CLARITA COSTA MAIA

O PRINCÍPIO DA TRANSPARÊNCIA COMO BALIZADOR INSTRUTIVO E NORMATIVO DO REGIME MULTILATERAL DO COMÉRCIO:

Em Busca de Uma Resposta Sistêmica Para a Crise de Legitimidade Interna e Externa da OMC

TESE DE DOUTORADO
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Tese apresentada à Banca Examinadora do Programa de Pós-Graduação em Direito da Faculdade de Direito da Universidade de São Paulo como requisito para conclusão do curso de Doutorado na área de concentração de Direito Internacional, sob a orientação do Professor Titular Alberto do Amaral Junior

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MAIA, Clarita Costa.

O Princípio da Transparência Como Balizador Instrutivo e Normativo do Regime Multilateral do Comércio: Em Busca de uma Resposta Sistêmica para a Crise De Legitimidade Interna e Externa da Organização Mundial do Comércio.

1. Direito Internacional. 2. Organização Mundial do Comercio. 3. Principio da Transparência. 4. Acordo de Facilitação do Comercio. 5. Atividade Regulatória

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To my mother, Idalice Costa Maia, who allowed me to follow the paths of my soul. To my father, Agicer Maia, who first inspired them.

Nobody warned you that the women whose feet you cut from running would give birth to daughters with wings.
Ijeoma Umbeinyuo. Questions for Ada.

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Ad pulchritudinem tria requiruntur. Primo quidem integritas, sive perfectio (…) Et debita proportio, sive consonantia. Et iterum claritas.
Thomas Aquinas, Summa Theologiae 1, q. 30, a.8c)

Find beauty not only in the thing itself but in the pattern of the shadows, the light and dark which that thing provides.
Junichiro Tanizaki. In Praise of Shadows

Transparency has no transcendence. The society of transparency is see-through without light.
Byung-Chul Han. The Transparency Society

Things are not what they seem; outward form deceives many.
Rare is the mind that discerns what is carefully concealed within.
Phaedrus. Plato.

Resumo

MAIA, Clarita Costa. O Princípio aa Transparência Como Balizador Instrutivo e Normativo do Regime Multilateral do Comercio: Em Busca de Uma Resposta Sistêmica para a Crise de Legitimidade Interna e Externa da Organização Mundial do Comércio. 439 páginas. Tese de Doutorado – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2021.

A tese examina a transparência como princípio geral de direito e como principio geral de direito da Organização Mundial do Comercio (OMC). A despeito do espraiamento de regras de transparência nos diversos ordenamentos jurídicos nacionais e da existência de diversos dispositivos legais congêneres nos textos acordos da OMC, a literatura questiona o status da transparência como costume internacional. Nada obstante, utilizando do arcabouço teórico de Umberto Ávila, esta autora sustenta que a transparência é um princípio de direito da OMC, bem como um postulado. Como principio, a transparência almeja a promoção de um estado ideal de coisas (dever imediato), por meio da adoção de condutas necessárias (dever mediato) e definidas pelo caso concreto. Esse estado ideal de coisas, no âmbito da OMC, é uma transparência comunicativa, sagrada pela segunda e pela terceira geração de normas de transparência da OMC. A transparência comunicativa engendra não apenas legitimidade, mas também coerência, consistência e convergência das normas nacionais em relação as regras da OMC. Garante, assim, a sua integridade. Em razão deste efeito, a transparência é também um postulado hermenêutico, porquanto instrumentaliza outro postulado, de mesma natureza, que é o da coerência do ordenamento jurídico, ou, no caso concreto, do regime internacional do comércio. Também se trata de postulado inespecífico, por estabelecer um dever estrutural, ideia geral despida de orientadores de aplicação. Esse postulado inespecífico auxilia o postulado especifico da razoabilidade.

Para chegar a esse ponto, a tese historia o conceito da transparência na Ciência Politica, nas Relações Internacionais e no Direito, desde que o surgimento da ideia seminal da ritualística, chegando ao conceito de regra de direito, seguindo para a evolução histórica do conceito de fontes de direito, e, nela, para o surgimento da ideia de princípio geral de direito, a partir dos conceitos gerais de equidade e justiça. A tese adota a perspectiva da história legal e, como categorias, as categorias ou conceitos radiais, pelos quais um conceito, nas ciências humanas, apresenta expressões máximas e mínimas.

No capítulo que referência a transparência no Direito Internacional, o argumento se inicia com a análise da legitimidade, que é um dos elementos fundamentais de sua normatividade legal. Analisa, outrossim, o déficit democrático nas organizações internacionais como elemento de falta de legitimidade e, portanto, de integridade dos regimes internacionais. Transita para a análise do direito administrativo global e das vertentes do pensamento constitucionalista no regime multilateral do comércio, sempre na busca de uma engenharia jurídico-política que supere o déficit democrático. Segue com a análise da transparência adjudicatória e passa a analisar a transparência interna, externa e administrativa da OMC como resposta institucional não revolucionária, mas reformista, com alto potencial construtivista.

Na análise jurisprudencial da OMC, a tese reforça a ideia da evolução para o máximo radial do princípio da transparência e, ainda que reconheça dificuldades práticas na execução de diversos deveres de transparência específicos de notificação, bem como nota certa regularidade (sem aumentos ou decréscimos significativos) do número de casos junto ao OSC que impliquem dispositivos legais de transparência, compreende que o bem jurídico da transparência é um estado ideal de coisas perseguido por interpretações extensivas da abrangência dos dispositivos, também garantida pelo intenso trabalho de notificações, o qual, a despeito das suas insuficiências, tem se mostrado útil para o avanço da regra de direito na OMC e para a coesão e integridade do sistema.

Abstract

MAIA, Clarita Costa. The Principle of Transparency as an Instructive and Normative Beacon of the Multilateral Trade Regime: In Search of a Systematic Response to the Crisis of Internal and External Legitimacy of the World Trade Organization. 439 pages. Thesis - Faculty of Law, University of São Paulo, São Paulo, 2021.

The thesis examines transparency as a general principle of law and as a general principle of law of the World Trade Organization (WTO). Despite the spread of transparency rules in different national legal systems and the existence of several similar legal provisions in the texts of the WTO agreements, the literature questions the status of transparency as an international custom. However, using the theoretical framework of Umberto Ávila, this author maintains that transparency is a principle of WTO law, as well as a postulate. As a principle, transparency aims at promoting an ideal state of affairs (immediate duty), through the adoption of necessary conducts (mediate duty) and defined by the specific case. This ideal state of affairs, within the scope of the WTO, is the "communicative transparency", hold by the second and third generations of WTO transparency rules. Communicative transparency engenders not only legitimacy, but also coherence, consistency and convergence of national rules in relation to the WTO legal regime. This ensures its integrity. Due to this effect, transparency is also a hermeneutical postulate, as it instrumentalizes another postulate, of the same nature, which is the coherence of the legal system, or, in the specific case, of the international trade regime. It is also a non-specific postulate, as it establishes a structural duty, a general idea devoid of application guides. This unspecific postulate assists the specific postulate of reasonableness.

To get to this point, the thesis historically deals with the concept of transparency in Political Science, International Relations and Law, since the emergence of the seminal idea of ritualistic, reaching the concept of rule of law, moving on to the historical evolution of the concept of sources of law, and, in it, to the emergence of the idea of a general principle of law, based on the general concepts of equity and justice. The thesis adopts the perspective of legal history and, as categories, the radial categories or concepts, by which a concept, in the human sciences, presents maximum and minimum expressions.

In the chapter that refers to transparency in international law, the argument begins with the analysis of legitimacy, which is one of the fundamental elements of its legal normativity. It analyzes the democratic deficit in international organizations as an element of lack of legitimacy and, therefore, of the integrity of international regimes. Transits to the analysis of global administrative law and the aspects of constitutionalist thinking in the multilateral trade regime, always in search of a legal-political engineering that overcomes the democratic deficit. It proceeds with the analysis of adjudicatory transparency and begins to analyze the internal, external and administrative transparency of the WTO as a non-revolutionary or reformist institutional response, with high constructivist potential.

In the WTO jurisprudential analysis, the thesis reinforces the idea of the evolution to the radial maximum of the principle of transparency and, although recognizing practical difficulties in the execution of several specific notification duties, as well as noting a certain regularity (without significant increases or decreases) of the number of cases with the Dispute Settlement Body (DSB) challenging legal transparency provisions, this author understands that transparency is an ideal state of affairs pursued by extensive interpretations of the scope of the provisions, also guaranteed by the intense work of notifications, which, in spite of its shortcomings, has proved useful for the advancement of the rule of law in the WTO and for the cohesion and integrity of the system.

Résumé

MAIA, Clarita Costa. Le príncipe de Transparence en tant que limite instructif et normatif du régime comercial multilateral du commerce.: En quête d´une réponse systémique en vue de la légitimité interne et externe de l´Organisation Mondiale du Commerce. 439 pages. Thèse de Doctorat – Faculté de Droit, Université de São Paulo, São Paulo, 2021.

La thèse examine la transparence en tant que principe général du droit et en tant que principe général du droit de l'Organisation mondiale du commerce (OMC). Malgré la diffusion des règles de transparence dans différents systèmes juridiques nationaux et l'existence de plusieurs dispositions juridiques similaires dans les textes des accords de l'OMC, la littérature remet en question le statut de la transparence en tant que coutume internationale. Néanmoins, en utilisant le cadre théorique d'Umberto Ávila, cet auteur soutient que la transparence est un principe du droit de l'OMC, ainsi qu'un postulat. En tant que principe, la transparence vise à promouvoir un état de fait idéal (devoir immédiat), à travers l'adoption des conduites nécessaires (devoir de médiation) et définies par le cas spécifique. Cet état de fait idéal, dans le cadre de l'OMC, est une transparence communicative, sacrée pour les deuxième et troisième générations de règles de transparence de l'OMC. La transparence de la communication engendre non seulement la légitimité, mais aussi la cohérence, la consistence et la convergence des règles nationales par rapport aux règles de l'OMC. Cela garantit son intégrité. De ce fait, la transparence est aussi un postulat herméneutique, car elle instrumentalise un autre postulat, de même nature, qui est la cohérence du système juridique ou, dans le cas particulier, du régime commercial international. C'est aussi un postulat non spécifique, car il établit un devoir structurel, une idée générale dépourvue de guides d'application. Ce postulat non spécifique soutient le postulat spécifique du caractère raisonnable.

Pour arriver à ce point, la thèse traite historiquement du concept de transparence en science politique, relations internationales et droit, depuis l'émergence de l'idée fondatrice de ritualiste, atteignant le concept d'État de droit, passant à l'évolution historique du concept de sources du droit, et, dans celui-ci, pour l'émergence de l'idée d'un principe général du droit, fondé sur les concepts généraux d'équité et de justice. La thèse adopte la perspective de l'histoire du droit et, en tant que catégories, les catégories ou concepts radiaux, par lesquels un concept, en sciences humaines, présente des expressions maximales et minimales.

Dans le chapitre qui fait référence à la transparence du droit international, l'argument commence par l'analyse de la légitimité, qui est l'un des éléments fondamentaux de sa normativité juridique. Il analyse le déficit démocratique des organisations internationales comme un élément de manque de légitimité et, par conséquent, d'intégrité des régimes internationaux. Passe à l'analyse du droit administratif mondial et aux aspects de la pensée constitutionnaliste dans le régime commercial multilatéral, toujours à la recherche d'une ingénierie juridico-politique qui surmonte le déficit démocratique. Il procède à l'analyse de la transparence juridictionnelle et commence à analyser la transparence interne, externe et administrative de l'OMC en tant que réponse institutionnelle non révolutionnaire ou réformiste, à fort potentiel constructiviste.

Dans l'analyse jurisprudentielle de l'OMC, la thèse renforce l'idée de l'évolution vers le maximum radial du principe de transparence et, tout en reconnaissant des difficultés pratiques dans l'exécution de plusieurs obligations de notification spécifiques de transparence, ainsi qu'en notant une certaine régularité (sans augmentations ou diminutions significatives)) du nombre d'affaires avec l'OSC qui impliquent des dispositions de transparence juridique, comprend que le bien juridique de la transparence est un état de choses idéal poursuivi par des interprétations approfondies du champ d'application des dispositions, également garanti par le travail intense des notifications.

Tables and Figures

Glossary of Terms

ADP	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Appellate Body Report	The Appellate Body is a standing body composed by seven individuals with notorious expertise in law, three of whom serve on a particular appeal. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel.
CV	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation)
Doha Declaration	WTO Ministerial Conference, Ministerial Declaration, WT/MIN(01)/DEC/1 (20 November 2001)
Doha Implementation Decision	WTO Ministerial Conference, *Implementation-Related Issues and Concerns*- Decision of 14 November 2001, WT/MIN901)/17 (20November 2001)
DSB	Dispute Settlement Body
DSS	Dispute Settlement System
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade
ILC	International Law Commission
ILC Articles	International Law Commission`s Articles on Responsibility of States for Internationally Wrongful Acts: General Assembly, UN, Report of the International Law Commission, A/56/10 (SUPP) (1 October 2001)
IPU	Inter-Parliamentary Union
FAO	Food and Agriculture Organization of the United Nations
ICJ	International Court of Justice
LIC	Agreement on Import Licensing Procedures
Multilateral Trade Agreements	The Agreements and associated legal instruments included in Annexes 1, 2 and 3 to the Marrakesh Agreement Establishing the World Trade Organization
Panel	Adjudicator of first instance which decisions are subject to

	review by the Appellate Body.
Panel Report	WTO panels deliver reports on the findings on the consistency of the challenged measure(s) with one or more obligations encompassed by the WTO agreements. Panels' findings are related to questions of law and fact.
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Plurilateral Trade Agreements	The Agreements and associated legal instruments included in Annex 4 to the Marrakesh Agreement Establishing the World Trade Organization
PSI	Agreement on Preshipment Inspection
SCM Agreement	Subsidies and Countervailing Measures
SG	Agreement on Safeguards
Secretariat	Secretariat of the World Trade Organization
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
UN	United Nations
UN Charter	Charter of the United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
WCO	World Customs Organization
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization
WTO Agreements	The Marrakesh Agreement and the documents contained in its four annexes
WTO Tribunals	WTO Arbitral Bodies, Panels, and the Appellate Body

Table of Permanent Court of International Justice Judgements and Advisory Opinions

A07	Certain German Interests in Polish Upper Silesia (Merits) Judgment of 25 May 1926
A09	Factory at Chorzów (Jurisdiction) Judgment of 26 July 1927
A13	A13 Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) Judgment of 16 December 1927
A17	A17 Factory at Chorzów (Merits) Judgment of 13 September 1928 (including the text of the declarations of Judge de Bustamante and Judge Altamira)
B01	B01 Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference Request for an Advisory Opinion Advisory Opinion of 31 July 1922
B02	Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture Advisory Opinion of 12 August 1922 (including the text of the declaration of Judge Weiss)
B04	Nationality Decrees Issued in Tunis and Morocco Request for an Advisory Opinion Advisory Opinion of 7 February 1923
B06	German Settlers in Poland Advisory Opinion of 10 September 1923
B08	Jaworzina Advisory Opinion of 6 December 1923
B10	Exchange of Greek and Turkish Populations Advisory Opinion of 21 February 1925
B11	Polish Postal Service in Danzig Advisory Opinion of 16 May 1925
A/B 49	Interpretation of the Statute of the Memel Territory Judgment of 11 August 1932 (including the text of the declarations by M. Urrutia, Judge, and M. Römer'is, Judge ad hoc)

Table of International Court of Justice Cases

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2018
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Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)
2016
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)
2015
Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)
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Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)
2014
Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)
2013
Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)
2012
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Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)
Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)
Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development
2011
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2010
Certain Criminal Proceedings in France (Republic of the Congo v. France)
Accordance with International Law of the unilateral declaration of independence in respect of Kosovo
Pulp Mills on the River Uruguay (Argentina v. Uruguay)
2009
Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)
Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)
2008
Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)
2007

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)
2006
Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)
2005
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2004
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Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
Avena and Other Mexican Nationals (Mexico v. United States of America)
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2000
Aerial Incident of 10 August 1999 (Pakistan v. India)
1999
Kasikili/Sedudu Island (Botswana/Namibia)
1996
Legality of the Threat or Use of Nuclear Weapons
1995
East Timor (Portugal v. Australia)
1994
Territorial Dispute (Libyan Arab Jamahiriya/Chad)
1992
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1988
Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947
1987
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1986
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Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)
1984
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1982
Continental Shelf (Tunisia/Libyan Arab Jamahiriya)
1980
Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt
1978
Aegean Sea Continental Shelf (Greece v. Turkey)
Nuclear Tests (Australia v. France)
Fisheries Jurisdiction (United Kingdom v. Iceland)
Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)
1973
Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal
1971
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)
1970
Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)
1969
North Sea Continental Shelf (Federal Republic of Germany/Netherlands)
1966
South West Africa (Ethiopia v. South Africa)
1962
Temple of Preah Vihear (Cambodia v. Thailand)
1960
Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)
Right of Passage over Indian Territory (Portugal v. India)
1956
Admissibility of Hearings of Petitioners by the Committee on South West Africa
1952
Rights of Nationals of the United States of America in Morocco (France v. United States of America)
1950
Asylum (Colombia v. Peru)
1948
Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)

Table of WTO award and report abbreviations

DS1 Malaysia — Prohibition of Imports of Polyethylene and Polypropylene
DS16 European Communities — Regime for the Importation, Sale and Distribution of Bananas
DS23 Venezuela — Anti-Dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods (OCTG)
DS27 European Communities — Regime for the Importation, Sale and Distribution of Bananas
DS38 United States — The Cuban Liberty and Democratic Solidarity Act
DS44 Japan — Measures Affecting Consumer Photographic Film and Paper
DS45 Japan — Measures Affecting Distribution Services
DS 49 United States — Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico
DS55 Indonesia — Certain Measures Affecting the Automobile Industry
DS 49 United States — Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico
DS56 Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and other Items
DS60 Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico
DS64 Indonesia — Certain Measures Affecting the Automobile Industry
DS66 Japan — Measures Affecting Imports of Pork
DS69 European Communities — Measures Affecting Importation of Certain Poultry Products
DS72 European Communities — Measures Affecting Butter Products
DS74 Philippines — Measures Affecting Pork and Poultry
DS81 Brazil — Measures Affecting Trade and Investment in the Automotive Sector
DS82 Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights
DS83 Denmark — Measures Affecting the Enforcement of Intellectual Property Rights
DS86 Sweden — Measures Affecting the Enforcement of Intellectual Property Rights
DS89 United States— Anti-Dumping Duties on Imports of Colour Television Receivers from Korea
DS97 United States — Countervailing Duty Investigation of Imports of Salmon from Chile
DS99 United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea
DS100 United States — Measures Affecting Imports of Poultry Products
DS101 Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States
DS102 Philppines — Measures Affecting Pork and Poultry
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DS111 United States — Tariff Rate Quota for Imports of Groundnuts

DS112 Peru — Countervailing Duty Investigation against Imports of Buses from Brazil
DS115 European Communities — Measures Affecting the Grant of Copyright and Neighbouring Rights
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DS118 United States — Harbour Maintenance Tax
DS119 Australia — Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets
DS122 Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland
DS132 Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States
DS133 Slovak Republic — Measures Concerning the Importation of Dairy Products and the Transit of Cattle
DS136 United States — Anti-Dumping Act of 1916
DS140 European Communities — Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics from India
DS141 European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India
DS145 Argentina — Countervailing Duties on Imports of Wheat Gluten from the European Communities
DS149 India — Import Restrictions
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DS156 Guatemala — Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico
DS157 Argentina — Definitive Anti-Dumping Measures on Imports of Drill Bits from Italy
DS161 Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef
DS162 United States — Anti-Dumping Act of 1916
DS167 United States — Countervailing Duty Investigation with respect to Live Cattle from Canada
DS168 South Africa — Anti-Dumping Duties on Certain Pharmaceutical Products from India
DS174 European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs
DS177 United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand
DS178 United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia
DS179 United States — Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea
DS182 Ecuador — Provisional Anti-Dumping Measure on Cement from Mexico
DS183 Brazil — Measures on Import Licensing and Minimum Import Prices
DS184 United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan

DS185 Trinidad and Tobago — Anti-Dumping Measures on Pasta from Costa Rica
DS187 Trinidad and Tobago — Provisional Anti-Dumping Measure on Macaroni and Spaghetti from Costa Rica
DS189 Argentina — Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy
DS191 Ecuador — Definitive Anti-Dumping Measure on Cement from Mexico
DS194 United States — Measures Treating Export Restraints as Subsidies
DS198 Romania — Measures on Minimum Import Prices
DS202 United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea
DS206 United States — Anti-Dumping and Countervailing Measures on Steel Plate from India
DS207 Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Product
DS208 Turkey — Anti-Dumping Duty on Steel and Iron Pipe Fittings
DS210 Belgium — Administration of Measures Establishing Customs Duties for Rice
DS211 Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey
DS213 United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany
DS215 Philippines — Anti-Dumping Measures Regarding Polypropylene Resins from Korea
DS216 Mexico — Provisional Anti-Dumping Measure on Electric Transformers
DS217 United States — Continued Dumping and Subsidy Offset Act of 2000
DS218 United States — Countervailing Duties on Certain Carbon Steel Products from Brazil
DS219 European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil
DS220 Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products
DS225 United States — Anti-Dumping Duties on Seamless Pipe from Italy
DS228 Chile — Safeguard Measures on Sugar
DS229 Brazil — Anti-Dumping Duties on Jute Bags from India
DS230 Chile — Safeguard Measures and Modification of Schedules Regarding Sugar
DS232 Mexico — Measures Affecting the Import of Matches
DS234 United States — Continued Dumping and Subsidy Offset Act of 200
DS237 Turkey — Certain Import Procedures for Fresh Fruit
DS238 Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches
DS239 United States — Anti-Dumping Duties on Silicon Metal from Brazil
DS241 Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil

DS244 United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan
DS247 United States — Provisional Anti-Dumping Measure on Imports of Certain Softwood Lumber from Canada
DS248 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS249 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS251 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS252 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS253 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS254 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS257 United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada
DS258 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS259 United States — Definitive Safeguard Measures on Imports of Certain Steel Products
DS260 European Communities — Provisional Safeguard Measures on Imports of Certain Steel Products
DS262 United States — Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany
DS268 United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina
DS272 Peru — Provisional Anti-Dumping Duties on Vegetable Oils from Argentina
DS275 Venezuela — Import Licensing Measures on Certain Agricultural Products
DS277 United States — Investigation of the International Trade Commission in Softwood Lumber from Canada
DS278 Chile — Definitive Safeguard Measure on Imports of Fructose
DS279 India — Import Restrictions Maintained Under the Export and Import Policy 2002-2007
DS294 United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)
DS295 Mexico — Definitive Anti-Dumping Measures on Beef and Rice
DS281 United States — Anti-Dumping Measures on Cement from Mexico
DS282 United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico
DS284 Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua
DS288 South Africa — Definitive Anti-Dumping Measures on Blanketing from Turkey

DS290 European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs
DS291 European Communities — Measures Affecting the Approval and Marketing of Biotech Products
DS292 European Communities — Measures Affecting the Approval and Marketing of Biotech Products
DS293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products
DS296 United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea
DS299 European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea
DS302 Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes
DS303 Ecuador — Definitive Safeguard Measure on Imports of Medium Density Fibreboard
DS306 India — Anti-Dumping Measure on Batteries from Bangladesh
DS312 Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia
DS314 Mexico — Provisional Countervailing Measures on Olive Oil from the European Communities
DS315 European Communities — Selected Customs Matters
DS318 India — Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
DS319 United States — Section 776 of the Tariff Act of 1930
DS322 United States — Measures Relating to Zeroing and Sunset Reviews
DS323 Japan — Import Quotas on Dried Laver and Seasoned Laver
DS325 United States — Anti-Dumping Determinations regarding Stainless Steel from Mexico
DS327 Egypt — Anti-Dumping Duties on Matches from Pakistan
DS328 European Union (formerly EC) — Definitive Safeguard Measure on Salmon
DS330 Argentina — Countervailing Duties on Olive Oil, Wheat Gluten and Peaches
DS331 Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala
DS334 Turkey — Measures Affecting the Importation of Rice
DS335 United States — Anti-Dumping Measure on Shrimp from Ecuador
DS336 Japan — Countervailing Duties on Dynamic Random Access Memories from Korea
DS337 European Communities — Anti-Dumping Measure on Farmed Salmon from Norway
DS338 Canada — Provisional Anti-Dumping and Countervailing Duties on Grain Corn from the United States
DS344 United States — Final Anti-Dumping Measures on Stainless Steel from Mexico
DS346 United States — Anti-Dumping Administrative Review on Oil Country Tubular Goods from Argentina

DS350 United States — Continued Existence and Application of Zeroing Methodology
DS366 Colombia — Indicative Prices and Restrictions on Ports of Entry
DS341 Mexico — Definitive Countervailing Measures on Olive Oil from the European Communities
DS342 China — Measures Affecting Imports of Automobile Parts
DS343 United States — Measures Relating to Shrimp from Thailand
DS345 United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties
DS348 Colombia — Customs Measures on Importation of Certain Goods from Panama
DS351 Chile — Provisional Safeguard Measure on Certain Milk Products
DS355 Brazil — Anti-dumping Measures on Imports of Certain Resins from Argentina
DS370 Thailand — Customs Valuation of Certain Products from the European Communities
DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines
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DS376 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products
DS377 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products
DS379 United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China
DS384 United States — Certain Country of Origin Labelling (COOL) Requirements
DS385 European Communities — Expiry Reviews of Anti-dumping and Countervailing Duties Imposed on Imports of PET from India
DS386 United States — Certain Country of Origin Labelling Requirements
DS389 European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States
DS393 Chile — Anti-Dumping Measures on Imports of Wheat Flour from Argentina
DS394 China — Measures Related to the Exportation of Various Raw Materials
DS395 China — Measures Related to the Exportation of Various Raw Materials
DS397 European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from Chi
DS398 China — Measures Related to the Exportation of Various Raw Materials
DS401 European Union (formerly EC) — Measures Prohibiting the Importation and Marketing of Seal Product
DS402 United States — Use of Zeroing in Anti-Dumping Measures Involving Products from Korea
DS404 United States — Anti-dumping Measures on Certain Shrimp from Viet Nam

DS405 European Union — Anti-Dumping Measures on Certain Footwear from China
DS407 China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union
DS408 European Union and a Member State — Seizure of Generic Drugs in Transit
DS409 European Union and a Member State — Seizure of Generic Drugs in Transit
DS410 Argentina — Anti-Dumping Duties on Fasteners and Chains from Peru
DS414 China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States
DS422 United States — Anti-Dumping Measures on Shrimp and Diamond Sawblades from China
DS424 United States — Anti-Dumping Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy
DS425 China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union
DS 429 European Communities — Measures Affecting the Tariff Quota for Fresh or Chilled Garlic
DS427 China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States
DS431 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum
DS432 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum
DS433 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum
DS438 Argentina — Measures Affecting the Importation of Goods
DS440 China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States
DS439 South Africa — Anti-Dumping Duties on Frozen Meat of Fowls from Brazil
DS442 European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia
DS445 Argentina — Measures Affecting the Importation of Goods
DS449 United States — Countervailing and Anti-dumping Measures on Certain Products from China
DS444 Argentina — Measures Affecting the Importation of Goods
DS445 Argentina — Measures Affecting the Importation of Goods
DS446 Argentina — Measures Affecting the Importation of Goods
DS448 United States — Measures Affecting the Importation of Fresh Lemons
DS454 China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan
DS457 Peru — Additional Duty on Imports of Certain Agricultural Products
DS460 China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union

DS461 Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear
DS464 United States — Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea
DS465 Indonesia — Importation of Horticultural Products, Animals and Animal Product
DS466 Indonesia — Importation of Horticultural Products, Animals and Animal Product
DS470 Pakistan — Anti-Dumping and Countervailing Duty Investigations on Certain Paper Products from Indonesia
DS471 United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China
DS473 European Union — Anti-Dumping Measures on Biodiesel from Argentina
DS474 European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia
DS476 European Union and its Member States — Certain Measures Relating to the Energy Sector
DS477 Indonesia — Importation of Horticultural Products, Animals and Animal Products
DS478 Indonesia — Importation of Horticultural Products, Animals and Animal Products
DS479 Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy
DS480 European Union — Anti-Dumping Measures on Biodiesel from Indonesia
DS482 Canada — Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
DS483 China — Anti-Dumping Measures on Imports of Cellulose Pulp from Canada
DS484 Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products
DS486 European Union (formerly EC) — Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan
DS488 United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea
DS491 United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia
DS493 Ukraine — Anti-Dumping Measures on Ammonium Nitrate
DS494 European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia — (Second complaint)
DS499 Russia — Measures affecting the importation of railway equipment and parts thereof
DS500 South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan
DS501 China — Tax Measures Concerning Certain Domestically Produced Aircraft
DS502 Colombia — Measures Concerning Imported Spirits
DS504 Korea — Anti-Dumping Duties on Pneumatic Valves from Japan

DS505 United States — Countervailing Measures on Supercalendered Paper from Canada
DS506 Indonesia — Measures Concerning the Importation of Bovine Meat
DS509 China — Duties and other Measures concerning the Exportation of Certain Raw Material
DS512 Russia — Measures Concerning Traffic in Transit
DS513 Morocco — Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey
DS514 United States — Countervailing Measures on Cold- and Hot-Rolled Steel Flat Products from Brazil
DS515 United States — Measures Related to Price Comparison Methodologies
DS517 China — Tariff Rate Quotas for Certain Agricultural Products
DS521 European Union — Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia
DS523 United States — Countervailing Measures on Certain Pipe and Tube Products (Turkey)
DS524 Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico
DS525 Ukraine — Measures relating to Trade in Goods and Services
DS526 United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS527 Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS528 Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS530 Kazakhstan — Anti-dumping Measures on Steel Pipes
DS532 Russia — Measures Concerning the Importation and Transit of Certain Ukrainian Products
DS533 United States — Countervailing Measures on Softwood Lumber from Canada
DS536 United States — Anti-Dumping Measures on Fish Fillets from Vietnam
DS538 Pakistan — Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates
DS539 United States — Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available
DS544 United States — Certain Measures on Steel and Aluminium Products
DS545 United States — Safeguard measure on imports of crystalline silicon photovoltaic products
DS549 China — Certain Measures on the Transfer of Technology
DS546 United States — Safeguard measure on imports of large residential washers
DS549 China — Certain Measures on the Transfer of Technology
DS550 United States — Certain Measures on Steel and Aluminium Products
DS551 United States — Certain Measures on Steel and Aluminium Products

DS552 United States — Certain Measures on Steel and Aluminium Products
DS553
DS554 United States — Certain Measures on Steel and Aluminium Products
DS555 Morocco — Provisional Anti-Dumping Measures on School Exercise Books from Tunisia
DS556 United States — Certain Measures on Steel and Aluminium Products
DS562 United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products
DS564 United States — Certain Measures on Steel and Aluminium Products
DS568 China — Certain Measures Concerning Imports of Sugar
DS572 Peru — Anti-dumping and countervailing measures on biodiesel from Argentina
DS574 United States — Measures relating to trade in goods and services
DS575 Colombia — Measures concerning the distribution of liquid fuels
DS576 Qatar — Certain measures concerning goods from the United Arab Emirates
DS578 Morocco — Definitive Anti-Dumping Measures on School Exercise Books from Tunisia
DS583 Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products
DS589 China — Measures Concerning the Importation of Canola Seed from Canada
DS590 Japan — Measures Related to the Exportation of Products and Technology to Korea
DS591 Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands
DS592 Indonesia — Measures Relating to Raw Materials
DS593 European Union — Certain measures concerning palm oil and oil palm crop-based biofuels

Introduction

Writing a thesis on the future of the World Trade Organization (WTO) would be challenging in several dimensions at any time, but is especially so in the present circumstances. The COVID-19 pandemic has imposed burdens that are world-wide, systematic, legal, economic, and social, but also local, and personal. Given this situation, analyzing the present course of the WTO may therefore seem an innocuous if not naïve exercise.

Like the epitome of an epoch, in the opening statement of the Virtual Press Conference held on April 8th, 2020, for the release of the Annual Trade Statistics and Outlook Report, the former Director-General of the World Trade Organization Roberto Azevedo emphasized that even before the pandemics, "(…) we were not making the most of trade potential to drive growth (…) global merchandise trade was falling at a significant pace in the final quarter of 2019".

If the second part of his speech clearly alludes to the finding of a downward trend in the international trade in goods, it is opened to question to which extent one can presume that the first part was a subtle and diplomatic allusion to the well-criticized North American attempts to what is being called the disempowerment the Dispute Settlement Body (DSB).

United States meddling with the DSB has a long history:

> – The reappointment of AB members from the US (like Merit Janow 2003 – 2007or Jennifer Hillman 2007 – 2011) was opposed by the USTR because of their participation in AB rulings against US legal positions, which were seen "unpatriotic" 12;
> – Trade law scholars proposed by other WTO members (such as Kenya in 2013) were ruled out almost immediately by the USTR even if the scholar had taught at a US university;
> – In 2016, the reappointment of the Korean AB member Chang Seung Wang was blocked by the USTR on grounds of alleged judicial "overreach";
> – At the beginning of 2017, the US blocked the consensus in the WTO Dispute Settlement Body (hereinafter "DSB") for filling WTO AB vacancies for reasons related to the ongoing transition in the US political leadership;
> – Subsequently, the replacement of AB members Kim, Ramirez and van den Bossche in 2017, and of AB member Servansing in 2018, was vetoed by the USTR on grounds of "systemic" legal USTR concerns about, *inter alia*, "Rule 15" of the AB Working Procedures

> as elaborated by the AB in conformity with Article 17.9 DSU and practiced in WTO dispute settlement practices since 1996.[1]

According to Prof. Dr. Ernst Ulrich Petersmann, those vetoes were not grounded on personal qualifications, nor were they satisfactorily explained, which leads to the conclusion that the US did not respect its duty to act in good faith, instead aiming to *terminate the functioning of the AB and the related "judicial restraints" on US trade protectionism.*[2]

Since mid-2019, the DSB has only had one member and, therefore, lacks quorum to hear disputes. The Trump Administration's refusal to allow new members to be appointed is the cause of this paralysis. The United States government bases its position on its disagreements with the dispute settlement and the Appellate Body, the use of the national security rationale to justify barriers to trade, the special and differential treatment that some members enjoy, and, finally, what it considers the quintessential incompatibility of China's economic model with the WTO.[3] In addition to this panorama, the US also complains of the lack of transparency in the notification mechanism for industrial subsidies.

A year before, the US detailed its reservations to DSB, claiming that: (1) the Appellate Body exceeded its authority by deeming as an ongoing member an individual whose term as an Appellate Body member expired; (2) the Appellate Body repeatedly issued reports beyond the 90-day deadline mandated by the Dispute Settlement Understanding ("DSU"); (3) the Appellate Body exceeded its authority by consistently engaging in the review of panel's fact-finding, going as far as adopting an interpretation of a Member's municipal law; (4) the Appellate Body has issued advisory opinions with findings that are not necessary for the resolution of the dispute; and (5) the Appellate Body has misleadingly insisting that its reports constitute legal

[1] Petersmann, E.-U. (2020). Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp. 28–68.
[2] *Idem*.
[3] World Trade Organization Public Forum 2019. Report by session organizer. Session Title: US Challenges to the World Trading System: A Way Forward. Organizer: Cato Institute, Herbert A. Stiefel Center for Trade Policy Studies. Date: Friday, 11 October 2019.https://www.wto.org/english/forums_e/public_forum19_e/pf19_128_rpt_e.pdf. 2 May 2020.

precedent “absent cogent reasons”.[4]

The U.S assessment of the DSB has been refuted as misguided and even fallacious. Yuka Fukunaga summarizes the counter-reasons as follows

> (…) First, the United States wrongly considers that the Appellate Body has undermined the exclusive authority of the WTO Members to adopt authoritative interpretations. Second, the analogy that the United States seeks to draw between the Appellate Body’s interpretative approach and a common law system is misguided. Third, the United States does not properly understand “customary rules of interpretation of public international law” under Article 3.2 of the DSU. Fourth, unlike the allegations of the United States, the Appellate Body did not depart from its previous interpretative approach. Fifth, the concern of the United States that the Appellate Body’s interpretative approach prevents a panel from making an objective assessment is unfounded. Sixth, the United States ignores the hierarchical structure in the WTO dispute settlement system, which is clearly contemplated in the DSU. Seventh, the views of the United States on the Appellate Body are not supported by other WTO Members.[5]

Although WTO reform would best be promoted through internal debates without undermining the Organization`s authority, detraction of the WTO has been the course of action chosen by the White House, one that has had a mischievous effect on multilateralism:

> (…) Without a functioning Appellate Body, countries that lose their cases at the panel level of the dispute mechanism can effectively block the decision by filing an appeal, and the case will languish. In other words, the world could be heading back to the days of the broken GATT enforcement system[6].

As a matter of fact, the WTO's institutional reform agenda is a long overdue theme. A few years after its establishment, some reflections were already being made in the sense that, if the Agreement in Establishing the World Trade Organization overcame some of the “constitutional defects” of the General

[4] Statement by the United States Concerning the Precedential Value of Panel or the WTO Agreement and DSU, Meeting of the DSB on December 18, 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.asdeliv.fin_.public.pdf. May 2nd, 2020.

[5] Fukunaga, Yuka. “Interpretative Authority of the Appellate Body: Replies to the Criticism by the United States.” *Papers.ssrn.com*, 20 Mar. 2019, papers.ssrn.com/sol3/papers.cfm?abstract_id=3356134. Accessed 1 July. 2021.

[6] Packard, Clark. “Trump’s Real Trade War Is Being Waged on the WTO.” *Foreign Policy*, foreignpolicy.com/2020/01/09/trumps-real-trade-war-is-being-waged-on-the-wto/.

Agreement on Tariffs and Trade (hereinafter GATT)[7] , there remained much to be done in many fields, among them, transparency issues. Among the most evident points of concern at that time were its relationship with the public, non-governmental organizations, civil society and other intergovernmental organizations, and the use of the exceptions to trade foreseen in Article XX of the GATT and the notification discipline.

In its decennial appraisal of the WTO, the Sutherland Report[8] missed a chance to confront some important and foundational shortcomings of the Organization[9], in which an exception was made for transparency. The general need to improve mechanisms for transparency and public access to the WTO were mentioned, although not all aspects related to the topic were developed. Along these lines, although reform of the WTO is a legitimate demand and is supported by understandable reasons, largely shared by decision makers[10] and the epistemic community of international commercial law[11], the way by which the United States has forced the issue on the international agenda is understood as potentially deleterious for multilateralism. The crisis of multilateralism is, itself, the larger context in which this thesis is being written.

Along with the trade war waged at the WTO, the United States has made efforts to renationalize value chains. In the context of the COVID-19 pandemic, this

[7] Jackson, J.H. (1999). *The World Trade Organization: constitution and jurisprudence*. London: Pinter, p.13.

[8] Sutherland Report is the sobriquet given to the document named "The Future of the WTO: addressing institutional challenges in the new millennium", made by the Consultative Board to the Director-General Supachai Panichpakdi, chaired by former Director-General Peter Sutherland. World Trade Organization. Consultative Board to the Director-General (2004). *The Future of the WTO: addressing institutional challenges in the new millennium*. [online] Available at: https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf [Accessed 22 Apr. 2020].

[9] Pauwelyn, J. (2005). The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO. *Journal of International Economic Law*, 8(2), pp.329–346.

[10] European Union has presented its proposition of WTO Reform through document "Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council". The document supports three of the United States demands on transparency: that the Appellate Body abstains from determining the meaning of municipal law as an issue of fact, to establish findings unnecessary for the resolution of the dispute and to apply a *de facto stare decisis* system. World Trade Organization (2018). Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council. WT/GC/W/752. [online] Available at: https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf.

[11] Do Amaral Júnior, A., de Oliveira Sá Pires, L.M. and Lucena Carneiro, C. (2019). Introduction. In: *The WTO dispute settlement mechanism. A developing country perspective*. Cham, Switzerland: Springer, pp.1–16.

rhetoric has been gaining momentum and spreading to other continents. Renationalization or regionalization of value chains, reviving state control over strategic industries, economic protectionism, barriers to foreign investment in strategic industries and the implementation of several preferential regional trade arrangements are common topics of the actual political parlance.

A new role of the WTO and the World Health Organization (WHO) are to be expected. The practicality and adequacy of these measures to head off a future crisis similar to the one we are currently going through are highly controversial. However, in the context of profound social crisis, short-termed and demagogic political choices can overwhelm the best technical and economic alternatives.

Given this scenario, one which is neither encouraging nor promising for the multilateral trade regime initiated after WWII and accelerated after the fall of the Iron Curtain, it is worth asking how productive my research might be both in terms of improving the WTO's institutional framework and reaffirming faith in the Organization`s power to endure and reframe.

In general, the fundamental reasons behind the creation of the pillars of the world economic system (the International Monetary Fund, World Bank and World Trade Organization) are the same reasons for their preservation: they are important elements of the plan devised to avoid another large-scale violent conflagration. The conservation of stable international economic order, in turn, depends on cooperation and concertation, dialogue and, again, transparency, all of which require a permanent institutional structure to facilitate dialogue. Even before the elaboration of Keohane and Nye on interdependence and spill-over effects of institutionality and trade[12], the notion that trade can encourage peace and peace can stabilize and propel trade was a central part of pervasive reasoning since the 18th century Abbe of Saint Pierre`s *Projet Pour Rendre La Paix Perpétuelle En Europe*[13] to the drafters of the Bretton Woods system.

