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Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison

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Friedl Weiss and Silke Steiner

Abstract

This article seeks to provide a comparative overview of relevant practice of the European Union ("EU") and the World Trade Organization ("WTO") with regard to the interpretation and use made of "good governance," and in particular with regard to "transparency," one of its core component elements.

TRANSPARENCY AS AN ELEMENT OF GOOD GOVERNANCE IN THE PRACTICE OF THE EU AND THE WTO: OVERVIEW AND COMPARISON

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INTRODUCTION

In the course of the last few years, numerous attempts have been made to solve the problem of an emerging transnational legal order that still significantly lacks both democratic legitimacy and transparency. To that end, a number of theoretical concepts and models have been developed, aimed at guaranteeing a more legitimate exercise of international authority.¹

The evocative concept of “good governance,” though a relatively young one, has recently emerged as a key concept in discourse about governance. Various intergovernmental institutions have formulated similar definitions of good governance, yet have attributed to them different meanings and functions and use them for different purposes. This article seeks to provide a comparative overview of relevant practice of the European Union (“EU”) and the World Trade Organization (“WTO”) with regard to the interpretation and use made of “good governance,” and in particular with regard to “transparency,” one of its core component elements.

Before examining such practice, however, it should be recalled that, while both the EU and the WTO have made considerable strides toward enhancing transparency in their respective spheres of governance, they have done so from different vantage points and perspectives, due to their fundamentally different sta-

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1. Examples are globalism (the idea of a global democracy and/or a global state), networkism (the designation of coordinating governmental or private networks), or social constitutionalism (the identification of separate global societal spheres). For more details see Rainer Nickel, *Participatory Transnational Governance*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 157, 163-175 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

tus and legal characteristics as intergovernmental organizations. Suffice it to recall that the EC, unlike the “intergovernmental” WTO, is a uniquely supranational organization. Its constitutive legal order has been developed and refined by two of its institutions of central importance, the European Commission and the European Court of Justice (“ECJ”). The former has been the Community’s acknowledged “engine of integration policy.”² The latter is a court of law enjoying a monopoly on dispute settlement,³ which has been credited with the establishment of the fundamental doctrines of the supremacy and direct effect of Community law.⁴

By contrast, global integration of trade policies through the legal framework of the “Member-driven” WTO, a less homogeneous organization of 150 Members, is not supported by organs comparable to those in the EC. Its executive head, the Director-General, may not even construct a negotiating agenda for the Members under his own authority,⁵ and the Appellate Body (“AB”) is not, as yet, an independent court of law.⁶

Thus, it is not surprising that the WTO has not been very active in adopting measures aiming at the implementation of the concept of good governance, whereas its twin concept of sustainable development is explicitly referred to as an objective in the preamble to the WTO Agreement and has, as such, been invoked by the AB.⁷

2. John W. Cioffi, *The Collapse of the European Union Directive on Corporate Takeovers: The EU, National Politics, and the Limits of Integration*, (Berkeley Roundtable on the International Economy, Research Paper, 2001), <http://brie.berkeley.edu/publications/John%20Cioffi's%20paper.pdf>.

3. Consolidated Version of the Treaty Establishing the European Community art. 292, Dec. 24, 2002, O.J. C 325/33 (2002), [hereinafter EC Treaty] (stating “[m]ember States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.”)

4. See Peter Holmes, *The WTO and the EU: Some Constitutional Comparisons*, 13 (University of Sussex at Brighton, Discussion Paper 78, 2001), <http://www.sussex.ac.uk/Units/economics/dp/holmes78.pdf>.

5. EC Treaty, *supra* note 3, O.J. C 325/33 (2002).

6. See Holmes, *supra* note 4, at 8, 11.

7. See Surya P. Subedi, *Managing the “Second Agricultural Revolution” Through International Law: Liberalisation of Trade in Agriculture and Sustainable Development*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE* 161 (Nico Schrijver & Friedl Weiss eds., 2004). See also Appellate Body Report, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, ¶¶ 12, 67, 129-130, WT/DS58/AB/R (Oct. 12, 1998).

1. THE CONCEPTS OF GOOD GOVERNANCE AND TRANSPARENCY: ORIGIN, CONTENT AND DEFINITIONS

1.1 *Origins of "Good Governance"*

Although the idea, concept and objective of good governance have regularly been used for a good number of years, its content and contours remain uncertain. Indeed, a multitude of definitions of differing scope and content have given rise to an "increasing confusion regarding the boundaries of the concept."⁸

Yet, conceivably, some kind of "common understanding," at least with respect to the core elements of good governance, may already be discerned in the practice of certain international organizations.

The notion of good governance itself originated in the practice of international donor agencies, particularly of the World Bank, not in any academic discourse or context. It was used for the first time in the 1989 World Bank Report on Sub-Saharan Africa, which characterized the crisis in the region as a "crisis of governance," including rampant corruption and resistance to reforms by recipient governments, rendering the provision of aid ineffective.⁹ In the late eighties, especially after the fall of the Berlin Wall, the concept of good governance gained currency. A new approach was initiated according to which regimes of dubious legitimacy and governmental practice will not be supported, while eligibility for support is conditional upon institutional reforms by potential client/recipient states as well as upon the manner in which they conduct their governmental affairs.¹⁰

During the 1990s,¹¹ good governance has, in this way,

8. Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 GEO. PUB. POL'Y REV. 1, 3 (2001).

9. See WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 80, (Nov. 1989) (identifying lack of good governance as underlying cause of economic problems in Sub-Saharan Africa); see also Thandika Mkandawire, Director, United Nations Research Institute for Social Development, *The Itinerary of an Idea*, VIEWPOINT, OCT. 1, 2004, [http://www.unrisd.org/unrisd/website/newsview.nsf/\(httpNews\)/2C5859E012A29D06C12570220036B48A?OpenDocument](http://www.unrisd.org/unrisd/website/newsview.nsf/(httpNews)/2C5859E012A29D06C12570220036B48A?OpenDocument) (claiming African origin of concept and decrying current divergence of term from original concept).

10. See Santiso, *supra* note 8, at 5; Martin Doornbos, 'Good governance': *The rise and decline of a policy metaphor?*, 37 J. DEV. STUDIES 93, 96-97 (2001).

11. For further details, see generally Carlos Santiso, *International Cooperation for Good Governance and Democracy: Moving Toward a Second Generation?*, 13 EUR. J. DEV. RESEARCH 154 (2001).

emerged as an integral part of the wider process of democratization, arguably reflecting a general trend of “democratization of international law,”¹² at least of a general underpinning by international law of the widening process of democratization.¹³

1.2 *Content of Good Governance*

The shift that has occurred from the notion of governance to that of *good* governance implies an additional normative dimension pertaining to the quality of governance. A system of good governance, consequently, stems from the fulfillment of particular process requirements, both with respect to decision-making and to the formulation of public policy. For instance, researchers at the World Bank Institute have distinguished six main dimensions of good governance:

- Voice and accountability, which includes civil liberties and political stability;
- Government effectiveness, including the quality of policy-making and public service delivery;
- Lack of regulatory burden;
- Rule of law, including the protection of property rights;
- Independence of the judiciary;
- Control of corruption.¹⁴

1.3 *International Organizations: Definitions and Practice*

1.3.1 Definitions

As mentioned above, there is no generally accepted definition of good governance. On the other hand, however, definitions developed in international organizations only slightly differ from one another.

12. See Roda Mushkat, *The Principle of Public Participation: An Asia-Pacific Perspective*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE*, 607, 608 (Nico Schrijver and Friedl Weiss, eds., 2004) (citing Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL'Y 527, 537-543 (2001)).

13. Examples for a great deal of development of democracy-promotion through international law are election-monitoring by international organizations and non-governmental organizations, the institutionalization of these functions, for instance through the OSCE Office of Fair Elections, and the jurisprudence of international courts and commissions in this field. See James Crawford, *Democracy in International Law*, in *INTERNATIONAL LAW AS AN OPEN SYSTEM* 39 (James Crawford, ed., 2002).

14. Santiso, *supra* note 11, at 5.

The most recent definition by the United Nations Economic and Social Commission for Asia and the Pacific ("ESCAP") differs only slightly from earlier definitions by the Organization for Economic Cooperation and Development ("OECD"). One additional component states that good governance "is also responsive to the present and future needs of society."¹⁵ The eight key components of good governance are:¹⁶

- (1.) Accountable
- (2.) Transparent
- (3.) Responsive
- (4.) Equitable and inclusive
- (5.) Effective and efficient
- (6.) Follows the rule of law
- (7.) Participatory
- (8.) Consensus oriented

In its policy paper, *Governance for Sustainable Human Development*, the United Nations Development Program ("UNDP") defines good governance as, among other things, participatory, transparent, and accountable as well as effective, equitable, and as promoting the rule of law.¹⁷ Good governance, accordingly, seeks to ensure that political, social and economic priorities are based on a broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making on the allocation of development resources.¹⁸

UNDP's definition is clearly very similar to those of the OECD and ESCAP, as it also includes the elements of participation, accountability, effectiveness, equity, consensus orientation, and the promotion of the rule of law. It does not, however, encompass the elements of inclusiveness and transparency, unlike the foregoing definitions.

In the absence of a generally accepted definition of good governance, the eight essential aspects of good governance identified in the OECD and ESCAP definitions might be considered

15. United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance* (2007), <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf> [hereinafter ESCAP].

16. *Id.* at 3.

17. United Nations Development Program, *Governance for Sustainable Human Development* (1997), <http://www.pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf>.

