towards the right direction. However, India and Brazil are two large economies. They are part of the BRICS group (named after the initial letter of each of its

[82] *WTO Members and Accession Candidates* www.wto.org/english/thewto_e/acc_e/members_brief_e.doc
[83] It has no relation to the other G-20, which consists of the twenty countries with the highest GDP.

members), together with Russia, China and South Africa. Their trade needs and negotiating priorities are very different than other developing countries.

Exclusion continues to be the WTO's *modus operandi.* Bali like previous Ministerial conferences was not the setting for meaningful trade negotiations among all member states, but rather involved the usual informal meetings among some member states and the continuous exclusion of others. Moreover, the Bali Agreements show the persisting lack of desire on behalf of the developed world to reach meaningful consensus over development needs and more specifically on products essential to developing countries, such as cotton, pharmaceuticals and agricultural products. The WTO preambular commitments to raise standards of living and share the growth in international trade remain an empty letter, as developed countries still enjoy the majority of benefits from joining in the international trade regime, while simultaneously being able to afford to sidestep- almost without consequence- WTO rules when those are not to their benefit.

Trade ministers from smaller countries were traditionally excluded from talks with the "big boys." However, two things are different in the WTO era. First, the economic backlash of liberalization put people in the developing world out of jobs faster, at greater amounts without creating opportunities for participation in alternative product markets. Modern technology made it possible for states with resources to exploit them, and the returns in production were tenfold. This annihilated the contribution of small farming units in large parts of Latin America, Asia and Africa to world trade and resulted in sharp GDP drops and widespread poverty. Globalization put national markets dependent on smaller production units in distress.

Second, the inability of trade representatives from the developing world to do anything about this situation was broadcasted on real time across the world. Government ministers were sitting idle for hours and days at a time outside the rooms where the select few were negotiating. Journalists who sat with them took pictures and wrote reports, which the next day, or the next hour reached local media. The news of exclusion spread like wildfire, and dissatisfaction with the WTO, its policies and methods grew. Trade

ministers could no longer politically afford to return to their countries empty-handed. This landscape remains unchanged to this day. For more than a decade, developed and developing countries have not achieved any meaningful consensus on how to move forward together in the WTO in a manner that is conducive to developing countries' needs.

The exclusion of less powerful WTO members also occurs through the proliferation of regional trade agreements as evidenced by the current ongoing trade negotiations, among others, between the US and the EU and the US and Canada. When more powerful WTO members with large trade volumes cannot achieve their desired goals of tariff reduction through multilateral negotiations, they resort to regional trade agreements. More specifically, when countries with larger economies are faced with frustration expressed by developing countries during the WTO formal and informal negotiations, instead of seeking ways to achieve meaningful consensus on key products for developing countries at the multilateral level, they decide to sign bilateral or regional agreements amongst themselves in products that interest them. These agreements are allowed by the WTO but are traditionally left without any scrutiny from the WTO monitoring bodies, although their provisions can sidestep cardinal WTO rules. Thus, in practice their compatibility with WTO law is never checked, neither by the General Council nor by the Panels and Appellate Body, allowing potential collusions among the members of such agreements. Not extending Most-Favored Nation treatment to anyone but the parties of regional and preferential agreements can be identified as an obliteration of the fundamental rules of WTO law at the expense of all non-parties to these agreements. As a result, developing countries (together with any other country excluded from such agreements) remain particularly powerless before the collusive tactics of the richer member states. The proliferation of regional trade agreements compromises both WTO rules *per se* as well as the multilateral process of WTO trade negotiations and exacerbates the WTO's legitimacy problems.

Civil society dissatisfaction with the WTO at a global scale started soon after the creation of the organization. [84] One of the very first instances of this backlash against the WTO occurred in November 1999 in Seattle, during a ministerial meeting that would launch the next round of negotiations.[85] Inside the doors of the negotiating rooms, it was starting to become clear that the negotiating priorities of developing countries were very diverse, while the Quad (EU, US, Japan and Canada) had lost their stature in the WTO, to be replaced by middle-income countries, together with India and Brazil. Outside the doors of the ministerial the anti-WTO, anti-globalization events were also broadcast by activist internet media sources (most notably the Indymedia project) that emerged while the protests were occurring.[86] This internet coverage of the events changed the landscape of global events coverage altogether[87] and Seattle became "synonymous with tear gas and gridlock"[88] Ironically, as the WTO's court, the Dispute Settlement Body was developing its transparency jurisprudence, and as the organization was publishing most of its documents online, the backlash of protests- the so-called "external transparency issue"- widened.

NGOs demanded to have their voice heard in a formal fashion, during the trade negotiations and the dispute settlement. The impressive volume of the WTO Agreements was negotiated and decided upon almost in obscurity, in the traditional diplomatic fashion of treaty negotiations. In 1995 few news reports, mostly from large newspapers, published relatively short announcements for the creation of the WTO. Shortly thereafter, the extent of trade regulation authority that was transferred from nation states to the WTO became discernible to a large number of stakeholders around the world: the intended beneficiaries of tariff reductions, workers, farmers, environmental groups, consumer groups and individual consumers, students and concerned citizens, among many, realized

[84] David Sanger, *ECONOMIC VIEW; Global Food Fights: The Worst Are Yet to Come*, NEW YORK TIMES (25 July 1999).
[85] Interestingly, the Seattle events reflected criticism and civil anger directed against the WTO as much as globalization itself. See *Storm over globalisation* THE ECONOMIST U.S. ed... 15 (27 Nov. 1999).
[86] *Indymedia and Indybay History* http://www.indybay.org/newsitems/2005/03/11/17262451.php by indybay (Friday Mar 11th, 2005).
[87] Paul D. Almeida & Mark I. Lichbach., *To the Internet, from the Internet: Comparative Media Coverage of Transnational Protest*, 8:3 MOBILIZATION 249-272 (2003).
[88] Joseph Kahn, *The Next Center of the World*, NEW YORK TIMES (28 January 2001).

that they could no longer rely on their local politicians for produce regulation, nor get plausible answers from their governments on practices adopted or participate in debates that directly impacted on their lives. Voting and debating on trade issues in national democracies mattered much less. Most of the debate and the decisions on tariff reductions and non-tariff trade laws (such as environmental and health related regulations) that affect civil society at large, occurred either a while ago in Uruguay, or on a daily basis in Geneva.

Left without a voice in matters that affect everyone's lives significantly, civil society groups took to the streets most notably during the meetings of WTO member states' ministers in Geneva and Seattle. Since then, civil society groups have tried to raise their concerns with respect to the international trading system at large but also specific regulations, on numerous occasions. The WTO, reluctantly at first, tried to open its doors to civil society. Soon it became evident that institutions such as the WTO Public Forum, participation of NGOs in Ministerial Conferences and the much-contested *amicus curiae* brief issue before the Dispute Settlement Body have done little to address the severed connections between the WTO and civil society and serve merely a decorative function. The lack of meaningful participation of civil society actors and genuine consideration of their concerns remains an important issue in the WTO to this day, further aggravating its legitimacy problems.

Developing countries feel locked in a trade system that they see as filled with commitments and obligations, giving no useful returns; the same negotiation processes- in the form of the trade round- that brought about the WTO have been at a stalemate for almost two decades. In addition to the shareholders, stakeholders are becoming visible and are demanding a voice at the table. Furthermore, the line separating the WTO shareholders and the stakeholders is becoming progressively blurry. WTO member states and civil society organizations have joined forces, as is evident in the case of Oxfam and its relationship with developing and least developed countries.

This dire situation has not left the WTO administration entirely indifferent. In 2005, the WTO Secretary General Panitchpakdi commissioned a report on the occasion of the organization's tenth birthday, supervised by a former WTO Secretary General, formally under the title "The Future of the WTO" but informally known under its supervisor's name as the "Sutherland Report." The report describes a fragment of the aforementioned marginalizing phenomena, insisting that the WTO is addressing them adequately and does not have a legitimacy problem as an organization. The WTO has found itself in crossroads. As noted in the Sutherland Report:

> Generally, the efforts to create new partnerships between state and non-state players in the global arena have been marked by tensions. The simple ideological divide that market the global political order during the Cold War has been replaced by more complex alliances among a larger and more diverse body of actors.[89]

At the same time, in 2001 a new international organization, the Advisory Center on WTO law or ACWL is created with a mandate to provide "advice, support and training to developing and least- developed countries." It has to date prepared over 900 legal opinions and assisted developing countries in 38 cases in Dispute Settlement.[90] Still, there is a long way to go. The limited use of dispute mechanisms and the oftentimes observed reluctance to enforce adopted reports of the DSB and give tit-for-tat to developed countries (such as the case of Ecuador, which did not use its right to retaliate in the EC-Bananas III case) shows that developing countries have not found themselves yet in a peer-to-peer position with developed ones.

[89] Report by the Consultative Board to the Director-General Supachai Panitchpakdi, by Peter Sutherland et al., *The Future of the WTO, Addressing Institutional Challenges in the New Millenium*, Published by the WTO (2004), hereinafter The Sutherland Report Paragraph 181, page 41.
[90] ACWL website www.acwl.ch/e/documents/Quick%20guide%202011%20for%20website.pdf.

Another noticeable shift reflective of legitimacy concerns was occurring on the focus of the cases before the newly established Dispute Settlement Body.[91] The cases brought before the DSB were no longer strictly cases of tariffs but they extended to alternative considerations, most notably public morals, [92] human, animal or plant life and health[93], the environment[94], consumer protection and the assistance for developing countries[95]. Other problems that arose immediately after the birth of the WTO were related to other smaller issues, that nevertheless reflected the larger systemic ones. In short, in the first five years of its existence the WTO managed to shift the focus of global protest and global political debate and become a focal point of contestation for not only international trade law but international law in general.

In 2015, ten years after the publication of the Sutherland report, the legitimacy crisis has paralyzed the WTO's Ministerial Conferences. Instead of insisting on new agreements and concessions, the organization has to first address its extant problems. Changes in the voting process (or lack thereof) or additional concessions for developing and least

[91] Arie Reich, The WTO as a Law-Harmonizing Institution 25:1 U. PENN. J. INT'L ECON. L. 2004 321-382. The WTO regime is transformed to include harmonization of domestic policies, however this was a gradual evolutionary process.

[92] Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475); Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797.

[93] Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135; Panel Report, EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235; EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699; Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243; Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, 3305.

[94] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, 2821.

[95] Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925; Panel Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R, DSR 2004:III, 1009.

developed countries (such as the ones agreed upon during the Bali Ministerial conference) may not be sufficient any more to resolve the crisis. Something also has to be done for the ever-increasing list of Preferential Trade Agreements Most importantly, WTO member states must concentrate on remedying the exclusionary precedent that has lasted for decades and has tainted the organization in a structural manner. The longer these issues remain without serious consideration or confrontation, the longer the crisis will persist, and worsen.

Against this backdrop we will discuss transparency in the WTO. Both the WTO and its self-proclaimed opposition, namely a large number of NGOs, have developed narratives to discuss the legitimacy crisis facing the organization from the inside, with the inability to reach further agreements until developing nations are satisfied, and from the outside, with unpleased civil society keeping a close eye. One of the most significant narratives, which emerged during the last few years of the GATT and was amplified in the WTO was a multidimensional commitment on transparency. The formation of transparency as the WTO's own institutional narrative was evidenced in the organization's most recent self-assessment report, the Sutherland Report. Transparency according to the WTO has a dual role: first, it signifies a commitment to openness of market regulations- and thus becomes insurance against protectionism. Without clear and transparent rules and procedures in the markets of member states, trade-distorting practices can prevail. Second, transparency is the institutional response to critics who see the WTO as an elite institution, the organization purports that it publishes its documents and has set up a few events to introduce its work those interested. Civil society and citizens of WTO member states also ask for more transparency from the organization insisting that most decisions are still made behind closed doors without sufficient consideration of the interests of everyone affected.

The question of whether transparency in the WTO mitigates (and how) legitimacy deficits falls under the exploration of the sources of normativity in the contemporary world and the pertinence (if any) of the Westphalian world order, as well as the progression from one to the other during the twentieth century. First, legal transparency

creates obligations for WTO member states that are supposed to benefit consumers and traders. Second, external transparency argues for the introduction of transnational actors in the WTO decision-making process. Administrative and internal transparencies also evidence the evolution of International Law in the direction of better governance and developing country emancipation. Before we examine each of these in detail, it is important to outline the various ways that legal scholarship has analyzed transparency in the GATT and the WTO.

I. A Context for WTO Transparency in International Law and International Relations Discourse

A. Introduction

This chapter aims at providing a comprehensive review of the literature related to transparency, legitimacy and global governance with respect to the WTO. Before discussing transparency in the WTO, the first part offers a brief analysis on transparency as a concept in law generally. Next follows a brief overview of transparency as defined specifically in the WTO context followed by an overview of the Sutherland Report, the commissioned report discussing WTO's first decade. This is the first and most complete to date official institutional account acknowledging transparency forms that go beyond Article X of the GATT and its equivalents. Part E is a summary of transparency and global governance scholarship from many different scholarly groups, ranging from positivism in International Law to rationalism, critical International Law and Regime theory. The emphasis on this part is on public law theories and more specifically, constitutionalist approaches that currently appear to be the most prevalent account on transparency forms.

B. A brief outline of transparency as a legal concept

Transparency is a familiar concept in law, especially in the fields of administrative and corporate law. Open-meeting laws and sunshine laws [1] oftentimes set minimum procedural requirements for decision-making. Such legislation embodies the understanding that in the Rule of Law, citizens, shareholders and stakeholders, interested parties at large need to be informed about decisions that actually or potentially affect them, and in many cases need to be given the opportunity to participate, either in an

[1] The word "sunshine" to describe transparency rules appears to have been used by LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

advisory or a decisive role in the decision-making process. In many instances, if such transparency rules are not followed, the decisions ensuing are rendered void. In effect, citizens cannot be ambushed with new regulations without their knowledge and/or consent.[2]

Transparency in general is a term that cannot be defined easily[3], which is ironic considering that dictionary definitions relate transparency with ease to perceive or detect. According to Black's Law Dictionary, transparency is defined as "Openness; clarity; lack of guile and attempts to hide damaging information."[4] It is often associated with shedding light on something that was formerly obscured[5] and, in law it is related to the disclosure of information, the clarification of information and the explanation of its meaning. In this sense, it is central to the more general notion of the Rule of Law.

In public administration the main goal of transparency is the publication and in general, the disclosure and clarification of information. In national administrative law, it takes the form of a right to information, which includes the obligation of authorities to publish their decisions and the right of the administrated to receive explanations when decisions concern them; the form of obligation to report on behalf of the administrators; and the provision of a communication avenue between the administrator and the administrated. Thus, transparency includes two levels of knowledge: the primary element of disclosure of information and the secondary element of explaining the rationale behind the information disclosed.

Another useful way of defining transparency is by looking at its opposites. Transparency can be juxtaposed with both corruption and confidentiality. In the first case, it is almost self-evident that any disclosure that aims at combating corruption is an improvement and

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[2] See STEPHEN BREYER ET AL, ADMINISTRATIVE LAW AND REGULATORY POLICY, PROBLEMS, TEXTS AND CASES 738-739 (2006).
[3] Laurence Boisson des Chassournes, *Concluding Remarks: Changing Roles of International Organizations; Global Administrative Law and the Interplay of Legitimacies*, 6 INT'L ORG. L. REV. 655-666 (2009).
[4] *Transparency* in BLACK'S LAW DICTIONARY (9th ed... 1999).
[5] Laurence Boisson des Chassournes, *Concluding Remarks: Changing roles of international organizations; global administrative law and the interplay of legitimacies*, 6 INT'L ORG. L. REV.655-666 (2009).

should be welcome. Transparency should be introduced in a meaningful and fair manner, aiming at improving administrative structures and adding to the long-term benefits of citizens, instead of being used in a fragmented fashion only to satisfy populist demands and utilized for political reasons and demagogy.

The relationship between transparency and confidentiality is more complex. The concealment of information may have an operational purpose or value that cannot be easily discounted. Such a value became obvious in the CableGate case when Wikileaks published a large number of diplomatic correspondence, whose classification could be essential in the function of governmental external policy.[6] A similar case that examined the value of disclosure versus that of public order protection was the case of the Pentagon Papers[7] in 1971, which is one of the most important cases examining national security and a court order restricting speech. At the time the New York Times and the Washington Post published excerpts of a study requested by Secretary of Defense under the Johnson Administration, Robert McNamara on the Vietnam conflict consisting of both historical analysis and classified government documents. After the publication of few articles out of a forty seven-volume report, then president Nixon and Attorney General John Mitchell obtained an injunction forcing the times to cease the publication. The case went all the way up to the Supreme Court, which decided that the US government failed to demonstrate the burden of proof required in First Amendment cases.[8] Overall, with respect to decisions of disclosure of information that may be of sensitive nature, there should be a number of reasons for the information to remain confidential. These could be related to private information, physical and mental health or safety of individuals, or

[6] See Rainey Reitman, *The Best of Cablegate: Instances Where Public Discourse Benefited from the Leaks*, https://www.eff.org/deeplinks/2011/01/cablegate-disclosures-have-furthered-investigative (January 7, 2011) Mark Fenster, *Disclosure's effects: WikiLeaks and transparency* 97 IOWA L. REV. 753 (2011). Andrew Murray, *Transparency, scrutiny and responsiveness: fashioning a private space within the information society* 82.4 POLIT. QUARTERLY 509-514 (2011).
[7] US Department of Defense, UNITED STATES- VIETNAM RELATIONS 1945-1967: A STUDY (1967)
[8] New York Times Co. V. United States (403 U.S. 713). See also Joseph E. Stiglitz, *On liberty, the right to know, and public discourse: the role of transparency in public life*, paper (1999). Alasdair Roberts, *WikiLeaks: the illusion of transparency* 78.1 INT'L REV. ADMIN. SCIENCES 116-133 (2012). Also Mark Fenster, *Disclosure's effects: WikiLeaks and transparency* 97 IOWA L. REV. 753 (2011).

public order and national security, to name a few.[9] In such cases, the competing interests of those that confidentiality is geared to protect should be balanced against the gains from transparency.[10]

Arguably, three distinctions can be made on transparency rules, based on their normative strength, their relational nature and their content. Depending on whether transparency norms are enforceable rules or aspirational commitments, they can be distinguished in hard law transparency rules and soft law transparency guarantees/pledges. Depending on which parties it involves, transparency can be internal, external and administrative. Depending on the content of the transparency rules, they can be procedural or substantive/regulatory.

Table 1 Possible Transparency Classifications

Normative strength of rule	Relational nature of rule	Content of rule
Soft law transparency	Internal transparency	Procedural transparency
Hard law transparency	External transparency	Regulatory transparency
	Administrative transparency	

Soft law transparency usually appears as a general principle, either in the form of a good governance commitment at the political level (documents and codes related to the practice of an organization[11] or speeches of high ranking administrators), or a preambular general principle. In this form, it has the least normative effect, and it can be used (at best) either as a guideline of persuasive value to shape the behavior of the actors it can affect or as an interpretative tool for the better understanding of concrete rules, in case

[9] See generally discussion of first amendment considerations and public order, and in particular the notion of clear and present danger in Schenck v. United States, 249 U.S. 47 (1919), Abrams v. United States, 250 U.S. 616 (1919), Dennis v. United States, 341 U.S. 494 (1951), Brandenburg v. Ohio, 395 U.S. 444 (1969), Cohen v. California, 403 U.S. 15 (1971).

[10] Accountability mechanisms generally aim at enhancing transparency but if pushed too far transparency may threaten the level of discretion required for administrative practice. See also here Anne Trebilcock, *Implications of the UN Convention Against Corruption of International Organizations: Oversight, Due Process and Immunities Issues* 6 INT'L ORG. L. REV.513, 538 (2009).

[11] Todd Grierson-Weiler & Ian Laird, *Standards of Treatment* in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 259-304, 278 (Peter Muchlinski, et al. EDS., 2008) citing OECD Recommendation of the Council of the OEDC on Improving the Quality of Government Regulation and APEC Leaders Statement to Implement APEC Transparency Standards.

this somehow becomes relevant before a tribunal, which examines obligations of parties *in light of* their commitment to transparency. [12]

The other form transparency can take is hard law, that is, binding commitment. It can be either a procedural or a regulatory obligation, or a combination of both. In the domestic context, procedural transparency rules impose the obligation for different administrative bodies to follow a specific procedure, make their meetings open to the audience or certain interested or affected parties or to publish the results of such meetings and to publish the rules that underlie their decision-making. This form of transparency helps to add to the predictability of decisions.

At the international level procedural transparency has achieved a hard law status usually in the area of arbitration and dispute settlement, as far as it concerns the choice of judges and the following of formal procedures.[13] In some cases, it also establishes elements of the "right to be heard" for interested parties and more specifically, organized groups of civil society, professional associations, unions, or NGOs. A third, more hybrid form of transparency, which departs slightly from the soft law category, is "administrative transparency."

In international law, soft law transparency can be further distinguished into internal transparency, when it affects the conduct of diplomatic negotiations and other relations among member states to the organization, and external transparency, relating to the "public relations" of the organization, namely its outreach to the general public. Transparency can be of regulatory or substantive in nature when the obligation to disclose, publish, inform on a certain matter is self-standing. That is, if the organization or network or actor or state fails to be transparent by not publishing a specific decision or

[12] Erika de Wet, *Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work*, 9 GERMAN L. J. 1429, 1448 (2008).
[13] See Joachim Delaney & Daniel Barstow Magraw Procedural Transparency" in in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 721-788 at 756-777 (Peter Muchlinski, et al. EDS., 2008).

law, it is solely accountable for that omission, regardless of whether this caused harm to a certain individual or other organization.[14]

Consideration of context along with balancing potentially conflicting interests become crucial in circumstances when transparency is competing with corruption concerns as well as when confidentiality is at stake. For example, when a majority political party insists on adopting certain rules during elections that seem to be designed to promote transparency, one should examine whether this request is geared towards disempowering smaller minority parties or dissent within the country. Similarly, in the domestic context, trials often take place behind closed doors when the rights of vulnerable groups (such as children) are at stake. At the international level, we should be cautious when transparency provisions that are tailored to the needs of western states are being imposed upon developing countries.[15]

C. Defining transparency in the WTO

Traditionally transparency is coupled with disclosure of information. In the WTO context it has acquired a more expanded meaning. It includes the possibility of expanded participatory rights for citizens and consumers or external transparency; and also refers to the position of developing countries' with respect to decision-making, also called internal transparency. Administrative transparency is the closest type to the traditional definition, as it refers to publication of documents and disclosure of information from the WTO administration. Finally, in the GATT and other agreements are articles under the title "Transparency" that refer to the publication of national trade related laws and the existence of administrative and judicial review mechanisms for decisions that relate to tariffs. These last two categories invite less debate over their content.

[14] Anne-Marie Slaughter & Thomas Hale, *Transparency: Possibilities and Limitations*, 30 FLETCHER FOR. WORLD AFF. 153, 154 (2006) where they say that ransparency is not synonymous to accountability.
[15] See also on disadvantages of transparency Joachim Delaney & Daniel Barstow Magraw, *Procedural Transparency*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 721-788 at 762-763 (Peter Muchlinski, et al. EDS., 2008).

Internal transparency was defined in Paragraph 10 of the Doha Declaration as "the effective participation of all Members" referring specifically to developing countries.[16] I call this aspect "internal transparency *stricto sensu*" as it is the one traditionally accepted in the WTO. I argue that similar characteristics to internal transparency *stricto sensu* appear elsewhere, and thus a proper examination of the term needs to extend to two more categories: Acceding countries and Preferential Trade Agreements. The reasons for this, further elaborated on in the chapter on Internal Transparency are threefold. The first relates to the text of the Doha Declaration, which does not name developing countries explicitly when it mentions problems of effective participation. Instead the reference made is to the expanding membership of the WTO. Second, the preferential treatment of development and developing countries, regional, bilateral and other plurilateral trade agreements and accession protocols that give incoming members obligations on top of what they sign for in the WTO Agreements is similar: they are all deviations from classic MFN and National Treatment. Third, in all three cases we can observe a stronger versus weaker state paradigm, in other words power imbalances are easily decipherable.

External transparency is a term originating outside the WTO. In fact, WTO member states have strongly refuted that any effort from non-state actors to participate in the WTO can be called a "transparency" issue. It remains unclear why there is such strong opposition to calling for example the *amicus curiae* submissions a transparency issue. WTO member states have not explained why they object the terminology. In their objections they cite the intergovernmental nature of the WTO and they often say that if they had wanted more involvement for civil society, they would have written that into the WTO Agreements. Most likely, civil society has clustered all the requests made towards the organization into the three greater ones: more participation, more consideration of areas affected by trade (such as the environment) and more transparency. As the door to the WTO for citizens, consumers and NGOs is a very narrow one, and publication of documents may very well be the only actual product of transparency, the other two, participation and consideration of trade-related interests were tagged on to the first one.

[16] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 149-150 (2008).

Added to that is the non-transparent informal (and infrequent) practice of corporate interest participation in dispute settlement.

I use the term "civil society" in this dissertation in the broadest sense possible. It includes both organized civil society (NGOs, labour and consumer unions, interest groups and lobbies), as well as citizens, academics, "netizens" (those who become active in online fora, blogs, twitter, instagram, etc), protesters (organized and individual), members of political parties and coalitions. In a sense, I aspire to include any politically motivated participants and stakeholders in world trade. This may imply that corporations are also actors included in civil society. The reason behind such an expansive definition relates to amicus curiae briefs and their admissibility in the WTO dispute settlement process. I realize that it may be controversial to include in the same group both environmental groups and big oil corporations, or human rights' NGOs and big pharmaceutical corporations. However, if the WTO were to institute a process for the submission of memoranda that ask to be heard in the dispute settlement, as with national courts, standing should be as expansive as it is possible. Moreover, in the design of such a mechanism, special attention should be given towards ensuring access to the Dispute Settlement Process- perhaps with a two-tier mechanism for individuals and non-profit organizations versus for profit institutions.

The only two transparencies that have been discussed by the Panels and the Appellate Body have been legal transparency, since the 1980s and external transparency, with respect to *amicus curiae* briefs. For the latter, the Panels and Appellate Body have not used the term "transparency" in reports.

The following table summarizes the terminology used in each of the following chapters.

Transparency	Definition
Internal *stricto sensu*	Internal transparency *stricto sensu* refers to decision-making deficits of developing countries in the WTO. It highlights the significance of trust in the WTO institutional processes, such as negotiations, decision-making, dispute settlement and trade monitoring that the representatives of member states should have in order for the WTO

	system to function productively.[17]
Internal *lato sensu*	Internal transparency *lato sensu* is introduced in this thesis as an extension of decision-making deficits. Power imbalances in the WTO that have led to developing countries' exclusion have also created other asymmetrical outcomes, specifically in the areas of new member accession and preferential trade agreement proliferation.
External	External transparency refers to the relationship of the organization not with its own member states, its shareholders, but with anyone else affected by the rules and procedures introduced under its auspices, the stakeholders. Although generally civil society is understood to be represented by NGOs, this thesis will discuss not only the interactions of the WTO with the organized civil society, but it will look at all possible communication and information flows between the WTO and citizens of WTO member states and non-member states, namely the public at large.
Administrative	Administrative transparency refers to transparency aspects in the administrative level of the WTO. The functions of the WTO are carried at the political level by the diplomats who are employed by WTO member states and at the administrative level by the WTO secretariat, namely the permanent staff of the WTO. The Secretariat assists the main organs consisting of diplomats in their function. In addition, the Secretariat with its legal officers assists the Panelists and Appellate Body members during the resolution of trade disputes. The transparency issues that arise in this context are mainly related to the selection of the WTO employees, judges and other participants in the administration of international trade.
Legal	The obligation of WTO member states, outlined in Article X of the GATT and its equivalents in other agreements, to publish their trade-related legislation and the rule of law obligations to maintain adequate recourse mechanisms for traders and consumers in order to resolve issues that may arise in transnational trade matters, at the border upon the entry of products and in the domestic market.

Table 2 Transparency forms in the WTO

D. The Sutherland Report

Transparency existed as a rule in the GATT, Article X, since 1947, but was officially brought to the forefront of institutional discussions with the Sutherland Report no earlier than 2005. In view of the WTO 10th anniversary in 2005, then Director-General Supachai Panitchpakdi commissioned a report from a consultative board consisting of the former Director-General of the WTO, Peter Sutherland and a few select members of

[17] Doha Ministerial Declaration WT/MIN(01)/DEC/1 20 November 2001 Paragraph 10 (internal transparency definition and commitment).

governments, academics and policy-makers. The result was a report entitled "The Future of the WTO: Addressing Institutional Challenges in the New Millennium." Previously, in 1983, GATT Director-General Arthur Dunkel similarly commissioned the "Leutwiler Report", which actively pushed towards the initiation of the Uruguay Round and the establishment of a robust multilateral trading system. The Sutherland report looks at the functioning of the WTO as an institution. Although the report is not directly related to the Doha deadlock, the assessment of institutional parameters has as a goal among other things to find productive avenues that can be used to address the issues underlying the Doha negotiations' problems.

The report purports to be an evaluation of the WTO and to discuss legitimacy concerns concerning the WTO. In its nine chapters, the report discusses central issues such as the relationship between the WTO and Globalization and Sovereignty (Chapters I and III), the erosion of non-discrimination mostly due to national protectionism and regional and preferential trade agreements (Chapter II), the problems of the consensus voting rule, political reinforcement, process efficiency and the WTO's variable geometry (Chapters VII and VIII), the relationship of the WTO with other international organizations (Chapter IV), transparency and civil society participation (Chapter V), the dispute settlement system (Chapter VI) and challenges and improvements of administrative nature for the Secretariat and the Director General (Chapter IX).

Even though the report includes some (albeit very limited) constructive criticism for the WTO, it largely is an apologetic document, a defense of the WTO [18] and those aspects of globalization that provide fertile ground for the economic paradigm under which the organization operates. It has been criticized as a "trade liberalization gospel"[19] which is "trapped in [its] functionalist straightjacket." Its conclusions are seen as unconvincing[20]

[18] Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO* 8:2 J. INT'L ECON. L. 329 at 329(2005).
[19] Deborah Z. Cass, *The Sutherland Report: The WTO and its Critics* 2 INT'L ORG. L. REV. 153 at 154 (2005).
[20] Armin Von Bogdandy & Markus Wagner, *The Development of the WTO-Remarks on the Sutherland Report* 2 INT'L ORG. L. REV. 167 at 168 (2005).

as being an attempt to defend "the *status quo* by WTO insiders."[21] Indeed, the members of Consultative Board are linked to the WTO, the report was written only by them, without the participation of civil society actors, and it even mentions that one goal of the report is to "revisi[t] some of the fundamental principles of the trading system that, in our view, have been greatly misunderstood or misrepresented."[22] Among the academics discussing the Sutherland Report, a small fraction who have or have had an institutional affiliation with the organization are the only ones who agree with the analysis and conclusions of the Report.[23] The usefulness of the Sutherland Report does not lie in providing answers for the legitimacy problems of the WTO, as it seems to be giving the WTO a perfect score. However, it helps delineate some issues, and thus we can sketch a rough territory where the WTO needs improvements.

Several themes transpire from the scholarship discussing the Sutherland Report. First, scholars point out that the report did not adequately address the central issue of development in the WTO, in the form of the negotiating asymmetries for developing countries as well as the incomplete and fragmented understanding of development needs, coupled with a blind trust on the trade liberalization paradigm. For as long as trade negotiations resulted in lower trade tariffs, the legitimacy issues facing the international trading system (the GATT at the time) remained less visible. Developing countries voiced their frustration in a number of occasions, but the institutional response, reflecting developed countries' convictions was that as long as developing countries stay on the trade train, they will eventually gain some speed, reduce poverty and create prosperity for themselves. Since 1995 and the Uruguay Round results, we have yet to witness a successful trade round. Legitimacy as a derivative of trade negotiations and their resulting tariff reductions is no longer a plausible narrative in WTO discourse. Thus, in the ten-year anniversary of the WTO, the Sutherland Report had the opportunity to

[21] Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO* 8:2 J. INT'L ECON. L. 329 at 329 (2005). See also page 7 of the Sutherland Report, the short bios of the Consultative Board, all of which have long-standing careers in international organizations.
[22] Sutherland Report, 5.
[23] For example see William J. Davey, *The Sutherland Report on Dispute Settlement: A comment* 8:2 J. INT'L ECON. L. 321 (2005) and Mitsuo Matsushita, *The Sutherland Report and its Discussion of Dispute Settlement Reforms* 8:3 J. INT'L ECON. L. 623 (2005).

reframe the issue of development in the WTO. In view of the Doha Development Round, the Report could take advantage of the opportunity and revisit the liberalization paradigm. Instead, citing a number of "empirical studies" and in sync with the Report's tone, development and internal transparency concerns are barely addressed. It is their own "autarkic, inward-looking policies" and "their own protection" that "undermined the developing countries' export performance by creating a 'bias against exports.'"[24] Countries who benefit from preferential rules become "over-reliant on preference."[25]

The "it's-not-us-it's-you" tone of the report continues during the second theme, which dominated the criticism of the report. The openness of the organization towards civil society and NGOs is deemed satisfactory; the Secretariat does not have sufficient resources to do more; and, some of these organizations are intransparent themselves. This type of reasoning was greatly criticized, and rightfully so, in the literature. Such a line of argumentation, besides not addressing but fueling legitimacy problems, it also carries little normative value and does not contribute to a good governance model.

Another major point of discussion for academics engaging with the Sutherland Report was the Dispute Settlement Understanding and the proposals for its reform. The Panels and Appellate Body are perhaps the only example in international law of such a prolific system of adjudication, and a high rate of implementation. Implementation is successful when countries have- even theoretically- the opportunity to cross retaliate in their markets, should another country be found non compliant with WTO law. However, some implementation problems remain when smaller economies are involved in dispute settlement, developing countries still underutilize the system. Generally the Sutherland Report moved in the right direction with respect to pointing out some institutional concerns and offering suggestions to address them.

[24] Sutherland Report para. 92.
[25] Sutherland Report para. 101.

Finally, the Report falls short of explicitly and systematically discussing larger institutional problems and power asymmetries in the WTO, as well as the balance between legitimate national concerns for regulation and the principle of non-discrimination. State sovereignty has been eroded through participation in the WTO. The WTO has a long reach and affects a large segment of the domestic legal orders of its members, because of the pervasive nature of trade. Unlike environmental treaties, or agreements on the law of the sea, trade touches almost any activity. Additional Agreements, especially TRIPS, TBT and GATS can leave economists hard-pressed to think of areas where the WTO has no relevance. The Sutherland Report adopts an analysis that treats the WTO as one of many intergovernmental organizations and the reduction of state sovereignty as a product of the proliferation of organizations. This obscures the fact that trade regulation is highly intrusive on national legislations and since the Uruguay Round the WTO has extended its reach in a vast area of jurisdiction. As such, national parliaments are *de facto* sidestepped. Any legitimacy discussion surely does not need to propose the demise of the current trading system, intrusive as that system may be or seem. Instead, the Report could have pointed out avenues for the repoliticization of interest areas in order to re-introduce debates and participation of stakeholders that would have been part of national deliberation processes had the WTO not acquired jurisdiction in these areas. Both for underestimating the deflation of sovereignty, and for failing to remedy the legitimacy issues that deflation causes, the report falls critically short.

1. Transparency in the Sutherland Report

Transparency as a theme in the WTO is prominently featured in the report, as it occupies an entire chapter (out of nine in total). Additionally, transparency-related issues are scattered throughout the report in the other eight sections. The Sutherland report directly addresses external transparency and it alludes or discusses less elaborately all other forms of transparency that will be discussed in this thesis, namely internal, legal, and administrative.

First and foremost, the report explicitly refers to external transparency in Chapter V, entitled "Transparency and dialogue with civil society." The report here mentions that:

> 176. A distinct feature of the tremendous transformation that has taken place in the global order over the past two decades has doubtless been the expanding role of civil society. The rise of *mass democracy*, or what some have called the "*global associational revolution*" was particularly powerful in the decade of the nineties as the UN world conferences galvanized the forces of civil society globally in a bid to promote a more inclusive, participatory and transparent system of global governance. This, amidst a growing sense that many global problems could only be effectively addressed through a partnership of state and non-state actors.
>
> 177. This new partnership has not been without its tensions. The concerns of civil society organizations for more meaningful and substantive participation, the anxieties of sovereign governments about the invasion of their hitherto uncontested space, and the challenges faced by global institutions in reconciling their mandates and legal frameworks with these new realities are still very much alive.
>
> 178. Even so, *the new partnership has in many ways been a welcome and beneficial experience*. It has focused political and public opinion on the importance of trade and often has revealed key intersections between trade policies and economic, foreign, social and other policy areas. At the same time for those who recognize the large benefits the multilateral trading system has brought to hundreds of millions of people across the globe, it has often been a frustrating and discouraging experience. *While some non-governmental organizations have sought to acquire the necessary expertise on trade issues to make a productive contribution, others have not, being content to protest the existing order*.[26]

Altogether, the chapter on civil society has been characterized as "disappointing."[27] This last part should be read together with a perplexing excerpt from the conclusions of the report. The report there mentions that "[t]he Secretariat is under no obligation to engage seriously with groups whose express objective is to undermine or destroy the WTO."[28] This is a very troubling statement. Assuming that the Sutherland report is not referring to criminal organizations (which naturally can be excluded as they do not contribute to

[26] Emphasis added.
[27] Deborah Z. Cass, *The Sutherland Report: The WTO and its Critics* 2 INT'L ORG. L. REV. 153 at p 161 (2005).
[28] Sutherland Report Page 80 paragraph 12.

public debate), it is reasonable to expect some serious contributions from organizations that may oppose segments (even large ones) of the WTO's mandate. If such organizations care enough to submit proposals that oppose the current WTO *status quo* in a courteous manner and maintain such a level of discussion, it is unclear why these organizations should not be engaged with. If this note simply refers to organizations who perpetrate crimes (such as the destruction of public property in protests), then it is unnecessary. This excerpt gives the wrong message about the WTO, namely that the organization might not engage, at all, with voices from the inside or the outside that directly oppose its mandate, so the only possible debates can occur with anyone who thinks the WTO has to continue working as it does.

Generally, it is the organization's responsibility to filter voices from civil society, and establish transparent and legitimate mechanisms and thresholds to distinguish among all NGOs willing to participate. Moreover, the failure of the Seattle Ministerial, the only Ministerial to date that took place during huge protests at its doors, did not fail because of those who were dressed as turtles and yelled "Kill the WTO." The death came from the inside: the developed/developing country divide, Charlene Barshefsky's (the US Trade Representative at the time) decision to reach a final declaration in a smaller group setting, and Bill Clinton's hijacking of the conference's agenda in a direction that developing countries could not accept.[29] To turn this around and accuse NGOs for their lack of transparency, or direct attention to national mechanisms of citizen participation does not address the WTO's legitimacy problems. Instead, it discusses other actors' legitimacy problems.[30]

Amicus curiae briefs are interestingly absent from the part discussing criticisms of WTO jurisprudence.[31] Only the chapter discussing the relations with other international organizations briefly mentions that:

[29] PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 57 *et seq*. (2009).
[30] Cho agrees with the reports position on the legitimacy of NGOs- even though he links legitimacy to transparency, see Sungjoon Cho, *A Quest for WTO's Legitimacy*, 4:3 WORLD TRADE REV. 391(2005).
[31] Sutherland Report Page 55, paragraphs 246 et seq.

> "[t]he dispute settlement system of the WTO, due to its special characteristics and being self-contained in its jurisdictional responsibilities, offers no legal space for cooperation with other international organizations except on a case-by-case basis derived from the right of panels to seek information. The Board endorses the maintenance of this policy."[32]

It is unclear why the report does not elaborate the issue of *amicus* briefs, which we will discuss in the Chapter on external transparency. The limited discussion in the Report, compared to Appellate Body practice is even deemed to be a "step backwards." [33] In any event the briefs were by the time of the publication of the Report an informal, not officially endorsed yet frequent practice before the Appellate Body. The report came out in 2005, after the 2001 General Council decision opposing the briefs, but nevertheless relating them to the notion of transparency. The absence of any analysis is troubling.

Framing civil society participation and external transparency in such a wide framework initially appears to provide a more comprehensive perspective on the issue of global civil society mobilization and participatory mechanisms in world affairs. However, this analysis obscures the unique to the international trading system protests, objections and formal and informal requests for participation as well as the WTO-specific challenges with respect to civil society participation.

For example, seen under this light of a general expansion of civil society role in world affairs, the *amicus curiae* brief issue that will be discussed in a following chapter acquires a different significance: the response of WTO member-states, the Secretariat and the Sutherland Report moves along the lines of the legal personality and the subjects of public international law and intergovernmental organizations under a Westphalian perspective. States and states only can participate, following the formal mechanisms of participation outlined in the Dispute Settlement Understanding, in any disputes, either as claimants and respondents, or as third parties. This official response, reiterated over the last two decades in several occasions however represents the role of civil society and

[32] Sutherland Report Page 39 paragraph 167.
[33] Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO* 8:2 J. INT'L ECON. L. 329 at 335(2005).

NGOs in the WTO inaccurately. The WTO Agreements contain several formal mechanisms for the participation of transnational actors, and others that were established through case law and will be discussed in this thesis. Extending this case law to include *amicus curiae* briefs, seen under the light of traditional international law and the system of international organizations, is a big stretch.

The Sutherland Report itself places "business and consumers" at the center of stakeholdership in multilateral trade negotiations.[34] To be absolutely clear on the report's intensions vis-à-vis civil society, they add the word "rightly" in this part. [35] The opportunity to envision a role for these stakeholders in formal mechanisms is greatly missed.[36] If civil society participation is placed under the light of the WTO law and case law, then it appears to fall within acceptable institutional margins, together with scientific opinions, consumer preferences and corporate interests. In this respect, it has also been observed that the WTO is focused on producers and exporters, who have many incentives to support protectionism[37], much more than it is on consumers and citizens.[38] Beyond obscuring the external transparency deficits, the report also fails to recognize the uneven focus of the WTO rules and the economic paradigm that it puts forward on only one side of the stakeholders, namely businesses. Even more, it is the consumers that would mostly benefit by the lowering of tariffs, and currently, businesses lobby at a national level to increase protectionism. The Report overall fails to capitalize at the NGO potential to be a "direct, transnational interface or voice mechanism where citizens and consumers can transmit concerns and obtain information about WTO activities and decisions."[39]

Another aspect of external transparency discussed in the Sutherland Report relates to opening of Panel and Appellate Body meetings to the public. This positive attitude

[34] Sutherland Report Para. 278.
[35] See the discussion in Jan Klabbers, *New Logo: The Sutherland Report and the Rebranding of the WTO* 2 INT'L ORG. L. REV. 177 at 177(2005).
[36] Steve Charnovitz, *A Close Look at a Few Points* 8:2 J. INT'L ECON. L. 311 at 316 (2005).
[37] Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO* 8:2 J. INT'L ECON. L. 329 at 333 (2005).
[38] *Id.* at 331.
[39] *Id.* at 342-343.

towards transparency in the dispute settlement has a very large number of supporters[40] mostly from non participants (civil society and academics) but also from some WTO representatives, as it can initially be done on a voluntary basis with state consent (as it currently happens) and progressively open up the process, perhaps by only requiring one state to request the opening of the meetings during the process, or, in the traditional WTO decision-making fashion, establish that all larger meetings are open unless consensus exists among parties to a dispute to the contrary. It has also been observed that uncoupling the WTO Public Forum or Public Symposium from the WTO Ministerial Conference reduces the former to a "show-and-tell" event, instead of taking the opportunity to build civil society into the negotiating process.[41] The conclusion in the Transparency chapter is positively supportive to the WTO, even providing a long passage on the necessity of secrecy for negotiations,[42] or the idea that there is such as thing as "excessive transparency."[43]

Chapter V contains some discussion on internal transparency, that is, negotiating asymmetries among WTO member states, especially present in the tension between developed and developing countries.[44] Internal transparency ironically is discussed in the context of justifying the need for secrecy of negotiations. Interestingly, despite the Doha Development Round and its challenges, and its explicit mention in Paragraph 10 of the Doha Declaration, the report does not elaborate on how internal transparency is compromised in the WTO by the treatment of developing countries.[45]

Paragraph 222 of the report interestingly notes that developing countries participate much more in the Dispute Settlement Process than in the GATT, and "developing countries – even some of the poorest (when given the legal assistance now available to them) – are

[40] See for the Sutherland Report William J. Davey, *The Sutherland Report on Dispute Settlement: A Comment* 8:2 J. INT'L ECON. L. 321 at 328 (2005) and Niall Meagher, *So Far, so Good: but What Next? The Sutherland Report and WTO Dispute Settlement* 4:3 WORLD TRADE REV. 409 at 416 (2005).
[41] Steve Charnovitz, *A Close Look at a Few Points* 8:2 J. INT'L ECON. L. 311 at 318 (2005).
[42] Sutherland Report Paragraph 199.
[43] See for example Sutherland Report paragraph 198 page 44.
[44] Robert Wolfe, *Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report have the right prescription?* 8:3 J. INT'L ECON. L. 631at 639 (2005).
[45] Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO*, 8:2 J. INT'L ECON. L. 329 at 336-337 (2005).

increasingly taking on the most powerful. That is how it should be." This statement is largely exaggerated. In fact, a number of countries have never participated in the dispute settlement system, not even as third parties. Isolated examples like that of Antigua and Barbuda show that perhaps the system works, but it works for those who use it, which is not the overwhelming majority of the WTO. Also despite its victory against the United States during dispute settlement, the subsequent effective inability to implement the, report should warrant a revision of the implementation rules. When cross-retaliation is allowed only within the domestic market of the winner, and the winner is a micro-state, then cross-retaliation is meaningless: no sector can be large enough to harm the strong state that stood on the other side of litigation. That is *not* "how it should be."

Once again in the report, the opportunity is missed to discuss at a pragmatic level how to bring developing countries not up to speed with trade, but on equal footing with their peers at an institutional level.[46] The repeated failures to conclude a negotiating round in Doha and later in Bali demonstrate that the institutional and collective reluctance to tackle internal transparency as a serious issue comes at a high cost that threatens the WTO's main function. This institutional reluctance is evident in the Sutherland Report. The Green Room issue is barely addressed. Emphasis is instead placed on need for confidentiality, a discussion on variable geometry and a gospel for the current negotiation arrangements that perpetuate the internal transparency deficits and are, in relative terms, archaic, since they are reminiscent of the GATT days.

Some discussion on Least-Developed countries appears later in the report[47] but not exploring their real problems with the WTO. They are mentioned as "unfortunately, insignificant in terms of world trade (even collectively)." However, as it appears from the Doha Round, collectively they can contribute to blocking further decision-making and their accession process takes a very long time (despite their 'insignificance') as we will see in the chapter on accessions and internal transparency *lato sensu*.

[46] Dan Sarooshi, *The Future of the WTO and its Dispute Settlement System* 2 INT'L ORG. L. REV. 129 151 (2005).
[47] Sutherland Report page 67 et seq., paragraph 306 et seq.

It is important to note here that even though the Sutherland Report rightly observes that the institutional and monetary resources of the WTO are not unlimited, this does not mean that focus on one form of transparency necessarily needs to occur at the expense of the other.[48] This perspective fails to capture that institutional and pecuniary constraints reflect a lack of support from member states, another issue that should be remedied. Also, considering the extent of the WTO's legitimacy crisis, addressing these legitimacy problems should be a first priority for the organization, both at the internal and at the external level.

The Sutherland Report does not discuss asymmetries caused by accession, although the Chinese candidacy has brought many of the internal transparency issues during accession processes into light.[49] The Report does focus on Preferential Trade Agreements and regionalism.[50] Although it mentions that the vast majority of the PTAs and RTAs have not been notified and all but one have never been examined to check their compatibility with the WTO Agreements, the Report does not encourage the organization to expose this state of affairs.[51] It engages in a discussion on whether such agreements promote or undermine the world trading system, only to conclude that the evidence and research is inconclusive. The systemic reluctance to discuss regional trade agreements remains. We can hypothesize that this occurs at the expense of the less powerful players in the WTO. [52] Insofar PTAs are not even notified with the WTO, and power asymmetries are caused and perpetuated by PTAs the transparency deficit in this respect is massive, and it results both from the lack of disclosure and marginalization of member states.

Chapter V discusses legal transparency when it defers to WTO member states for the management of civil society voices and concerns in national parliaments. In this context, the Sutherland report mentions that governments are under the obligation to openly discuss their trade-related legislation, which is linked to the obligation embodied in

[48] Donald McRae, *Developing Countries and 'The Future of the WTO'* 8:3 J. INT'L ECON. L. 603 (2005).
[49] Bernard Hoekman, *Proposals for WTO rRform: A Synthesis and Assessment* 20 MINN. J. INT'L L. 324 passim (2011).
[50] Sutherland Report Paragraph 68, and paras 75-87.
[51] Pieter Jan Kuijper, *Do Parallels with Other International Organizations Help*, 2 INT'L ORG. L. REV. 191 at 194 (2005).
[52] *Id.*

Article X of the GATT and its equivalents.[53] With respect to the relationship of Member states and civil society, the report notes:

> **"It must continue to be recognized that the primary responsibility for engaging civil society in trade policy matters rests with the Members themselves.** While the WTO's relations with civil society have their own integrity and dynamics, they are inextricably bound with government /civil society relations at the national level.[54]"

Fourth, aspects related to administrative transparency are discussed in Chapter IX, entitled "The role of the Director-General and Secretariat." The Sutherland report acknowledges that the WTO Secretariat is "one of the smallest among major international institutions"[55] but interprets its small size as an institutional constraint, rather than a caveat to the organization's legitimacy. Instead, the report notes in paragraph 361 that "the legitimacy of decision-making is adequately protected by the consensus principle."[56] The Secretariat could assume greater responsibility in ensuring that the information published publicly and internally is meaningful in the way it is presented to citizens of WTO member states and traders that have their own systemic constraints in using the vast amount of data produced and presented by the WTO, with increased emphasis on consumers, developing and least-developed countries.[57] The selection of the members of the Secretariat is limited to the senior positions of the Director-General's deputies[58] without any word on the selection of the remaining more than five hundred employees. Moreover, the "pro-trade ethos" of the Secretariat does not allow a fruitful dialogue and the formation of internal dissent clusters. Instead, similarly to the Sutherland Report the Secretariat is there to defend the *status quo*.[59]

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[53] Sutherland Report Paragraphs 204-205
[54] *Id.* Paragraph 212 emphasis in the original.
[55] *Id.* 73 paragraph 337.
[56] *Id.* page 77.
[57] Gregory Shaffer, *The Role of the Director-General and Secretariat: Chapter IX of the Sutherland Report* 4:3 WORLD TRADE REV. 429 at 435 (2005).
[58] Sutherland Report paragraph 354 page 75 onwards.
[59] Armin Von Bogdandy & Markus Wagner, *The Development of the WTO-Remarks on the Sutherland* 2 INT'L ORG. L. REV. 167 at 172 (2005). See also Deborah Z. Cass, *The Sutherland Report: The WTO and its Critics* 2 INT'L ORG L REV 153 at 154 (2005).

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E. WTO and Transparency in International Law and International Relations' discourse

Academic discourse focusing on the legitimacy problems facing international organizations has been around for some time. Legitimacy concerns and discussions were coupled even during the birth and early years of those institutions.[60] The failure of the League of Nations, coupled with the Second World War became an early symbol of the problématique of international institutions: the League of Nations was one of first permanent structures created after international negotiations that failed shortly thereafter. The UN, the IMF, the World Bank and the GATT/WTO have been dealing with legitimacy problems throughout their history. Dissatisfaction and disappointment ensue, together with long discussions on how to remedy the problems that these institutions face, and review their normative frameworks and agendas. The peak period of legitimacy discussions are mostly the last forty-five years. With respect to the international trading system that timeframe is slightly smaller- legitimacy-related discourse did start as early as the late sixties, however, the vast volume of scholarship appeared in the late eighties and peaked after the nineties- during the Seattle and surrounding events and the initiation of the Doha Round of negotiations.

Both in the international and the domestic domain, the formal and informal exercise of political authority produces normative outcomes whose legitimacy is constantly tested.[61] Under the notion of the Rule of Law, a number of principles have emerged in order to ensure legitimate decision-making. Transparency, openness or disclosure of information

[60] See for example the work of Hans Kelsen following the creation of the United Nations, HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS. VOL. 11. (1950), Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations* 42 AM. J. INT'L L. 783 (1948).

[61] Terry MacDonald, *Citizens or stakeholders? Exclusion Equality and Legitimacy in Global Stakeholder Democracy*, in GLOBAL DEMOCRACY: NORMATIVE AND EMPIRICAL PERSPECTIVES 47-68 at 57 (Daniele Archibugi, et al. eds. 2011), on understanding legitimacy as "consisting […] in the justifiability of institutions in terms of reasons embedded in the real social identities of the existing political agents who are participants in the institution in question. […] Legitimacy is concerned […] with the actual political acceptability given some background set of sociological facts about the identities that political actors possess through their shared participation in these institutions."

is an important form of substantiating legitimacy. In the WTO, it is formally become both a rule binding member states to publish their trade rules and an institutional commitment on behalf of the organization itself. Transparency and legitimacy discussions first crossed paths at the domestic level. In international law, Global Administrative Law systematically defined and explored a normative space where transparency was one of few prominent principles. A significant number of scholars in WTO law, International Law and International Relations have also examined transparency in their work. A fraction of the contributions on transparency in International Law and International Relations frequently refers to the WTO, either exclusively, or to compare it with other international organizations, more specifically the EU and the World Bank and IMF. Some scholars have dealt specifically with transparency in the WTO.

After summarizing the scholarship directly reacting to the Sutherland Report and its transparency issues, I will group the scholarly contributions into five large categories[62]: first, positivism, realism and rationalism; second, mainstream WTO law and transparency; third international public law; fourth, critical public international law; and fifth, societal constitutionalism. Furthermore, the third group, international public law, has a number of significant variations within its domain, which will be addressed in a separate chapter.

The table below summarizes the positions of the four groups with respect to each group's position on seven key questions. The first column presents the attitude towards global governance as the overall discourse platform in which discussions on the WTO should take place. Here the two main camps are those who assume that the WTO is an intergovernmental organization, analyzed under traditional international law (with emphasis on state sovereignty and the doctrine of *pacta sunt servanta*) and those who discuss WTO law in the context of some form of "global governance" theory-introducing more variables.[63] The second column summarizes the degree of emphasis on

[62] The grouping may be artificial, as numerous writings exhibit more than one group's properties, but the categorization is based on the main or more recurring theme or argument in one's work.
[63] In international relations theory, this distinction is seen as corresponding to rationalism versus weak cognitivism. See ANDREAS HASENCLEVER ET AL., THEORIES OF INTERNATIONAL REGIMES, 136-138 (1997).

the WTO's legitimacy problems, which ranges from almost non-existent to central. The third issue is the strength of a link between legitimacy and transparency. The fourth question, based on the four transparency forms, is which types of transparency are analyzed. The next two questions are what are the positions of these groups towards sovereignty and civil society in the WTO (or at the global level generally).

	WTO and Global Governance	**WTO and Legitimacy problems**	**Relation of Transparency to Legitimacy**	**Transparency**	**Sovereignty of States**	**Civil Society in the WTO**	**Sutherland Report**
Classic International Law/Rationalism/Realism/ Positivism/ Trade Law	NO (or tautology between global governance and international community)	Not as pronounced and crucial	Loose link	Emphasis on legal and internal. Some administrative	YES- only states can bind themselves	Filter through the nation state	Agreement in spirit, some criticisms on trade law related issues
International Public law * **GAL** * **IPA/IPL** * **Constitutionalism -see Table 3.**	YES (resembling a domestic public law order)	Crucial but "public-law like" Global Governance can help solve them	Strong link	Emphasis mostly on external, and then internal	YES with a global polity	Element of deliberative or representative democracy	Disagreement in parts, opportunity to extrapolate publicness in others.
Critical Public International Law/ Opposition to IPL/ Sutherland Report reactions	YES (critical of existing structures, transnationalist elements)	Crucial, unclear how (if) global governance will (can) handle the erosion of the nation-state and power asymmetries	Medium/ Strong link	Emphasis on internal and external	YES-eroded	Important as part of transnational actors, at times amorphous, at times more organized	Stronger reaction and criticism
Societal Constitutionalism	YES (transnational constitutionalization)	Crucial (socio-legal analysis necessary)	Medium link	Discussion on deliberative polyarchy and knowledge, capacity for action and power of implementation	YES (but national constitutions are structurally inadequate to deal with global problems)	YES (massive external- including civil society- intervention will trigger the internal process of change	N/A

Table 3 WTO Transparency Theoretical Approaches

The following analysis will discuss each of these groups in detail.

1. The scholarly debate on the Sutherland Report

Transparency has been discussed in the context of the extensive debate following the Sutherland report. Transparency as a theme in the WTO is prominently featured in the report, as it occupies an entire chapter (out of nine in total). Additionally, transparency-related issues[64] are scattered throughout the report in the other eight sections. The Sutherland report directly addresses external transparency and it alludes or discusses less elaborately all other forms of transparency that are discussed in this thesis, namely internal, legal, and administrative. After its publication, a number of scholars organized symposia discussing the missed opportunities of the report to address legitimacy issues raised in the report, and criticizing it for missing the mark on legitimacy concerns in global governance and trade governance, praising the organization instead. Some of these contributions, led by Jan Klabbers,[65] identified global governance deficits and serious concerns with respect to developing countries, the dispute settlement process and civil society participation in the WTO. Many scholars from the GAL and IPA/IPL projects participated in the symposia. As the main lens of this discussion was to address the problems of the WTO as an institution, they extended the debate on the law of international organizations (IOs), examining institutional structures and deficits of IOs and comparing different IOs and their practices. These works are understandably critical of the self-evaluation of the WTO.