Notwithstanding, there is a real chance that decision makers will repeat gross mistakes of the past out of fear of disappointing the masses. For the sake of electoral

[12] Viotti, P.R. and Kauppi, M.V. (n.d.). *International Relations Theory*. 5th ed. Pearson, p. 144.
[13] Saint-Pierre, A. de (2003). *Projeto Para Tornar Perpétua A Paz Na Europa*. ed. Translated by S. Duarte. São Paulo: Imprensa Oficial do Estado Editora Universidade de Brasília Instituto de Pesquisa de Relações Internacionais, p.12.

viability, leaders may cower from confronting the situational blindness of voters who are convinced of their own ideas and driven more by psychological than practical needs, and effectuate their demands for short term measures that might only yield symbolic advantages at the expense of long-term benefits[14]. This could take form in the abandonment of multilateral systems or the constant invocation of “enemies” of international regimes.

The strength and resilience of collective psychology is impressive. In the chapter on plagues in his book *Fear in the West 1300-1800*, Jean Delumeau, a specialist in the historiography of Western religious mentalities, describes a psychological and political scenario very similar to the current one. It is worth mentioning some of the most enlightening excerpts, in free translation of the Portuguese version:

> Poorly rooted, relentlessly recurrent, the plague, due to its repeated reappearances, could not fail to create in the populations 'a state of nervousness and fear'. (...) [some] annotations, however excessive they may be, constitute one more piece to be incorporated into the dossier 'of those who accompany subsistence crises and pestilent cycles'. But they are also part of a mental representation of the epidemics that, especially in the case of 17th century Italy, appeared to be linked to the two other traditional scourges: hunger and war. The plague is then a 'plague' comparable to those of Egypt. At the same time, it was identified as a devouring cloud that came from abroad and moved from country to country, from coast to the countryside and from one end of the city to the other, sowing death as it passed. (…) When the danger of contagion appears, at first you try not to see it. The plague chronicles underscore the frequent negligence of the authorities in taking the measures that the imminence of the danger imposed, although it is true, however, that once the defense mechanism was triggered, the means of protection were improved over the centuries. (…) Cut off from the rest of the world, the inhabitants move away from each other inside the accursed city, fearing that they will contaminate each other. Avoid opening the windows of the house and going down the street. People struggle to resist, closed at home, with the reserves that can be accumulated. If you still need to go out and buy the essential, precautions are in order. (...) Oppressive silence, and also a universe of suspicion. (...) Interruption of family activities, silence in the city, loneliness in illness, anonymity in death, abolition of collective rites of joy and sadness: all these brutal ruptures with everyday uses were accompanied by a radical impossibility to conceive projects of future, belonging to 'initiative', henceforth, entirely the plague. In order to

[14] Here we make an analogy to the choices of the European political leaders that resulted in the Versailles Peace Treaty, which, in reality, was only one armistice and led Europe to World War II. Spencer Churchill, W. (1995). *Memórias da Segunda Guerra Mundial*. 2a ed. Translated by V. Ribeiro. Botafogo Rio de Janeiro: Editora Nova Fronteira, p.6.

> understand the psychology of a population plagued by an epidemic, it is also necessary to highlight an essential element: in the course of such a trial, a 'dissolution of the average man' inevitably took place. The universe of middle ground and half-dyes that is commonly our-universe that repels the excesses of virtues and addictions to the periphery - was abruptly abolished. (…) The cowardice of some added to the kinetic immorality of some others - true spoilers of destruction - almost certain of impunity, since the repressive apparatus had collapsed[15].

The spread feeling of fear and the defensive posture that are common today complicates any projection or future plan, especially on a global scale. Still, our leaders must decide whether to repeat the psychological and political cyclothymia caused by plague from the 14th to 19th centuries or, taking to heart the successful lessons from history, to wager less on self-absorption and more on cooperation.

Society today is caught between fake news and the wide reach of the internet and the continuous exchange of information between countries, which should curb obtuseness. Nevertheless, the pandemic is being highly politicized in all its aspects, from scientific to commercial ones.

Although very worrying perspectives for economic multilateralism and globalization are emerging, we consider it too early to condemn the DSB, or any international organization or regime for that matter, as obsolete. Evoking previous crises of equal scope and impact, such as the Great Depression of 1929 or the recent 2008 economic crisis, several international analysts have stressed the importance of international concertation in social and economic recovery. More multilateralism, not less, is the most appropriate response, however counterintuitive that is for many governments that have already brandished the flag of economic nationalism, international isolationism, xenophobia or culturalism. From Henry Kissinger[16] to Yuval Noah Harari[17], the defense of the liberal international order has been taken up by the most brilliant and well-founded thinkers of different generations.

Yet it is necessary to clarify what those authors allude to when they defend

[15] Delumeau, J. (1993). *História do medo no Ocidente 1300-1800: uma cidade sitiada*. São Paulo (SP): Companhia das Letras, pp.108, 112, 117, 121, 122, 125, 133, 135, 138.
[16] Kissinger, H. (2020). The Coronavirus Pandemic Will Forever Alter the World Order. The US must protect its citizens from disease while starting the urgent work of planning for a new epoch. *Wall Street Journal*. Opinion. [online] Available at: https://www.wsj.com/articles/the-coronavirus-pandemic-will-forever-alter-the-world-order-11585953005 [Accessed 1 Jul. 2020].
[17] Harari, Y.N. (2020). The world after coronavirus. *Financial Times*. [online] Available at: https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75 [Accessed 1 Jul. 2020].

multilateralism in international relations. Multilateralism, in its strictest sense, means cooperation between multiple parties, which may or may not occur through the intermediation of an international institution, forum or regime, although cooperation naturally leads to the creation of such political bodies. It is an institutionalist, formal, perspective that, according to John Gerard Ruggie[18], has proved inadequate for both the translation of the dynamics of many existing multilateral regimes and for charting a future course for the international institutions and organizations to follow in search of effective answers to the current transnational and global dilemmas.

The mere coordination of expectations and actions of state actors through institutions, although a positive advance in the history of international relations, has produced insufficient results. International institutions dominated by one or a few state actors, in a logic of nominal multilateralism, only or mostly serve to maintain the balance of power and play a secondary or residual role in international affairs, for they are frequently neutralized whenever their institutional purposes conflict with the circumstantial interests of the great powers[19].

Anne-Marie Slaughter affirms that the multilateralism that characterizes the liberal world order of the post-war international regimes was designed by the United States, the *liberal state most inclined and most able to project its domestic political and economic arrangements onto the world*[20]. Its features were identified by Ruggie.

Ruggie offers a promising theoretical contribution by suggesting that the qualitative dimension of multilateralism engenders a different institutional dynamic of cooperation and coordination that does not bind international institutions or regimes to the specific and particularistic interests of the parties, of the dominant group or of a dominant actor. Multilateralism would be *an institutional form that coordinates relations among three or more states on the basis of generalized principles of conduct* (…) *that specify appropriate conduct for a class of actions* [21]. Qualitative

[18] Ruggie, J.G. (1993). Multilateralism: The Anatomy of an Institution. In: J.G. Ruggie, ed., *Multilateralism Matters. The Theory and Praxis of an Institutional Form*. New York: Columbia University Press, p.6.
[19] Viotti, P.R. and Kauppi, M.V. (n.d.). *International Relations Theory*. 5th ed. Pearson, p.73.
[20] Burley, A.-M. (1993). Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State. In: J.G. Ruggie, ed., *Multilateralism Matters. The Theory and Praxis of an Institutional Form*. New York: Columbia University Press, p.125.
[21] Ruggie, J.G. (1993). Multilateralism: The Anatomy of an Institution. In: J.G. Ruggie, ed., *Multilateralism Matters. The Theory and Praxis of an Institutional Form*. New York: Columbia University Press, p.11.

multilateralism would be built on two corollaries: generalized organizing principles logically entail a socially constructed indivisibility among the members of a collectivity with respect to a range of legitimate behavior in question; and diffuse reciprocity, which means that the arrangement is expected by its members to *yield a rough equivalence of benefits in the aggregate over time*[22]. For Anne-Marie Slaughter, multilateralism so defined is nothing more than the internalization of the liberal conception of rule of law, which rests on the faith that general rules can be applied to all[23]. To this I should add, predictability, a pre-determined, transparent law-making process that ensures room for the contribution of all parties involved, among other predicates.

Qualitative multilateralism is very demanding and requires the most powerful and influential actors to exert self-restraint, or at least admit limits on or mitigation of the range of their action, and to discipline their attitude such that it remains coherent with the premises of the system. For that reason, this degree of qualitative multilateralism is uncommon in international architecture. Actually, most of the multilateral arrangements are, in practice, governed by subgroups of states with *de facto* power to set agendas, either through direct or indirect economic or political influence[24]. In this sense, the original promise of and inspiration for the liberal world order is unfinished and still largely lacking.

According to Slaughter, Bretton Woods institutions were primarily the projection of the U.S Regulatory State that took shape following the implementation of the New Deal. The domestic institutional solution to the Great Depression was premised on the idea that economic prosperity and political security were bound to each other and that the government held the responsibility to exercise its power affirmatively to promote the welfare of its citizens. In this sense, the systemic economic crisis required “collective defense”, as did the economic recovery of the world at large. Many of the individuals involved in the New Deal also became planners of the postwar institutional arrangements.

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[22] *Idem*.

[23] Burley, A.-M. (1993). Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State. In: J.G. Ruggie, ed., *Multilateralism,* p. 144..

[24] Ruggie, J.G. (1993). Multilateralism: The Anatomy of an Institution. In: J.G. Ruggie, ed., *Multilateralism Matters. The Theory and Praxis of an Institutional Form*. New York: Columbia University Press, p.34.

Critics of the type of multilateralism proposed by Ruggie point out that diffuse reciprocity and indivisibility of interests are less conducive to collaboration than direct retaliation for defection[25]. The lack of a sanctioning instrument in International Law is well known and widely explored in the literature. The principle of international responsibility, more often than not, implies political responsibility, moral coercion and gives rise to disturbance in diplomatic relations, remedied or not, through political negotiations.

Qualitative multilateralism, that is, a multilateral system of international governance that takes seriously its commitment to the equal standing of member States, one that, I daresay, could also be labelled liberal multilateralism, distributes power among actors by effectively socializing the law-making process and responsibilities. One or the other is rarely feasible, much less both. Asymmetry in the responsibility for ensuring the premises of the new order, from the creation and maintenance of institutions to the financing of international cooperation and subsidizing or supporting the internal reforms of some countries, ends up generating *de facto* asymmetric power of influence in international forums based on juridical equality. The global liberal order evolved into a hybrid model with a qualitative multilateral dimension alongside classical multilateralism marked by traditional power asymmetries. Fundamental commitments from the great powers are required and must be credibly respected for all member States to voluntarily comply with the arrangement. The success of multilateral regimes thus depends on the discipline of great powers and the solidity of their reputation for reliability that they have before the other countries[26].

Several issues have been highly politicized today by the international conservative political movement that found in the Covid-19 pandemic the perfect pretense to inculcate themselves against and potentially hurt the economy of the current challenger of the world order, the People's Republic of China. These include the institutional weakness of the World Health Organization’s capacity to impose international sanitary commitments that can be adjudicated before the International

[25] Martin, L.L. (1993). The Rational State Choice of Multilateralism. In: J.G. Ruggie, ed., *Multilateralism Matters. The Theory and Praxis of an Institutional Form*. New York: Columbia University Press, p.97.
[26] Cowhey, P.F. (1993). Elect Locally-Order Globally: Domestic Politics and Multilateral Cooperation. In: J.G. Ruggie, ed., *Multilateralism Matters. The Theory and Praxis of an Institutional Form*. New York: Columbia University Press, p.157.

Court of Justice (ICJ)[27] , the difficulties of implementing that Court's judgments or awards, the executive function to be exercised by the United Nations Security Council under 94 (2) of the Charter of San Francisco, in which the veto power is expected to be largely confined to situations where the interests of the permanent members are at stake[28]; and the need to improve international sanitary regime, which has become apparent since the Ebola epidemic[29]. While these issues open space for legitimate discussion about the shortcomings of the current multilateralism, they end up offering these same political forces the answer they least like to hear: once again, the post-crisis solution demands more multilateralism, not less; reform of the international institutions, not diplomatic isolationism; diversifying the countries participating in global value chains, not renationalizing them, which is as unfeasible as massive state intervention in the economy is inefficient. Reinforcement of international scientific and intelligence cooperation, not protection of strategic industries, is needed because the optimal solution for the next health crisis may not be related to the strategic solution for this one. Finally, undoubtedly, the improvement of access to healthcare is not only advisable for reasons of social order and domestic economics, but also international ones. All these require the same approach taken by the architects of the New Deal and Bretton Woods: an attitude that recognizes the indivisibility of national and world problems.

This conclusion finds support in the Law and Economics approach to International Law, since the WHO deals with the public good of health, and addresses, among other issues, transnational threats to it. Multilateralism advanced in the scope of the WHO does not merely represent coordination of interests, actions and agendas. It is one of the most complex regimes in the collaborative game, compared to others in which no international public good is at stake, what makes coordination easier. As examples of this last kind of international regimes, there are the jurisdictional cooperation regimes in criminal and civil matters and the multilateral

[27] Bowett, D.W. and And, I. (1997). *The International Court of Justice: process, practice and procedure*. London: British Institute of International And Comparative Law, p.20.

[28] Tzeng, Peter. Taking China to the International Court of Justice over COVID-19. https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/. April 2, 2020.

[29] Moon, Surie, et al. Will Ebola Change the Game? Ten Essential Reforms before the next Pandemic. *The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*, vol. 386, no. 10009, 25 Nov. 2015, pp. 2204–2221. The Lancet, www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)00946-0/fulltext. Accessed 1 July 2020.

trade regime under the umbrella of the WTO. Moreover, the international health regime is prone to risks of reciprocity, defection and, therefore, abdication of cooperation and bilateral retaliation. Take, for instance, the case of

In structures of political interaction such as the WHO, reciprocity, the first incentive to compliance, according Andrew Guzman's theory, is less probable because of the different costs of cooperation and different pay-offs that fall to the actors. Some States abide by the WHO's recommendations and regulations for they enjoy a more solidly established social welfare system, a small population and lack major social discrepancies. Those states, independent of the defection of others, tend to remain loyal to their commitments in order to increase their political and reputational capital for future diplomatic negotiations in this and other areas. Other states, however, that face more stringent social and economic challenges, often unsatisfactorily comply with the rules. Their weak adherence to multilateral norms will not necessarily result in the emptying of the regime by chain defections. Retaliation, the second incentive for compliance according to the Law and Economics approach to International Law, is not likely either. The great number of actors in such a regime creates an intricate web of cross-interests that might favor the defector. As the damage is diffuse and the States are less willing to retaliate, those most affected by non-compliance frequently allow the others not to jeopardize their bilateral diplomatic relations with the defector[30].

Andrew Guzman characterizes the political calculations made in regimes like these in terms of the Prisoner's Dilemma[31]. In this model of game theory, in the hypothesis of a one-shot game, general cooperation is more advantageous than non-cooperation. The assumption of defection by the other actors, however, is the most expected logical reasoning. Out of self-defense, all actors in the game end up betraying the premises of collaboration, which generates a benefit for everyone which is mutual but suboptimal. However, the risk of cooperating when other actors defect is too high[32] for the one who engages in collaboration. In the case of arms regimes, this model fits perfectly but in the case of the multilateral sanitary regime, the fit is not

[30] Guzman, A. (2008). *How International Law Works: A Rational Choice Theory*. New York Oxford University Press -03-01, p.69.
[31] *Idem*, pp. 25-69.
[32] Guzman, A. (2008). *How International Law Works: A Rational Choice Theory*. New York Oxford University Press -03-01, pp. 29-33.

as good. Both involve a public good that is only fully protected with multilateral engagement and attracts a high degree of public concern. Yet present in the former case is a generally feared and unwanted potential for change in the balance of power that can be brought on by the defection of any of the actors, compounding the temptation of defection for all. By contrast, in the latter case there is no immediate risk of gaining or losing power resources in the way that International Relations Realists understand them[33]. The potential losses or gains are instead reputational.

In the multiple-shot Prisoner Dilemma scenario, the applicable model for multilateral cooperation involving a public good, the primary variables in the political calculus are the reputational costs and the uncertainty over the pay-off structure's stability. For example, about the uncertain prediction that international cooperation in health matters will be more or less important in the future will be a decisive factor in determining whether the actors remain in or abandon such sanitary regimes, as will be decisive the perception of the strength of the others' adherence to them.

Reputation, or the perceived commitment of the main international actors to the WHO system, is therefore central at this moment for international political stability, as it is key for maintaining confidence in global capacity to find solutions which increases the international community's power to react to the current health crisis and potential future one. As already seen, more multilateralism, not less, is the answer.

Whether the crisis has already or nearly reached its zenith, one assertion remains valid: the juridical conscience of humanity, in spite of the syncopated history of its institutions, is not unfamiliar with advances, interruptions and, even last-minute rescues, as history proves, depending on the institutional and political conditions. The Academy's ongoing task remains the intellectual refinement of juridical and political thinking in the hope that the salvos of unilateral willfulness are not stronger or longer lasting than humanity's accumulated experience.

This applies to WHO and WTO.

The Crisis of Transparency: nothing is but what is not.

[33] Morgenthau, H.J. (2005). *Politics among Nations: the Struggle for Power and Peace*. 7a ed. Boston, Burr Ridge, IL Dubuque, IA Madison, WI New York, San Francisco, St. Louis, Bangkok, Bogotá, Caracas, Kuala Lumpur, Lisbon, London, Madrid, Mexico City, Milan, Montreal, New Delhi, Santiago, Seoul, Singapore, Sydney, Taipei, Toronto: McGraw-Hill Higher Education, pp.122–177.

If we were to translate into imagistic concepts the understanding of the Brazilian Ambassador Rubens Ricupero[34], the ongoing crisis of the World Trade Organization (WTO) is not a Nietzschean eternal recurrence, nor some Polybium cyclical spiral, a much less the consecration of the end of history and the coronation of the liberal man. Perhaps there is simply no image perfectly suited to represent the current moment, or one has yet to be created. As Ricupero points out, the moment is not a repeat of previous deadlocks, but rather brings new complexities: the proliferation of bilateral or regional trade agreements; a crisis of legitimacy of the so called "jewel of the crown" of the WTO, the Dispute Settlement Body; and, finally, the rise of China whose peculiar economic, political and legal features somehow challenge many of the liberal premises on which the whole multilateral trade system is founded.

Since an image that aptly symbolizes the current crisis does not occur to us, our minds inevitably turn to the Roman god of transitions to characterize the current impasse*. Janus Bifrons* was not only the Roman god of transitions and change, but also of ambiguities, complexities, and, in the best *coincidentia oppositorum* [35] approach, permanences. He was depicted as having two faces or heads, with the image of a young man looking one way and that of an elderly man looking in the other direction. In some depictions he is even presented as the four-faced god Janus Quadrifons. One way of interpreting this intricate symbolism would be acknowledging that reality, whatever it may be, necessarily involves both irremediable changes and irrefutable continuities. Among the aspects of the multilateral trade system targeted for improvement during its past and present challenges is the issue of transparency.

According to the WTO Glossary, transparency is "the degree to which trade policies and practices, and the process by which they are established, are open and predictable."[36]. This concept is sophisticated and goes beyond the notary publication of acts: it encompasses not only rules and official processes but also practices. It requires the qualities of openness and predictability, which suggest the aggregate

[34] Ricupero, Rubens. "WTO in Crisis: Déjà vu All over Again or Terminal Agony?" *The WTO Dispute Settlement Mechanism. A Developing Country Perspective*, edited by Alberto do Amaral Júnior et al., Springer, 2019, p. 18.
[35] Valk, John. "The Concept of the Coincidentia Oppositorum in the Thought of Mircea Eliade." *Religious Studies*, vol. 28, no. 1, Mar. 1992, pp. 31–41.
[36] World Trade Organization (n.d.). Transparency. In: *Glossary of Terms*. [online] Available at: https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/23glos_e.htm [Accessed 1 Jul. 2020].

quality of accountability:

> The principle that government – not just its laws and policies, but the reasons and processes of decisions that generated those policies and the flows of money that fund their implementation – should be open seems not just unobjectionable, but an essential complement of democratic government. Without that freedom of information, citizens cannot hold their government accountable, evaluate official`s claims, and hold them responsible when they veer too far from the tether of democracy[37].

It is a well-known fact that one of the major complaints of the international trade players before the WTO is the lack of transparency in all its three pillars: negotiations, implementation, and enforcement[38]. From the Least Developed Countries to the United States and China, the need to improve transparency was recognized.

The LDC group [39], while admitting the serious impasse currently faced by the WTO and the importance of *effective transparency and notification requirements are important,*

> ii. (…) **does not support the imposition of additional/new notification and transparency obligations on LDC Members, if these new obligations do not take full account of LDC capacity constraints, many of which cannot be resolved simply through short-term Secretariat technical assistance and capacity building**. In all circumstances, the LDC Members shall be provided technical and financial assistance by the Secretariat to fulfill their notification and transparency obligations.
> iii. The LDC Group **does not support under any circumstances the imposition of punitive measures on LDC Members, who may already be subject to similar measures, including ineligibility for technical assistance due to arrears in WTO dues**. The Marrakesh Agreement (particularly Article XI.2) and the Uruguay Round Ministers' Decision on Measures in Favour of Least-Developed Countries (paragraph 1) ensure that LDC Members are required to undertake only those commitments and concessions where they have recognized capabilities. **LDC Members are not to be forced to act beyond their capacities and limitations**. More positive incentives and solutions should be envisaged for LDC Members. In this regard, existing difficulties in notification should be reviewed, and where required, the templates and procedures for LDC Members should be simplified. (emphasis added)

[37] Fung, A. and Weil, D. (2016). Open Government and Open Society. In: D. Lathrop and L. Ruma, eds., *Open Government. Collaboration, Transparency, and Participation in Practice*. O'Reilly, p.106.
[38] Willems, C. (2020). *Revitalizing the World Trade Organization*. [online] The Atlantic Council Washington International Trade Association. Available at: https://www.wita.org/atp-research/revitalizing-the-wto/.
[39] World Trade Organization General Council. *LDC Views on WTO Reform Discussions and Proposals Communication from Chad on Behalf of The LDC Group*. JOB/GC/223. 6 December 2019.

In a *Joint Statement of the Trilateral Meeting of the Trade Ministers,* Japan, the United States and the European Union proposed expanding the list of prohibited subsidies as to encompass unlimited guarantees, subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan, subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity and certain direct forgiveness of debt. The statement also exhorts effective transparency[40].

In a communication to the General Council of the WTO signed by the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico, amendments were proposed in order to enhance transparency in the Dispute Settlement Body (hereinafter DSB).

The Peoples Republic of China (hereinafter PRC) addressed on its own some concerns about the WTO reform to the General Council. PRC noted that the *WTO's function of trade policy review and monitoring, transparency of trade policies of its Members awaits to be enhanced and the operational efficiency of the WTO stands in need of improvement*. China added the mention of the need for transparency of and due process for anti-dumping and countervailing investigations and transparency and inclusiveness in the case of fishery subsidies. China emphasized the necessity of greater transparency in trade policy reviews and investments. China also addressed the uncomfortable topic of state-owned-enterprises (SOEs), raising the concern that some Members have come to set differentiated rules on the basis of ownership of enterprises, labeling some as 'public bodies' within the meaning of the Agreement of Subsidies and Countervailing Measures, requiring additional transparency requirements and disciplines for SOEs, and discriminating against SOEs in foreign investment security review. Such practices are detrimental to an institutional framework for fair competition and, if left unchecked, would give rise to more discriminatory rules in the future.

[40] United States Trade Representative. *Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union*. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union

The Joint Communiqué of the Ottawa Group on WTO Reform Communication from Canada[41] urged the strengthening of monitoring and transparency in the WTO and committed itself to intensifying engagement in the ongoing examination of the proposal to enhance transparency and strengthen notification requirements under WTO Agreements.

Argentina, Brazil, Chile, Colombia, Mexico, Paraguay and Uruguay on the occasion of discussions on the reform of the WTO delivered an unofficial room document, a Declaration to the General Council to which the access is restricted and that supposedly addressed, among many issues, the transparency gap.

Third, the Joint Communiqué of the Ottawa Ministerial on WTO Reform Communication from Canada [42] calls for strengthening the monitoring and transparency of Members' trade policies in order to ensure the WTO Members the necessary understanding on the policy actions taken by their partners in a timely manner, in order to increase the *effet utile* of publication[43]. The document states that the current situation of the WTO is no longer sustainable and a full operational Organization is most wanted and beneficial.

In spite of the failures of the WTO system – aggravated, to a great extent, by the circumstance of the coronavirus pandemic that might serve as a pretext for China's main economic rivals to seek improvements in their negotiating positions – concern over transparency within the Organization is authentic and well founded.

When investigating transparency, it is necessary to it is necessary to trace its attributes. Certainly, transparency essentially involves sharing information. In providing his theory on information systems, Professor Michael Keeble Buckland defines the concept in three aspects

> (1) information-as-process, the process of becoming informed; (2) information-as-knowledge, that knowledge which is imparted by information-as-process; and (3) information-as-thing, the attributive use of information to denote things regarded as informative. Of these, information-as-thing is of special interest because information

[41] World Trade Organization General Council. *Joint Communiqué of the Ottawa Group on WTO Reform Communication From Canada*. WT/L/1057. 25 January 2019. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1057.pdf&Open=True

[42] World Trade Organization General Council. *Joint Communiqué of the Ottawa Ministerial on WTO Reform Communication from Canada*. WT/L/1042. 7 November 2018. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1042.pdf&Open=True.

[43] Karttunen, Marianna B. *Transparency in the WTO SPS and TBT Agreeements*. *The Real Jewel in the Crown*. Cambridge University Press. International Trade and Economic Law. p. 92.

> systems deal directly with information only as information-as-thing: data, documents, signals[44].

Actually, the author considers that information systems can only deal directly with information-as-thing, which is nothing more than information-as-knowledge made tangible, by means of expressions, descriptions or representations[45]. Status and law reports are considered evidence in law[46].

> The term evidence is much used in law. Much of the concern is with what evidence, what information, can properly be considered in a legal process. It is not sufficient that information may be pertinent. It must also have been discovered and made available in socially approved ways. However, if we set aside the issues of the propriety of the gathering and presentation of evidence and ask what, in law, evidence actually is, we find that it corresponds closely to the way we are using it here. In English law, evidence can include the performing of experiments and the viewing of places and is defined as: "First, the means, apart from argument and inference, whereby the court is informed as to the issues of fact as ascertained by the pleadings; secondly the subject matter of such means" (…)[47].

The evidence gathering process might create a reverse dynamic by which information turns out to be information-as-process, since the collected elements may require narrative sequencing to create meaning.

However, throughout this work, we will explore the most basic level of information subjected to transparency directives. This study is not focused on legal discourse or legal semiotics. In fact, I believe that the scrutiny of transparency of information in the multilateral trading system does not reach this level of refinement, although it might in the future. Information-as-thing will be our focus.

In effect, one benefit of regulatory cooperation, or regulatory dialogue, is regulatory harmonization when unification is not possible. It also offers, especially to developing countries, an interesting opportunity for improved regulatory quality.

Much of the lack of transparency in third world countries is not due to a lack of publicity of acts *per se*, but to the lack of a tradition on “legistics”. According to the World Bank, among the newly industrialized countries (South Africa, Mexico, Brazil,

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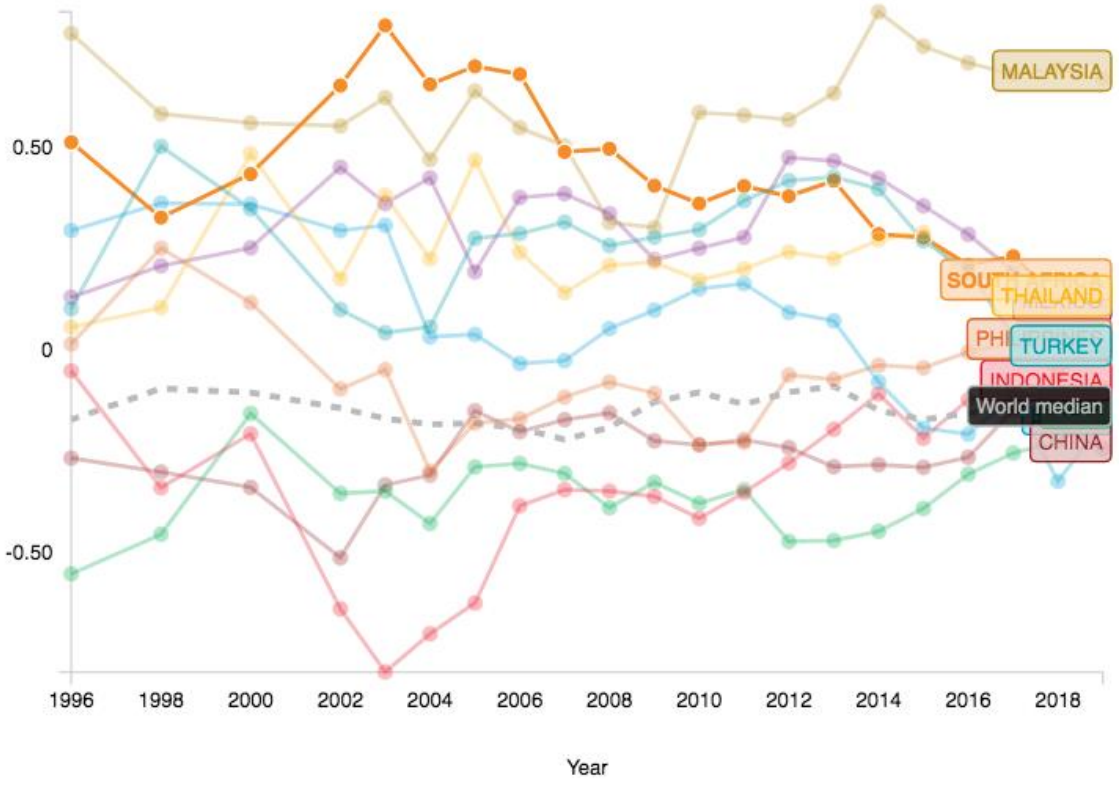
[44] Buckland, M.K. (1991). Information and Information Systems. New Directions in Information Management ed. Westport, Connecticut; London: Praeger, Kindle Locations 2422–2424.
[45] *Idem*, (Kindle Location 97). Kindle Edition.
[46] Ibidem, (Kindle Location 558). Kindle Edition.
[47] Buckland, M.K. (1991). *Information and Information Systems*. New Directions in Information Management. ed. Westport, Connecticut; London: Praeger, Kindle Locations 569-573. Kindle Edition.

China, India, Indonesia, Malaysia, Philippines, Thailand and Turkey), only the normative performance of Malaysia stood out well above the world average in 2019, while the majority were only slightly above the average and Brazil and China fell slightly below it[48].



Source: World Bank. *Regulatory Quality*. GovData360. https://govdata360.worldbank.org/indicators/hf8a87aec?country=BRA&indicator=394&countries=ZAF,MEX,IND,CHN,MYS,PHL,TUR,IDN,THA&viz=line_chart&years=1996,2019

The World Bank index on regulatory quality is calculated on the basis of, among others, the following elements [49]:

i. unfairness competitive practices;
ii. price controls;

[48] World Bank. *Regulatory Quality*. GovData360. https://govdata360.worldbank.org/indicators/hf8a87aec?country=BRA&indicator=394&countries=ZAF,MEX,IND,CHN,MYS,PHL,TUR,IDN,THA&viz=line_chart&years=1996,2019

[49] World Bank. *Worldwide Governance Indicators*. http://info.worldbank.org/governance/wgi/Home/Documents

iii. discriminatory tariffs;

iv. excessive protections, discriminatory taxes;

v. prevalence of non-tariff barriers;

vi. extent of market dominance;

vii. investment freedom, financial freedom;

viii. ease with which local law makes of starting a business;

ix. ease with which foreign firms can open local subsidiaries;

x. share of administered prices and subsidized commodity prices;

xi. *de facto* importance of barriers to entry for new competitors in markets for goods and services;

xii. efficiency of competition regulation in the market sector;

xiii. investment profile;

xiv. **regulatory burden**, which is the risk that normal business operations become more costly due to the regulatory environment (regulatory compliance and bureaucratic inefficiency and/or **opacity**);

xv. tax inconsistency, which also captures the risk that fines and penalties will be levied for non-compliance with a tax code that appears disproportionate or manipulated for political ends.

Baldwin, Cave and Lodge elaborated a more concise list, considering five criteria for the qualification of regulation: i. Is the action or regime supported by legislative authority?; ii. Is there an adequate scheme to ensure accountability?; iii. Are procedures fair, accessible, and **open**?; iv. Does the regulator possess and act on sufficient expertise?; and v. Is the action or regime **efficient**?[50]

Carlos Blanco de Morais defines legistics as follows:

> From the second half of the 20th century onwards, the study of normative interpretation in a mere framework of law enforcement by the judge was insufficient (…).
>
> From the eighties of the last century, the study of norms experienced a **qualitative leap** in Europe, from the moment when non-jurists began to observe it as an instrument of political and economic transformation and action, and the law started to be studied. In the field of techniques and methods that should govern the **design of norms and rules**, writing, evaluation, systematization and practicality are important. Thus, Legistics was born as part of the Science of Legislation, concerned with the study of the

[50] Baldwin, R., Cave, M. and Lodge, M. (2012). *Understanding regulation: theory, strategy, and practice*. New York: Oxford University Press, p.27.

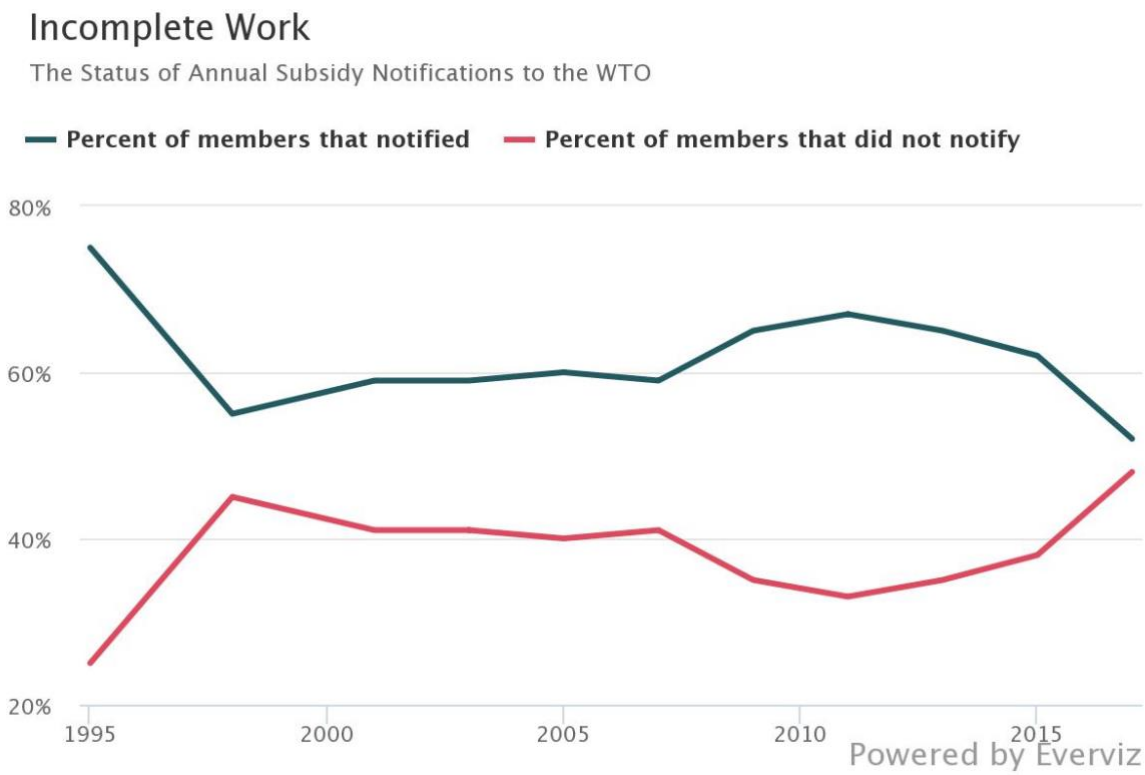
> **consequences produced by legislative acts** and with the design of methods and techniques that can enhance its **quality, simplification and efficiency**.
>
> What is the use of legistics? As a technical assumption of the **quality of the laws**, it has a special positive impact on the State, companies and citizens. Thus, in the context of the functioning of the State: i. Reduces costs of poorly calibrated laws in relation to charges / benefits; ii. Ensures laws able to achieve objectives, anticipating potential risks; iii. Provides less risk of unconstitutionality; iv. It provides for clearer, less litigious and less burdensome laws in the justice system. v. With regard to companies: vi. Administrative and financial costs are reduced; vii. Promotes red tape; viii. Ensures greater legal certainty and lower rate of litigation; ix. It provides greater participation by companies and business associations in the making of laws.
>
> Finally, with regard to citizens: i. better accessibility to the Law is provided, namely through free electronic search engines and informal consolidation structures. ii. There is less risk of laws that violate or unnecessarily sacrifice your fundamental rights; iii. **Participatory democracy** is reinforced at the procedural level through previous hearings. Among the two main areas of legistics, formal and material legistics should be considered[51]. (emphasis added)

Legistics is therefore the means and techniques for achieving maximum efficiency and transparency to improve regulatory quality.

The WTO galvanizes regulatory quality through regulatory cooperation mechanisms, which, of course, require functioning notification mechanisms. This requirement holds from the most elementary form of transparency to the most qualitative, qualified concept, by which control is exercised over rules and the rule making processes so that the normative and business environment is as intelligible and fair as possible. The challenges for maintaining such a notification regime become evident in the first steps of the journey.

Either for lack of willingness to comply with trade obligations, or because of capacity constraints (human resources, technological capacity), the levels of notification in the WTO are strikingly deficient.

[51] Blanco de Morais, C. (2020). Introdução. In: M.N. Lins Barbosa, C. Morais Cajaiba Garcez Marins and I.M. Ferreira Pires, eds., *Legística. Estudos em Homenagem ao Professor Carlos Blanco de Morais*. São Paulo: Almedina. Kindle Location 183. Kindle Edition.



Breakdown of WTO Subsidy Notifications

New and full subsidy notification	Percent share of total WTO members										
	1995	1998	2001	2003	2005	2007	2009	2011	2013	2015	2017
Members that notified subsidies	50%	39%	44%	45%	47%	48%	48%	47%	47%	46%	41%
Members that made a "nil" notification	25%	16%	15%	14%	13%	11%	17%	20%	18%	16%	11%
Subtotal notifying Members	75%	55%	59%	59%	60%	59%	65%	67%	65%	62%	52%
Members that did not make any notification	25%	45%	41%	41%	40%	41%	35%	33%	35%	38%	48%

Source: “Notification Provisions under The Agreement on Subsidies and Countervailing Measures, Background Note by the Secretariat, G/SCM/W/546/Rev.10,” (WTO Secretariat).

As previously stated, the concept of transparency has many attributes and has has evolved over time. Basically, it has become denser and spread to encompass all branches of law, and, by consequence, International Law and international economic

law as well.

A priori, the notification mechanism of the WTO corresponds to the most basic level of transparency, related to the duty to publicize administrative acts. However, the way in which the WTO Glossary defines transparency touches on good faith, due process and the rule of law, all principles recognized in WTO law. Interestingly, the WTO glossary does not define these terms; in part because the principles are not rigid, meaning they are adaptable to the specific case and can be evoked in their radial elements.

To explain the radial manifestations of these principles, let us take as an example the notion of procedural justice. In the simplest forms of social organizations, the most important public and civil events were ritualized[52]. Social validation depended on properly following the sequence of prescribed acts and the result was symbolically announced. Peter Meijes Tiersmathe holds the position that "*Ritual worlds and actions were and [still] are an important part of many legal systems"*[53]. The author illustrates his approach to van Gennep's theoretical framework using the legal practices of ancient Rome, which was riddled with rituals, whereas a modern law. The prevailing form of ritual in the legal world since ancient Rome involves speech acts. Tiersmathe shows how such legal formalities, or legal rituals, have evidentiary, cautionary and channeling functions. The channeling faculty of legal rituals gives legal acts enforceability and meaning. A shift in focus to contract from status, tends to grow less ritualistic over time.[54]

In modern constitutionalism born of the American and French revolutions, the idea of due process replaces the idea of correct process, or mere ritual, as the main basis for the validation of acts, whether private or public in nature.

On the spectrum between ritual-based and due process-based legalism, most

[52] "As we move downward on the scale of civilizations (taking the term "civilization" in the broadest sense), we cannot fail to note an ever-increasing domination of the secular by the sacred. We see that in the least advanced cultures the holy enters nearly every phase of a man's life. Being born, giving birth, and hunting, to cite but a few examples, are all acts whose major aspects fall within the sacred sphere. Social groups in such societies likewise have magico-religious foundations, and a passage from group to group takes on that special quality found in our rites of baptism and ordination". van Gennep, A. (2019). *The Rites of Passage*. 2a ed. Translated by M. B. Vizedom. and Translated by G. L. Caffee. United States of America: The University of Chicago Press, p.2. Kindle Edition.

[53]Tiersmathe, P.M. (1988). *Rites of passage: Legal ritual in Roman law and anthropological analogues*. The Journal of Legal History, 9(1), pp.3–25.

[54] *Idem*, p. 10.

societies naturally fell in between the two extremes. In ancient Rome, public and legal acts were consecrated or infused with religious elements but elaborated based on a legal rationale. Even today, some ritualistic facets of legal practices are noticeable across the world, due to the extreme valorization of procedural formalism, despite the consistent advance of secularization[55] and greater attention to substantive issues of due process. In the United States

> (…) the United States Supreme Court supports the view that due process, "'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."" The Court acknowledged the flexibility of the concept, noting that its protections are required only when the "'particular situation demands."" Third, and with most relevance to WTO dispute settlement, the types of procedures that are required by the dictates of due process where a government action would deprive an individual of a constitutionally protected liberty or property interest-even in the specific field of procedural due process-must be determined on the basis of a balancing test.' On the side of the individual, a court must assess the importance of the individual liberty or property interest at stake and the extent to which the requested procedure may reduce the possibility of an erroneous deprivation of rights." On the other hand, the court must assess the governmental interest in avoiding the increased administrative and fiscal burdens that result from increased procedural requirements[56].

