



Research article

The power of transparency norms in the WTO legal framework: Impacts beyond the trade context

Long Van Tran*

Yokohama National University, Yokohama, Kanagawa, Japan

*Email: tran-van-rz@ynu.jp

Abstract

Beyond trade facilitation, transparency norms in the WTO legal context are, implicitly and explicitly, aimed at addressing problems in the domestic administrative laws of its members. Through the lens of global governance, this article attempts to shed more light on the power of transparency norms enshrined in multilateral trading agreements under the aegis of the WTO. In this global ruled-based system, transparency has become sufficiently powerful to be a multifunctional instrument for promoting the rule of law, good governance, and democracy.

Keywords: WTO, transparency, good governance, the rule of law, global administrative law

Cite this article as: Van Tran L. The power of transparency norms in the WTO legal framework: Impacts beyond the trade context, *International Review of Law* 2016;iit.2 <http://dx.doi.org/10.5339/irl.2016.iit.2>.pp1–24

Introduction

Despite continuing debates about whether Western liberal democratic values explicitly conflict with Eastern culture in developing countries, Western transparency norms have recently become internationally and domestically accepted and are considered to be a key component of good governance and public policy in both public and private sectors. Christopher Hood and David Heald have labeled the recent emphasis on transparency “quasi-religious in nature.”¹ Transparency is the *sine qua non* for democracy, a *panacea* for fighting corruption and bad governance. As with other “religious” manifestations, though, the nature and reach of transparency is not always clear. This article seeks to probe the sources, adoption, and likely impact of transparency norms.

Demands for greater transparency adhere inevitably to what many commentators agree is a fundamental human right: Freedom of Information (hereinafter, FOI). In Article 19 of the Universal Declaration of Human Rights (UDHR), adopted by the United Nations (UN) General Assembly on December 10, 1948,² the international community collectively defined the basic rights of every individual worldwide as including:

the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.³

Professor Ann Florini has stated that Article 19 defined the link between the right to know and the right to speak.⁴ A free press is useless without the freedom to be informed.

From a broader perspective, many scholars have argued that the right to access documents held by authorities needs to be globally recognized as a fundamental human right for several reasons, such as guaranteeing full participation in political activities⁵ and assuring the functioning of democracy.⁶ More specifically, Mark Bovens (2002) has emphasized that information rights should be considered as an element of citizenship, a part of constitutionally-regulated civil rights establishing a crucial step toward correcting existing problems of accountability.⁷

After World War II, under the aegis of globalism, transparency, along with the right to know, became a hot topic in international law. This norm has increasingly spread from the West to the rest of the world through international organizations (hereinafter, IOs). The New World Order, which has gradually shifted from coexistence to cooperation, has facilitated this cooperative tendency. Transparency is demanded, in order to compensate for the lack of a full-fledged international system of checks and balances.⁸ To date, transparency norms have gradually been endorsed and adopted by such pillars of the international economy as the International Monetary Fund (IMF), the World Bank (WB), and the World Trade Organization (WTO)—the focus of this article.

¹TRANSPARENCY: THE KEY TO BETTER GOVERNANCE 135 (Christopher Hood & David Heald, eds., Proc. British Acad. Ser. 2006).

²G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-on-human-rights/index.html>.

³*Id.* art. 19.

⁴THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD (Ann Florini, ed. 2007).

⁵TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY (2d ed. 2008).

⁶Article 19 Global Campaign for Free Expression, *The Public's Right to Know: Principles on Freedom of Information Legislation* (1999), <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>.

⁷Mark Bovens, *Information Rights*, 10 J. POL. PHIL. 317, 341 (2002).

⁸Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, in TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters, eds., 2013).

Many scholars have highlighted the role of the WTO as a “policy-anchor.”⁹ In the WTO legal context, transparency norms, from Article X of the 1947 General Agreement on Tariffs and Trade (GATT)¹⁰ to Article X of the 1994 GATT,¹¹ have regularly been utilized by developed countries, whose strong economic power and reputations within the international community have then enabled them to impose their standardized policies on the WTO’s legal system.¹² As a result, to be accepted as a new WTO member, developing and transition state members must accept and internalize these unfamiliar policies in order to meet the demands of global integration and economic promotion. In imposing such requirements, the WTO has clearly become a mechanism by which international norms originating in Western industrialized countries have been imposed; these are then adopted by weaker members with varying degrees of enthusiasm.

Together with other WTO principles, transparency norms were expected to significantly promote trade liberalization and establish transnational economic interdependence. It is becoming increasingly clear, however, that the impact of the WTO norms goes beyond the trade context. A growing number of empirical studies have examined other potential or actual impacts of WTO regulations and obligations on developing countries. For instance, the WTO could directly promote and disseminate values of good governance through its functioning and decision-making to help consolidate its institutional and regulatory capacities in developing countries.¹³ Susan Ariel Aaronson and Abouharb have argued that while the WTO does not tend to explicitly affect the governance of its member states, group of states in negotiating processes and new state members all have moved toward a more transparent society by improving their policies on access to information.¹⁴ In other words, WTO regulations and obligations have indirectly resulted in governmental change.

More specifically, some contemporary scholars have analyzed the impact of WTO accession on the promotion of democracy and legitimacy. Professor Padideh Ala’i has mentioned the role of WTO jurisprudence underpinning in Article X of GATT, which concerns transparency and due process in consolidating good governance both internationally and domestically.¹⁵ Other scholars have stressed the positive impacts of transparency norms and other WTO actions on anticorruption efforts and democracy-

⁹See Sudip Ranjan Basu, *Does WTO accession affect domestic economic policies and institutions?* (UN Conf. on Trade & Dev., Geneva, HEI Working Paper No: 03/2008, Feb. 14, 2008), http://repec.graduateinstitute.ch/pdfs/Working_papers/HEIDWP03-2008.pdf; Michael J. Ferrantino, *Policy Anchors: Do Free Trade Agreements and WTO Accessions Serve as Vehicles for Developing-Country Policy Reform?* (Off. Econ., U.S. Int’l Trade Comm’n, Working Paper No. 2006-04-A, Apr. 2006), <https://www.usitc.gov/publications/332/EC200604A.pdf>; Sam Laird, *WTO Rules and Good Practice on Export Policy* (WTO Trade Pol’y Rev. Div., Staff Working Paper TPRD9701.WPF, March 1997), https://www.wto.org/english/res_e/reser_e/tprr9701.pdf; Robert Wolfe, *Regulatory Transparency, Developing Countries, and the Fate of the WTO*, 2 *WORLD TRADE REV.* 157 (2003).

¹⁰General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (GATT 1947), https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

¹¹The 1994 GATT adopted the provisions of the 1947 GATT, “as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement”, https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm. See also the Marrakesh Agreement, which resulted from the Uruguay Round and established the WTO and acknowledged the continuation of, and updates to, the GATT. Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 1867 U.N.T.S. 154, <https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf>.

¹²Alasdair Roberts, *A Partial Revolution: The Diplomatic Ethos and Transparency in Intergovernmental Organizations*, in *TRANSPARENCY AND SECRECY: A READER LINKING LITERATURE AND CONTEMPORARY DEBATE* 67 (Suzanne J. Piotrowski, ed. 2010).

¹³Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, in *THE FUTURE OF INTERNATIONAL ECONOMIC LAW* (William J. Davey & John Jackson, eds., 2008).

¹⁴See Susan Ariel Aaronson & M. Rodwan Abouharb, *Does the WTO help member states improve governance?* 13 *WORLD TRADE REV.* 547 (2014).

¹⁵Padideh Ala’i, *The WTO and the Anti-Corruption Movement*, 6 *LOYOLA UNIV. CHICAGO INT’L L. REV.* 259, 278 (2008).

building in developing and transition countries. Some examples of these actions are the accession procedures,¹⁶ the Trade Policy Review Mechanism (TPRM),¹⁷ and various implicit WTO agreements.¹⁸ Obviously, analyzing the impact of norms on a given state must inevitably and initially be contextualized to local legislation and political orientation.

Significantly, the Doha Ministerial Declaration of 2001 defined transparency as one of three vital elements of trade liberalism.¹⁹ Beyond trade, as asserted in the Report of the Consultative Board to Director-General Supachai Panitchpakdi (Sutherland Report), transparency is key to addressing issues relating not only to the governance and legitimacy of the WTO itself, but also to those of their members due to the member-driven milieu.²⁰

It is apparent that transparency policy in the WTO context has expanded beyond its focus on trade facilitation. This article will conduct a comprehensive study of the diverse aims of transparency norms in WTO jurisprudence to shed more light on the hypothesis that transparency in global trade institutions is more than just a tool for promoting trade liberalization.