The Sutherland report was criticized as an apologetic document, a defense of the WTO and those aspects of globalization that provide fertile ground for the economic paradigm under which the organization operates, a "trade liberalization gospel" which is "trapped in [its] functionalist straightjacket." Its conclusions are seen as unconvincing as being an attempt to defend "the *status quo* by WTO insiders."[66] With respect to transparency, despite the observation in the Sutherland Report that the institutional and monetary resources of the WTO are finite, focus on one form of transparency should not occur at the expense of the other. The critiques of the Sutherland report related to transparency mostly discuss the issue of internal transparency and more particularly, developing

[64] As previously defined in Part C.
[65] Jan Klabbers, *Forum: The Future of the WTO: Introduction* 2 INT'L ORG. L. REV. 127 (2005), the same, *New Logo: The Sutherland Report and the Rebranding of the WTO* 2 INT'L ORG. L. REV. 177 at 177 (2005).
[66] Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO* 8:2 J. INT'L ECON. L. 329 (2005).

country meaningful and equal participation in WTO processes. They also focus on external transparency and civil society participation. The majority of these contributions are appropriate responses to the Sutherland Report, which suffers from an almost absolute lack of critical self-reflection.

Pauwelyn noted that report does not elaborate on how internal transparency is compromised in the WTO by the treatment of developing countries. Instead it demonstrates an incomplete and fragmented understanding of development needs, coupled with a blind trust on the trade liberalization paradigm.[67] Wolfe emphasized the negotiating asymmetries among WTO member states, especially present in the tension between developed and developing countries. Moreover, the "pro-trade ethos" of the Secretariat does not allow a fruitful dialogue and the formation of internal dissent clusters. Instead, similarly to the Sutherland Report the Secretariat is there to defend the *status quo*.[68] Kuijper criticized the report for another form of internal transparency deficits, caused by Preferential Trade Agreements and regionalism. Although the vast majority of the PTAs and RTAs have not been notified and all but one have never been examined to check their compatibility with the WTO Agreements, the Report does not encourage the organization to engage in a discussion on PTAs and RTAs. The systemic reluctance to discuss regional trade agreements remains at the expense of the less powerful players in the WTO. [69]

The report purports that the openness of the organization towards civil society and NGOs is deemed satisfactory and the positive attitude towards transparency in the dispute settlement has a very large number of supporters. The Sutherland Report itself places "business and consumers" at the center of stakeholdership in multilateral trade negotiations but not as participants, as Klabbers correctly points out.[70] Charnovitz concurs that the opportunity of envisioning a role for these stakeholders is greatly missed

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[67] *Id.*
[68] Robert Wolfe, *Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report have the Right Prescription?* 8.3 J. INT'L ECON. L. 631-645 (2005).
[69] Pieter Jan Kuijper, *Do Parallels with Other International Organizations Help*, 2 INT'L ORG. L. REV. 191 at 194 (2005).
[70] Jan Klabbers, *New Logo: The Sutherland Report and the Rebranding of the WTO* 2 INT'L ORG L REV. 177 at 177(2005).

and adds that the WTO Public Forum has been reduced to a "show-and-tell" event, instead of taking the opportunity to build civil society into the negotiating process.[71] Pauwelyn notes that WTO is focused on producers and exporters, who have many incentives to support protectionism, much more than it is on consumers and citizens and the Report overall fails to capitalize at the NGO potential.[72] Finally, Shaffer observes Secretariat could assume greater responsibility in ensuring that the information published publicly and internally is meaningful in the way it is presented to various stakeholders that have their own systemic constraints in using the vast amount of data produced and presented by the WTO, such as consumers or developing and least-developed countries.[73] On a similar tone, external transparency has been discussed by Delimatsis.[74]

2. Positivism, Realism and Rationalism

In order to approach the positivist approach to transparency, I will first look at positivism in legal theory in general and give an overview of its history. Positivism in the domestic legal context and positivism in international law exhibit a number of significant differences, mainly due to the lack of centralized enforcement in the international community. As such, this chapter will continue to examine the positions of positivists in international law before moving to positivism in WTO law more specifically. Finally, I will discuss positivist accounts of transparency in WTO law. Two more theoretical streams, realism and rationalism will be briefly discussed in this chapter, as in many instances the argumentation of positivists approximates that of realists and rationalists.[75]

Positivism stems from the 19th century withdrawal from natural law and focus on written decisions and laws by the government as the only ones having the legal power to regulate

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[71] Steve Charnovitz, *A Close Look at a Few Points* 8:2 J. INT'L ECON. L. 311(2005).
[72] Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO* 8:2 J. INT'L ECON. L. 329 (2005).
[73] Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries* 23 WIS. INT'L L. J. 643 (2005).
[74] Delimatsis Panagiotis. *Transparency in the WTO Decision-Making*, TILEC Discussion Paper No. 2012-006 http://ssrn.com/abstract=2001919 (2012).
[75] Briefly: Realism: international law is not really law because it cannot be enforced. Rationalism: nations obey international law only when it serves national self-interest. See also the distinction between soft and hard legal positivists John Gardner, *Legal Positivism: 5 1/2 Myths* 46 AM. J. JURIS. 199, at 202 (2001).

human conduct. In the tradition of Hobbes, Bentham and Austin[76], H.L.A. Hart insisted on the separation of law as it is and as it ought to be.[77] Kelsen's Pure Theory of Law[78] follows in the same tradition and so do contemporary positivists such as Coleman and Raz. [79]In the tradition of H.L.A. Hart[80], positivists often distinguish between primary rules (under the understanding that law is a command) and secondary rules, or rules of enforcement.

In international law, the concept of sovereign equality and resulting lack of hierarchy, which further produces lack of centralized enforcement mechanisms have had a strong influence on positivist theories. During the first half of the 19th century the departure from natural law approaches resulted in the emergence of two positivist legal traditions.[81] In continental Europe, first Jellinek and Triepel, followed by Kelsen introduced methodological legal positivism in international law, while in the Anglo-American tradition, Austin and H.S. Maine and later to some extent H.L.A. Hart posited that "international legal science" should focus on "positive custom of nations as actually practiced."[82] The continental tradition recognized reciprocity as the foundation of international law, as evidenced through the express and tacit consent of states in treaty and custom. Kelsen argued that a pluralistic view of legal systems is not attainable. Instead, national and international law form a single and hierarchical legal system.[83] However, the entire edifice relies on the existence of a "Grundnorm", a basic norm whose characteristics are reminiscent of natural law rather than positivism proper.[84] Hart conceded to Kelsen that international law can be conceived as a decentralized system of

[76] John Gardner, *Legal Positivism: 5 1/2 Myths* 46 AM. J. JURIS. 199, at 200 (2001).
[77] H.L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593-629 at 595(1958).
[78] Hans Kelsen, *The pure theory of law and analytical jurisprudence* 55 HARV. L. REV. 44-70 (1941).
[79] John Gardner, *Legal Positivism: 5 1/2 Myths* 46 AM. J. JURIS. 199, at 200 (2001).
[80] H.L. A. Hart, *Positivism and the Separation of Law and Morals*, 71:4 HARV. L. REV. 593-629 (1958).
[81] WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 503-515 (2000).
[82] *Id.*
[83] Detlef von Daniels, *Is positivism a state-centered theory* in LAW, MORALITY, AND LEGAL POSITIVISM 25 (Patrick Capps ed. 2004).
[84] Marco Haase, *The Hegelianism in Kelsen's Pure theory of Law* Marco Haase, *The Hegelianism in Kelsen's Pure theory of Law* in LAW, MORALITY, AND LEGAL POSITIVISM 97, and 94-96 (Patrick Capps ed. 2004).

law with no secondary rules.[85] The Anglo-American positivist tradition embraced the natural law foundations of international law more openly and acknowledged that international law is not law in the strict meaning. Thus, both the sources' thesis and the separation thesis were obscured by reference to a common shared morality in international relations.[86]

Despite the fact that positivism in international law was never "genuine" as it was strongly diluted with natural law elements, its initial theses on sovereignty, the dualistic separation between national and international law and the exclusivity of legal personality for states remain central to many approaches in contemporary international law. Koskenniemi observes this paradoxical turn and posits that positivism and naturalism are not as separate as they appear in the writings of their respective proponents. Rather, they are relational and have significance only in opposition to each other. [87] The resulting inconsistencies continue to be the problem in the theories, which insist on the primacy of treaty as a contract and the codification of international law. This Westphalian-centric attitude renders contemporary international law analysis murkier. For transnational phenomena that are still in the process of formation (for example civil society participation at the international level), positivism gives an answer to those who do not think these are normatively relevant. They resort to the mantra that international relations are still the exclusive domain of sovereign states.

The more theoretically elaborate perspective on positivism is discussed by Palmeter and by Trachtman. This section will focus on these two, as well as Richard Steinberg's analysis on internal transparency issues in the WTO, mainly because in their work the link between transparency and legitimacy is more clearly evidenced, albeit a loose one. The next section will discuss other formalist approaches on transparency from the mainstream WTO scholarship.

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[85] Detlef von Daniels, *Is positivism a state-centered theory* in LAW, MORALITY, AND LEGAL POSITIVISM 25 (Patrick Capps ed. 2004).
[86] Patrick Capps, *Methodological legal Positivism in Law and International Law* in LAW, MORALITY, AND LEGAL POSITIVISM (Patrick Capps ed. 2004).
[87] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 131-132 and 164 (2006).

The positivist scholars examine transparency as a rule in WTO law mainly by tracing the history of Article X of the GATT and its jurisprudence. With respect to other forms of transparency and especially external and internal transparency, positivists turn to a rationalist approach, which posits that information disclosure is a strategic tool for states and only occurs when it is to their interest. Realist approaches in international law, which argue that international law is not really law because of the lack of enforcement are very similar to "hard" Hartian positivism[88] which cites the lack of secondary rules in international law as evidence for its nature as not "true" law.

The general disposition of positivist approaches towards WTO legitimacy concerns is summarized well in Joel Trachtman's analysis on civil society participation in WTO adjudication, which we will see in more detail at the end of this chapter. Trachtman notes:

> "It is best to avoid conclusory assertions of the rightness, fairness, democracy, or legitimacy of private participation in WTO dispute settlement. Private participation in dispute settlement should not be determined by natural law assertions, for the market is constructed, and the property contract, and trading rights allocated to individuals are determined, not by natural law but by politics, hopefully informed by comparative institutional analysis. The right to litigate should be understood as a component of individual rights in the same way."[89]

The underlying rationale here is the separation between law and behavior, which prompts a centralist approach in international law, whereby only treaties bind states and focusing on specific rules will clarify how and when compliance occurs.[90] Legitimacy, fairness and democracy are displaced to the periphery of the academic discussion and not explicitly linked to specific rules in the WTO. At best, they appear in non-binding chapeaux of treaties. As such, any link between transparency and legitimacy is not plausible. Positivism discusses rules, and their enforcement in a "pragmatic" fashion,

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[88] John Gardner, *Legal Positivism: 5 1/2 Myths* 46 AM. J. JURIS. 199, at 202 (2001).
[89] JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 250 (2008).
[90] Robert Wolfe, *See you in Geneva? Legal (Mis) Representations of the Trading System* 11:3 EUR. J. INT'L REL. 339-365 at 344 (2005).

instead of looking at the "quality of the legal regime."[91] This implies more than the possibility of analytical separation between law and legitimacy: it argues that such a separation is not only possible but a better framework for analysis. The result is that legitimacy and state-interest are eventually collapsed into each other.

Trachtman's version of positivism is described in his book "The Economic Structure of International Law" as a "social scientific approach to international law"[92] and more specifically "methodological and normative individualism"[93] According to Trachtman, his positivist analysis focuses only on secondary rules, namely rules that induce and ensure enforcement of international obligations.[94] His approach however to rules' and institutional design as a means for states to induce the type of compliance they desire approximates rationalism more than positivism.[95] Similarly, for the WTO Trachtman posits that depending on each member's interests, the WTO system authorizes members to breach obligations and pay compensations as a result. [96] He specifically says that the implementation of the GATT as a treaty is based on power politics and reputation.[97] As such, any type of "constitutional changes" for the WTO occur when there are shifts in state preferences, induced by public pressure, technological advancement, or health concerns. [98] Any discussion on concessions in key sectors to developing countries or the Green Room problems is absent for the most part.

A different positivist perspective is adopted by Palmeter who discusses all treaty regimes, including the GATT as regimes of primary rules. [99] However, without secondary norms the primary rules are not "serious" enough. [100] This reflects a realist understanding of international law, namely that without enforcement mechanisms international law is not

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[91] Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11.4 EUR. J. INT'L L. 763-813 (2000).
[92] JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 1 (2008).
[93] *Id* at 6.
[94] *Id.* at p. xi and 25.
[95] *Id.* at 1-6.
[96] *Id.* at 144
[97] *Id.* at 172.
[98] *Id.* at p 172, 184
[99] David Palmeter, *The WTO as a Legal System* 24 FORDHAM INT'L L. J. 444 at 454 (2000).
[100] *Id*. 473-474

law. Thus, Palmeter observes that the negotiators of the Uruguay Round, which resulted in the creation of the WTO wanted an independent adjudicatory system. Furthermore this dispute settlement system has evolved from a more formalist application of rules to introducing value considerations.[101] This observation can be seen as Palmeter's internal critique to his originally positivist thesis.[102]

As a result from the aforementioned approaches on WTO rules, transparency is analyzed in two different ways by scholars who identify their theories as positivist. As mentioned before there is a significant portion of Article X of the GATT formalistic analysis. This approach is also adopted by Palmeter, who categorizes Article X as a primary rule.[103] Even with the realist and rationalist elements, this scholarship is closer to a narrow, or hard positivism. The other two positivist approaches do not look at article X but more towards internal, external and administrative transparency. At first it seems odd (perhaps even encouraging) that the non-legal forms of transparency are of interest to positivists. However, as mentioned before, when discussing the WTO, positivists appear to be closer to realism and rationalism than a Kelsenian approach to international law. Thus, the following theorists can be classified as soft positivists or even pseudo-positivists.

Trachtman explicitly discusses private rights of action in the WTO. This form of private participation is also called "external transparency" and involves NGOs, corporations and members of civil society at large who wish to formally participate in WTO's judicial proceedings. The absence of an explicit legal right of such parties to participate in the DSU, except in some specific cases in TRIPS (approximating NAFTA's Chapter 11) lead Trachtman to conclude that such private rights are absent from the WTO.[104] However, this is a very narrow understanding of the WTO's normative framework. As we will see

[101] *Id*. at 480.
[102] Sol Picciotto, *The WTO's Appellate Body and the Legalization of Global Governance* WORKING PAPER 14 SCHOOL OF PUBLIC POLICY UNIVERSITY COLLEGE LONDON ISSN 1479-9472 available at <http://www.ucl.ac.uk/spp/publications/downloads/spp-wp-14.pdf> 7. He critiques formalism/positivism.
[103] David Palmeter, *The WTO as a Legal System* 24 FORDHAM INT'L L. J. 444 at 452 (2000) in the sense that all treaty regimes, including the GATT are "essentially regimes of primary rules."
[104] JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 248 (2008).

further, especially in the Asbestos case[105] the Panels and the Appellate Body have the opportunity, through formal rules of procedure to introduce an *ad hoc* platform for civil society participation in dispute settlement. Overall, Trachtman's analysis does not explain the few but consistent filed *amicus curiae* briefs.[106]

An extension of the same rationalist rationale behind Trachtman's account on the WTO is adopted by Steinberg where all "information gathering" (which includes mostly internal transparency but also elements of external transparency). Transparency is seen under the lens of "maximizing efficiency in policy making."[107] More specifically, Steinberg points that: "[t]he agenda setters from powerful states must have good information about each country's preferences, the domestic politics behind those preferences, and risk tolerances- across all of the topics that might be covered- to understand potential zones of agreement on a package acceptable to all. To be most useful, the available information must be sincere and not provided for strategic purposes (that is, not for purposes of yielding an outcome that would make the information provider better off than if he or she had provided sincere information)."[108] Thus, not only is information used against less powerful states, but the sincerity of their disclosure is manipulated. External transparency and administrative transparency are weaved together in Steinberg's analysis, and in terms of external transparency, information signals preferences and is utilized in agenda-setting processes without any regard for legitimacy altogether. [109]Steinberg to some extent down acknowledges this as a problem and even characterizes this as "organized hypocrisy."[110] However, he misplaces attention and blames the consensus rule for all the extant WTO problems, while the real issue at stake is the underlying disregard for development needs and the economic theory that lacks legitimacy. It is the lack of meaningful consensus- and this would be the same even if the voting rules were diametrically different, and

[105] Panel and Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2000.
[106] JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 250 (2008).
[107] Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO* 56:2 INT'L ORG. 339-374 at 361- 364 (2002).
[108] *Id.* at 361-362.
[109] *Id.* at 362.
[110] *Id.* at page368.

involved weighted decision making, or even simple voting.[111] It is not the decision-making process that induces legitimacy.[112]

3. Formalist and fragmented analysis of Transparency in the WTO

Traditional WTO scholarship on transparency is either focused on a formalist analysis of Article X, its history, case law and other implications, and the trade review and monitoring mechanisms that exist in the WTO. Moreover, some of the analyses focus on either internal or external transparency problems. This second stream of transparency scholarship breaks away from a formalist perspective and introduces non- Article X transparency forms, however it does so in an isolated and fragmented manner. After bringing forward the current state and problems related to internal or external transparency no links are drawn between the two or the rest of transparency forms and as a result the engagement with transparency remains unfinished.[113] Publication of WTO documents is often mentioned and the WTO's track record on openness is seen positively. Any proposals for improvements on transparency focus on the utilization of existing rules, advocating for the protection of the inter-state nature of WTO agreements, which create rights and obligations only for their member states and only after their consent to limit their sovereignty.

This fragmented approach to transparency isolates and de-contextualizes each of the transparency forms. More specifically, governmental attitudes towards these different forms vary significantly, to the point that some governments may support one form of transparency and celebrate it as pivotal, while trying to stop efforts to promote another. If an open and transparent attitude towards world trade regulation is beneficial to traders, consumers and citizens, then it becomes less and less obvious why one form is desirable while others are polemically engaged with.

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[111] *Id.* at 342.
[112] *Id.* at 361 says that one is preferred over the other to create legitimacy.
[113] With the exception of PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS (2008) and Steve Charnovitz, *Transparency and Participation in the World Trade Organization*" 56 RUTGERS L. REV. 927(2003).

Most traditional analyses on transparency recognize the legitimacy conundrums in the WTO and identify rather loose links between transparency and legitimacy. Padideh Ala'I, [114] a prolific Article X scholar, mainly focuses on the history of GATT and WTO jurisprudence. Although she links the emphasis of the WTO on legal transparency to good governance, she does not elaborate more on the implications of this emphasis, other than to say that transparency is moving to the forefront of international trade law. In particular, she traces the emergence of the rule from obscurity to prominence in jurisprudence and extends her analysis on the affect the expansion of the trade mandate that the WTO brought about to transparency. Her more recent work on transparency is as editor of a book and author, co-edited with Robert Vaughn, which focuses mainly on general theory of transparency and transparency in domestic law. In the last part, entitled Transparency in Global Governance, the last of three contributions by Padideh Ala'i and Matthew D'Orsi discusses transparency in the WTO. The analyses does not depart from Ala'i's previous work, discussing transparency under classic international law and focusing on Article X of the GATT and implementation of related reports. Biukovic also explores legal transparency and the national trade and administrative practices of China and Japan.[115]

In addition to providing the only, very brief account of the four types of transparency in the WTO in his book,[116] Van Den Bossche also discusses external transparency in a separate article, where he looks at other international organizations in addition to the WTO.[117] Charnovitz elaborately discusses the pre-GATT history of transparency and the GATT and WTO case law in a manner similar to Ala'i. Additionally, he introduces

[114] Padideh Ala'I, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance* 11.4 J. INT'L ECON. L. 779-802 (2008) and Ala'i, Padideh, & Matthew D'Orsi, *Transparency in International Economic Relations and the Role of the WTO* in RESEARCH HANDBOOK ON TRANSPARENCY (P. Ala'i & R. Vaughn eds. 2014).
[115] Ljiljiana Biukovic, *Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan* 11:4 J. INT'L ECON. L. 803(2008).
[116] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 152 et seq. (2008).
[117] Peter Van den Bossche, *NGO Involvement in the WTO: A Comparative Perspective* 11:4 J. INT'L ECON. L. 717 (2008).

private participatory rights[118] that appear in the Safeguards Agreement, the GATS and the TBT Agreement. In his article, he also mentions administrative transparency[119], external transparency,[120] as well as the relationship between other governmental organizations and the WTO, drawing some links to the organization's accountability. He also includes some suggestions for the future of the WTO. This work perhaps is the only to-date article that incorporates almost all forms of transparency, but in a score-card fashion, albeit with very limited analysis on the implications of each form.

Drawing a comparison with the EU, Weiss discusses legal transparency and briefly mentions *amicus curiae* briefs.[121] Asif Qureshi focuses on the Trade Policy Review Mechanism, its history and work, without further elaborating on the institutional framework and the overall effect of the mechanism in international trade culture. Etsy and Bonzon draw links with good governance that place them much closer to Global Administrative Law. Etsy discusses transparency in the context of links between the WTO's governance and administrative law while Bonzon's analysis focuses more on public participation avenues within the WTO. De Brabandere in a similar note discusses public participation, but in the context of adjudication and the submission of *amicus curiae* briefs by NGOs. He links such participation to what he sees as "public interest" of a dispute, which begs the question of which WTO decisions lack such interest.[122] Mavroidis and Hoekman discuss external transparency peripherally in the national legal orders' framework and civil society voices are seen as best filtered within domestic administrations.[123]

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[118] Steve Charnovitz, *Transparency and Participation in the World Trade Organization* 56 RUTGERS L. REV. 927 at 937(2003).
[119] *Id.* 945
[120] *Id.* Page 949
[121] Friedl Weiss, & Silke Steiner. *Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison*, 30 FORDHAM INT'L L. J. 1545 (2006).
[122] Eric De Brabandere, *NGOs and the'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12:1 CHI. J. INT'L L. 85 (2011).
[123] Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance* 23.4 THE WORLD ECONOMY 527-542 (2000).

Wolfe and Mavroidis in a recent article[124] salute transparency as "the real jewel in the WTO crown"[125] and part of the "WTO's DNA."[126] They focus entirely on legal transparency, although some of their comments on developing countries and Preferential Trade Agreements allude to internal transparency issues. Looking at the history of Article X transparency they identify three generations of transparency norms[127], where the first generation is Article X of the GATT, the second generation includes monitoring and surveillance mechanisms in the WTO (such as the various notification and policy review mechanisms), and the third generation is related to the WTO's enlargement and access of the public to information. In their analysis, unclear at parts, they mention that information can be of assistance to traders and consumers, or citizens.

They cite the establishment of inquiry points but mention that "the 'intensity' of information" given to traders should be different as "traders do not possess sophisticated bureaucracies that will 'process' supplied information for them." This is one of the more obscure parts of their analysis, as it is not entirely evident what type of information would require a sophisticated bureaucracy in order to be understood. Usually, traders are interested in a single product or a class of products, and given their familiarity with their specific trade area, they may be very capable to understand, assess and utilize information given to them with respect to the commodities of interest. A similar rationale applies to labor and trade unions. Moreover, instead of keeping information from reaching the public unless filtered and processed, especially considering the internet's low publication cost, it is better to publish more and provide filters of assistance when those are available.

Their analysis turns towards treating information like a scarce commodity.[128] Three major points are not at all addressed, or are not addressed sufficiently. First, the notion of internal transparency asymmetries, or the systematic exclusion of developing countries.

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[124] See Petros C. Mavroidis & Robert Wolfe, *From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO* ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES RESEARCH PAPER RSCAS (2015).
[125] *Id.* 1.
[126] *Id.* 1.
[127] *Id.* 2 et seq.
[128] *Id.* 5, 6.

They note that small countries need more from the WTO without any mention of the collusive practices endorsed by developed countries, such as the Green Room.[129] Second, they mention citizens and the general public but do not elaborate on how to make the organization and its functions more accessible, both at an informational level but also during litigation, when interested citizens try to submit *amicus* briefs. Finally, they allude towards administrative capacities of the WTO, but do not discuss at all any aspects of the WTO's administrative transparency. In particular, they do not propose any concrete measures to improve institutional capacity that will promote more reporting of information meaningful to traders and consumers.

Any proposals for improvements on transparency focus on the utilization of existing rules, advocating for the protection of the inter-state nature of WTO agreements, which create rights and obligations only for their member states and only after their consent to limit their sovereignty. The vast majority of the aforementioned analyses do not differ much from the WTO official day-to-day discussions on transparency, obscuring the large internal and external problems, and instead focusing on trade monitoring alone.[130] Most importantly, the different forms of transparency are always discussed in isolation from each other. These contributions adopt many of the classic international law scholarship characteristics lacking a coherent framework for transnational phenomena and are distinguishable from global governance discussions in the sense that they filter out transnational governance.

4. International Public Law

International public law scholarship has been very prolific in discussions on the Rule of Law, transparency, accountability and participation in global governance. In particular, a large number of scholars have discussed the aforementioned themes in the context of international organizations, transnational actors and regimes, such as the UN, the WTO, the Basle Committee, WADA, the International Red Cross and others. Early works pre-

[129] *Id.* 5.
[130] Deputy Director-General Yonov Frederick Agah WTO: 2014 NEWS ITEMS 11 July 2014 TRADE MONITORING *DDG Agah notes no acceleration of new restrictions, urges more trade transparency* at https://www.wto.org/english/news_e/news14_e/ddgra_10jul14_e.htm

dating the proliferation of this scholarship focused mainly on arms control, disarmament (nuclear and otherwise) and nuclear energy. In the nineties and throughout the last decade, many public international law scholars identified the proliferation of international institutions and tribunals and the ensuing institutional crises, and set out to create an analytical framework that would provide investigations and potential solutions to problems. All of the scholarship in the group of international public law gravitated strongly towards public law analyses. They engage in discussions of global governance, which they trace in the emergence and consolidation of principles such as transparency, accountability and participation, as well as global rights and legal orders above the nation state. Four sub-groups emerged within International Public Law, all of them using parts of the domestic public law conceptual metaphor: first, the Global Administrative Law (GAL) theorists, second those who discussed the exercise of public authority in international organizations, the constitutionalists and finally, societal constitutionalism.[131]

Based on three different factors, the following table summarizes the position of each group. The first column summarizes the type of domestic public law that each theory uses as its main analogy for its approach on WTO law and on principles such as transparency. The second column discusses the types of actors each group places emphasis on: state and non-state actors, intergovernmental organizations, for profit and non-profit non-state actors, formal and informal governance networks and individuals. Finally, the third column summarizes the relationship between the international public law theory and the notion of hierarchy, which in domestic public law exists in a more pronounced manner. The approaches to hierarchy range from non-existent, fluid or heterarchical to more structurally defined and approximating the Kelsenian order.[132]

	Domestic Law Analogy	**Actors**	**Hierarchy**
GAL	Administrative Law	All	Fluid/Amorphous
IPA/IPL	Public Law	All (states and international organizations more pronounced)	Two orders: domestic public and international public
Constitutionalism/ Democratization	Constitutional Law/ Democratic theory	All	Pyramid (on top combination of democratic values and constitutionalism)
Societal	Autonomy of	All	Two orders: Constitutional law (with the

[131] As distinctions become more specific, many works overlap within two or all of the three groups.
[132] Hans Kelsen, *The pure theory of law and analytical jurisprudence* 55 HARV. L. REV. 44-70 (1941).

Constitutionalism	societal constitutions (loose link with constitutional law)		*pouvoir constituant*), ordinary law

Table 4 International Public Law Theories

a) Global Administrative Law

The field of Global Administrative Law (GAL), as a coordinated scholarly effort to examine how global governance works, emerged at the end of the last century at New York University School of Law and carried itself into the first decade of the new century. The GAL project had a transnational approach to the evaluation and interpretation of principles of administrative law that emerge in the global space. Its focus was less directed to the nation-state. It is based on two conceptual notions. First, most of what is described as "global governance" is in fact regulatory administration, namely administrative action that occurs at various levels. Second, this administrative action is governed by principles of administrative law. Global administrative law is not restricted to formal and traditional international law, nor does it exclude national law. In addition to these, it extends to hybrid regulatory networks, informal institutional arrangements, transnational initiatives and private governance and regulatory schemes. The principles it focuses on are mainly participation, transparency, accountability, reasoned decision making and review. In the words of its architects:

> "We […] regard global administrative law as encompassing the legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.[133]"

Thus, GAL looks at processes, structures, norms and actors that are involved in global regulatory decision-making and implementation. The analysis that the GAL project did

[133] See *Global Administrative Law - Resources Concept and Working Definition* available at http://iilj.org/GAL/GALworkingdefinition.asp.

not only revolve around the legal nature and the effects of these normative phenomena, or the validity of their sources but it extended to examining how they affect the accountability of global administrative bodies. [134] The GAL project adopts a transnational approach to the evaluation and interpretation of principles of administrative law that emerge in the global space. It is based on two conceptual notions. This approach essentially traces global governance in any form of administrative action that occurs in a "global space." As such, it does not assign a higher quality to the exercise of administrative action when it originates in international organizations or national institutions, versus that of informal networks, NGOs, private initiatives and multinational corporations. This approach departs from the narrow Westphalian-centric view, suggests that the origins of global governance lie in *any form* of administrative action with a cross-border element, and it moves away from statist concepts of exercise of public authority. GAL is not restricted to formal and traditional international law, nor does it exclude national law. In addition to these, it extends to hybrid regulatory networks, informal institutional arrangements, transnational initiatives and private governance and regulatory schemes.

Transparency and information disclosure are prominent regulatory principles in national administrative law, and GAL scholarship traces these principles at the transnational and international level, discussing their function and proposing ways to improve them. Transparency takes many forms, such as openness [135], participation, right to information[136] and access to documents.[137] Transparency is also explored in the context

[134] Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 2 INT'L ORG. L. REV. 319–356 (2009) and Nico Krish & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17:1 EUR. J. INT'L L. 1-13 (2006).

[135] Interesting examples of transparency improvement are the OECD (see James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS 191-227 (2005)) and the Basle Committee (Michael Barr & Geoffrey Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15-46 at 17 (2006)), Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6 INT'L ORG. L. REV.421-446 at 445 (2009).

[136] James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS 191-227 at 196 (2005).

[137] Julio A. Lacarte, *Transparency, Public Debate and Participation by NGOs in the WTO*, 7:3 J. INT'L ECON. L. 683–686 at 659 (2004).

of promoting stability.[138]Etsy discusses administrative principles and transparency, and good governance.[139] Bonzon traces the different levels through which civil society (or global citizens/consumers) engage with the WTO administration, comparing them with other organizations, and discussing ways to improve these participatory platforms.[140] Stewart explores the push for transparency from national governments (with a focus on the US).[141] The GAL project focuses on soft law transparency, although the project extends into the other forms as well. It refers mainly to the process of selection, every-day works and working procedures for international administrators, employees of the organization. When examining transparency, scholars of the Global Administrative Law project focus equally on intergovernmental organizations, formal and informal regulatory bodies, mutual recognition arrangements, indirect regulatory powers of international organizations and hybrid public-private or private transnational bodies. Some trace the development of transparency in traditional administrative law, but identify a paradox in the asymmetry of focus in transparency in the domestic level compared to the international level.[142]

The GAL project thus sees transparency as structurally linked to participation [143] and accountability. [144] It is not confined in the realms of structures and processes that resemble those of national administrative law. Instead, transparency in GAL extends to private initiatives and hybrid regulatory networks. Its coupling with participatory elements is a clear attempt to locate some form of democratic legitimacy at the global level, and to further argue for ways to increase these quasi-democratic elements. There is

[138] Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 NYU J. INT'L L. & POL. 953-972, 953 (2006).
[139] Daniel Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law* 10:3 J. INT'L ECON. L. 509 (2007).
[140] Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues* 11:4 J. INT'L ECON. L. 751 (2008).
[141] Richard Stewart, *The Global Regulatory Challenge to U.S. Administrative Law* 37 NYU J. INT'L L. & POL. 695 (2006).
[142] Sabino Cassese, *Administrative Law without the state? The challenge of global regulation*, 37 NYU J. INT'L L. & POL. 663 691-692 (2006).
[143] Richard Stewart, *The Global Regulatory Challenge to U.S. Administrative Law* 37 NYU J. INT'L L. & POL. 695, at 683 (2006). Benedict Kingsbury et al., *Foreword: Global Governance as Administration - National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS 1-13 (2005).
[144] Nico Krish & Benedict Kingsbury, *Introduction: Global governance and Global administrative law in the international legal order* 17:1 EUR. J. INT'L L. 1 at 6 (2006).

an aspirational inclination, faintly captured in this debate, to eventually introduce electoral democracy beyond the borders of the nation-state. Scholars even go as far as to deposit on transparency and participation their hopes for electoral democracy in the transnational level.[145]

Extending the domestic law analogy, the most important aspect of WTO transparency under GAL is external transparency. Transparency in the WTO according to GAL is linked to public access to documentation. Until the Uruguay Round there seemed to be lack of adequate minutes of meetings and thus, the reports of the meetings did not provide the public with sufficient information. This has been addressed in part by the publication of a greater amount of documents that shed light into the negotiations between member states. Moreover, the WTO website is an important gateway for efficient access to information and documents relating to the works of the organization. The second theme that appears in the transparency of the WTO discussion in GAL is participation of interested parties, like NGOs in WTO processes.[146] The third theme involves the review of transparency requirements by the Appellate Body. Authors such as Shaffer and Nicolaides[147], Benvenisti[148], Chimni[149] and Cassese[150] have very briefly looked at instances where the Panels or the Appellate Body have tackled issues of substantive transparency. However they have tied this analysis with a more general discussion on accountability in international organizations and systemic issues facing the WTO. Finally, GAL discusses internal transparency in the WTO briefly, mostly under the lens of fairness and the Rule of Law.

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[145] Martin Shapiro*, "Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?* 68:3 L. & CONTEMP. PROBS 341-356 (2005). See page 341 "Perhaps, the future transnational administrative law will emerge creating sufficient transparency and participation such that transnational technocracy will achieve some meaningful level of pluralist, if not electoral, democracy."

[146] Daniel Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 11 J. INT'L ECON. L. 509-527 (2008); Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PENN. J. INT'L ECON. L. 359-381 (1996).

[147] Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government* 68:3-4 L. & CONTEMP. PROBS 263-317 (2005).

[148] Eyal Benvenisti, *The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions* 68:3-4 L. & CONTEMP. PROBS 323-340 (2005).

[149] Bhupinder Singh Chimni , *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1-37 (2004).

[150] Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 L. & CONTEMP. PROBS 111-126 (2005).

Two problems with GAL theorists are the lack of linkage between transparency and the organization's unique history as well as the underemphasized legal transparency. GAL literature insists on soft law transparency. GAL does move away from the treaty-centric analysis of rationalism and realism, and closer to knowledge-based or cognitive theories in international law, since it explores the normative potential emerging out of civil society initiatives, scientific communities, and consumer-citizens. However, GAL remains complimentary to the analysis of treaty-based transparency, and thus, appears to introduce a weak cognitivist perspective. Weak cognitivism adopts a critical perspective towards rationalist approaches by introducing the perspective of normative elements of transnational actor participation in global governance. Strong cognitivism would, instead provide a single framework of analysis for both the internal WTO discourse (legal, internal and administrative transparency) as well as the external discourse (external transparency). In seeking such a common thread, theories responding to GAL introduced notions such as "constitutionalism" or "global norm" in order to show that transparency has a meta-normative value. In reality, GAL in its definition also alluded to the meta-normative value of administrative principles. The entire theoretical account aims to show that the collective analysis of the administrative law principles that appear in international law produces a result larger than the aggregate of the principles, a new group of rules, Global Administrative Law. The next groups counter this meta-normative perspective with Global Constitutionalism.

b) The exercise of Public Authority at the International Sphere

The response to the Global Administrative Law project came from the second sub-group, the Max Planck Institute for International Law, where scholars captured this debate focusing mostly on public law elements of the exercise of international authority by extending domestic notions of public authority to the international level (International Public Authority- International Public Law, or IPA/IPL) under the understanding that the

nation-state still had a significant role to play in the discussion of global governance.[151] The Max Planck School extends domestic notions of public authority to the international level.[152] Such extension is the focus on the "publicness" of public international law, including administrative law, constitutionalism and any other examples of domestic public law.[153] Global governance exists insofar the adoption of such principles by international institutions (or other networks) occurs as exercise public authority, similarly to the domestic legal order. The IPA/IPL theorists discuss the regulatory authority from non-state actors and hybrid networks but show emphasis on state-created institutions, especially international organizations, their tribunals and their committees.

According to Armin Von Bogdandy:

> "a public law approach to the law of international institutions is a way to further legal understanding of the phenomena of global governance […] The development of general principles of international public authority, such as the principle of attributed competence, or of human rights protection, aims at the strengthening of the publicness of public international law. So far the general principles of international law correspond mainly to private law principles or principles of litigation between equal subjects, i.e. private law litigation. The emergence of the public law component together with principles of international public authority is not just a sectoral phenomenon since international institutions are of considerable importance in many fields of international law. Therefore this development heralds an overall strengthening of the publicness of public international law and evolves the general principles of international law. We propose as the disciplinary point of departure for studying global governance phenomena the discipline of international institutions. […] One should not only study principles of such international institutions which are subjects of international law but also of other institutions such as treaty organs or informal institutions which exercise public authority."[154]

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[151] One of the main publications of the Max Planck School discussing public authority in international institutions is volume 9 issue 11 of the GERMAN L. J. special issue "Public Authority and International Institutions" 2008.
[152] Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERMAN L. J. 1909-1938 (2008).
[153] *Id.*
[154] *Id.* 1914-1915.

This approach suggests that the origins of global governance lie in national administrative law. In particular, the principles of participation, transparency, accountability and review of reasoned decision-making were substantiated in the national level after the French Revolution and have been elaborated on extensively both in administrative practice but also through judicial review. Thus, they are now considered part and parcel of rule of law requirements for governments.

The Heidelberg response to the Global Administrative Law project begins under the understanding that transparency is a fundamental value of public institutions in liberal democracies[155]. Under a Weberian analysis, governments were seen as seeking exclusive access to knowledge as a method of increasing their power.[156] Instead of focusing on informal participatory elements, which, if identified are seen as underdeveloped at best[157], the Max Planck School directs the focus of the transparency debate to free access to documents.[158] It is generally seen as a "fuzzy" concept, which can be understood when seen under the lens of a particular institution. [159]

Transparency in IPA/IPL is discussed under the administrative law paradigm. Bogdandy, Goldmann, Ioannides and Venzke observe transparency as the legitimizing element of international public authority in the WTO, the international public law substitute to the lack of a parliamentary authority and majoritarian democracy at the global level and a method to limit unjustified discrimination. De Wet and Feichtner argue that transparency will improve the efficacy of monitoring and oversight mechanisms themselves. Thus, the Max Planck School focuses on formalized processes that promote transparency and are coupled with specific "global bureaucracies", that is, formal administrative processes that

[155] Armin von Bogdandy et al, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L. J. 1375-1400, 1384 (2008).
[156] Ingo Venzke, *International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law*, 9 GERMAN L. J. 1401-1428, 1418 (2008).
[157] Clemens A. Feinäugle, *The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?* 9 GERMAN L. J. 1513-1539, 1538 (2008).
[158] Diana Zacharias, *The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution* 9 GERMAN L. J. 1833- 1864, 1850 (2008).
[159] Karen Kaiser, *WIPO's International Registration of Trademarks: An International Administrative Act Subject to Examination by the Designated Contracting Parties*, 9 GERMAN L. J. 1597-1624, 1617 (2008).

exist in the context of intergovernmental organizations. Any potential democratic elements of transparency beyond that of "legitimacy substitution" are altogether eluded, but without any formal explanation other than the general mandate of focus on "publicness."

With respect to the WTO, the transnational idea of involvement of non-state actors and networks is obscured.[160] Rather, the focus shifts on circulation of documentation to all members by the secretariat and the move toward multilateral review of documentation.[161] The main distinction examined here is between informal and formal meetings, and the conceptual dichotomy that results is between formality and informality.[162]

c) Constitutionalism

A very prominent and illuminating set of analyses that discuss transparency in the WTO come from two groups of scholars who engage in discussions of constitutionalism in Global Governance and in WTO Governance. We will divide these into two groups, namely "endogenous" and "exogenous" constitutionalists, depending on whether they treat the WTO as their main case study, emphasizing the uniqueness of the organization and thereby, their conclusions, or they see the WTO as one of few examples of the manifestation of transparency as a norm. The origins and aspirations of each constitutionalist perspective differ to a certain extent. Both scholarly streams appear to exhibit a form of angst with respect to the political space in global governance.[163] Constitutionalist theories in International Law seek a framework with elements that resemble the domestic public legal order. They recognize common features between

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[160] Isabel Feichtner, *The Administration of the Vocabulary of International Trade: The Adaptation of WTO Schedules to Changes in the Harmonized System*, 9 GERMAN L. J. 1481-1512 (2008) and also (mainly) Joseph Windsor, *The WTO Committee on Trade in Financial Services: The Exercise of Public Authority within an Informational Forum*, 9 GERMAN L. J. 1805-1832 (2008) but also Ravi Afonso Pereira, *Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission*, 9 GERMAN L. J. 1693-1718 (2008).
[161] Feichtner, *id*, 1494.
[162] *Id.* p.1500, 1502, Joseph Windsor, *The WTO Committee on Trade in Financial Services: The Exercise of Public Authority within an Informational Forum* 9 GERMAN L. J. 1805, 1816 (2008).
[163] Opposite argument by Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law*, 17:3 EUR. J. INT'L L. 647 (2006).

national parliaments and plenary organs of international organizations, the judiciary and international tribunals, and the executive (government) and international administrations.

First, exogenous constitutionalists, namely Global Governance constitutionalists, form the outer limit of theorists in International Public Law/International Public Authority. Amongst IPA and IPL analyses the constitutionalist perspectives demonstrate the strongest public law features. They are concerned with legitimacy deficits in international organizations and identify patterns of normative distillation into norms that resemble those of the national constitutions, which, they argue, have consolidated into "global norms." Transparency in Constitutionalism as an extension of IPA/IPL legitimizes international rules and enables, through the dissemination of information, to the possibility of deliberative democracy at a global level. Just like IPA/IPL, IPA/IPL constitutionalism focuses on external transparency in the WTO and openness and prompt publication of dispute settlement proceedings. As such, transparency is an enabling condition or a pre-condition of constitutionalization of global governance.

Within the IPA/IPL discourse, and in opposition with the constitutionalist voices who are his peers, Delimatsis explicitly refuses the constitutional qualities of transparency in the WTO, together with constitutionalization generally, claiming that a "constitution without distributional effects cannot be conceived." This demonstrates that his theoretical approach is pegged to national constitutionalist structures. He discusses a few aspects of three transparencies, namely internal, external and administrative transparency, leaving legal transparency entirely outside this debate. He adopts an institutionalist approach with some critical elements, resembling the IPA/IPL scholarship but falls short of adopting the constitutional dialect of Peters.[164]

Most analyses tracing constitutional qualities in international transparency are either bound by the constraints of Article 38, gravitating towards the formal pronouncement of transparency as a general principle of law, tied to due process and the rule of law, and

[164] Panagiotis Delimatsis, *Institutional Transparency in the WTO*, in TRANSPARENCY IN INTERNATIONAL LAW 112-141 (A. Bianchi & A. Peters, eds. 2013).

simultaneously are tied to the domestic administrative law and constitutional paradigms. They either emphasize a link to the nation state, or to Article 38 of the ICJ Charter, which is reflective more of the Westphalian world-order. Possibly a saving grace of the latter tendency is the linkage to general principles of law, the source less connected to *pacta sunt servanta.*

Such a framework of analysis is highly reminiscent of early 20th century scholarship on general principles of law, identified as general principles of the common law and civil law.[165] In this vein, Andrea Bianchi traces transparency to national democracies[166] which further explains the "operational" quality assigned to transparency as a principle of national administrative law.[167] The definitions of transparency adopted also retreat from the idea of "meaningful" information, which would embrace a more contextual approach to transparency in the internet era, as we will see in the next chapter. Thus, transparency is coupled with the "adequacy, accuracy, availability, and accessibility of information"[168] or to the "degree to which information is available to outsiders that enables them to have informed voice in decisions and/or to assess the decisions made by insiders."[169]

Megan Donaldson and Benedict Kingsbury, who offer the following twelve hypotheses on the effects of transparency in global governance, adopt a clearer outlook towards transnational elements of transparency:

1. "Transparency measures […] may affect choices about what information to produce and how it is presented."[170]

[165] See Maria Panezi, *Sources of Law in Transition: Re-visiting General Principles of International Law*, 66 ANCILLA IURIS, available at www.anci.ch (2007).
[166] Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law* in TRANSPARENCY IN INTERNATIONAL LAW 4 (A. Bianchi & A. Peters, eds. 2013).
[167] Hinojosa Martínez & Luis Miguel, *Transparency in International Financial Institutions* in in TRANSPARENCY IN INTERNATIONAL LAW 102-103 (A. Bianchi & A. Peters, eds. 2013).
[168] Julie Maupin, *Transparency in International Investment Law: the Good, the Bad, and the Murky* in TRANSPARENCY IN INTERNATIONAL LAW (A. Bianchi & A. Peters, eds. 2013) citing Chayes Chayes and Mitchel.
[169] Cosette Creamer & Beth A. Simmons, *Transparency at Home: How Well do Governments share Human Rights Information with Citizens?* in TRANSPARENCY IN INTERNATIONAL LAW 239 (A. Bianchi & A. Peters, eds. 2013).
[170] Megan Donaldson & Benedict Kingsbury, *Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance* in in TRANSPARENCY IN INTERNATIONAL LAW 522 (A. Bianchi & A. Peters, eds. 2013).

2. "The impact of transparency depends on the existence of intermediaries wiling and able to make use of the information provided."[171]
3. "Transparency measures may alter existing inequalities between states in access to information held or collected by global governance institutions."[172]
4. "Impacts of transparency measures on particular States depend on resources and capacity to make use of information."[173]
5. "Transparency measures may increase the influence of some States over the programmes of global governance institutions, relative to the influence of other states."[174]
6. "Transparency measures may play a role in shifting relations of power within states."[175]
7. "Transparency measures may reduce cooperation of some States with an institution and/or decrease willingness to seriously address particular issues within that institution."[176]
8. "Transparency measures can enable greater scrutiny and contestation of, or conversely support for, policies being pursued at the instigation of a global institution."[177]
9. "Transparency measures may foster productive contributions to an institution's work by other actors, facilitating reform and development within the institution and/or strengthening its epistemic authority."[178]
10. "Transparency measures can break down an institution's epistemic authority."[179]
11. "Transparency measures may multiply and diversify relationships between global institutions and non-State actors."[180]
12. "Transparency measures may empower actors who are in a position to process information and render it comprehensible to others, altering the influence of non –State actors on the work of global institutions."[181]

These twelve points offer a comprehensive approach to transparency in global governance. They offer a typology of different possible relationships that transparency creates within and outside international organizations and an insight in the different dynamics that transparency produces. According to Kingsbury and Donaldson, six types of relationships become possible with transparency. The first two are unidirectional,

[171] *Id.* 524.
[172] *Id.* 525.
[173] *Id.* 526.
[174] *Id.* 526.
[175] *Id.* 527.
[176] *Id.* 527.
[177] *Id.* 528.
[178] *Id.* 528.
[179] *Id.* 529.
[180] *Id.* 530.
[181] *Id.* 530.

referring to the global institution as the source of information (1) and the possibility of intermediaries to distribute information (2). The other four involve two or more actors: relations among states (3, 4), relations between the state and the institution (3, 4, 5, 7, 8), relations within a state (4,6 for example, among political powers, the governing and the governed, or various constituencies) and relations between the institution and the global community at large (9, 10, 11, 12).

All four forms of transparency fall within this typology. For example, administrative transparency relates to the first point, external transparency to the last four, three and four relate to internal transparency, and points three to eight can apply to legal transparency. Three more things are noteworthy at this point with respect to this list and the WTO. First, legal transparency, the obligation of states to disclose information appears in more robust form in the WTO (as it is a specific treaty obligation) and it is litigated on. Second, the WTO has developed peer-to-peer monitoring mechanisms, and thus point 8, on scrutiny is built into the WTO agreements, thus it is not an outcome of transparency but one of its constitutive elements. Third, transparency in this analysis appears to be induced by institutional preference. In other words, it exists as a result of a choice made by the global administration itself. That may be accurate for many international organizations, however it only describes part of the WTO's transparency landscape. External transparency for example has been at times initiated by civil society alone, as it happened with the *amicus* briefs.

This is possibly the most extensive analytical framework on transparency in Global Administrative Law and global constitutionalism. It indicates that transparency can take multiple forms, but stops short of exiting weak cognitivism and the proximity to the national paradigm of administrative law.[182] The four transparency forms explored in this thesis aspire to follow a similar typology and identify relations among different actors and the effect transparency has on their dealings. However, it combines this analysis with the points Howse, Nicolaides and Cass have made on democratization in an attempt to

[182] Kingsbury and Donaldson *id.* only say that there is no one transparency rule but stop at that.

depart from weak cognitivism and the nation-state prototype that lies beneath the transparency analysis.

The most constitutionally conscious approach on transparency comes from Anne Peters. She sees the transition of transparency towards the status of a global norm[183], a global public good, non-rival and non-excludable.[184] and insists on its public law elements, as it is a component of publicness, necessary for deliberative democracy.[185] She notes that

> "In yet another sense, transparency is both the driver and the manifestation of a paradigm shift to 'public' international law. Transparency seems indispensable to international practices and rules, because the element of transparency supports the qualification of these rules and practices as *law* in the modern sense."[186]

A very illuminating observation is her argument on the compensatory nature of transparency. The forces of globalization resulted in a proliferation of norms as well as the lack of transparency within many regimes. The GATT for example was barely newsworthy before 1995. Only in 2002 did the organization start publishing its documents online. Yet, the tens of thousands of pages of documents regulate trade to an impressive extent. The force that produced this need for transparency has come from globalization itself. [187] She also acknowledges the lack of a right to transparency, when she observes that "international organizations generally do not acknowledge the *individual rights* of persons to access their documents"[188] Rather, transparency exhibits

[183] Anne Peters, Towards Transparency as a Global Norm in TRANSPARENCY IN INTERNATIONAL LAW 536 (A. Bianchi & A. Peters, eds. 2013).
[184] *Id.* at 542.
[185] *Id.* at 603.
[186] *Id.* at 602.
[187] *Id.* at 540.
[188] *Id.* at 545: True, in the WTO that is not actionable. But think about the provisions in treaties that obligate states to create transparency. Perhaps we can speak of the formation of indirect rights.

both strong emancipatory elements, as a power shifter.[189] Transparency's enabling role is a recurrent theme in Peters' work on democracy in global governance.[190]

Peters draws a link between transparency and democracy referencing Madisonian democracy.[191] She further briefly notes that "the international legal system may have a proto-democratic quality in which transparency plays a role"[192] Her analysis is replete with a domestic understanding of constitutionalism, publicness and democracy, although there are many important observations on the role of NGOs, experts and international administrations with respect to global governance and democratization. [193] She mentions for example that

> "the transparency of global governance should be improved in order to assume those very constitutional and in particular democratic functions transparency performs in domestic law."[194]

Her insistence on the national legal system characteristics of transparency appear throughout her analysis. Moreover, transparency and its costs may be not compatible with Peters' constitutionalism.[195] She hails the EU transparency, although in her analysis[196] the multifaceted role of EU transparency norms is not evident. Finally, she declares that "Most importantly, transparency in itself does not bring about democracy. It is only, but importantly, a pre-condition for democratic procedures."

Second, endogenous constitutionalists, or WTO constitutionalists, primarily examine WTO legitimacy issues. They mostly identify as WTO scholars and are exploring

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[189] *Id.* at 555 resembling the analysis of Kingsbury and Donaldson.
[190] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 266 (J. Klabbers et al eds. 2009).
[191] Anne Peters, Towards Transparency as a Global Norm in in TRANSPARENCY IN INTERNATIONAL LAW 562 (A. Bianchi & A. Peters, eds. 2013).
[192] *Id.* at 564.
[193] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 288, 292 (J. Klabbers et al eds. 2009).
[194] *Id.* at 326.
[195] *Id.* at 327.
[196] *Id.* 329 et seq.

patterns of constitutionalization within the WTO and insist on the possibility of WTO reform.

First, John Jackson puts forward an institutionalist form of constitutional theory, which locates the constitutional elements in the WTO in the dense institutional forms that have consolidated over the GATT years and became a lot more pronounced and formally institutionalized in the WTO, especially in view of the establishment of the Dispute Settlement Mechanism in the transition to the WTO. Second, Ernest-Ulrich Petersmann proposes a trade-rights-based constitutionalism. He emphasizes the constitutional dimensions of a fundamental right to trade, which limits the power and reach of governments. According to this approach, a set of normative values have concentrated in the organization to the extent that they effectively give rights to citizens and limit the power and reach of governments.[197] As the right to trade resembles the rights in domestic constitutions it contributes constitutional qualities to the WTO. External transparency is both an aspect and a manifestation of this right. Petersmann places economics above politics in the constitutional structure that he designs. The flaw in Petersmann's construct stems mainly from the circularity of legitimizing an economic regime through the use of economic rights. It becomes self-referential to expect the economic system that was built based on a neoliberal economic paradigm and produced certain rights as a result of its underlying economic thinking and principles to be in its turn legitimized by the very same rights.[198] Neither Jackson nor Petersmann appear to have a concrete agenda for the role of transparency in their constitutional constructs, although one could imagine that for Petersmann it forms part of the economic rights he proposes as the basis of his rights' constitutionalism.

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[197]Ernst-Ulrich Petersmann, *How to Constitutionalize International law and Foreign Policy for the Benefit of Civil Society?,* 20 MICH. J. INT'L L. 1-30 (1998); the same: *The WTO Constitution and Human Rights* 3 J. INT'L ECON. L. 19-25 (2000); the same *Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 32-67 (D.L.M.Kennedy & J.D.Southwick eds.. 2002); the same: *From 'Member-Driven Governance' to Constitutionally Limited 'Multilevel Trade Governance' in the WTO*, in THE WTO AT 10: THE ROLE OF DISPUTE SETTLEMENT 86-110 (G.Sacerdoti et al. eds. 2006).

[198] GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 32-33 (2012).

The third approach by Deborah Cass argues that we can trace constitutional elements in the WTO generally, and more specifically in the organization's adjudicating processes (judicial constitutionalization). Cass however suggests we should move beyond the efforts to create a single constitutionalist theory in the WTO. She posits that inconsistencies in the interpretation of WTO rules will be avoided if we replace trade constitutionalization with trading democracy. The shift towards the democratic rule mitigates the circularity that is apparent in Petersmann's account. With respect to transparency, her focus is mostly on external transparency and existing inconsistencies with respect to individual and NGO participation and access to information. Allowing more transparency and participation of more actors according to Cass will strengthen deliberative processes, and contribute to trading democracy. A similar approach, linking transparency directly to democracy is adopted by Howse and Nicolaides who identify transparency as a 'key value' in the WTO demonstrating "the embrace of the political ethics of democracy." We will follow up on their very useful critique of constitutionalism in favor of democratization in the beginning of the next chapter. When Howse and Nicolaides discuss the connection between constitutionalism and legitimacy, they note that:

> "In the short run, at least, the application of the language of constitutionalism to WTO is likely to exaggerate the hopes of globalization's friends that economic liberalism can acquire the legitimacy of higher law- irreversible, irresistible, and comprehensive. At the same time, it is likely to exacerbate the fears of the "discontents" of globalization that the international institutions of economic governance have become a supranational Behemoth, not democratically accountable to anyone."[199]

d) Societal Constitutionalism

Teubner proposes a form of constitutionalism that actively steps outside the bounds of the nation-state and adopts a different lens of analysis for transnational constitutional forms.

[199] Robert Howse & Kalypso Nicolaidis, *Legitimacy and global governance: Why Constitutionalizing the WTO is a Step too far: Efficiency, equity, Legitimacy—The multilateral trading system at the millennium* 227-252 at 228 (2001), Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?* 16.1 GOVERNANCE 73-94 (2003).