In any case, whether in the world of rite or the universe of due process, in mitigated or expansive fashion, the value of transparency in public acts, a concept so apparently modern, has always been manifest, as will be shown in the chapter on the origin of the concept.

Vishwanath and Kaufmann define transparency as *increased flow of timely and reliable economic, social, and political information*, encompassing the attributes of access, comprehensiveness, relevance, and quality and reliability[57].

In the multilateral trade regime, transparency originally appeared as duty of publicity and review at the national level, which *designated beneficiaries are not only*

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[55] "Classical judicial architecture has always shown a certain transcendence, something vertical in the design features that express, make visible, the links between God–Monarch–Judge; traditional design suggests something 'sacred', then, that perhaps conflicts with the immanence, the horizontality, of contemporary democracy". Marrani, D. (2020). *Space, Time, Justice: from archaic rituals to contemporary perspectives*. London and New York: Routledge Taylor & Francis Group, p.67. Kindle Edition.

[56] Gaffney, J.P. (1999). Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System. *American University International Law Review*, 14(4).

[57] Vishwanath, T. and Kaufmann, D. (2001). *Towards Transparency in Finance and Governance*. SSRN Electronic Journal, pp.3–4.

the parties to the Convention but also "persons concerned," a class that could include domestic persons as well as aliens [58], in the 1923 International Convention Relating to the Simplification of Customs Formalities ("Customs Convention"). The legal texts resulting from the Uruguay Round of Multilateral Trade Negotiations reinforced the duty of publicity. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS Agreement) and he WTO Agreement on Technical Barriers to Trade (hereinafter TBT), added the attributes of participatory legislation to transparency, bringing the understanding of transparency in the multilateral trade regime closer to that of regulatory science, for which regulatory rationality represents the most thorough form of transparency.

From the contribution of Baldwin, Cave and Lodge to the "better regulation" or "smart regulation" debate and focus on regulatory quality, it can be adduced that transparency boils down to rational planning, regulatory impact assessments, cost-benefit analysis, pre-review, comparative evaluation, command and control mechanisms, approaches that favor incentives, principles, and empirical risk analysis over restrictions[59] . The Law and Economics approach would factor in elements such as the fixed costs of designing and implementing legal standards (rule-making costs), the costs of enforcing the standards (enforcement costs), the costs imposed on the regulated industry (compliance costs), and the social costs imposed by regulatory offenses (harm costs)[60].

The abovementioned attributes of transparency and transparency as an attribute of other principles are the radial concepts to which this study refers.

Methodology

When constructing theories, categories are essential. The most prestigious definition of categories comes from Aristotle. In the fifteen chapters of his work *Organon*, Aristotle defines categories, in brief, as non-complex statements or

[58] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020], p. 3.
[59] Baldwin, R., Cave, M. and Lodge, M. (2010). Introduction: Regulation- The Field and the Developing Agenda. In: R. Baldwin, M. Cave and M. Lodge, eds., *The Oxford Handbook of Regulation*. Oxford New York: Oxford University Press, pp.4–13.
[60] Veljanovski, C. (2010). Economic Approaches to Regulation. In: R. Baldwin, M. Cave and M. Lodge, eds., *The Oxford Handbook of Regulation*. Oxford New York: Oxford University Press, p.28.

enunciations[61]. Similarly, *Aristotelian concepts are based on individually necessary and jointly sufficient attributes[62]*. According to the classic concept of categories, they must be understood *in terms of a taxonomic hierarchy of successively more general categories[63].* However, inspired by Moller and Skaaning[64], I chose to apply, whenever suitable, radial concepts, or categories, of rule of law and transparency typologies. Radial concepts were introduced into political science by Collier and Mahon[65].

> Radial concepts do not conform to this notion of a taxonomic hierarchy. The core of a radial concept is instead represented by the most maximalist definition that can be envisaged – what we referred to using Tolstoy's metaphor of the happy families above. The definitions which can be situated at higher rungs on the ladder of abstraction are construed as subsets of this 'primary category': 'they do not share the full complement of attributes by which we would recognize the overall category, as they do with classical categories. Rather, they divide them' (Collier and Mahon, 1993, p. 848). In our metaphor, these subsets are the many unhappy families which are distinctly unhappy, i.e., unhappy each in their own way. Returning to the example, subtypes such as 'illiberal rule of law' (where respect for liberal rights is missing but formal legality is present), exemplify this logic[66].

Radial concepts of transparency and rule of law abound. Collier and Mahon contrasted the radial logic they employ with the Aristotelian logic used by Sartori (1970) in his classic article on concept formation.

Applying this logic to concept of rule of law, for instance:

> Aristotelian concepts are based on individually necessary and jointly sufficient attributes. In the case of rule of law, this entails that the instances of more maximalist definitions – such as liberal rule of law (a.k.a., constitutionalism) – are also instances of more minimalist definitions, such as pure formal legality. The core of rule of law is thus found at the highest level of abstraction, normally represented by a situation where laws are general, prospective, clear, and certain. More maximalist definitions can be situated neatly along what Sartori terms 'the ladder of abstraction' as the addition of defining attributes

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[61] Aristotle (1856). *The Organon*. Translated by O. Frere Owen. Deutschland: Jazzybee Verlag Jürgen Beck, p.4. Kindle Edition.

[62] Møller, J. and Skaaning, S.-E. (2014). *The Rule of L*aw. Hampshire New York: Palgrave Macmillan UK, Kindle Positions 532–687. Kindle Edition.

[63] Collier, D. and Mahon Jr (1993). Conceptual "Stretching" Revisited: Adapting Categories in Comparative Analysis Source. *The American Political Science Review*, [online] 87(4), p.845. Available at: http://www.jstor.org/stable/2938818 [Accessed 1 Jul. 2020].

[64] Møller, J. and Skaaning, S.-E. (2014). *The Rule of Law*. Hampshire New York: Palgrave Macmillan UK, Kindle Positions 532–687. Kindle Edition.

[65] Collier, D. and Mahon Jr (1993). Conceptual "Stretching" Revisited: Adapting Categories in Comparative Analysis Source. *The American Political Science Review*, [online] 87(4), pp.845–855. Available at: http://www.jstor.org/stable/2938818 [Accessed 1 Jul. 2020].

[66] Møller, J. and Skaaning, S.-E. (2014). *The Rule of Law*. Hampshire New York: Palgrave Macmillan UK, Kindle Positions 532–687. Kindle Edition.

> (say, liberal rights in case of liberal rule of law) displaces the concept to a lower rung of the ladder[67].

The rule of law will be an important category in this study because transparency, as a duty or principle of law, is also a corollary that derives from it. Studying legal transparency without framing the evolution of the radial concepts of rule of law is meaningless.

Transparency will also be considered as a radial category. Transparency assumes different features, shapes and degrees depending on the historical moment and the societies analyzed. Conversely, every type of historical and comparative study in the human sciences also perform a descriptive function. Radial categories were brought in to mitigate the risks of conceptual stretching, which when employed strains the analysis and comparisons and increases inaccuracy. If, on one hand, broad comparison is problematic for political and social realities are so dissimilar that the application of any category is impaired, possibly to the point of undermining the validity of social sciences altogether, on the other hand, it is necessary to *pacify stable concepts and a shared understanding of categories*[68] for the sake of the evolution of social sciences. Radial concepts are providential in this task.

As Maria Panezi emphasized in her doctoral thesis:

> In public administration the main goal of transparency is the publication and in general, the disclosure and clarification of information. In national administrative law, it takes the form of a right to information, which includes the obligation of authorities to publish their decisions and the right of the administrated to receive explanations when decisions concern them; the form of obligation to report on behalf of the administrators; and the provision of a communication avenue between the administrator and the administrated. **Thus, transparency includes two levels of knowledge: the primary element of disclosure of information and the secondary element of explaining the rationale behind the information disclosed[69]**. (emphasis added)

[67] Møller, J. and Skaaning, S.-E. (2014). *The Rule of Law*. Hampshire New York: Palgrave Macmillan UK, Kindle Positions 532–687. Kindle Edition.

[68] Collier, David and Mahon Jr. Conceptual "Stretching" Revisited: Adapting Categories in Comparative Analysis Source: The American Political Science Review, Vol. 87, No. 4 (Dec., 1993), pp. 845. Published by: American Political Science Association Stable URL: http://www.jstor.org/stable/2938818 . Accessed: 24/01/2011 20:40.

[69] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.49. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].

Using radial concepts requires confessing that the study does not intend to meet the criterion of falsifiability in the manner of Karl Popper. The Austrian philosopher summed up his premises about the formation of scientific theories as follows:

> (3) All "good" scientific theory is an interdiction: it prohibits certain things from happening. The more the theory forbids, the better.
>
> (4) A theory that is not refutable by any conceivable event will be a non-scientific theory. Irrefutability is not a virtue of theory (as people often think), but a defect.
>
> (5) Any genuine test of a theory constitutes an attempt to falsify or refute it. Testability is equivalent to falsifiability. But there are degrees of testability: some theories are more likely to be tested and are more exposed to refutation than others; take, as it were, greater risks.
>
> 6) Confirmatory evidence should not be taken into account, except when they are the result of a genuine test of the theory and this means that they can be presented as a serious, albeit unsuccessful, attempt to falsify that theory (I tend to speak now, in these cases , in 'corroborating evidence').
> (7) Some genuinely testable theories, even after having concluded that they are false, are still supported by their adherents - through the *ad hoc* introduction of an auxiliary hypothesis, for example, or through an *ad hoc* reinterpretation of the theory, made in a way that escapes rebuttal. Although such a procedure is always possible, the theory is only saved from refutation at the expense of destruction or, at least, of the lowering of its scientific status.
>
> We could summarize all this by saying that "the criterion of a theory's scientific status is its falsifiability, or refutability, or testability."[70]

The empirical falsification test of the thesis that underlies this study is deeply hampered by several factors. Transparency has a pervasive and mutant nature, which allows radial manifestation. First, History, as well as Legal History and Anthropology, are narratives. Accessing their primary sources (the historical facts, without interpretive coverage) is not totally possible. Many of those facts are only cognizable with some non-negligable degree of interpretation, which makes empirical falsification difficult to achieve from the outset. Second, as we will see from the doctrine of Humberto Ávila, we cannot measure whether a principle of law exists or not by verifying its application in all cases. The principles are malleable under the circumstances for a myriad of reasons and may even give way to other criteria for valuation understood to be more suitable or meritorious in the case in question. Analyzing the centrality of the principle for a legal order or international legal regime

[70] Popper, K. (2018). *Conjeturas e Refutações*. Biblioteca de Filosofia Contemporânea ed. Translated by B. Bettencourt. Lisboa Portugal: Edições Almedina, S.A, pp.88–89.

is thus dependent on the leading cases in which it was raised, which, strictly speaking, might distort the theory itself by relying on a reduced sample size[71]. Thus, this study has no pretensions of scientific rigor in Popperian terms other than narrative rigor, in accordance with the norms of legal history, literature review and case law review.

The study developed here is anchored in the model of social research design offered by King, Keohane and Verba[72], which is composed of four elements. The first element is the research question, which must be relevant to both society and academia. The second element is the theoretical contribution, defined by the authors as a precise and rational formulation in response to the research question. This theoretical element should include argumentation backing the proposed answer. The third component of scientific study identified by King, Keohane and Verba is the collection of empirical data to test the hypothesis advanced by the theory. Finally, the fourth and final element of the research design pointed out by the authors involves the adequacy of the data used.

The intent of this study is not to reach a positive or negative conclusion regarding the existence of the principle of transparency in International Law or in the WTO law itself. Our premise is that, albeit superficial, transparency has always been part of legal systems, in its radial aspects, no matter how primitive they were, and that, therefore, understanding it as part of the current rule of International Law is not as fundamental as knowing how transparency is evolving.

In the light of the fact that the abovementioned search for better standards of transparency for the purpose of promoting international trade, which, in a more incisive way, now reaches Brazil's regulatory-making process, it is reasonable and timely to question whether transparency is in a state of mutation in the multilateral trade regime: from duty described in some of the Uruguay Round agreements and encouraged through the duty of notification and the Trade Policy Review mechanism to the status of general principle of trade law International. Before that, it is even legitimate to question whether, in the face of the increasingly and constant bravado in favor of transparency, it can be considered to have sufficient radiation in national and international legal systems to the point that its identification as a general principle

[71] Popper, K. (2018). *Conjeturas e Refutações*. Biblioteca de Filosofia Contemporânea ed. Translated by B. Bettencourt. Lisboa Portugal: Edições Almedina, S.A, pp. 87-88.
[72] King, Gary. Designing Social Inquiry. Princeton University Press. Kindle Edition.

can be advocated.

Lastly, based on the premise that the evolution of normative rules is pointing indeed in the direction of raising the status of transparency, we identify the deepening and thickening of regulatory supervision by the WTO both on the path of disputes and of its administrative procedures (Trade Policy Review Mechanism and theme committee consultations).

A new consolidated system of regulatory checks and balances may thus be advocated, one with the potential of facilitating the efforts of regulatory rationalization and de-bureaucratization in countries such as Brazil, where cultural, ideological, political and practical difficulties currently impede modernization of governance. Such an arrangement would, in our view, either purport or tend to engender transparency as a Principle of Law in the multilateral trade regime. For some scholars in the field, transparency already represents its keystone of the regime:

> The obligations linked to transparency are part of the multilateral trade system since 1947 via the disciplines established by Article X of the GATT. This principle can be considered as one of the basic WTO principles. Under the internal purview of WTO member countries, transparency is evinced by the rules linked to the publicity of trade regulations, which have the aim of attributing higher legal certainty and predictability to their beneficiaries. Transparency is materialized by the official disclosure of regulations as general public knowledge, so these regulations may attain their external effects.[73]

This understanding is shared by Porto, Barral, Matos & Silva[74], for whom the discussions on trade facilitation promote the harmonization of regulation and greater efficiency, transparency and predictability.

The above-cited interpretations on the meaning of Article X of the General Agreement on Tariffs and Trade (GATT-1994) go against the notion that this provision has a more modest scope that only validates the publicity of legal acts. The jurisprudence linked to the dispute settlement mechanism (GATT-47) and the dispute settlement system (GATT-94), however, does confirm a minimalist reading. Even though the jurisprudential self-restraint was influenced to a certain extent by the

[73] Rocha de Araújo, L. (2016). O Acordo sobre Facilitação do Comércio da OMC: medidas para a redução das barreiras administrativas ao comércio internacional. In: *Desafios da Diplomacia Econômica na Perspectiva de Jovens Diplomatas*. Brasília: Fundação Alexandre de Gusmão, p.304.
[74] Porto, P.C. de S., Barral, W., Matos, M.D. de and Silva, R.C. (n.d.). Facilitação Comercial no Brasil: Avanços e Desafios. [online] p.2. Available at: https://www.researchgate.net/publication/261175513.

dispute settlement system, it must be emphasized that the minimalist interpretation was maintained despite elements that suggested the principle of transparency as a meta-concept at the basis of publicity.

Article X of the General Agreement on Tariffs and Trade is considered by many as the cornerstone for transparency of the entire multilateral trading system. The article has an extremely strict scope: it deals with the duty to promptly and officially publish, before their entry into force,

> 1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use (…) Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.

Article X also imposes the duty to administer the norms in a uniform, impartial and reasonable manner, and to:

> (b) (…) maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

Article X could have created, as a result of its obligations, the duty of regulatory dialogue between the Parties, or even among national or international economic actors affected by the measures. Although this did not occur, Article X opened the way for the Trade Facilitation Agreement to do so. Official publication prior to the entry into force of the regulations, by the language of the Article, was intended only to make the commercial parties aware of the rules so they are able to meet the new legal requirements. In that respect, the transparency obligation contained in article X

of the GATT-47 resonates deeply with ritualistic transparency obligations and therefore occupies a place somewhat below the full requirements of due process as currently understood.

Article X of the General Agreement on Tariffs and Trade (GATT) was the first dispositive of the new multilateral trade regime that broached the duty of legal transparency, although it did not expressly qualify it. Article X formally addressed the duties of publication and administration in such a conditioned manner that its *telos* could be naturally inferred. The doctrine is consensual in classifying Article X as a framework for legal transparency.

The article defined an unprecedented range of obligations on Member States, but did not go far beyond the perfunctory duty of publication of official acts. Nevertheless, its shortcomings cleared a path for the following improvements of the transparency concept.

First, Article X imposes the prompt publication of trade-related national measures before their entry into force (from any constituted Power or instance or level of the Administration) as well as international agreements affecting trade such that governments and traders may be informed of them. Second, Article X demands uniformity, impartiality and reasonableness in the administration of such agreements and measures, as well as independent review when their application is challenged. Third, it demands Members to establish and maintain practicable, judicial, arbitral or administrative independent tribunals or procedures for the purpose of prompt review and correction of administrative action related to tariffs and duties.

As a legal concept, Article X premises the notion of transparency operative in the World Trade Organization system on due process. For Maria Panezi, transparency is a notion intrinsically connected to the rule of law[75], an analysis of which will be further developed.

Equivalent commitments were mirrored in many of the legal texts elaborated in the wake of the Marrakesh Agreement that preceded the establishment the WTO and largely achieved the Uruguay Round and added more layers to transparency commitments. Specifically, these include the Agreement on the Application of

[75] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.49. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020], p. 69.

Sanitary and Phytosanitary Measures (Article 7, and Annex B); the Agreement on Technical Barriers to Trade (Articles 2.9.1, 2.12,5.6.1,5.9,9,10, 10.8.1 and 13 and Annex J and L); the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Articles 12 and 22), also known as Agreement on Customs Valuation; the Agreement on Import Licensing Procedures (Articles 1.3,1.4 and 5); the Agreement on Subsidies and Countervailing Measures (Articles 11, 12, 22 and 23); the Agreement on Safeguards (Articles 3 and 12); and, recently, the Trade Facilitation Agreement (Articles 1, 2, 6.1, 6.1.3 and 7); the General Agreement on Trade in Services (Article III); the Agreement on Trade-Related Aspects of Intellectual Property Rights (Article 63). Among the plurilateral trade agreements, the Agreement on Government Procurement includes the transparency duties expressed in Articles VII, IX and XVII[76].

The transparency burden was also mentioned in the Understanding on the interpretation of Article II:1 (b) of the General Agreement on Tariffs and Trade 1994, which required that the "other duties and charges" levied on bound tariff items be recorded in the schedules of concessions; and the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 that establishes the obligation to notify governmental and non-governmental trading enterprises.

Finally, the Trade Policy Review Mechanism introduced the instrument of notification in order to overcome the limitations of the publication in national jurisdictions and in non-official languages of the WTO. The praxis of *ad hoc* consultations was created under the name of "specific trade concerns" (hereinafter STC), not as an express duty but rather as an encouraged process[77].

Jurisprudence might exercise the role of clarifying the principle of transparency. Marija Đorđeska identifies as a general principle of law recognized by the International Court of Justice (hereinafter ICJ) the principle attributing the competence of authoritative interpretation of a legal rule solely to the person or body who has power to modify or suppress it (the general principle of *ejus est interpretare*

[76] World Trade Organization. *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press. 1999.
[77] Mavroidis, P.C. and Wolfe, R. (2015). From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO. *SSRN Electronic Journal*, p.3.

legem cujus condere)[78]. A hasty reading might hold this principle to be a potential impediment to cross-fertilization between the jurisprudence of international courts and dispute settlement bodies or even between national and international jurisdictions, or perhaps as closing definitively the possibility of judicial review, at least between international courts, because of the lack of *stare decisis* in these instances. This principle, however, does not prevent courts from resorting to comparative international law, from which cross-fertilization derives, nor from seeking comparisons that shed light or from providing useful insight for the advancement of international law. Rather, the principle reminds us that the DSB is not compelled to respect as general principles of law or of International Law those recognized by the Permanent Court of International Justice (hereinafter PCIJ) or the ICJ. It does not prevent the DSB from engaging in an exercise of comparative jurisprudence to assess the degree of maturity or reflection of the international legal community with regard the concepts whose analysis we propose here.

In the jurisprudential research behind this study, I will focus primarily on the decisions of the World Trade Organization's Dispute Settlement Body and, in addition, on the work of the PCIJ and the ICJ. The reason for this choice is that, of the current permanent international courts[79], the ICJ is the only one that adjudicates general disputes between countries and whose rulings constitute primary sources of international law.

The ICJ's authority or influence over the general principles of International Law is expressed in different ways. First, the ICJ is an integral part of the United Nations and functions as its principal judicial organ, rendering assistance to its political bodies, the General Assembly and the Security Council. The UN is the most comprehensive international organization of universal vocation, in scope and in object, and its charter is considered a constitutional political pact among nations due

[78] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p.360.

[79] Among others, the International Criminal Courts, the International Tribunal of the Law of the Sea, the Investment Dispute Resolution Center, the International Chamber of Commerce, the Court of Justice of the European Communities, the Southern Common Market (MERCOSUR), the North American Free Trade Agreement (NAFTA), the Free Trade Area of the Americas (FTAA), the Chile-United States Free Trade Agreement, the Andean Community, the Central American Integration System (SICA) and the European Court of Human Rights. Barral, W. ed., (2004). Tribunais internacionais: mecanismos contemporâneos de solução de controvérsias. Florianópolis: Fundação Boiteux.

to the fundamental precepts it enshrines that determine how the international order should be properly maintained and stabilized. The ICJ is constrained by the general limits imposed by the Charter on UN bodies and by the domestic jurisdiction of litigating States – by the reservations stipulated by States to accept its mandatory jurisdiction – and by the scope of its function, which does not extend to legal disputes. Apart from these limitations, the ICJ has a wide field of action. It is based not only on international acts elaborated by the UN in its legal reasoning, but also on bilateral or multilateral agreements that are outside its scope, but to which the parties to the dispute are parties.

Second, the ICJ has the power to interpret the constitutive Charter of the UN and to give advisory opinion even on issues involving parties that do not recognize its compulsory jurisdiction. This grants the Court an even wider reach.

Third, and as a result of the previous considerations, the condition of UN juridical body does not prevent the ICJ from operating as the world court. As Mohamed Sameh M. Amr remarks:

> (…) It should be noted that its status as a judicial organ of the UN is different from the status of the political organs of the UN; consequently, it has to some extent to distance itself from them. The ICJ is not only a principal organ of the UN but also the principal public central judicial body of the international community. This fact was affirmed by the Court`s geographical separation from the UN`s other organs- the headquarters of the UN being in New York and the European offices of the UN in Geneva. This special position is also marked by the fact that the staff of the Registry do not belong to the staff of the UN Secretariat. In addition, the legal position and duties of the staff members are determined in general provisions of the Statute, detailed up by the Registry and approved by the Court. Moreover, the cases decided by the Court are issued by it in its capacity as the "International Court of Justice" with no reference to the UN. Finally, states that are not members of the Un may be parties to the ICJ`s Statute[80].

The transposition of general principals from the jurisprudence of 19th century arbitral courts to Article 38 (1) (3) of the PCIJ and, then, to Article 38 (1) (c) of the ICJ, marked a rupture in terms of the nature and the contours of what would become an autonomous source of international law. This is so because

> First, it should be noted that general principles of law did not generally appear as a source of International Law in classical treatises of the late 19th century and beginning of the 20th century. Second, and

[80] Amr, M.S. (2003). *The Role of the International Court of Justice as the Principle Judicial Organ of the United Nations*. The Hague London New York: Kluwer Law International, p.40.

> more fundamentally, the earlier arbitral practice denotes a use of general principles of law in a completely different fashion. Indeed, in arbitral practice prior to article 38, general principles of law were relied on as an interpretive principle, as an expression of equity, or more generally as a "spontaneous argumentative move". Even when general principles were used, in the practice of arbitral tribunals, as mechanism playing a law-ascertainment function – that is as a source of law – they were continuously derived from Roman Law. For these reasons, the understanding of general principles as a source of law vindicated by article 38 of the PCIJ Statute and its generalization beyond this adjudicatory framework of the PCIJ cannot be seen as a sanction of the pre-1920 scholarship and practice, but should rather be explained as a major innovation[81].

Even with the codification of law sources in the PCIJ and ICJ Statutes, the principles of equity and equitable principles remained regular references in the jurisprudence of these and other international courts and tribunals, as well as the doctrine of several scholars. These principles, as could be expected, underwent full specification and clarification through work of scholars. For some, equity would be no more than a method to achieve equitable results and thus, at least in this sense, only a postulate, according to the doctrine of Humberto Ávila, as will be seen. For other scholars, they were and remain general principles, in parallel with several other recognized principles and supports for achieving fairness[82].

The nature of arbitration itself allows for a more fluid use of sources of law and legal reasoning, creating greater space for extra-legal commitments, despite the ensuing augmentation of the legalization of the arbitration process[83]. Thus, for didactic reasons and with the aim of circumscribing the legal analysis as much as possible to decision-making environments less vulnerable to political interference in order to understand the purest state of the debate on the general principles of law, this author chose to review the jurisprudence of the permanent international courts in parallel with that of the WTO.

The jurisprudence of the Central American Court of Justice and the Central American International Court are also of interest for four historical reasons: (i) the

[81] d'Aspremont, J. (2018). What Was Not Meant to Be: General Principles of Law as a Source of International Law. In: *Global Justice, Human Rights and the Modernization of International Law*. Cham: Springer International Publishing, pp.8–9.
[82] Higgins, R. (1995). *Problems and Process: International Law and how we use it*. Great Britain: Oxford University Press, p.237.
[83] Brownlie, I. (1998). *Principles of Public International Law*. 5a ed. Oxford: Clarendon Press, pp. 704-705.

General Treaty of Peace and Friendship, celebrated in Washington, on the 20th of December 1907 by the respective plenipotentiaries of the governments of Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador, and approved by the National Congress at its closing on the 25th of December, 1908 provides the Court with an unprecedented jurisdiction by which any Contracting Party or person could submit a case in the face of an international dispute; (ii) the Court had the competence to decide its jurisdiction *in concretu*m; (iii) the Court could resort to any International Treaty or Convention pertinent to the subject, applying the principles of International Law; and (iv) finally, the Central American Court of Justice and its successor consolidated the notion of an American International Law, making their findings and decisions a promising source for research into the principle of transparency in international law, among other legal institutes.

> Created in 1907 and endowed with a wide jurisdictional base, the Central American Court of Justice granted direct access not only to states but also to individuals (who could file complaints against their own states). The Central American Court of Justice was brought in by both the State and individuals, having operated continuously for a decade (1908-1918), while the Washington Convention that established it was in force. She announced the advent and the first advances of the rule of law (pre-eminence du droit) at the international level (even before the creation of the Permanent Court of International Justice) and, during its existence, it was seen as giving expression to "Central American conscience"[84].

It should be noted that there is no precedent for or subsequent experience with a permanent judicial court as wide-ranging as the Central American Court of Justice in Latin America. The constitutive treaty of the Union of South American Nations (Unasur), whose institutionalization is recent and was inspired by the process of integration of the European Union, did not provide for a jurisdictional mechanism outside diplomatic channels for dispute resolution between the twelve member countries. Considering the bloc's ambition, this omission could jeopardize the arrangement's stability. Some permanent court proposals following the models of the Luxembourg Court and the Court of Managua (Central American Court of Justice) were declined. The current political moment, with the departure of Brazil from Unasur, does not permit, at least for the time being, an optimistic assessment of the prospects

[84] Trindade, A.A.C. (2013). *Os Tribunais Internacionais Contemporâneos*. Brasília: Fundação Alexandre de Gusmão, pp.10–11.

of such an institutional development[85].

Celso D. de Albuquerque Mello sets forth his argument for an American International Law in the following terms[86]:

> The origins of American International Law can be traced back to the colonial period when the Treaty of Madrid (1750) was introduced, the principle of "uti possidetis" as the regulator of the Portuguese and Portuguese spheres in South America. In 1826, in the Congress of Panama, gathered under the inspiration of Bolivar, an institutional treaty of a confederation among the peoples of America was concluded, which already demonstrates continental solidarity at that time, although the confederation has not yet become a reality. We could also mention the Monroe Doctrine (1823), protecting America from new colonizations.
>
> In the doctrine, however, the first manifestation in favor of the existence of an American International Law occurred in 1883, in an article by Amancio Alcorta, published in Nueva Revista de Buenos Aires, in which he criticized his fellow countryman Carlos Calvo for not having made reference in its Treaty of American International Law, nor taking into account the specific situations of our continent. Calvo contested, claiming that "situations" were not "principles" and that International Law was formed by "principles)". (...)
>
> In 1905, at the III Latin American Scientific Congress held in Rio de Janeiro, the representative of Chile, Alexandre Alvarez, presented the following work: "Native and development of American International Law". This congress decided that "it recognizes an American International Law, that is, a set of rules and special laws, which the Latin American States observe or must observe in their relations between themselves or with the other European and American States"

Analyzing the jurisprudence on the exercise of the international judicial function is a methodological choice aimed at collating the jurisprudential developments to yield a rich enough basis for the identification of possible cross-fertilization, defined as:

> In a sense, the idea of cross-fertilization in International Law presupposes that the international legal system works very much like a language system.
>
> (…) Any talk of cross-fertilization in International Law implies the existence of principles that can explain why some legal utterances are more closely related than others.
>
> (…) Any talk of cross-fertilization in International Law implies that if a legal agent brings the analysis of a legal utterance (U1) to bear on its relation with some other legal utterance (U2), his

[85] Mazzuoli, V. de O. (2014). *Por um Tribunal de Justiça para a UNASUL*. Brasília, Distrito Federal, Brasil: Coordenação de Edições Técnicas. Senado Federal, p.13.
[86] Mello, C.D. de A. (n.d.). *Curso de Direito Internacional Público*. 13a ed. Renovar, pp.177–179.

> understanding of U1 will profit by this. Is this assumption necessarily true?[87]

In some measure, this thesis thus represents a critical response to Andrea Bianchi's harsh account on transparency:

> (…) the language of transparency continues to be spoken by those whose unfalteringly optimistic view of International Law cause them to see the emergence of a global administrative space or a process of democratization of the international community. (…) However, transparency as such is used sparingly and, almost invariably, in an accessory, secondary role. It is often subservient to other principles and/or values and rarely plays a prominent role in the international political agenda. (…) Even in the context of the United Nations' many initiatives to promote the rule of law, transparency is not an indispensable element, albeit occasionally quoted in relevant documents and resolutions.
>
> (…) Admittedly, there have been some attempts to frame transparency within the traditional doctrine of sources. While transparency obligations can be incorporated into treaties, which at most may raise an issue of interpretation of the relevant text, no one has (so far) the temerity to characterize transparency as a rule of customary international law. The most obvious reflex for international lawyers would be to characterize transparency as a "principle" under article 38 (1)(c) of the Statute of the International Court of Justice. As has been rightly pointed out, this qualification is not without its difficulties, given the problematic character of defining the precise content of such principle, let alone the possibility of reproducing at International Law the domestic law conditions that can make it operational at the domestic law level, most notably judicial enforcement.
>
> Caution is exercised on all sides. Transparency as practice, norm, rule or principle is generally seen as "developing" or "emerging" (…) usually described as if it were *in statu nascendi*, a potential that has not yet turned into actuality[88].

This study is in the spectrum of academic contributions that perceive the general principles of law, the principle of transparency in particular, as a fertile mechanism for the integration of the different layers of law, as well as for expanding and developing international law.

> (…) general principles are about more than gap-filling, and that they play a decisive role in International Law in at least three different ways; (i) by representing a cohesive force certifying the systemic nature of international law; (ii) by operating as a centripetal force by providing a common ground for interaction between 'clusters' and individual bodies of law, such as international environmental and cultural

[87] Linderfalk, U. (2014). *Cross-Fertilization in International Law*. [online] papers.ssrn.com. Available at: https://ssrn.com/abstract=2456175 [Accessed 1 July. 2020].
[88] Bianchi, A. (2018). On Power and Illusion: The Concept of Transparency in International Law. In: A. Bianchi and A. Peters, eds., *Transparency in International Law*. Cambridge, pp.4–5.

> heritage law, international investment law and international human rights law; (iii) by reducing the separation between International Law and municipal legal systems.
> (…) general principles of law are not just about filling gaps in particular legal orders, regimes or sub-regimes; they also help smoothening certain tensions inherent in legal pluralism, by ensuring a minimum openness and conversation between legal orders, regimes and sub-regimes, precluding them for living "in clinical isolation" from each other.[89]

Starting with an historical analysis that includes a brief anthropological incursion and follows the genesis of the concept of rule of law, I will try determine whether the notion of transparency was already harbored by that concept, and in what way. Our preliminary hypothesis is that transparency constitutes a radial category that found its lightest expression in the early legal manifestations of many cultures, which were largely ritualistic (in the anthropological sense). Following this logic, transparency was and remains part of the notions of correct process and due process, by which the legitimacy of public or private acts (publicly expressed) were and still are assessed.

This thesis engages the works of Maria Panezi[90] and Marianna B. Karttunen[91], who explore, respectively, the political and legal benefits of raising levels of transparency in the WTO, in the face of the crisis of legitimacy of the Organization and the paralysis of the Dispute Settlement Body (hereinafter DSB).

Panezi provides a systematic and very comprehensive examination showing how the improvement of the internal, external, administrative and legal transparency of the WTO could generate greater democratization of the Organization and, thus, greater vitality and adherence, even without progress in the current Negotiation Round. The author draws on Global Administrative law, Constitutionalism, Societal Constitutionalism, Critical Legal Studies and the international theory of regimes in search of points of entry through which the transparency imperative can be advanced in the WTO.

Karttunen, for her part, presents a simple, elegant and powerful thesis that the

[89] Wouters, J., Andenas, M., Fitzmaurice, M., Tanzi, A. and Chiussi, L. (2019). General Principles and the Coherence of International Law: Setting the Scene. In: M. Andenas, M. Fitzmaurice, A. Tanzi and J. Wouters, eds., *General Principles and the Coherence of International Law*. Leiden Boston: Brill Nijhoff, pp.1–5.
[90] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis]. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].
[91] Karttunen, M.B. (2020). *Transparency in the WTO SPS and TBT Agreements: the real jewel in the WTO's crown*. Cambridge, United Kingdom New York, NY, USA Cambridge University Press.

transparency obligations in the WTO contribute more effectively to multilateral trade order than coercion does: such obligations act both as a substitute for and as a complement to dispute settlement. In addition to being fundamental for the coherence of the system, transparency obligations favor regulatory dialogue and cooperation. This exercise is essential for States to be able to clarify, often for themselves, the purposes of their norms, to open a dialogue to less costly and equally efficient regulatory alternatives and to overcome limitations of their perception, or even of their human resources, and to achieve optimized rules.

The opposite of regulatory dialogue is regulatory war, a topic widely researched by Professor Vera Thorstensen[92]. The need for regulatory governance to bring coherence, when convergence is not possible, is of utmost importance to prevent regulatory burden from becoming the new category par excellence of non-tariff barriers. It is even more urgent given the impartiality owed to all individuals before the law that the rule of law generally prescribes. Historically, non-tariff barriers are more detrimental to exports from developing countries. A plethora of economic studies confirms this proposition.

> The work by Diddier et al. (2008) concentrates on the effects of TBT/SPS measures on agricultural trade. They show that while developing countries' exports to OECD countries are significantly reduced by the presence of TBT/SPS measures, they do not affect trade among OECD members. Moreover, European imports tend to be more negatively influenced by TBT/SPS measures in comparison to imports of other OECD countries[93].

Panezi and Karttunen, *prima facie*, highlight potential benefits of their proposed regulatory policy.

These are both political (increased legitimacy) and economic (improved regulatory environment, prevention and qualification of litigation, which benefit countries with weaker institutions and have less economic power for litigation or defense before the Dispute Settlement Body).

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[92] Thorstensen, V. and Vieira, A.C. (2016). *Regulatory Barriers to Trade: TBT, SPS and Sustainability Standards*. [online] *FGV EESP Centro de Estudos do Comercio Global e Investimentos. WTO Chairs Programme*. São Paulo: FGV EESP Centro de Estudos do Comercio Global e Investimentos. WTO Chairs Programme. Available at: http://hdl.handle.net/10438/17663 [Accessed 1 Jul. 2020].

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[93] Ferraz, L.P. do C., Ribeiro, M. and Monasterio, P. (2017). On the effects of non-tariff measures on Brazilian exports. *Revista Brasileira de Economia*, 71(3).

However, in highlighting the benefits of transparency, the authors, reflexively, also end up stressing the immense integrative potential of due process.

For Bin Cheng, the duty to notify a change in policy is one application of the principle of good faith[94]. Bin Cheng perhaps does not frame transparency as a principle *per se*, it potentially frames it as a corollary of important principles, such as good faith and due process.

In this respect, literature review and jurisprudential analysis will be critical. The use of legal history as a material source of International Law and auxiliary source of legal interpretation will be noted . Tracing the historical evolution of certain institutions of International Law helps to understand their content and contours.

> In the contemporary perspective of international law, it may seem odd to speak of history as a "source" of international law. Article 38 of the Statute of the International Court of Justice (ICJ) is usually taken as providing an authoritative expression of the sources of international law, and we shall here follow this conception. Nowhere in Article 38 would one find a reference to history. In the continental legal science, history would qualify as "material source" of international law, i.e. as a sociological fact explaining why and in relation to what needs the legislator has adopted a particular piece of legislation (in International Law in particular treaty or a customary rule)[95].
>
> (…)
>
> The truth is, however, that history has for a long time been a "source" of International Law in a much larger sense than it is today, or than is perceived today. At the time of natural law doctrines, even in the nineteenth century, the references to historical rather than to dogmatic arguments we extensive. Moreover, even at present, history displays some legal roles. It does so by way of a series of positive legal institutions, which refer to historical aspects interrelated to the law. Thus, for example, in the context of territory and delimitation, the legal concept of "historic rights", "historic waters", or "historic bays" has a long-standing legal pedigree.

Reference to legal history is different from adopting a subjectivist school of legal interpretation. This school of legal interpretation has lost a lot of space with the advent of the Vienna Convention on the Law of Treaties (hereinafter VCLT), which established that the main standards of interpretation were the objective and literal

[94] Cheng, B. (2006). *General principles of law as applied by international courts and tribunals*. Grotius Publications ed. Cambridge ; New York: Cambridge University Press, p. 137.

[95] Kolb, R. (2017). Legal History as a Source of International Law. From Classical to Modern International Law. Section VII. Legal History as a Source of International Law. In: *The Oxford Handbook on the Sources of International Law*. Oxford: Oxford University Press, p.279.

ones. Articles 31(4) and Article 32 of the VCLT, however, retain much of the subjectivist school's influence, by which, respectively, *a special meaning shall be given to a term if it is established that the parties so intended*. Article 32 also address supplementary means of interpretation in these terms:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

For the subjectivist school of legal interpretation, the jurist must be aware of the seminal reasons of legislators and the proper procedure one should follow to achieve the true meaning of the rule of law, with the exception of situations in which the intention is not expressed and not discernible[96].

Social Utility: Transparency as a Vehicle for Regulatory Quality and Almost a Substitute for Dispute Settlement.

Winston Churchill once said that *If you have 10,000 regulations you destroy all respect for the laws*. This famous quotation refers to the economic and social costs of a heavy regulatory burden[97].

Operation *Lava Jato* (Operation Car Wash), became known across the world as the largest anti-corruption investigation in Brazil that began in 2008 when a money laundering scheme was uncovered. In early March 2017, the Brazilian Federal Police Department (DPF) launched another operation which would become the largest carried out by that enforcement institution: Operation *Carne Fraca* (Operation Weak Meat). It was based on two years of investigation spanning three Brazilian states. It brought to light alleged corruption involving agriculture and livestock inspectors for the Ministry of Agriculture, Livestock and Supply (MAPA) who took bribes from food companies to falsify data in addition to allegedly committing other offenses against economic and public health regulations and law.

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[96] *Idem*, p. 293.

[97] Langworth, R. (2008). *Churchill by himself. The Definitive Collection of Quotations*. 1st ed. New York: Public Affairs, p.17.

The police investigation[98] led to arrests and charges[99] , judicial searches and seizures, coercive removals, seizures of goods and real estate, and frozen bank accounts. Even though the evidence produced during the legal proceedings was more consistent with corruption crimes, the Operation failed to present a corpus of associated crimes – that is, reliable proof of noncompliant charges. The crimes against health, food safety and security, and economic regulation triggered a widespread national commotion. Brazil's prestigious animal inspection system was fully discredited nationally and internationally. Despite the efforts by then minister Blairo Maggi and his team, inevitable – though mitigated – damage was done to the production chains of the livestock and agricultural industries.

Operation *Carne Fraca* revealed that the corruption was effectively enabled by bureaucratic structures, by the state of regulatory chaos and legal insecurity that these structures, insufficiently controlled. One of the side effects of the Operation was shedding light on a problem that had been, until then, virtually ignored by the segments of Brazilian society that were outside the epistemic community[100] of agricultural trade: the infra-legal norms of the agricultural sector were in a state of disarray, which prevented autonomous economic agents operating in the field from obtaining open access to them and, therefore, a full understanding of the rule of law.

