Chapter 13

Transparency as an Element of Good Governance in the Practice of the WTO

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1 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

In the context of governance, transparency or openness (as opposed to opaqueness) denotes the availability of information to the general public and clarity about governmental rules, regulations and decisions. Demand for transparency is not new. Already in 1790 Bentham declared that “secrecy, being an instrument of conspiracy, ought never to be a system of regular government.”2 Immanuel Kant, in his “Perpetual Peace” (1795) criticized secret treaties3 and other philosophers writing in the Kantian tradition emphasized the importance of the public and of public reasoning as a conditio sine qua non of legitimate government.4 US President Woodrow Wilson’s first of his famous 14 Points – the only programme of the world’s peace after World War I – was that “Open covenants of peace, openly arrived at, after which there shall be no

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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 Nickel, R., “Participatory Transnational Governance,” Joerges, C. & Petersmann, E.-U. (eds.), Constitutionalism, Multilevel Trade Governance and Social Regulation (Oxford and Portland: Hart Publishing, 2006) 157–95, at 163.
3 Kant, I., Zum ewigen Frieden, (Stuttgart: Reclam, 1984) 1st section 3.
private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view." And at the beginning of the 20th century US Supreme Court Justice Louis Brandeis famously observed that "sunlight is the best disinfectant."

The evocative concept of “good governance," though a relatively young one, has recently emerged as a key concept in discourses about governance. Various intergovernmental institutions have formulated similar definitions of good governance, yet attributed to them different meanings and functions and use them for different purposes. This article seeks to provide an overview of relevant practice of 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 the WTO has made considerable strides toward enhancing transparency in its respective spheres of governance, it is still a “Member-driven" organization whose executive head, the Director-General, may not even construct a negotiating agenda for the Members under his own authority, and the WTO Appellate Body (AB) is not, as yet, an independent court of law.

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.

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5 President Wilson in US Congress joint session of 8 January 1918.
7 For an account of relevant EU practice, see Weiss, F. assisted by Steiner, S., “Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison,” 30(5) Fordham International Law Journal (2007) 1545–86; see also, Classen, K.-D., Gute Verwaltung im Recht der Europäischen Union (Berlin: Duncker & Humblot, 2008).