Following Koselleck's analysis[200], he observes that transnational regime constitutions do not reach the density of national ones.[201]

Teubner addresses global governance and its legitimization in the context of societal constitutionalism. He refutes the 'unitary bias' of the term "constitution" and instead he traces constitutionalism in several different regimes, intergovernmental and private, applying constitutionalism to "fragments" of global society, such as the economy, law, art, science and others.[202] He identifies the constitutional emancipation of the WTO in the existence of the Dispute Settlement Body, the Most Favored Nation principle, the prioritization of trade rules and the direct effect of WTO law.[203] However, any "one-sided 'neo-liberal' reduction of global constitutionalism" cannot be sustained.[204] The WTO's constitutive elements are heavily biased pro-trade and pro-MFN, with few exceptions (and even then, the exceptions are strategically allowed only when they follow the pro-trade ethos).[205]

The push from the periphery of the WTO has grown stronger and as a result, 'deliberative-participatory polyarchy' can show the way to democratic avenues for stakeholder participation. Such theories of 'deliberative-participatory polyarchy' draw emphasis on "the political relevance of civil society but also [attempt] to discover their democratic potential and to design procedures of civic participation."[206] Such a process of societal constitutionalization allows for the establishment of norms that draw their legitimation from their public interest character.[207]

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[200] Gunther Teubner, *The Project of Constitutional Sociology: Irritating Nation State Constitutionalism*, 4.1 TRANSNATIONAL LEGAL THEORY 44-58 at 52 (2013).
[201] *Id.* Page 48.
[202] *Id.* and GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012).
[203] GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 55(2012).
[204] *Id.* 78.
[205] *Id.*
[206] *Id.* 38.
[207] *Id.* 50.

This socio-legal analysis actively moves away from the domestic analogies that almost all constitutionalist theories use and adds two crucial elements that will help us dissect transparency in a much better light: polyarchical democratization, namely democratic forms that do not necessarily stem from voting processes, and legitimization through the public interest. Coupled with Cass', Howse and Nicolaides' recommendations to move towards democratization and away from constitutionalism in the WTO we will in Chapter II propose a theoretical frame to utilize transparency in order to understand how such analysis may be practically possible in the WTO today. However, before that, two more theoretical strands deserve our attention: a critical perspective on global governance in international law from the global south and its global north counterparts, and the contributions of regime theory.

5. TWAIL and Critical International Law

Transparency was discussed in the works of others who critically engaged with the works of the Global Administrative Law and the Max Planck groups. Scholars from the Global South, as well as their counterparts in the North, which I will group here as "Critical International Law", criticized the scholars in these previous two groups (IPL) for their lack of adequate consideration for development needs and the celebratory analysis of administrative principles as "good governance principles." All agree on the existence of inconsistencies in global governance discussions and the need for a more critical approach towards principles that are borrowed from domestic legal systems and may carry particular histories not applicable in all contexts or in international law, cautioning against legal transplants.

In its discussion of transparency generally and transparency in the WTO more specifically, Critical International Law scholarship is divided into two distinct groups: those who see the current status of transparency in international financial institutions as inadequate and urge for more and more meaningful transparency as one terrain for the resolution of legitimacy conundrums and those who view transparency skeptically altogether, citing either the origins of the rules in national administrative law that was in

and of itself a product of troublesome national histories, or its links to the Mandate system or finally because of overall skepticism on the political process that labeled some administrative principles from the domestic legal order into "good governance" principles at the international level.

The transparency supporters urge for a need for more transparency and openness of governance at the global level.[208] Chimni addresses skeptically the relocation of sovereign powers to the benefit of international organizations, and discusses the potential compensatory effects of more transparency, which may induce better accountability mechanisms:

> "The relocation of sovereign space in international organizations has undermined resistance in third world countries. Accountability is not even theoretically envisaged today. Those affected in the third world are prevented from expressing their doubts directly to the concerned international organization. Thus, for example, the WTO has no address in India. It is impossible for Indian farmers to protest, like their French and Belgian counterparts, in front of the WTO office in Geneva."[209]

The lack of formal judicial avenues for civil society at the international level render transparency the next best thing according to Chimni.[210]

Dongsheng Zang offers the only to date monograph on transparency in the WTO. He focuses extensively on the negotiations of Article X as well as the political and legal origins of transparency, which he mainly traces in the US administrative law. He then looks at the case law in the GATT and the WTO and argues that liberalism as the core ideology in the WTO is related to the transparency requirements. His approach focuses on legal transparency mostly, and transparency-related institutional discourse, as well as national administrative law. Similarly, Zumbansen cautions against the conceptualization

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[208] Bhupinder S. Chimni *Contribution in* B. S. Chimni et al. (2003). *Theme III: Global Governance: Institutions* 16 LEIDEN J. INT'L L. 897-913 at 899 (2003).
[209] *Id.*
[210] Bhupinder S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, 37 NYU J. INT'L L. & POL. 799 (2004). See also similarly Gerhard Loibl, *Contribution in* B. S. Chimni et al. (2003). *Theme III: Global Governance: Institutions* 16 LEIDEN J. INT'L L.897-913 at 900-901 (2003).

of international norms outside their "historical-intellectual contexts." Similarly to Zang, he argues that the publication of transparency laws coincided with state systems or judicial eras that had devastating results for the world history and economy.[211] Elsewhere, he questions the attitudinal differences towards different administrative law principles when he says that:

> Whereas administrative law for a long time has been described as the law governing "the processes and mechanisms of the welfare and regulatory states," the changes in conceptualization and delivery of "public" services, the role of private actors in public governance and the resulting ambiguities of political representation, transparency and accountability have contributed to a new context of administrative governance.[212]

Also a skeptic, Anghie discusses the links of administrative law principles and the concept of "good governance" to the Mandate system.[213] Rajagopal elaborates on the colonialist origins of administrative law and good governance:

> "Once defined this way development comes to include everything that is seen by the ruling classes as desirable or necessary for the catching up of the Third World with the West: economic growth, poverty alleviation, anticorruption and transparency, environmental sustainability, and even democracy and freedom/rights. The ideology of 'catching up' is itself a complex notion: an aspiration as well as a programme."[214]

Harlow, seeking the principles and values behind the "fashionable" good governance principles echoes the reservations expressed by Anghie and Rajagopal.[215] She also identifies the distinct history that transparency had in the EU context and its emergence as a general principle of administrate law, having received judicial recognition after the Maastricht treaty. A similar reluctance to expand the notion of transparency in the context

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[211] Peer Zumbansen, *Transnational Comparisons Theory and Practice of Comparative Law as a Critique of Global Governance* in PRACTICE AND THEORY IN COMPARATIVE LAW (M. Adams & J. Bomhoff 2012).
[212] *Id.* 509
[213] Antony Anghie, *Time present and time past: globalization, international financial institutions, and the third world* 32 NYU J. INT'L L. & POL.243 (1999) and James Thuo Gathii, *TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography* 3 TRADE L. & DEV. 26 at 31, 42 (2011).
[214] Balakrishnan Rajagopal, *Counter-hegemonic international law: rethinking human rights and development as a Third World strategy* 27:5 THIRD WORLD QUARTERLY 767-783 at 776 (2006).
[215] Carol Harlow, *Global administrative law: the quest for principles and values* 17:1 EUR. J. INT'L L. 187-214 at 195 (2006).

of the WTO has been put forward by Steger,[216] although she belongs to more conventional WTO scholarship. In conclusion, the treatment of transparency by TWAIL is different in each of the two scholarly streams. Both groups however are preoccupied with the meaningful participation of developing countries in international organizations and also the genuine consideration of their interests without the constraints of the neoliberal paradigm.

6. Theory of International Regimes

Examining transparency in the WTO under the lens of Global Governance also relates to International Regimes' Theory to the extent that the latter involves institutional evaluations and normative proposals combining International Law, International Relations and Global Governance in the context of international organizations. We have already briefly discussed realism, rationalism, weak and strong cognitivism. This part will elaborate on these categories and others that appear in Regimes' theory.

The three larger categories of International Regimes' theories depending on their explanatory variables[217] are first, power-based or realist assessments that consider power dynamics as the most plausible lens of analysis in international relations: powerful nations dominate normative production based only on self-empowering motivations; second, interest-based or neoliberal perspectives mostly based on economic analyses and game theory, treating states as rationalist interest-maximizers; and finally, knowledge-based or cognitivist perspectives (weak and strong), examining the origins of state interests and adopting sociological analyses to explain state behavior and interests. The three different theoretical strands assign a different degree of value to international institutions, from weak (realism) to medium (neoliberalism) to strong (cognitivism).[218]

Stephen Krasner in the introductory chapter of the 1982 spring issue of International organization introduces the first four elements of international regimes: normativity (at

[216] Debra Steger, *Afterword: The "Trade and..." Conundrum-A Commentary*, 96 AM. J. INT'L L. 135, 137 (2002) discussing how the GATT "became something greater than a contract."
[217] ANDREAS HASENCLEVER ET AL EDS., THEORIES OF INTERNATIONAL REGIMES 1-2 (1997).
[218] *Id.* 3.

various degrees of potency), decision-making, enforcement, and specificity, namely focus on an issue-area. He defines international regimes as: "principles, norms, rules and decision making procedures around which actor expectations converge in a given issue-area."[219] He further defines principles as "beliefs of fact, causation and rectitude", norms as "standards of behavior defined in terms of rights and obligations", rules as "specific prescriptions or proscriptions for action" and decision-making procedures as "prevailing practices for making and implementing collective choice."[220] In the same volume, Ernst Haas, similarly to Krasner[221], adds issue-specificity to the definition of regimes, when he notes that regimes are: "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations"[222] He further distinguishes the notion of a regime from that of an order in that:

> "regimes are artificial creations designed to bring about particular orderings of values among actors; there is no general international "order." The qualities we have in mind when we use the term order in general are those associated with the concept of system. We can only speak of particular orders devoted to equity, efficiency, justice, survival or whatever we value. Order, then refers to the benefits a regime is to provide; system refers to the whole in which collaboration toward an order takes place."[223]

Certain elements from regime theory are useful in discussing global governance issues. First the turn from a state-only analysis of international relations to the transnationalization of legal relationships is embracing the critique that cognitive approaches express against the Westphalian-oriented international law. A cognitive approach criticizes realism for assuming that states are rational actors.[224] It remains a fact, however, that the WTO is a member-driven organization, however multilateralism

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[219] Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36:2 INT'L ORG. 185-205,186 (1982).
[220] *Id.*
[221] *Id*.
[222] Ernst Haas, *Words can hurt you; or, who said what to whom about regimes* 36:2 INT'L ORG. 207 (1982) and ANDREAS HASENCLEVER ET AL EDS., THEORIES OF INTERNATIONAL REGIMES 11 (1997).
[223] Ernst Haas, *Words Can Hurt you; or, Who Said What to Whom about Regimes* 36:2 INT'L ORG. 207, 211 (1982).
[224] ANDREAS HASENCLEVER ET AL EDS., THEORIES OF INTERNATIONAL REGIMES 5 (1997).

combined with globalization is not of the same nature as it was before the proliferation of international organizations.[225] It is important at the same time to internalize levels of governance that extend beyond the nation state. NGOs and the amorphous maze of the global civil society, either in the form of consumers or in the form of protestors, are relevant to the WTO. [226]A cognitive approach takes these actors into account and a measures their relevance to law.

An intergovernmental organization, or a transnational network needs to develop its own institutional history [227] , during which normative expectations are created and distinguished. Time allows for negotiation, agreement, conflict, resolution and thus consolidation of norms. It also allows for dynamics to develop between members, thus revealing asymmetries that can further produce bargaining and stabilization. If bargaining results in instability and further conflict without resolution, organizational structures break down, and thus the possibility of a regime becomes remote. A regime also demonstrates properties of self-governance and flexibility in the legal obligations its members assume, which over time will favor change of normative forms[228] to a more optimal location.[229] Moreover, a regime works as a stabilizer of relationships amongst actors, which necessarily implies some conflict resolution properties, and the shared understanding of principles.[230] Conflict resolution corrects ambiguity in legal, economic and political relationships and that process can be described as evolution in the organization. The GATT and the WTO, through the negotiation rounds, the GATT jurisprudence and the numerous decisions the organization has adopted over the years has clearly evolved. By the time of creation of the WTO a prolific legal system consisting of Agreements, jurisprudence and binding decisions was in place. Then the Uruguay round

[225] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 261 (2005).
[226] Achilles Skordas, *Self-determination of peoples and transnational regimes: a foundational principle of global governance*, *in* TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS 207-268, 253 (N. Tsagourias ed. 2007).
[227] See also Robert Keohane, *The Analysis of International Regimes: Towards a European-American Research Programme*, in REGIME THEORY AND INTERNATIONAL RELATIONS 23-45, 28 (V. Ritteberger & P. Mayer eds. 1993).
[228] HELMUT WILLKE, SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY 21(2007).
[229] See also Mark Neufeld, *Interpretation and the 'Science' of International Relations* 19:1 REV. INT'L STUD. 39, 55 note 55 (1993).
[230] Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State* 40:4 INT'L ORG. 753 at 764 (1986).

resulted in the further enlargement of the legal Agreements. [231] Issue specificity is also important, as international regimes form a "web of meaning" and linkages in specific issue areas.[232]

Finally, regime theory considers the WTO compliance record as relevant. Louis Henkin observed that "almost all nations observe almost all principles of international law and almost all of their obligations almost all the time."[233] However, when this occurs in a consistent manner, rather than sporadically, it is relevant to the formation of a global governance regime. It is important to consider here also that many legitimacy concerns often raised in international law are related to implementation and the lack of enforcement mechanisms in international law. The existence of the Dispute Settlement Body in the WTO is unique in international relations.[234] The WTO has established a mechanism for the resolution of disputes that in the last 17 years has been prolific, with 425 cases having been brought before it, and with an impressive compliance record. Even though retaliation is authorized at the end of Panel and Appellate Body Reports quasi-automatically, only four cases have ended with actual retaliation (i.e. suspension of concessions) in the WTO.[235]All others were complied with, settled, terminated or are still in consultations. No other international tribunal has had such a large number of cases being brought before it and a similarly notable compliance record. As we mentioned before, there exist some serious problems when cases involve larger and smaller economies and compliance.

Complementing a socio-legal analysis of transparency in the WTO with a cognitive approach of international relations complements global governance and international law

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[231] See also the analysis on why the human rights regime is not a global governance regime due to lack of effective enforcement mechanisms: James W. Nickel Is Today's International Human Rights System a Global Governance Regime? 6:4 THE J. OF ETHICS 2002, pp. 353-371 p.371.
[232] Mark Neufeld, *Interpretation and the 'Science' of International Relations* 19:1 REV. INT'L STUD. 39, 43 (1993).
[233] LOUIS HENKIN, HOW NATIONS BEHAVE, LAW AND FOREIGN POLICY 47(2nd ed... 1979).
[234] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 51(2008) sees the DSU as the single most important achievement of the Uruguay Round.
[235] EC – Bananas III (US), EC – Hormones (Canada), US – FSC and US – Offset Act (Byrd Amendment), see also PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 226-229 (2008).

theory with many useful components that can help measure the degree to which transparency as a principle has the potential to establish and maintain a normative framework that lies outside the WTO agreements and include WTO stakeholders, NGOs, and the civil society at large. Complementing the analysis on transparency with links of each form of transparency to democratization and further to legitimacy aspires to move towards a strong cognitivist perspective with respect to the WTO legal system.

II. Transparency through the lens of democratization in the WTO

A. Constitutionalism and its discontents

The presence of elaborate constitutionalist analyses in global governance and the incorporation of transparency as an enabling principle for global constitutionalism indicates the omnipresent fascination with the rule of law in the nation state and the difficulties of formulating an analytic framework that can address challenges posed by globalization and transnational aspects in Westphalian terrains and particularly international organizations. More specifically we could identify five shortcomings from constitutionalism in global governance theory.

The first problem is the intimate and intricate relationship between the constitution and the nation state. National constitutions became the communication point, a document that was used to govern the relations between the political system and the legal system during revolutionary periods. Constitutions did not emerge necessarily from bloody revolutions and it can be argued that they are the social contract that legal systems draw legitimacy from. Constitutions emerge out of a social contract momentum in order to organize national polity when a demos or a government distinctly understands itself as dissimilar or even opposite that its predecessor. Many similar moments, of seeming constitutional nature exist in international law: the treaty of Westphalia, introducing the nation state as it was understood for the past three centuries; the first and second World War and the Holocaust, which established the United Nations and unconditional respect for human rights; the pronouncement of Martens clause, to which the respect for humanity is traced back to; the Brian Kellogg Pact, outlawing war and establishing peaceful coexistence as the only acceptable *modus operandi* among nation states; decolonization and the formation of the G-77, breaking with the colonizing past and the distinction between "civilized and the rest"; the fall of the Berlin Wall, the September 11 events and the end of history euphoria. However, reflecting the difference between government and

governance, these constitutional moments did not result into constitutions,[1] as they lacked several other elements beyond the absence of a written text.[2]

The second problem in global constitutionalist perspectives is that the emphasis on the notion of a constitution may imply a reluctance to genuinely move to a post-Westphalian analysis where international organizations and non-governmental actors can and do create a new public space, which can in turn become normative space through the emergence of meta-principles. Howse and Teitel allude to the potential of treaty regimes to expand their normative space when they discuss the notion of ultra- compliance. International law can produce:

> "ultra-compliance […] which mean[s] it can have normative effects that are greater or more powerful or different than what may be desired or consistent with the values or intentionally that might be plausibly be attributed to the "creators" of the norms.[3]

Such normative effects can be the result of a treaty regime. Linking meta-principles with the creation of public space has other benefits. Global constitutionalism requires some consolidation process for the rules it entails, and possibly in the future agreement among state actors or state and non-state actors on its scope. Public space can emerge spontaneously, at any time, without an explicit agreement (online, in forums, or during protests, or on twitter).[4] Transparency and the dissemination of information as well as transparency linked to participation possibilities enable the formation of this public space instantaneously. The meta-principles that emerge can in some cases be of a quasi-normative nature, that is, they exhibit many law-like elements but do not stem from international agreements or national laws. This is the case for example for the traditional

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[1] Although the opposite claim has been made with some frequency. See for example Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANS. L. 529 (1998).

[2] This is what Dunoff calls the problem of translation. Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law*, 17:3 EUR. J. INT'L L. 647, 673 (2006).

[3] Robert Howse & Ruti Teitel. *Beyond Compliance: Rethinking Why International Law Really Matters* 1.2 GLOBAL POLICY 127-136, 22 of pdf version (2010).

[4] See Sol Picciotto, *Democratizing Globalism* in THE MARKET OR THE PUBLIC DOMAIN, AND OTHER CONTRIBUTIONS IN REDRAWING THE LINE (D. Drache ed. 2005).

and classic source of *lex mercatoria* and a more modern one is the legal elements of Second Life.

Third, the celebratory side of seeking hierarchies to understand transnational regimes and analyzing transnationalism through the constitution may be paired with such theoretical approaches seeking a form of Kelsenian stability in order to deal with the omnipresent in international law "anxiety of fragmentation".[5] However, it is optimal to contextualize fragmentation rather than obscuring the debate by adopting quasi-hierarchical forms of analysis in an attempt to avoid its risks altogether.

Fourth, constitutionalization oftentimes relies on overemphasis on adjudicatory processes while it obscures other elements that may contribute to the legitimacy debate.[6] This is particularly true for the WTO. This form of institutionalist analysis does not stress the importance of domestic mechanisms in some (albeit few) countries that allow industries, corporations and those involved in cross border commercial activities to file direct complaints which their governments will take before the WTO.[7] Peters notes that the emphasis on judicialization is harmful to constitutionalism itself:

> "Promotion of judicial protection reinforces the lopsidedness of the constitutionalization of international law. This process has so far been adjudicative rather than deliberative. This is most visible in the WTO and the related sector-constitutionalization debate. What has been identified by some scholars as a constitutionalization of the WTO boils down to the legalization of the dispute settlement mechanism, judge-made principles, and constitutional techniques applied by the panels and Appellate Body, such as balancing […][T]his reading foists an impoverished, legalist (judicially made), a-political conception of a constitution. So exclusive focus on the improvement of judicial protection in international law is not only a foul trick to define away the democratic deficit, but might moreover

[5] Ruti Teitel, *Debating the Global Rule of Law a Half Century after Hart/Fuller: Different Transitions, New Perspectives on Morality and Legality*, ANU COLLEGE OF LAW, Draft available at law.anu.edu.au/sites/all/files/teitel.pdf

[6] GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012).

[7] For example the petition process in US Section 301.

> undermine the persuasiveness of the constitutionalist reconstruction of international law."[8]

However, this does not mean that adjudication is not crucial for the analysis that will follow, it just has to be complemented with other normative equivalents within the organization that can produce more discourse space to address the democratic deficit. Peters' remarks also allude to another problem stemming from constitutionalism in international law, namely the attempt to de-politicize the debate by insisting on consolidated normative forms, instead of ones that are constantly being negotiated and expanded.[9] Andrew Lang among many cautions strongly against such de-politicization in the WTO.[10]

The question asked in this thesis is: can there be a theory that allows for the re-politicization of the WTO debates, without using constitutionalism as a framework? The answer stems from the observations of Howse, Nicolaides and Cass[11] who hint on the value of democracy in the WTO. Democratic occurrences can occur outside the constitutional framework, at any public or even private space. For example, a corporation can adopt democratic practices, or a university, or the denizens of a small neighborhood. Such events do not need to be systematic. In the WTO, transparency as a notion offers glimpses of such space for democratic moments. In some instances the participatory effects of transparency are more mature than others (where we identify deficits in the WTO).

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[8] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 264-341, at 341 (J. Klabbers et al eds. 2009).

[9] See Jan Klabbers, *Constitutionalism Lite* 1 INT'L ORG. L. REV. 31 at 54 (2004) and Robert Howse, *From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94-117 (2002).

[10] ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER (2011).

[11] Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too far Efficiency, Equity, Legitimacy—The Multilateral Trading System at the Millennium* 227-252 at 228 (2001), Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?* 16.1 GOVERNANCE 73-94 (2003), Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade* 12.1 EUR. J. INT'L L. 39-75 at 73 (2001).

The analysis followed here on the democratization potential of transparency cannot solely rely on previous theoretical accounts on WTO transparency, since none of them has evaluated the aggregate democratizing potential of the norm, and instead have insisted on its constitutional qualities or its role as an aid to, or a prop for global constitutionalism. In the words of Peters transparency is a condition for constitutionalism and "serves more of a reformative quality for democracy, a preventor of ills, instead of something that in and of itself expands the democratic space." Rather, this dissertation adopts this polynormative perspective whereby transparency is analyzed as a norm within the legal, political and economic frameworks in the WTO. My analysis extends beyond the traditional sources of international law and I argue that normative impetus can potentially be traced in transparency forms that have not distilled to *any* form of law (not even soft law).

B. Democratization as an alternative framework

Finding normative space that enables more legitimacy in global governance can be done through a focus on democratization. Peters, Cass, Howse and Nicolaides and Teubner have all noted, others briefly and others extensively, that this discussion on democratization is not only possible but also necessary. Howse and Nicolaides in particular emphasize the re-politicization properties of democratic fragments in the WTO. Cass also sees it as a better alternative to constitutionalism in the discussion of the history and development of legal principles in the WTO.

Democracy *stricto sensu* is currently not possible at the international level.[12] Robert Dahl however argues that a more expansive definition of democracies can occur in polyarchical structures. Polyarchies may be thought as relatively democratized regimes, popularized, liberalized and "highly inclusive and extensively open to public contestation."[13] Thus, all institutions and processes, formal and informal can be involved in the exercise of governance and are affected or affect transnational actors, individuals,

[12] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (J. Klabbers et al eds. 2009).
[13] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 8 (1973).

corporations, unions, NGO's governments and parts of governments, other regimes and international organizations. My argument is premised on the understanding that transnational regimes, or regimes of transnational governance such as the WTO include multiple levels of exercise of authority and affect a very large number of stakeholders either directly or indirectly with trade rules and policies. They do so with both contractual rules and soft law principles or guidelines. As such, the WTO as a transnational regime exhibits two fundamental characteristics: it is a *polyarchy,* a relative but incomplete regime with few democratic elements and its normative reach can be described as *polynormative*, ranging from guidelines to contractual obligations.

To revisit the mapping of the various approaches in global governance, this democratization perspective is critical of existing structures in the WTO but recognizes the global governance aspects in the organization with many transnational elements and argues that legitimacy problems should be discussed on the understanding that an expansion of discourse and normative space in the WTO is possible. A strong link exists between transparency, legitimacy and democracy and all four transparency forms in the WTO are discussed under the single narrative of composite democracy.

Note: The shaded areas are parts of my approach that correspond to others. Darker shade implies stronger overlap.

	WTO and Global Governance	**WTO and Legitimacy problems**	**Relation of Transparency to Legitimacy**	**Transparency**	**Sovereignty of States**	**Civil Society in the WTO**	**Sutherland Report**
Classic International Law/ Positivists/ Trade Law	NO (or tautology between global governance and international community)	Not as pronounced and crucial	Loose link	Emphasis on legal and internal	YES- only states can bind themselves	Filter through the nation state	Agreement in spirit, some criticisms on trade law related issues
International Public law * **GAL** * **IPA/IPL** * **Constitutionalism** **See also Table 5**	YES (resembling a domestic public law order)	Crucial but "public-law like" Global Governance can help solve them	Strong link	Emphasis mostly on external, and then internal	YES with a global polity	Element of deliberative or representative democracy	Disagreement in parts, opportunity to extrapolate publicness.
Critical Public International Law/ Opposition to GAL/Sutherland Report reactions	YES (critical of existing structures, transnationalist elements)	Crucial, unclear how (if) global governance will (can)	Medium/ Strong link	Emphasis on internal and external	YES-eroded	Important as part of transnational actors, at times amorphous, at times more	Stronger reaction and criticism

		handle the erosion of the nation-state and power asymmetries				organized	
Societal Constitutionalism	YES (transnational constitutionalization)	Crucial (socio-legal analysis necessary)	Medium link	Discussion on deliberative polyarchy and knowledge, capacity for action and power of implementation	YES (but national constitutions are structurally inadequate to deal with global problems)	YES (massive external- including civil society- intervention will trigger the internal process of change	N/A
Theory of Composite Democracy	YES (critical of existing structures, **many** transnational elements	Crucial but **global governance can help with legitimacy problems through the expansion of discourse and normative space**	Strong link	Analysis of all four transparency forms under one single narrative of composite democracy without elections	YES- eroded **with the possibility of global democracy substitutes**	Element of **composite** democracy (closer to Cass' democratization of trade and Howse's democracy in the WTO)	Disagreement in parts, opportunity to emphasize the prevalence of transparency.

Table 5 Links to other constitutionalization theories

	Domestic Law Analogy	**Actors**	**Hierarchy**
GAL	Administrative Law	All	Fluid/Amorphous
IPA/IPL	Public Law	All (states and international organizations more pronounced)	Two orders: domestic public and international public
Constitutionalism/ Democratization	Constitutional Law/ Democratic theory (representative, deliberative democracy)	All	Pyramid (on top combination of democratic values and constitutionalism)
Societal Constitutionalism	Autonomy of societal constitutions (loose link with constitutional law)	All	Two orders: Constitutional law (with the *pouvoir constituant*), ordinary law
Democratization without Constitutional elements	Democratic theory (composite/compound democracy)	All	Fluid/Amorphous until it becomes constitutional- then two orders (not domestic/ international, but constitutional/ordinary)

C. Theory of composite democracy

In the Spirit of Laws Montesquieu was the first to discuss checks and balances extending beyond democratic legitimation and put in place in order to ensure the liberties that democracy enabled in the first place. In particular, Montesquieu notes:

> "It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will. […][C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits. […][T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." [14]

Similar ideas are echoed by Madison in the Federalist Papers:

> "It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[15]

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[14] CHARLES-LOUIS DE SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, THE SPIRIT OF LAWS BOOK XI. OF THE LAWS WHICH ESTABLISH POLITICAL LIBERTY, WITH REGARD TO THE CONSTITUTION (The Complete Works of M. de Montesquieu 4 vols trans. T. Evans, 1777).

[15] The Federalist No. 51 (James Madison) *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* (1788).

It is in the writings of the two statesmen that scholars trace the origins of composite democracy, or the idea that elections alone do not guarantee good government, nor secure individual rights and freedoms. In his work, Robert Dahl extended the Madisonian and Montesquieuian paradigms and established a pluralist theory of democracy, or as he calls it, polyarchy. Dahl, like Montesquieu and Madison posited that elections alone do not guarantee democratic governance. There should be in place a sophisticated and flexible set of institutions, norms and processes that ensure constant access to bargaining and checks and balances. As a result, many of the so-called democratic states did not withstand the test of being a polyarchy, while other institutions or even processes exhibited elements of democratization outside electoral processes and possibly outside the nation state. Knowledge, access to information and participation are cornerstones of his pluralist democratic construct. More specifically Dahl observes:

> "Because of its inherent requirements, an advanced economy and its supporting social structures automatically distribute political resources and political skills to a vast variety of individuals, groups and organizations. Among these skills are resources and knowledge, […] skill in organization and communicating; and access to organizations, experts and elites. These skills and resources ban be used to negotiate for advantages – for oneself, for a group, for an organization. When conflicts arise […], access to political resources helps individuals and groups to prevent the settlement of the conflict by compulsion and coercion and to insist, instead, upon some degree of negotiation and bargaining – explicit, implicit, legal, a-legal. Thus, systems of bargaining and negotiation grow up within, parallel to, or in opposition to hierarchical arrangements; and these systems help to foster a political subculture with norms that legitimate negotiating, bargaining, logrolling, give and take, the gaining of consent as against unilateral power of coercion."[16]

Further he notes that:

> "The condition that no subculture be indefinitely denied the opportunity to participate in the government can be met in two ways: - by a system

[16] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 76-77 (1973).

> oriented toward unanimity or by a system of shifting coalitions, that, over time allow each group to shift out of opposition into the government." [17]

If such conditions are not met, then we can anticipate decisional immobility and other major problems. [18] Dahl places discourse pluralism at the heart of polyarchies. At the international level, a great example of such multilayered governance with incomplete democratic forms has been analyzed in the context of the European Union. Heritier discusses composite democracy this setting.

The first and very strong element of democratic legitimation is the periodic, free and fair elections. The representativeness of European elections for EU issues is not as strong however, as oftentimes national political divides and issues carry themselves over at the EU level. In addition to the limited representativeness, the European Parliament has incomplete decision-making powers. [19] Secondly, legitimacy stems from executive representation, at the level of the Council of Ministers and the European Council. The executive branch of the EU at the level of the Council of Ministers has received indirect legitimation through national elections. [20] The third legitimation aspect is mutual horizontal control, stemming from Montesquie's and Madison's separation of powers, close also to Dahl's pluralist democracy, so that no single group dominates decision-making and minority voices are represented in government. [21] The fourth legitimazing element in the EU composite democracy is associative and expert representation "reflected in the fact that policymaking often takes place in policy networks in which sectoral interests are represented and negotiated among associative and independent experts often nominated by the member states."[22] Finally, the EU democracy provides for certain rights for EU citizens (rights' based legitimacy), among which transparency plays

[17] *Id.* 118.
[18] *Id.* 120.
[19] Adrienne Héritier, *Composite democracy in Europe: the role of transparency and access to information* 10:5 J EUR. PUB. POL'Y 814 at 815(2003).
[20] *Id.* at 816.
[21] *Id.* at 817.
[22] *Id.* at 818.

a prominent role, as a right to access to information as well as a pre-requisite for decision-making.[23] The next table summarizes the above legitimacy elements.

Form of legitimation	**Expression**	**EU form**
Vertical legitimation	Voting/Majority	European Parliament
Executive representation	Negotiation	European Council and policy networks
Horizontal mutual control	Diversity of actors and bodies	CJEU, Council, Parliament
Associative and expert representation	Deliberation/ consultation	Policy networks
Individual- Rights' based legitimacy	Individual demand/ complaint mechanisms	Access to information, transparency, CJEU

Table 6 Elements of Composite Democracy in the European Union

Heritier emphasizes the subsidiary role of access to information as a component of democratic legitimation in the European Union.[24] In fact, the increased emphasis on transparency may imply the deficiency of EU institutions and other legitimizing processes to genuinely address legitimacy concerns that arise within EU governance. The recent financial crisis is also demonstrative of this fact: more laws and new organizations and facilities does not imply consideration of social concerns that are assume radical forms and produce political impasse at national levels.[25]

There are many fundamental differences between the EU and the WTO. Most visibly, the WTO does not hold any kind of elections, and the EU is a regional organization while the WTO is global. The EU integration is nearing federalism, while the WTO maintains its intergovernmental organization structure. The disparities among the WTO member states in terms of economic and political histories are more divisive than within the EU.[26] With respect to transparency, the meanings it has assumed within the WTO as we will see in

[23] *Id.* at 818-819.
[24] *Id.* at 824.
[25] See Maria Panezi, *Whose Crisis Is It Anyway? Normative Frameworks in the Greek Financial Crisis*, 40:2 OHIO NORTHERN U. L. REV. (Forthcoming 2015)
[26] See Geoffrey Garrett & James McCall Smith, The Politics of WTO Dispute Settlement, LEITNER PROGRAM WORKING PAPERS ISSUE 5 11-12 (1999) http://mercury.ethz.ch/serviceengine/Files/ISN/30237/ipublicationdocument_singledocument/a5fd2fd0-a3e4-4d2c-b475-cb807e39797d/en/1999-05.pdf

the next chapter are distinct to the notion of transparency within the EU. As such, the subsidiary nature of the principle in the EU does not transpire in the WTO. The left column of Heritier's composite democracy matrix as summarized here can thus be utilized to discuss how the different forms of transparency in the WTO formulate a composite democracy space.

Dahl perhaps more clearly links the notion of "competition of ideas" and public contestation as direct result of transparency to a pluralistic social order. [27] In such polyarchies even when they assume the elementary shape if transnational regime, Dahl's "competition of ideas" is coupled with demands to participate in decision-making (in opposition to hegemonic systems).[28] Issue specificity of the regime can also allow for more genuine competition of ideas. Originally the WTO was seen as the face of globalization (during the protests in Seattle, Geneva and Montreal), but progressively this response was replaced by the sophistication of arguments against the trade liberalization paradigm which corresponded to a sophistication of participatory forms and more importantly the insistence of civil society to be heard in the adjudicatory processes through *amicus* briefs.

Finally, discussing the relationship between transparency and democracy, Hollyer et al. answered the question whether democracies are more transparency than other political regimes affirmatively, utilizing Dahl's concepts of polyarchy. Other works on transparency as complementary to democratic polity come from Mitchell[29], Vishwanath and Kaufmann[30]Stasavage[31], Florini[32], Bellver and Kauffman[33], all linking transparency

[27] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 3 Table 1.1 (1973).
[28] *Id*. 78.
[29] Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes* 42.1 INT'L STUDIES QUARTERLY 109-130 at 109 (1998) and the same, *Transparency for Governance: The Mechanisms and Effectiveness of Disclosure-Based and Education-Based Transparency Policies* 70.11 ECOLOGICAL ECONOMICS 1882-1890 (2011).
[30] Tara Vishwanath & Daniel Kaufmann, *Toward Transparency: New Approaches and their Application to Financial Markets*, 16.1 THE WORLD BANK RESEARCH OBSERVER 41-57 (2001).
[31] David Stasavage, *Transparency, Democratic Accountability, and the Economic Consequences of Monetary Institutions* 47:3 AM. J. POL. SCI. 389-402 (2003).
[32] Ann M. Florini, *Increasing Transparency in Government* INT'L J. ON WORLD PEACE 3-37(2002).
[33] Ana Bellver & Daniel Kaufmann, *Transparenting Transparency: Initial Empirics and Policy Applications*, WORLD BANK POLICY RESEARCH WORKING PAPER 1-72 (2005).

and accountability in democratic governance. Kono[34] however cautions that transparency in democratic regimes may induce the adoption of even more complex and opaque trade policies by governments. Kono examines if democracies trade more than autocracies and where transparency and liberalization are more robust.[35] He concludes that the adoption of transparent policies in terms of tariffs carries a backlash, as it encourages less transparency non-tariff barriers to trade.[36] The next part will outline the four transparency forms in the WTO before linking them to each of Heritier's legitimation aspects in the last section of this chapter.

D. Transparency forms in the WTO

Transparency in the WTO context has been seen as an unclear notion.[37] It appears in multiple forms and many instances. The following matters are discussed under the term "transparency" in the WTO: power asymmetries among WTO member states ("*internal transparency*"), openness, publications and participation of non-state actors, civil society and individuals in the WTO ("*external transparency*"), transparency as an administrative principle invoked in the selection and operations of various WTO bodies, such as the Secretariat, the Dispute Settlement Body and the General Council ("*administrative*" or "*institutional transparency*"), and transparency as an obligation to publish national laws and maintain judicial remedy mechanisms for traders, assumed by WTO member states in Article X of the GATT and its equivalent in other WTO Agreements ("*legal transparency*"). Moreover, transparency in the WTO normatively takes the form of: *soft law*, as part of the organization's operational dogma and as an administrative principle; *general principle of international law* in the meaning of Article 38 para.1 c) of the ICJ Statute; and, *treaty obligation*, in the meaning of Article 38 para.1 a).All four forms of

[34] Daniel Y. Kono, *Optimal obfuscation: Democracy and trade policy transparency* 100: 3 AM. POL. SCIENCE REV. 369-384 (2006).
[35] *Id.* at 369.
[36] *Id.* at 381.
[37] Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L & FOREIGN AFF. 1-21, 1 (1998-1999) Karen Kaiser, *WIPO's International Registration of Trademarks: An International Administrative Act Subject to Examination by the Designated Contracting Parties*, 9 GERMAN L. J. 1597-1624, 1617 (2008).

transparency are relevant to the main argument of this thesis as they all correspond to a form of democratic legitimation under the theory of composite democracy.

1. External Transparency

External transparency appears as a global governance principle in relation to civil society at large (citizens, consumers, for profit and non-profit non-governmental organizations). The first element of external transparency is information, namely the declassification and publication or online availability of a very significant number of WTO documents. Also, information includes the opening of WTO meetings at various levels of the organization's day-to-day work to the public. This opening occurs via either online streaming or in a televised presentation in the WTO building in Geneva. Even though for the latter limited seating is available, it appears that all interested parties so far have been admitted to watch the meetings. In exceptional cases where the parties agree to do so, the WTO dispute settlement process can be open to the public through a real time closed-circuit television broadcast, as it recently occurred in the EC-Canada case on seal products.[38]

The second element of external transparency is participation of everyone other than WTO member states. To this day, such participation is not of a decisive nature. In particular, NGOs can participate in Ministerial Councils as observers and can also submit *amicus curiae* briefs during the Dispute Settlement process. Moreover, the international community is invited every year to participate in a usually three-day event, the WTO Public Forum (previously known as the public symposium)[39], where members of the civil society, media, academics, business representatives and government officials meet to discuss the most recent developments in international trade. Even though the Public Forum has minimal normative value, it promotes transparency in the form of outreach and openness towards the general public.[40] Another formal category of non-state

[38] *WTO meeting on seal products dispute opened to the public* https://www.wto.org/english/news_e/news13_e/hear_ds400_401_18feb13_e.htm .See also *Registration begins for public observation of appeal in renewable energy disputes* http://www.wto.org/english/news_e/news13_e/hear_ds412_426_14mar13_e.htm .
[39] *Public Forum* http://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm .
[40] Interesting examples of analogous transparency improvement are the OECD, see James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L.

participants in the WTO dispute process is experts, whose opinions can requested by the Panels or the Appellate Body when needed. [41] Finally, representatives of large industries involved in a particular dispute have participated in the Dispute Settlement Process, either informally, or as ad hoc members of national missions.[42]

2. Internal Transparency

Internal transparency as it has become known in the WTO context is the problem of effective participation of developing countries in WTO decision-making. Indicative of the internal transparency problem is the famous "Green Room" where only a small part of member states participate in discussions, as well as incidents during the Seattle Ministerial Council and others, where informal consultations took place only in the presence of certain WTO member states while others were excluded.[43]

This issue extends to the underutilization of adjudicatory processes. This problem appears first, in limited usage of the dispute settlement system by developing countries. Second, countries with smaller economies are reluctant to seek enforcement of decisions once they have won against a bigger trading WTO country in fear of retaliatory consequences (such as the case of Ecuador, which did not use its right to retaliate in the EC-Bananas III case). Finally, even when developing countries attempt retaliation, WTO rules limiting retaliatory measures in the domestic markets limits the ability of developing countries to

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& CONTEMP. PROBS 191-227 (2005) and the Basle Committee, see Michael Barr & Geoffrey Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15-46, 17 (2006) and Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6 INT'L ORG. L. REV. 421-446, 445 (2009).

[41] See for example Article 13 Dispute Settlement Understanding, appendix 4 Dispute Settlement Understanding. The Subsidies and Countervailing Measures Agreement (SCM) and the Technical Barriers to Trade Agreement (TBT) also establish permanent groups of experts in order to assist and consult the Panels and Appellate Body or provide the relevant committee with advisory opinions. See Article 14.2, 14.3 and annex 2 TBT and Articles 4.5 and 24.3 SCM. See also Article 11.2 SPS, 19.3, 19.4 and annex 2 of the Agreement on implementation of VII GATT (AD).

[42] Jeffrey Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 437 (1998).

[43] Maria Perez-Esteve, *WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations* (2012) WORKING PAPER Draft Prepared for the IISD--Entwined Workshop (May 9, 2011) Robert Wolfe, *Decision-Making and Transparency in the 'Medieval'WTO: Does the Sutherland Report have the Right Prescription?* 8.3 J. INT'L ECON. L. 631-645 at 638 (2005).

get effective compensation at the end of adjudication. Moreover, developing countries lack the armies of lawyers that large nations can afford.

Similar problems of exclusion and powerlessness of weaker economies have been caused by the proliferation of preferential trade agreements that result essentially in collusion amongst their members, as their rules are never inspected for their compatibility with WTO rules. Finally, take-it-or-leave it agreements are imposed to candidate member states during their accession process. In this thesis these two areas of exclusionary tactics and take-it-or-leave-it deals are discussed as problems of internal transparency *lato sensu.*

The WTO differs from other organizations with respect to the length and complexity of negotiations–and accession instruments. Accession to the WTO occurs through several stages. Negotiations for accession have been very different from case to case. Indicative of the spectrum of proceedings is that the shortest accession to this day, Kyrgyzstan, lasted for almost three years, while the longest, China, lasted for more than fifteen years. The WTO puts forward an elaborate process with many thresholds to be met. These are not uniform for all candidate members and the WTO does not operate under a "checklist" type of criteria. Rather, for each country that wants to accede, all current members can put forward their interests and through negotiations at different levels, reach an agreement on rules, tariffs and other issues covered by agreements under the WTO umbrella. Thus, the accession requirements vary, to a lesser or a larger extent, from country to country, thus questions for lack of transparency.

In recent years, especially with the accessions of China and Russia, negotiations have extended to a number of commitments that exceed the WTO baseline of obligations, as these are outlined in the WTO Agreements. More specifically, partly due to the fact that both countries are considered Non Market Economies (NMEs) but also due to the trade volume that the two countries engage in[44], existing member states feared that admission to the WTO would send shock waves through their domestic markets and their external

[44] In fact, as it turns out, Russia's trade volume is far from comparable with China's. The WTO Plus elements of the Russian Accession protocol were mostly pushed by the United States in order to achieve domestic approval of the terms and possibly reflect a Cold War mentality that affected the negotiations.

trade. They also feared that both countries would not be prepared to participate on equal terms with existing WTO member states. Thus, an additional set of obligations was imposed to them, the so-called WTO-Plus. [45]

3. Administrative or Institutional Transparency

The next type of transparency is administrative or institutional transparency. This form of transparency relates to the main participants in managing the WTO as an organization, the less than 700 people[46] who are employed by the WTO Secretariat with short or long-term employment contracts. Together with them, another six hundred or so liaison officers and representatives to WTO[47] located in the same building since 1977 in Geneva, manage international trade.[48] The limited information published on the Secretariat furthered the idea that the organization suffered from a significant compositional flaw: a very small number of diplomats and international technocrats, working within the legacy of the original architects of the WTO, namely a handful major WWII-era neoclassical economists, are now the key actors of the international financial system. This "elite administration" has not been elected and remains unaccountable for advancing normative changes in the area of international trade that affect the lives of the vast majority of the world population.

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[45] See Julia Ya Qin, *"WTO Plus" Obligations and Their Implication for the World Trade organization Legal System: An appraisal of the China Accession Protocol*, 37:3 J. WORLD TRADE 483-522 (2003) and also the same, *The Challenge of Interpreting 'WTO-Plus' Provisions*, 44:1 J. WORLD TRADE 127-172(2009).

[46] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 135 (2008). Today its staff consists of 629 people. See *Overview of the WTO Secretariat* http://www.wto.org/english/thewto_e/secre_e/intro_e.htm.

[47] Interestingly enough, it is very difficult to find an approximate number of the liaison officers and representatives to the WTO. In any event an accurate number could be found in the internally published annual phone directory. In 1999 C. Michalopoulos, based on this directory, reported that the number of member-state representatives was 540. The entry of China and Russia to the organization pressumably changed this number, to bring it closer to 600. See Constantine Michalopoulos, *The Participation of the Developing Countries in the WTO*, MIMEOGRAPH (1999).

[48] Hoekman and Kostecki, [BERNARD HOEKMAN & MICHEL KOSTECKI THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 55 (2nd ed... 2001)] observe that the small size of the WTO Secretariat does not accurately reflect the very large network of diplomats in Geneva and civil servants within national administrations of member states which work "in close cooperation." As they note: "The total size of the network is impossible to determine, but certainly spans at least 5,000 people."

Transparency concerns can be raised specifically with respect to the hiring process of WTO employees. The original GATT was administered by a very small number of international officials, mostly lawyers and economists.[49] Their duties were not only administrative, but they were required to help the committees working on tariffs, provide expert assistance to national delegations, support negotiations among different groups and provide statistical assistance.[50] As the organization expanded, the size of the secretariat remained proportionally small with respect to the size of the GATT membership. After the transition from the GATT to the WTO, the secretariat doubled in size, and the WTO delegations have increased proportionately. Ordinarily, the hiring process begins with the public announcement of a position. Only citizens of WTO member states can apply and interested candidates can submit an application online. Up until this point the process is quite transparent. No other information exists publicly with respect to the interview process and the types of questions asked, or average candidate profiles.[51] For those who have not participated in this process, very little information is publicly available, unlike, for example, the hiring processes of the European Union or the United Nations.

4. Legal Transparency

Last, but not least, the final form of transparency in the WTO is legal transparency, namely transparency as a legal obligation for member states substantiated in several rules in the WTO Agreements and other related documents, such as Accession Protocols and Trade Policy Reviews.[52] Member States are required to publish information related to legislation that can have an effect on trade that are regulated by the WTO Agreements that they are parties to and notify other members with respect to any changes in such legislation (publication and notification requirement). Additionally, WTO Members are required to establish enquiry points to provide information. Finally, several committees

[49] IRWIN DOUGLAS A., MAVROIDIS PETROS C. & SYKES ALAN O., THE GENESIS OF THE GATT 118 (2008).
[50] *Id.* at 118.
[51] *Id.*, at 135.
[52] See also on transparency forms PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 461-466 (2008). Van Den Bossche mentions four kinds of transparency requirements in the WTO: the publication requirement, the notification requirement, the requirement to establish enquiry points and the Trade Policy Review Mechanism. He examines them in the context of mitigating the issue of non-tariff barriers to trade in goods.

and mechanisms are put forward, including the Trade Policy Review Mechanism, in order to produce reports with respect to trade policies of Member States (trade policy review process). [53]

Transparency as a legal obligation is embodied principally in Article X of the GATT, entitled "Publication and Administration of Trade Regulations." The transparency obligation also appears in Article III of the General Agreement on Trade in Services (GATS). Article III of the GATS imposes obligations for publication of legislation and notification of changes in laws that affect trade in services and prompt response to requests by other members on any of the regulations affecting trade in services.[54] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Part V, under the title "Dispute Prevention and Settlement", contains Article 63 on Transparency, effectively extending the obligations of publication, notification and establishment of review mechanisms to the subject matter of this Agreement. Articles 5, 6, 12 and 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) contain provisions that address transparency related issues relevant to anti-dumping investigations. Transparency related are also Articles 11, 12, 22 and 23 of the Agreement on Subsidies and Countervailing Measures, Paragraphs 3, 4 and 5 of Article 1 of the Import Licensing Agreement, Articles 3 and 12 of the Agreement on Safeguards and Article 2(g) of the Agreement on Rules of Origin and Article 12 of the Valuation Agreement which make reference to Article X. Finally, the plurilateral Agreement on Government Procurement also contains provisions to ensure transparency in Article V, Article VII paragraph 2, Article VIII, Articles IX to XVII and finally Article XVII, which explicitly addresses transparency. [55]

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[53] There are over 200 notification requirements embodied in the various WTO agreements and mandated by ministerial and General Council decisions. See BERNARD HOEKMAN & MICHEL KOSTECKI THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 71 (2nd ed... 2001).

[54] See Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20:3 EUR. J. INT'L L. 575-614 (2009) and Richard H. Steinberg, *The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott* 20:4 EUR. J. INT'L L. 1063-1071 (2009) discussing administrative issues with respect to WTO Committees and WTO governance involving the GATS and SPS Agreements.

[55] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 474 (2008).

Dispute settlement with respect to Article X has an interesting history in the GATT and the WTO. Until 1980, transparency was never mentioned in any Panel reports. Even if claims were raised by member states, they were not examined by the members of the Panels. The transparency case law began in the eighties, and expanded within the overall framework of the US-Japan disputes, which dominated the first period of Article X. With the transition from the GATT to the WTO, the proliferation of disputes examined in the dispute settlement process coincided with a proliferation of Article X claims. An impressive number of disputes filed since 1995 cite Article X and its equivalents in other WTO Agreements. Out of those, many have resulted in panel and Appellate Body reports discussing the notion of transparency.

Another very important mechanism fostering the culture of transparency in the WTO is monitoring of countries' trade policies and practices. Trade monitoring first occurs on an ad hoc daily basis at various WTO committees Second, the member states have established two permanent monitoring bodies, one general and one specific, the Trade Policy Review Mechanism (TPRM)[56] and the Textiles Monitoring Body (TMB). The various councils and the committees in the WTO act as ad hoc monitoring mechanisms, since, among other things, they are responsible for observing members' activities related to the GATT and other agreements.[57] Each specialized committee issues reports and updates on countries' notifications and compliance with WTO obligations. Some of the notification, information-sharing and monitoring procedures at the committees' level are directly linked to transparency,[58] especially when the documents produced are de-

[56] Annex 3 of the Marrakesh Agreement (WTO 1995) Under A (i) objectives: "…contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements […] and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members."

[57] See for example, Articles 17 and 18 of Agreement on Agriculture, establishing the Committee on Agriculture, Article 3 paragraphs 4 and 5 and Article 12 paragraphs 1-4 of the SPS Agreement establishing the SPS Committee and the collaboration of WTO members with international organizations whose mandate is to develop and harmonize standards on Sanitary and Phytosanitary products, Article 18 of the Customs Valuation Agreement, Article 7 of the TRIMS, Article 4 of the Import Licensing Agreement, Article 13 of the Agreement on Safeguards etc. Each Agreement regulates to a lesser or a larger extent the relevant committee.

[58] *Members' transparency toolkit* http://www.wto.org/english/tratop_e/trips_e/trips_toolkit_e.htm

classified and published. But even prior to publication, the internal information monitoring and sharing promotes a culture of transparency within the organization.[59]

E. Composite democracy and transparency in the WTO

All the phenomena labeled as transparency in the WTO carry a number of characteristics prevalent in democratic regimes, such as participation and meaningful information. Whether these amount to constitutional principle is a derivative point: first we have to understand the democratizing potential of transparency and how it can expand the WTO's normative space.

In other words, if there exist principles that have emerged above the WTO Agreements, first we must understand how these principles add to the existing normative framework, and then assess their constitutional quality. The appropriate framework has to steer clear from nationally embedded public law and national notions of the constitution, and instead first explore the democratizing potential of transnational principles, before moving to transnational constitutionalism. In the absence of elections at the global level, composite or compounded democracy offers a full list of other potential democratic functions in governance. It extends beyond voting, for example into the executive representation, horizontal mutual control, associative and expert representation, and legitimacy based on individual rights.

To each of the four forms of transparency corresponds to a different aspect of composite democracy. There exist very few and incomplete elements of vertical legitimation through external transparency as well as intermediate democratic legitimation (or secondary vertical legitimation) to the extent that governments of democratic member states represent the interests of their citizens periodically legitimized through national elections. Internal transparency parallels horizontal control (mutual at a political level and structural at the permanent review bodies). The participation of NGOs and experts in the WTO relates to both secondary vertical legitimation and associative or expert

[59] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 138 (2008).

representation present in composite democracy. Finally, Article X, directly assigning informational and adjudicatory resources for traders exhibits elements of individual-rights based legitimacy.

Form of legitimation	Expression	WTO form
Vertical legitimation	Incomplete secondary vertical legitimation	National legitimacy processes of WTO member states' governments
Executive representation	General Council, Ministerial Conferences	Internal transparency, consensus and meaningful decision-making
Horizontal mutual control	Permanent in trade review bodies and mechanisms, exceptional during the DSU process	Legal and administrative transparency
Associative and expert representation	Amicus curiae briefs, expert testimonies, NGO participation in Ministerials etc.	External and administrative transparency
Individual- Rights' based legitimacy	Publication of WTO documents, national inquiry points, Article X and equivalents national administrative and adjudicatory recourse mechanisms	External and legal transparency

Table 7 Transparency and Composite Democracy forms in the WTO

The numerous forms of transparency in the WTO also display these two characteristics: polyarchy in the sense that transparency appears at various levels of governance and involving numerous actors, and polynormativity because of the varying legal nature of transparency forms.

However, the dominant neoliberal pro-trade ethos, prevalent in the WTO, on one hand refutes the value of internal and external transparencies, stubbornly ignoring the former for decades, until having reached a veritable deadlock today, and reducing the latter to a non-issue during decision-making. Administrative and legal transparencies on the other hand are perceived as conducive to the acceleration of trade liberalization and are promoted with the proliferation of relevant case law and trade monitoring bodies. I will

address this contradictory treatment of transparency. Legal and administrative transparencies are useful to trade access and to eliminate unnecessary transaction costs, while external and internal transparencies have more deeply embedded potential to remedy imbalances in the world trading system.

All forms of transparency as they appear in the WTO can favor the proliferation of discourse space in international trade regulation, by allowing for the dissemination of trade information, the meaningful participation of developing countries and the inclusion of civil society. However, their significance for the WTO varies. Publishing laws and trade monitoring means more trade for WTO member states. Systematically sidestepping the interests of developing countries and civil society has the potential of causing the demise of the WTO.

I propose that for this reason that there can be a common red thread that cuts through all the transparency forms. Adopting a sociological perspective to examine the four forms of transparency is crucial for four reasons: first, the current inconsistencies with respect to each of the transparency forms do not become obvious in the debate that discusses each one separately, but when examined alongside. Second, a direct comparison of how different forms of transparencies has evolved shows common histories that coincide with the emancipation of global civil society, the refinement of their arguments and the systematic push for accountability of national governments and international organizations and the expansion of democratic discourse space at a global level to match that which may exist at the national level in many countries. Third, demonstrating the interconnectedness of different transparency forms and their relationship to democratization gives developing countries more terrains to pursue fair and meaningful integration of their economic needs at the WTO level. Finally, a sociological approach in law that refocuses the transparency analysis in the WTO from constitutionalism to democratization seeks to not limit participatory platforms to those allowed by the GATT and other normative forms. Instead, an analysis that includes both legal and other transparencies in the context of democratization will allow multiple and innovative participatory forms to emerge and be proposed by developing country members outside

the "rigidness" of an analysis based on constitutional consolidation. Rather, democratic fluidity is proposed as the main analysis framework.

The two most contestable elements of this matrix are both related to the WTO demos. The first is the possibility of indirect vertical legitimation, otherwise known as transitive legitimacy. Second is the question of whom the WTO peoples consists of.

Transitive legitimacy is based on the link between periodic elections for national governments and the representation of national interests at international fora and in the bodies of international organizations. Anne Peters extensively discusses transitive legitimacy as a factor for global democracy that will additionally result in the promotion of global goods.[60] She further adds that:

> "[D]omestic democracy is warranted as a basis for the transitive democratization of global governance, and […] promotes global constitutional values, notably peace. [I]nternational law as it stands already demands fulfillment of the international constitutional ideal of a community of democratic nation states, while strictly limiting the means of enforcing the spread of domestic democracy. Although the application of the democratic prescription remains selective, the quest for domestic democracy in the international *lex lata* is an indicator of the constitutionalization of international law."[61]

The data that Freedom House publishes every year on the quality of national democracies are not as encouraging as Peters' conclusions. There may be a rhetorical push towards democracy, and it is an interesting and sometimes puzzling fact that the overwhelming majority of countries in the world, all but one or two, describe themselves as free, or as democracies. An overview of where democracy functions properly and where not is much different. Using the WTO membership list as our sample group, and Freedom House three-fold ratings we can see that 40 out of 160, or 25 percent of WTO member states are authoritarian in practice, 76 out of 160 or 47 percent are free and everyone else falls somewhere in between. This could be considered as a majoritarian victory for

[60] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 271, 273 (J. Klabbers et al. eds. 2009).
[61] *Id.* 286.

democracy in the WTO. However, considering the always-observed consensus rule, we never witness in the auspices of the WTO Ministerials or General Council meetings a show of hands that demonstrates a divide in values based on mode of governance. It is also hard to imagine a democratic value-based divide in voting considering the trade-specific mandate of the WTO.

Finally, the demographics of the WTO may be only in theory weighing towards democracy. The balance of 47 percent democratic states versus 25 percent authoritative does not adequately describe the quest for democratic values in international law. In fact, a comparison of population data for the very same countries paints a different picture. The 40 authoritarian member states account for approximately 2 billion 348 million people, while the 76 democratic ones have a population of 2 billion 831 million. This changes the dynamics significantly, especially when one considers the end-consumer of trade policies, the consumer-citizen herself.