Until 2019, nearly 15,000 agribusiness-related infra-legal standards currently in force in connection with agribusiness were registered in the SISLEGIS, Legislation Database System of the Ministry of Agriculture, Livestock and Supply (MAPA). A sample of these standards reveals serious database indexing and maintenance failures. These include maintaining expired legislation without formal signaling that they are no longer in force and the inclusion of rules that, indirectly or cursorily, revoke other rules without properly articulating the relation between them. Furthermore, sampling could be used to identify the anomalous typologies or incorrect categorization of infra-legal rules. Such errors and shortcomings greatly encumber the interpretation of the hierarchy of the rules. Encroachment of parliamentary

[98] 0136/2015 SR/DPF/PR - 5002816-42.2015.4.04.7000

[99] Request of Preventive Arrest 5002951-83.2017.4.04.7000/PR; Police Inquiry 0136/2015 SR/DPF/PR (5002816-42.2015.4.04.7000/PR) and Confidentiality Removal Requests 50621795720154047000, 50383882520164047000 and 50161106420154047000

[100] Amaral Junior, Alberto do, Sa Pires, Luciana Maria de Oliveira and Carneiro, Cristiane Lucena (editors). The WTO Dispute Settlement Mechanism (p. 2). A Developing Country Perspective. Springer. 2019.

competence by ministry-level rulings are prominent among the many complaints of the agriculture sector.

The original intent of this research was precisely the collection of a sufficient sample of these infra-legal norms for the diagnosis of regulatory adherence, coherence and convergence in the face of WTO regulations. However, the difficulty of access and the unreliable cataloguing in the legislative database made the original objective untenable, although the higher aim remains demonstrating that the mere publicity of acts does not mean the fulfillment of the duty of transparency. On the contrary, the way norms are published can actually impair transparency. That swivel from building and analyzing a corpus of intra-legal norms from the agricultural ministry's database to a broader analysis of the theoretical imperatives of the transparency principle brought the elements of transparency into the scope of this doctoral research.

The legistic means to reinforce and promote rule of law and transparency will be the subject of our last chapter. At this point, we will demonstrate how "legistics" refers not only to law-making technique, but the practical articulation of philosophical and sociological concepts about the law that are rooted in conscience and legal science and have international expression. To do so, we will mainly rely on the doctrine articulated by Lon L. Fuller in *The Morality of Law*[101].

The sub-optimal regulatory environment is a consequence of the problem dubbed in general terms as "bureaucratization"– a many-headed Hydra well-known in the history of Brazil, as well as in the history of many developing countries, with a syncopated trajectory. Research carried out by the Brazilian Institute of Public Opinion and Statistics (IBOPE) and the National Confederation of Industry (CNI) show a generalized perception among three fourths of the interviewees, that excessive bureaucracy (i) stimulates corruption; (ii) discourages business; (iii) encourages the government to spend more than the necessary; and (iv) stimulates the informal sector of the economy. Relatedly, 72% of those interviewed agree either fully or in part with the assertion that the government should make reducing excessive bureaucracy an urgent priority.[102] The measurable consequences of the current state

[101] Fuller, L.L. (1969). *The morality of law*. New Haven: Yale University Press.
[102] Bogéa, D. (n.d.). A Desburocratização Como Agenda Permanente. [online] Available at: http://interessenacional.com.br/2016/01/05/a-desburocratizacao-como-agenda-permanente/ [Accessed Oct. 2017], p.6.

of affairs could be mitigated by substantive transparency in law-making processes that allow the effective participation of the affected sectors.

In his work *Time as a Trade Barrier*, David Hummels presents estimates of the added costs incurred by actors in foreign trade because of the time that elapses between the moment an order is placed and the goods reach their destination.[103] According to his figures, each additional day spent in transport reduces a country's chances to compete in US markets by 1%-1.5%. Another curious figure he presents is that each additional day spent in transport corresponds to a 0.8% ad-valorem increase for exported goods.[104] Other studies indicate that, measured as the average of the aggregate, each bureaucratic procedure reduces exports by 4.2%.[105]

Since 2008, the World Economic Forum has issued a bienniel report on several trade-facilitation indicators. *The Global Enabling Trade Repor*t includes an *Enabling Trade Index* (ETI) that summarizes country performance in nine dimensions: market access; customs administration; import and export procedures; transparency of border administration; availability and quality of transport infrastructure; availability and quality of transport services; availability and use of ICTs; regulatory environment; and physical security. Strongly correlated,[106] the fifth and eighth pillars – transparency of customs administration and regulatory environment – are relevant to the present discussion. The former serves as an indication of corruption level (facilitation payments, extra, undocumented payments or bribery) in connection with the imports and exports of each country. The latter indicates how conducive the country's regulatory setting is to trade. According to the "trade facilitation" variable, Brazil ranks 19th in relation to its 25 leading trade partners.[107] The ranking is led by Singapore, followed by Hong Kong, Switzerland

[103] Rocha de Araújo, L. (2016). O Acordo sobre Facilitação do Comércio da OMC: medidas para a redução das barreiras administrativas ao comércio internacional. In: *Desafios da Diplomacia Econômica na Perspectiva de Jovens Diplomatas*. Brasília: Fundação Alexandre de Gusmão.
[104] *Idem*.
[105] Souza, M.J., Nunes Faria, R. and Poloni Sant`Anna, V. (2012). Indicadores de facilitação de comércio: o caso do Brasil e seus parceiros comerciais. *Revista de Economia & Relações Internacionais*, 10(20), p.129.
[106] *Idem*, pp. 128-129.
[107] This database encompasses trade facilitation indicators from Brazil and its leading trade partners. A survey of the data on Brazilian trade flows (exports and imports) from January 1999 to December 2009, obtained from the Alice-Web System (of the former Ministry of Development, Industry and Trade, MDIC), allowed defining the country's key commercial partners. A representativeness-level of 90% for imports and exports was initially established for the identification of countries, and countries with an overall participation-level of 90% under the established criteria were selected. Souza, M.J., Faria, R.N.

and Canada.[108] As for the eighth pillar, which addresses the quality of the regulatory environment, the results suggest that Brazil's regulatory environment is considered relatively less attractive to trade compared to its leading trade partners.[109]

Sousa, Faria and Sant'Anna produced a table with three clusters of similar countries in terms of trade facilitation and its pillars.[110] Their table is presented below for the sake of gauging the challenges ahead. Brazil is part of Cluster 1: Low Development Level in Trade Facilitation (ABD-FC).

Table 3: Brazil's Leading Trade Partners, sorted by Clusters

Complete Linkages

Cluster	Countries
Cluster 1	Argentina, Bolivia, **Brazil**, Bulgaria, India, Indonesia, Mexico, Nigeria, Paraguay, Peru, Russia and Venezuela
ER	Germany, Austria, Belgium, Canada, Denmark, Spain, United States, Slovenia, Estonia, Finland, France, The Netherlands, Hong Kong, Ireland, Japan, South Korea, Luxemburg, Portugal, United Kingdom, Singapore, Sweden, Switzerland and Taiwan
Cluster 3	Saudi Arabia, Chile, China, Slovakia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Czech Republic, Romania, Thailand and Uruguay

According to a report on the world's largest exporters (in value-terms), in 2017, Brazil is the 25th biggest actor on the market[111]. Nonetheless, the parameters

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and Sant'Anna, V.P. (2012). Indicadores de facilitação de comércio: o caso do Brasil e seus parceiros comerciais. *Revista de Economia & Relações Internacionais*, 10(20), p. 130

[108] Souza, M.J., Faria, R.N. and Sant'Anna, V.P. (2012). Indicadores de facilitação de comércio: o caso do Brasil e seus parceiros comerciais. *Revista de Economia & Relações Internacionais*, 10(20), p.133.

[109] Idem, p.136.

[110] Ibidem.

[111] The list of countries below was obtained following a decreasing order of relevance, considering the total economic value of exports: United States, Germany, Japan, The Netherlands, Republic of Korea, China, France, Italy, United Kingdom, Belgium, Canada, Mexico, Singapore, United Arab Emirates, Russian Federation, Spain, Taiwan, Switzerland, India, Thailand, Poland, Australia, the Kingdom of Saudi Arabia, Malaysia, Brazil, Vietnam, Czech Republic, Indonesia, Austria, Turkey, Sweden, Ireland, Hungary, Denmark, Norway, Iran, South Africa, Slovak Republic, Romania, Chile, Finland, Qatar, The Philippines, Portugal, Israel, Argentina, Kuwait, Kazakhstan, Nigeria, Iraq, Peru, Ukraine, Slovenia, New Zealand, Colombia, Bangladesh, Algeria, Angola, Greece, Venezuela, Bulgaria, Lithuania, Oman, Belarus, Egypt, Morocco, Pakistan, Ecuador, the Kingdom of Bahrain, Serbia, Croatia, Azerbaijan, Luxembourg, Libya, Estonia, Tunisia, Latvia, Ghana, Myanmar, Ivory Coast, Panama, Sri Lanka, Guatemala, Uzbekistan, Dominican Republic, Costa Rica, Papua New Guinea, Paraguay, Honduras, Zambia, Democratic Republic of the Congo, Uruguay, Bolivian, Jordan, Trinidad and Tobago, Turkmenistan, Bosnia and Herzegovina, Mongolia, Botswana, El Salvador, Kenya, Macedonia, Brunei Darussalam, Gabon, Equatorial guinea, Nicaragua, Congo, Iceland, Mozambique, Tanzania, Namibia, Lebanon, Zimbabwe, Laos, Cameroon, Guinea, Cyprus, Ethiopia, Sudan, Senegal, Mali, Uganda, Georgia, Cuba, Malta,

considered put Brazil behind less robust export economies, such as Argentina (47th), Bolivia (96th), Bulgaria (63rd), Indonesia (29th), Nigeria (50th), Paraguay (91st), Peru (52nd) and Venezuela (61st). This conveys a sense, however rudimentary, of how much this problem affects Brazilian competitivity.

Brazil rose 33 (thirty-three) positions in the World Bank's foreign trade report *Doing Business 2019*, climbing from the 139th to the 106th overall position – a notable improvement in three years likely a consequence of implementing trade facilitation measures such as the Unified Foreign Trade Web Portal – and also climbed 16 (sixteen) positions in the business-environment ranking,[112] from the 125th to 109th position. Notwithstanding, these improvements do not signify that either Brazil's export or business environments are satisfactory. The report compares 190 (one hundred and ninety) economies. In regulatory terms, Brazil therefore remains below the median – which surely affects its competitiveness and its more aggressive foreign trade interests to a considerable extent. The inexistence of empirical studies on the specific impact of trade facilitation measures in improving the international trade and business environments impedes an accurate assessment of the success or failure of Brazilian government initiatives.[113]

One of Brazil's expressed foreign policy goals of is admission to the select group of the Organization for Economic Co-operation and Development (OECD) in order to increase its investment ratings. A 1998 analysis of indicators led to the conclusion that

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Moldova, Burkina Faso, Mauritius, Madagascar, Albania, Armenia, Benin, Surinam, Swaziland, the People's Republic of Korea, Syria, the Kyrgyz Republic, Mauritania, Guyana, New Caledonia, Macau, the Faroe Islands, Chad, Jamaica, Tajikistan, Nigeria, Rwanda, Togo, Lesotho, Fiji, Malawi, Haiti, Yemen, Afghanistan, Sierra Leone, Nepal, the Bahamas, Bhutan, Seychelles, Greenland, Curacao, Solomon Islands, Barbados, Montenegro, Belize, Liberia, Eritrea, Guinea-Bissau, Maldives, American Samoa, Burundi, Djibouti, French Polynesia, Saint Martin, Central African Republic, Aruba, Micronesia, Saint Lucia, Gambia, Cape Verde, Saint Kits and Nevis, Vanuatu, Marshall Islands, Samoa, Saint Vincent and the Grenadines, Antigua and Barbuda, East Timor, Guam, Comoros, Tonga, Grenada, Dominica, Bermuda, the Cook Islands, Saint Thomas and Prince, Kiribati, Northern Mariana Islands, Palau, Montserrat, Saint Pierre and Miquelon, and Niue. HOW MUCH UNDERSTANDING MONEY. Visualizing the Global Export Economy in One Map. https://howmuch.net/sources/largest-exporting-countries-2017

[112] World Bank. *Doing Business 2019: Training for Reform*. 16th edition.http://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf

[113] Correia Lima Macedo, L. and Costacurta de Sá Porto, P. (2010). Aspectos Legais e Econômicos do Acordo de Facilitação Comercial da OMC. In: *XIX Congresso Nacional do CONPEDI (Congresso Nacional de Pesquisa e Pós-Graduação em Direito)*.

> (…) countries that had restrictive economic regulations also tended to impose burdensome administrative procedures on business enterprises. A positive correlation between these two regulatory areas has persisted into 2003, when the product market regulation indicators were updated. It would seem that reforms which liberalize market access and enhance the role of market-based mechanisms contribute and are conducted in parallel to a reduction in administrative procedures and burdens. And in a less burdensome environment, endorsement for further reforms may be more forthcoming, leading to a virtuous cycle.[114]

Bearing in mind these aims, the OECD drafted a set of **Guiding Principles for Regulatory Quality and Performance** in 2005, which mandate: (i) adopting at the political level broad programs of regulatory reform that establish clear objectives and frameworks for implementation; (ii) assessing impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment; (iii) ensuring that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory; (iv) reviewing and strengthening where necessary the scope, effectiveness and enforcement of competition policy; (v) designing economic regulations in all sectors to stimulate competition and efficiency, and eliminating them except where clear evidence demonstrates that they are the best way to serve broad public interests; (vi) **eliminating unnecessary regulatory barriers to trade and investment through continued liberalization and enhancing the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness**; (vii) identifying important linkages with other policy objectives and developing policies to achieve those objectives in ways that support reform.[115]

The Brazilian saga in the search of red tape and regulatory quality is its own, but it mirrors, to a greater or lesser extent, the difficulties of many developing countries in introducing good practices in their government culture. As seen, the problem of regulatory burdens spans agendas beyond the agenda of trade liberalization: it touches on several interests of the development agenda, such as

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[114] Organization For Economic Co-Operation And Development (2007). *Reduzindo burocracia: Estratégias nacionais de simplificação administrativa*. Brasília: Ministry Of Planning, Budgeting And Public Management, Brazil, p.8.

[115] *Idem*, p.24.

combatting corruption, drawing investment and promoting the rule of law. There is a growing literature that identifies WTO transparency mechanisms as the cornerstone for promoting greater adherence to multilateral norms, as well as for maintaining the integrity of the multilateral trading system. For Robert Wolfe:

> (…) sunlight contributes more to order than coercion. (…) Transparency is the foundation for the trading system as a living thing not just a legal text stored in a Geneva filling cabinet. Some think transparency is the antechamber to dispute settlement. I think dispute settlement, useful for managing a limited range of conflict, is what happens when transparency and other accountability mechanisms fail[116].

As we see, Wolfe places effective transparency before effective dispute resolution. For their part, Kian Cassehagari, Emmanuelle Ganne and Roberta Piermartini, transparency and monitoring improve regulatory practices and foster trade and economic growth:

> (…) Lack of transparency or monitoring creates opportunities for the inappropriate exercise of official discretion and for collusion. In their study on trade facilitation in Asia and the Pacific, the ADB and UNESCAP (2013) found that lack of transparency created opportunities for collusion between customs officials and trades where agents extract rent from traders. Because it allows all stakeholders to be treated equally, regulatory transparency ensures a level playing field as well as fair and equal conditions for competition.
>
> (…)
>
> There is evidence that GRP [good regulatory practices] foster trade. De Groot et al. (2004) found that an increase in regulatory quality of one standard deviation from the mean leads to an estimated increase of 16 to 26% in trade. Their study also finds that lower corruption results in 16 to 34% extra trade. Increasing the overall quality of institutions by one standard deviation above its mean level would raise bilateral exports by 44% and bilateral imports by 30%. The quality of institutions appears to influence not only the quantity of trade, by also its quality. By embedding cross-country institutional differences affecting contract enforceability in a general equilibrium model of trade, Levchanko (2007) shows that higher institutional quality in the exporting country is associated with a higher degree of trade specialization in complex products., i.e. products that are institutionally intensive due to the need to contract for intermediate

[116] Wolfe, R. (2013). Letting the Sun Shine in at the WTO: *How Transparency Brings the Trading System to Life*. Economic Research and Statistics Division. Staff Working Paper ed. Geneva: World Trade Organization; Organisation Mondiale Du Commerce -03-06, pp.4, 31.

goods[117].

These figures empirically demonstrate the potential benefits of improved transparency mechanisms for foreign trade and the improvement of the export profile.

Potential benefits to domestic policy have also been identified. Valentin Zahrnt claims that the Trade Policy Review Mechanism (hereinafter TPRM) may and should facilitate negotiations, sharpen the focus of international attention on specific and questionable practices, and also, importantly, influence domestic politics, not only in the sense of promoting adherence to WTO norms in the negotiation phase, but also in helping States to understand their own trade policies and their effects. This surprising observation stems from the lessons that countries with erratic and not so developed bureaucracies often end up learning about their own public policies through simply communicating and seeking clarification with the WTO[118]. Of course, implementing such mechanisms is far from straightforward. In fact, for Aileen Kwa and Peter Lunenborg, the notification requirements can be overwhelming. They emphasize *that it is no small task for Members with limited staff to familiarize themselves with the entire breadth of the WTO agreements and prepare notifications which are 'highly technical' and require technical expertise*[119].

Therefore, from a social perspective, understanding whether a general principle of transparency exists before or in addition to the duties of transparency imposed by the WTO is highly relevant. Such a principle, independent or corollary to other general principles of law (such as due process and good faith), would constitute as an additional element in *public justification* in the Rawlsanian sense, promoting national regulatory transparency and international adherence to multilateral standards. Currently, these duties and prinicples are considered by

[117] Cassehgari, K., Ganne, E. and Piermartini, R. (2020). *The Role of WTO Committees through the Lens of Specific Trade Concerns Raised in the TBT Committee*. Economic Research and Statistics Division ed. World Trade Organization; Organisation Mondiale Du Commerce -05-20, p.4.

[118] Zahrnt, V. (2019). The WTO`s Trade Policy Review Mechanism: How to Create Political Will for Liberatization? [online] European Centre for International Politics Economy (ECIPE). Available at: https://ecipe.org/wp-content/uploads/2014/12/the-wto2019s-trade-policy-review-mechanism-how-to-create-political-will-for-liberalization-1.pdf.

[119] Kwa, A. and Lunenborg, P. (2019). *Notification and Transparency Issues in the WTO and the US' November 2018 Communication*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559647 [Accessed 17 Apr. 2021], pp. 3-4.

decision makers and public servants in charge of drafting laws as merely supplementary. Compliance with the principle is a task understood as of lesser importance in comparison to the regular assignments, either because of the importance and political urgency of their usual tasks, or due to the lack of time, material and human resources.

Academic Utility

Addressing Regulatory Burden as a Challenge to Transparency, Rule of Law and Effective Trade Liberalization

The International Law Commission, at its seventieth session held in 2018, introduced the topic "General Principles of Law" in its programme of work[120]. The first report of the Special Rapporteur was published in 2019[121]. "General principles of law recognized by civilized nations" is the third source of International Law according to Article 38(1)(c) of the International Court of Justice Statute (hereinafter ICJ), along with treaties and customary international law.

A precedent for the International Law Commission can be found a century ago, when the Advisory Committee of Jurists (hereinafter ACJ) convened at the Peace Palace in 1920 with the mission of drafting the PCIJ Statute. This model was designed to avoid *non liquet.* At that moment of intense codification and development of International Law in the midst of profound social and political change, the ACJ members *knew there was more to International Law than what was covered by "positive rules"*[122] (treaties and custom). To cover the lacunae, the ACJ incorporated to the array of sources of International Law the concept of general principles.

This concept was already common in International Law parlance since its

[120] United Nations General Assembly. International Law Commission. 31 December 2019. General principles of law in Chap. III.B of A/74/10. Specific issues on which comments would be of particular interest to the Commission. 30 of April 2020 https://legal.un.org/docs/?path=../ilc/reports/2019/english/chp3.pdf&lang=EFSRAC. 30 of April 2020

[121] Vázquez-Bermúdez, M. (2019). *First report on general principles of law*. A/CN.4/732. [online] United Nations General Assembly. International Law Commission. Available at: https://legal.un.org/docs/?symbol=A/CN.4/732 [Accessed 30 Apr. 2020].

[122] Spiermann, O. (2017). The History of Article 38 of the Statute of the International Court of Justice. "A Purely Platonic Discussion"?. In: *The Oxford Handbook on The Sources of International Law*. Oxford University Press, p.172.

origins, but picked up intensity during the nineteenth century, although its contours remained imprecise. The concept was often employed synonymously with norms. James Crawford observes that *the formulation appeared in the compromise of arbitral tribunals in the nineteenth century, and similar formulae appear in draft instruments on the functioning of tribunals*[123]. Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet partly diverge from Crawford and attribute a slightly older origin:

> Since 1794, the mixed Anglo-American commissions constituted by the Jay treaties have based their decisions directly on the general principles of law. Since then, the arbitral tribunals, as established in law, have not failed to follow the same example without the validity of their sentences having ever been challenged by the States parties to the conflicts that were submitted to them. We can also mention Article 3 of the Hague Convention of 1907 on the peaceful resolution of conflicts, stipulating that, in the interpretation of the commitment by which the parties collect it, the arbitral tribunal may apply the same principles. (...) It follows from these precedents that, before the creation of the PCIJ, a fundamental customary rule had already been formed by virtue of which the general principles of law were endowed with mandatory force in the international legal order. In 1920, Article 38 therefore created nothing[124].

For his part, Milos Vec argues that nineteenth century International Law embodies *the idea of secularization* of the tenets of international behaviour, purging its roots of Divine Law (which greatly influenced the doctrines of just and unjust war, for example), and replacing natural law with philosophical law. Despite all the academic efforts, natural law was not entirely expelled from nineteenth-century sources of international law. On the contrary, natural law is intertangled with other types of considerations (political, legal, philosophical, etc.) in defining the content of the general principles of international law. Therefore, the legal positivism that inspired International Law in the 19th century, and maybe even still today, was and still must be seen as an unfulfilled, perhaps even impossible mission[125].

Although the original idea was humbler, that is, finding a gap-filling mechanism to avoid *non liquet* in International Law, the debate concerning general principles of

[123] Crawford, J. (2019). *Brownlie's Principles of Public International Law*. 9th ed. Oxford United Kingdom: Oxford University Press, p.32.
[124] Dinh, N.Q., Daillier, P. and Pellet, A. (1992). *Direito Internacional Público*. 4th ed. Translated by V.M. Coelho. Lisboa: Fundação Calouste Gulbenkian, p.316.
[125] Vec, M. (2017). Sources of International Law in the Nineteenth-Century European Tradition. The Mith of Positivism. In: *The Oxford Handbook on The Sources of International Law*. Oxford University Press, pp.122–144.

law was spirited and went on much longer than expected, gaining *a prominent place in the Committee*, as Malgosia Fitzmaurice reminds us[126]. Current debates on the topic are said to be evocative of the discussions held at the ACJ.

The ACJ, in search of a compromise formula, ended up borrowing the wording "recognized by civilized nations" from the Supreme Court of the United States (hereinafter SCOTUS) to qualify the general principles of International Law in order to attain their entry of the general principles of International Law in the panoply of formal sources of International Law. This would grant space for creative legal reasoning to correct normative gaps while addressing fears of potential judicial activism. As early as the preparatory work of the IPCJ Statute, concern was expressed over maintaining highly consequential legal reasoning in the hands of recognized jurists (particularly experts in comparative legal sciences and law) and also avoiding potential abuses in the name of the general principles of international law. Again, as Crawford put it:

> Tribunals have not adopted a mechanical system of borrowing from domestic law. Rather, they have employed or adapted modes of general legal reasoning as well as comparative law analogies in order to make a coherent body of rules for application by international judicial process[127].

The rise of general principles of International Law is extremely important in the international jurisprudence. However, broad consensus remains today that the general principles are unclear and ill-defined. Courts sometimes avoid formally evoking or referring to them even when they are clearly referring to a principle of international law[128].

Nevertheless, some general principles of general and specific International Law are recognized in the scholarly literature. As Brownlie argues:

> The rubric may refer to rules of customary law, to general principles of law as in Article 38(I)(c), or to logical propositions resulting from judicial reasoning on the basis of existing International Law and municipal analogies. What is clear is the inappropriateness

[126] Fitzmaurice, Malgosia. The History of Article 38 of the Statute of the International Court of Justice. The Journey from the Past to the Present. In: Besson, Amanda & D`Aspremont, Jean. The Oxford Handbook on The Sources of International Law.Oxford University Press. 2017. p. 192-193.

[127] Crawford, J. (2019). *Brownlie's Principles of Public International Law*. 9th ed. Oxford United Kingdom: Oxford University Press, p.32. .

[128] James Crawford exemplifies by mentioning the Chorzow Factory Case, in which of reparation before a breach of international was not clearly mentioned as such. *Idem*, p.33.

> of rigid categorization of the sources. Examples of this types of general principles are the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas. In many cases these principles. (…) certain fundamental principles have recently been set apart as overriding principles of jus cogens which may qualify the effect of more ordinary rules[129].

Dinh, Daillier and Pellet would add the following: a) Principles related to the general concept of law, which involves the abuse of law and the principle of good faith, the principle that no court can impose its own serious error, and any violation of a commitment imposes the obligation to repair the damage suffered and restore legal security and legitimate trust; b) Principles of a contractual nature transposed to treaties, which include the principle of useful effect, principles related to the bias of consent and interpretation, and fore majeure; c) Principles related to litigation regarding liability, reparation, integration of losses, late payment interest, demand for a cause-effect link between the fact giving rise to the liability and the loss suffered; d) Contentious procedural principles: force of *res judicata*, prohibition on adjudicating cases in which one is a party, equality between the parties, respect for the rights of the defense; e) Principles of respect for the rights of the individual, namely the protection of fundamental rights and specific protection of the rights of public agents; f) Principles concerning the regime of legal acts which involve legal security and balance of the interests of the parties[130].

Marija Đorđeska, in a breathtaking review of the jurisprudence of the PCIJ and the ICJ from 1922 to 2018, identified 156 principles, categorized in three large groups (substantive principles of law, procedural principles of law and interpretative general principles). Đorđeska divided the substantive general principles into the following subgroups: Law of Treaties; Diplomatic and Consular Law; Law of State Sovereignty; Law of State Responsibility; Law of State Succession; Law of Economic Relations; Reparation; Individuals, Peoples, and International Organizations; International Maritime and River Law; International Humanitarian Law; Other Substantive General Principles. Under the procedural general principle fell: Court's Jurisdiction; Procedure before the Court; Functioning of the Court / Court's Competence; Standing before the

[129] Brownlie, I. (1998). *Principles of Public International Law*. 5a ed. Oxford: Clarendon Press, p. 18

[130] Dinh, N.Q., Daillier, P. and Pellet, A. (1992). *Direito Internacional Público*. 4th ed. Translated by V.M. Coelho. Lisboa: Fundação Calouste Gulbenkian, p.320.

Court; Facts and Evidence; Other Procedural General Principles. Finally, the Interpretative General Principles covered: Good Faith and Pacta Sunt Servanda; General Principles Specific to Treaty Interpretation; General Principles Not Specific to Treaty Interpretation; General Principle of Interpreting Customary International Law; General Principles of Interpreting International Decisions; General Principles Delineating International Law from Domestic Law; Other Interpretative General Principles[131].

Bin Cheng mentions as general principles of law applied by the international courts the principles of self-preservation, good faith in treaty relations, good faith in the exercise of rights, other applications of good faith, international responsibility, individual responsibility, fault, integral reparation, proximate casuality, jurisdiction, power to determine the extent of jurisdiction, *nemo debet esse judex in propria sua causa*, *audiatur et altera pars*, *jura novit curia*, proof and burden of proof, *res judicata* and extinctive prescription[132].

For Kotuby, Charles and Sobota, the principles and norms applicable in transnational disputes are good faith in contractual relations, *pacta sunt servanda* (the obligation to honor agreements), good faith in excusing contractual performance, abuse of rights and the principle of proportionality, estoppel, the prohibition of advantageous wrongs and unjust enrichment, corporate separateness and limited liability, the principles of causation and reparation, the principles of responsibility and fault, notice and jurisdiction, judicial impartiality and judicial independence, procedural equality and the right to be heard condemnation of fraud and corruption, and evidence and burdens of proof[133].

The principles of the WTO good faith identified by Andrew D. Mitchell are good faith, due process, proportionality and special and differential treatment[134]. Graham

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[131] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p. 352.

[132] Cheng, B. (2006). *General principles of law as applied by international courts and tribunals*. Grotius Publications ed. Cambridge; New York: Cambridge University Press.

[133] Kotuby Jr., C.T. and Sobota, L.A. (2017). *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes. Center for International Legal Education*. University of Pittsburgh School of Law. CILE Studies ed. Oxford United Kingdom: Oxford University Press, p.viii.

[134] Mitchell, A.D. (2011). *Legal principles in WTO disputes*. Cambridge: Cambridge University Press.

Cook identifies due process, good faith, non-retroactivity and reasonableness[135]. David Palmeter and Petros C. Mavroidis mention the principles with the caveat that "an exception to a general rule should be interpreted narrowly" (adopted by the Panel, e.g., in US- Underwear and rejected by the AB in EC-Hormones): good faith (encompassing the *abus de droit),* error in the negotiation as a vice to the will*,* prohibition of nullification and impairment, and proportionality[136].

None of these authors argue that there is a specific "principle of transparency" that constitutes a general principle of law as applied in transnational litigation by international courts or the DSB. Only Cheng, Kotuby, Charles and Sobota mention the principle of duty of notification, or of information, as a general principle. For Kotuby, Charles and Sobota, this principle is corollary to due process. For Cheng, it is corollary to the principle of good faith. As we will see when examining radial concepts, we consider the duty of notification to represent a minimalist expression of a general principle of transparency. Grahan Cook identifies the principle of issuing reasoned decisions linked to the principle of due process in the multilateral trade regime. The duty of public justification, in turn, has at its center publicity and stability[137]. Publicity and notification are similar notions. The reasoned decision principle is an advanced radial concept of transparency, one that falls closer to its maximalistic expression.

One preliminary conclusion that can be drawn here is that radial aspects of transparency on both sides of the radiation spectrum, from its minimalist expressions to its maximalist ones (e.g., notification, publicity, reasoned information, regulatory cooperation, communicative regulation and decrease in discretion) have already been enshrined in international jurisprudence as corollaries of other principles. Can it be inferred, therefore, that the principle of transparency is a general crypto-principle of international law, one not directly recognized because of political convenience than for lack of legal conviction? It is believed that answering this question can contribute to the formation of a Public Justification, in the Rawlsanian sense, for the promotion of international transparency and therein, and again, lies its academic utility.

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[135] Cook, G. (2015). *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*. Cambridge University Press.
[136] Palmeter, D. and Mavroidis, P.C. (2004). *Dispute settlement in the World Trade Organization: practice and procedure*. 2nd ed. The Hague: Cambridge University Press, p.68.
[137] Stanford Encyclopedia of Philosophy (1996). Public Justification. In: *Stanford Encyclopedia of Philosophy*. [online] Available at: https://plato.stanford.edu/entries/justification-public/.

Finally, Dinh, Daillier and Pellet consider general principles of law to be a primary and supplementary, albeit subsidiary source of International Law, because judges, in practice, only resort to general principles after scrutinizing treaties and customs. In addition, those principles should be common to the municipal laws and transposable to the international order. Their argument is not followed by other scholars who derive general principles of International Law from the international order itself and indicate general principles of International Law already recognized by international and natural courts in international cases that are not transposable to the national order, such as the legal equality of states and non-intervention[138]. Running parallel to the question of an implicit general principle of transparency, whether in its minimalist or maximalistic expression, or as autonomous or as corollary to other principles, the controversy over the specific contours of the general principles of law itself also represents a promising academic exercise for the evolution of the law and international rights.

The Agreement on Trade Facilitation that recently entered into force added new momentum to the debates over transparency. Approved as an amendment to the Marrakesh Agreement establishing the World Trade Organization (WTO), the 2014 Agreement on Trade Facilitation aimed to refine and enhance key aspects of Articles V, VIII and X of the 1994 General Agreement on Tariffs and Trade (GATT), "with a view to further expediting the movement, release and clearance of goods, including goods in transit". Regarding the regulatory activities of States, the 2014 Agreement expands the text of Article X of the 1994 GATT – which establishes, in strictly synthetic terms, the positive obligations of prompt and effective publication (so countries and economic actors may acquaint themselves quickly with updated normative frameworks), the non-application of more burdensome regulations before their publication and the uniformly consistent, impartial and equitable administrative compliance with the regulations in force.

Articles 1 to 5 of the Trade Facilitation Agreement establish additional regulatory provisions. Besides to the duty of publishing regulations on a timely basis, States must not discriminate in cases linked to the following acts, which are understood by the legal doctrine as *numerus apertus* cases, despite the extensive

[138]Dinh, N.Q., Daillier, P. and Pellet, A. (1992). *Direito Internacional Público*. 4th ed. Translated by V.M. Coelho. Lisboa: Fundação Calouste Gulbenkian, pp.317-321.

enumeration and literal hermeneutics of the text[139]: (i) procedures for importation, exportation and transit (including port, airport and other entry-point procedures, and required forms and documents; (ii) applied rates of duties and taxes of any kind imposed on or in connection with importation and exportation; (iii) rules for the classification or valuation of products for customs purposes; (iv) laws, regulations and administrative rulings of general application relating to rules of origin; (v) import, export or transit restrictions or prohibitions; (vi) customs duties or duties in connection with other public and private bodies in order to meet export and transit formalities or in connection with them; (vii) penalty provisions for breaches of import, export or transit formalities, among others.

Some analysts argue that the Agreement has a broader scope than is apparent. The hypothesis that Article 1 of the Facilitation Agreement did not include *numerus clausus* provisions linked to specific regulatory categories but, instead, a list of examples, compounds the thesis that item (v) of the above-mentioned measures opens room for debate over whether it could encompass the entire regulatory framework that may either be directly or indirectly related to foreign trade.

Despite the absence of consensus in regard to the concept of trade facilitation, it is generally defined as a set of policies meant to reduce import and export costs.[140] Based on the work of other legal scholars,[141] we might include a number of *border elements* such as the efficiency of ports and customs administration under the concept, in addition to some *inside-the-border* elements such as a country's regulatory framework. In line with the work of Porto, Barral, Matos and Silva,[142] the Agreement may be seen as a means to simplify, harmonize, standardize and modernize international trade practices. Accordingly, it sets out to cover customs, logistics, licensing and documentation procedures, in addition to insurance practices and other financial requirements as goods enter and leave the countries. The Trade Facilitation Agreement also provides for prior publication and discussion of

[139] Correia Lima Macedo, L. and Costacurta de Sá Porto, P. (2010). Aspectos Legais e Econômicos do Acordo de Facilitação Comercial da OMC. In: *XIX Congresso Nacional do CONPEDI (Congresso Nacional de Pesquisa e Pós-Graduação em Direito)*.

[140] Souza, M.J., Faria, R.N. and Sant'Anna, V.P. (2012). Indicadores de facilitação de comércio: o caso do Brasil e seus parceiros comerciais. *Revista de Economia & Relações Internacionais*, 10(20), p. 4.

[141] *Idem*.

[142] Porto, P.C. de S., Barral, W., Matos, M.D. de and Silva, R.C. (n.d.). Facilitação Comercial no Brasil: Avanços e Desafios. [online] p.2. Available at: https://www.researchgate.net/publication/261175513.

regulations that modify previous procedures meant to increase the participation of trade operators in their drafting-process – thus, observing the principles of transparency and efficiency.

Considering these patterns, the Agreement establishes a procedure for legal interpretation via prior consultation (advance ruling) in view of possible appeals and administrative disputes. The key criteria allegedly required by trade operators for prior consultation are the tariff classification and the interpretation of WTO agreements such as the Customs Valuation Agreement.[143] The Agreement also sets the countries' obligation to establish a reference information office.

Lastly – and capping off some aspects of interest under the Trade Facilitation Agreement – a demand of the export sector that was met by this international act regards the requirement of risk assessments to facilitate the clearance of low-risk goods. This request reflects the interest in accelerating and simplifying procedures and processes while mitigating the risk of corrupt practices commonly encountered during the inspection stage, especially in situations of backlog or accumulated goods.[144] The Agreement also has an impact, in turn, on national regulations linked to hazard and risk assessments. The agreement has generated an enormous

[143] Correia Lima Macedo, L. and Costacurta de Sá Porto, P. (2010). Aspectos Legais e Econômicos do Acordo de Facilitação Comercial da OMC. In: *XIX Congresso Nacional do CONPEDI (Congresso Nacional de Pesquisa e Pós-Graduação em Direito)*, p.12.

[144] As we will see below, Brazil's Foreign Trade Chamber (CAMEX) is responsible for the cross-sectoral efforts among different ministries to simplify the regulation in force. Prompted by the Secretariat of International Relations (SRI) of the Ministry of Agriculture, Livestock and Food Supply (MAPA), CAMEX requested the issuance of an informed opinion by the Office of the Attorney General of the Union (AGU) in order to settle an ongoing dispute between MAPA and the National Sanitary Surveillance Agency (ANVISA), which disagreed on some of the risk assessments. This request led to PARECER 00543/2018/CONJUR-MAPA/CGU/AGU. NUP: 21000.024314/2018-13 establishing criteria for the toxicological assessments of pesticides with the aim of clearing eventual doubts over normative or hermeneutical conflicts between Law 7,802 of July 11, 1989 on research, experimentation, production, packaging and labeling, transportation, storage, trade, commercial advertisement, use, imports and exports, final destination of waste and packages, registration, categorization, control, inspections and monitoring of pesticides, their components and correlated items, and establishes additional measures, and WTO's Agreement on Phytosanitary Measures. "Based on Technical Note 35/2018, SRI/MAPA hereby asserts that, considering art. 3, para. 6 of Law 7,802/1989, ANVISA has used the risk assessment-criterion in toxicological analyses for registration of pesticides. This would go against the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS/WTO), which was incorporated to the Brazilian legal framework by Decree 1,355/1994, establishing the analys of the composition of agrochemical products based on risk assessments as a standard procedure". PARECER n. 00543/2018/CONJUR-MAPA/CGU/AGU. NUP: 21000.024314/2018-13. This measure is a consequence of Brazil's adherence to the Facilitation Agreement, and it is linked to a considerable bottleneck for national exports and imports.

bureaucratic shift in countries like Brazil where a still seminal conception is taking root that the entire public administration must follow the same premise of maximum transparency, access and intelligibility in regulations that may affect the export organization chart.

The Agreement thus precipitated a new moment of reflection on bureaucratic structure and standards of integrity in Brazil, a moment whose duration will depend on the political vicissitudes of the country. In informal conversation, and even in some public discourse of second and third-tier decision makers, the term "principle of transparency" is increasingly heard in relation to foreign trade, perhaps because of familiarity with Brazilian municipal law that recognizes this principle as part of Administrative Law. An immediate response in Brazil was the enactment of Law No. 13.874, of September 20, 2019, which institutes the Declaration of Rights of Economic Freedom, and which brought the obligation of prior analysis of the regulatory impact of proposals for editing and amending acts regulations of general interest to economic agents that are issued by an agency or entity of the federal public administration, including autarchies and public foundations.

This trend can also be observed in other parts of the world. Most prominently, the United Nations Conference on Trade and Development (hereinafter UNCTAD) has demonstrated the significant procedural gains made by China in implementing the provisions of the Trade Facilitation Agreement[145]. In parallel, the international legal community welcomed the finalization of the Chinese Civil Code, which entered into force on January 1st, 2021 and which, according to analysts, will bring more legal security to court decisions. Finally, a series of transparency measures by the Chinese judiciary laid out in The Fifth Judicial Reform Plan Outline (Opinions on Deepening the Reform of the Judicial System with Comprehensive Integrated Reforms - Outline of the Fifth Five-Year Reform Program of the People's Courts (2019-2023))[146] has resulted in *the steady improvement in the quality of Chinese judges and the greater emphasis on transparency, especially the publication of Chinese court judgments*

[145] United Nations Conference on Trade and Development (n.d.). *China's Efforts to Improve Trade Facilitation* | UNCTAD. [online] unctad.org. Available at: https://unctad.org/news/chinas-efforts-improve-trade-facilitation [Accessed 17 July 2020].

[146] Supreme People's Court Monitor (2019). *Shining a light on Chinese judicial transparency*. [online] Supreme People's Court Monitor. Available at: https://supremepeoplescourtmonitor.com/2019/03/09/shining-a-light-on-chinese-judicial-transparency/ [Accessed 17 Apr. 2020].

online and live video streaming of many trials[147]*.* Even before The Fifth Judicial Reform Plan Outline, many took note of the creativity deployed by Chinese courts in *expanding the scope of government transparency (…) the political talent of judges has significantly advanced transparency*[148] with regard to the new Regulations on Open Government Information. The WTO has played its part in improving the transparency standards in Chinese legislative innovation[149].

Reaffirming the idea of radial concepts and, in the specific case of this study, the perpetuation of the theme of transparency in the legal knowledge and practice of societies – in simple or complex societies, in a Durkheimian sense[150] – we must remember that the Trade Facilitation Agreement represents a historical rescue mission. In other words, it is not the product of a continuous development of legal awareness reaching an apex, but the manifestation of an enduring notion.

> The foundation stone of international norms for transparency was the 1923 International Convention Relating to the Simplification of Customs Formalities ("Customs Convention"). The Customs Convention established rules for transparency and review at the national level. All customs regulations were required to be promptly published "in such a manner as to enable persons concerned to become acquainted with them and to avoid the prejudice which might result from the application of customs formalities of which they are ignorant." Moreover, no customs regulations were to be enforced before being published unless "previous publication would be likely to injure the essential interests of the [regulating] country."
>
> (…)
>
> This international customs law is remarkable in its modernity. The Customs Convention supervises the domestic policy process, and the designated beneficiaries are not only the parties to the Convention but also "persons concerned," a class that could include domestic persons as well as aliens. Furthermore, the Convention's rules are backed up by dispute settlement. It is also interesting to note that the Protocol to the Convention contains what is now called a "savings clause" to defer to past or future international treaties relating to the preservation of the health of human beings, animals, or plants and to the protection of

[147] XinhuaNet (2020). *Compilation of civil code promotes rule of law in China -- experts - Xinhua | English.news.cn.* [online] www.xinhuanet.com. Available at: http://www.xinhuanet.com/english/2020-05/24/c_139082849.htm.
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[148] Wenjing, L. (2016). The role of the courts in China`s progress towards transparency. In: *Research handbook on transparency*. Cheltenham: Edward Elgar, p. 215.