Article X of GATT: The Transparency Principle for Building the Rule of Law

Article X of the GATT of 1994 (Gatt 1994) may appear to be simply a reiteration of Article X of the GATT of 1947 (Gatt 1947) without any amendment.²¹ In fact, there is an underlying legal distinction between the two articles, as affirmed in Article II:4 of the Marrakesh Agreement.²² The legal distinction results from the history of each article: Article X of GATT 1947 was explicitly enacted to serve as the Havana Charter for the establishment of the International Trade Organization (ITO). Unfortunately, the Havana Charter never came into effect, and the ITO never actually existed. Eventually, however, the conclusion of the Uruguay Round, resulting in the Marrakesh Agreement and the creation of the WTO, invoked the provisions of GATT 1947. More specifically, it was transformed in GATT 1994 from a consensus-based legal norm into a fundamental

¹⁶See Basu, *supra* note 9; Monika Bauhr & Naghme Nasiritousi, *Towards better Governments? A theoretical framework for the Influence of International Organizations* (2009 QoG Working Paper Series); Manfred Elsig, *The democratizing effects of multilateral organizations: a cautionary note on the WTO*, 12 *WORLD TRADE REV.* 487 (2013), <https://www.cambridge.org/core/journals/world-trade-review/article/the-democratizing-effects-of-multilateral-organizations-a-cautionary-note-on-the-wto/DDFAC9D7E32ED1588314ABBB996DA053>.

¹⁷Susan Ariel Aaronson & M. Rodwan Abouharb, *Does the WTO Help Member States Clean Up?* (Geo. Wash. Univ., Inst. for Int'l Econ. Policy Inst. for Int'l Econ. Pol'y Working Paper Series IIEP-WP-2014-7 (June 2014))[hereinafter Aaronson & Abouharb, *Clean Up*].

¹⁸See Steve Chamovitz, *The WTO and the rights of the individual*, 36 *INTERECONOMICS* 98 (2001), <https://link.springer.com/article/10.1007/BF02973775>; Mary Comerford Cooper, *International Organizations and Democratization: Testing the Effect of GATT/WTO Membership* (Asia Pacific Res. Ctr., April 2003); Krista Nadakavukaren Schefer, *Corruption and the WTO Legal System*, 43 *J. WORLD TRADE* 737,770 (2009); 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 LJ.* 1545, 1586 (2006).

¹⁹The other two vital elements are non-discrimination and procedural fairness. See World Trade Organization, Doha Ministerial Declaration of 20 November 2001, WTO Doc. WT/MIN (01)/DEC/1 (2001), https://www.wto.org/english/thewto_e/minist_e/mino1_e/mindecl_e.htm.

²⁰WTO Consultative Board Report, *The Future of the WTO: Addressing institutional challenges in the new millennium* (2004); https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

²¹Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 *J. INT'L ECON. L.* 779, 802 (2008); Terry Collins-Williams & Robert Wolfe, *Transparency as a trade policy tool: the WTO's cloudy windows*, 9 *WORLD TRADE REV.* 551, 581 (2010).

²²Article II:4 of the Marrakesh Agreement states, "The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A . . . is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947." Marrakesh Agreement establishing the World Trade Organization, *supra* note 11.

principle of rule-based trade policy,²³ or, in other words, “from negative regulation—what governments must not do, to positive regulations—what governments must do.”²⁴ This transformation²⁵ marked a change in the legal nature of the transparency principle from a toothless formal provision²⁶ into one of the five basic principles of the WTO and the bedrock principle for multilateral trading systems.

The transformation did not significantly alter the content of Article X, whose essence had originally been based on the 1946 US Administrative Procedures Act (hereinafter APA). In retrospect, McCubbins, Noll, and Weingast in their much-cited article,²⁷ note that the basic function of the APA was to provide political actors a useful means of monitoring bureaucratic compliance. Through the APA, politicians, in cooperation with the judiciary, use the courts to expedite their control over bureaucratic functioning. For GATT 1947, the US government, assuming it could manipulate the ITO (considered a legislative body) to control the system of bureaucracy (contracting parties), proposed this model of domestic administrative law in order to monitor the compliance of contracting parties with the Havana Charter’s provisions. In the post-World War II world, the United States was recognized as a growing global empire threatening to dominate and control most of the 23 founding Members of GATT 1947.²⁸ Therefore, the unconditional acceptance of the contracting parties to the US proposal for the publication and administration of trade regulation can, in large, be attributed to pressure from US power.

International consensus on these efforts was not only because of the hegemonic position of the US but also because of the perceived insignificance of the provision, as Ostry observes:

Article X in the GATT replicates most of the American approach. The word transparency does not appear but the article spells out in detail the rule for “publication and administration” of trade regulations with the latter emphasizing the desirability (rather than necessity) of independent tribunal and judicial review . . . [B]e that as it may, the inclusion of Article X on transparency at the time of GATT’s origin appeared to be non-controversial to the drafters of the new system, because it mainly involved reporting tariff schedules. It was non-controversial because it was insignificant.²⁹

²³Padideh Ala’i & Matthew D’Orsi, *Transparency in International Economic Relations and the Role of the WTO*, *Research Handbook on Transparency*, (Padideh Ala’i & Robert Vaughn at Am. U. Wash. C. L., eds. 2014), available on SSRN: <http://ssrn.com/abstract=2500871>.

²⁴Sylvia Ostry, *External transparency: the policy process at the national level of the two-level game*, in DOHA AND BEYOND: THE FUTURE OF THE MULTILATERAL TRADING SYSTEM (Mike Moore ed., 2004).

²⁵Linguistically, transformation means “a marked change in form, nature, or appearance.” *Transformation*, OXFORD DICTIONARIES BRITISH AND WORLD ENGLISH, <http://www.oxforddictionaries.com/definition/english/transformation> (last visited 27 July 2016).

²⁶Sylvia Ostry argues that there was no objection from any “contracting party” on the draft of Article X of GATT 1947, since they all thought that this was just a *pro forma* provision due to its lack of procedural or substantive force. See Sylvia Ostry, *Article X and the concept of transparency in the GATT/WTO*, in CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION (Sylvia Ostry, et al. eds., 2002). Consequently, GATT panels from 1947 to 1984 made no reference to it. See also Ala’i & D’Orsi, *supra* note 23.

²⁷See Matthew D. McCubbins, Roger G. Noll, & Barry R Weingast, *Administrative procedures as instruments of political control*, 3 J. L., ECON., & ORG. 243 (1987), <https://academic.oup.com/jleo/article-abstract/3/2/243/859002/Administrative-Procedures-as-Instruments-of-redirectedFrom> = PDF.

²⁸On 1 January 1948, GATT 1947 entered into force. The 23 founding Member states were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States. WTO Press Brief, Fiftieth Anniversary of the Unilateral Trading System, https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm.

²⁹Sylvia Ostry, *Convergence and sovereignty: Policy Scope for Compromise?*, in COPING WITH GLOBALIZATION 52 (Aseem Prakash & Jeffrey A. Hart eds. 2003).

In actual practice, the political doctrine of separation of powers embodied in the US Constitution and that underlay Article 10 was impossible to apply to GATT 1947 because it had neither any formal organizational status as a legislative body (because of the nonexistence of the ITO), nor did it consider any official procedures for dispute settlement by an independent judiciary.³⁰ Fortunately, the US government had successfully provided models for administrative procedure and international trade law, whereby “emphasis on transparency, fairness, and access to the courts has increased the accountability, fairness, efficiency, and acceptability of a wide range of government decision making.”³¹ As a result, despite the incompatibility of Article X with the underlying GATT structure, its adoption has played a significant role in shaping so-called global governance.

The transparency norms embodied in Article X of GATT 1947 have, undeniably, become important for international trade regimes since the establishment of the WTO in 1995. Clearly, Article X of GATT 1994 is aimed at promoting transparency and building an environment of trust among member states.³² Since the mid-nineties, many legal and political scholars have praised the transparency norms as a multifunctional tool that can bring fruitful outcomes. For instance, Chamovitz considers the WTO’s transparency regulations “one of the most positive but least known features of WTO law” that can impact human rights around the world.³³ Howse believes that transparency norms help enhance democracy in countries abiding by the WTO legal system.³⁴

This paper argues that the spirit of Article X of GATT 1994 is to promote the rule of law in the WTO context. As background, the concept of the rule of law originated in Anglo-Saxon legal systems³⁵ and is found in the constitutions of Western countries as a supreme legislative principle with respect to equality, human rights, stability, and predictability of legal systems (or due process). Carothers asserts that the rule of law is a core principle of a legal system that consists of three elements: (1) clear, fair, and effective laws, in which political and civil liberties are enshrined; (2) fair, competent, and efficient central institutions, including a judicial branch that must be independent; (3) officials and public servants who have to be accountable to the law.³⁶ Similarly, in international law, the United Nation’s Secretary-General defines the rule of law as a “principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”³⁷

³⁰In fact, there was a dispute settlement system under GATT 1947 based on its Articles XXII and XXIII, but it was weak, ineffective, and non-binding. Professor William J. Davey states that “[A]rticle XXIII only outlines how disputes are to be processed in the GATT system, it does not establish any formal procedures for handling them . . . [f]rom the outset it was evident that a general meeting of all contracting parties would be ill-suited to consider disputes.” William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT’L L. J.* 51, 109 (1987). Then such procedures had to wait until the Uruguay Round 1994. For more details, see WTO, *Dispute Settlement System Training Module, Chap. 2, Historic development of the WTO dispute settlement system*, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm (last visited 29 July 2016).