18. *Id.*

as core elements of good governance. Transparency, though missing in UNDP's definition, is likewise widely accepted as an essential component of good governance. It also features in the OECD's anti-corruption instruments. Moreover, transparency, even if not always mentioned explicitly, may be considered implied by nearly all definitions. It is also noteworthy that all definitions of good governance considered above are aimed at (good) governance by national governments. When, in July 1997, the UNDP convened the International Conference on Governance for Sustainable Growth and Equity, its first global conference on governance at the United Nations Headquarters, it did not extend its definition of (good) governance to international organizations, despite the participation of representatives of UN Specialized Agencies, nor was there any discussion of the international dimension of national good governance.¹⁹

1.3.2 Practice

Is there as yet any discernible practice in international organizations based on "good governance," or at least habitual reference to the term "good governance"? And if so, does such reference only concern the "external dimension" of good governance as it were, i.e., the promotion of good governance in third countries, or is the concept also relied upon in relation to internal (administrative) proceedings? The OECD has published numerous studies analyzing what amounts to good public as well as corporate governance.²⁰ It has also adopted several legal instruments against corruption, thereby fostering good governance.²¹

19. Friedl Weiss & Paul de Waart, *International Economic Law with a Human Face: An Introductory View*, in *INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE* 1, 9 (Friedl Weiss, Paul de Waart, & Eric Denters eds., 1998).

20. See e.g., OECD, *MODERNISING GOVERNMENT: THE WAY FORWARD* (2005); OECD, *PROMOTING DEMOCRACY: AN INTERNATIONAL EXPLORATION OF POLICY AND IMPLEMENTATION PRACTICE*, (2006), <http://www.oecd.org/dataoecd/59/50/36502447.pdf>; OECD, *OECD PRINCIPLES OF CORPORATE GOVERNANCE* (2004).

21. See e.g., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1992, 337 I.L.M. 8; see also, Revised Recommendation of the Council on Combating Bribery in International Business Transactions, May 23, 1997, 36 I.L.M. 1016; OECD, Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, C(96)27/FINAL (Apr. 11, 1996), 35 I.L.M. 1311; OECD, *The OECD Guidelines for Multinational Enterprises* (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>; Working Party on Export Credits and Credit Guarantees, Action Statement on Bribery and Officially Supported Export Credits, Feb. 20, 2003, TD/ECG(2000)15.

Other OECD documents also explicitly refer to the term “good governance.” Thus, in 1993, its Development Assistance Committee (“DAC”) adopted orientations on participatory development and good governance and established an ad hoc Working Party on Participatory Development and Good Governance (“PDGG”) with the mandate to help bring PDGG into the mainstream of development co-operation by means of a three-year program of activities.²²

One noteworthy aspect, however, is that the definition and practice of good governance mentioned above refer to the “external dimension” of governance, namely good governance in third world or developing countries.

1.4 *The “European Understanding” of Good Governance*

In the European context, the idea of good administration as an element of good governance existed long before the concept of good governance gained currency. As early as 1977, the Council of Europe focused on good administrative behavior as an aspect of good governance, arguing that since the development of the modern state had resulted in an increasing importance of public administrative activities, individuals were more frequently affected by administrative procedures.²³ In view of the principal task of the Council of Europe, the protection of individual fundamental rights and freedoms, it intended to undertake efforts “to improve the individual’s procedural position vis-à-vis the administration with a view to adopting rules which would ensure fairness in the relations between the citizen and the administrative authorities.”²⁴ Accordingly, good administrative behavior is characterized by several principles, namely, a right to be heard, access to information, assistance, and representation, statement of reasons, and an indication of remedies.

In its White Paper on European Governance of 2001, the European Commission established its own concept of “European

22. See OECD Development Assistance Committee, Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance Parts 1 and 2, 24/6/1997; Development Assistance Committee, Evaluation of Programmes Promoting Participatory Development and Good Governance (1997), available at <http://www.oecd.org/dataoecd/31/13/2755291.pdf>.

23. Council of Europe Resolution on the Protection of the Individual in Relation to the Acts of Administrative Authorities, Res. 77(31) (Sept. 28, 1977).

24. *Id.*

governance,” defined as rules, processes, and behavior that affect the way in which powers are exercised at European level, particularly as regards openness,²⁵ participation, accountability,²⁶ effectiveness, and coherence.²⁷ These five “principles of good governance” reinforce those of subsidiarity and proportionality.²⁸

In the view of one author, interestingly, the concept of good governance is one of the four “minor core norms” comprised within the *acquis communautaire*, the only one that has not yet found any formal expression in the treaties.²⁹ However, good governance may well be seen as implicit in the Copenhagen criteria for democratic reforms in Central and Eastern Europe as well as in the emphasis on the role of governance in the EU’s aid programs.³⁰

1.5 *Transparency as a Particular Element of Good Governance*

As has been shown above, transparency, whether explicitly mentioned or derived from the context, is an integral part of nearly all definitions of good governance and is regularly used in practice. Nonetheless, its meaning, content, scope, and contours are not entirely clear.

Transparency in ESCAP’s definition means that, decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that informa-

25. Commission of the European Communities, *European Governance: White Paper from the Commission to the European Council*, COM (2001) 428 Final, at 10 (July 2001) (stating “The Institutions should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the confidence in complex institutions”) [hereinafter *European Governance White Paper*].

26. *Id.* (stating “[r]oles in the legislative and executive processes need to be clearer”).

27. *Id.* (stating “[p]olicies and action must be coherent and easily understood”).

28. *Id.*; EC Treaty, *supra* note 3, art. 5, O.J. C 325/33 (2002).

29. Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 *J. COMMON MARKET STUD.*, 235, 242-243 (2002). For background on the *acquis communautaire*, see P.J.G. Kapteyn & P.VerLoren van Themaat, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 45-68, (1998).

30. See Manners, *supra* note 29, at 241. To Manners, the “core norms” are peace, liberty, democracy, the rule of law and the respect for human rights and fundamental freedoms. The other three terms identified as “minor core norms” (besides good governance) are social solidarity, anti-discrimination and sustainable development. *Id.* at 242-43.

tion is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media.³¹

This definition includes openness of the decision-making and enforcement processes as well as access to and distribution of information. It will be interesting to examine how the EU and the WTO define and understand "transparency" and which measures they have taken to implement its prescriptions.

2. *TRANSPARENCY AS AN ELEMENT OF GOOD GOVERNANCE IN THE EU*

2.1 *The Internal Dimension of Transparency and Good Governance in the Legal Framework of the EU*

In March 2000, one year before the publication of its *White Paper on European Governance*, the European Commission adopted a *White Paper on Administrative Reform*, which stressed that European public administration should focus on the key principles of service, independence, responsibility, accountability, efficiency and transparency.³² The Commission also took an important practical step towards implementing those principles by adopting a code of good administrative behavior.³³ Accordingly, relations between the Commission and the public should be based on the principles of legality, non-discrimination, proportionality of measures to the aim pursued, and consistency in administrative behavior.³⁴

The above-mentioned *White Paper on European Governance*, though occasioned by and drafted against the backdrop of the EU enlargement process, provides, nonetheless, a useful contribution to the discourse on global governance. The EU evidently distinguishes between an internal and an external dimension of good governance, as the *White Paper* attempts to correlate both dimensions. In view of the Commission, therefore, it is incumbent upon the EU, as a first step, to strive for successful reform

31. ESCAP, *supra* note 15, at 2.

32. See European Governance White Paper, *supra* note 25, at 26.

33. European Commission, Code of Good Administrative Behaviour – Relations with the Public, adopted on 13 September 2000, published in the Annex to the Commission Decision of 17 October 2000 amending its Rules of Procedure, *see* (2000/633/EC, ECSC, Euratom), 2000 O.J. L 267/63.

34. See *id.* at 3.

of governance “at home” so as to strengthen the case for change at an international level.³⁵

Like the Council of Europe, the EU too places particular emphasis on good administrative behavior as a crucial element of good “European” governance. This focus is particularly reflected in the “European Code of Good Administrative Behavior,” a document drafted by the European Ombudsman that explains, in a detailed manner, the meaning of a “right to good administration” that is embodied in Article 41 of the EU Charter of Fundamental Rights.³⁶

The Code was aimed at EU institutions and bodies, in the expectation that in their relations with the public they would either adopt their own codes or respect the Ombudsman’s Code. As a result, the European Parliament adopted a resolution on the European Ombudsman’s Code of Good Administrative Behavior,³⁷ as did the Secretary-General of the Council/High Representative for Common Foreign and Security Policy.³⁸

Since then, debates have intensified on the need to increase transparency in an enlarged Union of twenty-seven Member States, and the European Council included transparency under the headline “more democracy, transparency and efficiency in the European Union” in its 2001 Laeken Declaration on the Future of the European Union.³⁹

35. European Governance White Paper, *supra* note 25, at 26.

36. THE EUROPEAN OMBUDSMAN, THE CODE OF GOOD ADMINISTRATIVE BEHAVIOUR, at 7, available at http://www.ombudsman.europa.eu/code/pdf/en/code2005_en.pdf. Substantial requirements for establishing a good administration enumerated by the code are: lawfulness (art.4), non-discrimination (art.5), proportionality (art.6), non-abuse of power (art.7), impartiality and independence (art.8), objectivity (art.9), legitimate expectations, consistency and advice (art.10), etc.

37. European Parliament Resolution on the European Ombudsman’s Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour, O.J. C 72E/331 (2002). In its resolution, the EP adopted the text of the Ombudsman’s draft with some modifications. Transparency is not mentioned in the code adopted by the European Parliament.

38. Secretary-General of the Council, Decision No. 2001/C 189/01, O.J. C 189, at 1–4 (2001). This modified version (shorter than the Code drafted by the European Ombudsman and adopted by the EP) refers to transparency in its preamble: “The provisions of Community law on openness and transparency should be fully respected in the daily practice of the General Secretariat of the Council. . .”

39. Presidency Conclusions, European Council Meeting in Laeken, (Dec. 14-15, 2001), SN 300/1/01 REV 1, Annex 1: Laeken Declaration on the Future of the European Union, at 19.