[149] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020], p. 12.

[150] Dans les sociétés simples, où la tradition est toute-puissante et où presque tout est en commun, les usages les plus puérils deviennent par la force de l'habitude des devoirs impératifs. Durkheim, E. (2011). *De la division du travail social*. 2nd ed. Paris: Norp-Nop Editions,Location 2525. Kindle Edition.

> public morals or international security. (…) No historical account of the Convention's implementation is readily available, and I do not know the extent of transparency attained[151].

The language of GATT Article X was also proposed by the United States, influenced by the U.S Administrative Procedures Act (APA), an act then newly in force. The protagonist role sought by the United States was related to their aggressive national commercial interests, which found in the confusing group of national regulations a non-tariff barrier to exports[152]. Wolfe speculates that:

> Others have argued that Article X of the General Agreement on Tariffs and Trade (GATT) 1947 on "Publication and Adminsitration of Trade Regulations", like the US Administrative Procedures Act of 1946, whose language it appears to replicate (…), was based on an American belief that transparency was the best way to control discretion of administrative agencies (…). But Article X was partly based on Articles 4 and 6 of the 1923 International Convention Relating to the Simplification of Customs Formalities (…), while transparency and independent judicial review had been part of English administrative law since the seventeenth century (…)[153].

If transparency is not a novel abstraction, whether from the point of view of legal anthropology or sociology, or in the historical evolution of the thinking behind giving the multilateral trade regime attributes of publicity and clarity, what is its substance and status at present? This is the question that will guide this author throughout the course of rescuing the evolution of the concept from misleading characterizations.

Outline

The thesis is versed in five parts: an introduction, three chapters and a conclusion.

The introduction, of which this outline is part, placed the object of study in the dimensions of its importance for practical and academic study, reviewing some common places on transparency that are the instigators of more detailed research.

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[151] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization. [online] papers.ssrn.com*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020], p. 3.

[152] Ala'i, P. and D'Orsi, M. (2014). Transparency in international economic relations and the role of the WTO. In: *Research Handbook on Transparency*. Cheltenham, UK. Northampton, MA, USA: Edward Elgar, p.368.

[153] Wolfe, R. (2013). Letting the Sun Shine in at the WTO: *How Transparency Brings the Trading System to Life*. Economic Research and Statistics Division. Staff Working Paper ed. Geneva: World Trade Organization; Organisation Mondiale du Commerce -03-06, p. 13.

The first chapter provides a brief depiction of evolution of the concept of transparency in Political Sciences and International Relations. The reason for providing the reader with this historical line is due to the fact that the concept of transparency was born within the scope of politics, first national then international, as a concept originating from this area of thinking, so that, then, it could be elaborated in the legal world. Indeed, the contours and conceptual scope of the legal idea of transparency was elaborated within the scope of political discourse and to meet the need for a new political praxis. Thus, an approximation that demonstrates the evolution of the concept in comparative political thought is unfathomable.

Chapter 2 shifts towards examining transparency in general International Law, addressing the problems and dimensions commonly raised by the Academy related to the subject. The first dimension is transparency as a legitimizing element of International Law. Thomas Frank was the pioneer scholar in trying to resolve the recurring criticisms of the lack of legality, due to the lack of coercitibility, of International Law, by offering the legitimacy, of which transparency is a fundamental component, as the core element of the international legal command and the source of its strength.

In parallel to Franck's construction, the crisis of legitimacy of international organizations and International Law, being general or specific, was felt and accused by academics not only from the periphery of the international system of power, highlighting a factor of possible erosion of this same system. Seminal ideas of multilateralism are rescued as a way to demonstrate the continuity of concerns, as well as the recurrence with which some solutions are proposed. At the end of the section, we identified two matrixes for the construction of international law: international administrative law and international constitutional law, which offer different solutions, as well as different possibilities, to the evolution of International Law. For some thinkers, both matrices coexist, in different intensities. The Charter of the United Nations is an attempt to establish an international constitutional order, albeit incomplete. Within the scope of International Constitutionalism thinking, three categories are presented: Institutional Managerialism, Rights-Based Constitutionalism and Judicial Norm-Generation.

Next, in the same Chapter, adjudicatory transparency is explored as an expediency by which the so called ‘legitimatory problem of international adjudication’

can be resolved or mitigated.

The chapter offers reflection on the three dimensions of transparency most related to the functioning of institutions: internal, external and administrative transparency. Although these aspects do not seem to influence the other previous forms of transparency in international law, still less the legal transparency, explored in Chapter 3, we resort above all to the doctrine of Maria Panezi to clarify that it is not dilettantism to think that they have an impact on the quality of the law produced.

Next, Chapter 3 explores transparency in legal thought itself and the concept as incorporated by the legislative efforts and by the jurisprudence.

Working with the notion of radial concepts, and with the perspective of the legal history, we demonstrate that, although many doctrines are uncomfortable with the idea of incorporating the idea, concept, or Aristotelian category of transparency in the multilateral trading regime, it reveals its fingerprints in the most basic concepts rule of law.

Moving on to the analysis of transparency as a principle of law, it is necessary to describe the nature and scope of this source of law. As a principle of law, transparency is also revealed, either as an autonomous principle or as a corollary to other foundational ones, notably due process and good faith. Evoking the doctrine of Humberto Ávila, transparency is revealed as a first-degree norm, with structural and formative (instructive) functions, which unifies all the academic reflection exposed from the previous sections on the many facets of transparency. Also, transparency is revealed as a second-degree norm, a meta-standard, or meta-norm, which assists in conferring coherence and cohesion to International Law, since it forms the systematic compliance of the elements of the normative structure. Mads Andenas and Ludovica Chiussi approaches the role of principles in general as instruments of cohesion, convergence and coherence of International Law[154].

Finally, the three generations of WTO transparency are explored, confirming the impressions exposed by the doctrine, the radial aspects of the concept and the first-degree norm and second-degree norm natures.

Once it has been established that transparency is spread in Law, through its

[154] Andenas, Mads, and Ludovica Chiussi. “Cohesion, Convergence and Coherence of International Law.” *General Principles and the Coherence of International Law*, edited by Mads Andenas et al., Leiden Boston, Brill Nijhoff, 2019, pp. 9–34.

most fundamental concepts of rule of law, and as a source of law in general International Law and International Trade Law, the question arises as to why, then, it is unsatisfactorily observed or, otherwise, how it can be achieved higher standards of compliance and compliance. Paolo Palchetti exempts principles of law of the requirement of general, consistent and uniform practice (diuturnitas) and the existence of a sense of legal obligation (*opinion juris sive necessitates*)[155] to be recognized as such, by distinguishing them from customary rules[156].

The conclusion offers, from the point of view of Legistics and behavioral economics, a suggestion of institutional and normative improvement.

[155] van Aaken, A. (2013). Behavioral International Law and Economics. *SSRN Electronic Journal*, (55). P. 34

[156] Palchetti, Paolo. "The Role of General Principles in Promoting the Development of Customary International Rules." *General Principles and the Coherence of International Law*, edited by Mads Andenas et al., Leiden London, Brill Nijhoff, 2019, pp. 47–59.

Chapter 1
TRANSPARENCY IN POLITICAL SCIENCES AND INTENATIONAL RELATIONS

1.1 Transparency in Political Sciences and Politics: The Major Milestones

A generation of defenders of absolutism ushered in modern political theory, beginning with Machiavell''s *The Prince*. Beyond the Florentine diplomat, Jean Bodin, Thomas Hobbes and Jacques Benigne-Bossuet all advanced an intellectual defense of the Regime[157]. The rule of law and its derivatives were not deemed relevant concepts by any of these authors, although the "assault on absolutism" was first rehearsed in England during the same period.

John Locke, the father of liberal thought, rescued the idea of a self-restrained and accountable government in his work, *Second Treatise of Government: An Essay Concerning the True Origin, Extension and End of Civil Government*. To quote Chevallier:

> Locke had departed, like Hobbes, from the state of nature and the original contract, giving them, however, a new version, which would allow him to erect as a rule the distinction between legislative and executive power, to end with an all-terrestrial limitation, all human power, sanctioned, in the last instance, by the right of insurrection of the subjects (...) It is the existence of the natural rights of the individual in the state of nature that will protect, from the abuses of power, the same individual in the state of society. (...) natural rights, far from being the object of a total renunciation by the original contract, far from disappearing, swept away by sovereignty in the state of society, on the contrary they persist[158]. (free translation)

Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, Jean-Jacques Rousseau and Emmanuel Joseph Sieyes, all liberal political philosophers, also took up and refined the concept of rule of law[159] in their work on achieving legitimacy and accountability in government.

However, transparency in lawmaking process and as an integral component of the legal order, or even as a means to attain legitimacy and accountability, was not taken seriously until the late 18th century. It was not because of intuitive or abstract

[157] Chevallier, J.-J. (1995). *As Grandes Obras Politicas de Maquiavel a Nossos Dias*. 7th ed. Translated by L. Cristina. Rio de Janeiro: Agir.
[158] Idem, p.108.
[159] *Ibidem*, 118-213.

reasoning. Sarah Schacht has argued that:

> During the revolutionary period in the United States, America struggled with the secrecy of English-controlled legislatures. Legislative secrecy was cited early in the Declaration of Independence for why the United States chose to secede. The fourth point of grievance the founders cited was "He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures". This means that neither elected legislators not citizens could access their laws or the legislative process, making it difficult for these proceedings to be accurate or accessible.
>
> America's frustration with inaccessible public records led to the country's rights to press freedom and Article 1, Section 5 of the Constitution, mandating public distribution of legislative information. (…) At the Constitutional Convention in 1787, James Wilson remarked, "(Americans)…have the right to know what their Agents are doing or have done, and it should not be in the opinion of the Legislature do conceal their proceedings"[160].

North-American constitutionalism with its idealized references to ancient Greece and Rome marked the first real modern milestone in the historiography of the principle of transparency in government or public acts. However, the repertoire of decisive moments and human actions that affect the course of history is vast. While this affirmation seems obvious, it may still come as a surprise that the roots of constitutional "freedom of information" in its modern sense do not lie in the foundational moment of the United States.

According to Meldcalfe, James Madison's title as the "father" of government transparency is undeserved. Ander Chydenius, an eighteenth-century legislator in the Kingdom of Sweden, fiercely defended the idea of "freedom of information". Ten years before the American Revolution, the first "freedom of information act" saw the light in Scandinavia as a result of Chydenius political advocacy.

Van Long Tran complements the information on the historical origins of transparency by reporting the British inspiration and detailing the Chinese inspiration to Scandinavian standards:

> (…) Researching the ideological backgrounds underlying the drafting of the Swedish FOIA [Freedom of Information Act], Professor Juha Manninen (…) depicts the contributions of three influential political thinkers: Anders Nordencrantz,

[160] Schacht, S. (2010). Democracy, under everything. In: *Open Government. Collaboration, Transparency, and Participation in Practice*.: O'Reilly, pp.155–146.

> Anders Chydenius, and Anders Schönberg. Nordencrantz, followed by Chydenius, observed the enlightenment movements resulting from the Glorious Revolution in England and then formulated the general principles of the right to know. Interestingly, Nordencrantz and Chydenius were inspired by the Chinese model of the 18th century and used this to exemplify their claims for freedom of writing and freedom of information (…). The wealthy and prosperous images of ancient Chinese polity – the representative authoritarian regime in this book, were once utilized to create the ideological foundations upon which the first act of the right to know was adopted (…). According to Chydenius, the practice of the Ch'ing Dynasty in the East should be the model for Western government accountability (…). Transparency and accountability – the concepts typically deemed to be Western values, paradoxically, initially first emerged from the shadows of East Asian monarchies in the 18th century[161].

Chydenius' premise was that *government works best if it shares as much information as possible with its people*. For some, much of the Swedish Congressman's inspiration harks to an unfamiliar source: the governing principles of Tang Dynasty during seventh-century China, and more precisely the reign of Emperor Taizong (626-49 A.D). The influence of medieval Chinese precepts on the first modern legal norm of transparency notably relativizes the debt owed to the Athenian notion of democracy and government openness, as well as the dominant strain of liberalism that paid homage to it[162].

It might be more accurate to locate the first discussion of legal transparency norms in US constitutionalism during the American Civil War. In this conflagration, Abraham Lincoln resorted to contracting secret agents. This led to the famous case *Totten v. United States*, where SCOTUS was asked to determine the enforceability of the secret contracts[163]. Because the contract could not be reviewed, the Supreme Court affirmed the lower court's dismissal of the plaintiff's lawsuit for back wages, and set an important precedent for the State Secrets Privilege recognized by SCOTUS in 1953.

Notwithstanding, Ishita Menon and other scholars[164] trace the modern idea of

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[161] Tran, V.L. (2016). *Beyond Trade: The Impact of WTO's Transparency Norms on Socialist Oriented States with an Emphasis on Vietnam's Legal Reform*. YNU, pp. 8–9.
[162] Metcalfe, D.J. (2014). The History of Government Transparency. In: *Research Handbook on Transparency*. Cheltenham, UK. Northampton, MA, USA: Edward Elgar, p.248.
[163] *Idem*, p.250.
[164] Menon, I. (2010). *The Political Dialectics of Transparency in Modernity and Beyond: The Radicalization and Problematic of Visual Politics*. PhD Thesis.

political transparency back to the Enlightment, particularly to the writings of Rousseau, Kant and Bentham. That said, Menon recognizes that the analogy between knowledge and vision goes much further back, but still remaining in the West:

> The dialectic of visibility and concealment is as old as politics itself. It is no accident that metaphors of light and vision have played a major role in Western political thought, or that they have frequently been used to explain the nature, method and goals of philosophy itself. One thinks of Plato and the allegory of the cave, Augustine's resistance to the spiritual darkness in the City of God, Descartes' concept of natural light, and, above all the modern idea of Enlightenment, or Aufklarung. Jacques Derrida argues that light is not just another rhetorical device used by philosophers; it is the foundation of the entire project of philosophy. The enterprise of philosophy is aimed, he says, at getting behind appearances in order to reveal the truth, the real underlying structure of things; so it is about "seeing oneself see."[165]

Still, it is interesting to note the frequent use of interdisciplinary metaphors by the Enlightenment political thinking at a time when optic science was also making great advances, a correlation that continues to this day.

Another example of interdisciplinary metaphors comes from Colin Rowe and Robert Slutzky. They were architectural theorists and historians who, for the first time, associated the fashion of using glass in public buildings to evoke the evolving idea of political and legal transparency as distinguished from the phenomenal conception of transparency[166]. They contrasted the typical pre-modern conception of political transparency with the latter, a more literal sense it attained in modern times. By phenomenal transparency, the authors meant the:

> "perceptual quality that allows the mind to discern the underlying governing concept or spatial concept." In other words, transparency was the ability of the light of the mind to penetrate a concept so as to reveal its true essence, as is evident from the writings of thinkers such as Plato and Augustine[167].

In other words, transparency in its pre-modern conception depended largely on the observor's faculty of vision.

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[165] Menon, I. (2010). *The Political Dialectics of Transparency in Modernity and Beyond: The Radicalization and Problematic of Visual Politics*. PhD Thesis, p. 2.

[166] Rowe, C. and Slutzky, R. (n.d.). *Transparency: literal and phenomenal*. 8th ed. Basel: Perspecta, p. 45.

[167] Menon, I. (2010). *The Political Dialectics of Transparency in Modernity and Beyond: The Radicalization and Problematic of Visual Politics*. PhD Thesis, p. 4.

Umberto Eco, drawing from Thomas Aquina's theory on art refers to the third quality of beauty as being *claritas*, which is light, luminosity, but also transcendence. This attribute was usually represented by a center of emanation of light *per se* or even the figure of the Holy Spirit as a dove, a sunshine or a radiation[168]. Rowe and Slutzky and Eco's reasonings reinforce the idea that transparency in pre-modern times referred to the ability of an individual to see through mundanity with the help of divine inspiration or even the revealed word, whether uttered by a politician (as in Plato) or a prophet.

In modernity, a quest for literal transparency is at the top of the agenda. In part, the Enlightment was about breaking down the phenomena of daily life to reveal the reason or immutable laws that governed them. This task turned the focus from the observer to the observed, requiring the elimination of obstacles like secret or privileged information in order to attain the least compromised observation possible.

Menon argues that Kant was the first to translate the Rousseaian ideal of transparency, which was almost psychological in character, into the political and juridical norm of publicity. The Kantian Enlightment motto *Spare Aude*, or "dare to know", referred to the importance of public reasoning that would allow others to elaborate knowledgeably and externalize their own understandings of events in the course of political action. Transparency thus involved an internal and external alignment and organization with reason as its central parameter, both for public men and public spaces, which could be scrutinized through public debate in order to withstand the "experiment of pure reason"[169].

> One foundational development was Immanuel Kant's attention to "capacity for publicity" in his essay Perpetual Peace (1795). In Kant's view, the "transcendental formula of public right" (or public law) is that "[a]ll actions that affect the rights of other men are wrong if their maxim is not consistent with publicity." An important intergovernmental action was the inclusion of Article 18 in the Treaty of Versailles providing that "[e]very treaty or international" agreement shall be registered by the Secretariat of the League of Nations and "shall as soon as possible be published by it[,]" and, furthermore, that "[n]o such treaty or international engagement shall be binding until so registered."[170]

[168] Eco, U. (2007). *História da beleza*. Translated by E. Aguiar. Rio De Janeiro: Record, p.100.
[169] Menon, I. (2010). *The Political Dialectics of Transparency in Modernity and Beyond: The Radicalization and Problematic of Visual Politics*. PhD Thesis, p. 38.
[170] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization. [online] papers.ssrn.com*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020], p. 2.

The Kantian moral axiom that an act is only moral if it can be translated into an universal law[171] is expressed in the relationship between law and morals:

> WHEN I represent to myself, according to the usage of the lawyers, the public right, in all its habitudes with the relations of the individuals of a state, and of states among themselves; if I then make an abstraction of all the material of right, there still remains to me a form, which is essential to it, that of publicity. Without it there is no justice, for one cannot conceive of it only as being able to be rendered public, there would be then no longer right, since it is founded only on justice. Each juridical claim ought to be capable of being made public; and as it is very easy to judge in each case, if the principles of him who acts would bear publicity, this possibility itself may commodiously serve as a criterion purely intellectual, in order to discover by reason alone, the injustice of a juridical pretension
>
> (…) "All the actions, relative to the right of another, whose maxim is not susceptible of publicity, are unjust.
>
> (…) Now, it is equally evident, that here exists between politics and morality, which have respect to right, an opposition just as easy to be removed, if one apply thereto the principle of publicity of maxims."[172]

Another contemporary of Kant's, Jeremy Bentham, is considered a theorist of publicity, or a theorist of transparency *per se* because of his particular reasoning on the matter. For Bentham, publicity represents the very soul of justice, law and security. The 19th century author was the first to clearly establish the correlation between publicity and rule of law. According to Bentham, publicity is so important that it reaches the status of law, or meta-law. In current parlance, publicity would be considered a meta-principle. For Bentham, publicity ensures public confidence for six basic reasons: it compels members of the assembly to exercise their duty; it ensures the people's trust and consent of measures of the legislature; it provides government officials a means to know the desires of the governed; it allows voters to act from qualified information; it provides the decision makers with the information and feedback that are necessary to maximize public benefits; finally, even if publicity does not always have tangible results, it provides the public with satisfaction and engages them, which creates a sort of public memory that can also be beneficial to public life. Bentham anticipates setbacks: ignorance and passion might result in unwanted and

[171] "If the maxim of the action is not such as to stand the test of the form of a universal law of nature, then it is morally impossible". Kant, I. (2008). *Perpetual Peace*. San Diego, California: The Book Tree, Kindle Location, 64. Kindle Edition.

[172] Kant, I. (2008). *Perpetual Peace*. San Diego, California: The Book Tree, Kindle Locations, 611, 650. Kindle Edition.

counterproductive pressure on legislators and public animosity could lead them to deviate from the dictates of their conscience. By the same token, legislators' integrity could be jeopardized by desire for popularity; publicity creates space for seduction that overwhelms reason. Finally, publicity may make them more vulnerable to political retaliation[173].

Bentham's vision of the appropriate level of publicity of legislative acts was extremely contemporary. For him, political assemblies should make public: (i) the character of each proposition; (ii) the character of the speeches or arguments for and against each proposition; (iii) the subject of each proposition; (iv) the number of votes on each side; (v) the identities of the representatives who voted on each side; and (vi) background information that served as the basis for the decision. The Assembly would only be exempt from publicizing its acts when one the following effects might reasonably ensue: (i) when it might favor an enemy's designs; (ii) unnecessarily harm to innocent people; or (iii) impose excessively severe punishment on a guilty party. The range of legislative activities that Bentham goes on to suggest for publication are quite contemporary. They are: (i) transcriptions of the meeting records with a complete outline that encompasses the six points mentioned above; (ii) employing shorthand writers to record speeches or, in case of hearings, the questions and answers; (iii) relevant background publications on the subject; (iv) allowing outsiders to attend the legislative sessions.

Bentham also developed a theory on the limits of adjudicatory discretion[174] in order to inhibit "sinister" or self-interest. For the purpose of assessing whether the limits were respected, he proposed three criteria: whether the right decision was taken, whether the decision was in accordance with the positive law and, whether the decision was in accordance with the Principle of Utility (subsistence, security, abundance and equality)[175].

A special section of Bentham's Constitutional Code was devoted to Publicity,

[173] Bentham, J. (2011). Da publicidade. *Revista Brasileira de Ciência Política*, [online] (6), pp.277–294. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-33522011000200011&lng=en&nrm=iso [Accessed 18 Apr. 2021].
[174] Constantinescu, D. (2011). *Benthamic Limits Upon Judicial Discretion –Theory and Practice*. 1st ed. Studia Ubb. Philosophia.
[175] *Idem*, p.3.

Recordation, and Publication[176], which imposed transparency standards on the judiciary:

> Art. 1. Special demand for secrecy excepted, and that never otherwise than temporary, (of which see the Penal, Civil, and Procedure Codes,) the leading principles of this constitution require, that, for the information of the several constituted authorities, of every Judicial proceeding, as well while carrying on, as thenceforward, the publicity be maximized. In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice[177].

In this Section, Bentham envisages not only required publication of sentences, but also rules on the conflict of interests, changing jurisdiction of judges proven to have self-interested agenda in the jurisdiction they are, a system of denouncing disciplinary faults by the judges (incidental complaint book), means to contest the judges` interpretation in case the judge does not give a uniform decision in relation to precedents and to the elements of the case, and, finally, procedures in case of bribery and corruption.

Despite refining the notion of transparency in the legal structure, Bentham does not develop a theory of Public Justification per se. However, Bentham's theories touch important elements of Public Justification: the limit of discretion and the elements of transparency and public communication. Jeremy Bentham is an utilitarian theorist of publicity who bases the imperative of publicity more on its capacity for social pacification than on the Kantian notion as a vehicle for forming informed opinions and thus improving the public space of debate.

According to Jurgen Habermas, Bentham was the pioneer of the public sphere responsible for transforming “opinion” into “public opinion”. His work provides a natural transition to post-modern political thought. For Habermas, the ideal speech situation would require: “a) the comprehensibility of the utterance, b) the truth of its propositional component, c) the correctness and appropriateness of its performatory component, and d) authenticity of the speaking subject.” Those criteria demand, as Menon argues, self-transparency by the speaker and the “fiction of transparency of

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[176] Bentham, J. (n.d.). *Constitutional Code*. Section XIV Publicity, Recordation, and Publication. p.1424.

[177] Bentham, J. (n.d.). *Constitutional Code*. Section XIV Publicity, Recordation, and Publication, p. 1424

communication."[178]

Another facet or derivative of transparency, the idea of public justification arose with the contractualists (Hobbes, Locke, Rousseau and Kant), who had different approaches on how Public Justification should be demonstrated:

> Hobbes, Locke, and Rousseau developed consent theories of legitimacy, but these three theorists seemed to oscillate between an empirical standard of consent and a normative standard of consent. (…)
>
> Notwithstanding the characteristic association between public reason liberalism and the requirement of public justification, public justification is the genus and public reason the species. The idea of public justification is, at its root, an idea about what justifies coercion. Although we can arrive at a state in which some social arrangement is publicly justified by an explicit course of reasoning leading to the legitimation of that social state, this is not intrinsic to the more general idea of public justification, as will be seen below. In particular, we can arrive at a social state in which some arrangement is publicly justified by non-deliberative, indeed non-discursive means, and it is for this reason that public reason is a narrower notion than public justification.[179].

Although the idea of Public Justification was introduced in political science through the discussion of transparency and publicity, as its logical consequence, Public Justification represents a robust, maximalist, expression of transparency, as it may, but not necessarily, submit public acts to the public for review of their merit.

In political science, the concept of legitimacy is usually employed in reference to the State[180]. In sociology, however, the concept is not limited to the capacity of the state entity to inspire legitimacy. In Max Weber's descriptive account, there are three types of legitimate domination: traditional, rational and charismatic, the first and the

[178] Menon, I. (2010). *The Political Dialectics of Transparency in Modernity and Beyond: The Radicalization and Problematic of Visual Politics*. PhD Thesis, p. 98.

[179] Stanford Encyclopedia of Philosophy (1996). Public Justification. In: *Stanford Encyclopedia of Philosophy*. [online] Available at: https://plato.stanford.edu/entries/justification-public/.

[180] Despite this, "in common language, the term Legitimacy has two meanings, one generic and one specific. In its generic meaning, Legitimacy has, approximately, the sense of justice or rationality (...). It is in the political language that the specific meaning appears. In this concert, the State is the entity that most refers to the concept of Legitimacy". Levi, L. (1983). Legitimidade. In: N. Bobbio, ed., *Dicionário de Política*. Volume 2. Brasília, Distrito Federal, Brasil: Editora UnB, p.675.

last of which are independent of the existence of any state-bureaucratic apparatus[181]. Going back to the reference to minimalist and maximalist versions of transparency elaborated during the discussion of procedural justice, those two types of Weber's conception of legitimacy would similarly be located in the lower, minimalist end of the spectrum of due process *lato sensu*.

In the simplest forms of social organization, the most important public and civil events were ritualized. Rituals, to begin with, enabled private individuals to assume new public status. In this sense, rituals did not only have a private purpose, as suggested by van Gennep,[182] but also meaning for the collectivity. It was a formula of empowerment, of conceding public entitlement for the individual who had attained a new status. Social validation depended on the recognition of the righteousness of the ritual, the process or at least the completeness of which was publicly announced.

As mentioned, Peter Meijes Tiersmathe holds the position that "ritual words and actions were and [still] are an important part of many legal systems"[183]. The author applies van Gennep's theoretical framework to the ritual-riddled Roman legal panorama, noting how modern law, as it focuses more on contract than status, tend to become less ritualistic over time[184]. The prevailing form of ritual in the legal world since ancient Rome lies in formalized speech acts. Expanding his reasoning, Tiersmathe argues that the legal formalities, as legal rituals, have evidentiary, cautionary and channeling functions. The channeling faculty of legal rituals gives legal acts enforceability and meaning. While the duty of publicity represents the minimal expression of transparency, that of Public Justification represents its maximal expression. Perhaps that is why the idea of transparency has divorced itself from the idea of justifiability.

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[181] Weber, M. (2004). *Economia e Sociedade. Fundamentos da Sociologia Compreensiva*. Translated by R. Barbosa. and Translated by K. Elsabe Barbosa. São Paulo: Universidade de Brasília. ABDR. Editora UnB. Imprensa Oficial.

[182] "As we move downward on the scale of civilizations (taking the term "civilization" in the broadest sense), we cannot fail to note an ever-increasing domination of the secular by the sacred. We see that in the least advanced cultures the holy enters nearly every phase of a man's life. Being born, giving birth, and hunting, to cite but a few examples, are all acts whose major aspects fall within the sacred sphere. Social groups in such societies likewise have magico-religious foundations, and a passage from group to group takes on that special quality found in our rites of baptism and ordination". van Gennep, A. (2019). *The Rites of Passage*. 2a ed. Translated by M. B. Vizedom. and Translated by G. L. Caffee. United States of America: The University of Chicago Press, p.2.

[183] Tiersmathe, P.M. (1988). *Rites of passage: Legal ritual in Roman law and anthropological analogues*. The Journal of Legal History, 9(1), pp.3–25.

[184] *Idem*, p. 10.

As the cradle of the Enlightenment and many of the political theories that it engendered, Europe might be considered a curious thermometer for the historical development of the concept of transparency. According to Sophie van Bijsterveld, the principle of transparency is a new feature in the European constitutional traditions and is largely a product of the legislative activity of the European Union.[185]

For its part, the principle of legality – an element common to Republican regimes and constitutional monarchies – has become a widespread feature in today's world and an indisputable historical advance enshrined in almost all modern constitutions.[186] For Bijsterveld, the principle of legality does not exhaust the principle of transparency, since the latter involves not only the activities of a single core of competences, but the decision-making process as a whole:

> The notion of transparency has become a key concept in Europe. It also features prominently in the Laeken Declaration and is one of its overriding concerns. It is clear that transparency is seen as a central requirement of legitimate governance in the EU. It is not surprising that the Constitution for Europe in many ways reflects this call for transparency.
>
> Transparency is an essential part of the Laeken Declaration's fabric. "Openness" and "transparency" are brought in connection with various different elements and statements. With its almost magic appeal, it functions more or less on the basis of intuitive consensus.
>
> Under the heading: "The democratic challenge facing Europe", the Declaration states that the Union must be "brought closer to its citizens". The openness of European Institutions is regarded crucial to that aim. Under the heading: "The expectation of Europe's citizens", it is stated that the citizens are calling for, among other things, an "open"

[185] " (…) The EU is in a position to make a positive contribution to constitutional renewal that may even have significance for its Member-States. In other words, the EU can make us sensitive to the constitutional demands of the future. This is also true with respect to the sudden emergence and success of the notion of transparency. The debate on openness in the EU, initially focused on access to information, has certainly played a key role in the promotion of "transparency". But what should we make of this new "principle" of transparency? (…) It is also interesting to see the way the European Court of Human Rights has interpreted the requirement that limitations to fundamental rights guaranteed in the European Convention must inter alia be based on "law". In the eyes of the European Court, this means that limitations must be "accessible" and "foreseeable". Thus, the Court has accepted that professional codes and policy regulations, which are both not based on a formal power to issue binding rules, can be limitations based on the "law". In doing so, it has not only accommodated the common law tradition, which does not so heavily rely on written legislation as the continental traditions traditionally do. It has also opened up to such new legal phenomena as highlighted above. This development shows the natural and close connection between transparency and legality. Van Bijsterveld, S. (n.d.). *Transparency in the European Union: a crucial link in shaping the new social contract between the citizen and the EU*. [online] . Available at: https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Agenda__Bijsterveld-Paper.pdf.

[186] Mendes, G.F. and Branco, P.G.G. (n.d.). *Curso de Direito Constitucional*. 6th ed. Instituto Brasiliense de Direito Público. Editora Saraiva, pp.860, 864.

Community approach.[187]

The Laeken Declaration was the result of the Debate on the Future of the European Union in 2001 – one year after the Intergovernmental Conference held in Nice. The Laeken Declaration defined the key issues to be debated at the Convention on the Future of Europe, held in Brussels on February 28, 2002: competence-sharing among the EU and its Member States; simplifying EU legislative instruments; maintaining inter-institutional balance and improving the efficacy of the decision-making process; and constitutionalizing Treaties.[188]

Also in 2001, the European Commission issued a White Paper on European Governance, which defined its concept of good governance:

> **Five principles underpin good governance and the changes proposed in this White Paper: *openness, participation, accountability, effectiveness* and *coherence*. Each principle is important for establishing more democratic 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. They are particularly important for the Union in order to respond to the challenges highlighted in the preceding chapter.
>
> **— Openness. The institutions should work in a more open manner.** Together with the Member States, they should actively communicate 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.
>
> **— Participation. The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain** — from conception to implementation. Improved participation is likely to create more confidence in the end result and in the institutions which deliver policies. Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies.
>
> **— Accountability. Roles in the legislative and executive processes need to be clearer. Each of the EU institutions must explain and take responsibility for what it does in Europe**. But there is also a need for greater clarity and responsibility from Member

[187] Van Bijsterveld, S. (n.d.). *Transparency in the European Union: a crucial link in shaping the new social contract between the citizen and the EU*. [online] . Available at: https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Agenda__Bijsterveld-Paper.pdf, p. 6.

[188] European Union (2001). *Laeken Declaration on the future of the European Union* (15 December 2001). [online] CVCE. EU by UNI.LU. Available at: https://www.cvce.eu/en/obj/laeken_declaration_on_the_future_of_the_european_union_15_december_2001-en-a76801d5-4bf0-4483-9000-e6df94b07a55.html [Accessed 1 Jul. 2017], p. 19-23.

> States and all those involved in developing and implementing EU policy at whatever level.
>
> **— Effectiveness. Policies must be effective and timely, delivering what is needed on the basis of clear objectives**, an evaluation of future impact and, where available, of past experience. Effectiveness also depends on implementing EU policies in a proportionate manner and on taking decisions at the most appropriate level.
>
> **— Coherence. Policies and action must be coherent and easily understood**. The need for coherence in the Union is increasing: the range of tasks has grown; enlargement will increase diversity; challenges such as climate and demographic change cross the boundaries of the sectoral policies on which the Union has been built; regional and local authorities are increasingly involved in EU policies. Coherence requires political leadership and a Strong responsibility on the part of the institutions to ensure a consistent approach within a complex system.
>
> Each principle is important by itself. But they cannot be achieved through separate actions. Policies can no longer be effective unless they are prepared, implemented and enforced in a more inclusive way.
>
> **The application of these five principles reinforces those of:**
>
> **— proportionality and subsidiarity**. From the conception of policy to its implementation, the choice of the level at which action is taken (from EU to local) and the selection of the instruments used must be in proportion to the objectives pursued. This means that before launching an initiative, it is essential to check systematically **(a) if public action is really necessary; (b) if the European level is the most appropriate one; and (c) if the measures chosen are proportionate to those objectives** (emphasis added)

In 2017, the White Paper on the Future of Europe reaffirmed the necessity of transparency.[189] It qualified transparency as a general principle of law *in statu nascendi*.

1.2 Transparency in International Relations

In international affairs, however, the praxis did not keep up with the pace of the political and legal changes identified in municipal orders. Secrecy, non-accountability and non-compliance were the rule in relations between governments. The traumatic experience of World War I, which is largely blamed on secret treaties and alliances, gave unprecedented force to public engagement in international relations debates[190], even resulting in the creation of a new science, derived from

[189] European Commission (2017). *White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025*. Brussels: European Commission, p.12.

[190] Carr, E.H. (2001). *The twenty years' crisis, 1919-1939: an introduction to the study of international relations*. London: HarperCollins Publishers.

Political Science.

The negative impact of the culture of secrecy and the lack of transparency in international diplomacy resulted both in the creation of International Relations in the post-World War I era, and in the search for permanent forums for international cooperation in which transparent negotiations were objectives to be achieved and also premises. This relation will be better explored throughout this thesis.

Woodrow Wilson attempted to include the prohibition of secret treaties in the Treaty of Versailles, the peace agreement that marked the end of World War I, but did not succeed. However, the Covenant of the League of Nations established the proscription in its Article 18[191]. All this results in the promotion and strengthening of the rule of law was considered one of the Millennium Goals by the United Nations, in the Sustainable Development Goal 16, which clearly connected rule of law with transparency at all levels and better national and international governance[192].

Transparency seems one of the top of the social, cultural, political and legal priorities in the 21st century, yet, in a way, however embryonic, it was already on the political and legal agenda in ancient civilizations. This means it is not a totally modern concept, one we have been called to reflect on only now. New generations might even speculate why such an elementary characteristic of legal security and the rule of law, on which modern business and often the viability of life itself hinge, is placed mostly as a topic of discussion and not as a priority for improvement.

For ancient peoples, as now, a certain level of transparency was necessary to legitimize and endorse decisions and processes. The transparency could be summed up in the mere announcement of the public decisions by means of rituals, publication of acts, or verbal announcements. For more conscientious regimes, albeit not necessarily open ones, an explanation of the facts and reasons that culminated in the public decision could be added to the liturgy. The communications were addressed to a qualified collective of members of the society who participated in public life. In democratic republics, they are directed for the entire population.

Nowadays, putting aside the hypothesis of continued electronic surveillance

[191] Yale University (2019). Avalon Project - The Covenant of the League of Nations. [online] Yale.edu. Available at: https://avalon.law.yale.edu/20th_century/leagcov.asp.
[192] United Nations (n.d.). *Sustainable Development Goal 16*. [online] United Nations and the Rule of Law. Available at: https://www.un.org/ruleoflaw/sdg-16/.

through artificial intelligence, there is no State with enough resources to operate as a total police state, nor has there ever been one that had such means. In the conjecture of a generalized and systematic civil disobedience, public resources are depleted without guaranteeing obedience to the law. This is precisely when social revolutions occur, and that is the reason why legitimacy is so important. Thomas Franck defines legitimacy as:

> (…) a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process[193].

In the absence or near-absence of an unambiguous and institutionalized coercive element in International Public Law, which, in light of modern theories of law, would challenge the very legality of this branch of law, Franck seeks answers for how and why international norms are more often obeyed than disregarded.

The anarchic international environment, or Anarchical Society, the environment in which there is no hierarchy of power between States, still less a supranational force in its most quintessential meaning, resembles the society in the pre-contractual state of nature that Hobbes uses as a starting point for his political theory. To adapt Hobbes' approach to fit the society of nations, we might use the reverse analogy to understand legitimacy in all social arrangements. Legitimacy would thus involve the recognition by each individual actor in a certain arrangement of certain standard that result from a process guided by general and accepted principles. The actors will have played a part in their formulation and compliance, although necessary, observance will be voluntary. This makes the need for coercive force less acute, as it will be circumscribed to specific cases of grievous non-compliance. In short, the legitimacy of the norms contributes more to the cohesion, stability and prosperity of the political and legal order than did the "absolute" coercive power of previous regimes, even though but also because it is a limited power.

Hedley Bull, credited for formulating the famous analogy that compares the international community to an anarchic society, has also demonstrated how factors yield principles that, in turn, play a significant role in determining standards for

[193] Franck, T.M. (1990). *The Power of Legitimacy Among Nations*. New York, Oxford: Oxford University Press, p.24.

legitimacy:

> In primitive anarchic societies, as in international society, the relationships between these politically competent groups are circumscribed by a structure of recognized normative principles, even in cases of violent struggle. However, in both types of society there is a tendency, during these periods of struggle, for the rule structure not to be sustained, and society to fragment to such an extent that the warring tribes or states are better described as society. Finally, both in primitive anarchic society and in modern international society there are factors, outside the framework of rules, that influence politically competent groups, inducing them to adjust in terms of these factors. These are, among other factors, mutual restraint or fear of unlimited conflict, the strength of habit or the inertia and long-term interests in preserving a system of collaboration (consciously rationalized in the modern world and intuitively perceived in primitive society), despite the fact that, in the short term, they are working towards their destruction[194].

Naturally, the aforementioned generally accepted principles of right process, in Franck`s parlance, varied historically. Nevertheless, being general and accepted, these principles were explained or implied and therefore, to some degree, transparent.

In the current international order, which could be characterized as politically, economically and institutionally liberal[195] by the rise and prominence of liberal democratic states, proto-principles seem to be those found in the 1941 Atlantic Charter. This joint declaration by President Franklin D. Roosevelt and Prime Minister Winston Churchill was limited to an affirmation of the principles that the two leaders would like to build around for a better future for the world and was not directly incorporated into the 1945 Charter of the United Nations. Still, it sets out the following principles: peace and security (including the right to self-defense and the preservation of the territorial status quo), self-governance (self-rule, **open societies**, the **rule of law**), economic prosperity (economic advancement, improved labor standards, social welfare), and free trade and the preservation of the global commons.

The Bretton Woods institutions stepped up the liberal pact. John Gerard Ruggie refers to the nature of the international order established after 1945 as

[194] Bull, H. (2002). *A Sociedade Anárquica*. Classicos IPRI ed. Translated by S. Bath. São Paulo: Imprensa Oficial do Estado. Editora Universidade de Brasília. Instituto de Pesquisa de Relações Internacionais., p.75.
[195] Kundnani, H. (2017). *What is the Liberal International Order?* The German Marshall Fund of the United States. Strengthening Transatlantic Cooperation, p.2.

embedded liberalism[196], multilateral in character and *predicated upon domestic interventionism*. Embedded liberalism would be an accommodation between free market system and domestic policies promoting the welfare state.

> The essence of embedded liberalism, it will be recalled, is to devise a form of multilateralism that is compatible with the requirements of domestic stability. Presumably, then, governments so committed would seek to encourage an international division of labor which, while multilateral in form and reflecting some notion of comparative advantage (and therefore gains from trade), also promised to minimize socially disruptive domestic adjustment costs as well as any national economic and political vulnerabilities that might accrue from international functional differentiation. They will measure collective welfare by the extent to which these objectives are achieved[197].

The concept of embeddedness was borrowed from Karl Polanyi's seminal work *The Great Transformation*. Analyzing the political and economic dynamics over the past few centuries, Polanyi argued that, with the rise of capitalism in the nineteenth century, the rationalization of economy activities "disembedded" such activity from society and came to dominate it. By "embeddedness", Polanyi meant that economic institutions were not formally autonomous but subordinated non-economic political, religious, and social institutions until the 19th century[198]. The economic institutions then came to dominate society and from that point on, decision makers and economic theorists promoted, albeit without total success, embedding or subordinating political, religious and social relations in an economic logic[199].