³¹Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 *ADMIN. L. J. AM. U.* 65, 80 (1996).

³²Weiss & Steiner, *supra* note 18, at 1456.

³³Chamovitz, *supra* note 18, at 100.

³⁴Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 *MICHIGAN L. REV.* 2329, 2357 (2000).

³⁵This concept originated in 1215, when King John of England signed the Magna Carta (or Great Charter), in which “due process” was first mentioned. The Magna Carta in England and subsequent Bill of Rights of American jurisprudence have been recognized as emblems of the rule of law. For more information, see ABA Division for Public Education, *Part I: What is the Rule of Law?*, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> (last visited 29 July 2016).

³⁶Thomas Carothers, *The Rule of Law Revival*, 77 *FOREIGN AFFAIRS*, 95, 106 (1998).

³⁷U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, ¶ 6, U.N. Doc. S/2004/616* (August 23, 2004).

From foregoing core ideas, the World Justice Project³⁸ developed the four principles of the rule of law: regulatory quality, government accountability, due process, and an effective and independent judiciary. Following this definition, unquestioningly, Article X of GATT 1994 is aimed at promoting the rule of law within member states, specifically transition countries, under the naïve Western assumption that the rule of law is “*an elixir*” to improve economic performance. The following table presents this hypothesis as demonstrated by the implications of the rule of law in Article X of GATT 1994:

Table 1: The Rule of Law embedded in Article X GATT.

		The Rule of Law³⁹ (Defined by World Justice Project)	Article X GATT 1994
PRINCIPLES	Regulatory quality	The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property	Laws shall be published promptly. Agreements affecting international trade policy shall also be published. (Article X:1)
	Due process ⁴⁰	The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.	Each contracting party shall administer all its laws in a uniform, impartial, and reasonable manner. (Article X:3)
	Accountability	The government and its officials and agents, as well as individuals and private entities, are accountable under the law.	The central administration may take steps to obtain a review of a matter in another proceeding if there is good cause to believe that the decision in the matter is inconsistent with established principles of law or the actual facts.
	Independent judiciary	Justice is timely delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.	Institute judicial, arbitral, or administrative tribunals or procedures that shall be independent of the agencies entrusted with administrative enforcement. (Article X:3)

³⁸An independent, multidisciplinary organization working to advance the rule of law around the world. Official website: <http://worldjusticeproject.org/>.

³⁹WTO Analytical Index: GATT 1994, General agreement on Tariffs and Trade 1994, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_04_e.htm; cf. <http://worldjusticeproject.org/what-rule-law> (last visited 29 July 2016).

⁴⁰A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one’s life, liberty, or property.

The first paragraph of Article X prominently introduces the principle of publicity that is associated with the right to know, despite the fact that the text of Article X explicitly limits the scope of public disclosure to laws or regulations related to “customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor [sic], or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.”⁴¹ The term “transparency” is not even explicitly used, but the foundational features of transparency (publicity and disclosure) obviously impact domestic administrative law to some extent. Practically, to adapt to (or comply with) the requirements of Article X, states have to institutionalize or internalize transparency norms by enacting FOI laws or administrative procedure acts and the like. Interestingly, Article X directly creates horizontal transparency to protect the interests of traders and investors of its member states (trade facilitation), but also indirectly impacts legal reform in transition states in favor of upward and in/outward transparency, thus eventually contributing to the respect for human rights (the right to know).

In fact, Article X has regularly been invoked to address the individual right of access to information of “traders,” “investors,” or “importers” and the like. Of course, the WTO and its Appellate Body always perceive that they cannot and should not go beyond their mandate to address issues irrelevant to trade, such as human rights or democracy. However, the principle of publicity embedded in Article X indirectly affects the domestic legal systems by requiring respect for the right to know, or FOI.

Even though the relevance of human rights in Article X has never been directly referred to in WTO jurisprudence, many scholars have emphasized that there is growing awareness in the WTO that standards of accountability “potentially provide an independent source of legitimacy, derived not just from states, but directly from citizens.”⁴² WTO leaders believe that transparency is an indispensable condition for democratic accountability, and that by engaging in transparency, “good faith” will likely emerge. In this sense, the WTO attempts to promote input legitimacy not only in its decision-making process, but also through members’ domestic law-making procedures. Hence, we can see a similarity in purpose between building public trust through the EU’s transparency initiatives and promoting “good faith” through WTO transparency norms.

It is striking that the WTO Appellate Body and Panel have scarcely mentioned the term “accountability” in their reports, but have regularly addressed the obligations of government and bureaucrats to account for their activities and transparently disclose their functioning. Take, for example, *Dominican Republic — Import and Sale of Cigarettes* (2005), in which the Panel decreed, “In order to become acquainted with the process of establishing the tax base for the application of the Selective Consumption Tax on cigarettes, governments

Footnote continued

Also, a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious.” *Due Process of Law*, WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008), <http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law>.

⁴¹In *EC — Selected Customs Matters*, the Panel found that “[L]aws, regulations, judicial decisions and administrative rulings of general application” described in Article X:1 of the GATT 1994 are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application.” Panel Report, *EC—Selected Customs Matters*, ¶ 7116, WTO Doc. WT/DS315/R (adopted 16 June, 2006).

⁴²Elizabeth Smythe & Peter J. Smith, *Legitimacy, transparency, and information technology: The world trade organization in an era of contentious trade politics*, 12 GLOBAL GOVERNANCE: REV. MULTILATERALISM & INT’L ORGS. 31, 53 (2006).

and traders would be entitled to obtain information on the results of the survey, as well as on the methodology used in order to conduct the survey.”⁴³ In other words, the competent authorities are responsible for comprehensively disclosing their conduct, processes, and methods in favor of the right to know. Similarly, in *Thailand — Cigarettes (Philippines)* (2011), the Panel reiterated the importance of the publication and disclosure of governmental information in a clear and adequate manner:

We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted.⁴⁴

In these two cases, the panel seized on the words and phrases “published promptly” and “to become acquainted” to obligate authorities or bureaucracies to account for what they have done. The principle of publicity therefore expanded not only from the publication of policy but also from accountability for how policies are made. Wolfe (2013) argues that transparency is a political environment through which citizens hold their governments accountable, and transparency today consists of three dimensions: predictability, simplification, and accountability.⁴⁵ Article X should thus be taken into account as a manifestation of these principles of the rule of law.

“Due process” is a term used frequently in WTO panel reports referring to Article X of GATT. One of the most clearly declared aims was in the *EC — Selected Customs Matters* (2006) where the Panel concluded that Article X:3 needed to be acknowledged in the context of the following provision: “Article X of the GATT 1994 contains a ‘due process theme’, which suggests that the aim of Article X:3 is to ensure that traders are treated fairly and consistently when seeking to import from or export to a particular WTO Member.”⁴⁶ More clearly, in *US — Underwear* (1997), the Appellate Body asserted the important principle of due process concealed in the spectrum of Article X as follows:

Article X:2, General Agreement, may be seen to embody 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.⁴⁷

Professor Padideh Ala’i (2008) notes that the Appellate Body has broadened the applicability of Article X to include domestic administration and the rights of citizens of all member states.⁴⁸ Therefore, the interpretation of WTO jurisprudence requirements relating to due process in the system of laws, regulations, judicial decisions, and administrative rulings embedded in Article X are demonstrated through improvements to the rule of law in domestic administrative law systems.

Regarding the principle of an independent judiciary, Article X:3(b) and (c) unfortunately cannot impose compulsory regulations mandating independent tribunals and administrative reviews. Instead, Article X calls on each member state to institute judicial or administrative tribunals “as soon as practicable” to

⁴³Panel Report, *Dominican Republic — Import and Sale of Cigarettes*, ¶ 7.407, WTO Doc. WT/DS302/R, (adopted 26 Nov. 2004).