These statistics render any efforts on behalf of the WTO as an organization to give an outlet to civil society voices directly at the international level all the more important, as such discourse and opportunities for influence and dissent may be entirely lacking at the national level. Thus, the argument that some[62] have put forward that the nation state is the appropriate terrain and filter for civil society voices may work well in the EU, US, Canadian, Japanese and other national contexts but it does not necessarily apply to the rest of the world in quite the same way. Moreover, even if national constituencies are heard at the national level, the Green Room practice may not allow for the representatives of many countries to ever bring the considerations that were nationally discussed forward. Picciotto more strongly than Peters argues for complementing the transformation of global democratic space with domestic pro-democratic transformations.[63]

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[62] See Petros Mavroidis, *Amicus Curiae Briefs before the WTO: Much Ado about Nothing* in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN 317 (A.V. Bogdandy, et al. eds. 2002).

[63] Sol Picciotto, *Democratizing Globalism* in THE MARKET OR THE PUBLIC DOMAIN, AND OTHER CONTRIBUTIONS IN REDRAWING THE LINE 338-339 (D. Drache ed. 2005).

Another problem with transitive democracy is that the WTO Agreements are only legitimized through treaty signing by a single government at a single time. Their successors are to a large extent "locked in." The process of treaty conclusions significantly adds to this problem. Peters observes this when she notes that:

> "…even within democratic states, the democratic foundation of foreign policy is traditionally weak. International treaties are negotiated, signed, and ratified by members of national executives, who enjoy less direct democratic legitimacy than national parliaments. In democratic states, parliaments are involved in the conclusion of treaties, but often in a late stage when the text is already fixed. They can for the most part only take or leave the treaty and have no creative power to introduce amendments or carve out single articles."[64]

A second issue that has been discussed with respect to the WTO, as it has in the EU context is who exactly belongs to the WTO demos. I argue that this question is not as relevant and has been sufficiently answered by Kjaer, who notes that a functional equivalent of the EU peoples at the global level is "the concept of stakeholders, defined as affected parties operating within a formalized institutional framework."[65] Instead of arguing who may be the recipient of WTO policies (as the answer to that today may very well be "everyone"), it is more pertinent to insist on the expansion of the WTO's public space and similarly the expansion of other international organizations' public space. Delineating a specific demos may even become a hurdle if it is eventually identified as a procedural requirement for participation in any processes in the WTO. In theory, the WTO Public Forum which invites everyone and anyone to participate in its three-day discussions on trade should serve as a prototype at least to the extent of not excluding anyone from the trade debate. Encouraging the expansion of public space in the WTO, that is, improving external transparency, is a *conditio sine qua non* for addressing the organization's legitimacy issues. Drache links this public space with transparency and a "strengthen civic order":

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[64] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 291 (J. Klabbers et al eds. 2009).
[65] POUL F. KJAER, CONSTITUTIONALISM IN THE GLOBAL REALM: A SOCIOLOGICAL APPROACH 35-36 (2014).

> "[W]ithin a globalized world, public domain activities are becoming more significant in the core economic jurisdictions, as well as many developing and advanced states that are having to confront globalization and a range of intractable distributional issues. International organizations like the WTO, stress the need for transparency and the rule of law, both of which require a strengthened civic order." [66]

Similarly Picciotto identifies the expansion of public forums as crucial to democratic deliberation,[67] and the assessment of expertise.[68] He sees the establishment of WTO contact points as a step in the right direction, and summarizes the need for a global deliberative space and its establishment through democratic legitimacy:

> "[D]emocratization of global governance is not a matter of creating a global version of an already outdated national model of representative democracy, but part of a more general process of the development of new democratic principles responding to changes in the character of the public sphere. The meaning and content of globalization are as much political as economic questions: the construction of global governance has been under way for some time, but it has been dominated by international elites. The issue now is whether it is possible to provide democratic legitimacy through appropriate constitutional principles, in the broad sense of ensuring the allocation and exercise of public power in ways that can be responsive to the values and preferences of those affected by relevant decisions."[69]

The next four chapters will elaborate on each of the four transparency forms and discuss whether they can provide for such "public spaces", in the sense of "normative discourse spaces" and create opportunities for democratization in the WTO.

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[66] Daniel Drache, *The Return of the Public Domain after the Triumph of Markets: Revisiting the Most Basic of Fundamentals* in THE MARKET OR THE PUBLIC DOMAIN, AND OTHER CONTRIBUTIONS IN REDRAWING THE LINE 63 (D. Drache ed. 2005).
[67] Sol Picciotto, *Democratizing Globalism* in THE MARKET OR THE PUBLIC DOMAIN, AND OTHER CONTRIBUTIONS IN REDRAWING THE LINE 342 (D. Drache ed. 2005) putting forward an argument based on Habermas.
[68] *Id.* 344.
[69] *Id.* 339.

III. Internal Transparency

Internal transparency in the WTO is defined as "the issue of effective participation of developing countries in WTO decision-making."[1] In 2001, internal transparency was included as an issue in Paragraph 10 of the Doha Ministerial Declaration as follows:

> "Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members. While emphasizing *the intergovernmental character of the organization*, we are committed to *making the WTO's operations more transparent*, including through more effective prompt dissemination of information, and to improve dialogue with the public. *We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal rules-based multilateral trading system.*"[2]

Paragraph 10 of the Doha Declaration addresses both internal and external transparency, although it only mentions the former by name. In this chapter we will focus on the internal transparency aspects of paragraph 10, and later we will also explore external transparency in the relevant chapter.

Arguably, Paragraph 10 could be divided in two parts, discussing internal transparency until the first period, and external for the rest of the paragraph. However, certain elements in the part after the first period can be seen as qualifiers for internal transparency: the WTO's intergovernmental character refers not only to the membership to the WTO and the conference of rights and duties reserved exclusively for states and not for other non-state entities, but also, *can* be a reference to sovereign equality as the foundation of international treaty making competence. Sovereign equality is alluded to as it is possibly seen as a counterbalance, a cardinal notion in the foundation of international law that aspires to offset the problematic notion that some countries are not participating as

[1] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 150 (2008).
[2] Emphasis added.

effectively as others, which the first sentence just spoke of. Even if internal transparency was formally recognized in the Doha Declaration, immediately after the recognition was tampered by an indirect reference to sovereign equality.

The last sentence of paragraph 10 makes the notion of internal transparency even murkier. Issues of transparency are directly linked to lack of *public* understanding, without it being further clarified if developing countries and their constituents are also victims to such a "misunderstanding" or this is a reference only to external transparency and non-state stakeholders, citizens, consumers and for profit and non-profit entities. Finally, the last sentence, perhaps the most problematic of the entire paragraph is the one directional notion that only benefits are to be reaped from the liberal rules-based system that is the WTO. Even more here lie the notions that first, the problem with the WTO is not the lack of benefits, or that such benefits come from its liberal rules-based nature, but that all the above have somehow been lost in translation and not been communicated properly to those who are interested or care, or are affected by these rules; and second, that the very nature of the WTO as a legal system is decided and set, and what needs and can be negotiated is the communication of the benefits. This reduces Paragraph 10 to a debate on the WTO's public relations' agenda, and obscures the real issues that exist within the organization and that have resulted to a negotiations' standstill.

Since the Doha negotiation's deadlock, it is evident that internal transparency problems entail a lot more than an anomaly in the WTO's communications' strategies. This conclusion is also evident through literature that discusses law and development in the WTO: the lack of effective participation of developing countries is due to more embedded issues that date before the creation of the WTO, and even before the conclusion of the GATT, and are not unique to the international trading context. Moreover, when one explores exclusionary practices from some WTO member states against others in general, problems appear outside the development framework as well.

Thus, I argue that the definition of internal transparency should not be pegged to developing countries. Instead, it should be extended for three reasons: the first is in order

to remain more faithful to the letter of the Doha Declaration: Paragraph 10 stipulates that internal transparency problems are linked to the expanding WTO membership, without an explicit mention of developing countries. Therefore, other participation hurdles caused by the increasing size of the organization should be considered under paragraph 10. Second, there are some similarities in the legal framework that addresses development in the WTO and two others, namely regionalism and accession. A set of exceptions are set forth to address a different issue each time, putting in question the validity of cardinal rules in the WTO and whether they function as intended. In other words, it is paradoxical why such sets of exceptions are necessary to rules that represent the liberal rules-based trading system, which provides its members with benefits only. Third, contextual parameters of the three sets of two-tiered processes exhibit similarities. There exist most importantly obvious stronger-versus-weaker state (or groups of states) dynamics, which further influence the processes followed to conclude these rules, their content and their monitoring mechanisms (when those are in place).

For these reasons I argue that internal transparency should extend to countries who are left out of Preferential and Regional Trade Agreements as well as countries who are in the process of acceding to the WTO. Or, one could argue that developing countries' participation problems are issues of internal transparency *stricto sensu* while the other two, accession and PTAs/RTAs belong to internal transparency *lato sensu.* Extending the definition of internal transparency to non-development related exclusionary problems can help us better understand the issue of non-effective participation to the world trading system, and can also help address fairness questions that do not exclusively appear in the development context.

A WTO member state can be facing exactly the same issues of complete disregard for its economic needs and inability to do much about it in the WTO context during its accession process or because of being left out from Preferential Trade Agreements. The former scenario happened for example in the case of Vanuatu, which, in order for its accession to be approved, was essentially being coerced into signing the plurilateral Agreement on Aviation even though the country has no civil aviation system. The

possibility of such anecdotes in accessions negotiations exists due to the structure of accession in the WTO. With respect to PTAs, the mega-agreements signed between the EU and Canada (CETA) and negotiated between the EU and the US (TTIP) can easily exacerbate the problems from extant subsidization practices from all three parties for their products at the expense of small economies. The three WTO members are already dominating the world trading system. New agreements between them without the obligation to extend the privileges agreed through MFN to anyone else can block entire sectors of global markets from any chances for prosperity. Additionally, a significant amount of intransparency exists with respect to PTAs in the WTO.

The first part of this chapter will discuss internal transparency *stricto sensu,* namely as it relates to developing countries. The second and third parts will extend to transparency *lato sensu*, in PTAs, RTAs and the accession process. The chapter will aim to highlight the significance of trust in the WTO institutional processes, such as negotiations, decision-making, dispute settlement and trade monitoring that the representatives of member states should have in order for the WTO system to function productively, observe similarities and differences amongst the three areas where internal transparency is relevant and link internal transparency to democratization in the WTO. This chapter acts as a form of "internal" critique to the WTO discourse, namely it adopts the Doha Declaration definition and examines how it can be better understood.

A. Internal Transparency *stricto sensu:* Developing Countries in the WTO

The problems with respect to internal transparency *stricto sensu* became more widely known during the Green Room incidents in the first few years of the GATT operations. The Green Room refers to a room adjacent to the office of the GATT and then the WTO Director-General where smaller group meetings traditionally took place.[3] Such meetings

[3] An eloquent account on the Green Room appears in PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 28 (2009): "Arif Hussain's eyes sparkle when he recalls the Green Room. A former Indian civil servant who joined the GATT Secretariat in 1984, Hussain even kept the old Green Room furniture in a small chamber across from his office at the Centre William Rappard. The room was named for the tacky color ("goat-vomit green," one of Hussain's former colleagues calls it) of the fabric and

include countries with higher financial stakes in certain products or the outcomes of certain negotiations and result in faster negotiations of rules, excluding the bulk of WTO member states. Thus, the familiar tactic of alliance formation during treaty negotiations was quasi-institutionalized. The exclusionary incidents proliferated to the point that countries with large delegations would meet in several small working groups who were convening in parallel and at the same time during Ministerial Meetings. Countries with smaller delegations, mostly smaller economies, developing and least developed countries would not have similar diplomatic armies and would thus be excluded from efficient representation of their interests in such meetings. Efforts of these countries to unite and conquer the meetings partially remedied the problems but cannot fully work, as the interests of developing countries and smaller economies are not uniform with respect to tariffs, products and agreements. To this day, internal transparency problems remain as one of the cardinal legitimacy deficits in the WTO.

This chapter will discuss the context and the rules related to internal transparency. The origins of the internal transparency deficits can be traced beyond the GATT and the WTO and the problems with developing country participation at international fora is not unique to the WTO. Instead of disembedding the treatment of developing countries with respect to WTO rules from the internal transparency problem, I argue that only through examination of the GATT development decisions can we fully understand how internal transparency became to be seen as an issue in the WTO in the first place and how deeply rooted internal transparency is to the tension between the "rules-based liberal trading system" and the economic needs of developing countries. The growing frustration of developing countries did not emerge after the creation of the WTO, and is not limited to

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upholstery that graced its walls and chairs. It was the director-general's conference room, which became famous in trade circles as the gathering place for representatives from a select group of powerful countries, usually twenty or so, at the invitation of Arthur Dunkel, the director-general from 1980 to 1993. "There was lots of cigar and cigarette smoke in the air," Hussain recalls. "Negotiators were poring over papers and drafts, with liberal servings of wine and sandwiches." The idea was to create the proper ambience for reaching agreements that could be sold to all the countries participating in the GATT. Although the former Green Room is no longer green—it has been elegantly appointed with wood paneling, modern art paintings, and a polished oval wooden table—neither the tradition nor the term have faded into history. "Green rooms" are held often under WTO auspices—the term will come up repeatedly in this book—and consist of small groups of negotiators who try to strike key compromises in a manageably sized forum before the larger WTO membership considers them."

being left out of the Green Room, or not having large enough delegations to fully engage in tariff negotiations. Instead, developing countries have voiced concerns of their interests being side-stepped throughout the history of the GATT and as a result, periodically the GATT member states and later the WTO member states have taken steps to rectify the problem. However, such steps are first, too few and too late, and second, they are introduced on an exceptional basis and not through a proper development-oriented dialogue.

In this chapter I argue that the marginalization of developing states during WTO meetings and the marginalization of development needs in international trade are linked. Developing countries have traditionally been excluded from discussing the needs of their economies in the WTO: many of their industries cannot sustain the pressure of extensive liberalization and competition in global markets. Instead of benefiting from comparative advantage, domestic markets have plummeted to extinction. This decline was greatly exacerbated by globalization. Not being heard, and not being taken seriously resulted instead in the adoption of "Band-Aid" frameworks such as the GSP and the Enabling Clause, and agreements with insignificant stature or restricted to single products like the ones adopted for Least Developed Countries during the Bali Ministerial. Therefore, the incomplete nature of development rules is coupled to a more systemic reluctance in the WTO to question the ideological foundations of the world trading system. This is evidenced *inter alia* by the wording of Paragraph 10 of the Doha Ministerial Declaration as we saw earlier, which is replete with disclaimers and qualifiers that negate the severity of the development issue. The "Green Room" saga and the failure to create a development-friendly normative agenda are having mutual spillovers onto one another. Thus they will be discussed together in this chapter.

The first part will begin the conversation of development outside the world trading system and provide an overview of the history of development in order to show that this lack of consideration for development needs is a more systemic issue in international affairs. In the second part, I will discuss the history of development and the legal parameters of development in the GATT and the WTO. This part will focus on the

Generalized System of Preferences, the Enabling Clause, the most important DSB report discussing the issue of development, *EC-Tariff Preferences*, and the status of development after the Doha Ministerial Conference. This analysis will help demonstrate the extent of the deficit on a proper consideration of development needs. The third part will link the conclusions from the first two parts to the notion of internal transparency. More specifically, I will first examine how development is, as shown, a complicated concept that encompasses a series of considerations and a plethora of diverse national interests. International administrations and global governance more generally has been struggling to form a proper development agenda. However, returning to internal transparency, I will argue that it will never be possible to include developing needs in multilateral trade negotiations without including developing countries in the dialogue as well.

a) A very brief overview of Development

The concept of development mainly arose during the period of decolonisation following World War II. In that sense, the dynamics between 'developed' and 'developing' countries can be said to be a direct result of the convoluted and complex history of colonialism.[4] Development is hard to define, and contains elements such as infrastructure and poverty, which are also difficult to define, and can incorporate a number of biases that may be difficult to identify.[5] It has been a central matter of contestation and attention in the work of development economists, economic geographers, international political economists, lawyers, sociologists, anthropologists, managers, production engineers and others.[6] In an attempt to define development, we could consider notions such as the standard of living (and how to improve it), economic and labour factors, and the desire to eradicate poverty. Tied to the notion of development are the history of colonialism, the economics of scarcity in goods, food and other commodities, labour economics, legal

[4] For an analysis of this background see SUNDHYA PAHUJA, DECOLONIZING INTERNATIONAL LAW (2011).
[5] Paul Glewwe & Jacques van der Gaag, *Identifying the Poor in Developing Countries: Do Different Definitions Matter?* 18 WORLD DEVEL. 803 (1990).
[6] RAPHAEL KAPLINSKY, GLOBALISATION, POVERTY AND INEQUALITY: BETWEEN A ROCK AND A HARD PLACE xii (2005).

pluralism and comparative law, and, finally, human rights discourse. These analytical categories include a large number of further distinctions that fall outside the scope of this thesis.

Development has been the meeting point for historical, economic and legal concepts and analyses.[7] It has also been the preoccupation of political and civil society actors and international organisations.[8] The notion of development differs from one country to the next, reflecting the varied development needs of each country. It also differs based on who defines it: lawyers, historians, economists, NGOs, the people living in developing countries, their politicians, other governmental structures such as international organisations (the WTO, World Bank, IMF), or the G20. Each discipline and stakeholder has developed multiple narratives, which are often not compatible with other descriptions of the same phenomenon. Accordingly, navigating development from the point of view of law is particularly challenging for lawyers and legal scholars. Globalisation amplified the difficulty of this task by accentuating more transnational dimensions in existing legal relationships.

Development economics is perhaps the most prolific discipline occupied with development. It is the discipline that had the greatest role in informing all other development-oriented disciplines. The focus of development economists can be summarised in two questions: Why are the poor countries still poor? What can be done to remove their persistent poverty?[9]

Notwithstanding classical economists and Marx, the history of development economics began in the late 1940s and early 1950s. It includes many schools of thought ranging across the political spectrum, from neoliberal laissez-faire economists to neo-Marxists. It includes institutionalist theories, theories of endogenous and exogenous growth,

[7] See Nicholas Crafts, *Historical Perspectives on Development* (*with chapter comments by Avner Greif and David Landes*) in FRONTIERS OF DEVELOPMENT ECONOMICS: THE FUTURE IN PERSPECTIVE (G.Meier & J. Stiglitz eds. 2001).
[8] LEONARDO MARTINEZ-DIAZ & NGAIRE WOODS (EDS.), NETWORKS OF INFLUENCE? DEVELOPING COUNTRIES IN A NETWORKED GLOBAL ORDER (2009).
[9] GERALD M MEIER, BIOGRAPHY OF A SUBJECT: AN EVOLUTION OF DEVELOPMENT ECONOMICS 7(2004).

heterodox theories, theories of path dependency, varieties of capitalism, developmentalist economics, external trade optimists and skeptics, theories exploring the world population, agriculture, technology and their effects on development, comparative political economy and many others.[10] A lawyer approaching this field is provided with an extensive menu of economic theory choices examining a variety of socioeconomic factors. At the same time, many of these theories are in stark opposition to others and offer opposite accounts for the same economic phenomena or the same case studies.[11]

Law and Development emerged in legal discourse in the 1960s and 1970s. In the 1960s it took the form of an aggregate of loosely connected theoretical accounts from comparative law scholars, legal anthropologists, Third World specialists and social theorists.[12] This original stream of work focused on establishing a model for the relationship between law and society and an explanation for the relationship between law and development.[13] In their seminal article 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', David Trubek and Mark Galanter deconstructed the 'liberal legalism' paradigm of previous accounts by challenging its underlying assumptions of law as an instrument for change towards the 'ideal' form of Western rule of law models.[14]

[10] For elaborate accounts of these streams, see Meier, *ibid*; JAMES M CYPHER & JAMES L DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT (2009); MARK IRVING LICHBACH & ALAN S ZUCKERMAN (EDS.), COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE (2009); ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER (2011); PETER HALL & DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (2001); Peter Hall & Daniel W Gingerich, *Varieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis* 39:3 BRITISH J. POL. SCI. 449 (2009).
[11] See GERALD M MEIER & JOSEPH E. STIGLITZ (EDS.), FRONTIERS OF DEVELOPMENT ECONOMICS: THE FUTURE IN PERSPECTIVE (2001) and more specifically the chapter by Gerald M Meier, *The Old Generation of Development Economists and the New* with comments by Philippe Aghion & Hla Myint; also see David M. Trubek, *Law and Development in the Twenty-First Century* in LAW AND DEVELOPMENT IN ASIA (G. McAlinn & C. Pejovic eds. 2011).
[12] David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,* 4 WISC. L. REV. 1062, 1067 (1974).
[13] *Ibid.* 1071, describing liberal legalism.
[14] *Ibid.*

Legal reform and legal education were featured as prominent tools for law and development in the first two decades of the movement.[15] In the 1980s, Trubek, among others, identified that in the 1980s 'Rule of Law' theories replaced previous Law and Development debates.[16] The first 'Rule of Law' wave emerged during the era following the end of 1980s Washington Consensus.[17] Very soon, the promise of solutions that would ensue endogenously through domestic market and rule-of-law reforms was replaced by an understanding that development needs varied significantly not only from one country to the next, but within geographic districts of the same country. Poverty alleviation and sustainable growth could not be attained based on prescribed development strategies.

In the post-Washington Consensus era,[18] law and development can no longer afford to disembbed economic from social considerations.[19] Soft law, informal norms, social norms, networks and culture must be considered during any attempt to formulate a development strategy.[20] As the vast majority of theories and assumptions of development economics has been drastically revisited, law and development is following suit.[21] The evolving Rule of Law discourse in the World Bank[22] is still far from proposing a positive roadmap to growth.

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[15] David M Trubek, *Law and Development* in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8443 (NJ Smelser and P. Baltes eds.) 2001). See also John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northesast Asian Experience* 28 U. PENN. J. INT'L ECON. L. 219(2007); David Trubek et al., *Towards a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions* UNIVERSITY OF WISCONSIN LEGAL STUDIES RESEARCH PAPER 1207 (2012).

[16] David M Trubek, *The "Rule of Law" in Development Assistance: Past, Present and Future* and David Kennedy, *The "Rule of Law", Political Choices, and Development Common Sense* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (D. Trubek & A. Santos EDS.. 2006).

[17] The harmonised efforts of the International Financial Institutions, the World Bank, the IMF and the US Treasury to provide recipes for countries facing economic crises.

[18] Roughly from the end of the previous millennium up to the present day.

[19] Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social* (2004) 26 MICH. J. INT'L L. 199.

[20] *Ibid,* 200, 206, 217–22.

[21] See the contributions in DAVID M TRUBEK AND ALVARO SANTOS (EDS.), THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (2006). See also AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

[22] See Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (D. Trubek & A. Santos eds. 2006).

b) Development in the GATT and the WTO

The complexity of development is well-known in historical, legal and economic analyses of trade and development.[23] Sonia Rolland gives a concise definition of development in the organisation as the 'unspoken … non-negotiated understanding … transpir[ing] from the GATT and WTO practice regarding special and differential treatment'. According to Rolland, the objectives of the special and differential treatment are in sum 'the promotion of North-South trade', 'allowances for domestic development policies that may be trade restrictive' and 'increase of South-South trade', albeit limitedly. The establishment of special and differential treatment, with its multiple facets,[24] occurred throughout the history of the GATT and the WTO.

The question of how to increase benefits from trade for developing countries arose shortly after GATT came into existence in 1947. Ten out of the 23 original GATT members were developing countries and more acceded shortly after the conclusion of the GATT.[2526] The strain of colonisation inevitably followed the developing countries in their multilateral trade responsibilities. Originally, the distinction among developed and developing nations was yet another outfit of the mandates' and the colonies' apparatus.[27] The dynamics between the two groups were a direct result of the history of colonialism but also the *de facto* position of developing countries, which accessed only limited resources of wealth, comprising mainly of primary products.[28] There was substantial discussion on development during the negotiations of the ITO but no aspects of it transpired to the GATT to form any kind of concrete legal rules.

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[23] See for a socio-legal analysis RAJ BHALA, TRADE, DEVELOPMENT AND SOCIAL JUSTICE (2003) and for a more economic-oriented JAMES CYPHER & JAMES DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT (2009).

[24] See Edwini Kessie, *The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements* in WTO LAW AND DEVELOPING COUNTRIES 23-34 (G. A. Bermann & P. C. Mavroidis, eds. 2007). Special and Differential Treatment provisions aim at increasing trade opportunities, requiring developed members to consider the needs of developing ones, allowing for lesser obligations and transitional time periods for developing countries and providing technical assistance.

[25] See DOUGLAS A.IRWIN ET. AL., THE GENESIS OF THE GATT 76-77, 120 (2008) looking at initial developing country reactions to the pre-GATT texts and their participation as Founding Members.

[26] Although China, Lebanon and Syria withdrew.

[27] ROBERT E HUDEC,. DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 6(1987).

[28] *Id.* 76-77.

Until 1954, developing countries participated as equal partners in the GATT. Article I of the GATT, entitled 'General Most-Favoured Nation Treatment' (MFN), contained an obligation to automatically extend the lowest tariff level in any given product that applied to one member of the GATT to all members. One ultimate goal of the cardinal GATT provision is an overall reduction in tariffs for its members. This was a cumbersome obligation for developing countries, whose domestic markets could not sustain the direct competition of foreign products. With the participation of developing countries in the GATT and later the WTO, opportunities for national protectionism and subsidies diminished.[29] National manufacturers had to compete with global prices, and domestic industries were left vulnerable to shocks of exposure to world markets.[30] Any opportunities of subsidies in order to help national manufacturers were originally inhibited by the GATT rules. For the developing GATT member states, membership in the organisation seemed to be an obstacle to, rather than an opportunity for, growth. To a large extent, formal equality translated to unequal rewards.[31] Developing countries pushed immediately for changes in the GATT system. As early as 1954, during the first GATT Review session, Article XVIII providing for infant industry exceptions was revised. Article XVIII (B) was adopted, giving the opportunity to countries with balance of payment problems to adopt exceptions. Finally, Article XXVIII (*bis*) lowered the reciprocity requirements for developing countries.

Later on, with the formation of the G77 group, and the negotiations of the UN Conference on Trade and Development (UNCTAD) and the New International Economic Order[32], the GATT Contracting Parties gained some negotiating power in the WTO. Partly responding to almost two decades of pressures from their developing members, partly due to concerns of progressive replacement by UNCTAD (whose mandate also was directly related to trade), WTO members chose to adopt Part IV of the GATT, under

[29] See Bernard M. Hoekman & Kym Anderson, *Developing Country Agriculture and the New Trade Agenda* CEPR DISCUSSION SERIES No 2096(1999); T.N. Srinivasan, *Developing Countries and the Multilateral Trading System after Doha*, YALE UNIVERSITY ECONOMIC GROWTH CENTER DISCUSSION PAPER No 843 (2002).
[30] *Ibid.*
[31] SONIA ROLLAND, DEVELOPMENT AT THE WTO 7 (2012).
[32] *Id.* 124-126

the title "Trade and Development." Even though Part IV does not contain any concrete legal obligations vis-à-vis development, it can be seen as a victory of developing countries. In any case, UNCTAD offers a comparable framework, equally aspirational in nature.

The creation of UNCTAD, another organisation specialising in Trade and Development, acted as a warning for the developed members of the GATT: their developing counterparts could abandon the organisation. Such a move would compromise the developed bloc's universal membership ambitions, which gained particular significance during the Cold War. [33] The Committee on Trade and Development was created in the GATT and Part IV of the GATT was adopted as a response. Part IV, entitled Trade and Development, consists of three articles entitled 'Principles and Objectives', 'Commitments' and 'Joint Action'. The content of these articles is more aspirational and declaratory than compulsory. It does not create any obligations for developed countries, nor rights for developing ones.[34]

Shortly thereafter, another three waivers to the Article I MFN clause were adopted with the aim of assisting developing countries. Most importantly, in 1971 the GATT member states agreed to the Generalized System of Preferences,[35] which granted tariff preferences to developing countries without a reciprocity requirement (as MFN would otherwise require). This was essentially a waiver, containing an expiration date whose extension was to be further decided. Its significance was strengthened eight years later, when it was concretized during the Tokyo Round of trade negotiations. In 1979, at the end of the Tokyo Round, the temporary waivers of the previous decade were made permanent in the Enabling Clause[36].

[33] ROBERT E. HUDEC,. DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 39 (1987).
[34] *Ibid,* 64–65.
[35] Decision on Generalized System of Preferences (25 June 1971) BISD 18S/24.
[36] Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, (28 November 1979) L/4903.

Waivers were granted under the GATT framework[37], which remains unchanged in the WTO. One could claim that they are mostly isolated and sporadic. Even though each waiver was granted for a legitimate reason, the explanation behind each one is on an ad-hoc basis and the conclusions to be drawn from such waivers are limited. In any case, waivers as exceptions portray a return to the bilateral structure,[38] juxtaposed to the sweeping MFN and National Treatment. The waiver mechanism for developing countries creates an elaborate system under the GATT/WTO, which targets a specific group for a particular reason with large political and economic parameters.

The special and differential treatment of developing countries could be seen as adhering to the principle of equality and doing so quite faithfully. Indeed, equality in law obliges one to treat equal cases equally, and unequals unequally[39]. As was pointed out by the Rapporteur of the Subcommittee on General Principles, in the Report of the Committee on Legal Aspects of a New International Economic Order:

> "From a legal point of view […] the equality principle (or the non-discrimination-principle) means that equal cases should be treated equally and unequal cases unequally. […] [U]nequal cases should be treated unequally in proportion to their inequality. In view of the objectives of the rules and policies concerned and particularly in view of the objectives of a NIEO this will mean in particular that developing countries have to be treated more favourably by developed countries in proportion to their level of under-development."[40]

There are three main parts to the legal framework of development under the WTO/GATT umbrella. First, the GATT provisions. Article XVIII of the GATT contains a detailed support structure in case developing countries need to adopt measures regarding infant or otherwise necessary for development industries. Part IV of the GATT is a lot more vague,

[37] Waivers are granted under Article XXV para. 5 of the GATT.
[38] JACKSON JOHN H., SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW, 164 (2006).
[39] This understanding of equal treatment is quite old. Elaborate references can be found, for instance in ARISTOTLE, POLITICS (ΠΟΛΙΤΙΚΑ), book number VII, chapter 14 as well as PLATO, LAWS, (NOMOI) Book VI, 757a-e, 758a.
[40] International Law Association, *Third Report of the Committee on Legal Aspects of a New International Economic Order* 61 INTERNATIONAL LAW ASSOCIATION CONFERENCE REPORT 131-132 (1984)

setting out ambitions and principles with limited legal application. This lack of legal obligations was even at the time of the adoption of part IV, depicted as an advantage.[41]

Second, the Generalized System of Preferences, paragraph (a), according to which:

> "…without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties […] to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment refereed to in the Preamble to this Decision, without according such treatment to like products of other contracting parties…"

Third, the Enabling Clause adopted in 1979, which in the first paragraph provides that:

> "Not withstanding the provisions of article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."

Further, it says in Paragraph 2:

> The provisions of paragraph 1 apply to the following:
> (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.

Of importance is also Footnote 3 (referring to paragraph 2a).

> "As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

Two areas of increased significance for developing countries were left out of the GATT until the Uruguay Round: trade in textiles and agricultural products. Another important

[41] ROBERT E. HUDEC,. DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 59 (1987).

issue, especially for sub-Saharan African countries, was that of the prices of drugs for many diseases that plagued large numbers of their populations. They were asking essentially to be able to produce generic versions of the drugs, circumventing the lengthy periods of expensive patents. The deal resulting from the Uruguay Round of negotiations in the next decade was in the form of a single undertaking and included an Agreement on Agriculture and one on Textiles and Clothing, as well as TRIPS on Intellectual Property. GATT Members had to accept all agreements as a package deal.

The inclusion of crucial to developing countries sectors, especially textiles and agriculture was only a Pyrrhic victory. The agreements themselves did not result in any changes to the benefit of developing country industries. In the meanwhile a number of regional initiatives attempted to assist developing countries, such as the EU Cotonou Agreement,[42] the United States' Caribbean Basin Initiative,[43] as well as the US African Growth and Opportunity Act.[44]

The new tariff schedules and their implementation reserved unpleasant surprises. First, agricultural concessions were entered into on an average basis. Compared to the less than 4% average tariffs of manufactured goods, agricultural products' tariffs were cut on average by 36% according to the Uruguay Round results. An average cut of 36% however does not entail significant liberalization, as countries can pick and choose products that are of lesser interest (or more difficult to grow, producing smaller volumes of exports) and eliminate tariffs completely, while keeping them intact for products that are of pivotal interests in domestic economies, as long as *on average* the cut amounts to 36%.

On top of that generous subsidies of domestic markets, as it happens for example for the US cotton industry, can help flood world markets with cheap US cotton. As a result, cotton, a key sector for sub-Saharan Africa's external trade is rendered much less

[42] See the *Cotonou Agreement* at https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en.
[43] *Caribbean Basin Security Initiative* http://www.state.gov/p/wha/rt/cbsi/
[44] *African Growth and Opportunity Act* http://trade.gov/agoa/

competitive. In 2005, former Mali President Amadou Toumani Toure summarized the importance that cotton acquired throughout the Doha Round of negotiations.

> "Cotton is by no means the only issue at stake in the agricultural sector in the Doha Round negotiations. But it must be recognized that, between Cancùn and Hong Kong, cotton has become the symbol of the African fight for fair and equitable trade, a fight that is supported by various international non-government organizations. A few years ago, cotton was a source of wealth for us. Now it has become a burden, and a factor in increasing poverty. This trend has become worse over the past few years, which have been marked by a major fall in global prices. Although a number of factors have led to this situation, agricultural subsidies are the main cause of market disruption, which has serious consequences for our economies. In addition to the macroeconomic impact of losses in government revenue, due to subsidies paid by developed countries to their producers, 15 million people in West and Central Africa, of whom over three million are farmers, depend directly on cotton for their livelihoods. These people are suffering the socio-economic costs. The current situation generates poverty in the rural areas of Africa, and particularly in the cotton-growing regions. This poverty in turn is causing an exodus of people from the rural areas. *The paradox of the situation is that, while African cotton is the most competitive in the world, African farmers can no longer manage to survive by growing it. […]The crisis in the cotton industry eloquently demonstrates that it is not enough for our countries to produce efficiently in order to hope for fair recompense for the efforts of our farmers*."[45]

During the 1996 Singapore Ministerial Conference, developing countries found themselves at the front line of opposition on the so-called Singapore issues, trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation. Later, a 1999 World Bank Report addressing the question of whether trade conducted based on WTO rules would result in assisting developing countries contributed a comprehensive analysis to what empirically developing countries were experiencing long before the creation of the WTO. In particular the report said that:

[45] Eric Hazard, *International Trade Negotiations and Poverty Reduction: The White Paper on Cotton*, http://ictsd.org/downloads/2008/04/cotton_book_en.pdf ENDA PROSPECTIVES DIALOGUES POLITIQUES OCCASIONAL PAPERS, n° 249 Preface, pages 5-6 (2005), emphasis added. Mali, Benin, Burkina Faso and Chad requested an elimination of cotton subsidies and compensation to be given to least developed countries for the period those subsidies lasted.

> "the WTO obligations reflect little awareness of development problems and little appreciation for the capacities of least developed countries to carry out the functions that SPS, customs valuation, intellectual property, etc. regulations address. The content of these obligations can be characterized as the advanced countries saying to the others, Do it my way!"[46]

Another very important point that this study put forward was that the continuous lack of participation for least developed countries resulted in a lack of "sense of "ownership" of the reforms to which WTO membership obligates." Although the report was focusing on market reforms that the Uruguay Round necessitated, its conclusions were directly referring to the Green Room problems that we have described to some extent already. The report notes that problems include the lack of resources for least developed country delegations, the fragmented communication of the WTO delegations and the governments back home as well as the non-existent involvement of domestic stakeholders.[47]

In addition, the Uruguay Round was a single undertaking process, developing and developed countries could not opt in the Agreements and concessions that their domestic economies could endure. The conclusions of the World Bank paper are damning for the WTO. The Agreements provide, mostly to a significant extent, both "inappropriate diagnoses" for development issues and "inappropriate remedies."[48] The paper concludes that:

> "Though the agreements allow for the possibility that alternative approaches might be developed and recognized, they provide no such alternative. As to developing alternatives, the WTO negotiations are a self-interest propelled process. Narrowly interpreted, that places the burden of developing alternatives that are appropriate to least developed countries' needs and their resources on the least developed countries themselves."[49]

The report finally mentions that some projects are in place to assist least developed

[46] Michael Finger, J. & Philip Schuler, *Implementation of Urugauy Round Commitments: The Development Challenge* 23:4 THE WORLD ECONOMY 23.4 511-525 online version- Page 1 (2000).
[47] Id. online version p. 8-9.
[48] Id. online version 28.
[49] Id. online version 29.

countries. Dani Rodrik has discussed the trade and development relationship in a similar line focusing not only on least developed countries but developing as well. He notes that the "success stories" of world trade, such as China or Korea adopted a large amount of protectionist measures in order to assist domestic industries before exposing them to world market shocks. He challenges the idea that benefiting from international trade through the GATT and WTO rules alone.[50] Essentially, he proposes a shift from evaluating the trade regime from the perspective of whether it maximizes the flow of trade in goods and services and to asking whether "the trading arrangements –current and proposed—maximize the possibilities of development at the national level" instead.[51] In a sense, it is a little like learning how to swim for the first time in the middle of the ocean. Those who survive and thrive in the current trading system had the opportunity to "learn" in a controlled environment. Furthermore, intra-country inequalities persist in those countries. Their GDP may be rising but a large segment of the population in some cases is still living under the poverty line. Even their benefit from global trade is relative.

The dissatisfaction of developing countries was carried over to the next two Ministerial Conferences in Geneva and Seattle. The failure to launch the next round in Seattle demonstrated that the problem of development couldn't be fixed with fragmented concessions and *ad hoc* solutions. The mainstream logic in trade that granting periodic privileges would push poorer countries' participation in world markets and market dynamics would take care of the rest and improve national economics was fundamentally challenged.

The eventual launch of the 2001 Round of negotiations, the Doha Round was linked to a strong commitment of member states to place the interests of developing countries in the

[50] See Dani Rodrik, *The New Global Economy and Developing Countries: Making Openness work* Vol. 24. Washington, DC: Overseas Development Council (1999), THE SAME, THE GLOBAL GOVERNANCE OF TRADE: AS IF DEVELOPMENT REALLY MATTERED (2001), Dani Rodrik, *Trading in illusions*, FOREIGN POLICY 55-62 (2001). Also, see various entries at his blog http://rodrik.typepad.com/.

[51] DANI RODRIK, THE GLOBAL GOVERNANCE OF TRADE AS IF DEVELOPMENT REALLY MATTERED, PAPER PREPARED FOR THE UNDP (Revised July 2001).

forefront. The round was subsequently named the "Doha Development Round."[52] The Doha agenda comprised of a number of issues: liberalization of trade in agricultural products, market access for non agricultural products, continuing liberalization in trade in services, improvement in rules on dumping, intellectual property rights and regional trade agreements, clarification of the relationship of trade and the environment and further integration of developing countries in the WTO.

Two important developments occurred two years later, in 2003. The first was during the Cancun Ministerial, the formation of a new and strong coalition of developing and least developed countries, the so-called G20 (whose variations were the G30 and the G40). Led by India and Brazil, who decided to set their trade dissimilarities aside, the group strongly opposed being coerced to more cumbersome concessions and agreements. Other developing country groups tried to push new agendas forward during the preparations of the Ministerial.[53]

The second event in 2003 was the delivery of the EC-Tariff Preferences report.[54] The Generalized System of Preferences and the Enabling Clause were given a more specific meaning during the EC Tariff Preferences dispute. The Panel and the Appellate Body in the EC-Tariff Preferences decision were called upon to answer some significant questions with respect to the legal treatment of developing country products in the WTO.[55] First the Panel and Appellate Body discussed whether the Enabling Clause consists an exception to Article I:1 of the GATT, and thus the two are mutually exclusive, or Article I:1 applies to measures falling under the Enabling Clause. Article I:1, embodying one of the cardinal rules of the GATT provides for non-discrimination of like products

[52] See Pascal Lamy, *The WTO Doha Development Agenda: Working for a Fairer Global Trading System in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 5-14 (M. Janow, V. et al eds. 2008)
[53] For example, the Core group see Jeffrey Dunoff, *Comment on Nordström Håkan Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES 189 (G. A. Bermann & P. C. Mavroidis, eds. 2007).
[54] Panel Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries WT/DS246/R (Dec. 1, 2003) Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries WT/DS246/AB/R (Apr. 7, 2004) [hereinafter: EC-Tariff Preferences]
[55] Appellate Body Report EC-Tariff Preferences ¶ 90.

originating from different member states when these products reach the market of a third member state. If the Enabling Clause is an exception to Article I:1 then, any measures adopted within the Enabling Clause context do not need to be automatically extended to all developing countries in the WTO. However, if the Enabling Clause were found not to be an exception to Article I:1 but a self-standing commitment, then, Article I:1 would apply to it, as it does to all WTO commitments. Thus, any privileges granted to one developing country would automatically need to be extended to *all* developing countries. The Panel decided, and the Appellate Body affirmed that the Enabling Clause is an exception to Article I:1. Specifically, the Appellate Body said:

> The ordinary meaning of the term "notwithstanding" is, as the Panel noted, "[i]n spite of, without regard to or prevention by". By using the word "notwithstanding" , paragraph 1 of the Enabling Clause permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally". Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1.[56]

Furthermore the Panel and Appellate Body were asked whether there exists for developed countries an obligation to extend the *same* privileges, once granted, to all developing countries. In other words, does the exception need to be *as such* applied in a *non discriminatory manner*. the Appellate Body reversed the Panel's findings. It said that extending tariff preferences to all developing countries in a non-discriminatory manner does not mean that identical treatment is ensured for all. Any privilege-granting member can choose what form and level of privileges it will give to different countries.

In particular the Appellate Body said:

[56] Appellate Body Report EC-Tariff Preferences ¶ 90.

> It does not necessarily follow […] that "non-discriminatory" should be interpreted to require that preference-granting countries provide "identical" tariff preferences under GSP schemes to "all" developing countries. [57]

> For all these reasons, we reverse the Panel's finding […] that 'the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations. [58]

Further down, the Appellate Body restates the thesis that 'developing countries' may mean "*less than all* developing countries."[59] In a sense, this differentiation among developing countries can support the claim that the Appellate Body may be keen on recognizing the rationale that lies behind the so-called 'graduation' principle. This principle, which has been often been seen as mercantilist and monolithic[60] very briefly says that developing countries, once they reach a certain level of development that puts them in a position noticeably better and comparable to developed countries, they should "graduate" from their "developing-country" status and receive no further privileges. The principle was accused as mercantilist[61] because it implies that, once it graduates the country will be in a position to grant preferential treatment to those still in a developing status.

The Appellate Body in EC-Tariff Preferences offered a systemic interpretation of the obligations contained in the Enabling Clause and the GSP:

> Furthermore, as we understand it, the participants in this case agree that developing countries may have "development, financial and trade needs" that are subject to change and that certain development needs may be common to only a certain number of developing countries. We see no reason to disagree. Indeed, paragraph 3 (c) contemplates that "differential and more favourable treatment" accorded by developed to developing counties may need to be "modified" in order to "respond positively" to the

[57] *Id.* ¶ 156.
[58] *Id.* ¶174.
[59] *Id.* ¶ 176 Emphasis in the original.
[60] ROBERT E. HUDEC,. DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 131 (1987) .
[61] *Id*.

> needs of developing countries. Paragraph 7 of the Enabling Clause supports this view by recording the expectation of "less-developed contracting parties" that their capacity to make contributions or concession under the GATT will "improve with the progressive development of their economies and improvement in their trade situation". Moreover, the very purpose of the special and differential treatment permitted under the Enabling Clause is to foster economic development for developing countries. It is simply unrealistic to assume that such development will be in lockstep for all developing countries at once, now and for the future.[62]

Since the launch of the Doha Round, not a single agreement was reached in twelve years until the Ministerial Council in Bali in 2013. The Doha Round indicated that developing country issues had no easy solution, and ignoring the problem was not an option any more. Negotiations reached a stand-still, and until today, there is still a rift in at least three important areas.[63] The most pressing present interests of developing countries, as the current Doha agenda indicates, are primary agricultural products, which are generally exported for further processing, access to medicines covered by patent agreements,[64] and implementation specifics with respect to special and differential treatment.[65]

Recently, during the Bali Ministerial Conference in December 2013, the Doha Development Agenda was revisited. Agriculture and Development were at the centre of the agenda.[66] Many developing countries expressed a desire to avoid small Green Room group negotiations.[67] The conclusion of the Bali package was the first positive outcome of the Doha Development Round. It includes three pillars: trade facilitation (reducing red tape and speeding up port clearances); agriculture, focusing on food security and finally

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[62] Appellate Body Report EC-Tariff Preferences ¶ 160.
[63] See http://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm.
[64] See Bernard M. Hoekman & Kym Anderson, *Developing Country Agriculture and the New Trade Agenda* CEPR DISCUSSION SERIES No 2096 195 (1999) and T.N. Srinivasan, *Developing Countries and the Multilateral Trading System after Doha*, YALE UNIVERSITY ECONOMIC GROWTH CENTER DISCUSSION PAPER No 843 8 (2002).
[65] See 'Subjects Treated under the Doha Development Agenda' (World Trade Organization), www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm; Suyash Paliwal, *Strengthening the Link in Linkage: Defining "Development Needs" in WTO Law* 27:1 AM. U. INT'L L. REV. 37(2012).
[66] '*Day 1: Bali Conference Kicks Off with Warnings that Failure will Hurt the Poor'* (World Trade Organization, 3 December 2013), http://wto.org/english/news_e/news13_e/mc9_day1_e.htm.
[67] Maria Perez-Esteve, *WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations*) WORKING PAPER DRAFT PREPARED FOR THE IISD–ENTWINED WORKSHOP (2012; Robert Wolfe, *Decision-Making and Transparency in the "Medieval" WTO: Does the Sutherland Report have the Right Prescription?* 8:3 J. INT'L ECON. L. 631, 638(2005).

including an agreement on cotton products from least developed countries; and provisions aiming at assisting the group of least developed countries.[68] The emphasis on developing and least-developed countries in the Agreements is prevalent.[69] Additionally, the mandate of the Monitoring Mechanism is extended to the implementation of special and differential treatment provisions.[70] It is still very soon to determine whether the reach of these agreements will result in a noticeable improvement in the position of developing countries.

Overall, Developing Countries have come a long way, from not being heard at all during the ITO negotiations, to causing an impasse at the last negotiation rounds. Still, there is a long way to go. The limited use of dispute mechanisms and the oftentimes observed reluctance to enforce adopted reports of the DSB and give tit-for-tat to developed countries (such as the case of Ecuador, which did not use its right to retaliate in the EC-Bananas III case,[71] or the Antigua and Barbuda case on gambling services against the US) shows that developing countries have not found themselves yet in a peer-to-peer position. This imbalance is still explained both by the actual economic position of developing countries in the world trading system, but also, historically by their continuing behavioral stance vis-à-vis the "Developed Country" paradigm, which, seen as

[68] *See 'Days 3, 4 and 5: Round-the-Clock Consultations Produce "Bali Package"'* (World Trade Organization, 5–7 December 2013), http://wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm.
[69] *Public Stockholding for Food Security Purposes — Draft Ministerial Decision* (Ministerial Conference Ninth Session Bali, 3–6 December 2013) WT/MIN(13)/W/10, https://mc9.wto.org/system/files/documents/w10_1.pdf; *Cotton — Draft Ministerial Decision (Ministerial Conference Ninth Session Bali,* 3–6 December 2013) WT/MIN(13)/W/13, https://mc9.wto.org/system/files/documents/w13_0.pdf; *Preferential Rules of Origin for Least-Developed Countries — Draft Ministerial Decision* WT/MIN(13)/W/14, https://mc9.wto.org/system/files/documents/w14.pdf; *Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries* — Draft Ministerial Decision WT/MIN(13)/W/15, https://mc9.wto.org/system/files/documents/w15.pdf; *Duty-Free and Quota-Free Market Access for Least-Developed Countries — Draft Ministerial Decision* WT/MIN(13)/W/16, https://mc9.wto.org/system/files/documents/w16.pdf; *Monitoring Mechanism on Special and Differential Treatment — Draft Ministerial Decision* WT/MIN(13)/W/17, https://mc9.wto.org/system/files/documents/w17.pdf.
[70] See *'Bali Ministerial Declaration, Revised Draft'* (Ministerial Conference Ninth Session, Bali, 7 December 2013) WT/MIN(13)/DEC/W/1/Rev.1, https://mc9.wto.org/system/files/documents/decw1r1.pdf; 'Revised Drafts of "Bali Package" Sent to Ministers after Intensive Consultations' (World Trade Organization, 6 December 2013), www.wto.org/english/thewto_e/minist_e/mc9_e/brief_monit_mecha_e.htm.
[71] Hunter Nottage, *Trade and Development in* the OXFORD HANDBOOK ON INTERNATIONAL TRADE LAW 496 (2009).

a "success", comes forward and imposes itself authoritatively with economic and legal recipes and a paternalistic attitude. The message that comes across towards developing countries is "you either follow or fall behind." The two factors, the pragmatic and the attitudinal perpetuate the existing imbalances. [72]

c) Development and Internal Transparency

The system in place for developing countries has been very much criticized, especially during the last twenty years.[73] The provisions, instead of assisting developing countries, are seen as in fact reproducing power and bargaining asymmetries. The WTO, just like GATT, stressed market-access as a sacrosanct target. The world trading system operates under the assumption that inclusion will produce larger volume of trade and this would semi-automatically bring developing countries out of any fiscal dead-ends. It reflected the belief that once in the marketplace, price mechanisms for commodities will allocate resources in an optimal manner.

There is no such thing as a recipe for development. There are only long histories of trial and error. In particular, within legal discourse, no framework can ever be taken for granted to produce positive results. [74] The successes and failures, among many, of China, Vietnam, the East-Asian Tigers, Russia, Chile, Argentina allow us to draw one conclusion only: no universally accepted set of rules (not even a minimal one) can lead to development, nor can it prevent financial collapse when it is bound to happen. Each case is vastly different from the next one. Labor, history, education, property law and contract law choices, political histories, relationship to neighbors and geographic location, current

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[72] See eg Sungjoon Cho*, The Demise of Development in the Doha Round Negotiations* 31 TEX. INT'L L. J. 574 (2010); Amrita Narlikar & Pieter Van Houten, *Know the Enemy: Uncertainty and Deadlock in the WTO* in DEADLOCKS IN MULTILATERAL NEGOTIATIONS: CAUSES AND SOLUTIONS 142–63 (A. Narlikar ed. 2010); RORDEN WILKINSON & JAMES SCOTT (EDS.), TRADE, POVERTY, DEVELOPMENT: GETTING BEYOND THE WTO'S DOHA DEADLOCK (2012).

[73] Among many, RAJ BHALA, TRADE, DEVELOPMENT AND SOCIAL JUSTICE (2003) and Kevin Watkins, Penny Fowler, Rigged rules and double standards: trade, globalisation, and the fight against poverty Oxfam Campaign Reports (2002).

[74] RAJ BHALA, TRADE, DEVELOPMENT AND SOCIAL JUSTICE (2003) and for a more economic-oriented JAMES CYPHER, & JAMES DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENt *at* 171 et seq (2009*)*.

or historical relationship to systems of economic organization (capitalism/communism before 1989), lack or existence of natural resources, weather, prioritization of commodities in the global market, religion, cultural habits, and everything under the sun are affecting the development of a country.[75] Even earthquakes and tsunamis can reverse in a matter of minutes any possible progress. If we loosely, and for the purposes of this paper, call this "the economic environment", it affects trade in a great number of ways, but there are only two legal instruments (Enabling Clause and GSP) that are on some level legally binding and are addressing the issue, and, just to make matters worse, the adherence to them by developed countries is done on a voluntary basis. So far, cursory attempts to formalise concessions granted to developing countries without careful consideration of context have only led to an aggravation of already existing problems.

The questions we ask in this last part are two: first, can it be argued that there is a correlation between internal transparency problems and a development-friendly development agenda? Will improving the first increase the chances of finding more solutions for the second? I answer this in the affirmative. Second, are there any practical proposals to help with the internal transparency problems? We will look at some suggestions below.

The WTO is a member-driven organization where decisions are made through an informal type of consensus. This means that unless anyone *present* at a meeting[76] formally objects, a decision is deemed to have been made. Voting occurs secretly, in the form of polling. A study conducted using records from 2003 showed that small economies and least developed countries are under-represented in Geneva.[77] Moreover, written submission figures show a dominance from the US and the EU in formal

[75] On the complexity of such issues, see among many, PARTHA DASGUPTA, HUMAN WELL-BEING AND THE NATURAL ENVIRONMENT (2001), especially Parts II and III.
[76] Marrakesh Agreement Establishing the World Trade Organization Article IX paragraph 1 Footnote 1.
[77] Nordström Håkan, *Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES 155 (G. A. Bermann & P. C. Mavroidis, eds. 2007) and also Finger, J. Michael, & Philip Schuler, *Implementation of Urugauy Round Commitments: The Development Challenge*, 23:4 THE WORLD ECONOMY 511-525 (2000).

participation.[78] Not only do smaller countries make fewer submissions, they also make fewer individual submissions, indicating that they often have to reach compromises with other developing and least developed countries whose interests may vary.

Developing countries lack the diplomatic resources to participate in lengthy and costly negotiations. At the same time they do not have the global political stature of large trading nations. This puts them at an inferior negotiating position. A larger national mission has the advantage of rotating its diplomats during the on-going negotiations, and also participates in simultaneous negotiating groups. Developing countries have small missions who cannot be present at all times in the time and energy consuming negotiation processes. This problem has been mitigated to some extent by the formation of groups of developing countries with common interests. Thus, they can benefit from joining forces and dispersing their missions in order to manage a continuous presence in areas where their interests converge. Even though this tactic has obvious practical advantages, as well as the opportunity of power-pooling that gives developing countries a negotiating edge, still, it can obscure variations in the positions of these countries. However close their interests might be, they are not identical. The three working languages of the WTO - English, French and Spanish- also play a role in participation by developing countries. Working in one's own language is seen as carrying an advantage.[79]

Overall, despite the open doors policies of the WTO, "countries that can afford to be active are the most active ones."[80] However, in the Doha Round, developing countries are more active than usual[81] and mostly in areas of interest to them.[82] The Cancun alliance formation seems to have been paying off to some extent. The WTO administration should try and assist on finding ways to ensure that developing countries continue to participate similarly in the day-to-day works of the organization in view of the scarcity of their

[78] Nordström Håkan, *Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES 160 (G. A. Bermann & P. C. Mavroidis, eds. 2007).
[79] *Id*. at 167.
[80] *Id*. at 169.
[81] *Id*. at 176.
[82] *Id*. at 179.

resources and strong power dynamics present.[83] The organized world trading system has been around for quite some time, and only for the last decade have we observed such a level of engagement from developing countries. The deadlock of the Doha shows that developing countries can demand that their needs are taken seriously in the WTO.

The replacement of the Quad with the group of Five Interested Parties is an important step forward. Middle income countries, developing countries with higher GDPs as well as the four very strong actors in international trade transactions, Brazil, China, Russia and India, have rightfully demanded and gained a central position in WTO negotiations. However, not all developing countries are equal. Those closer to LDCs in terms of GDP and per capita income are not in a similarly strong negotiating position. Such groups are less powerful in negotiations and cannot induce similar changes in rules. Also in the group of the Five Interested Parties are Brazil and India, two of the largest developing countries in the world.

Additionally any negotiating inferiority of least developed countries and developing countries outside BRICS also extends to their reluctance to utilize the Dispute Settlement mechanism and enforce adopted reports of the Dispute Settlement Body (such as the case of Ecuador, which did not use its right to retaliate in the EC-Bananas III case). Developing countries lack the armies of lawyers that large nations can afford. The Advisory Center on WTO law (ACWL), which was created with a mandate to provide "advice, support and training to developing and least- developed countries" has only assisted few developing countries in only 38 cases in Dispute Settlement.[84] The limited use of dispute mechanisms has been and continues to be a symptom of the lack of trust in the WTO processes. WTO case law keeps growing at a remarkable pace for international standards, thus making entry costs for first-time developing and least-developed litigants much higher. One idea is to allow for smaller economies that win dispute settlements in

[83] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 149-150 (2008). See also Jeffrey Dunoff, *Comment on Nordström Håkan Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES 189-193 (G. A. Bermann & P. C. Mavroidis, eds. 2007), who argues that participation is overrated and maybe developing countries should keep their "best and brightest at home."
[84] ACWL website www.acwl.ch/e/documents/Quick%20guide%202011%20for%20website.pdf.

the WTO to either get compensation that dates to the initiation of proceedings or be allowed to retaliate outside the national market. This may reduce the number of violations on behalf of stronger economies simply because they can currently afford to do so.[85]

As a step towards improving developing country positions and clarifying the status of preferences, we can discuss the possibility of a development definition in the WTO. This is not a proposal that suggests immediate and practical solutions in the WTO. The reluctance on behalf of developed countries to grant preferences, *inter alia* is due to free-rider fears[86]. This is further enhanced by the lack of any definition or clarity on the notion of a "developing country" under the WTO. Originally it was left to each industrial country to decide who qualified but later their status was based on self-identification. The situation varies for Least-Developed Developing Countries where the WTO uses the United Nations' lists.[87]

The World Bank and the International Monetary Fund, two international organizations with, *inter alia* a development mandate, have analogous working definitions of what constitutes a developing country. Perhaps the voting allocation of members based on quotas and the direct dependence of developing countries on external funds renders such definitions super-imposed. Adopting their definitions as a transplant would hardly ever be a success. Such recipe-like clauses could be avoided in the polarized negotiations of the WTO, where developing countries sit at one side and have the power to sustain the existing deadlock. They could set terms, to a certain extent. Moreover, the regime of international trade needs a differentiated definition for development due to many

[85] See Mateo Diego-Fernandez, *Compensation and Retaliation: A Developing Country's Perspective*, in WTO LAW AND DEVELOPING COUNTRIES 233 (G. A. Bermann & P. C. Mavroidis, eds. 2007). See also Jeffrey Dunoff, *Comment on Nordström Håkan Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES (G. A. Bermann & P. C. Mavroidis, eds. 2007), Nordström Håkan, *Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES 170 (G. A. Bermann & P. C. Mavroidis, eds. 2007) focusing on incentives.