Although transparency has evidently come to be seen as an important element of good “European” governance, the term “transparency,” surprisingly, is only mentioned twice in the *White Paper on European Governance*, under the title “confidence in expert advice,”⁴⁰ in the chapter on “better policies, regulation and delivery,” and in the context of “the EU’s contribution to global governance.”⁴¹ Similarly, the Code of Good Administrative Behavior does not explicitly refer to good governance but merely identifies some requirements of good administration which are related to transparency, such as that of requests for information (Article 22), public access to documents (Article 23) or that of the keeping of adequate records (Article 24).⁴²

Nevertheless, since 2006 transparency has been treated as a particularly important issue, both by the Council of Ministers and by the Commission. At first the European Council outlined its overall policy on transparency when it agreed that all deliberations of the Council of Ministers on legislative acts subject to the co-decision procedure⁴³ “shall be open to the public as shall the votes and the explanation of votes by the Council members” subject only to the possibility for the Council or Coreper to exclude such public access in individual cases.⁴⁴ By adapting its Rules of Procedure the Council of Ministers confirmed the deci-

40. See European Governance White Paper, *supra* note 25, at 19.

[T]he Union is required to apply the precautionary principle and play its role in risk assessment and risk management. The Commission over a number of years has been responding to these challenges, for example, through the re-vamping of its system of scientific committees in 1997 and ensuring that scientific advice from those committees is publicly available. The current proposal for a European Food Authority will enhance the Union’s scientific capability, transparency and networking in the area of food safety.

41. See *id.* at 26.

By acknowledging the global dimension more strongly, the Union will strengthen its voice in multilateral negotiations. It should aim to improve the effectiveness and legitimacy of global rule making, working to modernise and reform international and multi-lateral institutions in the medium to long term. The goal should be to boost the effectiveness and enforcement powers of multi-lateral institutions. In the short term, the Union should build partnerships with other countries in order to promote greater co-operation and coherence between the activities of existing international organisations and increase their transparency.

42. THE EUROPEAN OMBUDSMAN, THE CODE OF GOOD ADMINISTRATIVE BEHAVIOUR, *supra* note 38, at 18.

43. EC Treaty, *supra* note 3, art.251, O.J. C 325/33 (2002).

44. See European Council Meeting in Brussels, 15/16 June 2006, Presidency Conclusions, 10633/1/06 REV 1, Annex 1: An Overall Policy on Transparency, at 23.

sions taken by the European Council.⁴⁵ Furthermore, initial deliberations on other legislative acts, presented orally by the Commission in a Council session, were also opened to the public. Unless otherwise decided by a qualified majority decision by the Council or Coreper, the Presidency may extend that regime on a case-by-case basis to subsequent deliberations concerning a particular item.⁴⁶ Practical implementing measures, such as Internet video-streaming and online access to webcast public deliberations, were also agreed upon to enable citizens to fully benefit from increased transparency.⁴⁷

In 2006, the European Commission also launched the “European Transparency Initiative,” aimed at strengthening the

45. Council Decision adopting the Council’s Rules of Procedure 2006/683, 15 September 2006, 2006 O.J. L 285 47 (Euratom).

46. *Id.* at art. 8 (providing that Council deliberations be open to the public and public debates:

1. Council deliberations on legislative acts to be adopted in accordance with the codecision procedure under Art. 251 of the EC Treaty shall be open to the public as follows:

(a) the presentation, if any, by the Commission of its legislative proposals and the ensuing deliberation in the Council shall be open to the public;

(b) the vote on such legislative acts shall be open to the public, as well as the final Council deliberations leading to that vote and the explanations of voting accompanying it;

(c) all other Council deliberations on such legislative acts shall be open to the public, unless, on a case by case basis, the Council or Coreper decides otherwise with regard to a given deliberation.

2. The Council’s first deliberation on important new legislative proposals other than those to be adopted in accordance with the codecision procedure shall be open to the public. The Presidency shall identify which new legislative proposals are important and the Council or Coreper may decide otherwise, whenever appropriate. The Presidency may decide, on a case by case basis, that the subsequent Council deliberations on a particular legislative act shall be open to the public, unless the Council or Coreper decides otherwise.

3. On a decision taken by the Council or by Coreper, acting by a qualified majority, the Council shall hold public debates on important issues affecting the interests of the European Union and its citizens.

It shall be for the Presidency, any member of the Council, or the Commission to propose issues or specific subjects for such debates, taking into account the importance of the matter and its interest to citizens.)

47. Art. 5(2) of Council Decision 2006/683:

The opening to the public of Council deliberations and public debates in accordance with this Article shall be made through public transmission by audiovisual means, notably in an overflow room and through broadcasting in all official languages of the institutions of the European Union using video-streaming. A recorded version shall remain available for at least one month on the Council’s Internet site. The outcome of voting shall be indicated by visual means.

rules of ethics for conduct by EU policy-makers and for “civil society” pressure groups, such as lobbyists, NGOs, etc., who seek to influence them.⁴⁸ On May 3, 2006, as part of that initiative, it published a *Green Paper on European Transparency*,⁴⁹ which explains the objective of the Transparency Initiative as consisting of the adoption of a series of transparency-related measures that have already been put in place by the Commission, in particular those taken as part of the overall reforms outlined in the *White Paper on European Governance*.⁵⁰ It should also be noted that a review has been launched in the framework of the European Transparency Initiative, of the Commission’s overall approach to transparency.⁵¹

2.2 *The External Dimension of Transparency in the Good Governance Framework of the EU*

Although “internal” good governance is mainly based upon good administrative behavior and transparency,⁵² the term “good governance” is hardly ever used in EU practice in connection with the internal dimension of governance.⁵³ Instead, it is frequently used in reference to the promotion of European values as part of the EU’s foreign policy.⁵⁴

A typical means of achieving or promoting good governance is the concept of political conditionality. Conditionality, which was first introduced by the Lomé III Convention, signifi-

48. Commission of the European Communities, *European Transparency Initiative: Green Paper*, COM(2006) 194 Final, (March 3, 2006) [hereinafter *Transparency Green Paper*].

49. *Id.*

50. The Commission lists “access to documents”—legislation, the launch of databases providing information about consultative bodies and expert advisory groups, and the in-depth impact assessments prior to legislative proposals as essential contributions towards implementing the Commission’s “better lawmaking” policy and the Commission’s “Code of Good Administrative Behavior.”

51. *Transparency Green Paper*, *supra* note 48, COM(2006) 194 final, at 2f.

52. For more details on transparency in the EU, see below.

53. However, in the *White Paper on European Governance*, the principles of good governance also refer to the internal dimension of good governance. “They underpin democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local.” See *European Governance White Paper*, 10 COM(2001) 428 Final.

54. See, e.g., Parliament Resolution on the Commission Communication entitled “Democratisation, The Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership Between the European Union and the ACP States,” O.J. C 104/177 (1999).

cantly changed the EC-ACP association process and is now firmly established in the Cotonou Agreement,⁵⁵ which also recognizes good governance as a general underpinning⁵⁶ and stipulates “respect for human rights, democratic principles and the rule of law” defined as “an essential element” of the Agreement.⁵⁷

Three elements of the Agreement’s political dimension are deemed vital for the partnership and for sustainable development: respect for human rights, democratic principles based on the rule of law, and transparent and accountable governance.⁵⁸ Violation of these elements is subject to a new procedure stressing the responsibility of the country in question.⁵⁹

As a key concept, good governance is already referred to in the preamble, with signatories “acknowledging that a political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance is part and parcel of long term development.” In a similar vein, the political dialogue (Article 8) encompasses “a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.”⁶⁰ Overall, the approach of the agreement consists of “strengthening the institutions necessary for the consolidation of democracy, good governance and for efficient and competitive market economies.”⁶¹

Article 96 sets out the possible legal consequences of a violation of an “essential element,”⁶² a reference to Article 9 (2)

55. 2000/483/EC: Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, on the Other Part, June 23, 2000, O.J. L 317 (2000), at 3-353, signed in Cotonou [hereinafter Cotonou Agreement].

56. Cf. *id.* art.9(3): “Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement.”

57. MARTIN HOLLAND, *THE EUROPEAN UNION AND THE THIRD WORLD* 42, 50 (2002).

58. See Cotonou Agreement, *supra* note 55, at 2, (“Summary: Pillar I”).

59. See Summary of Cotonou Agreement, <http://europa.eu/scadplus/leg/en/lvb/r12101.htm>; see also Cotonou Agreement, art. 9.

60. Cotonou Agreement art. 8.

61. *Id.* art. 20.

62. *Id.* art. 96 (listing as essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law:

2. (a) If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfill an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Art. 9, it shall, except in cases of special

which defines and sanctions them. Both good governance and transparency play an important role and are mentioned in Article 9, but not in its paragraph 2, as “essential elements.” However, respect for human rights, democratic principles and the rule of law can be seen as elements of the “umbrella term” good governance, which—according to Article 9(3)—underpins the Africa, Caribbean, and Pacific (“ACP”)-EU Partnership.⁶³

Transparency also plays an important role as regards the external dimension of good governance and is mentioned in several contexts in the Cotonou Agreement, especially in connection with competition policy (Article 45),⁶⁴ macroeconomic and structural reforms and policies (Article 22),⁶⁵ and the need to increase market transparency through a better operation of international commodity markets (Article 40).⁶⁶ Furthermore, the parties’ commitment to transparency under the Agreement on Technical Barriers to Trade (“TBT Agreement”),⁶⁷ as well as

urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties . . .

. . . If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them have disappeared.

. . . (c) The “appropriate measures” referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort.

63. *Id.* art. 9(3) (stating:

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption. . .

Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement.)

64. *Id.* art. 45.

65. *Id.* art. 22.

66. *Id.* art. 40.

67. *Id.* art. 47 (“they [the parties] reaffirm their commitment under the Agreement on Technical Barriers to Trade, annexed to the WTO Agreement (TBT Agreement)”).

under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"),⁶⁸ is emphasized.

Lastly, one might mention several general references to the parties' commitments under the WTO Agreements that show the importance the EC is attributing to the WTO in its relations with the ACP-countries. "Full conformity" with the provisions of the WTO is mentioned as one of the "objectives and principles" of the Cotonou Agreement.⁶⁹ The parties also stress the importance they attach to their active participation in the WTO.⁷⁰

2.3 *Transparency and Good Governance as Bases for Claims of Individuals*

2.3.1 Transparency as a Basis of Individual Rights of Access to Documents

An important aspect of transparency that is of particular importance to individual citizens is the right of access to documents of the institutions. Adumbrated as a principle by Declaration 17 on the right of access to information annexed to the Final Act of the Treaty of Maastricht,⁷¹ it was subsequently inserted into the EC-Treaty by the Treaty of Amsterdam. In December 1999, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission documents,⁷² establishing principles to govern access to documents held by these institutions. To implement that undertaking, the Council and the Commission adopted Decisions 93/731/EC

68. *Id.* art. 48 (stating "they [the parties] reaffirm their commitments under the Agreement on the Application of Sanitary and Phytosanitary Measures, annexed to the WTO Agreement (SPS Agreement), taking account of their respective level of development").