⁴⁴Panel Report, *Thailand — Cigarettes (Philippines)*, ¶ 193, WTO Doc. WT/DS371/R (adopted 15 Nov. 2010).

⁴⁵Robert Wolfe, *Regulatory Transparency*, *supra* note 9, at 182.

⁴⁶*Selected Customs Matters*, *supra* note 41, ¶ 193.

⁴⁷Appellate Body Report, *US — Underwear*, 21, WTO Doc. WT/DS24/AB/R (adopted Feb. 10, 1997).

⁴⁸Padideh, *Periphery*, *supra* note 20, at 782.

independently review administrative actions. This weakness could be attributed to inconsistency among the domestic legal infrastructures of state members.⁴⁹ Moreover, the WTO does not explicitly intend to interfere in the domestic polity of member states, including the procedural rules for institutional structures. For example, in *Thailand — Cigarettes (Philippines)*, the Panel tried to limit the scope of the application of prompt review mentioned in Article X:3(b) as follows:

[W]e are of the view that Article X:3(b) of the GATT 1994 requires a WTO Member to establish and maintain independent mechanisms for prompt review and correction of administrative action in the area of customs administration. However, neither text nor context nor the object and purpose of this Article require that the decisions emanating from such first instance review must govern the practice of all agencies entrusted with administrative enforcement throughout the territory of a particular WTO Member.⁵⁰

As a result, the provisions of Article X:1, 2 can be deemed to be transparency obligations, whereas those of Article X:3 may be considered a set of recommendations rather than requirements for states. The Appellate Body has attempted to find an amicable solution to this inconsistency by interpreting Article X through litigation. In *EC — Selected Customs Matters* (2006), the Panel pointed out that “in some WTO Members, administrative action relating to customs matters may be reviewed by the same administrative authority,”⁵¹ but this kind of review is not allowed under Article X:3(b) of GATT 1994 due to the absence of independence. Thus, the Panel provided a definition of “independent review” as “free of control or influence from the administrative agencies whose decisions are the subject of review, [so as to act] with freedom in institutional and practical terms from interference by the agencies whose decisions are being reviewed.” No mechanism was proposed for independent tribunals or administration under this interpretation.

In sum, the intention of Article X of GATT (both 1947 and 1994) was to provide compelling requirements (or suggestions) for enhancing the rule of law within WTO state Members. We can see that Article X of GATT was easily accepted by all contracting parties in Geneva for the following reasons:

- (1) The insufficient legal force of Article X:3
- (2) The many potential benefits of the rule of law promoted by Article X and transparency principles, including trade facilitation, democratization, and good governance, as noted by Carothers.⁵²

Article X of GATT is not *sui generis*. The WTO right to know, notification, publication, and other transparency-related provisions are enshrined in many other different WTO agreements with different dimensions, including the General Agreement on Trade in Services (GATS),⁵³ the Technical Barriers to Trade (TBT) Agreement,⁵⁴ and the Sanitary and Phytosanitary (SPS) Measures Agreement.⁵⁵

⁴⁹Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 U.C.L.A. J. INT'L L. & FOREIGN AFFAIRS 1, 21 (1998) [hereinafter, Ostry, *China and the WTO*].

⁵⁰*Cigarettes*, *supra* note 43, ¶ 7.1053.

⁵¹*Selected Customs Matters*, *supra* note 40, ¶ 7.520.

⁵²Carothers, *supra* note 35, at 99.

⁵³General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B (15 Apr. 1994), https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm.

⁵⁴Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (15 Apr. 1994), https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

⁵⁵Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (15 Apr. 1994), https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

Transparency and due process requirements in Annex 1A Agreements: Addressing good governance in domestic administrative law

Sylvia Ostry asserts that Article X of GATT spearheaded the enabling and reform of domestic legal infrastructures, and more directly, the administrative law practices of Member states.⁵⁶ Administrative harmonization is aimed at facilitating multilateral trade and requiring domestic administrative regimes to be reformed toward good governance. Ala'i and D'Orsi argue that beyond Article X of GATT, other Annex 1A Agreements also embrace many provisions addressing transparency and due process not directly linked to Article X.⁵⁷ In fact, Article X of the GATT has been perceived as a general benchmark, or even a slogan, for the propaganda of transparency. Therefore, Article X, *ipso facto*, is not likely to promote good governance significantly and effectively within Members without the system of notification obligations found throughout other Annex 1A Agreements.

Notification Obligations: Enhancing the Legitimacy of the Domestic Administrative Process

Under the title "Transparency," Article 7 of the SPS Agreement includes the following provision: "Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures." Correspondingly, Member states have to meet requirements embedded in Annex B, including publication, notification, and establishment of enquiry points. Needless to say, WTO's attempts to address the administrative legal systems of its Members were intended to enhance not only transparency between countries but also within countries, preventing internal discrepancies by imposing the principle of regulatory transparency. As Wolfe observes, "transparency between countries appears easier than transparency within countries."⁵⁸ Annex B provisions are easily adapted by countries that are Members of the OECD or EU, but developing countries may find them difficult to comply with. Annex B-1 of the SPS Agreement mandates that states "shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them,"⁵⁹ echoing verbatim Article 9 of GATT relating to publication. Due to the inconsistency and unpredictability in the legal infrastructures of some Members, specifically developing countries, Annex B-2 of the SPS Agreement provides flexibility in the amount of time allowed "between the publication of a sanitary or phytosanitary regulation and its entry into force."⁶⁰ As a result, Annex B-2 threatens to "soften" the transparency requirements of Article 7.

In *India — Agricultural Products* (2014), the Panel examined the relationship between Article 7 and Annex B-2:

Article 7 of the SPS Agreement requires Members to notify changes in their SPS measures and to provide information on their SPS measures "in accordance with the provisions of Annex B".

Therefore, Article 7 must be read together with the provisions of Annex B of the SPS Agreement.

⁵⁶Ostry, *China and the WTO*, *supra* note 49, at 20.

⁵⁷Ala'i & D'Orsi, *supra* note 23, at 371.

⁵⁸Wolfe, *Regulatory Transparency*, *supra* note 9, at 170.

⁵⁹SPS Agreement, *supra* note 55, Annex B-1.

⁶⁰*Id.*, Annex B-2.

The intertwined nature of the relationship between Article 7 and Annex B has led prior panels and the Appellate Body to find that an inconsistency with the provisions of Annex B results in an inconsistency with Article 7, and that a failure to prove a violation of Annex B results in the same failure regarding Article 7.⁶¹

Similar to what has been discussed in the case of Article X of GATT regarding the “default” inconsistency in transparency requirements, Article 7, in conjunction with Annex B, involves the same type of conflict between soft law and quasi-hard law. Again, the WTO jurisprudence has attempted to reduce the legislative inconsistency through practical regulation. Then, a strong rule-based trading system may, in turn, support the domestic administrative law system with or without relating to trade. To demonstrate this hypothesis, this paper analyzes another inconsistency in notification requirements: the confusion between SPS measures (mentioned in Article 7) and regulations (Annex B-1), inasmuch as “regulations” cannot be used as a synonym for “measures” linguistically. In order to shed light on this confusion, in *Japan – Agricultural Product II* (1998), the Panel attempted to clarify the publication and notification requirements as follows:

Therefore, in our view, for a measure to be subject to the publication requirement in Annex B, three conditions apply: (1) the measure “[has] been adopted”; the measure is a “phytosanitary regulation”, namely a phytosanitary measure such as a law, decree or ordinance, which is (3) “applicable generally.”⁶²

Therefore, the Panel has tried to interpret transparency obligations in a teleology that broadens the scope of application of Article 7 and Annex B-1 to encompass the domestic legal environment of Member states. While these notification obligations are mandated for particular areas relating to trade, they can impact the whole legal system because it consists of a close-knit network of laws, decrees, and ordinances that must be matched. Ultimately, transparency requirements enshrined in notification obligations, to some extent, positively impact domestic governance and bureaucracy.

A number of transparency provisions embedded in the TBT Agreement show the same tendency, such as: Articles 2 and 3 (technical regulations); Articles 5, 7, 8, and 9 (conformity assessment procedures); Annex 3 and Articles 10 (general transparency provisions); and 15 (final provisions).⁶³ Transparency is emphasized as a “fundamental pillar in the implementation of the TBT Agreement” by the Committee on TBT.⁶⁴ The TBT Agreement emphasizes the role of central government bodies in implementing the notification of regulations. Clearly, this centralization is intended not only to reduce costs of decisions but also to enhance the consistency of the system of TBT-related policy. Moreover, the SPS Agreement intentionally addresses the input legitimacy⁶⁵ of domestic policies relating to trade. According to Article

⁶¹Panel Report, *India – Agricultural Products*, ¶ 7.741, WTO Doc. WT/DS430/R (adopted 14 October 2014).