The dominance of this model of embedded liberalism endured until 1970, when neoliberalism started to take its place as the dominant world paradigm. In both the paradigm of embedded liberalism and neoliberalism, the reform agenda was considered the responsibility of and allocated to regulatory activities of the States. A momentous example is the historical process through which "market economy" was defined. As Thorstensen, Ramos, Muller and Bertolaccini report:

> The Multilateral Trading System was created in the 1940`s with the GATT, containing clear objectives to liberalize and promote trade as an instrument of economic development. Aiming to become

[196] Ruggie, J.G. (1982). *International regimes, transactions, and change: embedded liberalism in the postwar economic order*. International Organization, 36(2).
[197] Ruggie, J.G. (1982). *International regimes, transactions, and change: embedded liberalism in the postwar economic order*. International Organization, 36(2), p. 399.
[198] Polanyi, K. (n.d.). *The Great Transformation. The Political and Economic Origins of Our Time*. Boston: Beacon Press. Beacon Press. Kindle Positions 389-391. Kindle Edition.
[199] *Idem*, Kindle Position 403.

> universal, the Multilateral Trading System gave support and incentives to both market and non-market economies (NMEs) to participate in its activities. With the strengthening of the Cold War, however, NMEs left the negotiations leading to General Agreement on Trade and Tariffs (GATT).
>
> During the second half of the 20th century, it was a common perception that the GATT system, along with the OECD, was the club of market economies in contrast to the Council for Mutual Economic Assistance – Comecom – that would be the club of centrally-planned economies. In this sense, GATT rules, tailored for market-economies, did not envisage dealing with the different aspects of NMEs[200].

The authors affirm that there is no uniform legal definition of market economy or non-market economy (NME). They also point out that although the system originally encouraged participation from market economy, non-market economy and transition economy countries, over time, it started to promote market economy policies actively to urge countries with different policies to make the transition to those economies:

> The failure to establish the International Trade Organization (ITO) led to a lack of specific trade rules applying to international trade between planned and market economies. Article XVII of the GATT dealt with only a minimal spectrum of the challenges posed by the subject. The process of accession of NMEs to the GATT, during the subsequent years, put on view some of these challenges and how they were dealt with in the protocols of accession – mainly through buffer mechanisms and import obligations. As the Multilateral Trading System gradually changed its focus, from import tariffs to non-tariff barriers, and started to supervise internal policy measures from its members in order to guarantee a level playing field, so did the adaptations required for the accession of NMEs. With the creation of the WTO, there was a substantial change in the nature of obligations imposed on acceding NME countries in order to preserve the well-functioning of the system. They now focus on a systemic approach, requiring deep economic changes and an adaptation of the development model of the acceding NME[201].

This is one of issues at the epicenter of the current WTO institutional and political crisis.

On February 20, 2020, the United States circulated a Draft General Council

[200] Thorstensen, V., Ramos, D., Muller, C. and Bertolaccini, F. (2013). *WTO-Market and Non-Market Economies: the hybrid case of China*. [online]. Available at: https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/15865/LATAM%20-%20WTO%20and%20NMEs.pdf?sequence=1&isAllowed=y [Accessed 18 July 2020].
[201] *Idem*.

Decision entitled *The Importance Of Market-Oriented Conditions To The World Trading System*, that identified elements considered particularly important to market-oriented economies:

> i. decisions of enterprises on prices, costs, inputs, purchases, and sales are freely determined and made in response to market signals;
> ii. decisions of enterprises on investments are freely determined and made in response to market signals;
> iii. prices of capital, labor, technology, and other factors are market-determined;
> iv. capital allocation decisions of or affecting enterprises are freely determined and made in response to market signals;
> v. enterprises are subject to internationally recognized accounting standards, including independent accounting;
> vi. enterprises are subject to market-oriented and effective corporation law, bankruptcy law, competition law, and private property law, and may enforce their rights through impartial legal processes, such as an independent judicial system;
> vii. enterprises are able to freely access relevant information on which to base their business decisions; and
> viii. there is no significant government interference in enterprise business decisions described above.

The General Council agreed to reaffirm Members' commitment to open, market-oriented policies in order to achieve market-oriented conditions that are critical to ensuring a level playing field for workers and businesses and a fairer and more open world trading system that benefits their peoples.

What seems inarguable is that the politically and economically liberal international system, while emphasizing principles such as national sovereignty and non-intervention and extolling multiculturalism, imposes liberal reforms and internal alignments that affect not only the States' regulatory autonomy, but also its very nature, forcing the introduction, where it does not exist, of independent powers, rule of law and republican aspirations.

Without doubt, the international order founded a little more than seventy years ago is now facing serious challenges in the recent retreat from standards of liberal democracy[202] and the rise of non-Western countries in international organizations with their own visions for the international system and international law:

> Many outside the West see the liberal international order —

[202] Muggah, R. and Owen, T. (n.d.). *The global liberal democratic order might be down, but it's not out*. [online] World Economic Forum. Available at: https://www.weforum.org/agenda/2018/01/the-global-liberal-democratic-order-might-be-down-but-its-not-out/ [Accessed 18 Mar. 2020].

> and in particular understand the role of the United States in it — in quite different terms than those within the West. For example, at the Munich Security Conference in 2016, Fu Ying, chairwoman of the Foreign Affairs Committee of the Chinese National People's Congress, distinguished between three elements of the "US-led world order": "the American value system," "the US military alignment system"; and "the international institutions including the UN system." When Chinese officials talk about supporting the international order, she said, they meant the third element — that is, they support liberalism in one sense (a "rules-based" order) but not in another (a system based on Western values like democracy).

Among the non-western countries that question the features of the international order, there is no doubt that the most important, due to the competitive advantage of its manufactured exports, is the People's Republic of China. Naturally, the questions are directly related to each country's understanding of the world.

The Five Principles of Peaceful Coexistence was one of the People's Republic of China's greatest contributions to the development of international law[203]. It announced Asian principles for international relations, but was not restricted to diplomatic relations[204]. The nascent People's Republic of China, in its Proclamation of September 29, 1949, which announced the end of the Republican phase led by nationalist forces, declared that the international relations of the New Nation would be governed by the principles of equality, mutual benefit and respect mutual recognition of the territorial sovereignty of States[205]. Five years later, in the Preamble to the Agreement between the People's Republic of China and the Republic of India on Trade and Exchange between the Region Chinese from Tibet and India, signed on April 29, 1954, two other principles were added to those canons. They thus became: 1. mutual respect for territorial integrity and sovereignty; 2. mutual non-aggression; 3. mutual non-interference in the internal affairs of another State; 4. equity and mutually beneficial treatment; 5. peaceful coexistence. Months after signing the bilateral treaty, the plenipotentiaries of both countries issued a joint statement in which it is determined that these principles should also apply more generally in the rest of Asia and international relations.

The "five principles" clearly drew inspiration from the principles contained in

[203] Tieya, W. (1990). *International Law in China: historical and contemporary perspective*s. Dordrecht: Martinus Nijhoff Publishers, p.264.
[204] *Idem*, p. 271.
[205] Ibidem, p. 264.

Article 2 of the San Francisco Charter, which instituted, in 1945, the United Nations Organization. Although the principles of the UN are more numerous and comprehensive, the "five principles" achieved greater status and were replicated in numerous treaties, bilateral and multilateral agreements and governmental declarations[206]. Notably, the Charter of Economic and Social Rights, which lists fifteen principles, begins with the “five principles”. Almost a decade later, following the legendary Bandung Conference, where twenty-nine Asian and African non-aligned countries, countries gathered to hold a foreign policy summit, the “five principles” were expanded to ten:

> 1. Respect for fundamental human rights and for the purposes and principles of the charter of the United Nations
>
> 2. Respect for the sovereignty and territorial integrity of all nations
>
> 3. Recognition of the equality of all races and of the equality of all nations large and small
>
> 4. Abstention from intervention or interference in the internal affairs of another country
>
> 5. Respect for the right of each nation to defend itself, singly or collectively, in conformity with the charter of the United Nations
>
> 6. (a) Abstention from the use of arrangements of collective defence to serve any particular interests of the big powers
>
> (b) Abstention by any country from exerting pressures on other countries
>
> 7. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country
>
> 8. Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties own choice, in conformity with the charter of the United Nations
>
> 9. Promotion of mutual interests and cooperation
>
> 10. Respect for justice and international obligations

In the early 1960s, Asian, African and Eastern countries asked the United Nations General Assembly to include in its agenda “Considerations on the Principles of International Law Concerning Peaceful Coexistence between States”. As Western States opposed the term “coexistence”, it was replaced by “friendly relations”. A Resolution was addressed to the Sixth Commission on International Law for the Codification of General Principles of Law International concerning friendly relations

[206] Ibidem, p. 265.

between States. Of this convention work, a homonymous Declaration emerged advocating seven principles: (i) States should refrain, in their international relations, from threat or use of force against territorial integrity and independence policy of a state or in any way inconsistent with the purposes United Nations; (ii) States must resolve their disputes by in such a way that international peace, security and justice cannot are put in danger; (iii) the duty not to intervene in matters of domestic jurisdiction of any State, in accordance with the Charter; (iv) the duty to States to cooperate in accordance with the Charter; (v) equal rights and self-determination of peoples; (vi) sovereign equality of States; (vii) the States must fulfill in good faith the obligations assumed in accordance with the Charter[207].

The above description should make clear that the formula for identifying the general principles of law International, as well as those that should be recognized as such today, is highly controversial and disputed. That is the reason why the International Law Commission (CDI) mandated, in 2017, the creation of Long-Term Working Group to Analyze General Principles of International Law[208] to progressively develop and codify international law. The initiative was the result of the report launched on March 31, 2016, by the Commission Secretariat, on Possible Topics for Consideration in light of the Review of the List of Topics in International Law of 1996. The theme of “general principles of law” was listed among those that the Commission would address in coming years.

Although the work is still in the early stages, a certain doctrinal pacification has been achieved in the sense that the “five principles”, reinforcing UN principles but also expanding their scope, particularly by returning to the semantic nuclei of “coexistence” and “mutual benefit”, which offer more equality in relations between states than “peaceful and friendly” and leaving out mention of the balance of benefits that ought to govern exchanges.

In addition to the Chinese contribution, other non-Western perspectives on International Law and on international relations deserve attention. They might also

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[207] United Nations General Assembly. *Resolutions Adopted by the General Assembly during its Twenty-Fifth Session. (XXV), 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*. https://daccessods.un.org/TMP/8824489.71271515.html.

[208]United Nations (n.d.). *Annexes. A. General Principles of Law*. [online] legal.un.org. Available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/annex.pdf&lang=EFSRAC [Accessed 18 Apr. 2021].

play a part in shaping the order in transition. Keishiro Irye wrote a famous account of the principles of International Law in light of Confucianism.[209] The author features prominently Ta T'ung, an ancient ideal of harmonious Chinese order that might serve as an inspiration in present times for a conception of world government. Ta T'ung was a republic that, however universal, did not encompass the non-Chinese world, which was not considered as strongholds of foreign powers or States, but as only barbarians.

Ta T'ung was ruled by Li (codes of morals, rites, legal rules and law) and Tao (the principled course) and by principles that included: peaceful settlement of disputes, inviolability of messengers, mutual recognition, humanity in warfare, recognition of dynasties and noble lineage (or of authority) based on their legitimacy (understood as respect of rules of succession), permission of passage through a third State, mutual assistance in time of famine or disaster, *par in pare non habet imperium*. Prohibited were artificial alteration of the course of inter-State rivers, submission of national and inter-state disputes to third States, inter-State cooperation in political, economic and military activities for mutual benefit, extradition of political criminals, employment of political refugees as an instrument of conspiracy against their home state, intervention in international affairs and pacification of civil disorders, the use of force, and arms trafficking.

K. N. Jayatilleke[210] argues that there is no Buddhist law or International Law *per se*, but that trace elements of the Buddhist ethics are present in secular law. For Buddhism, *the ultimate sovereignty resided* (…) *in the eternal principles of righteousness*[211], not in the word revealed by divine authority, nor because a simple human being found enlightenment and would become part of the Buddhist Pantheon of deities. The Buddhist conception of law is supremely naturalist, deeply rooted in morality and aimed at the perfectibility of human beings and the improvement of the common good. For that reason, trade in arms, slaves, meat, intoxicants and poisons are to be forbidden, while the equality of sovereign states is valued. Conflicts are to be mediated, not litigated.

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[209] Iriye, K. (1967). *The Principles of International Law in the Light of Confucian Doctrine* (Volume 120). Collected Courses of the Hague Academy of International Law.
[210] N. Jayatilleke, K. (1967). The Principles of International Law in Buddhist Doctrine (Volume 120). *Collected Courses of the Hague Academy of International Law*, 120.
[211] *Idem*, p. 478.

For Jayatilleke, *Buddhism does not favour a command theory of the law*[212]. The Ten Virtues it elevates are focused on self-improvement. In essence, the State and the law should be democratically conceived and republican, the king being no more than *primus inter pares*. Rule of law is important, as long as it is righteous. Sanctions in the face of illegality, although allowed for law enforcement, are deemed less important than the dictates of conscience, respect for public opinion and respect for righteousness[213]. Buddhism, whose foundational texts advance no legal project, much less mandates for international order, nevertheless proposes tenets that are in line with a notion of legitimacy as the main vehicle for maintaining order. Jayatilleke goes on to suggest that the sources of law are fourfold: those based on by the Buddha's statements, by a Sangha (a religious unity such as a monastery), edicts from a body of learned doctors of the law, or by a single learned doctor of the law. Laws so established would only be applicable if they were in accordance with Dhamma (the higher law, or Buddhist theory of knowledge) and Vinaya (the constitution or code of laws).

While it is difficult to carve a theory of law out from Buddhist doctrine, an interesting concept for international relations is easily extracted. This is the idea of a world-ruler or world-statesman, which derives from what the author considers to be the messianic component of Buddhism: "Cometh the hour, cometh the man". In the moment of the victory of Dhamma, meaning the fulfillment of political philosophy and constitution or, in other words, the rule of law, the world-ruler would carry out their duties or tenure non-personally. That sovereign would not ever see itself as absolute, for it would submit to the principles of Dhamma that were the condition for its exercise of power.

Islam, however, and as Sobhi Mahmassani[214] points out, is a religion, a moral code and a system of law that is scientifically molded and structured from established sources and recognized schools. International Law (as-siyar) represents one element of the law that was established before the sixteenth century. Considered a subdivision of the general law (Shari'a), Islamic International Law shares the same legal sources as the other branches of the Islamic jurisprudence: texts (the Qur'an, hadiths, and

[212] *Idem*.
[213] Ibidem, p. 504.
[214] Mahmassani, S. (1966). *The Principles of International Law in the Light of Islamic Doctrine* (Volume 117). Collected Courses of the Hague Academy of International Law.

sunna), plus general principles of law based on custom, on reason and equity. Mahmassani identifies the principles of Islamic International Law to be: peace and human equality; peace, tolerance and universal brotherhood; obligation to pursue peace; peace as the normal state; sanctity of treaties; encouragement of all kinds of peaceful relations (trade); public order as the only justification for limitations; mediation and arbitration. In addition to those principles, numerous others were developed for *jus ad bellum* and *jus in bellum* that are not central to this discussion.

From the point of view of political thought in international relations, non-Western perspectives may lack theoretical grounding, especially if only the Western scholarly standards for the discipline of International Relations Theory are valued; namely positivist, rationalist, materialist and quantitative analyses and argumentation[215].

Yaqing Qin partly diverges from this account, presenting some advances in Chinese academic efforts. Qin explains that, in the Chinese context, theory has two meanings. One is action-oriented, meaning theory is conceived as guidance for action. Mao's 'leaning toward one side' strategy and his Nixon Doctrine are good examples. The other connotation of theory in the Chinese context is knowledge-oriented, defining theory as a perspective that helps understand the world. Good examples are the American and British theorists of International Relations[216]. Moreover, the development of theory in three phases (pre-theory phase, theory-learning phase, and theory creation phase) can be clearly identified in the Chinese context[217].

For a long time, a suzerainty and vassalage worldview prevailed in China. The tributary system as not international *per se*, but a world view without *de jure* or *de facto* equality among actors[218]:

> In the traditional Chinese intellectual mind, there was nothing similar to the concept of 'international-ness', for there was no existence of a structure in which the ego stands against the other. The world or the state in the Chinese culture was not a clearly defined entity with a finite boundary. The Chinese world referred to everything under the heaven and on the earth. There was a sense of space, for there was a centre

[215] Qin, Y. (2010). *Why is there no Chinese international relations theory? In: Non-Western International Relations Theory Perspectives on and beyond Asia*. London. New York: Routledge Taylor & Francis Group, p.26.
[216] *Idem*, p. 27.
[217] Ibidem, p. 32.
[218] Ibidem, p. 37.

> and a gradually distancing periphery; there was a sense of time, for the generations of the Chinese in their thought and practice saw an endless continuum along which history and the future distanced gradually from the present backward and forward (…). If you stand on top of the hill in the Imperial Garden behind the Forbidden City, you see a square-shaped complex of buildings surrounded by a larger square surrounded by an even larger square, and so on. This is the Chinese understanding of the world, which is infinite in space and time with the Chinese emperor's palace at the centre. It was a complete whole where no dichotomous opposites existed. Thus, there was only one ego, a solitary ego without an opposite alter[219].

This perspective prevented theory of the international system from emerging and reaching maturity. Currently, China finds itself in the third phase of theoretical development in relation to exogenous theories, presenting some interesting contributions, but still lacking a national theory that competes with the established theories. Whatever the level of theoretical political or legal elaboration, the transcivilizational perspective is fundamental for greater legitimacy in international political and legal systems.

As will be explained in due course, despite the non-uniform acceptance by the Advisory Committee of Jurists (hereinafter the ACJ) of the terms of what would become the Article 38 (3) concerning the general principles of International Law of the Statute of the PCIJ, replicated in the Statute of the ICJ, one thing was uncontroversial: jurists never wanted to circumscribe the sources of law or the general principles to those recognized by States, if not by nations, in a more comprehensive fashion than the ones derived from State practice[220]. This cognitive opening to transcivility does not aspire to negate the historical suspicion that the term "recognized by civilized nations" had, in fact, at its inception a discriminatory implication. However, it demonstrates an already seminal idea of the need for a transcivilizational approach. Even though the criterion for which civilizations and cultures should be taken into account remains dubious. For Onuma Yasuaki:

> The transcivilizational perspective is basically a way of seeing things including matters on International Law in a different manner from that of prevalent international and transnational perspectives, which are often unconsciously taken by all of us, living in the modernistic, West-centric and State-centric world. It is not an alternative theory or methodology in the rigid sense of the term. Nor

[219] Idem, p. 36.

[220] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p.22.

> does it mean some civilizational-centrism. Rather it merely seeks to see the world from a viewpoint which as in fact been adopted in an unconscious manner, yet mostly ignored or underestimated during the West-centric, State-centric modern period.
>
> A transcivilizational perspective is a perspective from which we see, sense, recognize, interpret, assess, and seek to propose solutions to ideas, activities, phenomena and problems transcending national boundaries, by developing a cognitive and evaluative framework based on the recognition of plurality of civilizations and cultures that have long existed in human history[221].

Whatever the civilizational perspective of the international system or the purpose it should serve, a crisis of legitimacy is inferred by lack of representation or, relatedly, transparency. The claim that a system of representation, even if unfaithful, is not necessarily transparent could be considered a false syllogism. The events and the narratives demonstrate, however, a reality proven by experience. The least powerful countries in the international scenario have repeatedly complained that there is a fateful problem of access to information in the international environment, which aggravates the crisis of representation and legitimacy.

Transparency has become a modern mantra, a fetish, an obsession and an ordeal. Any ideology that aims for ubiquitous and perpetual conformity, control, surveillance, perfection, total illumination might also bring spiritual and informational burnout, if not bare apathy towards transparency, for highlighting everything obscures what is really important. In the words of Byung-Chul Han, who draws an aesthetic notion of transparency from art to all the human sciences, (total) transparency (might) come at the cost of absence of sense, of deep hermeneutic structure, semantic richness, transcendence and truth, for only emptiness is entirely transparent. In this sense, it might only amount to sensational, though ineffective, bravado. Although a deep-rooted legal concept that goes far back in time, a general feeling of incompleteness about transparency persists: the obscurity in attire of clarity is the prevailing pattern of much of the legal compliance framework in the different branches of law. Simple publicity is not clarity.

The quest for transparency has been mixed into many agendas. In the international arena, transparency seems to be a promising response, or at least an

[221] Yasuaki, O. (n.d.). *A Transcivilizational Perspective on International Law. Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century*. Collected Courses of The Hague Academy of International Law - Recueil des Cours, pp.130–131.

auspicious start to an attractive answer, to the problems of legitimacy and democratic deficit in international institutions and regimes. Different reasons lead different countries, whose stature in terms of power resources differ widely, to question the legitimacy of international institutions and international law. Such inconvenient inquiries are frequently raised, and many of the reasons for them are connected to lack of transparency. With specific regard to the WTO multilateral trade regime, the issues of legitimacy and democratic deficit seem to call for review, and ideally reform, of the Organization's external and internal information flow, of the *modus procedendi* of its administration, as well as improvement in the parameters through which the duty or principle of transparency, is promoted.

Chapter 2
TRANSPARENCY IN INTERNATIONAL LAW

Before diving into the theoretical and historical analysis of transparency in International Law, it might be helpful to refer to Maria Panezi's summary of certain accomplishments in International Law scholarship during the 1990s and early 2000s:

> (…) In the nineties and throughout the last decade, many public International Law scholars identified the proliferation of international institutions and tribunals and the ensuing institutional crises, and set out to create an analytical framework that would provide investigations and potential solutions to problems. All of the scholarship in the group of international public law gravitated strongly towards public law analyses. They engage in discussions of global governance, which they trace in the emergence and consolidation of principles such as **transparency, accountability and participation**, as well as global rights and legal orders above the nation state. Four sub-groups emerged within International Public Law, all of them using parts of the domestic public law conceptual metaphor: first, the **Global Administrative Law (GAL)** theorists, second those who discussed the exercise of **public authority in international organizations**, the **constitutionalists** and finally, **societal constitutionalism**[222]. (emphasis added)

These observations provide a partial structure around which the present work will build and develop in new directions.

2.1 Transparency and Legitimacy

A concept that precedes the analysis, also extracted from the domestic public law and politics, is that of legitimacy, a quality of **public authority** understood as indispensable for the stability of relations. As seen above, the exercise of public authority is one of the aspects of International Law scholarship during the recent years.

Legitimacy is an essentially political concept. In the broadest sense, it refers to fairness and rationality. In a specific sense, it is an attribute of the State that marks the degree of social consensus that ensures obedience to the State without systematic recourse to violent force and coercion. From a sociological perspective, the legitimation process depends on several factors. Some examples of the focal points of legitimation are the political community, the regime, and the government.

[222] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.112-139. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].

Finally, in political science, complete state legitimacy remains an abstraction, for a fully legitimate State would theoretically never need to resort to coercion[223].

Despite its nature, legitimacy was not typically used as an analytical tool in international relations theory up until the 1990s, nor in the literature on International Relations, what has traditionally focused more on power dynamics. For authors grouped in the realism school, legitimacy, like International Law and international institutionality, is considered epiphenomenal. Kauppi and Viotti described as partisans of “Images of International Relations” (Liberals, Economic Structuralists, English School thinkers) and those identified with the Interpretative Understandings approach (Constructivism, Critical Theory, Feminism, Postmodernism) all the above mentioned elements that are important foundations of the very existence of international political space. Yet even by these schools, legitimacy *per se* received scant attention. [224]

Contrary to Gelson Fonseca Junior, I do not consider the studies on the rise of ideas, cultural, religious and national identities that emerged after the end of the Cold War, of which the famous *Clash of Civilizations* by Samuel P. Huntington stands out, as studies on legitimacy as phenomenon or concept. They only brought to light hitherto understudied factors in the political calculations of state agents, perhaps because of the preeminence attributed to the high politics themes that marked the post-war period (geopolitics, the arms race, military power, scientific and technological superiority and, at the bottom of the list, economics)[225].

Without exploring the causal relationship, in texts that advocate reform of international institutions, legitimacy is usually indirectly presented as a diffuse solution to problems of international governance. Incredible as it may seem, it was in the field of International Law that legitimacy in International Relations was studied more carefully. Thomas M. Franck revisited the ontological question of the juridicity of International Law, proposing an enlightening theory that somehow converges, although partially, with the already mentioned Law and Economics approach to the subject. By contrasting its Austianian weakness, that is, its lack of effective coercive

[223] Levi, L. (1983). Legitimidade. In: N. Bobbio, ed., *Dicionário de Política*. Volume 2. Brasília, Distrito Federal, Brasil: Editora UnB, p.675.
[224] Viotti, P.R. and Kauppi, M.V. (n.d.). *International Relations Theory*. 5th ed. Pearson.
[225] Fonseca Júnior, G. (1998). *A legitimidade e outras questões internacionais*. São Paulo, SP: Paz de Terra, p.28.

enforcement mechanisms in a general scenario of systemic compliance and respect for its parameters, Franck locates the origin of International Law validity's in the shared feeling of legitimacy[226]. After all, considering the practical factors that impede authorities from maintaining a ubiquitous presence in society through police power, what else could explain obedience to the norms once when, to a large degree, disobedience of the law will only generate slightly more harmful legal consequences than voluntary adherence? The working definition of legitimacy offered by Franck is that "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process"[227]. As indicators of rule-legitimacy, Franck offers determinacy, symbolic validation, coherence, and adherence.

By determinacy Franck means clarity, precision and reasonableness, qualities manifested by the text of the rule or by the remedial work of a legitimate clarifying process, one achieved through judicial or quasi-judicial avenues or some political dispute settlement mechanism. Determinacy is the quality that counterbalances the straightforward clarity that often leads to *reductio ad absurdum* interpretation of norms, eroding norm legitimacy and ignoring the many layers of social complexity and sophistic interpretations that result from the opportunistic use of the norm's elasticity. Franck provides as an example of the first the categorical proscription of the use of force in international relations and of the second, the doctrine of just war. While the former excludes what the author considers legitimate justifications for the use of force like immediate, eminent, putative and preemptive legitimate defense, the latter admits an overly broad interpretation of legal reasons that might be used to justify going to war. Determinacy can be achieved through institutionalized multilateralization, just as clarity can.

Symbolic validation gives validity and legitimacy to the rules, safeguarding cultural values and anthropological dimensions. This attribute is not negligible, especially in a multicultural society. I offer as an example one of China's most striking

[226] Franck, T.M. (1990). *The power of legitimacy among nations*. New York: Oxford University Press, p.20.
[227] Franck, T.M. (1990). *The power of legitimacy among nations*. New York: Oxford University Press, p.24.

experiences in the international system that illustrates both the power of cognitive dissonance and symbology. The first systematic compilation of written norms in China took place in the Spring and Autumn Periods of the Warring States, or Warrior Period (770-221 BC). Subsequently, in the interregnum between the Han Dynasty (206-220 BC) and the Tang Dynasty (618-907 AD), a loose system of written laws was developed that was added to and revised existing norms. The Imperial Chinese legal system, although based on Confucian proceduralism with its ritualistic and behavioral norms and blurry distinction between legalism and morality, was no stranger to codification or the notion of rule of law. Notwithstanding, in the field of relations with foreign communities, the system of conducting relations through treaties was unfamiliar. Instead, such business was conducted on the customary procedural and ritualistic basis that afforded domestic arrangements their validity[228].

The different assumptions regarding the criteria that had to be met to give rise to international obligations was the fundamental cause of the disagreements that arose following the 1793 Macartney Mission. The British delegation sent to obtain trading concessions believed, from the perspective of Western international legal norms, that these had been granted. However, they ignored the Chinese treaty-sanctioning ritual, which, from the Chinese perspective, rendered the agreement invalid. Despite this emblematic case, it took twenty years after its forced opening to the Westin the mid-19th century for China to incorporate some precepts and terms of Modern International Law into its bilateral negotiations. It was European imposition in the service of the economic agenda that forced diplomatic opening and free trade in this and other regions of the world.

Despite the gradual standardization of customs, especially in the international arena, anthropological and sociological sensibilities and peculiarities are still very relevant in International Relations and International Law. Politics is essentially symbolic and, even with the advent of e-government that governments all over the world have been forced to embrace during the social isolation caused by the Covid-19 pandemic, the importance of the 'sign of authority' has not diminished. At the same time, the pandemic experience has cast doubt over the possibility of conducting

[228] Maia, Clarita Costa. A ária inconclusa: a aproximação china-mercosul pela perspectiva do direito internacional. In: Ribeiro, Elisa de Sousa. Direito do Mercosul. 2a edicao revista e ampliada. UniCeub Educacao Superior. Instituto Ceub de Pesquisa e Desenvolvimento (ICPD). Brasilia, 2019. ISBN 978-85-7267-0900-8.

negotiations almost entirely remotely, as the political and social culture will still require time to adapt to surveillance technologies and online citizenship. Difficult questions are being raised in several fields over the legitimacy of the deliberations remotely carried out in the current historical context. The "sign of authority" is not limited to the mere signature of an international act, promulgation or ratification. There are important visual and ritualistic aspects that consecrate the accord and give it special status. This may be why, judging by the strength of the cultural substrate that still exists in humanity, we remain far from dispensing with ceremonial solemnity in national or international public acts, as they confer the status, the gravity, the importance necessary that validate an act or the actors.

Franck resorts to Dworkin's concept of coherence, who, instead, uses the term integrity, which would have a moral and an adjudicative aspect. By the former he means that a substantive rule has integrity when it relates in a principled fashion to other rules of the same system, and, by the latter that, in applying a rule, conceptually alike cases will be treated alike.

The author distinguishes consistency from coherence in the following terms: while the former requires that like cases be treated alike, the later requires that distinctions in the treatment of like cases be justified in principled terms. *Coherence legitimates a rule, principle, or implementing institution because it provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems*[229].

According to Franck, the international community, more than national legal systems, places great emphasis on respecting coherence. To illustrate this, he describes the emergence of three new international rules as an adaptive effort. These include, among others, the right to self-determination and the development of a notion of state equality as exemplified by the voting system of the United Nations.

> Practice with each led states to a crossroads where choices had to be made between simples consistency, a more sophisticated coherence, or a state of rule-lessness. In the first example, the failure to negotiate a transition from straightforward consistency in the rule`s application to a more complex but still principled or rationally coherent rule led to the erosion of rule-legitimacy and to a rise in anarchic state

[229] Franck, T.M. (1990). *The Power of Legitimacy Among Nations*. New York, Oxford: Oxford University Press, pp. 147-148.

> behavior inexplicable except in terms of narrow and oft-times deluded self-interest. In the second, a special privilege inconsistent with the equality principles was sacrificed voluntarily by states which could no longer justify their preferential status. Arguably, the sacrifice was deliberately made in order to shore up the faltering legitimacy of the rule-system[230].

Coherence must be internal (which means connectedness among the several parts and purposes of the rule) and external (between one rule ou other rules, through shared principles)[231].

Finally, the concept of adherence, in the way it was crafted for domestic law, is also difficult to transpose to international law. The lack of secondary procedural rules, which allow a rule to change and adapt court decisions through legislation, or of a unifying rule of recognition of sources of law deprive International Law grounds of legitimacy. Franck rejects these arguments, which would dilute the binding power of international treaties, affirming that there is an ultimate rule that imposes their observance. Just as there are rules of public law that impose the conditions of validity of contracts and their cogency once they are respected, so there are rules that make international treaties, even those considered to have only contractual status, mandatory for a reason that is outside the voluntary pact but derive from the duties of States imposed by International Law or the international community. There could therefore be a subtle order of rules of recognition in International Law which the primary rules would infuse with strength. In the past, natural law and divine law would have been the underlying substrate of that subtle order. Nowadays, the nature is contested. Are they the general principles of law? Even though they do not know the exact nature of this substrate, as a result of membership in international community, states, governments, judges and the public in general believe in its validity and more often than not act as they do know its nature.

Of all the attributes of legitimacy, only one does not involve transparency: integrity, which is the relation of one rule to the others. Clarity, determinacy, symbolic validation, consistency and coherence require not only textual publicity, but also unequivocal standards for stabilizing expectations regarding the rule of law. Those are legal and procedural features of transparency. There is no way that the legitimacy

[230] *Idem*, pp.153-154.
[231] Franck, T.M. (1990). *The power of legitimacy among nations*. New York: Oxford University Press, p. 180.

of International Law can be achieved without an adequate level of transparency. In what seems to complement Franck's concept of legitimacy, Mattias Kumm [232] presents a constitutionalist model to estimate the levels of legitimacy of International Law. After World War II, in both national and international law, liberal political morality dominated rule-making and constitutionalist thought. The national and international events that led to Nazism and the wars of aggression in Europe and South Pacific prompted jurists and legislators to put principles, justice, legitimacy and morality at the center of the juridical order. The national constitutions that were promulgated in the post-war era gave constitutional fundamental rights the status of ultimate parameters of juridical and political legitimacy. This was a result of normative theorizing endeavors that *had expanded from jurisprudential accounts of rights and questions of legal reasoning to constitutional theory more generally*[233].

In contrast, queries about the legitimacy of International Law were curtailed. In consonance with Kumm`s panorama, this development had many causes. The newly created international system had to deal with traditional themes in the field of international law, which generated a feeling of detachment in national societies and even in international legal communities. The United Nations system, in turn, concentrated on the most immediate needs of developing countries, leading the legal communities of countries with more advanced constitutional traditions not to fall behind and support International Law or the international system as a motor for or pillar of the national constitutional values that were being consolidated. Another factor was the Cold War, whose emphasis on alliance prevented a more daring approach in the direction of participatory international constitutionalism[234].

With the end of the Cold War came an opportunity for the promotion of the free transit of people, goods, workers, tourists, which, in turn, opened the floodgates for nefarious activity previously largely cabined within national jurisdictions (organized crime, terrorism, human and drug trafficking, money laundering, gross human rights and environmental abuses, etc) to take on a much greater international dimension. As a consequence, International Law became more specialized and gained scope

[232] Kumm, M. (2004). The Legitimacy of International Law: A Constitutionalist Framework of Analysis. *European Journal of International Law*, 15(5), pp.907–931.
[233] Kumm, M. (2004). The Legitimacy of International Law: A Constitutionalist Framework of Analysis. *European Journal of International Law*, 15(5), pp.907–931, p. 910.
[234] *Idem*, pp.909.

support. Moreover, as the international courts and international organizations gained prominence and respect for their decisions and advocacy, the interpretation of International Law as strictly a product of national consent came into question (e.g., the kompetenz-kompetenz rationale of some international organizations and the flexibilization of the parameters of recognition of customary international law). The international courts' jurisprudence, with their heightened reputation, put significant pressure on States to show greater deference to their decisions.

Following his assessment of the factors that led to the resurgence of International Law, Kumm presents a Four Principles Framework of a Constitutionalist Model for International Law that could ensure its legitimacy. Those principles are international legality, the jurisdictional principles of subsidiarity, the procedural principle of adequate participation and accountability, and the *substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable*[235]. The principle of international legality *establishes a presumption in favour of the authority of international law*[236]. If International Law does not seriously violate the other principles (jurisdictional, procedural and outcome-related), it can contribute to express and reinforce commitments to liberal constitutional democracy in at least three ways: by reinforcing counter-majoritarian mechanisms and the checks and balances of the municipal constitutional systems to, for instance, protect discriminated minorities in a given country; by augmenting the predictability of and thus stabilizing social and juridical relationships; and by curtailing illegal abuses of political power by powerful countries against weaker ones or by national authorities against their own subjects.

Kumm's second principle is jurisdictional legitimacy. By this he means means that replacing the concept of sovereignty by subsidiarity and using as parameters the 'proportionality test' or 'cost-benefit analysis' creates a path for overcoming the long-standing dichotomy of national and international jurisdiction. The two jurisdictions become complementary and mutually beneficial.

The third principle is procedural legitimacy. Since no international institution with global scope is electorally accountable, it becomes necessary to focus on the

[235] Kumm, M. (2004). The Legitimacy of International Law: A Constitutionalist Framework of Analysis. *European Journal of International Law*, 15(5), p. 917.
[236] *Idem*.

rule-making process. Greater legitimacy is achieved by ensuring transparency and participation in the rule-making process for all countries affected, as well as accountability mechanisms that address constituents' concerns. Kumm mentions the European Union Commission's 2001 White Paper, whose terms will be examined later in this dissertation, as a useful source for infusing the idea of transnational procedural adequacy with substantive meaning.

Nevertheless, as will be explained, the very concept of transparency, which runs through all the guidelines in the White Paper, does not constitute a general principle of European law according to current literature. It could potentially be invoked as a nascent right. The resistance to identifying transparency as a general principle of municipal law is one of the challenges that impedes the principle of transparency from becoming common parlance.

The last principle is the outcome-related criterion by which misguided or erroneous decisions might discredit the authority of International Law. To mitigate this risk, Kumm considers mandatory the observation of the what he calls the "principle of substantive reasonableness" in order to preserve the authority of the international order.

Kumm`s "constitutional framework model" does not offer a direct, positive answer to Alf Ros (in 1950)[237] and Thomas Franck's (2004)[238] inquiry on the constitutional nature of the United Nations Charter. Aggregating the impressions of both those authors, the constitutional nature of the Charter would derive from: i) the inexistence of pre-established withdrawal procedures, hindering the evolution from a society to a community of nations; ii) the rigidity of the text that makes it difficult to amend or take a nuanced or differentiated approach; iii) its primacy among legal instruments available to the international community; iv) the aspiration to institutional autonomy; v) the independence of the General Secretariat and the expansion of its powers through the kompetenz-kompetenz doctrine.

More recently, Michal W. Doyle argued that the UN Charter was a *sui generis* treaty with constitutional features. His strongest claim qualifying the Charter as

[237] Ross, A. (1950). La Carte delle Nazioni Unite e un Trattato o una Constituzione? Jus Gentium: *Rivista di Diritto Internazionle Privato*, II(23), pp.97–108.
[238] Franck, T.M. (n.d.). Is the UN Charter a Constitution? [online] Available at: http://edoc.mpil.de/fs/2003/eitel/95_franck.pdf.

constitutional lies in its supranational character, particularly with regards the central element of the social contract: the monopoly over the use of force in international relations, that is, the exercise of police power. The most robust counterpoint is the failure of UN law to command pervasive respect. International Law has expanded to encompass a myriad of offenses and disputes and adjudicatory jurisdictions have multiplied that lie completely outside the UN system[239].

Whatever the original intentions of the architects of the Charter of San Francisco, it can hardly be said that there is consensus in the international society that the Charter represents an international constitution. This is so despite the significant advances in the evolution of the competences of the UN political bodies, the slow consolidation of resolutions, originally non-binding, into a customary International Law *in nascendi* and the many accomplishments of the International Court of Justice in stabilizing expectations about the dictates of international rule of law[240]. UN bodies lack sufficient Executive, Legislative and Judiciary powers to serve as a vehicle for a Hobbesian social contract[241] by which a political entity totally independent from its parts arises and commands the will of its constituent parts.

There are several reasons by which the *sui generis* Charter of the United Nations, does not qualify as a social contract, or in other words, have a constitutional nature. One of these reasons is its democratic deficit, which compromises its legitimacy at different levels and largely explains why much of international society remains uncomfortable in taking such a bold step. If legitimacy is a major issue for the UN, so it is for the WTO. Unlike other Bretton Woods institutions, the WTO does not form part of the UN system and its intergovernmental character is even more pronounced. If UN political bodies have enjoyed the privilege of extending their competences through the principle of kompetenz-kompetenz, a similar attempt at the

[239] Doyle, M.W. (2011). Dialectics of a global constitution: The struggle over the UN Charter. *European Journal of International Relations*, 18(4), pp.601–624.
[240] Trindade, A.A.C. (2003). *Direito das Organizações Internacionais*. 3a ed. Belo Horizonte: Del Rey, pp.9–121.
[241] Referring The Leviathan, of Hobbes, Chevallier explains the social contract as follows: “The transfer to a third party, by contract signed "between each and every one", of the natural right that each has over all things, this is the artifice that will constitute natural men and political society. The sole will of that third party (which may be a man or an assembly) will replace the will of everyone, representing everyone. This third party, for its part, is absolutely alien to the contract under which the crowd has mutually committed to its benefit. No obligation constrains it.”. Chevallier, J.-J. (1995). *As Grandes Obras Politicas de Maquiavel a Nossos Dias*. 7th ed. Translated by L. Cristina. Rio de Janeiro: Agir, p. 72

heart of the current political crisis in the WTO aptly, urgently, and brutally encapsulates its reform controversy. The application of a *de facto stare decisis* system by the Appellate Body was considered an extension *contra legem* of the Organization's competences. So was its practice of reviewing facts, determining the meaning of municipal laws and exploring facts not relevant to the case in question. Moreover, the democratic deficit might be even deeper than already intimated, given the opaque restrictions on participation of non-governmental organizations and other international organizations in negotiations, in addition to even more pronounced problems of transparency.

To conclude, while in general the formalism of International Law is being challenged in many ways, the WTO system the rule of law is fundamentally treaty-based and, therefore, essentially formalist. It thus follows that in WTO law general principles of law, a potential vehicle for expansion of the law, whatever the type (substantive, procedural or interpretative[242]), have a restricted role. This distinction will be explored in the chapter that discusses the jurisprudence of the International Court of Justice and the Dispute Settlement Body regarding the general principles of law in search of clues that the principle of transparency is on the way to consecration. The present analysis focuses on first criterion of legitimacy in International Law with regard legality. As the central subject of this study, it will be taken up in detailed, careful fashion later in the dissertation.