69. *Id.* art. 34(4) (stating "[e]conomic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development").

70. *Id.* art. 39(1,2) (stating "[t]hey agree to cooperate closely in identifying and furthering their common interests in international economic and trade cooperation in particular in the WTO, including participation in setting and conducting the agenda in future multilateral trade negotiations").

71. EC Treaty, *supra* note 3, declaration 17, O.J. C. 325/5 (2002), stating "[t]he Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration."

72. *See* Code of Conduct No. 93/730/EC, O.J. L 340/41, at 41 (1993).

(Council)⁷³ and 94/90/ECSC, EC, Euratom (Commission)⁷⁴ on public access to their documents. The Treaty of Amsterdam incorporated Article 255 EC into the EC Treaty. This provision explicitly guarantees a right of access to documents to natural or legal persons residing or having a registered office in a Member State.⁷⁵

Article 255 also provides the legal basis for Regulation (EC) No 1049/2001 of the European Parliament and of the Council of May 30, 2001, regarding public access to European Parliament, Council and Commission documents (“Transparency Regulation”).⁷⁶ The Transparency Regulation provides the framework, general principles, scope, and limits for access to the unpublished documents of the EU institutions and bodies, through registers of documents or upon individual application. It applies to documents held, i.e. adopted and received by the European Parliament, the Council, and the Commission, including sensitive documents, thereby significantly expanding the rules on public access to documents. It has rightly been referred to as a “milestone in the European institutions’ policy on openness.”⁷⁷ Access can only be refused if the disclosure of a document could undermine the protection of a specified public⁷⁸ or private interest, especially the privacy and integrity of the individual, particularly taking into consideration the protection of personal data in accordance with Community legislation.⁷⁹ In such instances, a weighing of interests is required.⁸⁰

73. See generally Council Decision No. 93/731/EC, O.J. L 340/43 43 (1993) (stating the decision on public access to Council documents).

74. Commission Decision No. 94/90/ECSC, O.J. L. 046/58, at 58, art. 1 (1994).

75. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C. 340/1, art. 255 (1997) (stating “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3”).

76. See generally Commission Regulation No. 1049/2001, O.J. L 145/43 (2001).

77. Marc Maes, *The “New” Regulation on Access to Documents, in INCREASING TRANSPARENCY IN THE EUROPEAN UNION? EUROPEAN INSTITUTE OF PUBLIC ADMINISTRATION 199-207* (Veerle Deckmyn ed., 2002).

78. Commission Regulation No. 1049/2001, art. 4(a) O.J. L 145/43, at 43-48 (2001) (listing the following reasons for a refusal of disclosure on the grounds of public interest: public security, defense and military matters, international relations, and the financial, monetary or economic policy of the Community or a Member State.)

79. *Id.*, art. 4, at 45.

80. *Id.* The institutions shall refuse access to a document where disclosure would

Applications for access to documents have to be made in writing, including electronic means.⁸¹ Reasons are not required, but applications must be sufficiently precise to enable the institution to identify the requested document.⁸²

Applications for access are to be handled "promptly," i.e., granted or refused within a period of 15 working days.⁸³ Written reasons must be provided for refusals, whether partial or total.⁸⁴ The applicant may, however, make a confirmatory application, asking the institution concerned to reconsider its position.⁸⁵ In the event of a partially or totally negative decision on the confirmatory application, the applicant has the right to initiate an annulment procedure according to Article 230 EC as well as to lodge a complaint with the Ombudsman.⁸⁶ Failure to reply within 15 days is deemed to constitute a negative reply, triggering an applicant's right to institute court proceedings⁸⁷ and/or to make a complaint to the Ombudsman.⁸⁸

2.3.2 Individual Rights Guaranteed by the Fundamental Rights Charter and the Draft Constitutional Treaty

The Charter of Fundamental Rights of the EU, which was later incorporated into the Constitutional Treaty, explicitly provides for both a right to good administration (Article 41)⁸⁹ and of access to documents (Article 42)⁹⁰ as fundamental rights of citizens of the EU.

The right to good administration was incorporated in Article II-101 of the Constitution for Europe,⁹¹ based on the exis-

undermine the protection of: commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

81. *Id.* art. 6, at 45.

82. *Id.*

83. *Id.* art. 7, at 45-46.

84. *Id.*

85. *Id.*

86. *Id.* art. 8, at 46.

87. *Id.* (which means again the possibility to initiate an annulment procedure according to art. 230 EC).

88. *Id.* art. 8(1, 3).

89. Charter of Fundamental Rights of the European Union, art. 41, O.J. C 364/1, at 18 (2000).

90. *Id.* art. 42, at 19.

91. Art. II-101 is titled the "Right to good administration" and paragraph 1 states "[e]very person has the right to have his or her affairs handled impartially, fairly and

tence of a Community subject to the rule of law possessing legal characteristics articulated and developed in the case law of the ECJ.⁹² Accordingly, the right to good administration includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions.⁹³

Therefore, the right to good administration encompasses the rights to have one's affairs handled impartially and fairly and within a reasonable period of time; the right to be heard before any individual measure is taken that would affect the citizen adversely; the right of access to his or her file; the obligation of the administration to give reasons for its decisions and, inherent in transparency, the right of access to documents.⁹⁴

Article III-398 of the Constitutional Treaty, furthermore, confirms the EU's commitment to a good administration.⁹⁵ It could eventually, should the Constitution ever enter into force,

within a reasonable time by the institutions, bodies, offices and agencies of the Union." Draft Treaty Establishing a Constitution of Europe, Dec. 16, 2004, O.J. C 310/1, art. II-101, at 56 (2004) (not yet ratified) [hereinafter Draft Constitutional Treaty].

92. See generally Jean-Louis Burban v. European Parliament, Case C-255/90, [1992] E.C.R. I-2253; Detlef Nölle v. Council of the European Union, Case T-167/94, [1995] E.C.R. II-2589; New Europe Consulting v. Commission of the European Communities, Case T-231/97, [1999] E.C.R. II-2403). The wording for that right in the first two paragraphs results from the case law. See Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (Unectef) v. Georges Heylens, Case 222/86, [1987] E.C.R. 4097; Orkem v. Commission of the European Communities, Case 374/87, [1989] E.C.R. 3283; Technische Universität München v. Hauptzollamt München-Mitte, Case C-269/90, [1991] E.C.R. I-5469; Lisrestal-Organizaçào Gestão de Restaurantes Colectivos Lda v. Commission of the European Communities, Case T-450/93, [1994] E.C.R. II-1177; Detlef Nölle v. Council of the European, Case T-167/94, [1995] E.C.R. II-2589.

93. Moreover, every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States (¶ 3) and every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language (¶ 4). Draft Constitutional Treaty, *supra* note 91, art. II-101, O.J. C 310/1 at 56 (2004); see also EC Treaty, *supra* note 3, art. 253, O.J. C 325/33, at 56 (2002).

94. Draft Constitutional Treaty, *supra* note 91, art. II-102, O.J. C 310/1 at 56 (2004).

95. *Id.* art. III-398(1) (stating "[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration").

provide the legal basis for a European law on good administration.

The right of access to documents was incorporated in Article II-102 of the Constitutional Treaty, the latter provision being nearly verbatim identical to that of Article 255 EC on which it is based.⁹⁶ However, Article II-102 extends the right of access to “documents of the institutions, bodies, offices and agencies of the Union, whatever their medium,” whereas Article 255 EC only guarantees the right of access to documents of the European Parliament, Council, and Commission.

2.3.3 Case Law of the ECJ

In a 1999 Article, *Transparency—Not Just a Vogue Word*, ECJ President Vesterdorf examined developments relating to transparency.⁹⁷ Evidently, the Court of First Instance (“CFI”) had already built up a considerable amount of case law during the period of application of the Code of Conduct (1993-2001),⁹⁸ the predecessor of Regulation 1049/2001. This case law, which has been partly codified in the new Regulation, reflects the Courts’ favorable disposition towards openness and a willingness to broadly interpret decisions on access.⁹⁹

In *Netherlands v. Council*, the ECJ ruled that there had been “a progressive affirmation of individuals’ right of access to documents held by public authorities, a right which has been reaffirmed at Community level on various occasions, in particular in

96. “The right guaranteed in this Article is the right guaranteed by Art. 255 of the EC Treaty. In accordance with Art. 52(2) of the Charter, it applies under the conditions defined by the Treaty.” Draft Charter of Fundamental Rights of the European Union - Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Note from the Praesidium, 11/10/2000, CHARTE 4473/00, CONVENT 49, p.37.

97. See generally Bo Vesterdorf, *Transparency—Not Just a Vogue Word*, *FORDHAM INT’L L.J.* 902 (1999).

98. See Code of Conduct, *supra* note 74, O.J. L 340/41, at 41 (1993). On December 6, 1993, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission Documents aimed at establishing the principles governing access to the documents they hold. In order to put that commitment into effect, the Council adopted Decision 93/731/EC of 20 December 1993 on public access to Council documents. See Council Decision 93/731/EC of 20 December 1993 on public access to council documents, O.J. L 340, at 43 (1993).

99. See, e.g., *Netherlands v. Council*, Case C-58/94, [1996] E.C.R. I-2169. Vesterdorf quotes the Advocate General Tesauro who pointed out that the right of access to information is “an expression of the democratic principle” and that exceptions should be interpreted narrowly.