[86] Statement by Mr. Rubens Ricupero, UNCTAD Secretary-General Ministerial Conference, Third Session, Seattle WT/MIN(99)/ST/136 (Nov.30, 1999)

[87] MICHAEL J TREBILCOCK,. & ROBERT HOWSE. THE REGULATION OF INTERNATIONAL TRADE 714 (3rd ed. 2005) who mention this in the first footnote of the chapter entitled "Trade and Developing Countries."

differences, and oftentimes contradictory positions among the developing countries.[88] Overall, even though development is very difficult to define, the World Bank and the IMF have managed to adopt working definitions, for the purposes of fulfilling their functions. Some attempt to introduce a set of rules that moves beyond the current non-binding legal framework would assist the WTO to tackle the issue of defining development and moving forward with development solutions.

The WTO political organs and the Director General must focus on ensuring that small group meetings do not become debilitating for any of the WTO members (developed versus developing, high-GDP developing versus low-GDP developing). Instead of encouraging the Green Room practices they should at least try to promote the opposite, open meetings for all. Finally, in the WTO there should be a serious discussion on the merits and the disadvantages of the consensus rule. Returning to voting rules, at least for some meetings can mitigate Green Room exclusionary practices. There has been a lot of pressure towards members that were not part of the Green Room discussions to accept what was decided in order for meetings to move forward and still adhere to the WTO's consensus practice. It may be a good idea that this precedent, which as we saw almost results in bullying tactics among various sides can be questioned and potentially abandoned when that is possible. Also, a majority rule is a lot more democratic than questionable consensus.

B. Internal Transparency *lato sensu*

1. Preferential Trade Agreements

The multilateral trading system established by the GATT and the WTO does not prevent its members from concluding bilateral or multilateral trade agreements of a more limited scope (namely among only few WTO member states). Regional Trade Agreements (RTAs) used to be traditionally signed among countries in terrestrial proximity but

[88] For an account on the issues put forward *see* LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY: AN ASSESSMENT OF THE WORLD TRADE ORGANIZATION (1999).

currently the term in the WTO refers to reciprocal trade agreements between two or more partners. They include free trade agreements and customs unions. Preferential trade arrangements (PTAs) involve unilateral trade preferences. They include Generalized System of Preferences schemes as well as other non-reciprocal preferential schemes granted a waiver by the General Council.

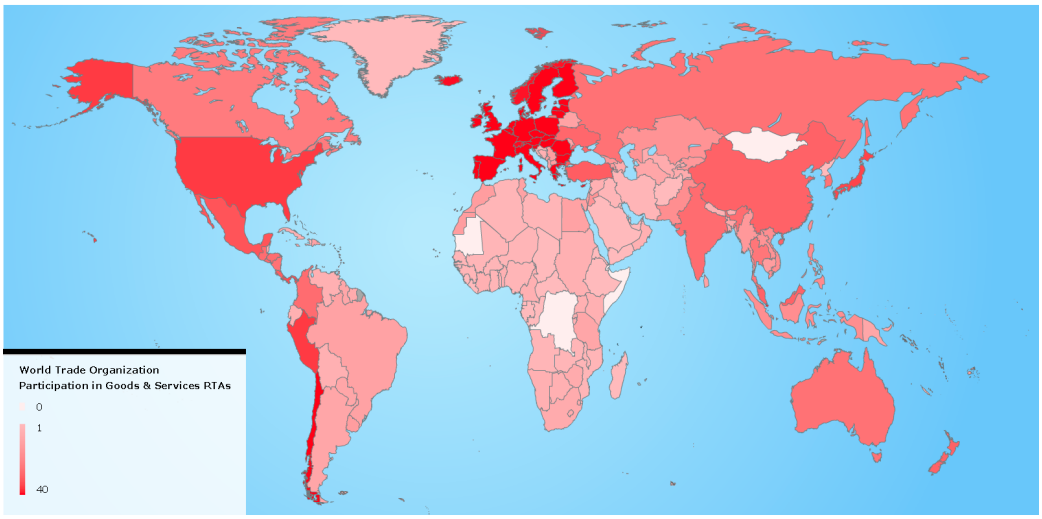

Figure 1 Map of RTA participants[89]

PTAs and RTAs are an exception to the Most Favored Nation rule of Article I:1 of the GATT. In essence, both the GATT/WTO and PTAs/RTAs aim towards trade liberalization, albeit at a different scale, and while the WTO is based on the principle of non-discrimination, not the same applies to PTAs/RTAs, who have a discriminatory logic in their rationale.[90] The two schemes pursue the same goal using contradictory rules, creating some reasonable frustration with respect to their compatibility.[91] The rationale behind the door existing in the GATT for such agreements is that more liberalization,

[89] Source: WTO website
[90] See Roberto V. Fiorentino et al., *The Landscape of Regional Trade Agreements and WTO Surveillance* in MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 54-55 (P. Low & R. Baldwin eds. 2009).
[91] Ironically there is an argument that the WTO might aspire to be a global CU or RTA, see Murray Kemp & Henry Wan, *An Elementary Proposition Concerning the Formation of Customs Unio*ns, 6 J. INT'L ECONOMICS 95-97 *at* 96(1976).

even if it occurs at a bilateral level, is better than no liberalization at all. Moreover, the GATT Founding Members at the time most likely did not want to annul their regional trade relations agreements, so instead of dealing directly with a possibility of conflict between multilateralism and preferential access to certain markets, they included an exception. Thus, it is very likely that the same subject matter is covered by PTAs/RTAs and the WTO rules, creating the potential for conflict.[92]

This asymmetry is intensified due the large volume and the importance of regional agreements [See Figure 1 for data on numbers of Regional Trade Agreements concluded between 1948-2014]. We need to go no further than point to the European Union, NAFTA, MERCOSUR and ASEAN. These agreements have strong impact for the trade amongst their members and are only four of the hundreds of bilateral and multilateral agreements that essentially provide an exception to the cardinal GATT rule of non-discrimination. As such, concerns have been raised that such agreements undermine "the transparency and predictability of trade relations."[93]

[92] THOMAS COTTIER & MARINA FOLTEA, CONSTITUTIONAL FUNCTIONS OF THE WTO AND REGIONAL TRADE AGREEMENTS 43-76, 53(2006).
[93] Roberto V. Fiorentino et al., T*he Landscape of Regional Trade Agreements and WTO Surveillance* in MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 28 (P. Low & R. Baldwin eds. 2009).

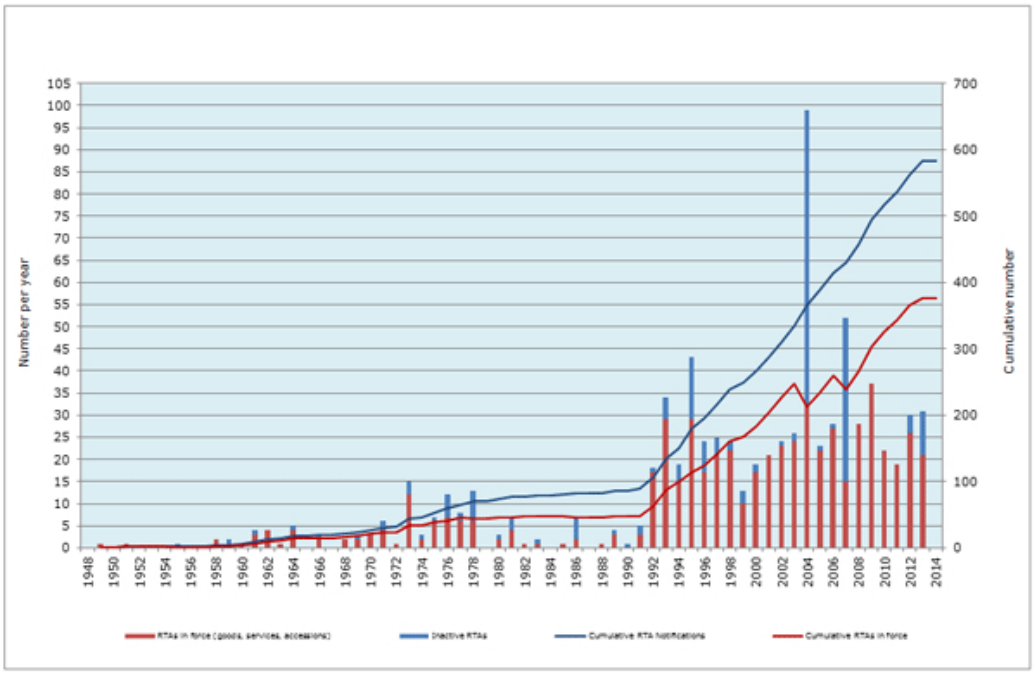

Figure 2 Regional Trade Agreements Concluded between 1948 and 2014[94]

Concerns with respect to the exclusionary nature of PTAs and RTAs are not unwarranted. It is very interesting to see the reaction of the US Trade Representative Robert Zoellick, following the Cancun Ministerial. As developing countries finally demanded that their needs be part of the agenda, or else they would not allow for the negotiations and the new Round to move any further, instead of embracing these requests, even in the slightest, the US Trade Representative retaliated with turning to a form of "coalitions of the willing." It is interesting to see how Paul Blustein reported Zoellick's reactions after the G-20's Cancun stand-off.

> "Reflecting his frustration over the events in Cancún was an op-ed he wrote in the Financial Times on September 22, 2003, a few days after the meeting. He blasted his adversaries—Brazil was mentioned five times—for having fostered a "culture of protest that defined victory in terms of political acts rather than economic results." He made it clear that *he was going to reward cooperative countries and punish uncooperative ones by intensifying his "competitive liberalization" strategy of pursuing trade deals on multiple levels*:

[94] Source: WTO website.

> [Zoellick wrote]: "The key division at Cancún was between the can-do and the won't-do. For over two years, the U.S. has pushed to open markets globally, in our hemisphere, and with sub-regions or individual countries. As WTO members ponder the future, the U.S. will not wait. We will move towards free trade with can-do countries."
> America's market of 300 million free-spending consumers, in other words, would be used as both a carrot and a stick. *Countries that shared Washington's enthusiasm for freer trade would obtain preferential access to that market by signing bilateral and regional agreements eliminating most trade barriers between them and the United States. Meanwhile, the ranks of the reluctant would be left at a disadvantage; their products would be subject to the tariffs that Washington maintained on MFN terms for members of the WTO*. Eventually, they would recognize that their self-interest lay in joining the U.S.-led bandwagon, the result being that small deals would prove to be "building blocks" toward bigger ones and, ultimately, a worldwide one."[95]

This chapter will first outline the legal framework and the types of PTAs/RTAs that are regulated in the GATT and other WTO Agreements, including the limited case law in this area. Second, I will describe the two different recently established Transparency Mechanisms for PTAs and RTAs and the WTO General Council Decisions of December 14 2006 and 2010 establishing them respectively. In the last part I will discuss the two different transparency aspects of PTAs/RTAs. The first relates to the contribution of the Transparency Mechanisms in the overall transparency record of the WTO and the significant deficiencies, mostly stemming from the lack of an enforcement mechanism obliging member states to report PTAs/RTAs that they have entered in.

The second form of transparency stems from the underlying exclusionary tactics of large trading countries such as the US in their decision to move forward with PTAs and RTAs and relates to the internal transparency problems we discussed in the previous chapter. As with developing countries whose economic needs have been systematically sidestepped for decades, and this is mirrored in their exclusion from closed meetings, PTAS/RTAs extend this small circle process of the Green Room. The difference here is that those "Green Rooms" are no longer located in Geneva and conducted under the auspices of the WTO Director General and his Secretariat, but in Washington, Ottawa, Brussels and

[95] PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 174 (2009) emphasis added.

Beijing. The reason why this is the WTO's internal transparency problem and not just a parallel phenomenon is that on one hand the GATT allows for these bilateral and plurilateral agreements to be signed without any control on how many are concluded and on the other hand all the notification and monitoring mechanisms for PTAs and RTAs are underutilized to the extent they are rendered meaningless. Thus, beyond the obvious proposal to strengthen the existing Transparency mechanisms, I will adopt one of Paul Blustein's proposals, to somehow put a cap on PTAs and RTAs.

a) The Legal Framework for PTAs/RTAs

The exception of PTAs/RTAs is considered the most important exception to Most Favored Nation.[96] The basic PTA rules are XXIV of the GATT under the title "Territorial Application – Frontier Traffic – Customs Unions and Free-Trade Areas", together with the Understanding on the Interpretation of Article XXIV of the GATT 1994, Article V of the GATS and the Enabling Clause. These provisions introduce five types of Preferential or Regional Trade Agreements, included in the WTO Agreements and deemed to generally be WTO- compatible.

During the initial negotiation of the GATT, there was discussion to preserve only those preferential schemes that were long-standing, however this suggestion did not prevail.[97] The so-called *London Draft* discussed the inclusion of existing and future Custom Unions within the GATT.[98] The notion of Free Trade Agreements was added later on.[99] Mavroidis et al, reject the claim that this inclusion was put forward in order to accommodate the subsequent creation of the European Communities.[100] Preferential trade exceptions were negotiated to some extent, and resulted to a relaxed scheme, which is based on three obligations: to notify, to liberalize among members to the Regional Trade

[96] MICHAEL J. TREBILCOCK,. & ROBERT HOWSE. THE REGULATION OF INTERNATIONAL TRADE 193 (3rd ed. 2005).
[97] DOUGLAS IRWIN ET AL., THE GENESIS OF THE GATT 109 (2008).
[98] *Id.*
[99] *Id.* at 122.
[100] *Id.* at 167-168.

Agreement or the Customs Union (internal requirement) and not to raise protectionism towards non-members (external requirement).[101]

An interpretation consistent with the principle of *pacta sunt servanta* evidently favors any agreement the Contracting Parties made. Even if RTAs are not encouraged in the WTO, at least they are tolerated. Article XXIV paragraph 4 discusses the overall framework for such RTAs:

> "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."

Paragraph 5 explicitly proclaims that:

> "…the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area."

Customs Unions are described in Paragraph 8 (a) of Article XXIV as follows:

> "For the purposes of this Agreement: A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories so that
> (i) duties and other restrictive regulations of commerce (…) are eliminated with respect to substantially all trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
> (ii) […] substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade territories not included in the union.

[101] MITSU MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION, LAW, PRACTICE AND POLICY 555 (2006).

Paragraph 5 (a) of Article XXIV limits customs unions by explaining that:

> "with respect to a customs union […] the duties and other regulations of commerce imposed at the institution of any such union […]in respect of trade with contracting parties not parties to such union […] shall not *on the whole* be higher or more restrictive than the *general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union […]."[102]

Similarly, second category of RTAs, Free Trade Areas, are regulated in the same Paragraph 8 of Article XXIV, under (b):

> A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (…) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Article XXIV 5 (b) also restricts the scope of Free Trade Areas:

> "with respect to a free trade area […] the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area […] to the trade of contracting parties not included in such area […]shall not be higher or more restrictive than *the corresponding duties* and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area […]"

Free Trade areas and Customs Unions essentially overlap since their members have to liberalize trade among them. The difference between the two is that a Customs Union additionally establishes a common external commercial policy. Also with respect to Customs Unions the effect in trade restriction is examined overall, unlike Free Trade Areas where individual instruments are investigated.

The third- hybrid- category, discussed in Article 5 under both (a) and (b) are the interim agreements necessary for the formation of a customs union or a free-trade area. Such interim agreements must be concluded within a "reasonable length of time" according to

[102] Emphasis added.

Paragraph 5 (c) of Article XXIV. According to the Understanding on Article XXIV, a reasonable length of time does not exceed the duration of ten years.[103]

Very important in terms of setting the foundations for transparency in this context is paragraph 7 of Article XXIV which reads as follows:

> 7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.
> (b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify in accordance with these recommendations.
> (c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

The fourth type of such agreements appears in Paragraph 2 (c) of the Enabling Clause that is now part of the GATT. The Enabling Clause establishes a PTA. According to paragraph 2 (c) the differential and more favourable treatment of Paragraph 1 applies also to:

> "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribe by the

[103] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 para. 3.

> CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another."

The fifth type of agreements is Economic integration Agreements under Article V of the GATS (entitled "Economic Integration"), according to which:

> "This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
>
> (a) has substantial sectoral coverage, and
>
> (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through,
>
> (i) elimination of existing discriminatory measures, and/or
>
> (ii) prohibition of new or more discriminatory measures,
>
> either at the entry into force of that agreement or on the basis of a reasonable time-frame […].

Article V paragraph 5 of the GATS further requires an at least 90-day advanced notice period. Article V*bis* of the GATS discusses labor market integration agreements, also notified, just like Agreements of Article V GATS to the Council for Trade in Services. Arguably, Article V is stricter than Article XXIV, since the former discusses "substantial sectoral coverage", including trade volume and modes of supply[104] while the latter "substantially all trade."

To date, 258 regional trade agreements and 26 Preferential Trade Agreements have been notified under the GATT/WTO system and are in force either between countries (the majority[105]), or between countries and existing PTAs and CUs (see Annexes 1 and 2). Very few cases have been brought before the Dispute Settlement Body with respect to PTAs and RTAs. The limited amount of jurisprudence is considered not surprising,[106] especially in view of the complex landscape these agreements create and the content of

[104] See DAVID A. GANTZ, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES 138 (2013).
[105] VIET D. DO & WILLIAM WATSON, ECONOMIC ANALYSIS OF REGIONAL TRADE AGREEMENTS 7-22 (2006), at 8.
[106] MITSU MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION, LAW, PRACTICE AND POLICY 582-589 (2006), see also Petros Mavroidis, *If I Don't Do It Somebody Else Will (Or Won't)*, MIMEO (2005).

Article XXIV and others. The original burden of proof for a complaint relating to article XXIV and its equivalents is easy to meet: all RTAs and PTAs are deviations from the Most Favored Nation rule by definition. As the burden of proof shifts to the defendant, it is up to them to demonstrate that the PTA or RTA is compatible with their GATT obligations. Conducive to this confusion and reluctance to litigate is also the lack of adequate monitoring mechanisms.

The cases that brought the issue of RTAs and PTAs to be examined before the Dispute Settlement Body are *Turkey-Textiles*[107] and *Argentina-Footwear (EC)*[108] mainly, but also, *Canada Autos*[109], *Brazil-Tyres*[110] and *US- Steel Safeguards*[111]. *Turkey-Textiles* focused on Customs Unions and the Appellate Body ruled that a Customs Union may be inconsistent with the GATT, and in *Argentina-Footwear*, the Panel discussed some GATT-consistency aspects of MERCOSUR. [112] A test for RTAs and PTAs under the GATT has three components: first, a procedural requirement (the notification), second, a substantive internal requirement, the obligation to liberalize all trade amongst PTA/RTA members,

[107] Appellate Body Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, p. 2345, Panel Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363.
[108] Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515, Panel Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
[109] Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985 Panel Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
[110] Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527 Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649.
[111] Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117 Panel Reports, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273.
[112] Also PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 699 (2008).

and third, a substantive external requirement, the obligation not to raise the overall level of protection.[113]

b) The Doha Transparency Mechanisms

The Doha Round has been known, among other things, for not having produced any agreements in almost over a decade since its launch. However, the General Council adopted two decisions, one in 2006 and one in 2010, establishing two transparency mechanisms, one for Preferential Trade Agreements and one for Regional Trade Agreements. Arguably, both mechanisms address issues covered in the Doha agenda. More specifically, the preamble of the Doha Ministerial Declaration emphasizes the compatibility of Regional Trade Agreements and the WTO:

> "We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development."[114]

Within this framework, paragraph 29 of the Doha Declaration further provides that:

> "We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."

As such, with the increasing number of Regional Trade Agreements being signed by WTO member states, the regulatory turn on "procedures applying to existing WTO provisions" focused on the lack of a functioning multilateral surveillance mechanism for RTAs.[115] Thus, the Negotiating Group on Rules focused on transparency since October

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[113] MITSU MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION, LAW, PRACTICE AND POLICY 555 (2006).
[114] Paragraph 4 Preamble Doha Ministerial Declaration
[115] See Roberto V. Fiorentino et al., *The Landscape of Regional Trade Agreements and WTO Surveillance* in MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 56 (P. Low & R. Baldwin eds. 2009).

2002[116] and in 2006 the General Council adopted the first decision on transparency entitled "Transparency Mechanism for Regional Trade Agreements" (hereinafter: the RTA/2006 Decision).[117] In 2010, the General Council adopted the second decision, entitled "Transparency Mechanism for Preferential Trade Agreements" (hereinafter: the PTA/2010 Decision).[118] Both decisions can be immediately implemented on a provisional basis, as is explained in paragraph 47 of the Doha Declaration, even though the Doha Round is treating all negotiations as a single undertaking. The scope of the two instruments differs in that the first discusses any sub-multilateral trade agreements among WTO member states, while the second discusses any non-reciprocal preferential treatment measures adopted on behalf of more developed countries in order to assist less and least developed WTO member states.

The most important contributions of the new RTA mechanism to the existing system provided in Article XXIV of the GATT are the early notification mechanism and the procedures for consideration and publication of RTAs. The PTA mechanism also establishes a similar consideration and publication mechanism, although slightly less stringent with respect to the process and the time-frames involved.

The early notification mechanism introduced in the RTA/2006 Decision in part A paragraph 1 provides that:

> […](a) Members participating in new negotiations aimed at the conclusion of an RTA shall endeavour to so inform the WTO.
> (b) Members parties to a newly signed RTA shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information.

[116] See Roberto V. Fiorentino et al., *The Landscape of Regional Trade Agreements and WTO Surveillance* in MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 57 (P. Low & R. Baldwin eds. 2009).
[117] Transparency Mechanism for Regional Trade Agreements, General Council Decision of 14 December 2006 WT/L/671, 18 December 2006.
[118] Transparency Mechanism for Preferential Trade Agreements, General Council Decision of 14 December 2010, WT/L 86 2010, 16 December 2010.

> 2. The information referred to in paragraph 1 above is to be forwarded to the WTO Secretariat, which will post it on the WTO website and will periodically provide Members with a synopsis of the communications received.

Paragraph 3 of Part B in the RTA/2006 decision clarifies the prompt notification period discussed in Paragraph 7 of Article XXIV GATT, defining it as "no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties." Paragraph 4 requires that the full text of the RTAs is notified to the WTO.

The mechanism described in the RTA/2006 Decision under "Procedures to Enhance Transparency" applies to both RTAs and PTAs, but with respect to PTAs it is further elaborated on in the PTA/2010 Decision. In particular, the RTA/2006 Decision provides that after notification, RTAs are considered by Member states within the year of the date of notification. The WTO Secretariat also prepares a factual presentation in which it "shall refrain from any value judgment" and which cannot be used as a basis for dispute settlement. Already in this provision becomes evident the tension between multilateralism and regionalism and the reluctance of the WTO as an institution to take a firm stance for or against such RTAs. Another crucial contribution of this mechanism appears in paragraph 13, according to which:

> "All written material submitted, as well as the minutes of the meeting devoted to the consideration of a notified agreement will be promptly circulated in all WTO official languages and made available on the WTO website."

Additionally, paragraph 21 further discusses the electronic database to be established and maintained by the Secretariat, which "should be structured so as to be easily accessible to the public." Finally, Part E outlines the two committees entrusted with the implementation of the transparency mechanism, first the Committee on Regional Trade Agreements (CRTA) for RTAs and second the Committee on Trade and Development (CTD) for PTAs. Paragraph 19 authorizes the WTO Secretariat to provide technical

support to developing and least-developed countries, another new feature introduced under the RTA/2006 Decision.

Besides the more lenient time-frames, the PTA/2010 Decision clarifies the role of the Secretariat and the CTD in the process of consideration of PTAs. An elaborate description of the contents of the factual presentation prepared by the WTO Secretariat is described in paragraph 9 of the PTA/2010 Decision:

> [T]he Secretariat may also include in the factual presentation, as appropriate, the following elements: background information, scope and coverage (products and countries), exceptions, S&D provisions, specific rules concerning the application of the scheme (graduation, eligibility for additional preferences), rules of origin, provisions affecting trade in goods (IP, labour, environment, TBT, SPS, trade remedies, if applicable), specific customs-related procedures, composition of merchandise imports from beneficiary member, fulfillment of TRQs, relationship with other PTAs by the same Notifying Member and imports under the PTA in the last three years, if applicable.

Similarly an electronic database, available to the public, exists for PTAs in the WTO website. Figure 3 gives a summary of the consideration process flow chart established in both Decisions.[119]

[119] Roberto V. Fiorentino et al., *The Landscape of Regional Trade Agreements and WTO Surveillance* in MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 63 (P. Low & R. Baldwin eds. 2009).

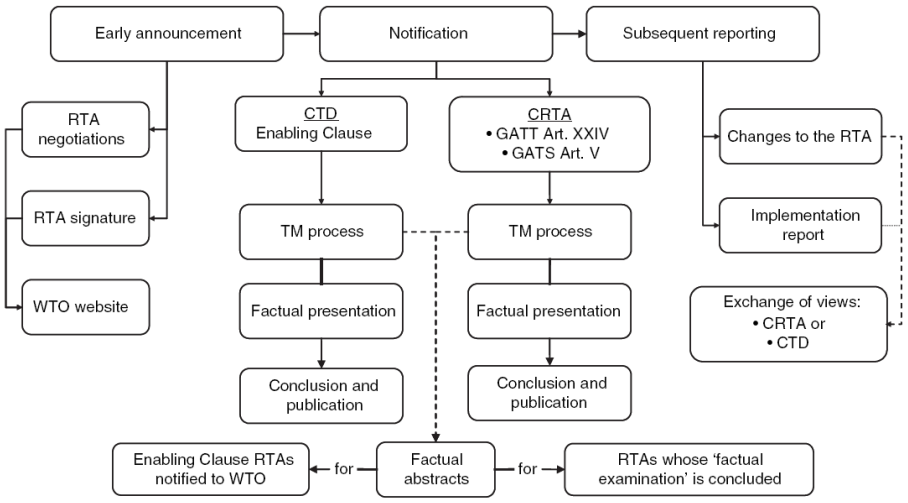

Figure 3 Processes established by the RTA/2006 and PTA/2010 Transparency Mechanism Decisions[120]

These Decisions are a serious attempt to address the issues that Working Groups faced under the GATT when considering Customs Unions and Free Trade Areas. In very few cases had such Working Groups reached a conclusion on the compatibility of such agreements and the GATT.[121] Transparency, namely disclosure, consideration and publication, is a significant first step in that direction. Still, neither decision, similarly to Articles GATT XXIV and GATS V provide for any consequences, should member states violate this process. As such, the enforcement record of both decisions is fragmented at best.[122] The WTO website indeed has two portals, one for PTAs and one for RTAs.[123] It appears however that not all RTAs and PTAs are notified there[124] and overall, even the ones notified are not properly evaluated by the WTO.[125] Another view is that the existing

[120] Source WTO website.
[121] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 709 and footnote 387(2008).
[122] See Roberto V. Fiorentino et al., T*he Landscape of Regional Trade Agreements and WTO Surveillance* in MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 60 (P. Low & R. Baldwin eds. 2009).
[123] *Preferential Trade Agreements* http://ptadb.wto.org/, *Regional Trade Agreements* http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx
[124] For a full table of currently notified RTAs and PTAs see Annexes 1 and 2.
[125] MITSU MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION, LAW, PRACTICE AND POLICY 554 (2006).

system has been overwhelmed by the legal definitions included in Articles XXIV GATT and V GATS, another issue impeding the RTA and PTA review process.[126]

Notably, an agreement was recently signed between Canada and the European Union, CETA, or the Canada-European Union Trade Agreement.[127] Canadian Prime Minister Stephen Harper and EU President Jose Manuel Barroso discussed the significance of the Agreement in a news conference, where Mr. Harper acknowledged that "This is a big deal. Indeed it is the biggest deal our country has ever made. This is a historic win for Canada."[128] The translation and approval processes, in the EU member states' languages, and by provincial parliaments in Canada and as provided in the EU has been cited as the reason why the agreement has not been published yet.[129] The Canadian government published a summary of the agreement,[130] which Trade Minister Ed Fast argued it provides "everything Canadians need to know."[131] Even though the translation and notification procedures are reasonable in international relations, under the RTA/2006 Decision, the parties should already notify the WTO under the early announcement process or the bilateral trade agreement. Nothing of the sort has occurred to date. Even though both Canada and the European Union are two of the strongest transparency proponents in the WTO, the two parties have failed to maintain a consistent attitude towards transparency and publish their agreement. Essentially, the CETA example is indicative of the low enforcement capabilities of both General Council Decisions.

c) Transparency and Trade Preferences

The debate on regional integration as an optimum versus the multilateral path as the only way to faster trade liberalization has yet to produce concrete and conclusive results. On

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[126] DAVID A. GANTZ, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES (2013), ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 189(2011).
[127] EU Press release http://trade.ec.europa.eu/doclib/press/index.cfm?id=973
[128] Paul Waldie, *Canada, EU unveil 'historic' free-trade agreement*, THE GLOBE AND MAIL (Oct. 18 2013).
[129] *Id.*
[130] http://www.actionplan.gc.ca/sites/default/files/pdfs/v4_final_ceta_-_summary_doc_v_10_ed._pgodon.pdf
[131] Stuart Trew, *Is Canada legally bound to release the CETA text?* COUNCIL-OF-CANADIANS'S BLOG (Nov.8 2013).

one hand it can be argued that regional trade integration leads to faster trade liberalization, even if it occurs outside the WTO. Economic ties amongst smaller groups may be stronger, the costs of negotiations are lower since fewer parties are involved and elimination of tariffs inside the PTA or the RTA can occur much faster than in the multilateral framework. Coupled with this idea is that political reasons (not only economic) may lie behind deeper integration, as is the case for the (arguably unique in this respect) EU. This argument favors PTAs and RTAs as they appear to be creating more trade.[132] Another interesting phenomenon in the RTA proliferation has been the rise of "new players" in international trade, such as the trading bloc of South American countries[133], the Asian Tigers,[134] BRICS and Middle Income countries, fundamentally changing the landscape of international trade.

On the other hand, several studies on customs unions and free trade areas suggest that the trade-diversion effects may be greater than the trade-creation, especially since PTAs and RTAs favor trade amongst participants, resulting to less trade with members of the PTAs and non-members. [135] Trade economists have in fact argued that regionalism leads to factionalisation, and PTAs may be optimal to protectionism, but they will always fall to the second-best spot[136] compared to a functioning global free trade system, since multilateralism in the WTO context entails a global vision lacking in regionalist integration models.[137]

Moreover, regional trading agreements cannot be fully open to accession from third parties. If they remained opened to membership, the original parties would have little incentive to commit to lowering trade tariffs in fear of considerable changes in value of

[132] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 695 (2008).
[133] Which Gantz calls the Jaguars.
[134] MICHAEL J. TREBILCOCK,. & ROBERT HOWSE. THE REGULATION OF INTERNATIONAL TRADE, (3rd ed... 2005) discussing the rapid growth in intra Asian trade at page 197 and DAVID A. GANTZ, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES (2013).
[135] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 696 (2008).
[136] ROBERT LAWRENCE, REGIONALISM, MULTILATERALISM AND DEEPER INTEGRATION, 29-30 (1996).
[137] MICHAEL J. TREBILCOCK,. & ROBERT HOWSE. THE REGULATION OF INTERNATIONAL TRADE 195 (3rd ed. 2005).

their preferences with the accession of a new party. Such problems are not as prevalent in a multilateral context. For example, the accession of China, a huge country and a great trading partner, may have taken years to conclude but the commitment to trade liberalization always supports accession of new members instead of exclusion. The exclusionary potential is however prevalent in regionalism.

The intensified attention on PTAs and RTAs in the Doha Declaration reflects the current "regionalization" of international trade (or "new regionalism"[138]) and is portrayed as a group systems which are "not attempting to shield themselves from the global economy and are rather trying to maximise their participation in it."[139] However the inefficiency of existing transparency mechanisms as well as the utilization of Preferential trade Agreements as a way out of negotiation difficulties at the multilateral level have rendered PTAs "stumbling blocks" for world trade for smaller economies who cannot negotiate such agreements as equals and rely on the GATT MFN for access to other countries' trade markets.[140]

With respect to transparency and monitoring, despite the existence of substantial mechanisms, in addition to Article XXIV and the Understanding on Article XXIV, Article V of the GATS and the Generalized System of Preferences, their enforcement momentum is low, at best. The web of RTAs and PTAs is growing very fast in the last decade. In contrast to the Doha Development Round, where all agreements must be considered under a single undertaking and also need to be agreed upon by consensus, regionalism has significantly expanded, to cover for the regulatory space of trade liberalization that multilateralism does not seem to achieve, albeit only for small groups.

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[138] For its characteristics see CHAD DAMRO, THE POLITICAL ECONOMY OF REGIONAL TRADE AGREEMENTS 23-42, 27 (2006).
[139] JAMES MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO 127 (2002). See more recently Gantz DAVID A GANTZ, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES 201(2013).
[140] Nordström Håkan, *Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES 170 (G. A. Bermann & P. C. Mavroidis, eds. 2007).

The WTO has committed institutionally to monitor, consider and publish the RTAs and PTAs. As it remains unclear whether in fact such regional initiatives undermine the multilateral agenda of the WTO, consideration beyond a superficial examination is rendered difficult. Similarly, not all agreements have been published as we saw in the previous section, illustrated by CETA. A possible solution for this problem is to introduce some form of a penalty system for failure to properly notify and publish such agreements in the WTO. Another more obvious solution is to raise the budget for the monitoring mechanisms, partially remove their member-driven elements and assign a new part of the WTO Secretariat just in monitoring duties. Instead of relying on member state committees, Working Groups, for the vast amount of monitoring, rely on the administration instead. Working Groups can be introduced at a second stage, after the collection of sufficient economic data and the drafting of initial but extensive reports.

As RTAs and PTAs have multiplied over the years, they have been described as a "spaghetti bowl", or a "noodle bowl" or even a "lasagna dish." [141] Pasta-metaphors aside, RTAs and PTAs create a very large web of agreements that can have negative effects on all those left outside of these cooperative structures and compromises general trust in the multilateral structure of trade negotiations. Keeping track on them alone consumes a part of the WTO resources. One proposal in order to remedy these detriments is to place a cap on the number of the Agreements.[142] Introducing a straightforward cap on PTAs and RTAs may cause a sort of revolution in the WTO and never reach consensus. Thus one form of moratorium could be based either on trade volume covered, or a set of products that can be agreed on by all WTO members to remain outside the scope of PTAs and RTAs. If the US and the EU are serious about their commitment to multilateralism then such an agreement can given them an opportunity to show it. Additionally WTO members could discuss the possibility for compensatory mechanisms in case of Agreements, which are found to violate WTO rules.

[141] Jagdish Bhagwati, *US Trade Policy: The Infatuation with FTAs,* ACADEMIC COMMONS (1995), the same, *The noodle bowl Why Trade Agreements are all the Rage in Asia*, THE ECONOMIST (Sep 3rd 2009).
[142] PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 277 *et seq.* (2009).

Finally, we should note here that there is one set of PTAs that should not be touched. Agreements giving preferential treatment to least developed countries should be sustained, as they are key to their economies and trade[143] or at least be converted to import subsidies that would benefit them equally. [144] Moreover there is an additional positive spillover of PTAs for least developed countries. During smaller scale negotiations smaller countries can refine their negotiating tactics. An interesting example is the case of Zambia and Mauritius as participants in the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC). The participation of the two countries in both Regional Trade Agreements has assisted them in preparations for negotiations in the WTO context by providing training, raising awareness, and overall giving a more familiar forum with countries facing similar issues for the exchange of trade information and ideas.[145]

2. Accession Protocols

This chapter discusses transparency issues with respect to a narrow group of countries. In particular, it explores two main transparency dimensions that emerge during the accession process of new member states. The process became much more elaborate and gained significance since the creation of the WTO. The new organization has a specific division handling accessions, the accession division. Since 1995, 32 countries have acceded to the organization, among which are China and Russia, bringing up the total membership to the organization to 160 countries. Moreover, another 23 countries have applied and are currently negotiating their membership. Once current negotiations are concluded, the organization will be representing more than 99.9% of world population, GDP and trade volume.

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[143] Nordström Håkan, *Participation of Developing Countries in the WTO – New Evidence Based on the 2003 Official Records* in WTO LAW AND DEVELOPING COUNTRIES 170 (G. A. Bermann & P. C. Mavroidis, eds. 2007).
[144] Limão Nuno & Marcelo Olarreaga *Trade Preferences to Small Developing Countries and the Welfare Costs of Lost Multilateral Liberalization* in WTO LAW AND DEVELOPING COUNTRIES 36-58 (G. A. Bermann & P. C. Mavroidis, eds. 2007).
[145] S. Bilal and S. Szepesi, *How regional Economic Communities can Facilitate Participation in the WTO: the Experience of Mauritius and Zambia* in MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES 389-390 (P. Gallagher et al. eds. 2005).

In theory, soon the accession division will become obsolete, when all candidate members accede and no more countries apply for membership. However, a discussion on accession will remain pertinent even then, because of the so-called WTO Plus/Minus commitments. These are commitments that acceding members states are bound by that are either below or beyond the WTO package of Agreements. On one hand, WTO minus do not pose as much of a problem, due to their nature, as they fall under the rules in place to assist developing and least developed countries. These include longer time frames, less stringent rules and like regulations. On the other hand, the WTO Plus commitments, imposing rules applicable only to certain acceding countries become problematic because they introduce asymmetries between WTO member states similarly to the issues facing developing countries in the WTO.

A second transparency-related issue in the accession process appears in the Working Party Reports and the Accession Protocols. The majority of these binding accession documents contain sections entitled "Transparency", introducing mainly two types of obligations, Notification and Publication obligations. These obligations refer to national legislation of WTO member states and measures that need to be notified with the WTO or published. Such chapters in accession instruments demonstrate the importance of transparency obligations during the accession process. Even though these transparency provisions technically fall under the rubric of Legal Transparency, examined in Chapter Five, they will be discussed here, since they organically belong to the accession process.

This chapter will first elaborate on the accession process in the WTO. Then I will discuss the example of the Chinese Accession Protocol and its WTO Plus transparency requirements. Finally, I will examine the legal position of WTO Plus commitments under traditional public international law and WTO law, and the relationship of such commitments to internal transparency.

a) The idiosyncrasies of the accession process

The WTO Agreement provides for two procedures of acquiring membership to the organization. First, Article XI, under the title "Original Membership" says that GATT

contracting parties that were members of the GATT at the time of the entry into force of the WTO Agreement which accepted this and relevant agreements "shall become original Members of the WTO." [146] Second, Article XII, under the title "Accession" provides as follows:

> "1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, *on terms to be agreed between it and the WTO*. Such accession shall apply to this Agreement and the Multilateral Trade Agreements thereto. 2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO. 3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."[147]

Obtaining membership through accession to the WTO is fundamentally different than the process followed by other international organizations, even though the basic elements of admission are similar. In the majority of governmental organizations, as in the WTO, their constituent treaties establish the criteria and the procedure of admission. The process usually begins with an application or an equivalent show of interest by the candidate country and it ends when the organizations competent organ concludes its decision making on the application. The WTO differs from other organizations with respect to the length and the complexity of negotiations that intervene between the opening and the concluding point, as well as in the sometimes complicated accession instruments.

In most international organizations acquiring membership seems rather straightforward and is based on criteria such as statehood[148] and commitment to the organization's mandate. International economic organizations in their constitutions reserve sometimes

[146] Article XI WTO Agreement.
[147] Emphasis added.
[148] Usually based on the Montevideo criteria, Montevideo Convention on the Rights and Duties of States, signed December 26, 1933, entry into force December 26, 1934. However, statehood, or rather sovereignty is not necessary for membership to an international organization, examples of that are the membership of the Ukraine and Belarus among many in United Nations.

the option to adapt the procedures and the conditions for membership in special circumstances. For example, the IMF in its Article II, section 2 of its Articles of Agreement provides that: "Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors." However, the provision limits this flexibility with the next sentence: "These terms, including the terms for subscriptions, shall be based on principles consistent with those applied to other countries that are already members." The European Union process for acquiring membership is also multilayered like that of the WTO. Candidate countries must comply with the "Copenhagen Criteria" [149] and according to Article 49 of the Treaty on the EU, the decision for the accession is made by the Council, which consists of all current EU member states, after consulting the European Commission, and a majority vote of the European Parliament.

Accession to the WTO occurs through several stages. Mainly, the distinguishing elements of the WTO accession process are the number of products, rules, services and other areas of interest in international trade where agreement must be reached, as well as the option for all current members to conduct bilateral negotiations with the acceding country. As a result, negotiations for accession have been very different from case to case. Indicative of the spectrum of proceedings is that the shortest accession to this day, Kyrgyzstan, lasted for almost three years, while the longest, China, lasted for more than fifteen years. Accession requirements also vary, to some extent, from country to country.

This structure is the product of years of negotiation under the GATT. According to Article XXXIII of the GATT:

> "A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement on its own behalf or on behalf of that territory, on terms to be agreed between such

[149] *Copenhagen Criteria* http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhague_en.htm

> government and the Contracting Parties. Decisions of the Contracting Parties under this paragraph shall be taken by a two-thirds majority"

During the second round of negotiations after the signature of the GATT, which took place in Annecy in 1949, the Parties agreed upon the Procedures Governing Negotiations for Accession, the Annecy Protocol of Terms of Accession, which provided for the accession of ten more countries, and a Model Protocol of Accession. The procedure was based on the establishment of a working party which examined the application and submitted recommendations to the Council, which could include a draft Protocol of Accession.

The discussion in the working party was not much different from the discussion under the WTO. The candidate country first submitted a memorandum on its foreign trade regime, and then the Contracting Parties posed questions to which the candidate member answered. Furthermore, negotiations took place on the schedule of concessions between the acceding country and those Contracting Parties that were interested. Once these were concluded, a draft Decision, Protocol of Accession and Working Party report were submitted to the Council for adoption (report) and approval (the other texts). Once a positive decision on accession was made, the country would become a member thirty days after singing the Protocol.[150]

The process in the WTO is regulated by Article XII of the Marrakesh Agreement. According to Article XXII:

> "1. Any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
> 2. Decisions on accession shall be taken by the Ministerial Conference. The ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members to the WTO.

[150] WTO SECRETARIAT, GUIDE TO GATT LAW AND PRACTICE 941-949 (2012), PETROS MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE, A COMMENTARY, 258-259 (2005)

> 3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."

Also relevant to Article XII is Article IV:2 of the Marrakesh Agreement which provides that the General Council can decide on Accessions in the intervals between meetings of the Ministerial Conference. It is worth noting here that Article XXXIII of the GATT and Article XII of the WTO Agreement are very similar.

The process of accession begins with the interested government making the initial contact with the organization either informally first, by approaching the Secretariat for information, or directly and formally, with a letter of application to the Director-General. Countries usually have the option of participating in the General Council as observers before applying for membership. Usually the next General Council that occurs after the formal application for membership invites the interested country to introduce the main features of its foreign trade regime and provide reasons for its application. Then the Council considers the application and the establishment of a Working Party, to examine the application.

All Working Parties have the same terms of reference, namely "to examine the application" and "to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession." Membership to the Working Party is open to all WTO members. Countries with trade interests related to the upcoming accession usually join the Working Party, thus its size varies from one accession to another. Four countries, Australia, Canada, Japan and the US, together with the European Communities, which all together represent 63% of world trade have been members to all Working Parties so far.

The Working Party process takes place in three stages. The first phase of the Working Party process focuses on collecting factual information on the applicant's foreign trade regime. The applicant country submits a relevant memorandum and members of the Working Party pose questions both in writing and orally, to which the candidate member responds. During the second phase, countries negotiate the terms of accession with the

candidate. Four types of negotiations take place: first, multilateral negotiations on rules, where all the members of the Working Party and the candidate participate; second, plurilateral on agriculture and export subsidies, where a group of those members of the Working Party, who are interested, discuss with the applicant; third, bilateral on goods' concessions, where each member has the opportunity to discuss concessions in goods with the candidate member on a one-to-one basis; finally, bilateral negotiations take place for members to discuss commitments in services with the applicant. Bilateral meetings are a platform oftentimes for a more efficient discussion on complex matters. The bilateral process is confidential and so are any bilateral agreements signed at this time. As bilateral negotiations are concluded, the agreements are signed by both parties and sent to the Secretariat.

The Secretariat, once all bilateral agreements have been submitted to it, prepares a consolidated draft Goods Schedule. According to the Most Favored Nation principle, the lowest percentage that the candidate member has bound its tariffs with one of the current members will apply to all members to the WTO, regardless of whether higher tariffs were agreed upon in bilateral meetings with other members. Essentially, the consolidation of agreements by the Secretariat *multilateralizes* the products of bilateral agreements. At the third stage of the Working Party process, the draft report is finalized and so are commitments and a draft protocol of accession. The three phases often overlap more or less in practice. This entire process essentially balances the interests and needs of the acceding country with the interests of WTO members and the credibility of the WTO system as a rules-based system. [151]

The General Council or Ministerial Conference then approves the text of the draft Protocol and Decision of Accession and adopts the Draft Decision and the Working Party report. This decision, as all decision making in the WTO is reached by consensus. According to the Agreement of the General Council [152] only when consensus cannot be

[151] WTO SECRETARIAT & PETER JOHN WILLIAMS, A HANDBOOK ON ACCESSION TO THE WTO ix(2008).
[152] WTO document WT/L/93, 15 November 1995.

reached, will WTO members resort to a two-thirds majority vote. A consensus is considered to be reached in the lack of formal objections.

Protocols usually contain a set of similar provisions but also obligations specific to the new member. All commitments of the Working Party report that are explicitly referred to in the Protocol are an integral part of the Protocol and the WTO Agreements as such. In some cases commitments by acceding members are more strict than those assumed by current WTO members. The introduction of novel commitments for new members creates a "ratchet effect" whereby once accepted, these new commitments become apart and parcel of the negotiations with the next acceding country.

In the next three to six months after the decision by the General Council or the Ministerial Conference to accept the applicant as a new member, the government of the acceding country completes all necessary internal procedures. It has been argued that in most cases, governments are undergoing a national reform process on which "they have already embarked for their own reasons"[153] After the applicant completes internal reforms, it accepts the Protocol and thirty days later it enters into effect and the candidate country becomes a member to the WTO.

In the two decades from 1995 to 2004, thirty-one countries have acceded to the WTO. The longest accession process lasted for nineteen years and two months, in the case of Russia. The shortest accession so far has been that of the Kyrgyz Republic, only two years and ten months. The average time from the day of application by the candidate member until the adoption of the accession instruments by national authorities is 9.6 years. With the exception of China, Accession Protocols tend to be short, one to three pages long. However, most of the commitments assumed are included in the Working Party reports, which are much lengthier and detailed documents. Six of the countries that have acceded belong to the category of least-developed countries, while another eight LDCs are candidates for accession (for the accession statistics and data see Annexes 4 and 5).

[153] WTO SECRETARIAT & PETER JOHN WILLIAMS, A HANDBOOK ON ACCESSION TO THE WTO 8(2008).

b) WTO-Plus transparency obligations for acceding member states: the case of China

Under the GATT (pre-Uruguay Round), accession negotiations were presumed to be restricted only to GATT obligations and related to GATT duties and rights such as market access, existing trade barriers etc. This principle faded after the Uruguay Round.[154] Accession now is seen as a "difficult and time-consuming process."[155] Reasons behind the lack of enumeration of terms, put forward could be first that each country accepts a unique set of terms and different concessions on tariffs[156], and second:

> "that the drafters of Article XXXIII of GATT 1947, on which WTO Article XII is based, saw the need to provide flexibility to ensure that the terms provided for a balance of advantage."[157]

Some commentators define WTO plus Agreements as including "areas not covered by WTO Agreements such as commitments on privatization, investment regime and bindings of export tariffs" and WTO minus as "commitments far beyond those accepted by the original WTO members, including (i) non-application of the rights under WTO Agreements available to WTO members such as transition periods, and tariffication and special safeguards for agricultural products."[158] Charnovitz, using as a comparative baseline that of "rules that exist for countries in that development class that were *original* members of the WTO"[159] redefines WTO plus/minus as anything above or below this baseline.[160] WTO plus commitments in particular, when they are not directly related to

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[154] Steve Charnovitz, *Mapping the Law of WTO Accession*, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL PUBLIC LAW AND LEGAL THEORY WORKING PAPER No. 237, LEGAL STUDIES RESEARCH PAPER No. 237 http://ssrn.com/abstract=957651 7 (2007)

[155] MITSU MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION, LAW, PRACTICE AND POLICY 11 (2006).

[156] WTO SECRETARIAT & PETER JOHN WILLIAMS, A HANDBOOK ON ACCESSION TO THE WTO 48(2008).

[157] *Id*.

[158] Jolita Butkeviciene, Michiko Hayashi, Victor Ognivtsev, Tokio Yamaoka, Terms of WTO Accession 155-176 *in* United Nations Conference on Trade and Development, WTO Accessions and Development Policies (2001)

[159] Steve Charnovitz, *Mapping the Law of WTO Accession*, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL PUBLIC LAW AND LEGAL THEORY WORKING PAPER No. 237, LEGAL STUDIES RESEARCH PAPER No. 237 http://ssrn.com/abstract=957651 16 emphasis in the original (2007).

[160] *Id*. 19, where he gives as an example of WTO plus: greater transparency requirements and WTO minus: longer transition periods.

trade, as was the case with China, are seen as "dissonant with the egalitarian self image of the WTO." [161] The procedure of concluding the accession agreements has been characterized as non-transparent[162]. Steve Charnovitz notes in this respect that:

> "Unlike most other multilateral organizations, where the membership process for states is routine, transparent and predictable, the WTO imposes significant barriers to entry because incumbent members use the lure of membership to induce economic policy changes in the applying country. Such linkage appears to be driven by both normative and procedural reasons. The normative reason is that the conventional wisdom in and around the WTO is that locking in economic changes in an applicant country will redound to the benefit of that country and will also help exporters and investors of incumbent members. The procedural reason is that a consensus of incumbent members is required in order to admit an applicant government."[163]

A very large number of the accession requirements involves information that the candidate country must disclose and discuss in order to move forward and become a WTO member. Moreover, a specific chapter entitled "Transparency" is included in all accession protocols. Transparency consists of two forms of commitments, namely Publication and Notification. According to the WTO Handbook on Accession the content of the Publication obligation entails that:

> "[A]ll relevant measures of general application should be published in such a way as to enable governments *and traders* to become acquainted with them; […] measures should be officially published before being enforced; [confidential information need not be provided if contrary to the public interest or prejudicial to legitimate commercial interests of particular enterprises."

The relevant provision also determines the method of publication (a website, an official publication, such as the national gazette or legislation bulletin or both). China and Chinese Taipei were also required to provide translations of measures into one of the

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[161] Steve Charnovitz, *Mapping the Law of WTO Accession*, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL PUBLIC LAW AND LEGAL THEORY WORKING PAPER No. 237, LEGAL STUDIES RESEARCH PAPER No. 237 http://ssrn.com/abstract=957651 27 (2007).
[162] *Id.*
[163] *Id.*

WTO official languages, English, French, or Spanish, an unprecedented requirement.[164] Until 2004 only Bulgaria, Cambodia and Nepal had only publication requirements. The second form of commitments is that of Notification, which contains a requirement to notify on measures taken or not taken in one of the official languages of the WTO. This ensures that acceding members make their initial notifications immediately available. This was the most common transparency obligation until 2004. Since 2004 and to date, all members had both notification and publication requirements (see Annex 4).

A striking example of a departure from the "GATT package" was China's Accession Protocol.[165] China's Accession Protocol came as a result of numerous bilateral agreements. The US and EU China negotiations are particularly noteworthy, as is the length of China's overall accession process which lasted 14 years altogether and the Accession Protocol, which is a striking departure from the WTO Secretariat's "model accession protocol."[166] Some examples of the WTO Plus commitments made by China that can be deemed as "discriminatory" compared to the "GATT Package" are: ironically, the transparency requirement (2.C); the Judicial Review commitment (2.D); the Right to Trade provisions (5.1, 5.2, which were also under review by the Panel and the Appellate Body); and, the regulation of State Trading (transparency 6.1, and information requirement, 6.2).

The Chinese Accession Protocol is impressive in length and content.[167] It is the longest protocol of Accession and comes as a result of the intricacies in the Chinese Accession, as well as the duration of the process itself, so far the longest accession to the WTO.[168] The larger the interests at stake, the longer the process will be as the Chinese case

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[164] See Julia Ya Qin, *"WTO Plus" Obligations and Their Implication for the World Trade organization Legal System: An appraisal of the China Accession Protocol*, 37:3 J. WORLD TRADE 483-522 (2003).
[165] JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 110 (2006)
[166] See Note by the Secretariat, *Technical Note on the Accession Process*, 42 WT/ACC/10/Rev.3 (Nov. 28, 2005)
[167] Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001) and Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (Oct. 1, 2001).
[168] See Paolo Farah, *L' Accession De La Chine A L' Organisation Mondiale du Commerce: Les Regles Internationales et les Barrieres Culturelles Internes*, REVUE DE L' ANTENNE FRANCO-CHINOISE, 8 http://www.antenne-pekin.com/etudes/Chine%20et%20OMC.%Paolo%20Farah.doc

indicates[169]. The Protocol also contains rules that appear for the first time in an Accession document and significantly add to the obligations of regular members, who became members to the WTO upon its founding, as well as countries, which became members after 1995. The Protocol has received a significant amount of criticism.

Part 2 of the General Provisions under the title "Administration of Trade Regime" addresses four issues: first, the uniform administration of measures in the territory of China, which includes autonomous areas, border trade regions, Special Economic Zones, and other territories where special regimes are in place. Local governments are also in obligation to conform with the WTO Agreements. Second, China assumes under its Protocol of Accession the obligation to provide information on its special economic areas and the legislation which is applicable there. The third and fourth sections of Part 2 address issues of transparency and judicial review respectively.

Section A paragraph 2 provides that

> "China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures […] pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange."

This obligation is accompanied by the establishment of a mechanism where both individuals and enterprises can report cases of "non-uniform application of the trade regime" to national authorities. [170] China must also notify to the WTO all the legislation related to the special economic areas. The obligations for the establishment of a review mechanism for trade related legislation and the notification of laws is further expanded in the next two parts, C and D. Part C specifically, entitled "Transparency" provides for the following obligations:

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[169] Richard H. Steinberg, *Institutional Implications of WTO Accession for China*, POLICY PAPERS, INSTITUTE ON GLOBAL CONFLICT AND COOPERATION, UC BERKELEY 5-7 (1998) http://www.escholarship.org/uc/item/43p951xk. See also Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B. C. INT'L & COMP. L. REV. 319-370 (2004).
[170] Protocol part 2 A para 4.

> 1. China undertakes that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced. In addition, China *shall make available* to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. In emergency situations, laws, regulations and other measures shall be made available at the latest when they are implemented or enforced.
>
> 2. China shall *establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting* trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented, except for those laws, regulations and other measures involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement. *China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises.*
>
> 3. China shall *establish or designate an enquiry point* where, upon request *of any individual, enterprise or WTO Member* all information relating to the measures required to be published under paragraph 2(C)1 of this Protocol may be obtained. Replies to requests for information shall generally be provided within 30 days after receipt of a request. In exceptional cases, replies may be provided within 45 days after receipt of a request. Notice of the delay and the reasons therefor shall be provided in writing to the interested party. Replies to WTO Members shall be complete and shall represent the authoritative view of the Chinese government. Accurate and reliable information shall be provided to individuals and enterprises.[171]

According to paragraphs 1 and, section C the Chinese government can enforce only the legislation that has been published in an official journal, whose copies are to be promptly available to enterprises and individuals. Further, paragraph 3 provides for the establishment of an enquiry point, which shall respond to requests for information within 45 days at the latest. The next section on judicial review of administrative decisions and action with respect to trade sets forth the obligation to establish "partial and independent"

[171] Emphasis added.

tribunals that "shall not have any substantial interest in the outcome of the matter" and an appeal process. Decisions on appeals should be given in writing. This unique set of clauses extends rights not only to other WTO members, as is the case for most WTO Agreements and other GATT legal documents, but directly to enterprises and individuals. Thus, any trade- related legislation that has not been published and is not accessible is essentially rendered void.