The second and third of Kumm's four principles to assure a legitimate framework for a constitutional International Law are jurisdictional and the procedural legitimacy. Those also cover what Maria Panezi considers three of the four transparency mandates of the WTO: external, internal and administrative or institutional transparency, which she relates irrevocably to what it is considered to be WTO democratization[243].

Using Kumm's analysis as a model, but reversing its order, I will now proceed with an analysis of the aspects of legitimacy and transparency mentioned in the previous paragraph. Before I do, it is important to keep in mind that the literature on

[242] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff.
[243] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.112-139. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].

global democratic deficts can be categorized into three broad groups depending on their focus, synthesized by Kuyper and Squatrito as follows:

> (…) the model of cosmopolitan democracy came with a variety of short- and long-term institutional prescriptions including international courts, transnational parliaments, and multi-level governance architecture that would enable individuals to participate in global decision-making. World government scholars went beyond the cosmopolitan model and outlined a hierarchical and encompassing system of state-like institutions, that could be replicated at the global level. This would include a world parliament, global constitution, and federal government with coercive power. In a different vein, global civil society advocates have often promoted a deliberative model that puts democratizing faith non-state actors who can employ different discourses to oppose, contest, and shape more formal international politics[244].

The nuances that distinguish the groups will be explored throughout the study, but for now it is important to note that the focus in the current state of debate seeks turning away from ideal proposals in favor of strategies meant to inspire democratic values and practices that could lead to incremental improvements.

2.2 Transparency and the Democratic Deficit: Power to the Peoples of the United Nations

> "For I dipt into the future,
> far as human eye could see,
> Saw the Vision of the world, and all the wonder that would be;
> Saw the heavens fill with commerce, argosies of magic sails,
> Pilots of the purple twilight, dropping down with costly bales;
> Heard the heavens fill with shouting, and there raind a ghastly dew
> From the nations airy navies grappling in the central blue;
> Far along the world-wide whisper of the south-wind rushing warm,
> With the standards of the peoples plunging thro the thunder-storm;
> Till the war-drums throbbd, no longer, and the battle-flags were furled
> In the Parliament of man, the Federation of the world.
> There the common sense of most shall hold a fretful realm in awe,
> And the kindly earth shall slumber, lapt in universal law."
>
> "Locksley Hall", Alfred Lord Tennyson [245].

The historian Paul Kennedy took the title of his book, *The Parliament of Man,* from a symbolic stretch of a famous 19th-century poem, one that relies on more than

[244] Kuyper, J.W. and Squatrito, T. (2016). International courts and global democratic values: Participation, accountability, and justification. *Review of International Studies*, 43(1), p.155.
[245] Tennyson, A. (1902). *Maud Locksley Hall and other poems*. New York: Frederick A. Stokes Company.

one symbol to convey the intellectual values of that century. The 19th century, as will be explained further on, with all its contradictions, represents a crucial phase in the path that led International Law to where it is today. To begin with, the poet Tennyson was inspired to write Locksley Hall by the translation of the Arabic Mu'allaqat, a collection of seven long pre-Islamic Arabic poems[246]. This is unsurprising in light of the *esprit d'internationalité* that swept across 19th-century England and was reflected in the popularity of deals like religious tolerance, freedom of opinion, free trade, and the development of contacts between peoples[247].

This apparent cognitive openness to alterity, however, did little to diminish the shared opinion that European International Law remained superior to the juridical constructions in distant lands. Article 1 of the *Institut de Droit International* founded in 1873 went as far as describing its mission to be the "*conscience juridique du monde civilisé*", a notion that so undeniably influenced International Law that leaders returned to it generations later when negotiating the "general rules of international law". The "civilized" qualifier transcended centuries of thought and was allegedly amalgamated in the ICJ Statute[248] not as a vestige of civilizational prejudice, but as a way of curtailing space for judicial activism by the future International Court of Justice judges. The inclusion of "general principles of law" to address the many instances of *non liquet* in International Law required to circumscribe them to more established legal parameters. Anyway, the controversy is now considered dead letter, as a result of the historical work that has demonstrated the load of civilizational prejudice implicit in the term and the important dimension of multiculturality assumed in current International Law practice.

Perhaps not the poem itself, but certainly the spirit of the time contributed to the founding of the Inter-Parliamentary Union (hereinafter IPU) in 1889, whose headquarters were in Bern, Switzerland. The IPU played an important role in setting up the Permanent Court of Arbitration in The Hague. Over time, its mission has evolved towards the promotion of democracy and inter-parliamentary dialogue. Besides the Permanent Court of Arbitration in The Hague, the IPU was instrumental

[246] Lahiani, R. (2020). Unlocking the Secret of "Locksley Hall." *Comparative Critical Studies*, 17(1), pp.25–46.
[247] Koskenniemi, M. (2002). *The gentle civilizer of nations: the rise and fall of International Law 1870-1960*. Cambridge: Cambridge University Press, p.12.
[248] Idem, p. 41.

in elaborating the basic ideas for the creation of the League of Nations in 1919 and the United Nations in 1945. More recently, the UN has tried to draw the IPU under its umbrella, but the Institution has chosen cooperation rather than incorporation.

The purpose of these initiatives was creating space for the discussion of and reflection on international issues that impacted and impacts all societies. Just as significantly, if not more so, is the use of the word “parliamentary” in the IPU to emphasize its representative dimension. It is a clear indication that the lack of accountability for foreign policy acts and the lack of transparency were already causing resentment and distrust.

After World War I, this perception crystallized. The British Parliament voiced society's dissatisfaction with the system of secret treaties whose lack of accountability and transparency had culminated in the conflict that cost the lives of a generation of young men. As Henry Kissinger pointed out in an analysis that has largely withstood criticism over the years:

> The astonishing aspect of the outbreak of the First World War [is] it took so long for it to happen.
>
> (…) The purpose of the alliances was no longer to guarantee support after a war had started, but to guarantee that each ally would mobilize as soon as and, it was hoped, just before, any adversary did. When alliances so constructed confronted each other, threats based on mobilization became irreversible because stopping mobilization in midstream was more disastrous than not having started it at all. (…)
>
> However trivial the cause, war would be total. (…)
>
> Though the military leaders of both sides insisted on the most destructive kind of war, they were ominously silent about its political consequences in light of the military technology they were pursuing. (…)
>
> The diplomats on both sides were silent, too, largely because they did not understand the political implications of their countries’ time bomb, and because nationalistic politics in each country made them afraid to challenge their military establishments. This conspiracy of silence prevented the political leaders of all the major countries from requesting military plans which established some correspondence between military and political objectives[249].

Moreover, the British Parliament reiterated in ideological key concerns over the morality of rival powers in both national and international matters, particularly the Ottoman Empire, consolidating the Eurocentric view of International Law and the common refrain about barbaric habits of non-European peoples.

[249] Kissinger, H. (1994). *Diplomacy*.: Simon & Schuster, pp.201–206.

Among other developments, this led to the emergence of the discipline of International Relations as an autonomous subject of study separate from Political Science and a public rejection of the abovementioned lack of transparency. Again, Kissinger masterfully described the political sentiment of the time.

> Peace terms gradually took on a nihilistic character. The aristocratic, somewhat conspiratorial style of nineteenth-century diplomacy proved irrelevant in the age of mass mobilization. The Allied side specialized in couching the war in moral slogans such as "the war to end all wars" or "making the world safe for Democracy" (…)
>
> First World War begun as a typical cabinet war (…) and turned into a struggle of the masses[250].

The world of diplomacy depicted by Hans Holbein the Younger in his iconic painting "The Ambassadors" could not go on. This was environment where only nobles or the well-born gained entry, carrying out nominal missions and hidden agendas, a world where appearances and impressions were deceptive, with disconnected agendas intermingled, one in which the specter of dystopic yet latent death always hovered near. The *system of diplomacy based on permanent missions, with a diplomatic class acting as an international force*[251] had been born in the Venetian Republic and matured in the Italian states. Its first intellectual theoretician Nicolo Machiavelli had made it known across the world, but it never, despite the amenities added to the post, strayed far from the ideal of service to the Prince. Only after World War I did the long-standing paradigms start to crumble.

Transparency in international affairs was first addressed by US President Woodrow Wilson in his famous speech of to the Joint Session of Congress on 8 January 1918, "Fourteen Points": "Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view"[252]. The Covenant of the League of Nations created a tripartite structure that resembled the distribution of powers between legislative, executive and judicial branches following liberal political ideology. A bicameral Parliament composed of the General Assembly as the lower

[250] Kissinger, H. (1994). *Diplomacy*.: Simon & Schuster, pp. 219-221.
[251] North, J.D. (2004). *The Ambassadors' secret: Holbein and the world of the Renaissance*. New York: Hambledon and London, p.37.
[252] Boyle, A. and McCall-Smith, K. (2018). Transparency in International Law-making. In: A. Peters, ed., *Transparency in International Law*. Cambridge New York Port Melbourne New Delhi Singapore Cambridge University Press, p.419.

chamber and the Security Council as the upper chamber; an Executive, in the form of Secretariat; and a Judiciary, represented by the Permanent Court of International Justice. The calls for transparency were translated into the Preamble of the Covenant, which states that the relations among Nations must be open, just and honorable and in Article 18, by which *Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered*.

The ineffectiveness of the Treaty of Versailles to consolidate peace after World War I had directly led to World War II, after which the project for international institutionality incorporated new elements by the letter of the agreements that gave it structure. These new elements, nevertheless, still largely reflected the interests and creative forces that have been traditionally dominant in the history of international institutionality. The values of governance, democracy, and representativeness established as guidelines in the Preamble to the United Nations Charter face challenges that impede their realization in the UN system. Nevertheless, for Paul Kennedy, *global representativeness and democracy is the most diffuse of the strands of the UN`s history between 1945 and the present day* [253]. The expectations that the United Nations General Assembly would serve as a channel for democratic manifestation in the international arena proved to be excessive at the outset. If, with decolonization and the concomitant increase in the number of independent nations, the General Assembly expanded in size, increasing, in one sense, its representativeness, much remained to be done to give adequate room for the international deliberation of the concerns of the innumerable civil organizations that did not make it onto the agendas of their diplomatic representatives.

That shortfall forced many movements to bypass the international system in order to gain recognition from it, while others had to wait until their causes were considered urgent and prominent enough to be considered part of the “international civil society”. It is thus understandable that the role of diplomacy and the diplomatic corps has been the target of harsh criticism by the academy and even by members of the international diplomatic community. Among their complaints is the democratic

[253] Kennedy, P.M. (2007). *The Parliament of Man: The United Nations and the Quest for World Government*. New York: Penguin Books, p.206.

deficit in the execution of diplomatic duties involving insufficient participation of society in foreign policy deliberations and preference for theses elaborated in its intelligence centers. There is little regard for the will of the population the diplomatic corps represents and to which it should be accountable, considerations whose importance is reduced as a result of the intense specialization of international negotiations. Integrating specialized negotiations and popular will would require the monitoring other Ministries and government departments on a more regular basis. Meanwhile, the legislator's hand is also forced by diplomats who often commit the country to enacting normative acts that may not serve the best national interest, to avoid reputational costs. Furthermore, diplomatic elites are often recalcitrant to expend their professional capital advocating the causes of civil society organizations and other subnational units in international matters.

One initiative that seeks to deepen and improve the forms of international communication and dispute resolution is the Future of Diplomacy Project at Havard University's Belfer Center for Science and International Relations in the John F. Kennedy School of Government[254]. One of its frequent guest speakers is Carne Ross, a former British diplomat and current director of the non-governmental organization Independent Diplomat, which he founded in 2004 after leaving the British Ministry of Foreign Affairs. In 2010, this NGO received an award from the Harvard Business Review recognizing it as one of the ten most revolutionary ideas of the year.

Independent Diplomat provides international advice to groups, minorities and even States that are unable to access or effectively influence international bodies regarding their complaints. It was in a capacity as international adviser that Ross formed part of Kosovo's diplomatic mission at the Security Council meetings debating the country's independence from Serbia. Ross also authored a book of the same name (*Independent Diplomat: Dispatches from an Unaccountable Elite*, Cornell University Press, 2007)[255].

The book is considered extremely controversial by those who feel it disparages the work, mission, and effort of diplomats and international organizations towards

[254] The Future of Diplomacy Project can be assessed through the webpage: https://www.belfercenter.org/project/future-diplomacy-project.

[255] Carne Ross reached a high rank in the British diplomatic career: he came to represent the United Kingdom in the United Nations, in New York, United States, for the Middle East theme at the time of the American invasion of Iraq and the revisions of the Oil for Food program.

global governance. Others however, including some members of the international diplomatic community, welcomed it as a legitimate effort that correctly identified problematic issues and defects of international diplomacy, as well as proposals for fixing them [256]. The book is structured around eight premises about modern diplomacy:

1. Diplomacy is not democratic, not even in democracies. Most of us do not know the identity of the diplomats who claim to speak on our behalf and we are unable to influence them.

2. Diplomats, when defending their government's foreign policy, do not necessarily represent the will of the people at the international level, whom they may commit to pacts and obligations that are riddled with shortcomings in terms of political legitimacy.

3. The majority of the population has little to no knowledge of how foreign policy is formulated and carried out. It is as if foreign policy were not part of the government's public policies, since those are subject to criticism and control.

4. The dominant realist conception of world politics, one which characterizes the international environment as hostile and nation-states as self-interested, competitive and therefore antagonistic and malicious, is flawed and leads to bad results.

5. Many of today's major worries – global warming, resource scarcity, epidemic diseases, migration – are mutually shared problems, but supranational institutions (such as the UN) cannot know effectively deal with them because they require negotiation and consensus between states with competing interests.

6. Information that can be presented as "objective" is routinely favored over all other information. Vital information for unraveling international problems is often therefore lost, especially information that cannot be quantified, has no immediate practical use or for whatever other reason is not recognized as relevant by diplomatic elites.

7. Governments, states and diplomats all attempt to present the issues facing

[256] Urquhart, B. (n.d.). *Are Diplomats Necessary? | by Brian Urquhart | The New York Review of Books.* [online] www.nybooks.com. Available at: http://www.nybooks.com/articles/archives/2007/oct/11/are-diplomats-necessary/ [Accessed 18 Apr. 2020].

the world as simple and understandable, as if it could be explained with a single theory. Such simplifications do injustice to the genuine complexity of the world and world events, often with serious consequences.

8. The practice of diplomacy is "deeply unbalanced and unjust" in terms of generating benefits for the rich and powerful at the expense of the poor and marginalized.

Ross's book rekindled familiar criticism and questions. These can be summed up in a single question, one which influential internationalists have already raised: What is the role of diplomats? Or rather: what should the role of diplomats be in today's reality? For Ross, diplomats cannot be effectively held responsible for their actions, since the level of knowledge of the issues delegated to diplomats necessary for effective supervision by society is extremely rare[257]. In effect, society observers are limited to assessing the outcome of the negotiations when the opportunity to influence their course has already passed. Ross's criticism is blunter yet: for all their credentials as international negotiators and the supposed authority and credibility that their position affords them, globally speaking diplomats almost never possess practical expertise of the matters under their responsibility and, when on mission in any country, they rarely engage in the level of social immersion that is expected of them – which is the only way they could capture the nuances of local politics without the distorted mediation of the elites that surround diplomatic circles[258]. Diplomats are generally more comfortable remaining in these circles, preferring the amenities and access of social life that their status offers them in them. Naturally, and as already mentioned, Ross's criticism generated strong reaction[259].

Some more belligerent thinkers even question the need for diplomats, based on the questions that we will address below.

Researchers have made proposals for alternative structures to replace not only for the General Assembly, but for the other organs of the United Nations as well. Perhaps the most daring and imaginative is that of Robert Sheppard. The author

[257] Ross, C. (2007). *Independent diplomat: dispatches from an unaccountable elite*. Ithaca, New York: Cornell University Press, pp.10–11.
[258] *Idem*, p. 28.
[259] Urquhart, B. (n.d.). *Are Diplomats Necessary? | by Brian Urquhart | The New York Review of Books*. [online] www.nybooks.com. Available at: http://www.nybooks.com/articles/archives/2007/oct/11/are-diplomats-necessary/ [Accessed 18 Apr. 2020].

suggests transforming the Assembly into a World Parliament. Together with the World Parliament, a Senate with budgetary and geopolitical powers would be created. He also envisages an International Court structured on a circuit system that includes lower courts of first instance, a deep reform of the Security Council and a specialized global court to audit accounts. Finally, he proposes the creation of a world commission and general assembly of councils of ministers[260].

Another proposal is that of Andreas Bummel. Using the conceptual framework of Dieter Heinrich's World Federalist Movement, Bummel proposes a Parliamentary Assembly at the United Nations because: *While diplomats have to take the interest of their government as guiding principle, delegates of the UNPA would be free from instructions, free from the constraints of* raison d'état*, free to take a global perspective and to represent the world community as such*[261]. For this aspiration to become reality, the UNPA's resolutions, in principle, even though they would still lack legal force, would have to be officially submitted to the United Nations General Assembly for approval. Later, the UNPA's influence would expand and it would have its own economic and financial powers, which would enable it, according to the author, to become the parliamentary umbrella of international cooperation and could as such help to overcome the fragmentation of international efforts that afflicts the UN system.

For his part, Dieter Heinrich uses the example of the formation of the European Parliament, which was originally consultative in nature until it gained institutional density and deliberative capacity. Although the author recognizes the representational problems that arise from the filtering that national governments would exercise over their delegations, he argues that *there are good reasons to prefer a strategy that gets governments themselves to establish a UN parliamentary body. It avoids many of the pitfalls of the direct citizen-action approach, especially problems to do with the legitimacy and effectiveness of the resulting body and with its cost to citizen`s groups[262]*.

Whether focusing on the lack of representation of international civil society as

[260] Sheppard, R. (2000). Towards a UN World Parliament: UN Reform for the Progressive Evolution of an Elective and Accountable Democratic Parliamentary Process in UN Governance in the New Millennium. *Asian-Pacific Law & Policy Journal*, 1(1).
[261] Bummel, A. (n.d.). *Developing International Democracy. For a Parliamentary Assembly at the United Nations*. Committee for a Democratic U.N ed. pp.16–17.
[262] Heinrich, D. (n.d.). *The Case for a United Nations Parliamentary Assembly*. Committee for a Democratic U.N. Published in cooperation with World Federalist Movement-Canada.

de facto or *de jure,* total or partial, attempts to revitalize the World Federalist Movement that first formed in the 1930s and 40s are coming forward in the midst of the discussions reforming the UN itself. There are proposals for a UN Parliamentary body modeled on the European Parliament, beginning as a consultative parliamentary assembly, with its members directly chosen by the electorate or by their legislators, and, *[t]hrough a gradual, phased processes (…) would become a citizen-elected body with a real role in the governance of international life*[263], overcoming the *raison d'état* reasoning of the diplomatic representatives and the vices of undemocratic or non-representative governments. Forming like-minded building blocks would favour detachment from purely national identities, fostering a true sense of world citizenship.

Such bold proposals for institutional redesign suggest that the transformation of the parliament from consultative assembly to deliberative instance would result in a chamber for the review of UN General Assembly resolutions. The General Assembly, like lower legislative chambers that represent regional interests in the aggregate, would be counterbalanced by a body whose vision was focused on another layer: the global interests[264].

2.3 The Old-New Global Social Contract Between High Political Density Or High Administrative Density: Between Global Administrative Law and constitutionalism.

2.3.1 Global Administrative Law

The international organizations that emerged in the 19th century, considered precursors of the current ones, were born under the veil and perspective of what Academia elaborated and called global administrative law. In 1920, José Gascón Y Marín gave his course *Les Transformations Du Droit Administratif International* at the Hague Academy of International Law, in which he conceived a nascent branch of legal science:

> The bibliography of international administrative law every day becomes more numerous; this branch of law increasingly attracts the

[263] *Idem*, p. 10.
[264] Heinrich, D. (n.d.). *The Case for a United Nations Parliamentary Assembly*. Committee for a Democratic U.N. Published in cooperation with World Federalist Movement-Canada, p. 32.

> attention of writers, who, in the book or magazine, analyze its content, trying to to determine the concept and the limits of this new branch of legal science. The question was not born today. A subject as real, as effective as that of relations creating between states in order to achieve goals falling undoubtedly in the administrative field, for example the need to determine the scope of certain legal provisions and certain regulations issued by the executive organs of a State with regard to those who, although that having in an accidental or transitory way their residence in the said State, are not nevertheless its nationals, or even the study of the nature of certain organs, of certain services, created to satisfy needs of an international order, such a subject, I say, must have scientists, given their desire, which is moreover very justified, to discover rules, principles, and to systematize them thus giving birth to a scientific branch which, although it is not considered by all as independent, autonomous, at least in some scientific-legal disciplines of special chapters where said subject is studied[265].

Gascón y Marín, a law professor at the University of Madrid, underlined the contributions of Bluntschli, Torres Campos, Kapoustine and Zalenski, Martens and Stein, Jellinek and Preuss, Neumeyer and Triepel, Scipione and Fedozzi, Donati and d'Alesio, Borsi and Ranelleti, Mayer, Reynaud, Mahaim, Diena, Anzilotti, Von Toll, Rapisardi,Ruffini, Kazansky and Strupp to the field.

Five years later, Paul Nêgulesco gave his own course on the *Principes Du Droit International Administratif* in which he defined global administrative law as distinct from International Law. For Nêgulesco it was more aligned with the tenets of municipal administrative law whose content were much more technical than political. Accordingly, the nature of the treaties dealing with global administrative law were contractual and not impinge on the balance of power, the struggle for power or the maximization of national power elements among the leading international actors. Those typical preoccupations of the Realist Theory of International Relations[266] were not seen, and are still not seen, as falling under the scope of Global Administrative Law, whose ambition was merely coordinating the arrangement of interests of States and persons to optimize the benefits of international administrative services[267].

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[265] Gascón y Marín, J. (1931). *Les Transformations du droit administratif international*. Collected Courses of the Hague Academy of International Law, p.6.

[266] Morgenthau, H.J. (2005). *Politics among Nations: the Struggle for Power and Peace*. 7a ed. Boston, Burr Ridge, IL Dubuque, IA Madison, WI New York, San Francisco, St. Louis, Bangkok, Bogotá, Caracas, Kuala Lumpur, Lisbon, London, Madrid, Mexico City, Milan, Montreal, New Delhi, Santiago, Seoul, Singapore, Sydney, Taipei, Toronto: McGraw-Hill Higher Education.

[267] Négulescu, P. (1935). *Principes du droit international administratif*. Collected Courses of the Hague Academy of International Law.

After these groundbreaking courses, the Hague Academy hosted a series of other courses were on specific topics of technical cooperation: *Les Principaux Services Internationaux Administratifs* by Michel Dendias[268]; *La Police Internationale* by Hans Wehberg[269]; *La Cooperation Internationale en Matiere D`Agriculture* and *Le Droit Sanitaire International* by Cino Vitta[270]. As might be expected, due to the COVID-19 pandemic, the Hague Academy has recently begun offering courses on international health law and its current dilemmas.

For Steve Charnovitz, the WTO can actually be considered an international administrative agency[271]:

> Some might resist the notion of the WTO as an administrative agency on the grounds that it is a legislative body, but that claim is weak. Because trade negotiations are so central to the WTO's mission, the WTO could be characterized as an international legislature. As a legislature, however, the WTO has an unusual decision rule. In general, any action by the WTO requires consensus. Moreover, even after an amendment to the WTO is approved, that amendment has to be accepted by a member government before becoming binding on that government. Thus, member governments do not transfer or cede lawmaking power to the WTO.
>
> (…) What has happened instead is that governments have established and joined the WTO, agreed to abstain from practices that violate WTO law, and assigned the WTO certain functions for promoting trade cooperation.
>
> (…) Although some might argue that governments have delegated judicial (or quasi-judicial) authority to the Appellate Body, that claim is faulty because there was no pre-existing national jurisdiction to adjudicate a foreign government's compliance with WTO law. Instead, the governments have created a judicial function at the WTO.
>
> The feature of the WTO that most renders it an administrative agency is that the principals—that is, the Members—have given the WTO competence as their joint agent to carry out certain discrete international functions[272].

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[268] Dendias, M. (1938). *Les principaux services internationaux administratifs*. Collected Courses of the Hague Academy of International Law.

[269] Wehberg, H. (1934). *La Police internationale*. Collected Courses of the Hague Academy of International Law.

[270] Vitta, C. (1936). *La coopération internationale en matière d'agriculture*. Collected Courses of the Hague Academy of International Law.

Cino Vitta (1930). *Le droit sanitaire international*. Collected Courses of the Hague Academy of International Law.

[271] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 16.

[272] *Idem*, pp. 17-18.

Charnovitz, however, admits that the international judicial control on the WTO is absent. Judicial control is a central dimension of administrative law, and would enhance the transparency and accountability of the WTO. Its absence weakens the argument that the WTO is effectively an administrative agency[273].

A more recent iteration is the Global Administrative Law (GAL) Project at New York University, which has given fresh impetus to the area. Its leading proponents define Global Administrative Law:

> (…) as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public–private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance[274].
> (…)

Although a claim for independence from general International Law is implied, leading researchers on the topic note that

> The formal sources of global administrative law include the classical source of public international law—treaties, custom, and general principles—but it is unlikely that these sources are sufficient to account for the origins and authority of the normative practice already existing in the field[275].

The main distinction between what I call the first generation of GAL scholars and the current one involves political engagement. Where the discipline's original reserve towards encroaching on political domains prevented it from formulating proposals for the qualitative reform of the international system, at present, GAL is seen by scholars as a possible, albeit discreet avenue for the democratization of international relations:

> Understanding global governance as administration allows us to recast many standard concerns about the legitimacy of international institutions in a more specific and focused way. It provides useful

[273] Ibidem, p. 21.
[274] Kingsbury, B., Krisch, N. and Stewart, R.B. (2005). *The Emergence of Global Administrative Law. SSRN Electronic Journal*, [online] p.16. Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp [Accessed 20 Oct. 2019].
[275] *Idem*, p. 29.

> critical distance on general, and often overly broad, claims about democratic deficits in these institutions. It also shifts the attention of scholars of global governance to several accountability mechanisms for administrative decision-making, including administrative law, that in domestic systems operate alongside, although not independently from, classical democratic procedures such as elections and parliamentary and presidential control. This inquiry usefully highlights the extent to which mechanisms of procedural participation and review, taken for granted in domestic administrative action, are lacking on the global level. At the same time it invites development of institutional procedures, principles, and remedies with objectives short of building a full-fledged (and at present illusory) global democracy[276].

GAL promotes principles that could represent important foundations for international democracy among and within countries. The theory is that regulatory harmonization, if not regulatory convergence, occurs as a product ofhrough the regulatory cooperation necessary for the proper execution of administrative services that have a global dimension or scale. Knowledge surrounding standards and good administrative practices is necessarily exchanged during such cooperation and, although their legal status does not rise above *soft law*, through practice and acceptance, those standards and practices gain strength and prestige that goes beyond the level of mere suggestion or recommendation. They may even end up becoming conditions for membership in an international regime (some examples being telecommunications, international transport or international trade). The potential cost of a country's decision not to adhere to these kinds of standards is not only reputational. The decision could also have a real impact on the technical efficiency of a country's international relations, making it less attractive as an international partner.

Regulatory cooperation also indirectly promotes all the basic principles of the rule of law, such as due process, good faith, and, finally, transparency, although the GAL Project founders themselves see such potential in much more modest terms, admitting that *[t]he acceptance of general principles in the practice of formal International Law has been low and is unlikely to be extended quickly to the diverse and fragmented contexts of global administration*[277].

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[276] Ibidem, p. 27.

[277] Kingsbury, B., Krisch, N. and Stewart, R.B. (2005). *The Emergence of Global Administrative Law. SSRN Electronic Journal*, [online] p.16. Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp [Accessed 20 Oct. 2019], p. 29.

Their assessment is in line with what other researchers in the area have observed:

> The global regulatory space has developed principles and rules that are mainly administrative in nature, relating to the due process of law, procedural fairness, transparency, participation, duty to give reasons, and judicial review. The entire arsenal of administrative law, as it is known to national governments, can be found in the global space. Global regulatory regimes, therefore, are more developed from an administrative perspective than they are from a constitutional one. This does not mean, however, such "global administrative law" is identical to national administrative law; on the contrary, it displays several particularities[278].

Despite this discrepancy exists between the countries' domestic administrative law and GAL, the advances made possible by the latter were and remain very promising. The scholarly literature considers the guiding principles of GAL to be legality, impartiality, participatory rights, transparency and the duty to give reasons, and proportionality and reasonabless.

From the perspective of GAL, the principle of transparency and the duty to give reasoned explanations in the WTO regulatory regime reached their highest expression in two Dispute Settlement Body (DSB) decisions, one concerning anti-dumping duties and the other safeguard measures. In *DS219: European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, the Appellate Body (AB) reversed the Panel`s finding that the EC did not violate Articles 6.2 and 6.4 of the Anti-Dumping Agreement. According to those provisions, all interested parties in an anti-dumping investigation have the right of "a full opportunity for the defense of their interests", and the authorities are obliged to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases". The controversy was about the non-disclosure of Exhibit EC-12 by the European Communities. The Panel found that the disclosure of the data in the exhibit would not have substantially changed the merits of the case, since the information was made available by other means. The AB reversed the Panel`s finding and reinforced the transparency requirement by

[278] Cassesse, S., Carotti, B., Casini, L., Cavalieri, E. and MacDonald, E. eds., (2012). *Global Administrative Law: The Casebook*. 3rd ed. The Institute for Research on Public Administration (IRPA). The Institute for International Law and Justice (IILJ).

suggesting its autonomy with regards the other premises. Maurizia De Bellis sums up the AB's decision this way:

> First, it explained that it was necessary to examine whether the information was "relevant" to the presentation of the cases of the interested parties, and not simply the perspective of the investigating authority (AB Report, para. 145). Second, it held that, in order to meet the third requirement, the information need not have been specifically relied upon in reaching the determination, nor have an "added value"; it is sufficient that it was used during the anti-dumping investigation (para. 147, AB Report). Moreover, the Appellate Body stated that the obligations contained in Articles 6.2 and 6.4 establish a framework of procedural and due process obligations, which apply throughout the course of the anti-dumping investigation (par. 138, AB Report)[279].

In addition to the duty of disclosure, the transparency provisions of the WTO also involve the duty to provide reasoned and adequate explanations. In *DS248: United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, both the Panel and the AB found that the US th had not met the the reasoned explanation criterion in its claim that its measures met the requirements for the adoption of safeguard measures:

> More specifically, it had failed to provide a reasoned and adequate explanation of how "unforeseen developments" resulted in "increased imports", of the "causal link" between the alleged increased imports and serious injury to the relevant domestic producers, and of "parallelism" (between the scope of the safeguard investigation and the scope of the measures imposed as a result thereof).
>
> The US argued that the USITC might have violated Article 3.1, but that a failure to provide a "reasoned and adequate explanation" of certain findings cannot constitute a violation of other articles of the Agreement on Safeguards or of Article XIX of GATT 1994, contrary to what the Panel had concluded (para. 18, AB Report). Moreover, it argued that it was not necessary to provide a reasoned and adequate explanation of the unforeseenndevelopments requirement, as these are mentioned in Article XIX GATT, but not in the Agreement on Safeguards (para. 273-274, AB Report).
>
> In the Appellate Body's view, the same standard of review – namely, the duty to provide a reasoned and adequate explanation – applies generally to all of the obligations under the Agreement on Safeguards as well as to the obligations contained in Article XIX[280].

[279] De Bellis, M. (2012). The Disclosure of Information: Anti-Dumping Duties and the WTO System. In: S. Cassesse, B. Carotti, L. Casini, E. Cavalieri and E. MacDonald, eds., *Global Administrative Law: The Casebook*, 3rd ed. The Institute for Research on Public Administration (IRPA). The Institute for International Law and Justice (IILJ).

[280] De Bellis, M. (2012). A Duty to Provide Reasons: Definitive Safeguards Measures on Imports of Certain Steel Products. In: S. Cassesse, B. Carotti, L. Casini, E. Cavalieri and E. MacDonald, eds., *Global Administrative Law: The Casebook*, 3rd ed. The Institute for Research on Public Administration (IRPA). The Institute for International Law and Justice (IILJ).

It turns out that, in the eyes of GAL scholars, transparency and due process can be treated interchangeably. As due process represents a general principle of basic procedural law in republican regimes, the arbitration of the State and guarantees of the freedoms and fundamental rights of the subjects must be respected, and that due process constitutes one of the main vehicles of democratization in both municipal and international law. It not only fills the gap that faulty representation can generate, but also stimulates improved protective standards of fundamental rights (in the case of the WTO, third generation economic rights) and, thus, in a subtle yet powerful way, contributes to decreasing the democratic deficit arising from 'low politics' approaches.

Certainly 'high politics' and 'low Politics' are contextual and depend very much on the agendas that are pivotal for changes in the balance of power calculus. From the Realist Theory of International Relations point of view, military security is always a matter of high politics, while the qualification of all other depends on how immediately or deeply they impact the international order. Economic and social affairs would normally pertain to the low politics category unless they might significantly enhance or impair national power. In a complex, interdependent world, those categories might simply not apply or become even more blurry[281]. That would create a confusing and all-encompassing high politics theory. It is safe to assume that economic affairs, even at present, are only highly political in exceptional circumstances. Therefore, most economic activity, which occurs under the aegis of international regulatory law, remains on the 'low politics' end of the spectrum.

Increasingly frequent and deeper affectation of national regulations by foreign or international policies and regulations has intensified the attention on International or Global Administrative Law. The intensification has yielded a tendency towards regulatory isomorphism, which includes *policy transfer, diffusion, convergence and related phenomena*[282]. Mathias Koenig-Archibugi has laid out the current spectrum of the regulation taxonomy, by which the two most comprehensive classifications are competition and institutional isomorphism. Other authors would expand the classification to seven categories: military coercion, economic coercion, reward

[281] Keohane, R.O. and Nye, Jr., J.S. (2011). *Power and interdependence*. 4th ed. Longman Classics in Political Science, p.19.
[282] Koenig-Archibugi, M. (2010). Global Regulation. In: *The Oxford handbook of regulation*. Oxford, U.K.: Oxford University Press, p.407.

systems (which increase the value of compliance), modeling, reciprocal adjustment, non-reciprocal coordination, and capacity-building[283].

In the end, Koenig-Archibugi focuses on three vectors of regulatory isomorphism: communication, competition and cooperation. Communication consists of information about the regulatory experiences of other countries shared through official channels or the epistemic community, generating a persuasive referendum or reputational discourse in favor of certain practices and contrary to many others. *Transnational communication may trigger both rational learning and normative emulation*[284]. As a matter of fact:

> There is some empirical evidence confirming the impact of transnational communication on regulatory policies. Raustiala (2002), for instance, discusses a number of cases in which US regulators successfully 'exported' their approaches in the areas of securities regulation, competition and antitrust law, and environmental policy. The quantitative study by Holzinger, Knill, and Sommerer (200*) assesses the effect of communication and information exchange in transnational networks on environmental policy convergence in twenty-four industrialized countries between 1970 and 2000[285].

The second motivational factor and vehicle for regulatory isomorphism would be competitive pressure, which in normal circumstances leads either cause a race 'to the top' or a race 'to the bottom' in terms of regulatory oversight, depending on which offers the most favorable circumstances for a country's commercial and economic interests. The author maintains that more empirical evidence is needed to make any assertion regarding the nature of the relation between regulatory tendency and competitive forces.

The third and final route of regulatory isomorphism would be international cooperation, one of the most complex themes in International Relations theory. The delegation of regulatory authority, under the logic of theoretical realism, offers a pragmatic minimalization of the externalities of non-cooperation and, by creating a regular and transparent information exchange environment, facilitates cooperative agreements. The institutional rationalist theory that behind the theory of regimes described in the following section that follows offers an explanation of the reasons and benefits of regulatory cooperation, which would prevent predatory regulatory

[283] *Idem*, p. 408.
[284] Koenig-Archibugi, M. (2010). Global Regulation. In: *The Oxford handbook of regulation*. Oxford, U.K.: Oxford University Press, pp. 412.
[285] *Idem*, p. 411.

movements. In this approach as well, empirical difficulties make it difficult to assess real adherence to the regulatory scope emanating from a specific regime. Reliable metrics are missing for teasing out and measuring the real impact of the regime on the regulatory advance compared against regulatory isomorphism that takes place among a set of countries through communication and institutional identities independent from the regime, among other difficulties[286].

Still on the subject of regulatory cooperation, two themes stand out: the role of public and private actors (with private standards) and power and inclusiveness in global governance. This last theme is more directly central to the narrative of this analysis. Power and inclusiveness in global governance involve the constructivist work of changing the structures and power relations in the international space through regulatory cooperation or, at least, making the balance of power less unfavorable to the actors currently in a weaker position. The author lists forums such as the OECD, the UN Food and Agriculture Organization and the World Health Organization as environments in which this constructivism has found space. /There is also room for more regulatory constructivism in the WTO. Viotti and Kauppi describe the aspirations of constructivism in the following terms:

> First, constructivism seeks to problematize the identities and interests of states. This is in contrast to neorealists and neoliberals who come close to believing identities and interests are givens. Constructivists are not only interested in the state as agent or actor, but also transnational organizations and international organizations. They emphasize the importance of subjective and intersubjective exchanges and actions taken by human beings as agents of these state and non-state organizational entities.
>
> Second, constructivists view international structure in terms of a social structure infused with ideational factors to include norms, rules, and law. This structure can influence the identities and interests of agents, as well as international outcomes in such areas as humanitarian intervention and taboos on the use of weapons of mass destruction. This emphasis on the social dimension of structure is in contrast to the neorealist and neoliberal, which is, by contrast, heavily materialist.
>
> Third, constructivism, as terms implies, views the world as a project always under construction (…)
>
> Finally, constructivists have done hard thinking on ontological and epistemological issues. Such debate and discussion are a far cry from most casual theorizing where positivist premises lead theorists confidently to seek as objective an explanation of reality as possible, somehow minimizing the subjective part of our understanding[287].

[286] Koenig-Archibugi, M. (2010). Global Regulation. In: *The Oxford handbook of regulation*. Oxford, U.K.: Oxford University Press, pp. 419-420.
[287] Viotti, P.R. and Kauppi, M.V. (n.d.). *International Relations Theory*. 5th ed. Pearson, pp. 278-279.

For other analysts, however, neither the perspective of GAL nor regulatory cooperation is satisfactory. For them, the lack of accountability of diplomats, bureaucrats and ministers at various points of the negotiations are problematic[288]. Some scholars argue that change would have to come in the form of international (and WTO) constitutionalism for the democratic, legitimacy and transparency challenges to be truly overcome.

2.3.2 Constitutionalism

John H. Jackson offers four different definitions of constitutionalism: 1. The political system of a nation-state that possesses a "constitution" comprised of a written charter, which as well as practices, evolutionary interpretations, customs, implicit understandings considered the authoritative precepts of its government system; 2. A body of principles with normative meaning and attributes often related to democratic practices and human rights; 3. A descriptive account of an international governmental institution or international organization, such as the Charter of the United Nations that is considered as having "constitutional significance"; 4. Processes of norm creation and evolutionary application of the entire International Law system [289].

A constitution establishes the very structure of an organized political community, whether enshrined in a formal document or not. Constitutionalism, in turn, pertains to the political and legal sciences that deal with constitutional forms, processes and technique. In modern times, the term constitutionalism has come to incorporate attributes that now seem irreversible because of all the political, cognitive and valuative '*acquis'* regarding State organization that have accumulated since the Glorious Revolution in England. Most scholars will agree that modern constitutionalism began with the bourgeois revolutions, the first of which was just mentioned. These historical events introduced constitutions as a legal technique of State organization to moderate the powers of the monarchy. The bourgeois revolutions in Britain's American colonies and in France went further, marking the advent of the modern conceptions of republican government and popular sovereignty.

[288] Charnovitz, S. (2007). *Mapping the Law of WTO Accession*. [online] papers.ssrn.com. Available at: http://ssrn.com/abstract=957651 [Accessed 19 Apr. 2020]. p.20.
[289] Jackson, J.H. (2006). *Sovereignty, the WTO and changing fundamentals of international law*. Cambridge: Cambridge University Press, pp.222–227.

The geographic spread of constitutionalism has led to its exaltation as a universal political principle. Its fundamental characteristics, however, remain disputed, although the following are reasonably grounded: (i) popular sovereignty or, in other words, the indispensable consent of the governed, as measured by a legitimate assembly or convention one more tangible than that presumably based on the British Bill of Rights where the "representatives of the people" spoke in their own names and interests; (ii) the separation of competences between constituted powers; (iii) rationality versus arbitrariness of the law; (iv) impediment of arbitration; (v) the rule of law.

The notion of separation of competences between constituted powers is, chronologically, the first foundation of modern constitutionalism. At the time of its emergence, it was shaped by the promise to moderate the monarch's discretion and the demands of nobles. It reflected a new social dynamic in which a new social layer of great importance began to rise up against royal, monocratic decisions. From the point of view of political science, the concept marked a dramatic paradigmatic shift in the conception of sovereignty and the exercise of power:

> However, in the modern constitution foreshadowed and upheld by Hobbes and Rousseau, two operations were absolutely impossible, without a doubt. The first consisted in the division of sovereign power, that is, in the individualization of a plurality of public powers counterbalanced among themselves and, therefore, mutually limited. As we know, the first characteristic of sovereign power was precisely that of its indivisibility. The second operation consisted in the possibility of individualizing a legal limit to the extension of the sovereign's powers, of being able to oppose a fundamental rule to those powers, perhaps to guarantee and protect the rights of individuals[290].