Declaration 17 on the right of access to information annexed to the Final Act of the Treaty on European Union (“TEU”), which links that right with the democratic nature of the institutions.”¹⁰⁰

While the Court thus recognized the existence of a “trend” towards a progressive affirmation of individuals’ rights of access to documents held by public authorities as a constitutional or legislative principle, it refrained, nonetheless, from establishing a general principle of access to documents in this case or in subsequent rulings.¹⁰¹

In *Hautala v. Council*,¹⁰² the ECJ upheld the CFI’s affirmation of jurisdiction even though the case involved documents of the second pillar of the TEU. The fact that the requested report came under Title V of the TEU was held to leave the jurisdiction of the Court unaffected. As the Court had already held in *Svenska Journalistförbundet*, Decision 93/731 (which preceded Regulation 1049/2001) applied to all Council documents, irrespective of their content.¹⁰³ It also held that, under the former Article J.11(1) TEU (now Article 28 EU), acts adopted according to the former Article 151(3) EC (now Article 207(3) EC), which provided the legal basis for Decision 93/731, were applicable to measures within the scope of Title V of the EU Treaty.¹⁰⁴ Therefore, in the absence of provisions to the contrary, documents relating to Title V of the TEU fell within the scope of Decision 93/731. Thus, the fact that under former Article L (now Article 46 EU) the CFI did not have jurisdiction to assess the lawfulness of acts falling within Title V of the TEU, was no reason to exclude its jurisdiction to rule on public access to those acts.¹⁰⁵

As to the merits, the Court of Justice pointed out that the public must have the widest possible access to the documents held by the Commission and the Council and rejected the Coun-

100. *Id.* ¶¶ 35, 36.

101. *See id.*; *Interporc Im-und Export GmbH v. Commission of the European Communities*, Case C-41/00 P, [2003] E.C.R. I-02125, ¶¶ 38-40; *Mara Messina v. Commission of the European Communities*, Case T-76/02, [2003] E.C.R. II-03203, ¶ 56; *see generally* *Co-Frutta Soc. Coop. RI v. Commission of the European Communities*, Case T-47/01 [2003] OJ 2004 C7/31.

102. *See Hautala v. Council*, Case T 14/98, [1999] E.C.R. II-2492; *Council v. Hautala*, Case C-353/99, [2001] E.C.R. I-9565, ¶ 123.

103. *See Hautala*, [2001] E.C.R. I-9565, ¶ 84.

104. *See id.* ¶ 38.

105. *See Svenska Journalistförbundet v. Council*, Case T-174/95, [1998] E.C.R. II-2289, ¶¶ 85-86.

cil's argument that Decision 93/731 concerns only access to "documents" as such, not to the items of information contained in them.¹⁰⁶ The Court found that the refusal of partial access constitutes a disproportionate measure of protection of the items of information covered by the exceptions in the decision.¹⁰⁷ Instead of refusing access to the entire report, the Council could have attained the protective aims pursued if it had confined itself to censoring only those passages in the report which could harm international relations.¹⁰⁸ Consequently, the Court of Justice upheld the decision of the CFI, and concluded that the Council may not systematically limit the public's right of access to documents.¹⁰⁹ When exceptions listed in the codes of conduct of the Council and the Commission are invoked, the possibility of partial disclosure must be considered.

In *Mattila v. Council and Commission*,¹¹⁰ the applicant requested documents in the field of international relations that had been adopted in the framework of the first pillar. The CFI found that the Council and the Commission had not considered the possibility of granting partial access to the documents requested by the applicant.¹¹¹ The ECJ annulled the judgment of the CFI in so far as it dismissed Mattila's form of order seeking annulment of the contested decisions.¹¹² According to the ECJ, the Council and Commission are obliged under Decisions 93/731 and 94/90, and in accordance with the principle of proportionality, to examine whether partial access should be granted to the information not covered by the exceptions. Where no exception is applicable, a decision refusing access to a document would have to be annulled as being vitiated by an error of law.¹¹³

In *Kuijter v. Council*,¹¹⁴ the CFI held that public access to documents of the institutions is to be granted as a matter of principle, whereas the power to refuse access is to be exercised only

106. See *Hautala*, [2001] E.C.R. I-9565, ¶¶ 91-94.

107. See *id.*

108. See *id.*

109. See *id.* ¶¶ 108-17.

110. See generally *Mattila v. Council and Commission*, Case T-204/99, [2001] E.C.R. II-2265.

111. See *id.* at ¶ 71.

112. See *id.* at ¶ 112.

113. See *id.* at ¶ 30.

114. See *Kuijter v. Council*, Case T-211/00, [2002] E.C.R. II-485, ¶ 55.

exceptionally.¹¹⁵ However, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical.¹¹⁶

In *Interporc Im-und Export GmbH v. Commission of the European Communities*,¹¹⁷ the ECJ referred for the first time to the new Regulation 1049/2001, even though the Commission's contested decision had been adopted before the entry into force of that Regulation. The ECJ observed that "the developments in the Community legal framework after the adoption of the contested decision," confirmed the importance of that right [right of access to documents].¹¹⁸ It also referred to Article 255(1) EC, which was inserted into the Community legal order by the Treaty of Amsterdam and "provides that [a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents."¹¹⁹ Furthermore, the ECJ held that Regulation 1049/2001 "lays down the principles and conditions for exercising that right in order to enable citizens to participate more closely in the decision-making process, to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system and to contribute to strengthening the principles of democracy and respect for fundamental rights."¹²⁰

In the case of *Verein für Konsumenteninformation v. Commission*,¹²¹ both the request for access to documents and the subsequent application for annulment before the CFI were already based on the procedure contained in Regulation 1049/2001. The *Verein für Konsumenteninformation* ("VKI"), an Austrian consumers' association, requested authorization from the Commission to consult the administrative file relating to the "Lombard Club decision," in which the Commission had found that several

115. *Id.* ¶ 55.

116. *See id.* ¶ 56.

117. *Interporc Im-und Export GmbH v. Commission of the European Communities*, Case C-41/00, [2003] E.C.R. I-02125.

118. *See id.* ¶ 39.

119. *See id.*

120. *See id.*

121. *Verein für Konsumenteninformation v. Commission*, Case T-2/03, [2005] E.C.R. II-1121.

Austrian banks had participated in a cartel.¹²² By letter of September 12, 2002, the Commission, basing its decision on Regulation 1049/2001, rejected the VKI's request in its entirety. It also rejected the VKI's confirmatory request based on Article 7(2) of that Regulation.

The CFI held that an institution's refusal to examine concretely and individually the documents covered by a request for access constitutes a manifest breach of the principle of proportionality.¹²³ However, it also held that in exceptional cases, in particular when a concrete and individual examination would entail an unreasonable amount of work, an institution must retain the right to balance the interest in public access to documents against the burden of work involved in providing access to them.¹²⁴ The CFI referred to the concrete, individual examination of the documents referred to in a request for access under Regulation 1049/2001 as constituting one of the elementary duties of an institution in response to such a request.¹²⁵ As in *Kuijer*,¹²⁶ the CFI reiterated that public access to documents of the institutions is to be considered the primary approach as a matter of principle, while the power to refuse access is the exception to that principle,¹²⁷ which, as such must, therefore, be interpreted strictly.¹²⁸ The CFI concluded that the right of access to documents is a substantive right embedded in the Treaty (Article 255 EC) as well as in the Constitutional Treaty (Article 11-102 and Article III-399 CT), and enforceable before the CFI or the Ombudsman when infringed. By contrast, the right of "access to the file" is a right accessory to the antitrust procedure. Only in the context of the rights of the defense in such procedure can that right be raised as a fundamental procedural guarantee. It can only be enforced by action for annulment against the final decision of the Commission in such competition cases.¹²⁹

In a more recent case, *Technische Glaswerke Ilmenau GmbH v.*

122. *Id.* ¶¶ 1-3.

123. *Id.* ¶ 100.

124. *See id.* ¶¶ 101-103; *see also Hautala*, [1999] E.C.R. II-2492, ¶ 62.

125. *See Verein für Konsumenteninformation*, [2005] E.C.R. II-1121, ¶ 104.

126. *Kuijer v. Council*, Case T-211/00, [2002] E.C.R. II-485.

127. *See Verein für Konsumenteninformation*, [2005] E.C.R. II-1121, ¶ 105.

128. *Id.* ¶ 106.

129. *Verein für Konsumenteninformation v. Commission*, CASE T-2/03 [2006] C.M.L.R. 43, ¶ 205.

Commission, the CFI basically repeated its VKI-decision.¹³⁰ Technische Glaswerke Ilmenau GmbH, a German company, was formed in 1994 with the aim of taking over some glass production of the former Ilmenauer Glaswerke GmbH, a company which had been wound up. In December 1998, Germany notified the Commission of various measures designed to consolidate the financial position of the Technische Glaswerke Ilmenau GmbH, including a partial waiver of the payment of the purchase price of the glass production and a loan granted by the German Bundesland of Thuringia.¹³¹ In the course of a formal investigation under Article 88(2) EC concerning the payment waiver and the loan, the Commission obtained additional information from Schott Glas, a competitor of the applicant. By Decision 2002/185/EC on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH of June 12, 2001, the Commission determined that the payment waiver was inconsistent with the conduct of a private investor and constituted State aid incompatible with the common market.¹³² Furthermore, the Commission opened a second formal investigation procedure pursuant to Article 88(2) EC.¹³³ By appeal of March 2002, based on Regulation 1049/2001, Technische Glaswerke Ilmenau GmbH applied for “access to all the documents in the Commission’s files in all the aid cases concerning [it] and in particular in aid case C 44/2001 as well as to all the documents in the Commission’s files concerning the State aid for the undertaking Schott Glas.”¹³⁴ The Commission rejected the application on the grounds that the documents sought were covered by the exception in Article 4(2) of Regulation 1049/2001, referring in particular to the possibility to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.¹³⁵ Interestingly, the applicant had invoked a right of access to documents, which is “not an ordinary secondary right but is, on the contrary, in view of ‘the

130. See *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-237/02, [2006] E.C.R. 00, ¶¶ 74-100.

131. See *id.* ¶ 2.

132. See *id.* ¶ 16.

133. This investigation was conducted under reference C 44/2001.

134. See *Technische* ¶ 5.

135. *Id.* ¶ 10.

democratic principle,' a fundamental right, derogation from which must be construed strictly."¹³⁶ The Court found that "the mere fact that a document concerns an interest protected by an exception cannot justify the application of that exception."¹³⁷ Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation 1049/2001, whether there was no overriding public interest in disclosure.¹³⁸ The Court also recalled its reasoning in *Kuijer* that the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical.¹³⁹ Consequently, the examination which the institution must, in principle, undertake in order to apply an exception, must be carried out in a concrete manner and must be apparent from the reasons for the decision.¹⁴⁰ The Court concluded that the complaint based on the lack of a concrete, individual examination of the documents referred to in the application for access had to be upheld and that the Commission's pure and simple refusal of access to the applicant was, consequently, vitiated by an error of law. Therefore, the Court found that the Commission had infringed Article 4(2) of Regulation 1049/2001.¹⁴¹

By way of conclusion, one can say that since 1999 the right of access to documents has been embedded in the EC-Treaty, secondary law, as well as explicitly recognized by the Court.¹⁴² Access to documents may only exceptionally be refused,¹⁴³ and such exceptions are to be interpreted restrictively.¹⁴⁴ The mere fact that a document concerns an interest protected by an exception does not as such justify the application of such an excep-

136. *Id.* ¶ 27.