Issues relevant to accession, post GATT, under the WTO umbrella were brought before the Dispute Settlement Body in the China-Auto Parts case where the Panel found that Working Party report commitments are enforceable in WTO dispute settlement proceedings.[172] China-Publications is the first report from Panel and Appellate Body to undergo a complete analysis on the legal nature of the Protocol and the Working Party report, to proclaim its enforceability in a systematic way, and not exclamatory. Further, both Panel and Appellate Body organically tied the Accession Protocol and Working Party report to the GATT but and accepted that the exceptions of Article XX can be invoked in view of the accession commitments.

c) WTO Plus, Public International Law and Transparency

Both future members and commentators would opt for a straightforward process of accession, in favor of predictability.[173] However an important issue is that international trade relations involve legal, political and economic considerations. Thus, the negotiation process for the WTO cannot be blanket and involve the same amount and level of discussions for China, the single most important player remaining outside the WTO until

[172] The decisions discussing China's Accession Protocol and Working Party Report are: Panel Report, China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products WT/DS363/R (Aug.12 2009); Appellate Body Report, China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products WT/DS363/AB/R (Dec. 21, 2009); Panel Reports, China – Measures Affecting Imports of Automobile Parts WT/DS339/R, WT/DS340/R, WT/DS342/R (Jul. 18, 2008); and Appellate Body Reports, China – Measures Affecting Imports of Automobile Parts WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008).

[173] Steve Charnovitz, *Mapping the Law of WTO Accession*, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL PUBLIC LAW AND LEGAL THEORY WORKING PAPER No. 237, LEGAL STUDIES RESEARCH PAPER No. 237 http://ssrn.com/abstract=957651 4 (2007).

2001, and for instance a country with Developing or Least-Developed country status.[174] Such differentiations are due to trade volume as a share of world trade, but also the amount of bilateral relations each potential member already has with all other members.[175] Harmonizing the nexus of previous bilateral relations and integrating it to the WTO framework will be far more complex than merely a stabilized variation of the GATT/WTO legal documents, particularly in view of the existing bilateral agreements between the acceding member and the WTO members. This alone creates a natural asymmetry in the negotiation process and the consequent variation from country to country.

One central issue involves the legal nature and enforceability[176] of the Accession Protocols and Working Party Reports. Some have gone so far as to say that each accession protocol plus working party report is an amendment to the GATT/WTO[177]. The recent US-China Publications case not only manifestly demonstrates that such documents are enforceable, but both the Panel and the Appellate Body moved as far as to outline the organic relationship between the Protocol and Working Party Report and the GATT, where they examined and answered to the affirmative whether the exceptions of Article XX can be used as justifications for non-compliance with the accession commitments. This fortifies the position that WTO plus/minus agreements are not of exceptional nature, but are in fact structurally tied to the GATT legal instruments.

Article XII talks about "terms" without further limiting existing Members as to the nature of the terms they can propose. Moreover, it is important to look at the balance between

[174] Very interesting issue in this respect are the challenges posed by the accession of Least Developed Developing Countries. See for instance: Mussie Delelegn, *Accession to the World Trade Organization: Challenges and Prospects for the Least-Developed Countries (LDCs)*, 6:2 THE ESTEY CENTRE J. INT'L L. & TRADE POLICY 181 (2005)

[175] For example the accession process of the Kyrgyz Republic lasted only a little more than two years. According to the WTO Website "The process of accession has been greatly accelerated by the willingness of the Kyrgyz Republic to bring its economic and trade regime into conformity with WTO rules and obligations as rapidly as possible, by putting in place the necessary implementing legislation prior to accession." See http://www.wto.org/english/news_e/pres98_e/pr109_e.htm.

[176] Steve Charnovitz, *Mapping the Law of WTO Accession*, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL PUBLIC LAW AND LEGAL THEORY WORKING PAPER No. 237, LEGAL STUDIES RESEARCH PAPER No. 237 http://ssrn.com/abstract=957651 10 (2007).

[177] Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization*, 8 J. INT'L ECON. L. 51, 57 (2005)

"object and purpose" on one hand, and "*pacta sunt servanta"* on the other in the Vienna Convention on the Law of Treaties (or VCLT) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (or VCLTSIO). Assuming that the terms negotiated will not fall under article 53 of the VCLT, and thus will not conflict with a "jus cogens" norm, both treaties seem to create a balance between the agreement of the parties on one hand, and the object and purpose of the treaty on the other.

A very important factor in "*pacta sunt servanta"* is the explicit consent to be bound by a treaty, as well as the full knowledge of the treaty's terms. As for any reservations and amendments, there are no prohibited reservations under the GATT, any reservations or amendments are possible so long as they are negotiated and agreed upon by all parties (or after the obtaining a certain majority). Thus, the departure from any treaty provisions is very well possible, when there is consent. This extends to provisions central to the "object and purpose" as much as it applies to peripheral provisions. The VCLT and the VCLTSIO does not separate between the two. [178] [179]Thus, the conclusion we can draw here is that both the VCLT and the VCLTSIO prioritize the foundational rule of "*pacta*

[178] See from the VCLT Article 15 – Consent to be bound by a treaty expressed by accession, Article 18 – Obligation not to defeat the object and purpose of a treaty prior to its entry into force, Article 19 – Formulation of reservations. See also Articles 20, 31, 32, 40, 41. From the VCLTSIO Article 17 paragraph 2 – Consent to be bound by part of a treaty and choice of differing provisions: The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

[179] Article 15 Consent to be bound by a treaty expressed by accession- The consent of a State to be bound by a treaty is expressed by accession when: (a) the treaty provides that such consent may be expressed by that State by means of accession; (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession. Article 18 Obligation not to defeat the object and purpose of a treaty prior to its entry into force- A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. Article 19 Formulation of reservations- A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: […] (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty. Other relevant articles Articles 20, 31, 32, 40, 41**.** Article 17 paragraph 2 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 CONSENT TO BE BOUND BY PART OF A TREATY AND CHOICE OF DIFFERING PROVISIONS The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

sunt servanta" when examining permissible reservations and amendments instead of looking at the object and purpose of treaties.

This interpretation should be accepted in the case of the GATT/WTO instruments, in particular in view of the opt-out provision in Art XIII of the WTO Agreement which can be seen as prioritizing consent to "object and purpose." [180]Any two members could opt out of the application of the Agreement between them, as long as this occurs during the time they become members and there is consent among them. This provision was included in order to accommodate countries that did not want to have formal trade or other relationships with another party for political or other reasons. Both a "formalistic" and a "progressive" interpretation should concur in the case of the WTO Agreement, that any terms can be possibly negotiated.

The question of extra-treaty accession terms was discussed in the first advisory opinion given by the International Court of Justice in 1947 on the Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter). The Court decided that the list of Article 4 is exhaustive and no additional criteria can be imposed. According to an *e contrario* argument, the UN Charter enumerates the criteria of admission, while the Agreement Establishing the WTO explicitly refers to negotiated terms. The individual opinion by Alvarez also emphasizes the following:

> "…the fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life."

Thus, he departs from a formalistic interpretation to a more systemic and oriented towards viewing the organization as an organic entity and not a static treaty. The variations in the accession process can be attributed to the differences in the nature of

[180] Article XIII discusses the issue of Non-Application of Multilateral Trade Agreements Between Particular Members.

each organization. In a nutshell, the WTO Plus/Minus provisions are compatible with general public international law.

However, it is important for the organization that at least some of the burdensome WTO Plus provisions can be renegotiated and phased out with time. Adding commitments beyond the WTO Agreements shows skepticism towards market access, or a mercantilist logic (for example, like the fears that Chinese products would saturate national markets of other member states). Possibly in the future negotiation rounds, such commitments can be phased out, in order to put all WTO members on equal standing, especially vis-à-vis the rules. The problems with lack of transparency during accession and imposition of rules as prerequisites appear as compromises to the WTO's chances to develop a more democratic profile. However, the issue is rather limited, as by now most countries in the world have already acceded to the WTO, and those remaining do not have as big economies and their accession process is not expected to last as long. Generally, the process of accession can benefit from more openness, but that does not necessarily need to be achieved for the accession process itself, it can be the result of overall democratization of the organization.

A final note on the transparency obligations in accession protocols: these conditions, even though they are additional to Article X of the GATT, they are important for the international trading system. They have become vehicles linking businesses and individual exporters and importers with WTO law. They contribute to the openness of trade in countries where perhaps legislation is not easily obtainable. Transparency in the Accession Protocols of large member states has promoted the unique and direct link between consumers and traders on one hand and WTO member states and the WTO regime on the other. Smaller countries that would be overly burden by such obligations are given the opposite option, the WTO Minus, giving them additional time-frames and assistance for implementation.

IV. External Transparency

External transparency was the explicit focus of the Sutherland Report in its fifth chapter on Transparency, discussed earlier. External transparency generally refers to the relationship of the organization not with its own member states, its shareholders, but with anyone else affected by the rules and procedures introduced under its auspices, the stakeholders. Although generally civil society is understood to be represented by NGOs, this chapter will not only discussed the interactions of the WTO with the organized civil society, but it will look at all possible communication and information flows between the WTO and citizens of WTO member states and non-member states, namely the public at large.

The first part will explore forms of interaction that are non-decisive. Even though the discussed transparency-related aspects are adding to the organization's overall outreach profile and hope to address its legitimacy deficits, it is important to bear in mind that none of these aspects affect the rules or the outcomes of decisions, at least not to date. The second part will examine in detail a type of external transparency that has considerable potential to affect the outcome of dispute settlement in the WTO. Even though panel and Appellate Body reports are binding *inter-partes* and not *erga omnes* the rare cases where the WTO court has included civil society arguments in its reports are extremely significant. They are the first and only step to engage with civil society arguments and allow them to inform (even to a small extent) reports which are binding to member states.

The first part will discuss first NGO participation in WTO Ministerial Conferences; second the new trend of (few) open meetings of the Dispute Settlement Body; third, the WTO symposia where academics, NGOs, business representatives and students often participate at, and the annual WTO Public Forum. Finally, this chapter will briefly discuss the publication of WTO documents at the WTO website, a very important and detailed source of information for the WTO. These non-decisive aspects of the WTO are

also often discussed in the context of Global Administrative Law. The second part begins with a brief history of *amicus* curiae briefs before it discusses the related case law in detail. Finally, after offering some statistical data on *amicus* briefs there is a short critique towards the Panel and Appellate Body's ambiguous stance towards *amicus* briefs.

A. Civil Society in Ministerial Conferences, Symposia, Publication

1. NGO Observer Participation

Attempts for participation from non-state actors began as early as 1946, during the ITO negotiations. At the London Preparatory Conference, the International Chamber of Commerce as well as the World Federation of Trade Unions expressed concerns for the status and content of the negotiations that eventually led to the GATT. [1] Yet, no provision in the GATT alluded to non-state actors, even though the GATT had some informal relationships with NGOs.[2] This changed when the WTO was created in 1995. Article V of the Marrakesh Agreement discusses the outreach of the organization. The first paragraph in particular briefly mentions the WTO's relationships with other intergovernmental organizations. The second paragraph, dealing with NGOs and other non-state actors provides as follows:

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

Shortly after the adoption of this article, in July 1996 the General Council adopted the "Guidelines for Arrangements on Relations with Non-Governmental Organizations." The Guidelines unambiguously link transparency with NGO access to the WTO:

> "In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication

[1] Page 41 para 179 Sutherland Report. See also DOUGLAS IRWIN ET AL., THE GENESIS OF THE GATT (2008).
[2] See PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 153 (2008) and Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance* MICH. J. INT'L L. 255 (1997).

> with NGOs. […] The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO."

However, the General Council clarified that this participation could not be decisive in nature. In particular, the disclaimer the members added is related to a strict view of the WTO as an intergovernmental organization and nothing more, an idea that is strongly coupled with state sovereignty. As the Sutherland report will reiterate, if governments wish to allow for more NGO participation, they should do so at a national level:

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

The Sutherland report hails the adoption of Article V:2, but moves cautiously and avoids discussing any decisive role for NGOs. In particular, it compares Article 71 of UN Charter authorizing the Economic and Social Council to "make suitable arrangements for consulting with non-governmental organizations concerned with matters within its competence" as less robust.[3]

Since the adoption of the Guidelines, the General Council has addressed the issue of external transparency in its meetings on several occasions.[4] In particular, the General

[3] Sutherland Report Paragraph 188.
[4] GC Meeting WT/GC/M/2930 September 1998, WT/GC/M/35 30 March 1999, WT/GC/M/45 2 August 1999, WT/GC/M/57 14 September 2000, WT/GC/M/58
8 November 2000, WT/GC/M/66 10 August 2001.

Council discussed after the Ministerial Conferences the results of NGO participation. NGOs participated as observers for the first time at the Singapore Ministerial Conference. The General Council concluded that the process and the results were successful and non-governmental organizations could attend as observers at subsequent Ministerial Conferences (Geneva, Seattle, Doha, Cancún, Hong Kong, Geneva- See also Table 3).[5]

Table 8 NGO participation in Ministerial Conferences

Ministerial	NGOs who received accreditation	NGOs who attended	Participants
Singapore 1996	159	108	235
Geneva 1998	153	128	362
Seattle 1999	776	686	Approx. 1500
Doha 2001	651	370	370
Cancún 2003	961	795	1578
Hong Kong 2005	1065	811	1596
Geneva 2009	435	N/A	Approx. 500
Geneva 2011	234	N/A	N/A
Bali 2013	346	N/A	694

The division which manages relationships with NGOs is the Information and External Relations Division, which communicates information about the WTO. It also organizes an annual Public Forum, which is discussed in the following section.[6] NGOs become accredited to participate in Ministerial Conferences through a system similar to that in the United Nations. It is unclear what NGOs contribute during the Ministerial Conferences. The Sutherland Report discussed the bureaucratic burden of the accreditation process to the WTO Secretariat. It is clear that more institutional capacity is needed in the WTO.[7] The Director-General and members of the Secretariat meet regularly with NGOs.[8] There is also an online forum for discussions in the WTO.[9] NGOs may provide position papers, which the WTO Secretariat distributes to members states. A position paper is a written

[5] *Ministerial Conferences* http://www.wto.org/english/thewto_e/minist_e/minist_e.htm
[6] *Information and External Relations Division*
http://www.wto.org/english/thewto_e/secre_e/div_e.htm#ierd
[7] Sutherland Report paragraphs 207-208, Peter Van den Bossche, *Debating the Future of the World Trade organization, Divergent Views on the 2005 Sutherland Report* 8:3 J. INT'L ECON. L. 759 (2005) and PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 154-155 (2008).
[8] Sutherland Report para.184.
[9] *Forum* http://www.wto.org/english/forums_e/chat_e/chat_e.htm

statement asserting the position of an organization on a specific WTO issue.[10] The position papers published at the WTO website are no more than a handful per year, although some years, such as 1999 and 2005 ten or more papers are submitted. As with the observer status in Ministerial Conferences, the usage of the papers is also vague. The WTO has been criticized for the selection process as a "supreme cognitive arbitrer" prohibiting thus any mitigation of the organization's democratic legitimacy problems through the participation of NGOs.[11]

2. WTO Public Forum and Open Day

The WTO instituted an outreach event, which takes place annually, originally known as the Public Symposium, which later became the Public Forum.[12] It was first held in 2001. Members of the civil society, media, academics, business representatives and government officials meet at the WTO during the Public Forum to discuss the most recent developments in international trade. Each year has a different theme (see Table 4). The Public Forum has minimal normative value, however it signifies the outreach and openness of the organization to the general public.[13] The event according to the WTO regularly attracts over 1,500 representatives from civil society, academia, business, the media, governments, parliamentarians and inter-governmental organizations.[14]

WTO Public Forum	
2014	"Why trade matters to everyone"
2013	"Expanding Trade through Innovation and the Digital Economy"
2012	"Is Multilateralism in Crisis?"
2011	"Seeking answers to global trade challenges"
2010	"The Forces Shaping World Trade"

[10] *NGO position papers received by the WTO Secretariat* http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm

[11] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 315-317 (J. Klabbers et al eds. 2009).

[12] *Public Forum* http://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm

[13] Interesting examples of analogous transparency improvement are the OECD, see James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 LAW AND CONTEMPORARY PROBLEMS 191-227 (2005)) and the Basle Committee (Michael Barr & Geoffrey Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15-46 at17 (2006)), Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6 INT'L ORG. L. REV. 421-446 at 445 (2009).

[14] *Public Forum* http://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm

2009	"Global Problems, Global Solutions: Towards Better Global Governance"
2008	"Trading into the Future"
2007	"How the WTO can help harness globalization?"
2006	"What WTO for the XXIst Century?"
WTO Public Symposium	
2005	"WTO After 10 Years: Global Problems and Multilateral Solutions"
2004	"Multilateralism at a crossroads"
2003	"Challenges Ahead on the Road to Cancún"
2002	"The Doha Development Agenda and beyond"
2001	"Symposium on issues confronting the world trading system "

Table 9 WTO Public Forum and Public Symposium

Another outreach event is the Open Day which takes place at the end of June. According to the WTO website:

> "[t]he WTO opens its doors to the public on the occasion of the inauguration of its new building and the completion of the renovation of the Centre William Rappard. The WTO opened its doors to the public for the first time in 2009, attracting some 5,000 visitors who came to learn more about the WTO, the work of its staff, and the artistic treasures of the Centre William Rappard, the WTO's headquarters in Geneva. A second Open Day was held in 2010, offering a variety of entertainment and educational activities, including guided tours of the building and special activities for children. A web-only event was held in 2012 to introduce the members of the WTO."

Both events are mostly decorative. The cost to travel to Geneva would be prohibitive for anyone who is curious about the works of the WTO. If these events represent some form of engagement with civil society, then presumably it is only the elite civil society, academics, lawyers and representatives of NGOs with large budgets, or just those who already reside in Geneva and the surrounding areas who participate. The idea of web events may be a better way to introduce those interested in the works of the WTO.

3. The WTO website

Another aspect of external transparency is direct information on the WTO, namely the declassification and publication or online availability of a very significant number of WTO documents. The General Council since 2002 has authorized the derestriction of WTO documents almost at the time of their circulation among WTO member states. In

particular, in the decision entitled "Procedures for the Circulation and Derestriction of WTO Documents"[15] the General Council "[e]mphasizing the importance of greater transparency in the functioning of the WTO" decided that all official WTO documents shall be unrestricted unless requested otherwise by Member states. In the latter case, documents can remain unrestricted for up to sixty days.

Minutes of meetings are restricted and are only released to the public forty-five days after the date of circulation. Documents relating to modification or renegotiation of concessions or to specific commitments are automatically derestricted after the certification of such changes in the schedules and documents relating the accession process are automatically derestricted after the adoption of the report of the working party. Moreover all documents are translated in English, French and Spanish, the three official languages of the WTO, and are made immediately available at the WTO website, which now contains a very large number of documents in order to "[f]acilitate their dissemination to the public at large."

Considering the complex nature of the WTO as an institution, and the WTO rules and agreements, this derestriction is not as useful to those who are unfamiliar with the WTO as a system, mostly trade economists and trade lawyers. Even though the WTO website is an invaluable gateway for professionals, these documents are not as useful to the public at large. The WTO has attempted to remedy this problem with the introduction of various researched guides and simplified versions of the structure of the WTO. [16]

4. Public hearings during Dispute Settlement

Finally, the opening of WTO meetings to the public has recently been occurring via closed-circuit televised presentations in the WTO building in Geneva.[17] This form of transparency is identified as "auxiliary meta transparency measures" put in place to

[15] WT/L/452 16 May 2002 (02-2719) Decision of 14 May 2002.
[16] See for example: *About the WTO* http://wto.org/english/thewto_e/thewto_e.htm
[17] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 328 (J. Klabbers et al eds. 2009) reports that those hearings are public.

safeguard the efficiency of confidentiality of judicial mechanisms. [18]Usually, limited seating is available. In exceptional cases where the parties agree to do so, the WTO dispute settlement process can be open to the public through a real time closed-circuit television broadcast, as it recently occurred in the EC-Canada case on seal products[19] or the US-COOL case.[20]

In this case, interested individuals must file a form with the WTO giving their name, address, phone, email, profession, organization, date of birth, nationality and passport number. It appears that any interested person, regardless of whether their country is a WTO member (for the small number of countries who are still not WTO members) can attend the meetings. Moreover, according to the disclaimer at the application form:

> "In the light of the limited seating capacity, the seats reserved for the public will be allocated on a first come, first served basis upon receipt of the completed form. […]A valid official photo identification will need to be presented on-site to access the viewing room. Please note that any form of recording or filming is prohibited. Security checks may delay access to the viewing room. […] Note that the names of those who have registered will be communicated to the parties and third parties in this dispute.

Finally, it is interesting to note here that these closed circuit hearings are another example where the organization could be a lot more transparent. It is unclear why such meetings are not published at the WTO website. The fears of member states for the real-time transmission could be minimized if such broadcasting occurs only with the consent of all member state involved, and after the meeting is over and the Panel or Appellate Body report is issued. Publicizing a video of the DSB meetings would assist with making the process more transparent. It is unclear why this has not happened to this date.

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[18] Thore Neumann & Bruno Simma, *Transparency in international adjudication* in TRANSPARENCY IN INTERNATIONAL LAW 472-473 (A. Bianchi & A. Peters, eds. 2013).

[19] *WTO meeting on seal products dispute opened to the public* https://www.wto.org/english/news_e/news13_e/hear_ds400_401_18feb13_e.htm .See also *Registration begins for public observation of appeal in renewable energy disputes* http://www.wto.org/english/news_e/news13_e/hear_ds412_426_14mar13_e.htm .

[20] WTO meeting on United States – Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 21.5 of the DSU by Canada and Mexico to be held on 18 and 19 February 2014

B. Participation in dispute settlement through amicus briefs

1. History and case law of amicus curiae briefs

In the first section we will first look at the history of *amicus curiae* briefs from 1995 to this day. The topic has been much discussed, as it is quite popular among WTO scholars. Many member states have been vocal on their disagreement with the interpretation of the DSU by the Panels and the Appellate Body who maintain that they have a right to accept unsolicited briefs. Yet, the Panels and Appellate Body, in most of the cases instead of opening their doors to briefs they engage in maneuvers of rejection unless the parties to the dispute incorporate the claims into their own submissions. As such, the member-centric nature of the process is reinforced. The Panels and Appellate Body seem progressive in their interpretation of the DSU *in almost every case*. At the same time, they end up not examining the *amicus* briefs, again *in almost every case*. However, as the last section will demonstrate, an opportunity exists for erosion of this *de facto* traditionalist practice. Utilizing the lessons from *US-Tuna II (Mexico)*, the only case where an amicus brief was explicitly relied upon in the Panel report, I will put forward a proposal on expanding this case law, based on the relevance of consumer preferences in WTO litigation.

The history for *amicus curiae* submissions in the WTO began with *US-Shrimp*, a case involving a US prohibition on shrimp imports originating from countries using a certain type of net. The Panel in *US-Shrimp* received two *amicus curiae* briefs. While the United States, citing article 13 of the DSU, urged the panel to take into consideration any relevant information, regardless of its source, the applicants, India, Malaysia, Pakistan and Thailand explicitly requested that the Panel not consider the briefs. The Panel decided for the applicants in this case, noting that "the initiative to seek information and to select the source of information rests with the Panel"[21] and therefore consideration of unsolicited information from parties other than the applicant(s), the respondent(s) and any third parties to the dispute is incompatible with the DSU. Moreover, the Panel noted that:

[21] Panel Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/R, adopted 6 November 1998 para 7.8

> "it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material."[22]

The *US-Shrimp* Panel approach, as I will further demonstrate after reviewing all case law to date, has become the *de facto* response of the Panels and the Appellate Body to the majority of *amicus curiae* briefs. During the appeal of *US-Shrimp*, another four *amicus curiae* were submitted, some from the same parties as the ones before the Panel, and some new. The joint appellees requested again the rejection of the briefs, albeit on a different legal basis. *Inter alia*, they stressed that only issues of law and not of fact can be brought before the Appellate Body as per article 17.6 of the DSU.[23] The Appellate Body responded that the admissibility of *amicus curiae* is in fact a legal issue.[24] Avoiding to rule on whether the DSU allowed for the Appellate Body to accept unsolicited briefs, it ruled instead that as long as these materials are attached to the brief of either party, and insofar it coincides with the main submission of that party, the Appellate Body will consider it. The Appellate Body then reversed the Panel's interpretation on its right to "seek information:

> Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word "seek" must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word "seek" is unnecessarily formal and technical in nature becomes clear should an "individual or body" first ask a panel for permission to file a statement or a brief.

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[22] Panel Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/R, adopted 6 November 1998 para 7.8

[23] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998
para. 80.

[24] *Id.* para 88.

The issue of *amicus curiae* was also discussed in the Article 21.5 *US-Shrimp* Panel and Appellate Body reports. By then, even though the briefs received were only two, an increasing number of organizations joined the previous ones in their efforts to be heard in the WTO dispute settlement context. Once again, Malaysia insisted that the DSU cannot accept or consider *amicus curiae*, but the Panel reiterated the previous position of the Appellate Body and exclaimed that it can consider such briefs, insofar they coincide with parties' submissions.[25] Another two briefs were submitted in the appeal during the compliance proceedings between the US and Malaysia. With respect to the first brief, which was attached to the US submissions, the Appellate Body repeated the Panel's ruling in the compliance proceedings and the Appellate Body's ruling in *US-Shrimp*. For the second brief, submitted by professor Howse, the Appellate Body simply stated that "we have not found it necessary to take into account the brief." The rejection did not decrease professor Howse's desire to be heard in the dispute settlement process.[26] At the same time the tribunal's reasonless declaration has been favored in many of the following disputes when *amicus* briefs were submitted.

In the Panel proceedings of *US-Lead and Bismuth II* only one *amicus curiae* was received. The Panel stressed they have the authority to accept or reject the brief and proceeded to say that since the parties did not have adequate opportunity to comment on the brief, "serious due process concerns" were raised, and although the Panel could have delayed the proceedings so that parties have adequate time to submit their comments, this could not be justified.[27] On appeal, Brazil, Mexico and the EC argued that the DSU does not have the authority to accept the briefs from non-parties to the proceedings as per article 17.4 DSU, also invoking article 17.10 DSU and confidentiality of the

[25] United States- Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia WT/DS58/AB/RW adopted 21 November 2001 paras 5.15 and 5.16.
[26] He has since submitted more amicus curiae briefs, which were rejected under the same rubric and he is one of the few parties with the highest amicus submissions. See infra, section on Evaluation of NGO Participation.
[27] Panel Report, United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom WT/DS138/R, adopted 7 June 2000 para 6.3.

proceedings.[28] The US rebutted that the Appellate Body as per article 17.9 DSU and Rule 16.1 of the Working Procedures for Appellate Review has the authority to create additional procedures when necessary.

The Appellate Body in this case ruled on its ability to accept and consider *amicus curiae* briefs. It first noted that the DSU neither allows nor prohibits the acceptance of unsolicited information and effectively agreed with the US position.[29] It further declared that access to the dispute settlement process as a *legal right* is reserved only for member states[30] and that non-member individuals or organizations have no such legal right and therefore the Appellate Body has no *legal duty* to accept the submissions.[31] The Appellate Body concluded that it has the *legal authority* under the DSU to receive the briefs, but in this case did not find it necessary to take the briefs into account.

Another *amicus curiae* brief was submitted during the compliance proceedings of *Australia-Salmon*. This is the first case where a letter from a non-state actor, the Concerned Fishermen and Processors in South Australia, was considered relevant and was accepted by the Panel without attachment to a national brief or national endorsement.[32] Interestingly enough, the tribunal emphasized that the claim raised by the Australian fishermen in their letter coincided with Canada's position on Article 5.5 of the SPS.[33]

US- Section 110 (5) Copyright Act is the next case where one *amicus* brief was submitted during the Panel proceedings. The United States, although they did not agree with the content of the letter, submitting that it had little value to the Panel since it provided no

[28] Appellate Body Report, United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138AB/R, adopted 7 June 2000 paras. 36-37.
[29] *Id.* para. 39.
[30] *Id.* para. 40.
[31] *Id.* para. 41.
[32] Panel Report, Australia – Measures Affecting Importation of Salmon Recourse to Article 21.5 of the DSU by Canada, WT/DS18/RW, adopted 20 March 2000 para. 7.8. The other two cases of unsolicited briefs being considered are the Moroccan submission in EC Sardines examined infra, which is largely distinct, considering the amicus comes from a Member state; and the US-Tuna II (Mexico) infra.
[33] Panel Report, Australia – Measures Affecting Importation of Salmon Recourse to Article 21.5 of the DSU by Canada, WT/DS18/RW, adopted 20 March 2000 paragraph 7.9

additional information, still argued that private parties had a "right…to make their views known to the WTO dispute settlement panels."[34] The EC further added that the panel can accept factual information and technical advice by "individuals or bodies alien to the dispute", however the panel's authority excluded legal arguments and interpretations.[35] The Panel concluded that they accept the letter, as it is their right to do so[36], but agreed with the parties that the letter contains "duplicate information" and therefore has not relied on it in its reasoning.[37]

A new issue with respect to private party participation and confidentiality of the dispute settlement process surfaced in the next case. During the appellate proceedings of *Thailand H-Beams*, one *amicus* brief was submitted. The thorny matter in this case was a claim Thailand made on violation of confidentiality of the proceedings.[38] In particular, Consuming Industries Trade Action Coalition (CITAC), a US-based private organization, referred to Section III.C.5 of Thailand appeal submissions. As Thailand claimed, the law firm hired by Poland in the dispute was also counsel for CITAC.[39] Poland responded that neither their mission, nor the law firm hired had any insight on how CITAC came about the information cited, and in any case, they dismissed the law firm from the case.[40] All third parties also informed the Appellate Body that they did not disclose the content of the Thai submissions. Interestingly, the US, a strong proponent of transparency in the WTO dispute process noted that:

> "this issue exemplified the need for enhanced transparency in WTO dispute settlement. In the view of the United States, the practice of claiming confidential treatment for submissions that did not contain confidential business information corroded public support for the WTO dispute settlement system and inhibited the ability of Members to represent fully the interests of their stakeholders."[41]

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[34] Panel Report, US—Section 110 (5) Copyright Act, WT/ DS160/R, 15 June 2000 para. 6.5.
[35] *Id.* para. 6.6.
[36] *Id.* para. 6.7.
[37] *Id.* para. 6.8.
[38] Appellate Body Report, Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R, 2001, adopted 5 April 2001 para. 64.
[39] *Id.* para. 65.
[40] *Id.* paras. 68-72.
[41] *Id.* para. 73.

The Appellate Body, in a demonstration of the reluctance of its members to communicate with the *amicus curiae* submitting organization, rejected Thailand's request to even simply inquire into how CITAC or the law firm obtained information about the brief. The Appellate Body considered the rejection of the brief provided sufficient remedy in this case and clarified that, in any event, the reason for the rejection of the brief was its irrelevance to the case at hand.

Next in the DSB docket was the (in)famous *EC-Asbestos* case between the EC and Canada. The Panel received only 5 *amicus curiae* briefs, two of which the EC decided to attach in their own submissions. Subsequently, the Panel rejected the rest of the submissions, two without explanation and one because it was submitted very late in the process. The Appellate Body received the largest number of *amicus curiae* briefs submitted in one case to date: seventeen. 23 organizations, associations and firms and two individuals submitted the briefs after the establishment of specific procedures[42] by the Appellate Body for *amicus curiae* submissions. Before filing a brief, interested non-state parties would have to apply in order to file a brief, explaining their reasons in no longer than 3 typed pages.[43] Initially, the Appellate Body received 13 submissions which were not submitted in accordance with the established procedures.[44] Subsequently, another 17 applications were submitted, six of which after the deadline set in the Additional Procedure.[45] The remainder of the applications to file a brief were examined and the Appellate Body concluded that:

> "We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently

[42] Called "Additional Procedure" based on Rule 16(1) of the Working Procedures, copied in Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2000Para 52.
[43] Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2000 Para 52.
[44] *Id.* Para. 53.
[45] *Id.* Para. 55.

> with all the requirements set forth in paragraph 3 of the Additional Procedure."[46]

One last brief, submitted after the process was concluded, was also rejected.

The *Asbestos* case is remarkable on the issue of *amicus curiae* briefs, for a number of reasons. First, the Appellate Body moves beyond simply recognizing its authority to accept unsolicited briefs, and establishes, for one and only time, a procedure by which such briefs will be submitted. The procedure is two-tiered, and interested parties have to first establish their interest in the case before actually submitting a brief. Second, *EC-Asbestos* is the closest example of the "floodgates" argument put forward by skeptics of *amici*. The unremarkably small number of parties interested in weighing in in this case contradicted the feared outpouring of briefs. Seventeen briefs (even at 20 pages each, if they had in fact been accepted by the Appellate Body) could hardly be seen as excessively burdensome to the Canadian and European lawyers' armies, especially in view of the large memoranda submitted during WTO disputes. One could also expect significant overlap in these briefs. Third, one cannot help but express disbelief upon reading Paragraph 56 of *EC-Asbestos*: it is unclear how all eleven applicants failed to comply with Article 3 of the Additional Procedure. This incidence becomes further troublesome if one assumes that at least one (if not many or all) of the organizations hired a law firm to assist them with the brief.

Asbestos is particularly noteworthy also because of the emergency General Council Meeting of November 22nd 2000.[47] While the case was pending and as the Appellate Body was accepting motions to file briefs, the General Council, the body assigned with the 'day-to-day' supervision of the WTO matters in between Ministerial Conferences, held a meeting discussing the issue of the *amicus* brief submissions. An overwhelming majority of member states expressed their disapproval to the Appellate Body practice, with only the United States agreeing to *amicus* brief submissions[48]. The representative of

[46] Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2000 Para 56.
[47] WT/GC/M/60 23 January 2001.
[48] WT/GC/M/60, 23 January 2001 paragraphs 74-77.

Egypt who requested this meeting notably acting on behalf of the Informal Group of Developing Countries said that the issue before the General Council "was not a transparency issue but was about the Appellate Body crossing its limits"[49] further citing the danger of "severe harm and a grave imbalance" for developing countries.[50] The question of *amicus curiae* briefs was also characterized as "constitutional"[51], challenging the very "intergovernmental nature of the organization"[52], threatening to contaminate the dispute settlement mechanism with "political issues".[53] Furthermore, a number of members argued that it is a mistake to frame the *amicus* brief issue as an external transparency.[54]

The next case, *EC-Bed Linen*[55], simply repeated the unwillingness to accept the single brief submitted. Following that, the case of *EC-Sardines* on appeal faced another unique issue: the possibility for an *amicus curiae* brief coming not from a non-state actor but from a WTO Member State. After Morocco submitted an *amicus* brief, the Appellate Body ruled on the issue that lied behind the objection expressed by representatives of WTO countries that member states were put at a disadvantage vis-à-vis non-state actors and it was unclear whether they could be part of the same procedure. On the issue of the Moroccan submission, the Appellate Body, basing its reasoning on *US- Lead and Bismuth II*, argued it can accept *amicus* briefs from *any* party.[56] However, the question arising in this context is that of a *legal right* of the member states to submit such briefs and a corresponding *obligation* of the Panels and Appellate Body to accept them. To this question, the Appellate Body in *EC-Sardines* answered negatively.[57] Once a member

[49] WT/GC/M/60, 23 January 2001 paragraph 14.
[50] *Id.* para. 18.
[51] *Id.* para. 22 Hong Kong.
[52] *Id.* para. 32 India.
[53] *Id.* para. 46 Brazil.
[54] See for example Canada, Turkey, Argentina WT/GC/M/60 23 January 2001 paragraphs 72, 81 and 93 respectively.
[55] European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted 12 March 2001 para. 6.1.
[56] Appellate Body Report, European Communities—Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002 para. 162.
[57] *Id.* paras. 163-164.

state decides to participate via an *amicus curiae* brief, then it no longer has the *right* to be heard (as it would if it were a third party to the dispute)[58].

Reaffirming that the WTO is a member-driven organization, the Appellate Body for the first time summarized and addressed the arguments in an *amicus* brief. [59] It continued to reject most of the arguments (with the exception of the arguments on Article 2.1 TBT and GATT 1994). Even though the tribunal proclaimed it would treat all *amici* in the same manner, regardless of their origin, only one *amicus* to date from a non-state source has been given the same attention as the Moroccan brief in *EC Sardines*[60]. With respect to the brief submitted by "a private individual", the Appellate Body repeated that it has the authority to accept the brief[61] but it is not helpful for the court in this appeal.[62]

The next case addressing an *amicus* brief was *US-Countervailing Measures on Certain EC Products*.[63] The Appellate Body again rejected the single *amicus* brief submitted, yet interestingly now both the EU and the US affirmed that the Appellate Body has the authority to accept and consider briefs from non-state actors. [64] In the next few cases, *US-Softwood Lumber III,*[65] *US-Softwood Lumber IV,*[66] *US-Softwood Lumber VI*[67]*, US-Softwood Lumber IV* on appeal[68] and *US-Steel Safeguards* on appeal[69] the Panels and Appellate Body eventually dismissed each of the 11 briefs submitted in total in these

[58] *Id.* para. 166.
[59] *Id.* para. 169.
[60] The amicus in Panel Report, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/R, adopted 13 June 2012.
[61] Appellate Body Report, European Communities—Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002 paras. 156-160.
[62] *Id.* para. 160.
[63] Appellate Body Report, US – Countervailing Measures on Certain EC Products WT/DS212/AB/R adopted 8 January 2003.
[64] *Id.* paragraph 76.
[65] Panel Report, US – Softwood Lumber III United States — preliminary determinations with respect to certain softwood lumber from Canada, WT/DS236/R, adopted 1 November 2002.
[66] Panel Report, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada WT/DS257/R, adopted 29 August 2003.
[67] Panel Report, Trade Commission in Softwood Lumber from Canada WT/DS277/R adopted 26 April 2004.
[68] Appellate Body Report, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada WT/DS257/AB/R, adopted 29 August 2003.
[69] Appellate Body Reports, United States – Definitive Safeguard Measures on Imports of Certain Steel Products WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R adopted 10 December 2003.

cases, either as irrelevant or as submitted too late. Only the Panel in *US-Softwood Lumber VI*, in footnote 75 remarked that:

> "in light of the absence of consensus among WTO Members on the question of how to treat *amicus* submissions, we decided not to accept unsolicited *amicus curiae* submissions in the course of this dispute. However, we noted that we would consider any arguments raised by *amici* curiae to the extent that these arguments were taken up in the written submissions and/or oral statements of any party or third parties."

This analysis retracts from previous case law, referring in the discontent expressed by WTO member states with respect to the treatment of *amicus* briefs. This is the first time in the six years since the Panel of *US-Shrimp* that a report returns to a strict member-driven rhetoric and rejects the brief on these grounds.

Confidentiality of state-parties to a dispute and an *amicus* curie brief came up again in the case of *EC-Export Subsidies on Sugar*.[70] This time the Panel directly communicated with WVZ, an association representing German sugar producers and requested information as to how they received confidential data from Brazil's submissions. WVZ responded that:

> "it had been 'able to examine' an attachment to Brazil's submission. According to WVZ, this document was not designated as confidential. It also indicated that WVZ was 'not in a position to reveal the source of its information regarding the evidence submitted by Brazil.'"[71]

The Panel found there was a breach of confidentiality, noted that a similar issue arose in *Thailand H-Beams*, rejected the brief and reported the incident to the Dispute Settlement Body. [72]

The next six cases, *EC-Export Subsidies on Sugar* on appeal,[73] *EC-Chicken Cuts* on appeal,[74] *Mexico-Taxes on Soft Drinks* on appeal,[75] *US-Zeroing (EC)*, [76] *EC-Selected*

[70] Panel Reports, European Communities – Export Subsidies on Sugar WT/DS265/R, WT/DS266/R, WT/DS283/R adopted 19 May 2005.
[71] *Id.* paras. 7.92, 7.93.
[72] *Id.* 7.96-7.100.

Customs Matters[77] and *EC - Biotech Products (GMOs)*[78], the Panels and Appellate Body once again rejected the briefs on the usual grounds. In the case of *Brazil- Retreated Tyres*[79] a unique request for webcasting the proceedings was made by the Center for International Environmental Law. The proposal was discussed with the parties to the dispute and was subsequently rejected.[80] Similarly, the Panels and Appellate Body rejected the total of sixteen *amicus* briefs submitted in *Brazil-Retreaded Tyres* on appeal[81], *EC-Salmon,* [82] *China-Auto Parts* on appeal,[83] *EC and certain member states-Large Civil Aircraft*[84] *Australia- Apples*,[85] *Thailand-Cigarettes*,[86] *US- Antidumping and Countervailing Duties (China)* on appeal,[87] *Canada - Renewable Energy* during the Panel process [88] and on appeal,[89] and *US-Clove Cigarettes* on appeal[90] either outright rejected the briefs or found their consideration unnecessary. In *US-COOL* the Panel accepted the

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[73] Appellate Body Reports, European Communities – Export Subsidies on Sugar WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R adopted 19 May 2005.
[74] Panel Reports, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil, WT/DS269/R, WT/DS286/R adopted 27 September 2005.
[75] Appellate Body Report, Mexico — Tax Measures on Soft Drinks and Other Beverages WT/DS308/AB/R adopted 24 March 2006.
[76] Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R, adopted 9 May 2006.
[77] Panel Report, European Communities — Selected Customs Matters WT/DS315/R adopted 11 December 2006.
[78] Panel Reports, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006.
[79] Panel Report, Brazil — Measures Affecting Imports of Retreaded Tyres WT/DS332/R 17 December 2007.
[80] *Id.* para. 1.9.
[81] *Id.*
[82] Panel Report, European Communities – Anti Dumping Measure on Farmed Salmon from Norway, WT/DS337/R, adopted 15 January 2008
[83] Appellate Body Reports, China – Measures Affecting Imports of Automobile Parts, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009.
[84] Panel Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R, adopted 1 June 2011.
[85] Panel Report, Australia – Measures Affecting the Importation of Apples from New Zealand, WT/DS367/R, adopted 17 December 2010.
[86] Panel Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/R, adopted 15 July 2011.
[87] Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011.
[88] Panel Reports, Canada — Certain Measures Affecting the Renewable Energy Generation Sector WT/DS412/R WT/DS426/R adopted 24 May 2013.
[89] Appellate Body Reports, Canada — Certain Measures Affecting the Renewable Energy Generation Sector WT/DS412/AB/R, WT/DS426/AB/R adopted 24 May 2013.
[90] Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, adopted 24 April 2012.

claims in the one brief it received for the part that it coincided with the parties' submissions[91].

One of the more recent cases which significantly departed from the previous case law is *US-Tuna II*.[92] The Panel here not only accepted the submission of Humane Society, an organization which has frequently submitted *amicus curiae* briefs, but it went as far as to consider the claims contained in the brief, even beyond the parts cited by the United States, agree with their content, and utilize them in its decision-making.[93] For example, the Panel said:

> We further note that it is undisputed that US consumers are sensitive to the dolphin-safe issue. This is acknowledged by both Mexico and the United States, and is also confirmed by the evidence presented with the *amicus curiae* brief to which the United States has referred to in its answers to questions. This evidence suggests that, following public campaigning by the environmental organization "Earth Island Institute" in the late 1980s (including through film footage shot in 1987-88 showing the capture and killing of dolphins during a fishing trip where setting on dolphins was used), tuna processors were under pressure to stop purchasing tuna caught in conditions that were harmful to dolphins. […] While this is only indirect evidence as to the final consumers' behaviours, it suggests that the producers themselves assume that they would not be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase. [94]
>
> We further note in this respect that *some of the evidence presented to the Panel suggests* that 90 per cent of the world's tuna companies have adopted a strict "no setting on dolphins" standard. [95]

[91] Panel Report, United States - Certain Country of Origin Labelling (COOL) Requirements WT/ DS384,386/R, adopted 23 July 2012 paras. 2.9-2.10.
[92] Panel Report, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/R, adopted 13 June 2012.
[93] *Id.* paras 7.182, 7.288, 7.289, 7.363, 7.368, Fn 559.
[94] *Id.* paras.7.288-7.289
[95] *Id.* para 7.368 Emphasis added. The evidence referred to in this paragraph, is cited in Footnote 559 of the report: Amicus Exhibit-28. As explained in paragraph 2.9 above, insofar as the Panel deemed this information to be relevant for the purposes of its assessment, it invited Mexico to comment on it in order to take full account of Mexico's right of response and defense in respect of due process considerations. Panel's question No. 88.

On appeal the Appellate Body did not find the three briefs submitted to it to be relevant.[96] Similarly in the cases that followed *US-Tuna II*, the Panels and Appellate Body retracted the decision's progressive approach.

Finally, the recent *EU-Seals* case demonstrates how *amicus curiae* briefs are treated in the WTO since it summarizes the scope of the entire issue. The case involves a complaint brought by Canada and Norway against the European Union involving the latter's ban on seal products. The ban mainly targets seal products and prevents them from entering the European Union market with some exceptions. Canada and Norway are amongst the few countries still engaging in seal trade. Pamela Anderson, a Canadian citizen, actress and PETA spokesperson was amongst the few non-state actors to submit an *amicus curiae* brief to the WTO Panel examining the case. Pamela Anderson requested that the Panel uphold the EU seal ban. In her one-page submission on behalf of PETA, she proposed a "practical exit strategy: a government buyout of the sealing industry, which would benefit both seals and sealers." She concluded with the hope that her "beautiful Canada will finally leave this barbaric practice in the past."[97] It is relevant here to clarify that *amicus* briefs are submitted up until the first substantive meeting of the Parties and the Panel. In fact, the first substantive meeting is the *de facto* deadline for the submission of any evidence coming from the parties including third countries parties to the dispute, and the purpose of this procedural rule is to give members to the dispute time to respond and process all the information put forward during this meeting.

The five briefs submitted in this case were: the first by a group of organizations, amongst which was Brigitte Bardot's foundation. The Bardot set of briefs was promptly endorsed by the European Union and annexed to its submissions. The rest of the briefs fall under the category of unsolicited briefs; the second was by professor Robert Howse, another Canadian, together with Joanna Langille and Katie Sykes; the third, was by Pamela Anderson on behalf of PETA. The last two briefs were by the International Fur Trade

[96] *Id.* para. 8.
[97] *Amicus curiae* brief of Pamela Anderson on Behalf of PETA before the WTO, available at http://www.pamelaandersonfoundation.org/news/2015/3/3/before-the-world-trade-organization-dispute-settlement-body-european-communities-measures-prohibiting-the-importation-and-marketing-of-seal-products-wtds400-wtds401-wtds369.

Federation and actor Jude Law. The first two briefs were accepted- and considered by the WTO, while the last three were rejected. Both Jude Law and the fur traders submitted briefs well after the first substantive meeting. Pamela Anderson and PETA and Professor Howse et al. both submitted briefs on time, and while one was considered, the other was rejected.[98] No reason was given by the court for either choice- and the court cited professor Howse's brief as an exhibit of the "public moral concerns" with respect to the ban of seal trade (which ended up being the deciding factor of the case as the court found that there were no less restrictive means to normatively express these concerns other than a flat-out ban on seal trade).[99] It remains unclear why one brief was accepted while the other was rejected.

2. Critique of the treatment of *amicus* briefs

Overall, regardless of the switch in interpretation and the rejection of the *US-Shrimp* dictum that accepting *amicus curiae* briefs is prohibited by the DSU, the end result is that the information contained in such documents is only considered during WTO dispute settlement when submitted as part of the parties' submissions. When such briefs are simply annexed to the parties' memoranda they are taken into account only insofar they coincide with the main positions of the country at hand, otherwise they are dismissed. Only in *US-Tuna II (Mexico)*[100] and *EC-Seals*[101] has a Panel addressed the substantive contribution of a non-state *amicus* brief and used it in its reasoning. The other *amicus* brief examined on the merits so far has been the submission by Morocco in *EC-Sardines*.

[98] On submission times see EC- Seals, WT/DS400/R WT/DS401/R (25 November 2013) para.1.17 and fn. 16.
[99] See Panel Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R / WT/DS401/R / and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/Rpara. 7.408 and fn. 672.
[100] Panel Report, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/R, adopted 13 June 2012.
[101] Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014 Panel Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R / WT/DS401/R / and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R.

Thus, the somber truth remains: although the court refined its approach with respect to unsolicited briefs in the thirty or so disputes since *US-Shrimp* in 1998, in reality almost nothing has changed. The Panels and Appellate Body overwhelmingly insist they can accept unsolicited information from for-profit and non-profit non-state actors, despite the strong opposition from the vast majority of WTO member states during the *EC-Asbestos* proceedings. Yet, they have rejected any information not annexed or referred to in parties' submissions, frequently without any further explanation. Non-governmental actors are only allowed to submit their briefs, but they remain excluded from any meaningful debate during the dispute settlement process. Moreover, it remains unclear why the Panels and Appellate Body insist on proclaiming their right to accept briefs, yet not a single time in the last fifteen years have they actually considered any of the information contained in those briefs, unless it was attached to a country's submissions. Despite the extensive case law examining the issue of unsolicited briefs, in effect all NGOs since 1998 have by result received the same treatment as the *US-Shrimp* panel report.

A brief summary of the *amicus curiae* statistics to date is illuminating when considering the doubts raised in the 2000 General Council emergency meeting on the issue. In the almost twenty years of the organization, a total of 87 *amicus curiae* briefs have been submitted for consideration in 41 Panel and Appellate Body proceedings of 33 disputes.[102] Of those, only 14 briefs are cited anonymously. The submitting organizations and individuals of the remaining 73 briefs are mentioned by name in the Panel and Appellate Body reports. According to these numbers, in 41 out of 329 Panel and Appellate Body reports combined (including Article 21 reports and the pending seals'

[102] Or 88 in 42 proceedings, if we count the brief filed in EC-Hormones. See Annex. In the numbers EC-Seals is included, although it is pending. The disputes in which briefs have been filed are: US-Gasoline, EC-Hormones, US-Shrimp, US-Lead and Bismuth II, Australia-Salmon, US-Section 110(5) Copyright Act, Thailand-H-Beams, EC – Asbestos, EC-Bed Linen, EC-Sardines, US – Countervailing measures on Certain EC Products, US-Softwood Lumber III, US-Softwood Lumber IV, US-Softwood Lumber VI, US-Steel Safeguards, EC-Export Subsidies on Sugar, EC-Chicken Cuts, Mexico-Taxes on Soft Drinks, US-Zeroing (EC), EC-Selected Customs Matters, EC - Biotech Products, Brazil-Retreaded Tyres, EC-Salmon, China-Auto Parts, EC and certain member states- Large Civil Aircraft, Australia- Apples, Thailand-Cigarettes (Philippines), US-Antidumping and Countervailing Duties (China), US-Tuna II (Mexico), EC-Seal Products, Canada-Renewable Energy, US-Clove Cigarettes and US-COOL.

report)[103] non-state parties have submitted *amicus* briefs. This amount to a little over 12% of the reports issued.

Approximately 130 organizations and individuals have tried to weigh in during the WTO dispute settlement process, based in a variety of countries, both developing and developed. The majority are organizations based in developed countries. Few academics have also submitted briefs. The mandate of the organizations varies depending on the case at hand. However, a few recurring names appear in the *amici* list: the first place is currently held by the Center for International Environmental Law (CIEL) with nine submitted briefs. CIEL is a U.S. non-profit organization based in Washington D.C. with a second office in Geneva. The second most prolific *amicus* submitter is Humane Society, also based in Washington D.C. Humane Society is the largest animal advocacy organization in the world and has submitted briefs either through its central or its regional offices. It is also the only organization to date whose submissions were explicitly considered by the Panel in US-Tuna II. Other repeated friends of the WTO dispute settlement system are Robert Howse, professor of International Trade law, Defenders of Wildlife, Friends of the Earth, the Foundation for International Environmental Law and Development (FIELD), the Worldwide Fund for Nature (WWF), the Center for Marine Conservation and the Argentina-based Center for Human Rights and the Environment (CEDHA).

The organizations or the individuals that submitted them have published some of the *amicus* briefs. The public briefs are neither excessive in length, nor do they advance unreasonable interpretations of WTO law. For example, the brief filed by the American Institute for International Steel (AIIS) during the appeal of *US-Steel*[104] argues for the inclusion of consumer perspectives and the views of "users of steel" in public policy debates. The AIIS, in its 10-page memo further proposes the inclusion of consumers' interests in the interpretation of the notion of "public interest" in Article 3.1 of the

[103] For numbers and statistics see http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm and http://worldtradelaw.net/ .
[104] Available at http://www.worldtradelaw.net/amicus/aiissteelamicus.pdf .

Safeguards Agreement. On a similar tone, Ecojustice et al. in a 22-page memo[105] submitted during the *Canada-Renewable Energy* case argue for an application of Article XX GATT to the SCM Agreement. Professor Rubini also submitted a brief in this case, which advances a pro-green policy approach on the determination of subsidies. Similarly Professors' Howse et al. offered a polemic approach in their brief on the seals' case.[106] The brief submitted to the Panel argues against the current Canadian policy on seals. The last two briefs move closer to advocacy than the first two. All four though are examples of well-thought submissions to the Panel and Appellate Body. If they are indicative of the general form that *amicus curiae* briefs have, then they serve to demonstrate that the fears expressed during the General Council meeting may have been largely exaggerated.

The argument that merits closer attention is the one about overburdening developing countries in the dispute settlement process. It is a valid concern, however, it is one that we should discuss more carefully. First of all, as we saw, the "floodgates" element of *amicus* brief submissions is highly exaggerated. Thus, the workload for developing countries will not be as burdensome as it appears. Moreover, this problem can be mitigated through procedural requirements that restrict the length of *amici* submissions. Second, it might be in the interest of developing countries to have a more pluralistic dispute settlement process. Their worries focus mainly on the possibility of NGOs and other non-state actors bringing forward environmental and labor concerns before the DSB. However, such considerations are weighed in during dispute settlement, they are not the only factor that will produce a decision on for example Article III or Article XX of the GATT. Labor issues are not covered by the WTO Agreements. Third, it is likely that the reluctance to accept *amicus* briefs may be related to the prevalence of the practice of such briefs in Western legal systems. That also is not entirely accurate. Many countries around the world have similar participation opportunities during various stages of national adjudicatory processes.

[105] Available at http://www.iisd.org/pdf/2012/ecojustice_amicus_curiae_brief.pdf .
[106] Available at http://www.worldtradelaw.net/amicus/howsesealsamicus.pdf .

V. Administrative Transparency

The functions of the WTO are carried at the political level by the diplomats who are employed by WTO member states, and at the administrative level by the WTO secretariat, namely the permanent staff of the WTO. This chapter will discuss the transparency aspects in the administrative level of the WTO. Before that, it is noteworthy to give a summary of the political organs of the WTO, since they are the main organs of the WTO, which the Secretariat assists in their function. I will then move to describe the structure of the Secretariat, and discuss the transparency issues that arise in this context and are mainly related to the selection of the WTO employees, judges and other participants in the administration of international trade.

A. Political bodies in the WTO: the various faces of the General Council

The political organs of the WTO are meetings of diplomats, who represent their national governments, the WTO member states, the candidate members and the countries who have acquired observer status. Selection of diplomats occurs at the national level, and it varies from country to country. The structure of the WTO as an organization appears in Figure 4. The Ministerial Conference consists of minister-level representatives and is the highest decision-making body, which meets approximately every two years. The permanent organ in the WTO, the General Council consists of ambassador-level diplomats and meets approximately every two months. The Chairperson of the General Council is the highest elected position at the WTO. The Dispute Settlement Body and the Trade Policy Review Body comprise of the same members as the General Council (they are in fact the same body), acting under a different capacity and a different Chairperson.[1] Below the General Council under its three forms are the Specialized Councils, Committees, such as the Committee on Trade and Environment, the Committee on Balance of Payment Restrictions, the Committee on Regional Trade Agreements, the

[1] Article IV:3 and 4 of the WTO Agreement.