⁶²Panel Report, *Japan – Agricultural Product II*, ¶ 8.109, WTO Doc. WT/DS76/R (adopted 27 October 1998).

⁶³SPS Agreement, *supra* note 54.

⁶⁴WTO, Decisions and recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995 - Note by the Secretariat WTO Doc. G/TBT/1/Rev.12 (21 Jan. 2015), <http://web.wto.org.tw/Page.aspx?pid=258993&nid=13119>.

⁶⁵Input legitimacy here “means that social acceptance of the structure in question derives from a belief that citizens have a fair chance (however understood) to influence decision-making and scrutinise the results.” See Deirdre Curtin & Albert Meijer, *Does Transparency Strengthen Legitimacy? A Critical Analysis of European Union Policy Documents*, 11 INFO. POLITY 109,122 (2006).

2:2, states must issue technical regulations that are not “more trade-restrictive than necessary to fulfill a legitimate objective,” including, but not limited to, the prevention of deceptive practices; protection of human health or safety, animal or plant life or health; or the environment.⁶⁶ A corollary to this provision is that, beyond trade facilitation and the elimination of protectionism, the TBT Agreement, along with the SPS Agreement, has attempted to balance different interests in policymaking, so that technocratic input legitimacy will be enhanced. As noted by Cassese (2004):

The SPS Agreement seeks to reconcile free trade with the sanitary and phytosanitary measures necessary to protect human, animal, and plant health. The TBT Agreement seeks to balance the needs of international commerce with the safety of products and processes, because excessively and unjustifiably complex national rules governing products, processes, and methods of production might discriminate against foreign products.⁶⁷

In many cases, the domestic infrastructure of Member states cannot meet the above requirements appropriately and comprehensively. International standards from good regulatory practice will be used as a “magnetic needle” for domestic regulation, thus cultivating harmonization by regulatory standardization as provided in Article 3 of the TBT Agreement.⁶⁸ Understanding that TBT-related policy differences and divergence have resulted in the gap in comparative advantages among nations,⁶⁹ the Committee on TBT agreed that transparency and public consultation are determinant mechanisms for international standardization contributed by all Members.⁷⁰ Through democratic participation, the input legitimacy of domestic regulatory regimes is likely to be consolidated. According to Mitchell’s theory of administration legitimacy, central or local government entities of Member states, following Articles 2 and 3 of the TBT Agreement, must have the right to determine relevant regulations and must ensure that public tasks are handled according to principles of transparency, public consultation, and democratic accountability.⁷¹ In this sense, the transparency principle embodied in notification obligations is aimed at improving the legitimacy of domestic administration.

Enquiry Points: Promoting Responsiveness and Accountability

According to Article 10 of the TBT Agreement and Annex B of the SPS Agreement, each Member shall establish one enquiry point through which all reasonable questions relating to the following will receive a response:

⁶⁶SPS Agreement, *supra* note 54.

⁶⁷Sabino Cassese, *Global standards for national administrative procedure*, 68 *LAW & CONTEMP. PROBS.* 109,126 (2004).

⁶⁸According to Article 3, “Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist.”

⁶⁹Graham Mayeda, *Developing disharmony? The SPS and TBT agreements and the impact of harmonization on developing countries*, 7 *J. INT’L ECON. L.* 737, 764 (2004).

⁷⁰Secretariat—Revision, *supra* note 63.

⁷¹Joe P. Mitchell, III, *The Central Bankers: Administrative Legitimacy and the Federal Reserve System*, (25 Feb. 2000) (unpublished Ph.D. dissertation, Virginia Polytechnic Inst. & St. Univ.), <https://theses.lib.vt.edu/theses/available/etd-0305100-180653/unrestricted/Title.pdf>.

Table 2: Designated enquiry points for the TBT and SPS Agreement.

SPS Agreement	TBT Agreement
<ul style="list-style-type: none"> – Sanitary or phytosanitary regulations – Control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures – Risk assessment procedures, factors, appropriate level of sanitary or phytosanitary protection <p>The Membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.</p>	<ul style="list-style-type: none"> – Technical regulations, standards, conformity assessment procedures, or proposed conformity assessment procedures, adopted or proposed central or local government bodies, by non-governmental bodies which have legal power to enforce, or by regional standardizing bodies of which such bodies are Members or participants

These national enquiry points are a means of disseminating information on technical regulations in response to reasonable and relevant questions. Functionally, enhancing regulatory transparency by promoting maximum disclosure, predictability, and consistency of the domestic administrative law system has been emphasized in the WTO Agreement on Trade Facilitation⁷² as a mechanism for not only facilitating trade but also for monitoring the compliance. Accordingly, each member, relying on “available resources,” takes responsibility for establishing national enquiry points to provide information for interested parties or stakeholders. These enquiry points are then deemed an information channel for responding to countries or persons submitting questions,⁷³ thus mutually increasing internal and external transparency.

In “Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement,”⁷⁴ the Committee agreed that administrative responsiveness national enquiry points should be more timely: “Members are strongly encouraged to comply with the five-day deadline” by taking full advantage of information and communication technologies. (Members should use fax and email facilities or publish regulations on the internet). Clearly, information infrastructure plays an important role in promoting government responsiveness to the informational demands of countries, investors, traders, and even citizens to eliminate information asymmetries relating to trade. The WTO Committee on SPS emphasized the obligations of responsiveness:

Members are obliged to designate a single central government authority as responsible for the implementation at the national level of the provisions concerning notification procedures ... [e]ach

⁷²WTO Agreement on Trade Facilitation (TFA) (inserted into Annex 1A of the WTO Agreement 27 Nov. 2014), https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

⁷³How to apply the transparency provisions of the SPS Agreement: A Handbook prepared by the WTO Secretariat. 7,9. Sept. 2002), https://www.wto.org/english/tratop_e/sps_e/spshand_e.pdf.

⁷⁴WTO Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)*, 4, Vol. G/SPS/7/Rev. 3 (1 Dec. 2008), link available at https://www.wto.org/english/tratop_e/sps_e/decisions06_e.htm.

Member “shall ensure that one enquiry point exists” which is responsible for the provision of answers to all reasonable questions as well as the provision of relevant documents.⁷⁵

In essence, WTO transparency requirements embedded in enquiry points initiatives, to some extent, positively impact the legitimacy and democracy of Member states. In this relationship, developing countries will enjoy overall advantages: they have a right to be treated favorably, based on the provisions of special and differential treatment of developing Member states in the SPS, TBT, and other agreements, but can request technical assistance from developed Member states in building responsive regulation, including notification procedures, enquiry points, and the like. As Speer (2012) notes:

The most frequently cited reasons for promoting the implementation of participatory governance mechanisms in developing countries are that it improves public service delivery, that it empowers citizens and that it deepens democracy. More specifically, participatory governance is stated to increase local government responsiveness and accountability.⁷⁶

In thinking so, technical assistance⁷⁷ and the Code of good practice⁷⁸ in the TBT and SPS Agreements are tools of the developed world utilized as political-economic weapons to attack the circumstances of poor governance and the lack of responsiveness and accountability in developing countries. Naiki (2009) argues that SPS and TBT-related regulations provide an accountability mechanism for facilitating interactions (cooperation or coordination) among States and promoting transparency, responsiveness, legitimacy, and accountability, commonly known as democratic values.⁷⁹

With regard to these democratic qualities, the WTO Committee on SPS defined public participation as information exchange in regular biennial meetings, in which representatives of interested observers participate and discuss technical issues.⁸⁰ In spite of leaving any policy-related consideration to the Committee itself, a person responsible for enquiry points still has opportunities to respond to and account for technical issues in domestic policies, while other meeting participants can inquire, discuss, or consult on relevant matters. Public participation will thus enhance the input legitimacy of the TBT and SPS, creating the environment of responsiveness and accountability, as argued by Orden and Roberts (2007):

⁷⁵*Id.* at 1.

⁷⁶Johanna Speer, *Participatory governance reform: A good strategy for increasing government responsiveness and improving public services?* 40 *WORLD DEV.* 2379, 2379 (2012).

⁷⁷According to Ulrike Grote (2002), this technical assistance includes standards, guidelines, and recommendations issued by other international organizations, such as the Codex Alimentarius Commission, the International Office of Epizootics, the International Plant Protection Convention, the International Standard Organization (ISO), and the International Electrotechnical Commission (IEC). *Environmental and Food Safety Standards and International Trade: Concerns and Challenges for Developing Countries*, Paper presented at International Symposium Sustaining Food Security and Managing Natural Resources in Southeast Asia - Challenges for the 21st Century (8-11 Jan. 2002, Chiang Mai, Thailand), https://www.uni-hohenheim.de/fileadmin/einrichtungen/sfb564/events/uplands2002/Full-Pap-S1-3_Grothe.pdf.