137. *Id.* ¶ 77; *see also* *Denkavit Nederland v. Commission*, Case T-20/99 [2000] E.C.R. II 3011, ¶ 45.

138. *Technische*, ¶ 77.

139. *See* *Kuijer v. Council*, Case T-211/00 [2002] E.C.R. II-485, ¶ 56.

140. *Technische*, ¶ 77; *see also* *Hautala v. Council*, Case T-14/98, [1999] E.C.R. II-2489, ¶ 67; *Kuijer*, [2000] E.C.R. II-1959, ¶ 38; *Verein für Konsumenteninformation v. Commission*, Case T-2/03, [2005] E.C.R. II-1121, ¶¶ 24, 69, 74.

141. *Technische*, ¶ 100.

142. *Interporc Im-und Export GmbH v. Commission*, Case C-41/00 P, [2003] E.C.R. I-02125, ¶ 39.

143. *Kuijer*, [2002] E.C.R. II-485, ¶ 55.

144. *Verein für Konsumenteninformation* [2005] E.C.R. II-1121, ¶ 105.

tion.¹⁴⁵ A concrete, case-by-case individual examination is an elementary duty of a concerned institution.¹⁴⁶ An institution's refusal to carry out such an examination of the documents covered by a request for access constitutes manifest breach of the principle of proportionality.¹⁴⁷ Only when such an examination would entail an unreasonable amount of work, would an institution be entitled to balance the interest in public access to documents against the burden of work involved.¹⁴⁸

3. TRANSPARENCY IN THE WTO

Good governance as a concept is scarcely present in the WTO legal framework, unlike as was seen above, in the EU's legal framework.

Elements of good governance can, however, be found in Section 2 of Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") on Civil and Administrative Procedures and Remedies. According to these detailed provisions regarding civil and administrative proceedings, WTO Members are obliged to guarantee certain judicial rights, in particular fair and equitable judicial procedures for enforcing intellectual property rights.¹⁴⁹ These requirements, however, do not guarantee individual rights, but merely require Members to ensure that national intellectual property rights ("IPR") proceedings are organized and conducted in accordance with a minimum standard. Thus, this implicit reference to good governance entails obligations for WTO Members. On the other hand, "transparency" does play an important role in WTO law, being defined as the "degree to which trade policies and practices, and the process by which they are established, are open and predict-

145. *Technische*, ¶ 77.

146. *Id.* ¶ 85.

147. *Verein für Konsumenteninformation*, [2005] E.C.R. II-1121, ¶ 100.

148. *Hautala v. Council*, Case T-14/98, [1999] E.C.R. II-2489, ¶ 86; see also *Verein für Konsumenteninformation*, [2005] E.C.R. II-1121, ¶ 101.

149. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994), pt. III, § 1, art. 42. [hereinafter TRIPS]. WTO Members shall provide fair and equitable civil judicial procedures for enforcing intellectual property rights, including timely written notice, representation by independent legal counsel, right to substantiate claims and present all relevant evidence.

able.”¹⁵⁰ According to a definition by the Committee on Trade and Environment, the function of WTO transparency provisions is to “support the proper functioning of the multilateral trading system, by helping to prevent unnecessary trade restriction and distortion from occurring, by providing information about market opportunities and by helping to avoid trade disputes from arising.”¹⁵¹

As in the case of the EU legal framework, one can distinguish between an internal and an external dimension of transparency. However, the actual meaning of these two terms is different from the EU’s understanding of internal and external transparency. Internal transparency in the WTO context means equal access to WTO negotiations and decisions by all Members, and in particular the transparency of the WTO decision-making process to its Members.¹⁵² External transparency, by contrast, refers to public and citizens’ access to information about WTO procedures and decisions. Especially since the Seattle Ministerial Conference, the WTO has made considerable efforts to improve both external and internal transparency.

Furthermore, there are a number of provisions of WTO Agreements that require transparency of domestic laws and regulations. These will be examined below.

3.1 *Article X GATT*

3.1.1 Doctrinal Views

According to Steve Charnovitz, one of the most positive but least known features of WTO law is the rule requiring national governments to publish laws, regulations, judicial decisions and administrative rulings affecting trade.¹⁵³ Robert Howse, too, acknowledges the potentially democracy-enhancing effect of the provisions of Article X of the General Agreement on Tariffs and Trade (GATT), while rightly pointing out that Article X GATT

150. WTO Glossary, http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm.

151. Furthermore, the importance of the full transparency of national environmental policy measures, such as labelling and packaging requirements, in order not to create unnecessary trade restrictions is pointed out in WTO, TRADE AND ENVIRONMENT AT THE WTO 44 (April 2004), http://www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf.

152. Steve Charnovitz, *The WTO and Cosmopolitics*, 7 J. OF INT’L ECON. L. 675, 678.

153. *Id.*

had been given relatively little attention so far.¹⁵⁴

The origins of the GATT must be seen against the background of the post-World War II situation, in which the GATT “provided rules to buffer or interface between the international objective of sustained liberalization and the objectives of domestic policy.”¹⁵⁵ By imposing notification obligations on contracting parties, Article X GATT aimed at ensuring transparency of and trust in the new international trade order.

Article X GATT had been adapted from the 1946 U.S. Administrative Procedures Act (“APA”).¹⁵⁶ When GATT entered into force in 1947, it “grandfathered” the existing legal systems of GATT Contracting Parties.¹⁵⁷

However, the notification requirement under Article X GATT has never been enforced, and its provisions, therefore, have long been viewed as weak and ineffective. Although it was frequently cited in dispute settlement proceedings and in complaints, violations of Article X GATT have typically been pleaded only as “add-ons” to other more promising legal claims of violations of WTO rules. WTO and GATT panels have habitually refused to rule on Article X claims where a measure has already been found to violate another, more substantive GATT or WTO obligation.¹⁵⁸

3.1.2 Panel Practice

In *Japanese Measures on Imports of Leather*, the United States argued, as a subsidiary matter, that Japan had also nullified or impaired benefits under Articles II, X:1, X(3) and XIII(3)

154. Robert Howse, *How to Begin to Think about the “Democratic Deficit” in the WTO*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 91 (Stefan Griller ed., 2003).

155. SYLVIA OSTRY, EXTERNAL TRANSPARENCY: THE POLICY PROCESS AT THE NATIONAL LEVEL OF THE TWO LEVEL GAME, 34 (2002).

156. *Id.* at 3.

157. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. X [hereinafter GATT]. Paragraph 3(c) of Art. X provides:

The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administration enforcement.

158. Warren Maruyama, *The WTO: Domestic Regulation and the Challenge of Shaping Trade*, 37 INT’L L. 677, 677 (2003).

GATT.¹⁵⁹ Typically, however, in view of the findings that the import quotas violated Article XI GATT, the Panel found it unnecessary to make a finding on these matters.¹⁶⁰

In *Indonesia—Autos*, the Panel had to examine whether a series of measures taken by Indonesia to develop its domestic automobile industry was inconsistent with Article X as well as with Articles I and III GATT.¹⁶¹ The Panel found that the Indonesian National Car Program violated the provisions of Article I and/or Article III of GATT and did not, therefore, consider it necessary to examine Japan's claims under Article X GATT.¹⁶²

Similarly, in *Argentina—Hides and Leather*,¹⁶³ the EC invoked Article X GATT, among claims of violations of other provisions, but this time the Panel made some essential clarifications of the interpretation of Article X(3)(a) GATT.¹⁶⁴ It emphasized the concept of "uniformity" relating to the requirement in Article X(3)(a) GATT that laws and regulations shall be administered "in a uniform, impartial and reasonable manner."¹⁶⁵ It also ruled that the provision of Article X(3)(a) should "not be read as a broad anti-discrimination provision" but that it required "uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places."¹⁶⁶

The first case in which Article X GATT played a central role is that of *EC-Selected Customs Matters*,¹⁶⁷ in which the United States complained of various deficiencies in the EC administration of customs laws and regulations, particularly in the area of the clas-

159. Report of the Panel, *Japanese Measures on Imports of Leather*, ¶¶ 26, 28, 30 & 57, L/5623-31S/94 (May 15-16, 1984), GATT 31 B.I.S.D. 94.

160. *Id.* ¶ 57; see generally Report of the Panel, *Republic of Korea—Restrictions on Imports of Beef—Complaint by the United States*, L/6505-36S/268 (Nov. 7, 1989), GATT B.I.S.D. 36S/286; *Canada—Import Restrictions on Ice Cream and Yoghurt*, (Dec. 5, 1989), 36 B.I.S.D. at 68, 92.

161. See generally Report of the Panel, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, (2 July 1998).

162. See *id.*

163. Report of the Panel, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, (Dec. 19, 2000). The provisions invoked were GATT Arts. III(2), X, XI and XX.

164. *Id.* ¶¶ 10.3-10.12.

165. *Id.* ¶¶ 10.5-10.6.

166. *Id.* ¶¶ 11.81-11.84.