Committee on Subsidies and Countervailing Measures, the Trade Negotiations Committee, and Working Parties in the WTO. [see following table]

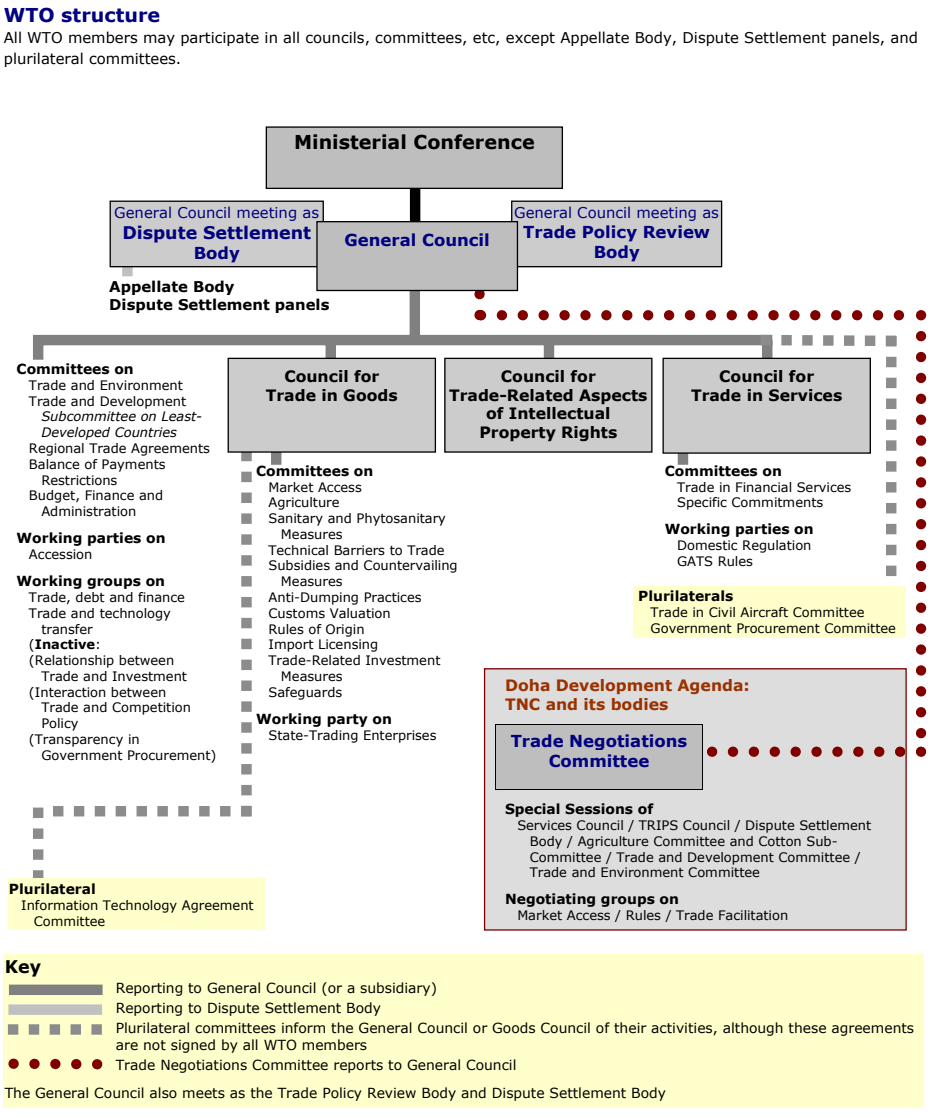

Figure 4 WTO Organizational Chart[2]

[2] Source: WTO website.

B. The WTO Secretariat

At the administrative level, the WTO Secretariat consists of about six hundred employees, hired on temporary or permanent contract status.[3]

Director-General Roberto Azevêdo	• Office of the Director-General • Council and Trade Negotiations Committee Division • Office of Internal Audit • Information and External Relations Division * The Appellate Body Secretariat reports to the DG for non-dispute-related administrative matters ** The Enhanced Integrated Framework Secretariat reports to the DG for administrative matters
Deputy Director-General Yonov Frederick AGAH	• Trade Policies Review Division • Development Division • Institute for Training and Technical Cooperation
Deputy Director-General Karl BRAUNER	• Legal Affairs Division • Rules Division • Administration and General Services Division • Human Resources Division
Deputy Director-General David SHARK	• Agriculture and Commodities Division • Trade and Environment Division • Accessions Division • Information Technology Solutions Division • Languages Documentation and Information Management Division
Deputy Director-General Xiaozhun YI	• Market Access Division • Trade in Services Division • Intellectual Property Division • Economic Research and Statistics Division

Table 10 The WTO Secretariat: Divisions[4]

The head of the Secretariat is the Director-General, who is appointed by the Ministerial Conference. Although the issue of choosing a Director-General has become contentious

[3] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 135 (2008). Today its staff consists of 629 people. See http://www.wto.org/english/thewto_e/secre_e/intro_e.htm.

[4] Source: WTO website.

at times,[5] he has always been appointed through a highly politicized process by the Ministerial Conference and as such he enjoys a minimum form of democratic legitimacy. His role is that of a facilitator in the decision-making process of member states. A similar selection process by member states applies to Deputy Directors General, who are appointed by the Director-General in consultation with member states. To this date, only men have been appointed Director Generals. All of them are career diplomats and/or former trade ministers in their countries. Only two holders of the post, the current Director General, Roberto Azevêdo as well as Supachai Panitchpakdi come from a developing country (Brazil and Thailand respectively). Panitchpakdi and Mike Moore shared the post for one half of a six year period each. To date, six Europeans have held the post as well as one New Zealander.

The rest of the Secretariat, most of which are lawyers or economists are hired through a different process. The original GATT was administered by a very small number of international officials[6] whose duties were not only administrative, but they were required to help the committees working on tariffs, provide expert assistance to national delegations, support negotiations among different groups and provide statistical assistance.[7] Even though the organization expanded, the size of the secretariat remained proportionally small. In the transition from the GATT to the WTO, the secretariat doubled in size and the WTO delegations have proportionately increased.

Still, the total number of WTO officials is very small. Currently, the WTO employs approximately six hundred employees [8] who are still mostly trade lawyers and economists. [9] Together with them, another six hundred or so liaison officers and representatives to WTO located in the same building since 1977 in Geneva, manage

[5] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 132-133 (2008).
[6] DOUGLAS IRWIN ET AL. THE GENESIS OF THE GATT 118 (2008).
[7] *Id*.
[8] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 135 (2008). Today its staff consists of 640 people. See *WTO Secretariat* http://www.wto.org/english/thewto_e/secre_e/intro_e.htm.
[9] *WTO Recruitment* http://www.wto.org/english/thewto_e/vacan_e/recruit_e.htm .

international trade.[10] Interestingly enough, it used to be very difficult to find an approximate number of the liaison officers and representatives to the WTO. In any event an accurate number could be found in the internally published annual phone directory. In 1999 C. Michalopoulos, based on this directory, reported that the number of member-state representatives was 540. The entry of China and Russia to the organization has changed this number, currently reported as 640.[11] Only recently has the WTO website provided specific information with respect to the Secretariat. The selection appears to be related to nationality more than merit.[12]

The hiring process for the WTO personnel begins in the WTO website where vacancies are announced. There, interested candidates, who must be citizens of one of the WTO member states and under the age of 65, can submit an application for the advertised positions. Before that, candidates fill out an elaborate online form in lieu of a curriculum vitae, together with an optional cover letter. The form contains personal details, contact information, family information, secretariat, language and computer skills, areas of expertise, education, employment history, an optional, vacancy-specific cover letter and names of references.[13]

Beyond this information, little is known about the selection process. The WTO website contains little information with respect to the duration of the selection process, which may last several months "due to the rigours of placement."[14] Moreover:

> As the organization is a relatively small one, the turnover of staff is accordingly limited. The vacancies which do occur are the subject of open competition and advertised by means of vacancy notices, the distribution

[10] BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 55 (3rd ed. 2009). They observe that the small size of the WTO Secretariat does not accurately reflect the very large network of diplomats in Geneva and civil servants within national administrations of member states which work "in close cooperation." As they note: "The total size of the network is impossible to determine, but certainly spans at least 5,000 people." Which is still an elite number.
[11] See Constantine Michalopoulos, *The Participation of the Developing Countries in the WTO*, MIMEOGRAPH (1999).
[12] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 292 (J. Klabbers et al eds. 2009).
[13] *WTO Recruitment* https://erecruitment.wto.org/public/edit/hrd-cl-vac-app.asp .
[14] *WTO Recruitment* https://erecruitment.wto.org/public/hrd-vac-faqs.asp?hdroff=1&faqqid=489&faqid .

> of which is made to all of the official representatives of the governments participating in the WTO and they are posted on this website. They are also occasionally advertised in the press. Upon receipt, applications for a specific vacancy are forwarded to the Division concerned for evaluation and selection of candidates. Selected candidates may then be invited to Geneva for an interview, which will normally be supplemented by a written test. After approval of the selection by the Director General, an offer of appointment is sent to the selected candidate. […] A person wishing to apply for such a position in the Secretariat should possess a post-graduate university degree in economics, international relations or law, with an emphasis on trade issues. The academic qualifications should be supplemented by at least five years of experience with a national government or with an international organization or other organizations or enterprises dealing with issues of trade policy and international trade relations. For the professional staff the general duties, in addition to any particular functions of an advertised position, consist of preparation of reports, research and analysis, both economic and legal, servicing of meetings, and working with delegations of member states. Drafting skills are particularly important.[15]

Beyond this information, nothing is known on the content of the examination. No other information exists publicly with respect to the interview process and the types of questions asked, or average candidate profiles.[16] For those who have not participated in this process, very little information is publicly available, unlike, other organizations, which are quite transparent with respect to their examination process, as it happens for example in the United Nations[17] or the European Union EPSO exams.[18] Candidates for the posts in the UN or the EU can be well-acquainted with the nature of the exam they will be taking in order to qualify for employment to the organizations. There is no available information for the exams in the WTO[19] and candidates usually sign waivers not to disclose any information after sitting for an exam.

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[15] *General information on recruitment in the World Trade Organization* http://www.wto.org/english/thewto_e/vacan_e/recruit_e.htm

[16] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 135 (2008).

[17] *United Nations Examinations and Test Section* http://www.un.org/exam/lpe/welcome/main.asp .

[18] *CAREERS WITH THE EUROPEAN UNION by the European Personnel Selection Office* http://europa.eu/epso/index_en.htm .

[19] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 135 (2008).

The administrative segment of the WTO has accentuated the organization's legitimacy crisis, since it is perceived as non-transparent and unaccountable. To a large extent, the organization's legitimacy issues are emphasized by its perceived significant compositional flaw: a very small number of unaccountable diplomats and international technocrats are the key actors of the international financial system has put the WTO under a lot of scrutiny. This "elite administration" has not been elected and remains politically unaccountable for advancing normative changes in the area of international trade that affect development and economic factors of all countries, developing and developed and by consequence the lives of a very significant fraction of the world population.

The WTO Secretariat has contributed significantly in the development of the so-called Global Administrative Law. Transparency in particular is viewed as a fundamental value of public institutions in liberal democracies[20]. Transparency and accountability are structurally linked.[21] Shaffer and Nicolaides[22], Benvenisti[23], Chimni[24] and Cassese[25] have linked transparency and accountability.

Transparency in the WTO secretariat context has been linked to the circulation review of documentation.[26] This focus is consistent with a Weberian analysis, whereby governments are seen as seeking exclusive access to knowledge as a method of

[20] Armin von Bogdandy et al, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L. J. 1375-1400, 1384 (2008).
[21] Benedict Kingsbury & Lorenzo Casini, *Global administrative law dimensions of international organizations law*, 2 INT'L ORG. L. REV. 319-356 (2009), pp and Nico Krish & Benedict Kingsbury, *Introduction: Global governance and Global administrative law in the international legal order*, 17:1 EUR. J. INT'L L. 1-13 (2006).
[22] Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government* 68:3-4 L. & CONTEMP. PROBS 263-317 (2005).
[23] Eyal Benvenisti, *The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions* 68:3-4 L. & CONTEMP. PROBS 323-340 (2005).
[24] Bhupinder Singh Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1-37 (2004).
[25] Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 L. & CONTEMP. PROBS 111-126 (2005).
[26] Isabel Feichtner, *The Administration of the Vocabulary of International Trade: The Adaptation of WTO Schedules to Changes in the Harmonized System* 9 GERMAN L. J. 1481 at 1494 (2008).

increasing their power[27] and therefore the publication of documentation becomes important as part of increasing the accountability of governments. We analyzed the circulation of documents in the previous section, as it is part of external transparency. Less attention has been directed towards the elite nature and the intransparent hiring processes of the organization, even though it is equally important. Steward and Ratton argue in this respect that strengthening the WTO's "internal administrative branch" will assist the organization in addressing its legitimacy deficit. [28]

C. Panelists and Appellate Body Members

The members of the Panel and the Appellate Body are selected through a process explained at the Dispute Settlement Understanding. The panelists are not permanent but they are selected *ad hoc* only for the dispute before them. On the contrary, the Appellate Body members serve four-year terms once renewable.[29]

According to Article 8 DSU:

> 1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, *including persons who have served on or presented a case to a panel* […].
> 2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
> 3. Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, *unless the parties to the dispute agree otherwise*.[30]

Even though panelists are only selected for the dispute before them, in the last two decades we can observe a few of trends in terms of panel member selection. The first is that certain members reappear in multiple disputes. It seems there is a reputational effect

[27] Ingo Venzke, *International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law*, 9 GERMAN L. J. 1401-1428, 1418 (2008).
[28] Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple dimensions of Global Administrative Law*, 9:3-4 INT'L J CONSTITUTIONAL L. 556-586, 559 (2011).
[29] Article 17.2 DSU.
[30] Emphasis added.

in the judges' approach to trade disputes, and thus panelists have incentives to decide in certain ways in order to get reappointed by countries.[31] Second, possibly as a result from the first, there is a significantly large number of judges are citizens of certain countries, such as New Zealand and Canada.[32] Panelists are selected from a roster as it is described in Article 8 DSU.

> 4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. […]. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB.
> […]
> 6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.
> 7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate […] after consulting with the parties to the dispute.
> […]

Paragraph 9 of Article 8 DSU discusses the independence of judges from their respective governments.[33] In particular, panelists serve in their individual capacities and cannot receive instructions or be in any way influenced by their governments. Moreover, *ex parte* communications are not allowed, and as such both parties must be present in all communications with the Panel. Here, however we should note again the reputational

[31] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 296 (J. Klabbers et al eds. 2009).
[32] See Annex 5, with data from the WTO website.
[33] Moreover "any covered person is required to disclose the existence or development of any interest, relationship or matter that he or she could reasonably be expected to know and that is likely to affect or give rise to justifiable doubts as to that person's independence or impartiality. Such disclosure has to include information on financial, professional and other active intersts as well as considered statements of public opinion and employment or family intersts. Right to challenge participation and request exclusion. RULES OF CONDUCT OF DSU, Page 27 , WT/DSB/RC/1 11 December 1996.

value of serving as a panelist and the desire to be re-appointed. As such, the temporary nature of the appointment as well as the popularity of certain panelists contributes to compromised independence as well as the transparency of the process. The expenses of panelists, according to paragraph 11 are covered from the WTO budget.

Similar provisions apply to the Appellate Body. Since it is a standing body, the Dispute Settlement Understanding provides that "[t]he Appellate Body membership shall be broadly representative of membership in the WTO." The Appellate Body has its own administrative infrastructure, the Appellate Body Secretariat. Former members of the Appellate Body have oftentimes been very vocal in describing the process and culture of decision-making. As a result, we know much about the process on appeal, although the information relies solely on personal accounts from former members.[34] Moreover, Appellate Body members have been vocal towards the political WTO organs and the need for more explicit and robust decisions.[35] It appears that since the WTO decision-making process is very intricate, the Appellate Body experiences some pressure to cover voids in the Agreements.[36] This has been hailed as forward looking, and the Appellate Body is seen as transitioning "from legalistic reasoning to public reason and deliberative

[34] James Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 VAND. J. TRANSNAT'L L. 1021 (2002), Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body* 38 TEX. INT'L L. J. 469 (2003.

[35] Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body* 38 TEX. INT'L L. J. 469 (2003) "At least among lawyers there should be no doubt that one of these legal channels has to be used by WTO Members if they want to guide the Appellate Body in its future attitude towards the *amicus curiae* issue or any other contested problem of interpretation" confirming what Ginsburg says (infra) Tom Ginsburg, *Political Constraints on International Courts* in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 483-502 at 492 (C. Romano ed. 2013).
"I'm afraid that the results achieved during the Uruguay Round with respect to dispute settlement can only be sustained in the long run, if political decision-making becomes easier and a true complement to judicial decision-making"

[36] Tom Ginsburg, *Political Constraints on International Courts* in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 483-502 at 492 (C. Romano ed. 2013) "Multiple parties typically do not build easy amendment procedures in to the treaty design and the more parties involved the more difficult any amendments will be to conclude. The WTO treaty is amended as a package in multinational negotiations that last years. The transaction costs are intentionally high; in order to make commitments effective, they must be difficult to escape. This makes the potential scope of law making capacity greater in multilateral settings and is a source of concern about the courts becoming runaway lawmakers. […] the bundling of international courts with broader regimes insulates the tribunals from certain forms of pressure."

reasoning, from retrospective compliance with the law to a prospective modeling of consequences."[37]

Additionally, with respect to transparency, according to Article 14 of the DSU, much of the formal and informal part of the dispute settlement process is confidential, such as the submissions of the parties, the first draft of the Panel Report, and the consultations leading to the circulation of the Report. The first oral hearing is usually taped.[38] The submissions of the parties are published in the "descriptive part" [39] of the report, and parties are free to disclose their own submissions to the public at any time.[40] Several members publish their submissions in their websites.[41] Once circulated to the WTO member states, the report is immediately made public and uploaded at the WTO website. In this sense, the procedure is quite transparent. As we noted previously, some of the meetings of the Panels can be publicly viewed in the WTO building if the parties agree to do so. Overall, the process is not different from many tribunals, and it could be improved.

D. Selection of experts for the Dispute Settlement Process

Lastly, the selection of experts is based on the right of the Panel to seek information according to Article 13 of the Dispute Settlement Understanding. Many agreements have similar provisions and discuss the advisory role of experts with professional experience. As with Panelists, citizens of parties cannot participate as experts unless parties consent

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[37] HELMUT WILLKE, SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY 85(2007) discussing the space for procedural rationality "from legalistic reasoning to public reason and deliberative reasoning. Looking closely at the world of the Appellate Body of the WTO, Garrett and Smith conclude"that the members of the Appellate Body are forward-looking and strategic" (Geoffrey Garrett & James McCall Smith, *The Politics of WTO Dispute Settlement* LEITNER PROGRAM WORKING PAPERS ISSUE 5 <http://mercury.ethz.ch/serviceengine/Files/ISN/30237/ipublicationdocument_singledocument/a5fd2fd0-a3e4-4d2c-b475-cb807e39797d/en/1999-05.pdf>) (1999) This change of normative perspective is prompted by the need to strengthen the authority and legitimacy of the norms of the WTO when the organization itself has no power of enforcing its rulings or of setting binding standards of its own.

[38] WTO SECRETARIAT, LEGAL AFFAIRS DIVISION & THE APPELLATE BODY, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 26 (2004).

[39] *Id.* 55.

[40] Article 18.2 of the DSU and para 3 of working procedures in Appendix 3 to DSU.

[41] See for example http://mkaccdb.eu.int/miti/dsu for the European Union, http://www.acwl.ch/cases/SubmenuCase.htm for developing countries who are represented by the ACWL, http://www/dfait-maeci.gc.ca/tna-nac/dispute-e.asp for Canada, http://ustr.gov/enforcement/briefs.shtml for the US.

to it. To date only individuals have been invited as experts, instead of expert review groups although the Dispute Settlement Understanding allows both.[42] The Subsidies and Countervailing Measures Agreement[43] and the Technical Barriers to Trade Agreement[44] establish permanent groups of experts in order to assist and consult the Panels and Appellate Body or provide the relevant committee with advisory opinions.

The choice of expertise in the WTO carries important consequences. Many of the issues discussed are highly technical and expertise is necessary especially for the Panels but also for the Appellate Body in order to deliberate. The reliance upon the Secretariat and experts, both of which lack democratic legitimacy shifts our examination in this chapter towards the choice of these "expert" groups. First of all, expertise alone is not a legitimizing factor.[45] In numerous disciplines exist multiple discourses and different results. The lack of transparency in choice of the experts together with the obscurity during the hiring process of WTO secretariat employees needs to somehow be countered. A very important way is the introduction of alternative views through *amicus curiae* briefs as was discussed in the chapter for external transparency. Even though the main premise of this thesis is a holistic approach on transparency and the idea that each of the issues related to transparency should be examined separately and the WTO should perform adequately in all of these areas, this is an exception. In particular, experts can be invited by the Panels and Appellate Body following any selection process, as long as alternative view points are introduced by the civil society through briefs. Such a balance would add to the legitimacy of the process before the Dispute Settlement Body.

[42] Article 13.2 and Appendix 4 DSU.
[43] Article 24 paragraphs 2 and 3.
[44] Article 14 paragraph 3 and Annex 2.
[45] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 292 (J. Klabbers et al eds. 2009).

VI. Legal Transparency

The previous chapters discussed various forms of transparency affecting the WTO, its member states and civil society at an institutional level. The last chapter will discuss a different form of transparency, namely the obligation of WTO member states to publish their trade-related legislation and the rule of law obligations to maintain adequate recourse mechanisms for traders and consumers in order to resolve issues that may arise in transnational trade matters, both at the border upon the entry of products, and at the domestic market context.

The lack of transparency in the legal orders of WTO member states is considered to be a non-tariff barrier to trade and WTO member states are obligated from the GATT to refrain from allowing, enabling or imposing such a barrier. Even though this obligation existed from 1947, it has acquired attention only after the mid-eighties, to become "the best insurance policy against protectionism."[1] When explored, both the content and the recipients of benefits from transparency are the same in the WTO context, for all the types of transparencies, including the legal transparency of Article X. Disclosure of information, recourse mechanisms, platforms for stakeholders and shareholders to raise their concerns and voice their opinions is the content of both transparency as a legal principle in the WTO at the institutional level and the GATT for member states. The beneficiaries of transparency are other states, their citizens, the citizens of the host state, consumers and traders at large. Similarly, the different forms of WTO transparencies explored in the previous chapters have in one way or the other the same recipients.

As such, transparency within the WTO's institutional culture and administration needs to be examined together with legal transparency, since attitudinal changes with respect to openness tend to cross-fertilize the different forms of transparency. This holistic approach to transparency has prompted the inclusion of this chapter, and in particular, the elaborate

[1] *Lamy hails transparency as the best insurance policy against protectionism* http://www.wto.org/english/news_e/news13_e/trdev_19jul13_e.htm

analysis on the different aspects of legal transparency, the monitoring mechanisms, which are in place to maintain updated information on trade legislation of WTO member states and their trade policies, and finally, the impressively large amount of disputes brought before the Panels and the Appellate Body, with transparency as a main or a secondary issue. Essentially, monitoring mechanisms and dispute settlement are the two tiers of the implementation of the letter and the spirit of Article X of the GATT.

Additionally, legal transparency refers to the knowledge of the rules of trade "on the ground" at the site of their application, the borders and the markets of WTO member states. It is in many ways a prerequisite for other forms of transparency, and the first "contact" point between the importer, the exporter and the consumer with the WTO rules of trade. Article X does not establish a right of the above actors towards the WTO, but under certain conditions it creates (or reiterates- if they already exist) rights in the domestic legal order. It certainly creates a right to challenge tariffs other border measures before an administrative or adjudicatory mechanism.

Finally, this chapter adds to the discussion on the value of the WTO as a game-changing organization in international trade by reducing the cost of information and ensuring that it is made available to all interested parties. This contribution is achieved because of the focus on transparency. This chapter will examine the law of transparency in the first section, the monitoring mechanisms in the second and the GATT and WTO case law in the third. Last, it will discuss the connection between legal transparency and the other forms, as it is one that needs further explanation.

A. The law of the transparency obligations

Surprisingly, Article X did not come to the forefront of adjudication and general attention until the nineties. On one hand, On the other hand, transparency as a legal rule has received significant attention. In particular, it will examine the history and evolution of transparency as a legal rule, its position in the accession process and the trade policy review mechanism and most importantly, its interpretation by the Dispute Settlement Body. In the WTO Agreements there are several provisions that impose transparency

obligations on WTO Member States. Member States are required to publish information with respect to legislation on any trade related issues that are regulated by the WTO Agreements that they are parties to and notify other members with respect to any changes in such legislation (publication and notification requirement). Additionally, WTO Members are required to establish enquiry points to provide information. Finally, several committees and mechanisms are put forward, including the Trade Policy Review Mechanism, in order to produce reports with respect to trade policies of Member States (trade policy review process). [2] A list of articles related to transparency will be mapped here.

In general, lack of transparency is viewed as a Non-Tariff Barrier to international trade.[3] Transparency provisions in the WTO have been viewed in a positive manner. As Bhagwati has stated:

> The mere exposure of a country's policies in a coherent and impartial fashion can bring moral pressure to bear for change in the desired direction. I call it the Dracula Effect: expose evil to sunlight and it begins to shrivel and then die. [4]

The incorporation of transparency obligations and other provisions in the WTO Agreements first stresses the significance of openness and information sharing with respect to tariffs and trade regulation in the conduct of international trade. Second, it promotes a culture of peer-to-peer knowledge communication on measures affecting trade, and it creates a noteworthy platform of continuous cooperation for the smoother and more legitimate conduct of trade. Presumably transparency provisions will help draw at least some political support from civil society towards the WTO and from national

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[2] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 461-466 (2008). Van Den Bossche mentions four kinds of transparency requirements in the WTO: the publication requirement, the notification requirement, the requirement to establish enquiry points and the Trade Policy Review Mechanism. He examines them in the context of mitigating the issue of non-tariff barriers to trade in goods.

[3] *Id.*

[4] Jagdish Bhagwati , *Free Trade: What Now?*, Keynote Address, University of St. Gallen, Switzerland, on 25th May 1998, International Management Symposium 1998 Freedom Prize, Max Schmidheiny Foundation p. 17, available at time.dufe.edu.cn/wencong/bhagwati/freedom_speech.pdf accessed on November 17, 2012.

constituencies towards their governments. Thirdly, transparency potentially facilitates the settlement of disputes between countries outside the Dispute Settlement Body, which is also encouraged by the organization.[5] Finally, it provides access to valuable information to investors, traders, individuals and corporate entities, thereby facilitating their participation in trade.

Article X, the main provision of transparency in the GATT, was included during the negotiations for the International Trade Organization (ITO) after 1944, and was incorporated in the GATT. [6] According to the ITO negotiation history, Article X was loosely formed in accordance to Articles 4 and 6 of the 1923 International Convention Relating to the Simplification of Customs Formalities[7]. It was included as Article 15 of the US' Department of Trade Suggested Charter for the ITO of the UN[8] and then became Article 38 of the Havana Charter. Finally, it was integrated into the GATT, as Article X.

Article X, entitled "Publication and Administration of Trade Regulations", in its first paragraph requires WTO Member States to publish any laws, regulations, judicial decisions, administrative rulings of general application and international agreements which are related to trade. Such publication should occur promptly and in a manner that enables governments and traders to become familiar with them. Confidential information and information whose publication would either be detrimental to the public interest or to the interests of enterprises are not required to be published.

Paragraph 2 adds a temporal character to the obligation of Paragraph 1; in particular, it provides that measures with respect to trade can be enforced only after they are

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[5] BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, (3rd ed. 2009). According to Hoekman and Kostecki, transparency facilitates communication, allows the exchange of information (at 43). Transparency also reduces the pressure on the dispute settlement system and channels the discussion of certain measures towards the appropriate WTO body (at 45).

[6] Paragraph 8 of section A Chapter III of the Proposals 13 Department of State Bulletin 913 (December 9 1945 No 337) at 920. Washington DC US Department of State Publication 3117 Commercial Policy Series 113 released April 1947. See also Padideh Ala'I, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11:4 J. INT'L ECON. L. 779-802 at 782 (2008).

[7] DOUGLAS IRWIN ET AL, THE GENESIS OF THE GATT 147-148 (2008).

[8] *Id.*

published, reflecting the legal maxim *nullum crimen, nulla poena sine lege praevia* (no crime, no penalty without a law that precedes the act).

Paragraph 3 (a) requires the administration of laws in a "uniform, impartial and reasonable manner." Paragraph 3 (b) outlines the obligation of WTO member states to maintain judicial review mechanisms and procedures, which should be prompt and independent, thus guaranteeing impartiality and minimum Rule of Law safeguards. The last part (c) of paragraph 3 discusses the existence of agencies that are not formally or fully independent at the date of entry into force of the GATT.

There are equivalents of Article X, with some differentiation depending on subject matter, in many other WTO Agreements. Here we will examine briefly some of the most important articles within the WTO Agreements. [9]

Article III of the General Agreement on Trade in Services (GATS) contains a provision on transparency, again imposing obligations for publication of legislation and notification of changes in laws that affect trade in services and prompt response to requests by other members on any of the regulations affecting trade in services. [10]

In the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Part V, under the title "Dispute Prevention and Settlement", contains Article 63 on Transparency, effectively extending the obligations of publication, notification and establishment of review mechanisms to the subject matter of this Agreement.

Articles 5 and 6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) contain provisions that address issues relevant to anti-dumping investigations. In particular, they describe

[9] There are over 200 notification requirements embodied in the various WTO agreements and mandated by ministerial and General Council decisions. See BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 71 (3rd ed. 2009).

[10] See Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20:3 EUR. J. INT'L L. 575-614 (2009) and Richard H. Steinberg, *The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott* 20:4 EUR. J. INT'L L.1063-1071 (2009) discussing administrative issues with respect to WTO Committees and WTO governance involving the GATS and SPS Agreements.

the kinds of information that need to be included in an application for an investigation and how authorities will respond to requests for information. For example, Article 6.4 provides that authorities will provide "timely opportunities for all interested parties" to have access to all information relevant to their claims. Article 6.9 requires authorities to inform all interested parties of all the essential facts under consideration before reaching a final decision. Article 12 outlines the content required in public notices of the initiation of an investigation and the explanation of the determinations on the anti-dumping investigation. Finally, Article 13, under the title "Judicial Review", provides for the establishment of tribunals or procedures for the "prompt review of administrative actions relating to final determination." Such tribunals must be independent of the authority that made the original decision.

The Agreement on Subsidies and Countervailing Measures in Article 11 regulates the initiation and conduct of an investigation on existence, degree and effect of subsidies. Article 12 discusses information on evidence, and finally Articles 22 and 23 set out detailed requirements for public notice and judicial review.

Article 1.3 of the Import Licensing Agreement provides that all licensing procedures will be administered in a "fair and equitable manner." Article 1.4 provides for publication of rules that enables "governments and traders to become acquainted with them." Paragraph 5 of the same article discusses application forms and procedures.

The first paragraph of Article 3 of the Agreement on Safeguards also contains publication requirements during the investigation phase by national authorities. The second paragraph describes the appropriate treatment of confidential information during the investigation. Also, Article 12 provides for notification obligations to Committee on Safeguards. The Agreement on Safeguards explicitly refers in Article 3 to Article X of the GATT. Similarly, Article 2(g) of the Agreement on Rules of Origin and Article 12 of the Valuation Agreement make reference to Article X.

Finally, the plurilateral Agreement on Government Procurement also contains provisions to ensure transparency in laws, regulations, procedures and practices with respect to government procurement, in Article V which provides for the establishment of information centers, Article VII paragraph 2, on not providing information in a manner that would have an effect of precluding competition, Article VIII on the qualification procedures for suppliers, Articles IX to XVII describing various procedural aspects during the tendering process, with Article XVII explicitly focusing on transparency. [11]

In addition to the above articles, several other decisions and Councils are related to transparency, publication, notification, judicial review and exchange of information. The most important one is the Trade Policy Review Mechanism, which will be examined in detail later. It is based on the Understanding on Notification, Consultation, Dispute Settlement and Surveillance where the GATT contracting parties agreed in 1979 to establish a periodic trade review process of laws and practices of parties to the GATT that affect trade. Besides the Trade Policy Review Mechanism, other bodies and procedures in the WTO that perform functions related to transparency are, *inter alia*, the Working Group on Notification Obligations and Procedures (established in 1995 by the Council for Trade in Goods, it focuses on import licensing procedures), the Council for Trade in Services, the Committee on Trade and Development (established in 1965), the Committee on Balance of Payments Restrictions, the Committee on Safeguards and the Textiles Monitoring Body.

Ensuring compliance with Article X comes at a high cost for many countries. Some of the WTO members already have, and possible have had for quite some time mechanisms in place to publish their trade laws, inquiry points and administrative and adjudicatory processes. For others, the cost of Article X has been proven to be high. [12] The proliferation of such requirements during the Uruguay Round, because of the covered

[11] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 474 (2008).
[12] Finger, J. Michael, & Philip Schuler. *Implementation of Uruguay Round Commitments: The Development Challenge* 23:4 THE WORLD ECONOMY 511-525 (2000). See also on the ideological foundations of such reforms, Robert Wai, *Transnational Liftoff and Juridicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization* 40 COLUM. J. TRANSNAT'L L. 209, esp. 224-225 (2001).

Agreements placed an undue burden to many WTO member states and in particular developing and least developed countries whose resources are more limited. Not only did many states have to change their legislation in order to conform with technical aspects of the new Agreements, they also had to ensure there is appropriate information and recourse processes for traders. The value of Article X is great, but there needed to be additional consideration for a phase-in process. Some technical assistance was provided but only to least developed and some developing countries.[13] It would have been optimal if similar support was provided for middle income countries as well as any country whose domestic legal system had to undergo a serious adaptation in order to comply with the abundance of transparency rules.

B. Transparency monitoring bodies

Trade monitoring and surveillance began in the late 1970's and the 1980's.[14] It is yet another very important mechanism fostering the culture of transparency in the WTO is monitoring of countries' trade policies and practices. Trade monitoring first occurs on an *ad hoc* daily basis at various WTO committees. Second, the member states have established two permanent monitoring bodies, one general and one specific, the Trade Policy Review Mechanism (TPRM) and the Textiles Monitoring Body (TMB).

The various councils and the committees in the WTO act as *ad hoc* monitoring mechanisms, since, among other things, they are responsible for observing members' activities related to the GATT and other agreements.[15] The three specialized councils working under the General Council are: the Council for Trade in Goods; the Council for Trade in Services; and the Council for Trade-Related Aspects of Intellectual Property

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[13] *Id*.

[14] Petros C. Mavroidis & Robert Wolfe, *From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO* ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES RESEARCH PAPER RSCAS 2-3(2015).

[15] See for example, Articles 17 and 18 of Agreement on Agriculture, establishing the Committee on Agriculture, Article 3 paragraphs 4 and 5 and Article 12 paragraphs 1-4 of the SPS Agreement establishing the SPS Committee and the collaboration of WTO members with international organizations whose mandate is to develop and harmonize standards on Sanitary and Phytosanitary products, Article 18 of the Customs Valuation Agreement, Article 7 of the TRIMS, Article 4 of the Import Licensing Agreement, Article 13 of the Agreement on Safeguards etc. Each Agreement regulates to a lesser or a larger extent the relevant committee.

Rights. The specialized committees issue reports and updates on countries' notifications and compliance with WTO obligations. They then report to the General Council or the three specialized councils, which further report to the General Council. They also issue annual reports to the General Council. The WTO Secretariat assists this process since monitoring developments in trade is one of its duties. Some of the notification, information-sharing and monitoring procedures at the committees' level are directly linked to transparency,[16] especially when the documents produced are de-classified and published. But even prior to publication, the internal information monitoring and sharing promotes a culture of transparency within the organization.[17]

Organized trade monitoring happens at the TPRM. The TPRM conducts periodic reviews of the trade policies and practices of all WTO members. In effect the TPRM embodies a consolidated effort towards the systematic implementation of all the different provisions in various WTO agreements which provide for the obligation of member states to publish their legislation and inform the organization on any changes in their trade policies or the adoption of new ones.[18]

The TPRM was established during the Uruguay Round negotiations and was included in the Marrakesh Agreement of 1995 as Annex 3. It is therefore part of the Agreement Establishing the WTO.[19] OECD and IMF review practices likely influenced its creation.[20] The TPRM was officially established in April 1989[21]. Originally the TPRM focused on

[16] *Members' transparency toolkit* http://www.wto.org/english/tratop_e/trips_e/trips_toolkit_e.htm
[17] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 138 (2008).
[18] Annex 3 of the Marrakesh Agreement (WTO 1995) Under A (i) objectives: "…contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements […] and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members."
[19] The origins of the TPRM can be traced in the 1985 Leutwiler Report Recommendation 8, as well as the 1986 Ministerial Declaration of Punta del Este, which officially launched the Uruguay Round or trade negotiations. see Asif Qureshi, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?* 24 J. WORLD TRADE 147, 148 (1990). Member States to the GATT decided to provisionally approve the TPRM in 1988 during the Montreal Ministerial Mid-Term Review Conference.
[20] *Id.*
[21] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS at 82 footnote 20 (2008). Also Asif Qureshi, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?* 24 J. WORLD TRADE 147, 149 (1990).

trade in goods, but after the birth of the WTO it extended its works in the areas of services and intellectual property.

Trade Policy Reviews consist of two reports, one by the member state undergoing review and one by the WTO Secretariat, and it includes the minutes of meeting of the Trade Policy Review Body and the concluding remarks of its Chairperson. There reviews are then published in the WTO website. To date, the Trade Policy Review Body has conducted 291 Trade Reviews.[22] The periodicity of the reviews depends on each member's share of world trade. Thus, the United States, the European Communities, China, Canada and Japan are reviewed bi-annually.[23] The next sixteen largest trading members are reviewed every four years and the rest every six years.[24] Review of Least-Developed countries can occur less frequently.[25] The General Council of the WTO, acting as the Trade Policy Review Body[26], meets on a monthly basis and under its Rules of Procedure appoints a Chairman, who has to be different than the Chairman of the General Council or the Dispute Settlement Body.[27]

The TPRM focuses on national trade policy openness as part of the overall agenda of supporting the effectiveness of the world trading system and achieving coherence in global policy making[28]. The TPRM is a mechanism that is directed to the benefit of both individuals and companies involved in trade, and it has as its objective to inform them as much as possible on all different aspects and conditions of trade. [29] According to Part B of Annex 3, entitled "Domestic Transparency"

> Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and

[22] http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically Accessed on April 8, 2014.
[23] Trade Policy Review Mechanism Paragraph C (ii) Annex 3
[24] *Id.*
[25] *Id.*
[26] Article III 4.
[27] Rules of Procedure for Meetings of the Trade Policy Review Body.
[28] See Annex 3 in light of the Punta del Este Declaration.
[29]According to the WTO website under the Trade Policy Review Mechanism, "Individuals and companies involved in trade have to know as much as possible about the conditions of trade." http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm

> promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems.[30]

The TPRM is not to be used as a corrective mechanism and is not established to assist with actionable violations of WTO law.[31] This means that the TPRM is not to be used as an information platform for launching disputes among member states.[32] Rather, the focus of the TPRM on transparency and the empowerment of private market actors through information. Additionally, the TPRM is to a very large extent complimentary to the concrete obligations of Article X. As the GATT was reaching its fourth decade of existence, the spirit of Article X was supported by the TPRM as a new institutional form that does not have as a primary goal to enforce, but to inform all actors in international trade rather than just the members to the Agreements. Thus, the WTO focuses on transparency and the systematic review of trade policies as part of providing trade-related information not only to governments but also to private parties.

It is interesting to take a look at an example of the Trade Policy Review of a country. China is an interesting case, since it is a recent WTO member, has requested developing country status and its economy is very substantial for the global economy.[33] For that reason, China is reviewed every four years and here we will look at the last four reports.

In the 2006 the TPRM acknowledged that the Chinese government has taken significant steps to improve transparency. Standardization of the behavior of administrative departments, public participation at various phases of the legislative process, establishment of enquiry points and websites are some of the measures mentioned in the Trade Policy Report. Two years later the TPRM revisited Chinese legislation and found that it had taken further steps to improve transparency. "Nonetheless," the TPRM notes

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[30] Annex 3 of the Marrakesh Agreement (WTO 1995) Under B.
[31] Asif Qureshi, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?* 24 J. WORLD TRADE 147-160 at 148 (1990).
[32] According to Paragraph A of the Annex on the Trade Policy Review Mechanism, the TPRM:"is not intended to serve as a basis for the enforcement of specific obligations under the Agreements, or for dispute settlement purposes or to impose new policy commitments on Members."
[33] Ljiljiana Biukovic, *Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan*, 11:4 J. INT'L ECON. L. 803-825 (2008).

"some aspects of China's trade policy regime remain complex and opaque." The Chinese government has focused on publication of laws and the prevention and reduction of corruption but is still not publishing the economic evaluation of policies and measures, including tax and non-tax incentives, "to the detriment of public accountability, and thus governance." In 2010 China had not improved significantly in terms of transparency. The Report of the TPRM mentions that China ranked 38th among 48 countries in the 2009 Opacity Index. Complexity and opacity are seen as leading to corruption. The Report also mentions the Corruption Perceptions Index, where China ranked 72nd, with a score of 3.6 out of 10 in 2008. Finally, in 2012, the TPRM focused again extensively on transparency and noted the same deficits in publication of laws and information disclosure. The TPRM noted that there is still room for discretion and thus for corruption. The Report cites the Transparency International Corruption Perception Index again, in which in 2011 China ranked 75th, with a score 3.6 out of 10, almost identical to its ranking in 2009. Then the report looks at information dissemination, still noting the lack of publication for tax and non-tax incentives. It also explores consultations with the private sector, including notice and comment procedures.[34]

A continuous scrutiny on the issue of transparency is obvious from these Reports. Even though the TPRM has little to no enforcement power, still, the exposure of inadequacies in the reform of the Chinese legal system according to WTO obligations is noteworthy. The lack of transparency in China has become both pervasive and costly.[35] There is intense criticism for China's judicial process and lack of transparency[36], which further causes a number of credibility problems for the country.[37] The WTO has helped to shed light to the country's previously corrupt practices. Prior to the accession of China to the

[34] "Although, according to the authorities, all draft administrative regulations have been published on the China Legislative Information Network for public comments since 2008, it would appear that not all departmental rules have been published for public comment. […] It was not clear to the Secretariat to what extent affected foreign investors were involved in the consultations, or whether proceedings or minutes of the hearings were available to the public."

[35] Lawrence Trautman, *American Enterpreneur in China: Potholes and Roadblocks on the Silk Road to Prosperity* 12 WAKE FOREST J. BUS. & INTELL. PROP. L. 427-446 (2012).

[36] John Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L. J. 42(2012), WIDENER LAW SCHOOL LEGAL STUDIES RESEARCH PAPER No. 12-02 http://ssrn.com/abstract=1979502.

[37] David Gantz, *World Trade Law After Doha: Multilateral, Regional and National Approaches*, ARIZONA LEGAL STUDIES DISCUSSION PAPER No 12-01 http://ssrn.com/abstract=1984777 23 (January 2012).

WTO such a thorough inspection process, which most importantly occurs with the participation of China, was nonexistent.

The second permanent monitoring body is the Textiles Monitoring Body or TMB established by article 8 of the Agreement on Textiles and Clothing.[38] The Agreement on Textiles and Clothing, singed in 1995, established a 10-year transitional program in order to eliminate previous quotas in textiles and integrate the sector into GATT rules. Thus, the Textiles Agreement is a transitional instrument. According to the Agreement, the TMB supervises the implementation of the Agreement and ensures that the rules are faithfully followed. It is a quasi-judicial, standing body[39] with unique characteristics in the organization. It consists of a Chairman and ten members, appointed by WTO Member governments and rotating at "appropriate intervals"[40]. The TMB issues annual reports to the Council for Trade in Goods.[41]

Another new mechanism is the Committee on Regional Trade Agreements, which in theory aspires to mitigate he negative consequences from RTAs and PTAs to global trade and the WTO Agreements.[42] Finally, Mavroidis and Wolfe discuss the "specific trade concerns" procedure, as

> "the most elaborate monitoring and surveillance mechanism[…] not mentioned in the text of any WTO agreement, although many agreements encourage a process where members may engage in ad hoc "consultations""[43]

[38] Swapneshwar Goutam, *The Role of Textiles Monitoring Body in the Agreement on textile and clothing and its Significance in International Trade*, 5:1 J. INT'L COMMERCIAL L. & TECHNOLOGY 41 (2010).
[39] Article 8 paras 2 and 3, and 6-10.
[40] Article 8 para 1.
[41] *Textiles* http://www.wto.org/english/tratop_e/texti_e/texti_e.htm
[42] Petros C. Mavroidis, *Always look at the bright side of non-delivery: WTO and Preferential Trade Agreements, yesterday and today*, 10:3 WORLD TRADE REV 375-387 (2011).
[43] Petros C. Mavroidis & Robert Wolfe, *From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO* ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES RESEARCH PAPER RSCAS 3 (2015).

In its most elaborate form the specific trade concerns procedure has consolidated in the SPS and TPT Committees.[44]

C. Case law (GATT/WTO)

1. GATT

This part will provide an overview of the key Panel reports in the GATT era. As the analysis progresses through time, we can see how the reports become more prolific and examine the issue. However, it is not until the establishment of the WTO that transparency moves to the forefront of disputes and is examined in depth.

The examination of transparency started with the case of *EEC-Apples from Chile* in 1980[45] where transparency is only mentioned briefly. The Panel examined the EEC suspensions applied to imports from Chile compared to voluntary restraint agreements negotiated with the other southern hemisphere suppliers, Argentina, Australia, New Zealand and South Africa. The EEC tried to negotiate similar voluntary restraints with Chile, but without success, and proceeded to adopt quantitative restrictions on Chilean apples. The suspensions were found to differ from the voluntary restraints because the Panel, *inter alia* found differences in transparency between the two types of action.

The next report examining transparency was *EEC- Wheat Flour* in 1983, which was not adopted.[46] The Panel, examining calculation of wheat prices observed that "certain problems might be reduced by improved transparency and possibly other forms of multilateral co-operation in either the International Wheat Council or the GATT."[47] Further, in Annex B, it moved to make a more substantive statement when it observed that "there are a number of problems in establishing price levels on the international

[44] See Henrik Horn et. al., *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees*, LEIBNIZ INFORMATION CENTRE FOR ECONOMICS WORKING PAPER IFN WORKING PAPER, No. 960.
[45] GATT Panel Report, *EEC Restrictions on Imports of Apples from Chile*, L/5047, adopted 10 November 1980, BISD 27S/98 Para 4.11.
[46] GATT Panel Report, *European Economic Community – Subsidies on Export of Wheat Flour*, SCM/42, 21 March 1983, unadopted.
[47] *Id.* Para. 5.9.

wheat flour market since there is no recognized world price" and "there is lack of transparency in international wheat flour sales generally."[48]

In 1984, the Panel issued a report on *Japan- Leather II (US)*[49], a case concerning import restrictions by Japan on leather. The United States asked that the Japanese government, in addition to the elimination of the quota, eliminate the "administrative obstacles intertwined with the quota" since Japan's administration of quota was inconsistent with the reasonableness requirement of Article X:3. Moreover, according to the United States, Japan failed to publish information with respect to the regulation of quotas, thus violating Article X:1.[50] The Panel noted that it was not necessary for it to make findings on the matter of Article X. [51]

The Panel examined Article X again in 1987, in *Japan-Agricultural Products I*. The case, concerning import restrictions through an import monopoly, discussed more extensively than in the two previous cases the obligation under article X. According to the complainant, the United States, the operation of the Miscellaneous Import Quota was non-transparent, and Japan failed to publish a complete list of the quota amounts to be allocated to individual items within the MIQ. Japan maintained it was complying with Article X.[52] The Panel for the first time elaborated on the Japanese practices and the requirement for transparency in administration of quotas. In particular, the Panel noted that:

> As regards the method used to enforce these measures the Panel found that the practice of "administrative guidance" played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgments on the effectiveness of the measures in spite of the initial lack of transparency. In view of the special characteristics of Japanese society the Panel wishes, however, to stress that its approach in this particular case

[48] I*d.* Annex B
[49] GATT Panel Report, *Japanese Measures on Imports of Leather*, L/4789, adopted 6 November 1979, BISD 26S/320.
[50] *Id.* Paras 26-29.
[51] *Id.* Para 57.
[52] *Id.* Paras 3.5.1.- 3.5.5.

> should not be interpreted as a precedent in other cases where societies are not adapted to this form of enforcing government policies.[53]

The same year in *US- Customs User Fee* [54] New Zealand claimed that an *ad valorem* tax imposed by the US may be "particularly non-transparent." A year later, *Canada-Alcoholic Drinks* very briefly mention the notion of transparency in combination with Article II of the GATT. [55]

In *Japan-Semiconductors* (1988)[56], the Panel examined Article XI and concluded that any measures, regardless of their legal status in the domestic legal order violate Article XI if they restrict imports. Thus, the measures imposed by Japan restricting the export of certain semi-conductors at a price below the cost were considered to be restrictive regardless of their non-mandatory nature.[57] With respect to transparency, the EEC claimed that the measures applied to export of semiconductors to third countries and the measures to improve access to the Japanese market lacked transparency, and thus violated Article X. [58] The Panel felt it was not required to decide on the violation of Article X and was further unable to identify any measure required to be published under Article X.[59]

The Panels were requested to examine transparency in a series of cases in the next few years, but refused to explore the matter extensively. The panels this first decade of jurisprudence on transparency are sometimes engaging with the issue and sometimes not. Some examples follow. In *Canada-Alcoholic Drinks II* (1991) [60], the Panel:

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[53] *Id.* paras. 5.4.1.4- 5.4.1.5.
[54] GATT Panel Report, *United States – Customs User Fee*, L/6264, adopted 2 February 1988, BISD 35S/245*)* para. 65.
[55] GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304, adopted 22 March 1988, BISD 35S/37.
[56] GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S/116.
[57] *Id.*
[58] *Id.* paras. 64-68, 81-83
[59] *Id.* paras. 128-129
[60] GATT Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R, adopted 18 February 1992, BISD 39S/27.

> "considered it important that, if fiscal elements were to be considered as internal taxes, mark-ups would also have to be administered in conformity with other provisions of the General Agreement, in particular Article X dealing with the Publication and Administration of Trade Regulations".[61]

In *EEC- Dessert Apples (Chile)* (1989) the Panel said that

> "the EEC had observed the requirement of Article X:1 to publish the measures under examination 'promptly in such a manner as to enable governments and traders to become acquainted with them' through their publication in the Official Journal of the European Communities. It noted that no time limit or delay between publication and entry into force was specified by this provision."[62]

It repeated the same reasoning in *EEC- Dessert Apples* (US) (1989) [63] where the United States claimed that The European Communities violated the obligations of Article X paragraph 1 because it did not give adequate public notice of the import quotas on apples.[64] The Panel, further said that Article X paragraph 2 prohibits backdated quotas and concluded the European Communities had acted inconsistently with Article X paragraph 2 since it gave public notice of the quotas only about two months after the quota period had begun.

In *Korea-Beef* cases [65] (United States, Australia, New Zealand) the Panel examined transparency as a subsidiary claim. According to the complainants, Korea had not met its obligations under Article X by not providing proper public notice of the import restrictions. The Panel found that:

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[61] *Id.* para. 4.20.
[62] GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile*, L/6491, adopted 22 June 1989, BISD 36S/93; arguments 36S/115-116, paras. 6.1-6.2, findings 36S/133, paras. 12.1, 12.29.
[63] *Id.*
[64] *Id.* para. 5.21.
[65] GATT Panel Report, Republic of Korea – Restrictions on Imports of Beef – Complaint by Australia, L/6504, adopted 7 November 1989, BISD 36S/202; GATT Panel Report, Republic of Korea – Restrictions on Imports of Beef – Complaint by New Zealand, L/6505, adopted 7 November 1989, BISD 36S/234; GATT Panel Report, Republic of Korea – Restrictions on Imports of Beef – Complaint by the United States, L/6503, adopted 7 November 1989, BISD 36S/268.

> "[Australia/New Zealand/the United States] had, as a subsidiary matter, claimed that Korea had not met its obligations under Articles X and XIII by not providing proper public notice of the import restrictions. It also noted that Korea had stated that the withdrawal of the measures imposed in 1984/85 and the import levels in 1988 had been widely publicized. In view of the Panel's determinations as concerned the consistency of the Korean measures with Articles II and XI, the Panel did not find it necessary to address these subsidiary issues. The Panel noted, however, the requirement in Article X:1 that 'laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports ..., shall be published promptly in such a manner as to enable governments and traders to become acquainted with them'. It also noted the provision in Article XIII:3(b) that '[i]n the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value'".[66]

Other cases under the GATT that touched very briefly upon transparency but did not consider it, either because no other violation was established or because it was seen as a secondary issue were: *US-Sugar Waiver* (1990)[67]; *EEC-Oilseeds I* (1990)[68]; *EEC-Regulation on Imports of Parts and Components* (1990)[69]*; Canada-Grain Corn* (1992)[70]; *US-Malt Beverages* (1992)[71]; *US-Cement* (1992)[72]; *US-Softwood Lumber II* (1993)[73]*; Korea- Polyacetal Resins* (1993)[74]; *EEC-Bananas I* (1993)[75]; *US-Salmon (AD)*

[66]Same three panel reports referred to above, at 36S/230, 267, 306, paras. 108, 124, 130 respectively.
[67] GATT Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, L/6631, adopted 7 November 1990, BISD 37S/228.
[68] GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, adopted 25 January 1990, BISD 37S/86
[69]GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990, BISD 37S/132, para. 5.27.
[70] GATT Panel Report, *Panel on Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr.1, adopted 26 March 1992, BISD 39S/411.
[71] GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206.
[72] GATT Panel Report, *United States – Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, 7 September 1992, unadopted.
[73] GATT Panel Report, *Panel on United States – Measures Affecting Imports of Softwood Lumber from Canada*, SCM/162, adopted 27 October 1993, BISD 40S/358.
[74] GATT Panel Report, *Panel on Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92 and Corr.1, adopted 27 April 1993, BISD 40S/205.

(1994)[76];*US-Salmon (CVD)* (1994)[77]; *Brazil-Milk* (1994)[78]; *EEC-Bananas II* (1994)[79]; *US-Stainless Steel Plate* (1994)[80]; *US-Auto Taxes* (1994)[81]; and, *US- Lead and Bismuth Carbon Steel* (1994). [82] Some of these reports were not adopted.

2. WTO

After the establishment of the WTO, the Panels and Appellate Body constructed a more systematic interpretation of Article X. As of 2013, fifty four legal claims were brought before the WTO Dispute Settlement relating to transparency in article X. [83] Here I will outline the reports that set the most important aspects of this jurisprudence.

One of the first cases to examine measures of general application of Article X was the case of *US-Underwear*[84] in 1997 brought before the WTO by Costa Rica against the United States. It involved a complaint on the Agreement on Textiles and Clothing and an alleged quantitative import restriction by the US under Article 6 of the Agreement. The Appellate Body upheld the Panel's findings that certain country-specific measures may constitute "measures of general application" under paragraph 2 of Article X, while a measure related to a company or a shipment may not. In the case the Appellate Body

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[75] GATT Panel Report, *EEC – Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993, unadopted.
[76] GATT Panel Report, *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, BISD 41S/229.
[77] GATT Panel Report, *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted 28 April 1994, BISD 41S/576.
[78] GATT Panel Report, *Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*, SCM/179, adopted 28 April 1994, BISD 41S/467.
[79] GATT Panel Report, *EEC – Import Regime for Bananas*, DS38/R, 11 February 1994, unadopted.
[80] GATT Panel Report, *United States – Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117 and Corr. 1, 24 February 1994, unadopted.
[81] GATT Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted
[82] GATT Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185, 15 November 1994, unadopted
[83] BERNARD M. HOEKMAN & MICHEL M. KOSTECKI. THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 98 (3rd ed. 2009) Table 3.5 Distribution of legal claims across WTO provisions. For GATT Article X, examining Transparency there are 46 claims in 2009.
[84] Appellate Body Report, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, Panel Report, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body ReportWT/DS24/AB/R, DSR 1997:I, 31

noted that Article X and paragraph 2 more specifically embodies "a principle of fundamental importance– that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality" which can be seen as a reflection of "the principle of transparency" with "due process dimensions." The due process value has further been cited in many other WTO reports dealing with transparency. It concluded that:

> "members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures." [85]

The same year, in *EC-Bananas III*[86] and with respect to Article X paragraph 3 (a), the panel ruled that Article 1.3 of the Import Licensing Agreement and Article X paragraph 3 (a) have "identical coverage."[87] Also it said that the provisions apply to the administrative procedures for rules only, not the rules themselves.

In 1998, three more disputes involved transparency issues under Article X. First, *EC-Poultry*[88], a complaint by Brazil against the European Communities, concerned the tariff rate quota system in the EC Schedule LXXX and the licensing requirements imposed by the European Communities with respect to frozen poultry originating from Brazil. Brazil

[85] US-Underwear, Appellate Body, Para. 29.

[86] Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591; Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, 1085; Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695; Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 803; Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943

[87] EC-Bananas III para.203.

[88] Appellate Body Report, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031; Panel Report, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/R, adopted 23 July 1998, as modified by Appellate Body Report WT/DS69/AB/R, DSR 1998:V, 2089

argued that the frequency of changes in licensing rules of poultry were not allowing WTO members to familiarize themselves with the rules as Article 1.4 of the Import Licensing Agreement provides. The Panel rejected this complaint, noting that

> "the transparency requirement under the cited provisions is limited to publication of rules and other information. While we have sympathy for Brazil regarding the difficulties caused by the frequent changes to the rules, we find that changes in rules *per se* do not constitute a violation of Articles 1.4, 3.3, 3.5 (b), 3.5 (c) or 3.5 (d)."[89]

The Appellate Body upheld the ruling that Article X applies only to measures of general application since Brazil's claims involved specific transactions such as individual poultry shipments and thus were outside the scope of Article X.

The second report with respect to transparency that year was *Japan-Film*[90], in which the Panel examined the publication requirement of Article X paragraph 1. A complaint was filed by the United States against measures taken by the Japanese government concerning the distribution, restrictions on sales and promotion of photographic film and paper. According to the Panel, the publication requirement of Article X paragraph 1 extends to administrative rulings of "general application" and administrative rulings addressed to "specific individuals or entities." The Panel found that Japan had not violated its obligations under Article X paragraph 1 because the United States failed to demonstrate that Japan's administrative rulings belonged to either of the above categories, which would result in the application of Article X.