⁷⁸TBT Agreement, *supra* note 54, Annex 3(b): “This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as “standardizing bodies” and individually as “the standardizing body.”).

⁷⁹Yoshiko Naiki, *Accountability and legitimacy in global health and safety governance: the world trade organization, the SPS committee, and international standard-setting organizations*, 43 *J. WORLD TRADE* 1255, 1279 (2009).

⁸⁰WTO Committee on Sanitary and Phytosanitary Measures, *supra* note 73, at 35.

International accountability is a major goal of the SPS and TBT agreements. Second, the international agreements impose administrative costs on poor countries. In exchange, poor countries ought to benefit from the agreements by gaining market access that enhances their ability to participate in world trade.⁸¹

From trade facilitation to regulatory legitimacy promotion, transparency requirements provided in many of the WTO's agreements have significantly contributed to domestic administrative laws, regulations, or rulings to advance openness, transparency, and accountability. Unfortunately, some developing countries and least developed countries (the LDCs) still have not complied with notification obligations or enquiry point requirements. According to a recent report by the Committee on SPS,⁸² as of September 15, 2014, only 152 out of 160 WTO Members had designated an "SPS Notification Authority,"⁸³ and 155 Members had provided the contact information of their Enquiry Point.⁸⁴ Six LDCs and two developing countries have not yet complied with transparency provisions adequately. Additionally, enquiry points in many developing countries and LDCs lack equipment, skillful staff, and mechanisms for effective cooperation.⁸⁵ Hence, obligations for notification and enquiry points obligations impose increasing pressure for compliance.

GATS's transparency: A reform model enshrined

As previously noted, transparency provisions embedded in GATT are more specific than those of the GATS, particularly with respect to requirements for promptly publishing "in such a manner as to enable governments and traders to become acquainted with them."⁸⁶ Also, the GATS provides weaker transparency requirements than the SPS-TBT Agreements, defining a "reasonable interval"⁸⁷ as going from the publication of the regulation until its date of effectiveness.⁸⁸ Article VI:2 of the GATS does borrow some ideas and concepts from Article X of GATT. For example, it mandates that "all measures of general application affecting trade in services must be administered in a reasonable, objective, and uniform manner" and "prompt review" by "judicial, arbitral, or administration tribunals" is necessary for administrative decisions affecting trade in services.⁸⁹ Strikingly, however, while the GATT does not use the term "transparency" in Article X (or in the text of the whole Agreement), the GATS conspicuously invokes the term "transparency" in its preamble when it references: "[w]ishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization."⁹⁰

Transparency is considered an element of good governance in the WTO context, while progressive liberalization is aimed at promoting market access with an emphasis on developing countries. But the two

⁸¹David Orden & Donna Roberts, *Food regulation and trade under the WTO: ten years in perspective*, 37 *AGRIC. ECON.* 103, 118 (2007).

⁸²Note by the Secretariat—Revision, *Overview Regarding the Level of Implementation of the Transparency Provisions of the SPS Agreement*, ¶ 2.1, WTO Doc. G/SPS/GEN/804/Rev.7 (adopted 6 Oct. 2014).

⁸³SPS Agreement, *supra* note 54, Annex b(10).

⁸⁴*Id.*, Annex b(3).

⁸⁵Grote, *supra* note 77, at 4.

⁸⁶GATT 1994, *supra* note 11, Article X:1, replicated in SPS Agreement, *supra* note 54, Annex b(1).

⁸⁷SPS Agreement, *supra* note 54, Annex b(2).

⁸⁸Panagiotis Delimatsis, *Due Process and 'Good' Regulation Embedded in the GATS—Disciplining Regulatory Behaviour in Services Through Article VI of the GATS*, 10 *J. INT'L ECON. L.* 13,50 (2007) [hereinafter *Due Process*].

⁸⁹GATS, *supra* note 53, Art. VI:2.

⁹⁰*Id.*, Preamble.

concepts are not as distinct as those definitions sound. In fact, transparency is a prerequisite for progressive liberalization, as the Panel concluded in *US – Gambling* (2004):

This requirement of transparency is undoubtedly an object and purpose of the GATS - and the WTO in general - and applies equally to GATS schedules of specific commitments. Indeed, schedules of specific commitments determine, inter alia, the scope of market access and national treatment obligations that Members undertake under the GATS.⁹¹

Cottier observes that progressive liberalization has never been an easy process; rather, it is indeed a long-term solution for balancing diversified policy, administrative regimes, political interests, and so on, among Member states.⁹² Consistent with this observation, “the rules of GATS serve the purpose of structuring the process of progressive liberalization and of avoiding the circumvention of commitments made.”⁹³ In addition, in developing countries and the LDCs, regulatory obstacles have resulted from inconsistency, volatility, partiality, unpredictability, and discrepancy of legal systems and administrative regimes. Consequently, and consistent with the GATT, the transparency and progressive liberalization conditions mentioned in the preamble of GATS are based on a non-discrimination principle, aimed at reducing discriminatory policies and eradicating regulatory obstacles to trade liberalization.

As Delimatsis points out, “the absence of transparency can increase the complexity and the costs of supplying services.”⁹⁴ Transparency requirements embedded in Articles III and VI of the GATS are aimed at addressing such institutional problems. For example, Members are required to publish promptly all relevant domestic measures or applications affecting trade in services through official websites or other appropriate means. Publicity is based on the principle of maximum disclosure, except for confidential information.⁹⁵ Furthermore, if there are “any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services,”⁹⁶ Members must promptly inform the Council for Trade in Services. Information flow among members, notification, and responsiveness are also regulated by Article III:3 to facilitate trade liberalization. Article III requirements of promptly responding to all requests for “information on any of its measures of general application” and establishing at least one “enquiry point to provide specific information” are two obligations that can also be found in the TBT and SPS Agreements, but less comprehensively.⁹⁷

⁹¹Panel Report, *US – Gambling*, WTO Doc. WT/DS285/R (adopted 10 Nov. 2004).

⁹²Thomas Cottier, *From progressive liberalization to progressive regulation in WTO law*, 9 J. INT'L ECON. L. 779, 821 (2006).

⁹³*Id.* at 780.

⁹⁴Panagiotis Delimatsis, *Article III GATS: Transparency*, 6 MAX PLANCK COMMENTS. WORLD TRADE L., WTO-TRADE IN SERVICES, 107 (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle, eds. 2008), available on SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280204 [hereinafter Article III GATS].

⁹⁵GATS, *supra* note 53. According to Article III bis, disclosure of confidential information is described as “the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.” Article XIV bis relates to information that would be contrary to essential security interests.

⁹⁶*Id.* at art. III:3.

⁹⁷Panagiotis Delimatsis argues that notification obligations in SPS and TBT Agreements are more specific and comprehensive than those of the GATS, relating to special notification procedure (Article 2.9 TBT and Annex B.5 of SPS), and the function of enquiry points at national level (according to the Code of good practice). PANAGIOTIS DELIMATIS, INTERNATIONAL TRADE IN SERVICES AND DOMESTIC REGULATIONS: NECESSITY, TRANSPARENCY, AND REGULATORY DIVERSITY (2007) [hereinafter INTERNATIONAL TRADE IN SERVICES].

Intentionally, Article III:4 regulates the notification obligations for Member states only, and the right to access information therein is provided for Members, as a government-to-government relation, not one of private service suppliers, traders, investors, or other individual actors.⁹⁸ Consequently, private parties have to contact to their governments to access information relating to other countries where they want to invest or trade. In order to facilitate this access procedure, states need to build a legal framework for accessing information held by the government, like an FOIA. In this way, GATS notification requirements clearly stimulate domestic institutional reform toward openness without directly imposing administrative costs on Members. Mattoo and Sauvé consider national transparency a global public good promoted by international organizations (IOs), but they have observed the need to balance openness with cost:

More generally, national transparency may be a global public good the full benefits of which are not fully internalized by each national government. In any case, if multilateral rules do create deeper transparency obligations, there must be some way of ensuring that these rules do not place an excessively costly administrative burden, especially on poorer countries.⁹⁹

As indicated by its title of “Domestic Regulation,” Article VI is clearly aimed at reducing discrimination in trade and services and harnessing domestic administrative regulation by applying the principles of due process and good governance to the GATS through different measures. It explicitly attempts to facilitate market access among Members, and implicitly fosters domestic administrative reform. Each Member is thereby obligated to enhance its legal infrastructure to different degrees in proportion to its own level of development, thus speeding up the process of progressive liberalization.¹⁰⁰ Delimatsis has explained the differential treatment accorded to developing countries and LDCs as follows:

In particular, the creation of horizontal disciplines on necessity and transparency, and depending on the limitations expressed thereunder (e.g. the application of the future disciplines only in scheduled sectors, the extent of best-endeavour provisions, the establishment of long transitional periods for implementation by developing countries, or LDCs, etc.), is expected to mitigate the trade-distorting effects of domestic regulations in the services realm.¹⁰¹

Overall, the foundation for administrative reform enshrined in Article VI of GATS was established to encompass a system of legally binding provisions—a framework for the development of licensing, qualifications, and technical standards—for the present and the future. The first three paragraphs of Article VI, as Delimatsis points out in his article,¹⁰² identify the criteria of due process originating from the common law system and introduce the procedural legitimacy to the domestic administration of each Member.