167. Panel Report, *European Communities—Selected Customs Matters*, WT/DS315/R (June 16, 2006).

sification and valuation of products for customs purposes, as well as of the EC's failure to institute tribunals or procedures for the prompt review and correction of administrative action in customs matters. The United States claimed that this non-uniform administration by the EC resulted in disparate administration among EC Member States in a number of respects, including differences in the classification and valuation of goods and in the implementation of appeals procedures.¹⁶⁸ Furthermore, the ability to obtain review of a customs decision by a tribunal of the EC is possible only after a review by national administrative or judicial tribunals.¹⁶⁹

The United States considered the aforementioned practice to be inconsistent with the EC's obligations under Articles X:1, X(3)(a) and (b) of GATT 1994.¹⁷⁰ The Panel found that the EC had partially violated Article X(3)(a) GATT, namely in three cases involving tariff classification and customs valuation. However, in five cases in the areas of tariff classification, customs valuation, and customs procedures, the EC had not violated Article X(3)(a) GATT, and in 11 cases the US had not been able to show that the EC had violated this provision.¹⁷¹

Concerning the interpretation of Article X(3)(a) GATT,¹⁷² the Panel found that the term "administer" relates to the application of laws and regulations, but not to laws and regulations *as such*.¹⁷³ Regarding the interpretation of "uniformity," the Panel noted that there was no single general concept of uniformity and that uniformity must be ensured within a reasonable period of time that should not fall below certain procedural minimum standards.¹⁷⁴ Based on these findings, the Panel concluded that the United States had failed to establish a violation of Article X(3)(a) in 16 out of the 19 particular instances of alleged violations. Concerning the interpretation of Article X(3)(b), the Panel found that the EC had not acted inconsistently with the

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. GATT, *supra* note 159, art. X(3)(a). GATT provides: "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

173. Panel Report, *European Communities—Selected Customs Matters*, *supra* note 167, at ¶ 7.114.

174. *Id.* ¶ 7.128 f.

requirements of Article X(3)(b) of the GATT 1994. Article X(3)(b) of the GATT 1994 would not necessarily mean that the decisions of the judicial, arbitral or administrative tribunals or review procedures “must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular [WTO] Member.”¹⁷⁵

On appeal by the United States on certain issues of law and legal interpretations developed by the Panel, the AB partially reversed the Panel’s findings.¹⁷⁶ Regarding the requirement of uniform administration in Article X(3)(a) GATT, the AB reversed the Panel’s finding that Article X(3)(a) of the GATT 1994 only relates to the application of laws and regulations, but not to laws and regulations as such. Instead, the AB found that legal instruments that regulate the application or implementation of laws, regulations, decisions, and administrative rulings of the kind described in Article X(1) of the GATT 1994 can be challenged under Article X(3)(a).¹⁷⁷

With respect to the review mechanisms for administrative action relating to customs matters, the AB upheld the Panel’s finding that Article X(3)(b) of the GATT 1994 does not require that first instance review decisions must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular WTO Member.¹⁷⁸ The AB reversed the Panel’s finding that the United States was precluded from challenging certain instruments of the EC’s customs legislation listed in the request for the establishment of a panel as a whole or overall.¹⁷⁹ However, the AB was unable to complete the analysis on this claim because the Panel’s “general observations” about the role of a number of institutions and mechanisms in the EC provided an insufficient factual basis for assessing whether the EC had failed to ensure uniform administration of its customs legislation. The AB upheld the Panel’s conclusion that the EC did not breach Article X(3)(b) of the GATT 1994.¹⁸⁰

Article X GATT is not, of course the only provision in the

175. *Id.* ¶¶ 7.496, 7.539, 7.554, 7.556 & 8.1(e).

176. Panel Report, *European Communities – Selected Customs Matters*, *supra* note 167.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

WTO legal framework which contains notification obligations. Also Article XVII(4) GATT states notification requirements for state trading enterprises,¹⁸¹ but provisions establishing notification requirements can be found in numerous agreements, underlining the central importance of notification obligations for the world trade system.

3.2 Other Arguments

3.2.1 Transparency Through Notification Obligations in Other Agreements

Article VI (“Domestic Regulation”) of the General Agreement on Trade in Services (“GATS”) builds on Article X GATT. It states that “all measures of general application affecting trade in services must be administered in a reasonable, objective, and uniform manner” (paragraph 1);¹⁸² and requires WTO Members to establish “judicial, arbitral, or administration tribunals” for prompt review of and appropriate remedies for administrative decisions affecting trade in services (paragraph 2).¹⁸³ The GATS Council, furthermore, formulates disciplines to ensure that regulatory decisions regarding an applicant’s qualifications to provide a service shall be based on “*objective and transparent criteria*”¹⁸⁴ (paragraph 4).

Under the title “Transparency,” Article 7 of the Agreement on Sanitary and Phytosanitary Measures (SPS) imposes a notification obligation upon WTO Members concerning their sanitary or phytosanitary measures.¹⁸⁵ The Anti-Dumping Agreement (“AD”) contains several notification obligations, concerning, *inter alia*, the investigation of dumping (Article 5 AD), and the notification of an application to initiate an investigation to the gov-

181. GATT, *supra* note 157, art. XVII, 4(a) (stating “[c]ontracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this article.”)

182. GATT, *supra* note 157, art. VI.

183. *Id.*

184. *Id.*

185. “Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B”. Agreement on the Application of SANITARY AND PHYTOSANITARY MEASURES, Apr. 15, 1994, Multilateral Agreement on Trade in Goods, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [Art. 7 SPS].

ernment of the exporting Member concerned (Article 5.5 AD).¹⁸⁶

Article 8.3 of the Agreement on Subsidies and Countervailing Measures ("SCM") imposes notification requirements relating to non-actionable subsidies which are also available through the WTO website ("Documents online").¹⁸⁷ Concerning specific subsidies, Article 25.1 of the SCM Agreement requires that all Members submit a new and full notification of all specific subsidies every three years, with updating notifications due in the intervening years.¹⁸⁸ This notification obligation extends to all specific subsidies related to goods, in any sector (including agriculture), and provided by any level of government (e.g., national, regional, state or provincial, local).¹⁸⁹ Article 12 of the Safeguards Agreement ("SG") envisages notification and consultation requirements relating to safeguard measures. A notification obligation on the establishment of enquiry/contact points is foreseen in Article III(4) GATS¹⁹⁰ as well as in Article 62 TRIPS.¹⁹¹

Further notification obligations can be found, *inter alia*, in Articles 3 and 4 TRIPS, in Article 5.1 of the Agreement on Trade-Related Investment Measures ("TRIMS"), in the Agreement on Government Procurement ("GPA") (Article XXIV(5)),¹⁹² the International Dairy Agreement (Article III,

186. Other notification obligations are: the notification of information required by the authorities in an investigation of dumping to all interested parties in the framework of evidentiary rules (Art.6 AD) and the notification to all interested parties of essential facts under consideration (Art. 6.9 AD). Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping), April 15, 1994 WTO Agreement, Annex 1A.

187. In order to assist the public in identifying and retrieving these documents, a discussion of some of the main types of notifications submitted to the SCM Committee and the document series in which they may be located is provided below.

188. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A.

189. *Id.*

190. Art. III requires a Member to notify to the Services Council, at least once a year, any new laws or regulations which significantly affect trade in sectors where that Member has scheduled specific commitments. In introducing such regulatory changes, a Member must act consistently with its legal obligations under the GATS. The notification obligation enables other Members to verify that this is the case.

191. In September 1995, the TRIPS Council adopted a common procedure for the notification of contact points that Members had established for the purposes of Art. 69.

192. Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4(b), art. XXIV, ¶ 5.

(b) Each Party shall inform the Committee of any changes in its laws and

VI(4)), the Import Licensing Procedures Agreement (Article 1.4, 1.5), and in the Agreement on Pre-shipment Inspection (Article 5). The Agreement on Technical Barriers to Trade ("TBT") sets out special notification requirements. Technical regulations and product standards are subject to the TBT requirement that the measures are notified to WTO Members, that they are applied in a non-discriminatory way, and that they are not more trade-restrictive than necessary to achieve their objective.

There is also a Working Group on Notification Obligations and Procedures, which reports to the Council for Trade and Goods on an annual basis.¹⁹³

3.2.2 Transparency Provisions in WTO Agreements

References to transparency are in a manner of speaking ubiquitous within the legal framework of the WTO. Provisions explicitly referring to the term "transparency" and provisions on notification obligations are closely linked to each other and can not, therefore, always be separated from one another. This can be seen for example in Article 12 AD, which is referred to as a "transparency" provision in the GATT Analytical Index, but which, under the title *Public Notice and Explanation of Determinations*, contains a notification obligation. However, the fact that public notice should also be given to other interested parties is at the same time an important contribution to transparency.

Under the heading "Transparency," Article III GATS obliges the Members to publish promptly and at the latest by the time of their entry into force, "all relevant measures of general application which pertain to or affect the operation of this Agreement".¹⁹⁴ International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.¹⁹⁵ Moreover, each member has to inform the Coun-

regulations relevant to this Agreement and in the administration of such laws and regulations.

193. This Working Group was established by the Council for Trade in Goods on 20 February 1995, pursuant to Part III of the Ministerial Decision on Notification Procedures in Marrakesh.

194. World Trade Organization, General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art. III(1), 1869 U.N.T.S. 183, art. III [hereinafter GATS].

195. *See id.* art. III(1).

cil of Trade in Services at least once a year of the introduction of "any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement."¹⁹⁶ Furthermore, as already mentioned above, Article IV(4) GATS sets out some notification requirements and envisages the establishment of contact and enquiry points, a clear illustration of the linkage between transparency and notification obligations.¹⁹⁷

The GPA seeks to open up government contracts for goods and services through "transparency of laws, regulations, procedures and practices regarding government procurement"¹⁹⁸ and, to that end, incorporates a number of specific obligations.¹⁹⁹

3.3 *Transparency in Dispute Settlement*

Transparency also plays an important role in the WTO Dispute Settlement Mechanism ("DSU"). Among several provisions that aim at ensuring a transparent procedure, Article 18.2 DSU requires that a summary of confidentially submitted submissions of a party to a dispute be disclosed to the public upon request of a Member.²⁰⁰ However, there is an exception to the rule of Arti-

196. *See id.* art. III(3).