The Appellate Body briefly looked at Article X paragraph 3 the same year in the *US-Shrimp* case where it noted as follows:

> "It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which in our view are not met here.

[89] EC Poultry para. 246.
[90] Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179

> The non transparent and *ex parte* nature of internal government procedures applied by the competent officials in the Office of Marine conservation, the Department of State and the US National Marine Fisheries Service throughout the certification processes under Section 609 as well as the fact that countries whose applications are denied do not receive formal notice of such denial nor of the reasons for the denial and the fact too that there is no formal legal procedure for review of or appeal from a denial of an application are all contrary to the spirit of Article X:3 of the GATT.[91]

The next case examining transparency was *Argentina-Hides and Leather* in 2001.[92]It focused on Article X paragraph 3 (a), which concerns the administration of trade regulations. The case involved an Argentinian regulation on the participation of representatives of the domestic tanners association in the customs inspection procedures for leather destined for export. The role of the representatives was to "assist" the customs authorities in their application of rules on customs classification and export duties. According to the European Communities, the participation of the representatives, who had a clear interest in the trade of hides, violated the principles of impartiality and reasonableness under Article X paragraph 3 (a). This form of transparency can be seen as assisting traders.[93]

In the report of *US-Stainless Steel*[94], also adopted in 2001 Korea complained that the United States acted inconsistently with Article X Paragraph 3 (a) by not following its own established policy in its antidumping investigation. The Panel rejected this claim of inconsistency. The panel held that Article X Paragraph 3 (a) is

> "not intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic

[91] Japan-Film para.183
[92] Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779.
[93] Panagiotis Delimatsis, *Transparency in the WTO Decision-Making*. TILEC DISCUSSION PAPER No. 2012-006 available at http://ssrn.com/abstract=2001919 at 11(February 9, 2012).
[94] Panel Report, United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295; Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513; Panel Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, 599 .

> law and practice; that is a function reserved for each Member's domestic judicial system."[95]

It is very interesting that the Panel here clarifies that regulation with respect to transparency occurs at the level of the member states. With regard to the requirements of 'uniform administration' and 'reasonable administration' the Panel said that:

> "The requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ. Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because in the administration of those laws and regulations, different conclusions were reached based upon differences in relevant facts."[96]

The Panel looked at the "real effect" that these administrative measures might have on traders. The focus of the Panel on traders is very important since it looks at the protection of interests of private actors in the WTO context. [97]The harmed party would not need to establish the existence of damage; it would only need to show potential impact on competitiveness due to partiality on behalf of the administrative body. The Panel here established that for the third paragraph of Article X to be applicable, it is not necessary to establish that a member discriminates between other members in the administration of its trade regulation. This means that Article X paragraph 3 can be examined regardless of any claims on discriminatory treatment. In particular, the Panel ruled that "the focus is on the treatment accorded by government authorities to the traders in question." It also found that under paragraph 3 (a) members can challenge the substance of an administrative regulation.

The Panel did not find a violation of the "uniform administration" obligation but did find a violation of the "reasonable administration" requirement in Article X paragraph 3 (a). With respect to partiality, the Panel found that "there is an inherent danger that the

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[95] US –Stainless Steel para. 6.50.
[96] *Id.* para. 6.51.
[97] Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance* 11:4 J. INT'L ECON. L. 779 at 795 (2008).

Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right"[98]. Should adequate safeguards had been in place, this could have remedied the situation, but the Panel did not find that such measures were in place. Thus, Argentina acted inconsistently with Article X, paragraph 3 (a).

In 2001 the Panel decided another case involving Article X, *US-Hot-Rolled Steel*[99]. The case brought by Japan against the United States involved antidumping duties imposed by the US on hot-rolled steel products originating from Japan. The Appellate Body later did not review the Article X claims. The Panel examined the notion of "general application" of Article X paragraph 1 and found that, even though a single instance of a member state's actions might be "evidence of lack of uniform, impartial and reasonable administration" of its legislation, a significant impact on the overall administration of the law is required. [100]

In 2003, Japan filled a complaint against the United States again, this time for a measure of sunset review of antidumping duties on corrosion resistant carbon steel flat products originating from Japan. In *US-Corrosion-Resistant Steel Sunset Review*[101] the Panel examined Japan's complaint under Article X paragraph 3(a). Japan claimed that the self-initiation of sunset review laws was not uniform. The Panel said that the claims from Japan did not fall under the administration of laws and regulations and thus were not within the scope of Article X paragraph 3(a). The Panel said that:

[98] Panel Report, United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295; Para 11.100.
[99] Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697; Panel Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769.
[100] US- Hot Rolled Steel Panel Report para. 7.268.
[101] Panel Report, United States – Sunset Review of Anti Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, p. 85.

> "[W]e find that this aspect of US law cannot be challenged under Article X:3(a_ of GATT 1994 because it relates to the *substance* rather than the administration of US law"[102]

In 2004 the Appellate Body in *US-Oil Country Tubular Goods Sunset Reviews*[103] addressed the issue of bringing an Article X case before the Dispute Settlement Body.

> "We observe first that allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be lightly or in a subsidiary fashion. A claim under Article X:3 (a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim and the evidence adduced by the complainant in support of it should reflect the gravity of the accusations inherent in claims under Article X:3 (a) of the GATT 1994.[104]

Another very important case on Article X jurisprudence was decided on 2005. *Dominican Republic- Import and Sale of Cigarettes*[105] was a complaint brought before in the WTO dispute settlement process by Honduras, regarding charges, fees and other measures by the Dominican Republic on sale of cigarettes. The Panel examined both the publication requirement of Paragraph 1 and the administration of trade regulations of paragraph 3 (a) of Article X. First it looked whether the surveys needed to make the tax determination for cigarettes were "administrative rulings of general application." These surveys had not been published, and they would provide the basis for administrative determination on taxes on cigarettes. Thus, the Dominican Republic was found in violation of Article X paragraph 1.

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[102] *Id.* Para 7.293.

[103] Appellate Body Report, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
Panel Report, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report W/DS/268/AB/R, DSR 2004:VIII, 3421.

[104] US-Oil Country Tubular Goods Sunset Reviews Appellate Body Report Para. 217.

[105] Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367; Panel Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425

With respect to Article X, paragraph 3 (a) the Panel found that the Dominican Republic had applied the provisions under examination in an unreasonable manner. Specifically, the Panel said:

> "The fact that the Dominican Republic authorities did not support its decisions regarding the determination of the tax base for imported cigarettes by resorting to the rules in force at the time and that they decided to disregard retail selling prices of imported cigarettes is not 'in accordance with reason', 'having sound judgment', 'sensible', 'within the limits of reason' nor 'articulate'."[106]

The next case on Article X was *EC-Selected Customs Matters*, a case dealing exclusively with article X.[107] The United States challenged European Community's administration of several laws and regulations on the valuation and classification of products for customs purposes because the procedures for review were different from one EU Member State to another. The Panel here examined Paragraph 3 (a), administration of trade regulations, and (b) obligation of prompt review and correction of the violation by an adjudicative body. The Panel said that the requirements of Article X Paragraph 3 (a) do not apply to laws, regulations and rulings but rather to their administration, reaffirming the ruling in *Argentina-Hides and Leather* in the sense that a separate examination of these rules would establish whether there is a violation of the Most Favored Nation treatment or the National Treatment rules of Articles I and III of the GATT.

However, the Appellate Body reversed the Panel's finding that "*without exception"*, Article X:3 (a) of the GATT 1994 always relates to the application of laws and regulations but not to laws and regulations as such." It upheld the Panel's conclusion that "substantive differences in penalty laws and audit procedures among the member States of the European Communities alone do not constitute a violation of Article X:3 (a) of the GATT 1994."[108]

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[106] Dominican Republic – Import and Sale of Cigarettes Panel Report Para. 7.388

[107] Appellate Body Report, European Communities – Selected Customs Matters, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791; Panel Report, European Communities – Selected Customs Matters, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX-X, 3915.

[108] EC-Selected Customs Matters Appellate Body Report Para. 309.

With respect to Article X Paragraph 3 (b) the United States claimed that it was not possible to get a review of a customs decision unless the importer had exhausted local (national) remedies. The Panel said that it is not reasonable that first instance national review tribunals, with limited jurisdiction, bind with their decisions all agencies within an EU Member. [109] So, the requirement to exhaust local review possibilities is reasonable.

One of the most recent cases examining Article X is *EC-IT Products.* [110] The complainants were the US, Japan and Taiwan against measures of the European Communities on tariff classification and treatment of information technology products. The Panel found that the European Communities had violated both paragraphs 1 and 2 of Article X. In particular, the Panel in examining the EC measures said that:

> "Laws, regulations, judicial decisions and administrative rulings" can encompass more than those instruments formally characterized as such by a WTO Member. Otherwise, WTO Members themselves could determine which provisions would be subject to WTO obligations under Article X:1 of the GATT 1994 merely by the labelling of those instruments."[111]

This is a rather expansive interpretation on what could fall under Article X Paragraph 1. Examining the notion of "made effective" the Panel adopted a rather expansive interpretation:

> "In our view, "made effective" also covers measures brought into effect in practice. In other words, it may include measures that have not yet been formally adopted in accordance with municipal law." [112]

Another recent case is *Thailand- Cigarettes*.[113] Philippines filed a complaint against Thailand on a number of measures affecting cigarettes from Philippines. The Philippines

[109] EC-Selected Customs Matters Panel Report para. 7.538.
[110] Panel Reports, European Communities and its member States – Tariff Treatment of Certain Information Technology Products, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933.
[111] *Id.* para 7.1024.
[112] *Id.* para 7.1046.
[113] Appellate Body Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines,

challenged the system under which Thai government officials served on the board of a state-owned domestic cigarette manufacturer. According to the Philippines, Thailand administered the measures under examination in a partial and unreasonable manner and there were delays in the administrative review process. Thus Thailand acted inconsistently with its obligations under Article X Paragraph 3 (a). Additionally the Philippines claims that Thailand's ad valorem tax, health tax, and TV tax are inconsistent with Article X paragraph 1 because violates the publication requirement. Finally, the Philippines claimed that Thailand did not maintain an independent review process with respect to customs, and thus is in violation of Article X Paragraph 3 (b).

The Panel did not find that Thailand was in violation of the impartiality and reasonableness requirement, however it found that there were delays in the review process and thus Thailand violated its obligations under Article X paragraph 3 (a). It found that Thailand violated Article X paragraph 1 because it did not publish laws that determine the VAT for cigarettes and the release of a guarantee in the customs valuation process. With respect to the Excice, Health and TV taxes, the Panel said that the claim was improperly brought under Article X paragraph 1. Finally with respect to the Paragraph 3 (b) claim the Panel found that Thailand had acted inconsistently since it did not maintain an independent review process. The Panel also agreed with the Philippines that Thailand violated Article X:1 by failing to publish laws and regulations pertaining to the determination of a VAT for cigarettes and the release of a guarantee imposed in the customs valuation process.

Thailand appealed the case with respect to Article X:3 (b) and the Appellate Body upheld the Panel's finding that Thailand acts inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent tribunals or procedures for the prompt review of customs guarantee decisions.

WT/DS371/AB/R, adopted 15 July 2011 Panel Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R.

In the case of *China-Raw Materials*[114], the United States, Mexico and the European Communities claimed that China's restraints on the export from China of raw materials such as bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc violated among other provisions, Article X in general and paragraphs 1 and 3 more specifically. The Panel after a very extensive analysis found that China acted inconsistently with Articles X paragraphs 1 and 3(a) as well as paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report.

Article X was mainly examined in the Panel report in the case of *US-COOL*. In this case Canada complained that the United States were violating their Article X paragraph 3 obligations by implementing the 1946 Agricultural Marketing Act as amended by the 2008 Farm Bill. The Act imposed mandatory country of origin labelling (COOL) including the obligation to inform consumers on the country of origin of commodities such as beef and pork. In order for products to be considered of US origin the animal had to be born, raised and slaughtered in the United States. Secretary of Agriculture Vilsack wrote in 2009 a letter urging industry representatives to voluntarily adopt suggested labeling changes in order to provide more useful information to consumers. The Panel after examining Vilsack's "suggestions for voluntary action" ruled that it constitutes unreasonable administration of the COOL measure in violation of Article X paragraph 3(a) of the GATT.

Finally, in the case of *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, the United States, Japan and the European Union have requested consultations with China involving the Chinese Customs Commodity Codes and other published and unpublished measures, which impose export restrictions on rare earths. Among other provisions, the US, Japan and the EU claim that such measures are

[114] Appellate Body Report, China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R, adopted 22 February 2012; Panel Reports, China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/R and Corr.1/WT/DS395/R and Corr.1/WT/DS398/R and Corr.1, circulated to WTO Members 5 July 2011 as modified by Appellate Body Report WT/DS394/AB/R.

inconsistent with Article X of the GATT. The Panel did not examine Article X in detail, even though it briefly looked at Chinese obligations to publish certain related legislation.

3. Other agreements

Currently there is no jurisprudence on Article III of the GATS, Article 63 of the TRIPS and Articles V, VII, and IX to XVII of the Government Procurement Agreement. With respect to the Antidumping Agreement, the cases on Articles 5, 6 and 12 are *Guatemala Cement I* and *II, Mexico-Corn Syrup, Thailand H-Beams, US-Offset Act (Byrd Amendment), Argentina-Poultry Antidumping Duties, US-Lumber 5, US-DRAMS, Argentina Ceramic Tiles, Egypt- Steel Rebar, US- Hot-Rolled Steel, US- Corrosion Resistant Steel Reviews, US-Oil Country Tubular Goods Sunset Reviews, US Stainless Steel (Mexico)*. There is no jurisprudence on Article 13. On the Agreement on Subsidies and Countervailing Measures, the cases on Articles 11, 12 and 22 are *US-Offset Act (Byrd Amendment), China-GOES, US Carbon Steel, US-Antidumping and Countervailing Duties (China)*. With respect to the Import Licensing Agreement, there are two cases on articles 1.3, 1.4 and 5, *EC-Poultry* and *Turkey –Rice*. Finally, on the Agreement on Safeguards, Article 3, the cases in the Dispute Settlement Body are *US-Lamb, US-Line Pipe, Chile-Price Band System, Argentina-Preserved Peaches, US-Steel Safeguards* and *Dominican Republic-Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric.*[115]

D. The link between legal transparency with the other three forms

Legal transparency establishes the core contact point between the trader and the government of the importing or exporting country. It involves tariffs and other trade regulations directly, so at first, it is not clear how it relates to the other three forms of transparency, and whether there is any mutual effect at all. Besides the argument that was made earlier that all four are linked through their relationship to different composite democracy facets, there is one more layer of connections.

[115] Full case citations omitted.

External transparency, mostly the *amicus curiae* briefs but also its other aspects give consumers, business associations, trade unions and others who are affected by the outcomes of WTO decisions and national trade policies to take their case directly before the Panels and the Appellate Body. Without Article X and information dissemination and the experience of the application of national trade rules (including administrative and judicial recourse mechanisms), external transparency would be less effective. External transparency, if it becomes procedurally specific and institutionalized, it can add an additional layer of review beyond the national legal systems. The *amicus* form moreover works very well within the intergovernmental organization paradigm: it does not create a right to file a case and pursue essentially a course tantamount to that of the European Court of Human Rights. Instead, when a case has been filed by one member state against another, if citizens, consumers, interested parties at large feel they have not had the opportunity to be heard or did not think the national processes gave adequate weight to their voice, the WTO Panels might. Similarly, NGOs and industry representatives can participate, in a limited way during Ministerial conferences. In one sense, Article X and external transparency are not two sides of a coin but two sides of the same dice. As in a dice each side has a different value, the legal standing of interested parties varies depending on the type of transparency at hand.

Internal transparency also represents one side of the same dice. Article X allows for WTO rules to be scrutinized in national debates and within domestic legal systems. The political outcomes from this process, whether they come in the form of lobbying, dissent, legal proceedings, or even voting for another government need to be re-directed towards the international forum. Internal transparency ensures that national governments can adequately represent the interests of their constituents at the multilateral stage. For developing countries this has now become a condition for participation in the international trading regime. Further liberalization does not appeal any more to their nationals. The WTO rules have been tested over the last twenty years, and the dissatisfaction at the domestic level has been filtered upwards towards the WTO through protests and through the national governments. Such critique needs a proper exit voice

especially at the WTO level, where all these decisions were made in the first place. Article X provides the formal mechanism for rules to be published and administered, and therefore tested at the domestic level. Internal and external transparency ensure that the outcomes of the domestic political debates regarding these rules will be communicated to all other WTO members and the representatives of each government will fully participate in reviewing the rules further.

Finally, administrative transparency is mostly the background against which all the other three operate. It would be a stretch to argue it also represents a side of the dice. It ensures however that the WTO's institutional structure functions as well as it can for trade ministers, diplomats, consumers, NGOs and everyone with internet access to remain informed and involved in the process.

VII. Evaluation

After having examined the four aspects of transparency in the WTO, I would like to offer an evaluation of the WTO's performance with respect to transparency. In the first part this chapter will discuss the outcome of each of the four previous chapters, on internal, external, administrative and legal transparency and the WTO's scorecard on benefiting from the normative and discourse space available to its members and stakeholders. Second, I will revisit the constitutionalist paradigm and reiterate that democratization and the flexibility it offers with respect to the expansion of discourse and the meaningful inclusion of voices from all stakeholders is more appropriate, especially in view of the many transnational processes that are already in place in global trade governance. The WTO's focus on transparency as a principle and a legal rule contributes to the transnationalization of the organization. This alters, as I will argue, the current content of state sovereignty. Finally, I will discuss the links between each form of democratic legitimation and the forms of legitimacy in global governance. As holding global elections may be a scenario that exists only in the distant future, different forms of legitimation explored in this thesis can be improved and temporarily fulfill input and output legitimacy roles. Moreover, there exist process and goal-specific legitimacy types, such as throughput and mission legitimacy that can also be linked to transparency forms in the WTO.

The WTO has engaged in a rudimentary attempt to remedy its lack of democratic legitimacy. However, this attempt is insufficient and there is still a long way to go from here. For the evolution of hybrid forms of global democracy, the WTO needs to review its transparency approach in a holistic manner, address some extant issues (such as the *amicus curiae* problem) and develop a more coherent mid-term and long-term agenda for the future. The transnational fragments within the WTO have multiplied to the extent that the organization and its member states can no longer "hide" behind the intergovernmental nature of their commitments, especially in view of individuals being the direct beneficiaries from some of these commitments. Moreover, the structure of the

organization and the emphasis on transparency can significantly contribute to the transition of the WTO to a more democratic global governance regime.

A. The WTO's transparency profile

Chapters III, IV, V and VI explored the different forms of transparency in the WTO. Transparency has gained a considerable amount of attention in the last two decades in the WTO. The organization's performance oscillates between glimpses of exemplary openness, as in the case of publication of decisions in the WTO's website and complete lack thereof, as evidenced in the problems associated with the Green Room. In some cases, transparent practices are more meaningful, in others they are positive but not useful in addressing the extant legitimacy concerns and in some cases, the transparency actions are inconsistent.

More specifically, the best performance of the WTO with respect to transparency occurs in the area of external transparency. As we saw, the WTO has been systematically publishing all the documents, and following a very short declassification timeline. This practice is not based on custom, but a General Council decision. The Sutherland Report emphasized this form of transparency, most likely because the drafters of the Report were aware that this may be the WTO's strongest legitimacy rating. Indeed, the WTO website appears to be very user friendly. However several heated issues in the WTO are absent from the website. Despite the enormous number of documents published, the WTO website does not allude to the paradoxes in international trade regulation. It remains entirely unclear how the pursuit of competitiveness and fairness for less developed countries can be compatible within the same organization. This paradox is exacerbated considering that most assistance to developing countries occurs at a voluntary basis, while the rules that promote competitiveness are obligatory.

Trying to eliminate nontransparent practices of member states and considering transparency "the best insurance policy against protectionism"[1] cannot coincide with complaints from developing countries on access problems during Green Room talks, the rejection of *amicus curiae* briefs without any justification and secrecy in PTA and RTA negotiations.[2] Hailing a fast-paced liberal market paradigm cannot be done in the same setting as the commitment to assist countries that suffer from extreme poverty conditions and no context-specific exit strategy. This lack of consistent narrative renders the large amount of information less meaningful.

The second form of transparency that functions well is legal transparency. The numerous transparency provisions in the WTO Agreements described in the chapter on Legal Transparency introduce the largest body of mandatory transparency-related supranational legislation. However, as the GATT history of Article X indicates, these provisions would not be as important without the robust case law, starting from the 1980s. The numerous panel and Appellate Body reports gave transparency its current content. Similarly, the Appellate Body actively opened up towards external transparency, despite the opposite desire of the Member States.

Article X was neglected for most of GATT's history. In comparison the current attention to Article X is disproportionate to its early years. The evolution of WTO law includes attention to non-tariff barriers and one of the greatest obstacles for cross-border trade is the lack of clarity in border processes. This was not as obvious in the early GATT years when elimination of tariffs mattered the most. Possibly, WTO member states found it more difficult to violate the tariff elimination rules, but non-tariff barriers to trade, where lack transparency belongs, are murkier and easier to introduce and sustain, at least for a while, at a national level. Information is an invaluable element for traders knowing how to navigate border procedures. Article X also imposes infrastructural costs to smaller

[1] *Lamy hails transparency as the best insurance policy against protectionism* http://www.wto.org/english/news_e/news13_e/trdev_19jul13_e.htm

[2] A recent example is that of the CETA, agreed between the EU and Canada. Both parties are vocal on their commitment to transparency, yet they have not published the bilateral trade agreement. See Robert Howse's comments at http://worldtradelaw.typepad.com/ielpblog/2013/11/has-canada-violated-its-nafta-transparency-obligations-by-keeping-the-ceta-text-secret.html

countries, which are further exacerbated by internal transparency deficits and the inability to adequately engage at the multilateral level on how to mitigate these costs.

The GATT and the WTO to some extent exist in order to level the playing field as much as that is possible. It was inevitable for the attention to Article X to rise over the years. However, WTO members have made numerous efforts to distinguish this obligation from any other transparency elements, especially ones of administrative and external transparency. This is inconsistent, if not ironic: if information is important to traders, its importance not limited to tariff schedules, it extends to the entire WTO system and the way it functions. WTO members are nowadays very keen on pursuing Article X disputes, to the point that almost half of the disputes filed before the Dispute Settlement Body are transparency related, and more specifically, related to Article X. Yet, a common understanding exists that transparency quests end at a state-to-state level. Holding each other accountable with respect to trade-related policies is the limit of transparency, as member states see it. Going beyond that, and *being* transparent as an organization is a secondary priority, one of little to no legal validity, limited to the publication of documents *ex post facto.*

In the case of external transparency and the participation of NGOs, the non-decisive role of transparency and participation are even more evident. NGOs have a hybrid observer status in Ministerial Conferences. It would not be a stretch to say that their contribution does not extend to any of the negotiations. Their presence became essential not for the multiplication of voices in international trade discourse but because the Seattle events and the dissatisfaction of civil society was so strong that the WTO needed to do something in order for the high-profile Ministerials to stop being opportunities for protests on the streets. They complemented NGO participation with meetings done with high police presence, and in some extreme cases, offered life insurance to WTO administrators.[3] This is only a temporary measure, not only because civil society will demand a more important role in the organization, but also because in the next few decades the multiplicity of voices in the WTO will become necessary for the organization to

[3] PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS 2 (2009).

effectively monitor and regulate international trade – otherwise it will become irrelevant. Citizen-consumers have always been at the center of cross-border trade as they are the recipients of trade benefits. For years governments have been hiding behind the sovereignty veil and it is time that they move the citizen consumer to the center of the international trading system.

The WTO has a very clear institutional path for the integration of civil society in a decisive manner. This path, created by the WTO Appellate Body is through *amicus curiae* briefs. However, this path is currently not functioning. The progress made in terms of external transparency is meaningless if NGOs still remain clueless as to what type of brief, with what content and in which cases could be truly useful to the members of the Panel and Appellate Body. First, *amicus* briefs are either simply dismissed, admitted in order to be dismissed as unnecessary or considered only inasmuch as the arguments they advance coincide with those of parties' submissions. This approach negates meaningful participation of NGOs in the dispute settlement process and thus exacerbates the participation deficit in the area of external transparency. Second, the laconic responses published in the reports do not explain the reasons behind the *amici* rejections, adding to the lack information with respect to the process. NGOs who wish to submit briefs in future cases are faced with ambiguous dicta. In future cases, if they coincide with the members' submissions, they might be rejected as redundant. If they deviate a lot, they might be rejected as non-relevant.[4] Either way, they have no guidance on how to proceed.[5]

The lack of information on reasons for overlooking *amicus* briefs points towards a deficit on two forms of transparency. The organization's commitment to external transparency is compromised, on both its informational and participatory aspects. At the same time, the DSB is part of an international administration. The absence of case-specific justification for the decision to reject a brief points towards gaps in institutional transparency. If we

[4] Lise Johnson and Elisabeth Tuerk, *CIEL's Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 243 (Tullio Treves ed. 2005). See more specifically pages 254-255, 257.
[5] Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4 TRADE, L. & DEV. V.1 19-44 at 34 (2012).

approach the issue of NGO participation as distinct from reasoned decision-making in international trade administration, then there is no flaw in all the short responses by the Panels and the Appellate Body: the issue of degree of NGO involvement is unrelated to the lack of justifications. In fact, only member states have a *legal right* to request answers to their questions. NGOs are not parties to the disputes, and they can be dismissed without further explanation. When treating the two transparencies separately, the WTO can report progress with respect to external transparency just by allowing the submission of briefs.

A viable alternative for a participation platform in the WTO dispute settlement can be found in the likeness test of Articles I and III of the GATT. Reports have cited consumer tastes and preferences as one of the criteria for the determination of likeness of products. Consumer organizations could weigh in during this process. The testimony of consumers' organizations regarding their tastes and preferences would be essential in determining likeness. An organized process, whereby unsolicited briefs can be submitted in order to argue on consumer's views on whether two products are like or not can first, signal to the consumers that their opinions matter in trade disputes; second, it can assist Panels in the fact-finding process; third, it can create a small but significant gateway for submissions.

Interested parties would be allowed to indicate their preferences directly to the DSB. The WTO would then accumulate some experience on *amicus* briefs and their management within this narrow legal window. Possibly, member states could end up trusting this process more than one allowing for blanket submissions. The submission option could be limited through time and length constraints, and it could be restricted only to include NGOs registered with the WTO. Considering that the largest number of briefs submitted to the WTO in a single dispute was 17, and if the permissible length of briefs is 5 or 10 pages, the response tasks for the parties and the dispute settlement panel would not be as burdensome. This proposal is a positive step towards addressing concerns regarding legitimacy and stakeholder participation in the WTO since it aspires to demonstrate a permanent opportunity for consumer association involvement in the Dispute Settlement Process. By introducing the consumer society as a potential friend of the court, the Panels

would further rationalize and democratize Article I and III likeness tests, thus paving the road for possible future participation of additional non-directly-trade related stakeholders once *amicus curiae* briefs are consistently introduced and advised.

An even more imminent problem is the position of developing countries. The internal transparency concerns as we examined them in the chapter on transparency and development have become critical for the future of the Doha Development Round. This is the biggest challenge facing the WTO. The lack of a coherent development approach and the persistence on a neoliberal trade liberalization paradigm, compatible with the Washington Consensus has stopped being a viable trade rhetoric almost since as early as 1995. Developing countries have stood up to their developed counterparts during the most recent conferences. Not only this is a recent phenomenon, after years of falling through the cracks during such meetings, but also developed countries responded with resort to PTAs and RTAs amongst themselves. Moreover, the solutions we proposed may mitigate some of the issues but they will be difficult (or better, impossible) to be agreed on under the current consensus rule.

For acceding countries the internal transparency issues appear more limited. The number of countries outside the WTO system is very few at this point. The issue is more one of principle rather than substance: if the WTO wants to maintain a platform of trust for future negotiations, this culture of trust must be present from the beginning of the accession process for candidate members. Moreover, many of the candidate members and the UN countries that have not applied for membership yet are developing and least-developed countries. This renders the relevance of trust much more prevalent. Examples such as the accession of Vanuatu, which was pressured by the United States as part of its accession to sign the Aviation Agreement (a plurilateral agreement) even though the country does not have a civil aviation system, should not occur in the WTO. The United States had a clear interest to "multilateralize" the Aviation Agreement by pushing towards the addition of signatory member states, to the point that this agenda became unreasonable, as the case of Vanuatu indicates. Products entirely absent from a national

market, either as imports or exports should at least be off the table during accession negotiations and should not be allowed to produce deadlocks.

The space for improvement in the WTO with respect to transparency and legitimacy is not only present, but easy to locate, and to regulate. Improving and expanding discourse by introducing, filtering and taking account of different voices is neither impractical nor requires a normative stretch, such as a new agreement, or even new decisions from the General Council. The aim of the four chapters on each transparency was to examine the problems, seek normative space and propose immediate solutions, without the requirement of painstaking multilateral negotiations.

B. Transnationalism, Constitutionalism and Democratization

The content of transparency as a rule and as a legal principle has been conducive to the transnationalization of the WTO. Information acts as the link between global civil society, citizens around the world either organized as NGOs or as consumers, traders, multinational corporations and voters facing the results of Articles I and III of the GATT and other cardinal rules from the Agreements. They also face the effects of subsidization of key sectors, violations of WTO rules and hand-twisting into further liberalization. The first level of transnationalization occurs at the level of national markets, as the WTO through the lowering of tariffs changes the competition balance in the domestic context. The relationship of domestic industries and their representatives as well as importers and exporters occurs through Article X, which obliges the importing state to publish its laws related to trade and to maintain adjudication mechanisms for challenges of administrative measures. Legal transparency is the most prevalent transnationalizing factor. Additionally, some WTO members maintain inquiry points on the WTO domestically and have established mechanisms for their citizens to report violations of the WTO Agreements that they experience as they engage in international trade.

External transparency also contributes to the transnationalization of the WTO. Non-state actors have a formal status in the organization and the Secretariat connects with them by maintaining a list of NGOs that can participate in events open to them. Moreover, the

controversial *amicus curiae* practice links non-state actors directly to the Dispute Settlement Process. If institutionalized, the submission of *amicus* briefs can become a major gateway for the representation of civil society interests at the international level and with time it will allow for the filtering of global citizenry interests in the WTO adjudicatory process, thus moving the WTO citizens, consumers and traders to the center of the world trading system. [6]

At a theoretical level, treating the four transparencies separately obscures the phenomenon of transnationalization resulting from increasing integration in the WTO context. The evolution of the GATT from diplomacy to law, the move towards transparency[7] and the creation of the WTO set in motion processes for the pursuit of non-state interests at the WTO level. Corporations and individuals participate indirectly in the WTO processes through national mechanisms that allow for them to notify their governments on WTO law violations, file complaints and generally exercise pressure on their governments to further pursue cases of violations of WTO law. Some examples of such practices are the United States Representative Open Government,[8] the Civil Society Dialogue initiated by the European Commission[9] and Canada's consultation venue in the Department of International Affairs and International Trade.[10] As we saw, in some cases, companies will even participate in the dispute settlement process. [11]

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[6] Similarly in the EU, see A. Brink and Flora Goudappel, *Processes of Transnationalization of Administrative Values: Administrative Regulation and Transparency in the EU*, in VALUES IN GLOBAL ADMINISTRATIVE LAW (G. Anthony et al eds. 2010).

[7] See for the emphasis in transparency in the WTO case law, segment on Legal Transparency. See also JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW, 116-118 (2006).

[8] *Office of the United States Trade Representative Open Government* http://www.whitehouse.gov/open/around/eop/ustr , *Freedom of Information Act and Open Government* http://www.ustr.gov/about-us/reading-room/freedom-information-act-foia/foia-and-open-government

[9] *Dialogues, Civil Society* http://trade.ec.europa.eu/civilsoc/index.cfm, *EU and the WTO* http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/working-with-the-wto/

[10] Canada and the World Trade Organization (WTO) http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/wto-omc/index.aspx?view=d

[11] The Appellate Body in EC-Bananas has affirmed that this practice is legal. See Appellate Body Report, EC — Bananas III, para. 10. See also on the issue: Marco Bronckers & John Jackson, *Editorial Comment: Outside Counsel in WTO Dispute Processes*, 2 J. INT'L ECON. L. 1 155-158 (1999). P.D. Ehrenhaft, *Right to Counsel' in WTO Dispute Settlement Proceedings: A 1998 Resolution of the American Bar Association*, 2 J. INT'L ECON. L. 1 159-162 (1999). Finally, on the Fuji-Kodak industry participation in Japan-Film see Jeffrey Dunoff, *The Misguided Debate over NGO Participation at the WTO,* 1 J. INT'L ECON. L. 437 (1998).

All the above elements demonstrate that state sovereignty of the 1947 GATT has changed drastically. Countries still hold an important role in international trade regulation while a large number of actors are now demanding to be heard during WTO processes. Civil society and traders are not satisfied with having an observer status, even if that is an institutionalized one (such as the Ministerial Conference). Multinational corporations have been present through their legal representatives in major disputes[12], NGOs consistently submit *amicus curiae* briefs and protestors are so vocal that Ministerial Conferences are brought to a complete halt. The "old world" center- periphery balance of western-state international law does not describe the contemporary international trading system.

Transnationalization renders constitutionalist arguments less convincing. Constitutionalism involves less flexible normative forms, and hierarchically superior principles that allow for reliable answers during conflict resolution. In this polynormative world, and in this polynormative regime that the WTO has evolved to, legal analysis should be able to account for all the phenomena we described without meaning that they necessarily need to be incorporated in a pyramid-like scheme, or prioritized over one another. However, this is not to say that domestic analogies are entirely unwarranted. The WTO as many international organizations exhibits institutional structures that are reminiscent, even modeled after the national separation of powers paradigm. The following tables outline the possible links to the traditional constitutional paradigm. The different "hats" of the General Council, as a legislative, an executive and a judicial branch, as well as the Ministerial Conference, with full powers to make any number of drastic changes to the Agreements (as it happened in the Uruguay Round), might look like a supranational version of the nation-state governance.

[12] See Jeffrey Dunoff, *The Misguided Debate over NGO Participation at the WTO* 1 J. INT'L ECON. L. 437 (1998).

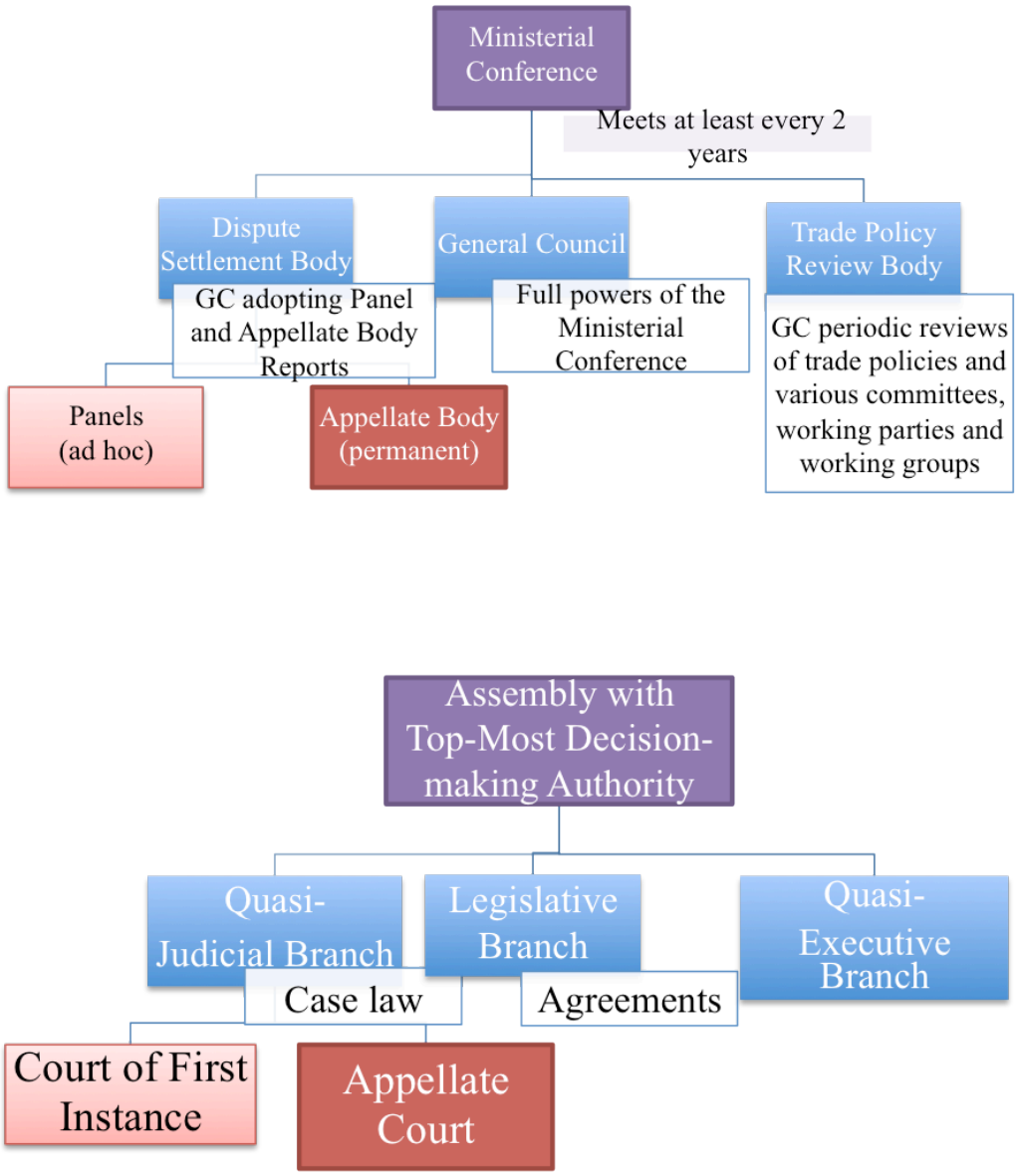

Figure 5 Separation of Powers in the WTO

However, everything else in the WTO and its most pressing issues today are not solved by resorting to this separation of powers scheme. To extend constitutionalist analogies beyond the tables above would be creating problems with incorporating into a single,

WTO-specific narrative transnational phenomena. Additionally, the ultra-normativity[13], the ability of international institutions to develop beyond the agreed legislation that created them is not necessarily a reason for the blank cheque skepticism that Peters cautions against. Peters argues that:

> "Another undemocratic feature of global governance is the blank cheque phenomenon. This problem in theory not only concerns the purely transitive democratic foundation of international law and global governance via the democratic nation states, but in practice arises here. States lack control over international law and global governance because many international treaties are not precise and static but general and dynamic. This is most obvious for treaties establishing international regimes or organizations with bodies which monitor behaviour, interpret imprecise and incomplete texts, and which develop new norms (adjudicatory and/or quasi-legislative activity), especially if such secondary law directly addresses individuals, and thus to some extent replaces domestic legislation and administrative acts (global governance properly speaking)."[14]

The other side of the blank cheque problem is the ultranormative ability of international organizations. It is a form of progressive adaptability to pressing problems. An illustrative example is that of *amicus* briefs in the WTO. Not only are they not explicitly covered by the WTO Agreements, but the members of the General Council in a meeting openly condemned the Appellate Body's practice. Yet, *amicus* briefs are still accepted in the WTO, not through some form of judicial activism, but through legal interpretation of existing clauses in the DSU that indeed allow for innovative fact-finding. When faced with the option of controversial discourse space, such as this, which clearly carries the potential of inclusion of many more voices, resorting to constitutionalism will lead to the end of such initiatives.

Madison and Montesquieu, when they described the structures that became the foundations of modern constitutionalism, they did so in the context of newborn democracies. Their analysis was coupled not only with the constitutional legal space that

[13] Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters* 1:2 GLOBAL POLICY 127-136 (2010).
[14] Anne Peters, *Dual Democracy* in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 329 et seq., 293(J. Klabbers et al eds. 2009).

emerged, the French and American constitutions, but also the political space that brought these to life. WTO analysis before discussing the possibility of constitutional principles or global norms should first explore the same political space and what *it can include in order to expand its reach and inclusiveness*. The blank cheque problem may be the WTO's saving grace to solve its legitimacy problems. A blank cheque to lock in place constitutional norms does carry the problems that Peters described. However, a blank cheque to enable more participants to put forward their concerns during decision making and a new mandate that moves away from the rigid neoliberalism of Articles I and III to the exploration of development-specific norms is the type of democratization that Cass and Nicolaides and Howse argued for.

C. Forms of legitimacy in the WTO

The least contested form of legitimacy is input legitimacy, through elections and direct participation of stakeholders in decision making. The nation state possesses the enforcement mechanisms, which are infamously absent in international law and draws legitimacy through clearly defined hierarchies or democratic participation. However, the direct participation of citizens in the operations of the organization is still not possible for two reasons mainly. First, states, which are still the main units of participation in the international community would be very reluctant to allow any involvement of individuals, and consensus to that effect is almost impossible to obtain at least in the near future. Second, even though participation platforms (elections) have been successfully established in few cases in regional organizations (such as the EU), the elected organs themselves are limited in their capacity. Equivalent forms at a global level are currently seen as utopian.

References to the WTO demos exist in the preambles of the Agreement Establishing the WTO, and the GATT which mention raising standards of living, ensuring full employment and real income, the preamble of the Agreement on Agriculture which refers to food security, the preamble of the Agreement on Sanitary and Phytosanitary Measures and Article XX of the GATT referring to human health. The numerous protests against

the WTO can also be seen as tokens of the existence of a demos, in a reverse fashion. Citizens of different countries voice jointly their opposition to the policies of the organization. Moreover, citizens of member states are the WTO demos both in terms of their government's membership in the organization but also as "citizens-consumers."[15] The fundamental participant units in trade are the vendor and the buyer.

In order to be a "citizen-consumer" any kind of participation in the national economy of a WTO member state can be sufficient to delineate the WTO demos as inclusive of all "citizens-consumers." Furthermore, it is in the interest of the consumers to find the cheapest product in the market and the progressive elimination of tariffs is a crucial mechanism to that effect.[16] Transparency thus can empower actors towards norm compliance and promote discourse.[17] Consumers in WTO member states ultimately enjoy the benefits from tariff reduction and elimination. A case for the immediacy of distributional effects of WTO measures to consumers is more than reasonable.[18] The strong civil society opposition during the Seattle Ministerial and other WTO high profile meetings indicates that citizens also understand themselves as direct recipients of measures adopted in the WTO context.

At first glance, it seems that the lack of direct participation or global elections could pose a legitimacy deadlock for the global demos, or the global civil society. Helmut Willke in his book "Smart Governance" addresses the input legitimacy dead-end and seeks methods to "compensate for the lack of formal legitimacy and formal democratic

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[15] ULRICH BECK, WHAT IS GLOBALIZATION 70 (2000).

[16] Under this description with respect to demos the WTO falls most likely between the model of intergovernmentalism and global governance, although one could argue that the existence of protests could also bring WTO to the model of global polity. See Raffaele Marchetti, *Models of Global Democracy in Defence of Cosmofederalism*, in GLOBAL DEMOCRACY: NORMATIVE AND EMPIRICAL PERSPECTIVES 22-47, 23-27, 32 (R. Marchetti ed. 2008).

[17] Thomas Hale, *Transparency, Accountability, and Global Governance* 14:1 GLOBAL GOVERNANCE 73-94, 85 (2008).

[18] See recently Benjamin Faber, *Trade liberalization, the price of quality, and inequality: Evidence from Mexican store prices*, (2012) available at http://www.wto.org/english/news_e/news13_e/rese_12sep13_paper2_e.htm.pdf and David Tarr, *Russian WTO accession: Achievements, impacts, challenges*, WORLD BANK & OECD 5-9 (2010) on impact of Russia's accession to the WTO on Russian households. See also T. Rutherford and D. Tarr, *Poverty Effects of Russia"s WTO Accession: modeling "real households" and endogenous productivity effects*, 75:1 JOURNAL OF INTERNATIONAL ECONOMICS 131 – 150 (2008).

structures."[19] According to Willke, the main source of the legitimacy complains is that there is no global government corresponding to the global political system. In the lack of "normative authority" (majority vote), it should be replaced with forms of "cognitive authority[…], a complex interplay of minimizing doubts and maximizing revisions in the framework of "organized skepticism."[20] Formal democratic legitimacy should be replaced by "*derivatives* of (formal) legitimacy" providing also some form of accountability of the organization or the regime.[21] He identifies the WTO as an example of an institution, which develops this rationale.[22]

He explains that:

> " In more general terms, the input-legitimacy of formal democratic law becomes but one side of a polycentric architecture of sources of legitimacy, including in particular an output-legitimacy as a major form of derivative legitimacy."[23]

Willke concludes that: "…transparency, efficiency, expertise, accountability, and popularity are as much foundations of legitimacy as are nationality and democratic process."[24] Facing legitimacy problems that structurally cannot be addressed through democratic means and input legitimacy the WTO's institutional response can be to excel in other legitimacy forms.[25] The most obvious legitimacy form would be output legitimacy. Currently one of the main output legitimacy processes in international law is transparency, and considering the prominent Article X transparency obligation in the GATT it is not outside the WTO's institutional ethos to extend such principles to its own function. Transparency can contribute to the WTO's output legitimacy (and marginally,

[19] HELMUT WILLKE, SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY 8(2007).
[20] Id. 45.
[21] *Id.* 46 emphasis in the original.
[22] *Id.* 76.
[23] *Id.* 94.
[24] *Id.*
[25] By analogy the argument in the EU has been discussed by FRITZ W SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999) as well as Andrew Glencross, *Democratic Inputs versus Output-Oriented Governance: The ECB's Evolving Role and the New Architecture of Legitimacy in the EU* <www.researchgate.net/profile/Andrew_Glencross/publication/270338057_Democratic_Inputs_versus_Output-_Oriented_Governance_The_ECB%27s_Evolving_Role_and_the_New_Architecture_of_Legitimacy_in_the_EU/links/54a7c0030cf257a6360ad46d.pdf> p.24

with *amicus* briefs to its input legitimacy). In the legitimacy debate within the WTO, transparency in its different forms serves as an output legitimacy component (through Article X, the constant updating of the WTO website, and the public broadcasting of meetings of various WTO bodies). It simultaneously serves as an expression of input legitimacy, through the submission of *amicus curiae* briefs. The costs of publication are continuously reduced because of information technology developments. Also, countries that publish their rules and administrative procedures related to trade become potentially more investor-friendly[26]. However, costs remain high for developing and least developed countries who still suffer from huge infrastructural deficits and need assistance to overcome them.

Overall, input and output legitimacy forms imply that independent of the WTO member states and whether the government representatives in the WTO are elected through democratic processes or not, the WTO, in absence of a global democracy has developed a proto-form of substitutes to its lack of democratic legitimacy. Transparency is currently the most significant of these substitutes, possibly the only one that is as prevalent.

Transparency can produce two other forms of legitimacy. First, process, or throughput legitimacy, which echoes the domestic rule of law in decision-making processes. Kjaer's analysis approximates a definition of such process legitimacy:

> "The question of legitimacy is therefore reduced to an evaluation of the ability of the relevant legal infrastructure to ensure that the perspectives emerging from different societal spheres are in concordance or to put it another way: that the legal infrastructure can achieve convergence between the different perspectives of science, environment, health, economics and politics. Taking the complexity of the issues and the multitude of perspectives into consideration, constant convergence is an unlikely outcome. […] Hence the classic distinction between input and output legitimation is replaced by an understanding of the process itself as the central source of legitimacy." [27]

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[26] Ljiljiana Biukovic, *Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan*, 11:4 J. INT'L ECON. L. 803-825 (2008).

[27] POUL F. KJAER, BETWEEN GOVERNING AND GOVERNANCE: ON THE EMERGENCE, FUNCTION AND FORM OF EUROPE'S POST-NATIONAL CONSTELLATION 137(2010).

However, Vivien Schmidt cautions against this substitution. As this is the most incomplete legitimacy form, it cannot replace neither input or output legitimacy deficits.[28] As such the WTO cannot rely, and this is evident from its current legitimacy deadlocks, in mere publication of documents or following established procedures in order to solve its legitimacy problems.

Finally, to the extent that transparency is part and parcel of WTO official rhetoric and a general institutional commitment, transparency becomes an integral element of the organization's mission legitimacy.[29] In the WTO context, the link between transparency and mission legitimacy does not signal towards the organization's "destiny" nor does it point to a "promised land."[30] Rather, it reaffirms trust and openness as the foundations of the international trading system. Historical periods that preceded both the GATT and the WTO, namely the Second World War and the Cold War, were characterized by historians as "dark times." Consequently, the two international trade structures that emerged after the end of obscurity have an inherent disposition towards openness, participation and transparency.

Form of legitimation	**Expression**	**WTO form**	**Legitimacy Classification**
Vertical legitimation	Incomplete secondary vertical legitimation	National legitimacy processes of WTO member states' governments	Input
Executive representation	General Council, Ministerial Conferences	Internal transparency, consensus and meaningful decision-making	Input, Throughput, Mission
Horizontal mutual control	Permanent in trade review bodies and mechanisms, exceptional during the	Legal and administrative transparency	Output, Throughput

[28] Vivien A. Schmidt, *Forgotten Democratic Legitimacy: "Governing by the Rules" and "Ruling by the Numbers" in the Euro Crisis* in THE FUTURE OF THE EURO" (M. Blyth & M. Matthijs eds. forthcoming, 2015 Final Draft for Chapter on file with the author)
[29] J.H.H. Weiler *60 Years since the First European Community: Reflections on Messianism*" 22 EUR. J. INT'L L. 303-311 (2011), and Gráinne de Búrca, *Europe's Raison D'Etre* NEW YORK UNIVERSITY PUBLIC LAW AND LEGAL THEORY WORKING PAPERS Paper 385. http://lsr.nellco.org/nyu_plltwp/385 (2013)
[30] J.H.H. Weiler *60 Years since the First European Community: Reflections on Messianism*" 22 EUR. J. INT'L L. 303-306 (2011).

	DSU process		
Associative and expert representation	Amicus curiae briefs, expert testimonies, NGO participation in Ministerials etc.	External and administrative transparency	Input, Throughput
Individual-Rights' based legitimacy	Publication of WTO documents, national inquiry points, Article X and equivalents national administrative and adjudicatory recourse mechanisms	External and legal transparency	Output, Throughput, Mission

Table 11 Legitimacy classifications of different transparency forms

All forms of legitimacy that are mentioned in table 11 are currently deficient and incomplete in the WTO. Their existence however demonstrates that there is potential to fix many extant problems in the organization. Transparency cannot be an *ad hoc* or *de facto* substitute for direct democracy deficits in the WTO. Rather, only a coordinated and committed change of direction in *all* transparency forms has the potential to act as an efficient legitimacy substitute and remedy the deficits outlined in the introduction. The WTO's performance on transparency is far from optimal. Consequently, such improvements would improve the legitimacy status of the organization. Most important is for the WTO officials to be aware of inconsistencies with respect to transparency. The same applies for the Appellate Body, as it chose to engage with external transparency: insisting that civil society should be heard means that its voice should be considered seriously and answered in case law. As we saw, such briefs have only been meaningfully integrated in WTO case law very few times. However, the overall approach of the Panels and the Appellate Body creates the necessary conditions for such input legitimacy. Allowing for a narrow and undisputedly open window for submission of briefs based on a practical standpoint – the determination of likeness in products – aspires to harvest the opportunity that the Panels and Appellate Body have chosen to leave open.

Conclusion

This doctoral dissertation has attempted to collect and discuss all the transparency elements that appear in the context of the WTO. As an academic project it aspires to act as a foundation for a systematic review of the WTO's performance on transparency and the improvement of all the problematic areas. In view of the Doha deadlock the WTO's role as a negotiation forum for multilateral agreements will subside in the next decade. However, its monitoring function will continue, and perhaps will redirect the mandate of the organization from trying to promote trade liberalization to maintaining a forum of information, which can be mainly useful to the WTO's global citizenry.

First, transparency has received a lot of attention recently in Public International Law, International Relations and International Economic Law. I expect that there will be a proliferation of systematic attempts to assess the position of transparency in other transnational regimes as the field grows bigger and extends beyond the more limited international/global administrative law analysis.

Second, as international organizations (and international financial institutions more specifically) have suffered from legitimacy crises at a more structural level in the last three decades, works geared towards tracing and evaluating democratic elements in multifaceted principles of these organizations will multiply. By exploring transparency in all its manifestations, this thesis aspires to provide a model of analysis of composite democracy at a transnational level, and a case for comparison with other international organizations, which also lack direct electoral legitimacy.

Lastly, this analysis can be useful for other international organizations in the context of global governance. The WTO exhibits many of the elements of a global governance system or regime and transparency contributes an important aspect, that of legitimacy substitution. Moreover, it is indicative of the dynamic process that David Kennedy describes when he discusses global governance. According to Kennedy:

> "We will need to think of our work on global governance not only as description, but also as program for a world in transition. At the same time, of course, any such program will be but one among many, and will find itself pushed and pulled by the projects and priorities of all the other actors on the field. We will need to think about global governance as a dynamic process, in which legal, political and economic arrangements unleash interests, change the balance of forces, and lead to further reinvention of the governance scheme itself."[1]

Willke in the same spirit notes that:

> Global governance consists in large parts in creating governance regimes for global contexts by establishing organizations (institutions), structures, processes and rule systems that have the capabilities to provide intelligent decisions for highly complex and concatenated problems.[2]

The transnationalization of legal relationships in the WTO context enables the emergence of a number of hybrid, public-private forms of participation in the global trade order. As such, a global governance regime describes the current state of the WTO. It differs from the international regimes because of a number of additional elements present in the WTO and evident through the transparency analysis. Considering the transnationalization of legal relationships, participation to the WTO is not static, but to some extent includes civil society stakeholders and other transnational actors. This element is very crucial for a global governance regime. Exclusion of civil society actors is reminiscent of the old Westphalian international organization instead of a global governance regime. To this day, direct and indirect participation of non-state actors *lato sensu* in the WTO has taken all the different forms that the transparency analysis shows.

It remains a fact, however, that the WTO is a member-driven organization. With this analysis, I do not negate the relevance of Westphalian state and the results of

[1] David Kennedy, *The Mystery of Global Governance*, 34 OHIO NORTHERN U. L. REV. 827-860, 832 (2008).
[2] HELMUT WILLKE, SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY 42 (2007).

multilateralism. [3] It is important at the same time to internalize levels of governance that extend beyond the nation state. NGOs and the amorphous maze of the global civil society, either in the form of consumers or in the form of protestors, are relevant to the WTO. [4] This analysis points towards ways by which the nation state has bound itself contractually that result in creating rights and information processes for individuals, corporations and NGOs (and other actors). Such state- non-state interactions at the international level make relationships incontestably transnational. The WTO is also responsive to global civil society, aware of the criticism and making efforts to address it at some level.[5] The WTO consists of member states whose constituencies are aware of the WTO and the way it works. Current technology and the WTO practice of publication online allows for information on international trade regulation to travel instantly and for a nominal cost. This flow of information increases the requests for transparency.[6] Thus transparency, which allows for information and the development of knowledge networks at a national and a global level matters a lot for the characterization of a organization as a global governance regime. Moreover, WTO has developed over the years many transnational properties and secondary participation mechanisms for civil society actors and industry representatives, also contributing to its transparency commitment. The dynamic process of global governance regime formation, as well as the evolution of transparency can be useful for other international regimes to embrace hybrid democratic forms through output legitimacy.

This thesis focused on a socio-legal assessment of democratic elements or traces that were achieved in the WTO context through consensus and can be expanded through the

[3] See AM- Slaughter, the emergence of a global rule of law coupled with the nation state structures where the "bearers" of sovereignty will be "disaggregated government institutions." That may be the near future of international trade regulation. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 261 (2005).
[4] Achilles Skordas, *Self-determination of peoples and transnational regimes: a foundational principle of global governance*, *in* TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS 207-268, 253 (N. Tsagourias ed. 2007).
[5] See also here HELMUT WILLKE, SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY 168 (2007) on political inclusion of intelligent governance regimes.
[6] See Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L & FOREIGN AFF. 1-21, 1 (1998-1999).

WTO processes.[7] Through this analysis I hope to shed light onto patterns of development of principles into legal norms. Further, I propose that efforts for reform of the WTO can concentrate in already functioning processes. Thus future proposals for reform can explore regulatory spaces where different elements of input and output legitimacy can exist, potentially adding to the democratization of international law. The challenge, of course, remains: to find practical ways to improve the WTO's transparency track record. This can help create permanent links between output legitimacy and hybrid forms of global democracy. This may be the future of global democratic structures, at least in the short term.

[7] Susan Rose-Ackerman & Rory Truex, *Corruption and Policy Reform* YALE LAW & ECONOMICS RESEARCH PAPER No. 444. http://ssrn.com/abstract=2007152 on the mutual impact of how non-democracies benefit from public accountability and transparency.

Table of Abbreviations

ACWL	Advisory Centre on WTO Law
ATC	Agreement on Textiles and Clothing
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GAL	Global Administrative Law
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade (1947 as amended)
GDP	Gross Domestic Product
IMF	International Monetary Fund
IOs	International Organizations
IPA	International Public Authority
IPL	International Public Law
LDCs	Least Developed Countries
MFN	Most Favored Nation
NGOs	Non Governmental Organizations
PTAs	Preferential Trade Agreements
RTAs	Regional Trade Agreements
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on the Technical Barriers to Trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Commission on Trade and Development
US	United States of America
WTO	World Trade organization