Additional sections of Article VI provide further standards and benefits:

- Article VI:1 provides standards for services administration, including reasonability, objectivity, and impartiality. In *US – Gambling* case,¹⁰³ the Panel stated that “this obligation does not refer to the

⁹⁸Delimatsis, *supra* note 94, at 92.

⁹⁹Aaditya Mattoo & Pierre Sauvé, *Domestic Regulation and Trade in Services: Looking Ahead*, in AADITYA MATTOO & PIERRE SAUVÉ, *DOMESTIC REGULATION & SERVICE TRADE LIBERALIZATION* (World Bank eBook 2003), <http://documents.worldbank.org/curated/en/377591468780874144/Domestic-regulation-and-service-trade-liberalization>.

¹⁰⁰Cottier, *supra* note 90, at 782.

¹⁰¹Delimatsis, *supra* note 97, at 48–49.

¹⁰²*Id.*

¹⁰³*Gambling*, *supra* note 90, ¶ 6432.

substantive content of domestic regulations of general application but rather to their administration and how they are applied.” This obligation is also limited to sectors where specific commitments are undertaken.

- Article VI:2 refers to independent judicial, arbitral, or administrative tribunals or procedures for the prompt review of, or appropriate remedies for, administrative decisions relating to trade in services. If the requirements for independent judicial review cannot be implemented, then Members must ensure their impartiality and the objectivity of the reviewing procedure. Clearly, this provision sets up minimum criteria for procedural fairness with independent judicial (or arbitral or administrative tribunal) capacities in national jurisdictions. However, this provision can be considered an orientation rather than an official mandate, since states are entitled to determine the appropriate institutional structures for the review mechanism. Consequently, developing states are not required to initiate such tribunals or procedures if they would conflict with the state’s domestic constitutional structure or the nature of its legal system. The ideal of progressive liberalization is for states to first adjust or amend their constitutional and legal systems to fully comply with these requirements and be considered a trustworthy player. These adjustments will then lead to overall legal reform.
- Article VI:3 requires timeliness and responsiveness. Accordingly, states have to inform applicants of their decisions regarding their applications (1) in a reasonable period of time, and (2) without undue delay in providing information relating to the status of the application.
- Article VI:4 anchors states in non-discrimination principles. No measure relating to qualifications, licensing requirements, or technical standards is allowed if it would create unnecessary barriers to trade (in services). The Council for Trade in Services then plays a role as a policy-anchor to establish and develop necessary disciplines that (a) are based on objective and transparent criteria, (b) are not more burdensome, (c) do not restrict the supply of services. In fact, Article VI:4 defines the term necessity as the EC has: “A measure that is not the least trade restrictive to trade will not be considered more burdensome/more trade restrictive than necessary so long as it is not disproportionate to the objective stated and pursued.”¹⁰⁴
- Article VI:5, similar to Annex A of the SPS Agreement and Articles 4 and 5 of the TBT Agreement, mentions external standards developed by relevant IOs “whose membership is open to the relevant bodies of at least all Members of the WTO.”¹⁰⁵ Moreover, Article VI:5 provides a mechanism for oversight on national measures for which a Member has undertaken specific commitments. Trachtman identifies two sets of standards embedded in Article VI that need to be satisfied: the nullification and impairment of the licensing or qualification requirements or technical standards.¹⁰⁶

Taken together, Article VI of the GATS explicitly introduces a structural model of administrative reform under the label of progressive liberalization. This was reiterated by the Appellate Body in *China - Publications and Audiovisual Products*:

The principle of progressive liberalization is reflected in the structure of the GATS, which contemplates that WTO Members undertake specific commitments through successive rounds of

¹⁰⁴WTO, Communication from the European Communities and Their Member States, *Domestic Regulation: Necessity and Transparency*, Summary after ¶ 22, WTO Doc. S/WPDR/W/14 (adopted 1 May 2001).

¹⁰⁵Definition of the term “relevant international organization” in Article VI:5.

¹⁰⁶Joel P. Trachtman, *Lessons for GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation* (Jan. 29, 2002), available on SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=298760.

multilateral negotiations with a view to liberalizing their services markets incrementally, rather than immediately and completely at the time of the acceptance of the GATS.¹⁰⁷

Reforming domestic regulation is a complicated task that cannot be accomplished in the near future. This will be a long process of regulatory reform to eradicate (or diminish) technical barriers to trade and increase awareness of Members of the importance of trade liberalization. Due process, including necessity and transparency, is considered a reflection of efficiency and effectiveness stemming from progressive liberalization.¹⁰⁸ Trade liberalization will improve economic performance, especially in developing countries. They will have to eliminate barriers to trade through WTO pressure via horizontal disciplines on necessity and transparency introduced in Article VI of the GATS. GATS rules have paved the way for administrative reform at national level to cultivate comprehensive market access among state Members.

The WTO has a unique role as a flagship of global governance that forms global administrative law. Kingsbury, Krisch, and Stewart argue that global administrative law helps ensure the accountability of global administration.¹⁰⁹ Transparency and participation are the most important elements for an effective administrative procedure in both the domestic and international spheres. An ambitious model of reform that the GATS introduced to WTO Members was undeniably based on this theory.

Trade policy review mechanism: Counter-surveillance device for “cleaning up”

In the Marrakesh Agreement (Annex III(a)), the founding Members of the WTO agreed to establish the TPRM aiming to

[c]ontribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral 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.¹¹⁰

The TPRM, in simple parlance, is an important mechanism for monitoring transparency. However, it does not impose equal obligations on all Members. The trade policies of major players (the Quad) of the WTO, the U.S., the EU, China, and Japan, are reviewed every two years; the policies of the 16 countries in the middle-level group are reviewed every four years; and the policies of the remaining countries every six years.¹¹¹ Functionally, the WTO TPRM is a process for evaluating individual Members' trade policies and their influence on the multilateral trading system. However, it is not considered “a basis for the

¹⁰⁷Appellate Body Report, *China – Publications and Audiovisual Products*, ¶¶ 392–94, WTO Doc. WT/DS363/AB/R (adopted 21 Dec. 2009).

¹⁰⁸Delimatsis, *Due Process*, *supra* note 88, at 20.

¹⁰⁹Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 62 (2005).

¹¹⁰For more details, according to “Trade Policy Reviews: ensuring Transparency” available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm, the objectives are: (1) to increase the transparency and understanding of countries' trade policies and practices, through regular monitoring (2) to improve the quality of public and intergovernmental debate on the issues (3) to enable a multilateral assessment of the effects of policies on the world trading system.

¹¹¹These “peer reviews” by other WTO members encourage governments to follow more closely the WTO rules and disciplines and to fulfil their commitments. WTO, Uruguay Round Agreement- Trade Policy Review Mechanism (TPRM), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm

enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.¹¹² This process can be schematized as follows:

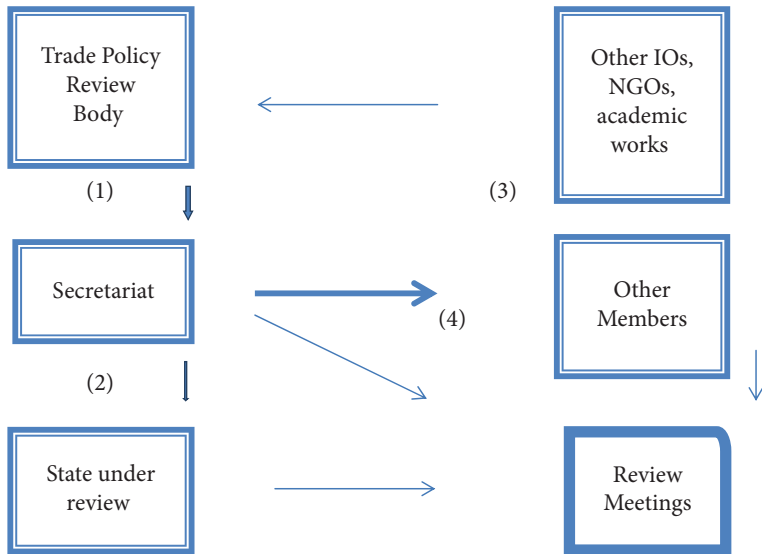


Figure 1: The process of trade policy review.