197. *See id.* art. IV(4).

198. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103.

199. These comprise obligations regarding: (1) tendering procedures; (2) qualification of suppliers; (3) timely publication of any conditions for participation; (4) publication of invitations for participation in proposed procurements; (5) "fair and non-discriminatory" selection procedures; (6) adequate time limits and deadlines; (7) submission, receipt, and opening of tenders "under procedures and conditions guaranteeing the regularity of the openings"; (8) contracts must be awarded to the entity determined to be "fully capable of undertaking the contract" and which is either the lowest bidder or offers the "most advantageous" tender; and (9) transparency of terms and conditions. *See Maruyama, supra* note 158, at 687.

200. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (stating

Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public." Appendix 3 reads "[w]here a party to a dispute submits a confidential

cle 18.2: The classification of information as business confidential information (“BCI”).²⁰¹ This exception has been invoked quite frequently by WTO Members, prompting Panels and the AB to clarify the exact scope and the limits of the exception of business confidential information.

In *Canada—Aircraft*, the Panel adopted special Procedures Governing Business Confidential Information (“BCI”) that went beyond the protection afforded by Article 18.2 of the DSU, but Canada declined to submit BCI under the revised Procedures because they did not provide the requisite level of protection.²⁰² The Panel stated that in its view, the final Procedures would “strike a reasonable balance between (1) the need for ‘reasonable access’ to BCI by the Panel and the other disputing parties, and (2) the need to provide private business interests with adequate protection for their proprietary business information.”²⁰³

In *Canada—Aircraft* and *Brazil—Aircraft*, the AB made a preliminary ruling that it was not necessary to adopt additional procedures to protect business confidential information in the appellate proceedings, but that the existing provisions concerning confidentiality of dispute settlement proceedings were sufficient.²⁰⁴

In its final ruling in *Canada—Aircraft*, the AB stated that the provisions of Articles 17.10 and 18.2 DSU apply to all Members of the WTO, and that they furthermore oblige them to maintain the confidentiality of any submissions or information they have submitted or received in an AB proceeding.²⁰⁵ Finally the AB concluded that it did not consider it necessary to adopt *additional* procedures for the protection of business confidential information in these appellate proceedings.²⁰⁶

In *EC—Bananas III (US)* (Article 22.6 - EC), the United States requested the Arbitrators to establish procedures for the

version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.)

201. *See id.*

202. Report of the Panel, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999).

203. *Id.* ¶ 9.68.

204. *See id.*

205. *See id.*

206. *See id.* ¶¶ 145, 147; *see also* Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, (Aug. 2, 1999), ¶¶ 123, 125.

handling of business confidential information.²⁰⁷ The United States proposed to establish a system of BCI: regular BCI and super BCI.²⁰⁸ The EC objected to this proposal, arguing that working procedures on confidentiality should not be adopted on a case-by-case basis.²⁰⁹ The Arbitrators agreed with the United States that special rules were justified in light of the type of information involved, but did not in the end accept the need for special treatment of super BCI.²¹⁰

Besides Article 18(2) DSU, transparency is also guaranteed by other DSU provisions. Thus, Article 4 (4) DSU requires notification of the WTO Secretariat that Members have entered into consultations under the DSU.²¹¹ Moreover, increased transparency can essentially contribute to a more efficient enforcement mechanism, as detailed, and early information about the merits of a particular case and about policies applied is a precondition for effective enforcement.²¹²

3.4 *Does the WTO Grant Transparency to Individuals?*

Although the WTO Agreement imposes many reporting, notification and transparency requirements upon its Members, it does not impose similar requirements upon the WTO itself. Unlike the EC's *acquis communautaire*, the legal framework of the WTO does not determine openness and transparency as fundamental principles of trade law, and no right to information is granted to individuals. However, there is one exception that can be found in Article 18.2 and in Annex 3 of the DSU, which states that a summary of confidentially submitted submissions of a

207. Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB (Apr. 9, 1999).

208. *See id.* Regular BCI was described as company-specific information that was non-public and sensitive, but that could be extrapolated from other public and non-public information available to governments and the company's competitors. Super BCI was described as non-public, sensitive company-specific information that could not be so extrapolated.

209. *See id.*

210. *See id.* ¶¶ 2.2.-2.5.

211. *See* DSU, *supra* note 202, art. 4.4, (providing that “[a]ll such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.”)

212. Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, 23 *WORLD ECON.* 527, 540 (2000).

party to a dispute has to be disclosed to the public upon request of a Member.²¹³ However, practice has not been impressive so far.²¹⁴ Basically, WTO external transparency “begins at home,” stemming from rights and responsibilities of governments, not of those of individual traders. However, some exceptions to this rule can be found, for example in the SCM Agreement which includes the rights of “interested parties” other than those of Member governments.²¹⁵ Consumer groups are specifically named in the Dumping Agreement.²¹⁶ The Agreement on Safeguards includes an obligation for the importing country to carry out an investigation including “public interest hearings,” which could also include interest groups. Similar provisions are contained in Article 22 TRIPS on the protection of geographical indications and in Article VI GATS on domestic regulation.²¹⁷ Although these examples do provide some procedural participatory rights, for the most part the WTO rules situate the determination of the policy process in the domestic arena of the member governments. One major exception is the Trade Policy Review Mechanism (“TPRM”).²¹⁸

The TPRM is an important tool aiming at the enhancement of transparency, which puts trade and related policies under review on a periodic basis in order to ensure significantly greater transparency of national policies. Through informed public understanding, the effectiveness of the domestic policy-making process should be enhanced. However, Howse has taken the view that its democratic potential has not been realized because of the narrow policy perspective adopted in examining Members’ policies and the non-appropriate realization of the potential of broad civil society input.²¹⁹ On the other hand, an appropriately

213. See DSU, *supra* note 202, art. 18.2, annex 3.

214. See Charnovitz, *supra* note 152, at 679. Charnovitz also characterizes Art. X as a “good governance” provision whose value has become “better understood as a driver of development and equity.”

215. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

216. World Trade Organization, Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade (1994).

217. World Trade Organization, Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401.

218. See Ostry, *supra* note 155, at 21f.

219. See Howse, *supra* note 154.

reformed TPRM could contribute to a greater extent to the enhancement of domestic democratic accountability for trade and related policies.²²⁰

In general, the GATT/WTO framework can be seen as an arena where information asymmetries have been severe and the understanding of trade rules quite poorly developed.²²¹ Charnovitz has suggested, therefore, that the WTO should take legislative action to open up to civic legitimacy because openness would contribute to the enhancement of legitimacy as well as to greater public support for the WTO's mission.²²²

Some progress has, however, been made since the establishment of the WTO in 1995. Indeed the WTO attaches particular importance to a transparent relationship with NGOs and has adopted Guidelines for Arrangements on Relations with NGOs in 1996.²²³ These guidelines were intended to serve as the principal foundation upon which the increasing interaction between the WTO and civil society should be built. Moreover, the WTO Secretariat hosts regular information briefings for NGOs and regularly transmits to the WTO Members lists of documents submitted by NGOs.

3.5 *Recent Developments*

Among the most significant improvements in the area of external transparency is the WTO website which provides access to a great variety of documents, including those of Trade Policy Reviews.

Transparency was also an integral part of the Doha Ministerial Declaration.²²⁴ Paragraph 10 of the Declaration contains a commitment to transparency:

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

220. *See id.* at 92; *see also* Hoekman & Mavroidis, *supra* note 214, at 527; *see also* Ostry, *supra* note 155, at 22.

221. *See* Howse, *supra* note 154, at 92.

222. *See* Charnovitz, *supra* note 152, at 679.

223. World Trade Organization General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162 (July 18, 1996).

224. World Trade Organization, Ministerial Declaration of November 14, 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and 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.²²⁵

Transparency in government procurement was also one of the four so-called "Singapore issues," alongside investment, competition policy, and trade facilitation. It should be mentioned, lastly, that in December 2006 the General Council decided to establish a Transparency Mechanism for Regional Trade Agreements ("RTA"), in view of the ever increasing numbers of RTAs notified to the WTO.²²⁶

FINAL ASSESSMENT AND OUTLOOK

For both the EU and the WTO, transparency has become much more than just a vogue word. Despite their considerably different organizational structures and legal status, both organizations have shown that transparency as a particular aspect of good governance is not only incumbent upon states but also that it can and should be guaranteed by international organizations.

However, the European understanding of good governance as such is still predominantly referring to the external dimension of good governance, an instrument to ensure the promotion of human rights and democracy in third (world) countries. In order to guarantee the implementation of the internal dimension of good governance which embraces the right to good administrative behavior, the EU-institutions adopted appropriate codes of conduct. Moreover, the transparency initiative launched by the European Commission should, over time, also contribute to the bridging of the confidence gap between the European institutions and the EU-citizens. Rights of access to documents

225. *See id.*

226. World Trade Organization Negotiating Group on Rules, *Transparency Mechanism of for Regional Trade Agreements*, WT/L/671 (Dec. 14, 2006), to be implemented on a provisional basis in accordance with paragraph 47 of the Doha Ministerial Declaration. WTO General Council, *Transparency Mechanism of for Regional Trade Agreements*, Decision of 14 December 2006, WT/L/671, to be implemented on a provisional basis in accordance with paragraph 47 of the Doha Ministerial Declaration.

which directly affect citizens' rights have also been enhanced, regulated by secondary legislation and sanctioned by the ECJ and CFI. While good governance is only of minor importance in the WTO legal framework, transparency has a particular role to play in the international trade order, as is, *inter alia*, amply illustrated by numerous notification obligations contained in various WTO agreements, as well as by its regular promotion since the establishment of the WTO, including the recent decision on a transparency mechanism for RTAs.

Whether transparency can be further strengthened in their respective legal frameworks will depend on general developments, such as the still uncertain future of the Constitutional Treaty and the outcome of multilateral negotiations in the Doha Development Round. Both organizations have, however, already made considerable progress in securing transparency, whether as a considerable right (EU) or as a principle (WTO).