Notes: (1) The Trade Policy Review Body (TPRB) establishes the Secretariat, (2) the Secretariat sends questionnaires to the country under review, then discusses and drafts reports, (3) the Secretariat collects information from IOs, NGOs, and academic works, (4) the Secretariat finalizes the report and sends it to other Members, and (5) review meetings are held for trilateral discussions.¹¹³

Questions that commonly need to be answered by states under review are related to what the state has done so far to make domestic regulations more transparent and promote due process and evenhandedness, and how timely the state’s responsiveness to public comments has been.¹¹⁴ In review meetings, states under review have to respond to and account for the objectives set forth in paragraph A, through which better governance and transparency are likely to be achieved. In its 2010 annual report, the TPRB noted:

The reviews have helped to enhance understanding in these countries of the WTO Agreements, enabling better compliance and integration in the multilateral trading system; in some cases, better interaction between government agencies has been facilitated by the reviews. The reports’ wide coverage of Members’ policies also enables Members to identify any shortcomings in policy, and specific areas where further technical assistance may be required.¹¹⁵

¹¹²TPRM, ¶A(i), https://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm.

¹¹³Synthesized from “Trade Policy Reviews: ensuring Transparency,” available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm.

¹¹⁴See Trade Policy Review Malaysia, WTO Doc. WT/TPR/M/225/Add.1 (adopted 25 and 27 Jan. 2010).

¹¹⁵TPRM 2010 report, ¶¶ 8–9, WTO Doc. WT/TPR/269 (adopted 29 Nov. 2010).

Similarly, Francois believes that an effective TPRM can bring positive outcomes to developing countries, such as enhanced market access and improved credibility for their domestic policies and institutional reforms.¹¹⁶ For developing countries, the TPRM helps promote institutional transparency, thus stimulating political pressure for legal reform toward liberalization. Moreover, national credibility and regulatory rationality will also be consolidated. It is worth noting that the TPRM mutually utilized internal and external resources for its reviews. Zahrt argues that the TPRM strives to shape domestic politics without interfering in domestic jurisdiction. According to Zahrt, the TPRM has three potential functions:

- (1) Facilitating negotiations: The legitimacy of trade negotiations will likely be enhanced by “reducing the informational disadvantage of small and developing countries.”
- (2) Focusing international attention: Governments tend to become more liberal in trade policies in order to attract praise and avoid criticism.
- (3) Influencing domestic politics: Counter-surveillance results in counter-learning, thus leading to more liberal policies, which in turn increase liberal stakeholders in the country under review. Ultimately, domestic liberal reform will result.¹¹⁷

Clearly, changes in domestic regulatory practice have not stemmed from direct external intervention, horizontally or vertically. Rather, regulatory changes or reforms resulting from TPRM serve as a counter-surveillance device that pushes states to protect their reputations from being criticized for their lack of regulatory transparency, predictability, evenhandedness, or due process. Through the pressure imposed by the TPRM, states under review may be cleaned up, become more transparent, and adopt practices of good governance. Aaronson and Abouharb simply describe how this process works as follows:

No member state can use this process to force changes to another states policies, but they can use the review to name and shame countries that fail to meet their obligations for transparency, participatory governance and due process.¹¹⁸

Moreover, in order to promote proactive disclosure, Members must regularly report their trade policy practices in response to the concerns of various parties, using an agreed-upon format determined by the TPRB.¹¹⁹ Members also have to provide brief reports summarizing any significant changes to their trade policy between reviews. The Secretariat takes responsibility for technical assistance to developing countries and the LDCs under requests. Along with this reporting obligation (proactive disclosure), trade policy review meetings can assist developing countries and the LDCs in promoting regulatory transparency and quality of governance. As Aaronson and Abouharb observe, Member states regularly and directly complain about problems of corruption, weakness of the rule of law, and ineffective governance in developing countries and the LDCs during their trade policy reviews.¹²⁰ Consequently, the TPRM can

¹¹⁶Joseph F. Francois, *Maximizing the Benefits of the Trade Policy Review Mechanism for Developing Countries*, prepared for the World Bank Institute, February. (1999).

¹¹⁷Valentin Zahrt, *Transparency of Complex Regulation: How should WTO Trade Policy Reviews Deal with Sanitary and Phytosanitary Policies?* (Brussels: ECIPE. Arbeitspapier, Working Paper, Graue Literatur, non-commercial literature 2009).

¹¹⁸Aaronson & Abouharb, *Clean Up*, *supra* note 17, at 17.

¹¹⁹WTO Trade Policy Review Body, *Rules of Procedures for Meetings of the Trade Policy Review Body* WTO Doc. WT/TPR/6/Rev.2 (adopted 14 Nov. 2008). “[T]he TPRB thought that Members should remain free to define the structure and coverage of their own reports in accordance with Annex 3 of the Marrakesh Agreement, and Chapter VI of the Rules of Procedure for Meetings of the TPRB.”

¹²⁰Aaronson & Abouharb, *Clean Up*, *supra* note 17, at 18. In their article, they mention trade policy reviews of Ghana, Bangladesh, Philippines, Pakistan, Thailand, Kyrgyz Rep, Sri Lanka, and the joint review of Tanzania, Kenya and Uganda.

positively impact domestic institutional change by consolidating the legal framework for multilateral trading, and stimulating the participation of the LDCs and developing countries in an international trading system.

Admittedly, the developed world expects the WTO to play a more active role in cleaning up the Third World in the common playground, particularly the “newbies” of multilateral trade. This raises the question of the extent to which the institutional and regulatory environment of countries under review can become more transparent or better governed, a continuing subject of fierce scientific debate. However, anyone who believes that WTO transparency norms guarantee complete, timely, and universal eradication of corruption and cultivation of good governance for all weak Member states will likely be frustrated. This must be a long-term process, slow but progressive, as economist Cosbey (2007) affirms:

Using the TPRM to strengthen that process is not a grand scheme for improving the world, and it will not get the WTO or trade policy generally off the hook for demands to be more open and responsive to civil society concerns, but it is a small step the WTO can take, one consistent with its principles and practices that would contribute to the achievement of sustainable development.¹²¹

Conclusion: The WTO transparency-norms for global administrative law

The Western countries, led by the U.S. and the EU, have successfully shaped the WTO legal framework despite the equal-voting rule for all Members. Among other developments, transparency norms have been transmitted to the WTO, and in turn, to developing countries. Through this process, the principles and norms offered by the WTO, including transparency, participation, and due process, have shaped the framework for global governance by compulsory power and institutional power. From Article X of GATT 1947 to GATT 1994, the requirements for transparency, uniformity, and impartiality have been intended to cultivate the rule of law as modeled by U.S. administrative law. Analogously, the transparency provisions in the Annex 1A Agreements are aimed at promoting publication, responsiveness, and accountability under the tactics of the “notification obligations,” “enquiry points,” and “Code of Good practice” embodied in the SPS and TBT Agreements. More generally, but less specifically, transparency requirements in the GATS have the ambitious goal of establishing the model of reform for domestic administration enshrined in Articles III-VI. For monitoring and surveillance, the WTO TPRM is a process to evaluate the system of individual Members’ trade policies and their influence on the multilateral trading system, thus serving as an instrument of counter-surveillance to reform bad governments and help states build trust within the international sphere. Admittedly, even though the degree to which states absorb these administrative law norms varies depending on their domestic political and institutional circumstances, the WTO has successfully and effectively established a foundation for global governance upon which transparency norms, among others, will help promote administrative legal reform among state Members.

¹²¹Aaron Cosbey, *How trade transparency contributes to sustainable development as understood by Amartya Sen*, in *PROCESS MATTERS: SUSTAINABLE DEVELOPMENT AND DOMESTIC TRADE TRANSPARENCY* (Mark Halle Robert Wolfe eds. 2007).

Transformative, regulatory transparency and the right to access information are bedrocks for the participation and accountability associated with democratic control and oversight. Therefore, global governance, from optimistic and constructivist perspectives, provides opportunities for states to improve the rule of law, develop sustainable institutions, and promote democracy. In the WTO environment, transparency norms have become powerful in addressing governance and institutional problems such as maladministration, lack of the rule of law, and ungoverned bureaucratic discretion.