From the point of view of engineering power, the separation of competences initially meant the division of jurisdiction between the executive, legislative and judicial powers, interdependent and with power-duty of control over each other's acts, making enforcement of one power's decisions impossible without the acquiescence of another constituted power. In a second moment, inspired by Machiavelli's work on the Roman republic, the separation of competences doctrine evolved to include the concept of bicamerality to ensure political representation across the social spectrum (the masses, bourgeoisie and aristocracy)[291].

[290] Fioravanti, M. (2001). *Constitucion: de la Antiguedad a nuestro dias*. Trotta, p.86.
[291] *Idem*, p. 90.

Perhaps a better analogy than engineering for the division of powers is provided by architecture. As Matteucci recalls, this division is exercised through a diversity of means and ways. No generalized pattern has been identified and the most effective arrangements, in any context, have included arbitration and guarantees for the proper discharge of public affairs. Social, political and even circumstantial aspects can positively or negatively influence the functioning of any power structure. A legislature largely comprising novice politicians might turn out to be too weak or lack the necessary prestige to stand up against the executive. A Judiciary whose members do not have advanced academic training may make judgments more on political than on technical grounds, to take another example. Lastly, a more parliament with a high degree of social representation might have the consequence of rendering the democratic system more deliberative, but it also might, given the need to please the electorate to win the next election, render the deliberation less productive by incentivizing populist rhetoric. There are so many hypotheses that Matteucci argues that normatively assessing the true degree of activism and independence of powers in a given country on the basis of the distribution of powers is futile. In other words, the degree to which the system of checks and balances guarantees the rights and freedoms of citizens cannot be determined by the constitutional architecture alone[292]

Popular sovereignty is understood as the notion that power is only legitimate when it serves the general will and is exercised by representatives chosen by the people. Its primary corollary is republicanism, be it limited or radical[293]. Such popular sovereignty is exercised through a parliament endowed with sufficient power to oppose the executive and, although this has not always historically been the case, today popular sovereignty also implies universal suffrage. Returning to the institutional architecture, combining the principle of one indivisible popular sovereignty with a conformation of political powers in such a way that the parliament

[292] Bobbio, N. and Pasquino, N. (1995). *Dicionário de Política*. 7th ed. Editora UnB, p.248.

[293] "Radical republicanism aimed at popular sovereignty and expanding people's participation; in this way, the scope of equality, as well as the issue of universal suffrage, remained as topics discussed. (...) the Constitution was, in American conservative republicanism, the constitutional basis of all legitimacy, for radical republicanism popular sovereignty was only the last source of political legitimation, whose various versions were being adapted by the constitution, without great additional constructions, in order to mitigate the barriers put at the will of the majority". Dippel, H. (2007). *História do constitucionalismo moderno: novas perspectivas*. Lisboa: Fundação Calouste Gulbenkian. Serviço de Educação e Bolsas, p.46.

is both effective and legitimate seems incontrovertible. Dippel characterizes this dichotomy in terms of "constitutionalism of principles versus constitutionalism of results". The dichotomy would be a product of the pendulary movement of the bourgeois revolution itself. In its first moment, the revolution demanded radical, non-negotiable popular sovereignty. In a second moment, it took into account the risks of not including the other powerful social groups[294]. The tension would be the reason many federal states adopted bicameralism, which is unnecessary in small, unitary states with relatively homogeneous populations (the common example being the Scandinavian countries[295]).

Popular sovereignty presents its own challenges, such as the protection of minorities. Minority rights are addressed by the introduction of quorum and qualified voting rules, by the constitutional provision of mechanisms that guarantee the demands and opinions of minorities visibility in parliaments (mixed inquiry commissions, information requirements, public hearings), by the introduction of constitutional courts that help, among other things, to restrain parliamentary excesses and set firm constitutional rules and disputably at the political level by refereeing party politics in mixed presidential regimes that depend on coalitions to govern effectively.

The existence of a body of fundamental rules that will serve as the ultimate parameter for the activities of the three powers. It challenges both the discretion of the Absolutist State and the moods of the general will and, finally, the very concept of sovereignty, this one, in a more evident way[296]. These are the fundamental rights and guarantees of the citizen, material or programmatic norms that subordinate the exercise of power to the dignity of the person.

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[294] Dippel, H. (2007). *História do constitucionalismo moderno: novas perspectivas*. Lisboa: Fundação Calouste Gulbenkian. Serviço de Educação e Bolsas, p. 93.

[295] This characterization is now dated. Today the populations of Scandinavian countries are much more diverse as a result of immigration and mixed marriages. The urban population has also increased, spurred by the steady wave of economic modernization and prosperity since the 1960s with the discovery and exploitation of major oil reserves in the North Sea. Finally, with the consequent complexification of the political agenda, demands for bicameralism and for the professionalization of the parliamentary function have also increased, which would generate the formation of a parliamentary office and advisory structure, as well as an increase in the countries' institutional machinery. Arter, D. (2008). Scandinavian politics today. 2nd ed. Manchester Manchester University Press, p.199. Dippel, H. (2007). *História do constitucionalismo moderno: novas perspectivas*. Lisboa: Fundação Calouste Gulbenkian. Serviço de Educação e Bolsas, p.115.

[296] Dippel, H. (2007). *História do constitucionalismo moderno: novas perspectivas*. Lisboa: Fundação Calouste Gulbenkian. Serviço de Educação e Bolsas, p.251.

Rule of law presupposes the two others elements mentioned in the previous paragraph. The rule of law is considered its own criterion not because of its conceptual distinctness but because of its importance. However rational the legal basis of society, without its equal, indifferent enforcement and recourse to justice for all, a given society cannot be considered fully committed to the tenets of constitutionalism.

The rule of law appears as “justice in administration”[297], a way of exercising power, in compliance with the normative structure. Although it does not provide much information about the absolute limits of the exercise of power, the concept of the rule of law, when combined with the pillar of the principle of political freedom (rechtstaat), the control of public administration activity is the pursuit of the effectiveness of individual freedom[298].

Although phenomena that developed on separate if parallel tracks, constitutionalism and liberalism have become more potent through mutual influence. The least exportable of European ideologies, liberalism has fundamentally two dimensions: economic and political. On the economic level, liberalism adheres to the ideals of free enterprise, the freedom of contract and the minimal state intervention in the economy. At the political level, it is associated with negative individual rights, that is: “with the radical defense of the individual, the only real protagonist of ethical and economic life against the State and society, but also the aversion to the existence of any and all societies intermediate between the individual and the State; consequently, in the political market as well as in the economic market, man must act alone”[299]. Liberalism thus advocates a market vision of politics that maximizes opportunity for individual choice with nuances for each society and social context: sometimes centered on the direct relationship between State and citizen, sometimes intermediated by civil society through associations of all kinds. The central value of liberalism is individual freedom, which can be understood as the “situational possibility that man has to choose, manifest, disseminate his moral or political values, in order to realize himself. The central value of liberalism is the guarantee of the individual's freedom, which can be understood as the “situational possibility that man

[297] Bobbio, N. and Pasquino, N. (1995). *Dicionário de Política*. 7th ed. Editora UnB, p. 251.
[298] *Idem*, p. 257.
[299] Ibidem, p. 689.

has to choose, manifest, disseminate his moral or political values, in order to realize himself[300].

The conception of fundamental rights, inherent to man inasmuch as human condition, is a not novel development, having been reiterated in numerous forms since at least the pre-Socratic philosophers[301]. Notwithstanding, it was with the emergence of medieval Christian natural law doctrine as distinct from divine (or canonical) and positive law that fundamental rights became an object of concern so that they should be protected from undue injunctions. Later, seventeenth century contractualism emphasized the relevance of human rights vis-à-vis political and economic interests. The most famous antecedent is undoubtedly the Magna Carta, through which the English King John recognized minimum rights for the church and nobility in order to end hostilities with barons who rebelled against abusive of tax collection and occupied London. Although it was primarily created to effect peaceful transition and did not envision universal rights, it has gone down in history as the first written charter consecrating individual rights and limiting public power.

John Jackson provides a characterization that illustrates the usefulness of bringing the notion of constitutionalism to bear on the international system:

> "Constitutionalism" thus may be a good approach to developing replacements or substitutes for the many existing perplexities and challenges to the overall international system. "Constitutionalism" could, if evolved appropriately with considerable careful thinking and discussion combined with practical experiments blending eventually into general practice, substitute for the problematic concepts of "sovereignty" and their corollaries such as the troubled "consent theory" of international norm making, the dilemmas of the concept of equality of nations, the desperate need to redress the atrocities of failed and rogue nation-states, the sometimes unrepresentative modes of treaty making, and other out-dated theories[302].

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[300] Ibidem, p. 692

[301] Pacheco, E.D. (n.d.). *Direitos Fundamentais e o Constitucionalismo*. [online] artigos.netsaber.com.br. Available at: http://artigos.netsaber.com.br/resumo_artigo_7364/artigo_sobre_direitos_fundamentais_e_o_constitucionalismo [Accessed 18 Apr. 2020].

[302] Among the characteristics of failed or failed states, the authors highlight the loss of political and police control over part of their territory, loss of the monopoly of the force, loss of the ability to protect citizens from violent aggression, loss of the ability to fulfill some of the main functions of the democratic state, loss of the ability to offer basic services to citizens, loss of government stability and effectiveness. Rotberg, R.I., Clapham, C., Morales, C. and Ira Herbst, J. (2007). *Los estados fallidos o fracasados: un debate inconcluso y sospechoso*. Bogotá: Siglo Del Hombre Editores.
Jackson, J.H. (2006). *Sovereignty, the WTO and changing fundamentals of international law*. Cambridge: Cambridge University Press, pp.224–225.

For her part, Deborah Z Cass warns that the term “constitutionalism”, however fashionable and provocative, has maximal and minimalist connotations[303] that must be kept clear. These connotations are represented in the jargon of this analysis as radial concepts. It is also important to remember the polysemy of both constitution and constitutionalization. Cass offers three visions of WTO constitutionalization: institutional managerialism, rights-based constitutionalization and judicial-norm generation. These visions will be presented in this work along with criticism and observations not present in Cass’s seminal book in order to shed new light on the arguments. The question is what constitutionalization approach is the most promising for the reallocation of power to the point of overcoming the problems of legitimacy and democratic deficit, both of which relate to the lack of representation and transparency.

Jackson emphasizes the rigidity of the "constitution" of the WTO, which has super-majority requirements and, at the extreme, the consensus rule. "Definitive interpretations" of the agreements and annexes can only be delegated if done explicitly with the support of a supermajority. The admission of new members requires the approval of three quarters of the members[304]. Jackson argues that this character reflects the implicit political agreement of the WTO, which favors producer-oriented approaches, market access and incumbent governments’ interpretation of national interest and nation-state sovereignty[305].

> (…) the WTO has a number of serious institutional or “constitutional” faults and problems. It is appropriately criticized for its relative lack of openness (although much progress over this has been achieved). It is also vulnerable to criticism about its antiquated, sloppy, and inefficient relationships to nongovernment organizations. Some of these problems stem from outdated attitudes to modes of diplomacy and an exaggerated sense of privilege for nation-state diplomats who claim legitimacy (whether the legitimacy purportedly stems from democratic governance or some other source)[306].

2.3.2.1 Institutional Managerialism

[303] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, p.16.
[304] Jackson, J.H. (2006). *Sovereignty, the WTO and changing fundamentals of international law*. Cambridge: Cambridge University Press, p. 237.
[305] *Idem*, pp, 237-238.
[306] Ibidem, p. 238.

For Cass, John Jackson is the scholar primarily responsible for the first model or approach to WTO constitutionalization, that of institutional managerialism. Basically, Jackson envisions international trading system and its constitution as institutions with an Aristotelian sense of what a constitution or constitutionalization would be:

> The conceptualization of the WTO as an institutional system, and not a rules-only system, has important consequences, especially in relation to the received account of constitutionalization. The institutional conception vets WTO law with a unity and coherence. This coherence, according to its adherents, indicates that WTO law has been transformed from a simple set of rules into a new legal order: a new foundational device or Grundnorm has emerged sufficient to ground a new system of law. From here it is a relatively short step to the claim that WTO constitutionalization is occurring[307].

Jackson's assessment likening the WTO to a constitutional order based on pragmatic empirical or functional arguments is further endorsed in another passage of the seminal book by the Georgetown professor:

> As 'heroic' as they may appear, the dispute procedures of the WTO have a number of features that are obviously designed to 'protect sovereignty' of the WTO members, and to prevent too much power being allocated to the dispute process. Many different illustrations could be described here, including: (1) the obligation to comply with a dispute ruling; (2) the legal precedent effect of a dispute report; (3) the standard of review by which the WTO panels examine national government actions; and (4) the broad question of 'judicial activism' or worries about panels stretching interpretations to achieve certain policy results which they favour[308].

In certain ways, Jackson's legal perspective shares many similarities to the theory of regimes from the field of International Relations Theory.

Stephen D. Krasner defined international regimes as implicit or explicit *principles, norms, rules and decision-making procedures around which actors' expectations converge in a given issue-area*[309]. In Krasner's analysis, regimes differ from international organizations. In this perspective, national governments are or might be as influential to the international regime as an eventual international organization[310].

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[307] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, p.100.
[308] *Idem*, p. 78.
[309] Krasner, S.D. (1982). Structural causes and regime consequences: regimes as intervening variables. *International Organization*, 36(2), pp.185–205.
[310] Viotti, P.R. and Kauppi, M.V. (n.d.). *International Relations Theory*. 5th ed. Pearson, p. 145.

On the interdisciplinary dialogue between International Relations Theory with the International Law Anne-Marie Slaughter recapitulates that

> Rejecting a view of institutions based on 'peace through law' or 'world government," [Keohane] argues that "institutions that facilitate cooperation do not mandate what governments must do; rather, they help governments pursue their own interests through cooperation." In a word, institutions "empower governments rather than shackling them".
>
> This was an insight new only to political scientists. As discussed above, international lawyers had spent the previous three decades defining International Law as something other than an Austinian constraint system. "World government" was international legal scholarship circa 1960, when scholars such as Inis Claude warned international lawyers to focus more on the "peace among groups" aspect of domestic legal structure. The international lawyers discussed above, among others, had spent two decades emphasizing the facilitative properties of international law. A comparison of a prototypical "functionalist" regime theorist`s list of attributes of international regimes with a summary of the functions and uses of international law, as identified by various international lawyers, is instructive[311].

Slaughter then provides the following comparative table of the features of both realms of knowledge:

International Norms and Institutions from the Perspective of Regime Theorists and International Lawyers

Functions and Benefits of International Regimes	Functions and Benefits of International Law
Lowering transaction costs	Providing rules of the game; fostering stable expectations (Falk, Henkin, Chayes)
Creating conditions for orderly multilateral negotiations	Establishing efficient baselines: avoiding the need for constant renegotiations and establishing common standards where they seem desirable (Henkin)
Legitimating and delegitimating types of state action	Positing criteria by which national governments and others can act reasonably and justify their action (Falk, Chayes) Providing a process of communication in crisis (Falk)
Increasing symmetry and improving quality of information	
	Creating opportunities for intermeshing of national and international bureaucracies (Falk)
Facilitating linkages	Enhancing compliance by embedding international agreements in domestic political and bureaucratic processes, improving transparency and fostering routinized "habits of compliance" (Chayes, Henkin)
Enhancing compliance by creating conditions for decentralized enforcement: monitoring enhancing value of reputation establishing legitimate standards of behaviour	

[311] Burley, A.-M.S. (1993). International Law and International Relations Theory: A Dual Agenda. The *American Journal of International Law*, 87(2), pp. 219–220.

Burley, A.-M.S. (1993). International Law and International Relations Theory: A Dual Agenda. The *American Journal of International Law*, 87(2), p. 220.

The interdisciplinary dialogue between International Law and the theory of regimes, under the Realistic Matrix of International Relations Theory, is as promising as it is riddled with pragmatism. It advocates recalibrating the expectations of International Law and the possibility of regime reform.

Slaughter locates International Managerialism is near the intersection of regime theory and International Law in a post-Austinian reading. Basically, it shares characteristics of both perspectives, except that, contrary to the theory of regimes, International Managerialism strictly associates regimes with international organizations, not as aggregate sets of various actors, relevant agencies and institutions related to a specific international subject. The criticism of Institutional Managerialism can be summarized in eight reasons: (i) the approach fails to distinguish between institution and constitution, and the latter corresponds to a higher, even preceding order of social practices whether or not it is expressed in terms of a social contract; (ii) collapsing institutions with constitutions would consequently formally legitimize action taken by the WTO, or at any international organization, without confronting the important aspects of democratic validity; (iii) by encompassing a great range of institutional developments under the label of “constitutionalization”, the theory allows a more coherent explanation of the phenomenon of international regulatory making. This is used to reinforce the argument that *Grundnorms* exist, the confirmation of which is provided by by the actions of those same institutions, representing a circular logic; (iv) the WTO Grundnorm is not evident and every attempt to identify it has been unsatisfactory; (v) the content of the presumptive constitutionalization is imprecise and unclear; (vi) WTO agreements do not offer a set of principles or scheme that disciplines or constrains power relations between the parties; (vii) mixing the history of international organizations with the history of constitutionalism accurately explains how international interdependence leads to uneven distribution of benefits, yet the their roles in the distribution of benefits is contextual, which prevents the theory from having real explanatory power, since it does not capture the real causalities of the new power arrangements; it only identifies the channels through which they are expressed; and (viii) the approach involves a limited understanding of the sorts of

institutions available for international trade, such as governmental technical cooperation (an object of study in GAL), parliamentary diplomacy, academic cooperation and many other sources of "soft law" that end up incorporated by intergovernmental institutions[312].

> The primary role of institutions is to manage trade relations, through a number of techniques of management including the balancing of competing values, regime maintenance, harmonization, reciprocity, and use of the WTO as, what is referred as, as 'interface'. Harmonization refers to agreement by states on international standards or, in the absence of this, agreement to recognize each other`s standards if they comply with the principle of non-discrimination. (…) Reciprocity refers to a system of bargaining and agreement over liberalization measures, conducted on a 'give and take' basis. Interface is used as all-encompassing conceptual term to refer to any institutional means, including organizations, and rules, for defusing tensions that arise from states having different economic politics, goals, and techniques. (…) In short, the claim of institutional managerialism is that the job of constitutionalized WTO law is not to impose particular substantive values on states but to manage disputes by institutional means[313].

In other words, *management as a technique of trade decision-making*[314] is meant to maintain the *status quo* and not to create new agendas or advance substantial values. It is sterile in terms of conceiving possibilities for satisfactory reform aimed at improving the legitimacy of the system. Nor is this managerial assessment particularly accurate, especially in light of the current crisis of in the WTO, even though a managerial role is indeed implied by some of the Organization's agreements. The due process requirements contained in many WTO agreements and the duty to provide reasoned explanation for the adoption of regulations is not befitting of a power-based regime.

Although Cass places Jackson as the leading figure of Institutional Managerialism, one cannot deduce an argument of what constitutionalism in the multilateral trade regime should be from his seminal work *The World Trade Organization: Constitution and Jurisprudence*. Instead, the book, published in the WTO's third year of the operation, provides a valid and accurate description of the

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[312] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, pp.106-111.
[313] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, pp. 113-118.
[314] Idem, p.113.

scenario at that time with explicit criticism of the shortfalls of the structure designed to address issues that had already been tagged as needing attention in the near future, including transparency and the Organization's democratic deficit.

Jackson himself expresses the opposite to the thesis attributed to him:

> I suggest that the rule-oriented approach, particularly concerning international economic affairs, has considerable advantage. It is this approach that focuses the disputing parties` attention on the rules and on predicting what an impartial tribunal is likely to conclude about the application of a rule. This in turn will lead parties to pay closer attention to the rules of the treaty system, and hence can lead to greater certainty and predictability – essential in international affairs, particularly economic affairs driven by market-oriented principles of decentralized decision-making, with participation by millions of entrepreneurs. (…)
>
> The phrase 'rule orientation' is used here to contrast with phrases such as 'rule of law', and 'rule-based system'. Rule-orientation implies a less rigid adherence to 'rule' and connotes some fluidity in rule approaches which seems to accord with reality (especially since it accommodates some bargaining and negotiation)[315].

What stands out is Jackson's sole intent to stress the difference between the WTO regime and a strict rule of law regime, as the WTO regime was more open to political bargaining. Jackson used an all or nothing criterion for the rule of law, a practice criticized throughout this work because it neglects the importance of radial concepts, the theory of which inspired the present analysis. As will be seen, there are minimalist and maximalistic concepts of rule of law and even in its non-maximalistic expressions, a rule of law or rule-oriented system provides some shield for power politics, which invalidates the essential premise for the validity of Institutional Managerialism.

Cass ends with the argument that Institutional Managerialism is too dated for the current phase of the multilateral trade regime in which the international system is moving more and more in the direction of regulatory countries' interests.

The tension between countries' regulatory sovereignty and the desire to maximize free trade is perceptible in, for example, the TBT and SPS agreements. The cases brought to the DSB concerning those treaties are exceedingly complex and often require dialogue between several national and international civil society

[315] Jackson, J.H. (1999). *The World Trade Organization: constitution and jurisprudence*. London: Pinter, pp. 60–61.

groups. In turn, the required broadening of dialogue makes the inadequacy of Institutional Managerialism even more apparent:

> (…) managerialism can lead to open-ended, formal, mechanistic communication and dialogue, resulting in superficial agreements which nevertheless mask unstated assumptions of classical free-trade theory and can reduce opportunities for dialogue by promoting unequal power relations[316]

Cass offers as counterexamples to Institutional Managerialism several important WTO decisions: DS231: European Communities — Trade Description of Sardines; DS58: United States — Import Prohibition of Certain Shrimp and Shrimp Products; DS473: EEC- Payments and Subsidies Pait to Processors and Producers of Oilseeds and Related Naimal-Feed Proteins (GATT-47); DS44: Japan — Measures Affecting Consumer Photographic Film and Paper; Japan-Film Case; DS31: Canada — Certain Measures Concerning Periodicals; and DS135: European Communities — Measures Affecting Asbestos and Products Containing Asbestos.

In the first case, the AB found that the European Communities breached the TBT Agreement by imposing a measure that was not based on any relevant international standard for differentiation among species of sardines for commercial purposes. In the second case, a very particular and unprecedented environmental policy by the US led to the prohibition of shrimps and shrimp products fished by trawlers that did not use "turtle excluder devices" (TEDs) in their nets. In the oilseeds case, *it was recognized that improved competitive opportunities legitimately expected from a tariff concession can be frustrated even by measures consistent with the Agreements, and that states have a 'reasonable expectation' that this not occur*[317]. The Japan-Film case established the understanding countries must refrain from suspicious or ambiguous practices not only when it seeks to protect their domestic market from foreign competition but also even when they are seeking instead to stimulate efficiency in a particular sector. Similarly, in the Canada Periodicals case the DSB rejected the Canadian claim as insufficient and unfounded in WTO law that protective measures against imports of American periodicals were justified by the need to protect the economic foundations of the national newspaper industry. In the

[316] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, p.132.
[317] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, p.129.

last case, health considerations were considered legitimate to the point of reclassifying products as like-products. Therefore, if Institutional Managerialism no longer functions as the prevailing paradigm in the WTO, it does not map well onto the constitutional evolution of the Organization either, because it does not adequately respond to the demands for greater transparency and openness of the institution[318].

2.3.2.2 Rights-Based Constitutionalism: the rescue of nineteenth-century liberalism canons, the representative democracy frailties

The second approach to the WTO's supposed constitutionalization is Rights-Based Constitutionalism, whose prominent figure is Ernst-Ulrich Petersmann. Petersmann clearly draws inspiration from the classic liberalism of Friedrich Hayek, for whom the creation of an international authority constrained by rule of law and responsible for the liberalization of the global economy was necessary to steer countries from the *Road to Serfdom* back to the abandoned road of the nineteenth-century economic and political liberalism[319]. In Hayek`s view, this international authority would serve as a shield against power politics and facilitate distributive justice between states, for, in standing up for individual rights, this institution would override state interests:

> It is fairly certain that in a planned international system the wealthier and therefore most powerful nations would to a very much greater degree than in a free economy become the object of hatred and envy of the poorer ones: and the latter, rightly or wrongly, would all be convinced that their position could be improved much more quickly if they were only free to do what they wished. Indeed, if it comes to be regarded as the duty of the international authority to bring about distributive justice between the different peoples, it is no more than a consistent and inevitable development of socialist doctrine that class strife would become a struggle between the working classes of the different countries.
>
> An international authority which effectively limits the powers of the state over the individual will be one of the best safeguards of peace. The international Rule of Law must become a safeguard as much against the tyranny of the state over the individual as against the tyranny of the new superstate over the national communities. Neither an omnipotent superstate nor a loose association of “free nations” but a community of nations of free men must be our goal. [320]

[318] *Idem*, pp.134-135.
[319] Cadwell, B. ed., (2014). The Road to Serfdom. Text and Documents. The Definitive Edition Hayek, F. A. *The Road to Serfdom: Text and Documents: The Definitive Edition*. New York and London: Routledge Taylor and Francis.
[320] *Idem*.

Petersmann complements Hayek's thinking with an argument that the state's economic interventionist inclination and, consequently, propensity to invade the economic rights of individuals stems from the persistence of the mercantilism paradigm in international economic thought. The vestiges of mercantilism would be an offense to the principles of political liberalism.

Liberal international trade rules and democratic constitutionalism rest on the same liberal principles: a) liberal constitutional values can be derived only from the individual, to whom must be granted the widest possible freedom of choice and of corresponding responsibility; b) the inevitable conflicts of freedoms are the central constitutional problems; c) *just as liberal constitutional theory holds that individual fundamental rights provide the most important determinant of the national "public interest", liberal welfare economics emphasizes that economic development will be maximized if the individual is at the centre of the process*[321]; d) contrary to the common axiom maintaining the "indivisibility of freedom", economic liberalism and the national constitutional laws of liberal democracies distinguish between the various types of intellectual, political, economic and other freedoms; e) *liberal international trade theory and GATT law are based upon the principle that almost all government interventions into the domestic economy can be made more efficiently and more effectively by internal policy measures rather than trade policy border measures with their harmful distorting effects on domestic prices, competition consumers and exporters*[322]. By contrast, the traits of the "new trade mercantilism" are:

> – resort to disproportionate, mutually impoverishing and conflict-oriented policy instruments (…);
> – return to "power-oriented" bilateralism and sectoral trade policies on the pattern of the 1930s rather than "rule-oriented", general and market-conforming trade policies in compliance with the multilateral GATT prohibitions of discriminatory "beggar-thy-neighbour" policies (…);
> – administrative "grey area trade restrictions" and "managed trade" without effective parliamentary and judicial control (…);
> – lack of transparent policy-making based on simple rules of general application and of a democratic determination of the "public interest" (…);

[321] Petersmann, E.-U. (2018). *Constitutional functions and constitutional problems of International Economic Law*. Routledge Taylor and Francis, p.366.
[322] *Idem*.

> – and use of discriminatory trade restrictions for the arbitrary, surreptitious redistribution of income among domestic groups for the benefit of well organized, protectionist interest groups (…)[323].

These practices and flaws that are holdovers from a bygone age would be responsible for a foundational failure in the social pact, or in constitutionalism, of republics and democracies, since they shift responsibility for the country's economic destinies to interest groups instead of increasing the representativeness of their government. Democratizing international trade policy gains importance because economic rights are the fundamental rights of the third generation and because, like the right to *no taxation without representation*, commercial freedom is fundamental for it is a form of property protection.

> Parallel to the use of the term “market failure” for situations in which the spontaneous, unhampered operation of the price system and market forces do not lead to an optimal allocation of resources that maximizes economic and social well-being (e.g. due to market distortions caused by monopoly power or due to adverse “external effects”), the term “government failure” is used to denote badly functioning policy institutions and distorted democratic decision-making processes which fail to lead to political decisions and legal rules that maximize the equal rights and individual and social welfare of domestic citizens
>
> (…) described the “new protectionism” as “government failure” because the administrative use of non-transparent, discriminatory, disproportionately harmful and conflict-oriented trade policy instruments without effective parliamentary and judicial control reduces not only the economic welfare of domestic citizens (e.g. their real income and non-discriminatory competition) but also their enjoyment of individual freedoms of choice and of other constitutional guarantees[324].

The legal structure of the WTO favors, in critical moments, "government failure". First, the cases to be presented before the DSB pass through the scrutiny and discretion of the State, allowing only powerful lobies to convince the government of the need to open panels. Another example is the fact that the compensatory measure is not necessarily applied to the affected niche, favoring also powerful lobbies.

For Petersmann, the seed of rights-based constitutionalism already exists in the WTO. The Organization recognizes the right of States to, subject to multi-amendment treaties and their tariff commitment agendas, determine the degree of

[323] Ibidem, p.366.
[324] *I* Petersmann, E.-U. (2018). *Constitutional functions and constitutional problems of International Economic Law*. Routledge Taylor and Francis, p.205.

protection and regulation of their economies. However, it recognizes some basic individual rights and guarantees such as

> *(…)* obligations for the use of transparent, non-discriminatory and proportionate trade policy instruments are more precise and more comprehensive than the corresponding national constitutional principles of transparent policymaking, non-discrimination, proportionality and freedom of trade. The self-imposed international GATT obligations protect and extend individual freedoms and property rights across national frontiers (e.g. individual access to foreign markets) and legally limit the excessively broad trade policy discretion of national legislatures, executives and courts[325].

Deborah Cass's main criticisms to the right-based constitutionalism are: (i) its theoretical ambivalence between descriptive and prescriptive application to the WTO; (ii) the difficulty of defining the rights that ought to be enshrined in the international constitutional order; (iii) confusion between the meaning of values and rights in Petersmann's treatment of them; (iv) the unclear status of other economic rights, such as the collective economic right to development, self-determination or sovereignty over natural resources; (v) the obscurity of the term "individual right to trade" and its form of operation; (vi) the countries' unyielding objection to allowing private individuals to participate in the WTO dispute settlement system; (vii) its human-rights based approach wrongly conflates humans rights with market freedoms; (vii) the potential conflict between trade rights and conventional human rights and, thus, tendency to privilege economic interests over social ones[326].

To these another criticism should be added: the author starts from the premise that the current architecture of representative democracies lack legitimacy, whether to deal with national issues or to carry out international affairs. Indeed, the legitimacy of the international system is strongly challenged and democratic deficits are seen as serious problems at both the national and international level. However, the argument seems to be that only rights-based international constitutionalism could lead to the realization of the ideals of economic liberalism in an unmitigated fashion. This argument that only in such a rights-based system would national legal systems operate optimally is excessive. That such international constitutionalism would be more legitimate than a system based on national constitutional construction is also a

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[325] I*dem*, p. 366.

[326] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, pp.152-163.

stretch, considering, as Cass points out, the myriad of cultural interests and values that are often in tension with commercial rights.

Certain observations from the specialized literature as well as recent developments seem to support Petersmann's views. Bogdandy and Venzke, for instance, address specific current constitutional difficulties, in which they seem to endorse Petersmann's thesis:

> An international treaty typically provides the legal foundations of international adjudication. More so than any other source of international law, makes it possible to utilize domestic resources of legitimacy, especially parliamentary consent. In many states, more important treaties require parliamentary involvement, which means that at first glance an international treaty possesses the same democratic legitimacy as adomestic law. But the impression is deceiving.
>
> The content of a treaty is spelled out in diplomatic negotiations, to which the parliamentary procedure is usually only a follow-up. The sequence in Articles 9-11 of the VCLT reveals that as well. A public debate that could influence the agreements, an essential element of democratic legitimacy, is practically impossible. Therein lies the difference from domestic law. Although the content of a bill is usually determined by ministerial bureaucracies and the government, the content can be more readily changed in the legislative process.
>
> Since this possibility does not exist with international treaties, the parliamentary process is often much less elaborate. (…) National parliaments, with the expectation of the US Congress, show a far greater willingness to follow government proposals on international agreements than they do proposals for domestic legislation[327].

Not only is parliamentary scrutiny of international treaties and constitutionally generally superficial, but the involvement of parliaments in foreign policy issues does not reach its full or even present potential. Critics argue that foreign policy does not even garner the attention it deserves in the United States Congress, even though the it is considered the paradigmatic model for all the other republics whose constitutions mimic the constitutional competences of the American Congress in international.

J. McIver Weatherford recognizes that despite the prestige of a seat on the Foreign Affairs Committee, *it is an impractical luxury because of its lack of access to congressional pork. Work in international relations is a form of political conspicuous consumption that produces little for the politician's followers back home, but ranks*

[327] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p.122.

high in status in diplomatic circles[328]. James M. Lindsay lays out a mitigated perspective. In his opinion, even the explanation of citizen disinterest in foreign policy can be relativized. If it is true that the subject engages the public opinion differently from domestic affairs, depending on the degree of global interdependence in each locality, occasionally international issues have extreme impact in even the most isolated sectors of society. Moreover, although the constituency has a vague notion about the big topics on the international agenda, it tends to understand them in terms of their perceived relevance to the country and world. It generally holds the politicians dealing with these issues as more intellectual, more universalist (or less parochialists)[329].

In response to this relative inertia and impotence of parliamentary engagement in international relations, some of the central States in the concert of nations elaborated proposals for institutional reform. The reflection that follows in the next paragraphs already started in the context of the celebrations of the anniversary of the 1988 Brazilian constitution with a prospective agenda for congressual diplomacy[330].

During the 2007-2008 biennium, two of the five permanent members of the Security Council of the United Nations – France and the United Kingdom – underwent an obstinate and significant constitutional debate over the limits and responsibility of their respective executive powers in foreign policy. Called into question were the greater or lesser effectiveness of parliamentary supervision of the executive in foreign affairs; the real or supposed need to reform current normative instruments to give the legislature parameters and instruments that would enable them to respond to the demand for improved participatory democracy; and the suggestion that the formal legitimacy of national foreign policy decisions needed to be complemented with mechanisms to imbue those decisions with substantive legitimacy.

The US military occupation of Iraq technically ended in August 2011. The intervention caused serious reputational harm to those directly involved in the decision-making process that led to it. The decision to take military action was based

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[328] Weatherford, J.M. (1985). *Tribes on the Hill. The U.S. Congress rituals and realiti*es. Westport, Connecticut. London: Bergin & Garvey. Kindle Location 989. Kindle Edition.

[329] Lindsay, J.M. (1994). *Congress and the politics of U.S. foreign policy*. Baltimore; London: Johns Hopkins University Press, Cop.

[330] Maia, C.C. (2011). O poder-dever de revisão das questões de política externa pelo Parlamento. In: M. Fernando Boarato, ed., *Agenda Legislativa para o Desenvolvimento Nacional*. Brasília: Subsecretaria de Edições Técnicas. Senado Federal, pp.177–204.

on controversial motives – ranging from non-compliance with Security Council Resolution 1441 to a tenuous new extension of R2P theory to democratizing intervention – and was not authorized by the UN. Moreover, the conflict was longlasting, had grim humanitarian and political results, and was innocuous in terms of the purpose of disarming the proud Sunni regime[331]. The UK's participation in the intervention precipitated a controversy that was already brewing, the issue of what to do about the obsolete *Royal Prerrogatives* that reserve for the monarch the authority to recognize foreign states and form treaties, among other powers. They make the much of the conduct of foreign affairs opaque and thus removed from parliamentary oversight or control.

The royal prerogatives, which overwhelmingly involve foreign policy in comparison to other policy areas, are not consolidated in a formal text, despite the longstanding appeals of the British Parliament to codify them. In 2000, the Cabinet Office, through the Freedom of Information Act, attempted to appease critics by broadening the range of issues within the scope of the royal prerogatives that should, from that date forward, be publicly disclosed. Ample exceptions were maintained in the field of foreign policy, however, leaving Parliament dissatisfied.[332]

In June 2007, Tony Blair resigned from the leadership of the Labor Party and thus the office of Prime Minister, fearful that the United States Republican Party's brutal defeat in the previous year's congressional elections, largely blamed on growing domestic opposition to the War in Iraq, foreshadowed a similar political debacle, since the war was even more unpopular in British public opinion. The UK's foreign policy structure seemed to have run up against the unavoidable circumstances of its exhaustion. Perhaps not coincidentally, exactly a month later, Lord Chancellor and the Secretary of State for Justice, at His Majesty's request, forwarded to Parliament a report or green paper, “The Governance of Britain”, containing a set of proposals to encourage parliamentary and public debate in which

[331] Blix, H. (2004). *Desarmando o Iraque: inspeção ou invasão?* Girafa.

[332] Section 27 (a) excludes foreign policy acts that could damage the United Kingdom's relations with another state. Section 27 (b) except those that could damage relations between the United Kingdom and any international organization or international court. Section 27 (b) excludes those who could harm the UK's interests elsewhere. Finally, section 27 (d) excludes those acts that undermine the promotion and protection of UK interests elsewhere. Wren, C. (n.d.). *Parliament, Accountability and Foreign Policy in the UK*. [online] www.routledge.com. Available at: http://www.greenleaf-publishing.com/content/pdfs/af08wren.pdf [Accessed 18 July 2020].

opinions and suggestions on the perceived need to limit executive power would be presented and if so, whether legislation was necessary.

With regard to foreign policy, the report specifically refers to the need to assign explicit powers to Parliament for the deployment of troops abroad, consultation in the analysis and ratification of treaties and oversight of intelligence services. Regarding the expansion of parliamentary control over the acts of the executive, it advises the publication of a new Ministerial Code of Conduct, by which independent consultants audit ministries and more transparency is imposed on their travels, requiring information regarding meetings held and their agenda be made public. The report also calls for the executive to start publishing its National Security Strategy under the supervision by a new National Security Committee. This would involve a consultation phase prior to the Queen's speech that defines the legislative agenda. In addition, the expense report would be simplified and Parliament would be invited to participate in annual debates on the objectives and plans of the main government ministries. In 2007, another document The Governance of Britain was released[333]. Its main object was reevaluating royal prerogatives to declare war and to sign international treaties. The intention was to deepen the discussion on constitutional reform in the United Kingdom, which, as far as we know, remains an open question.

Unlike the United Kingdom, France, Germany and Russia opposed the 2003 intervention in Iraq. Their rhetoric, however, was not followed up with similar resolve inside the Security Council. Although those countries expressed their intention to vote against the motion that would authorize the invasion of Iraq, they allowed the motion to be withdrawn, which opened a legal vacuum whose ambiguity favored the United States' belligerent intentions. Nevertheless, public opinion in these countries was satisfied with the performance of their governments during the episode.

Still, the French President initiated a constitutional reform process in 2007 whose purposes and results were both controversial purposes and whose reasons were very different from those that sparked the debates over constitutional reform in the United Kingdom. One aspect of the French reform was, however, also devoted to foreign policy and had similar results. Before 2008, when the Balladur Commission

[333] Secretary of State for Justice and Lord Chancellor (2007). The Governance of Britain. [online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf.

managed to obtain approval for constitutional amendments on foreign policy issues and executive and legislative powers in this area, the largest constitutional reform was the one that Charles de Gaulle spearheaded in his second term. De Gaulle managed to convince the French, who were worn out by the long Algerian War, to broaden executive power by shifting some from Parliament. Shortly thereafter, de Gaulle obtained the approval of a new constitution, promulgated in 1960, that inaugurated the Fifth Republic. A new Republic was thus ushered in because of foreign policy issues to shift more power to the executive branch in relation to parliament under a theory of reserved domain[334], a shift which, strictly speaking, does not appear in or emanate from the new constitutional norm.

This balance of power between the branches in foreign policy issues has always met with resistance and criticism, but it was only in the last constitutional revision that an attempt was openly made to change it. In reality, the results did not meet expectations: no significant reforms regarding the system for incorporating treaties or foreign policy negotiations were passed, although the President now has the manifest duty to announce the deployment of French troops abroad and obtain Parliament authorization for it in advance if the deployment will last more than four months. It is suspected that the vaunted and promised expansion of parliamentary powers in foreign policy and increased legislative oversight of executive acts in matters of foreign policy was a largely diversionist tactic or a token gesture in exchange for expanded presidential powers vis-à-vis the Prime Minister, who lost control of the parliamentary debates over the government's proposals for legislation. Proposals will henceforth be automatically forwarded to parliamentary committees, whose intervention will be limited to discussing amendments to improve the government's bills, making it impossible for the Prime Minister to reject them or control their discussion in Parliament.

In the United States of America, the scope of congressional oversight of acts of the executive branch in general and foreign policy in particular is the subject of ongoing debate. The divergences started as early as the debates over the ratification

[334] Boutillier, C. and Hammer, M. (2007). "Un Président irresponsable?" Prospects for democratic oversight of foreign policy in France under the constitutional changes proposed by the Balladur Commission. *One World Trust*, [online] 108. Available at: http://old.agora-parl.org/sites/default/files/OWT%20-%20un%20president%20irresponsable%20-%20EN%20-%202007%20-%20PI.pdf [Accessed 18 July 2021].

of the 1787 American constitution, when they polarized into two loose-knit camps, the Federalists and the Anti-Federalists[335].

Both camps agreed that the supervision of executive acts was necessary to ensure the legitimacy of the government and the well-being of the population, since preventing the abuse of power by the rival faction was what each most feared, and was the primary reason for secession from England. The Federalists believed the representatives of the people in government should exercise that control, while the Anti-Federalists favored much more direct control by the people. They feared gaps between the will of the people and the performance of their representatives would compromise the quality of representation. These gaps were indeed significant, ranging from the geographical gap between representatives in the capital and their constituencies, the temporal gap between elections and legislative decisions and the information gap, on the one hand, of representatives' knowledge of the needs of the people and, on the other, of the electors' knowledge of the representative's actions and motives. All of these gaps were too great for the mass media of the time to adequately fill, a circumstance that seems to argue in favor of doting the Congress with executive oversight powers. Needless to say, the issue remains subject to great popular pressure and demands to this day.

Certainly, although not in all circumstances, democratic vigilance proves sufficient to induce judicious political decisions. In some, the communication mechanisms prove themselves capable of effectively informing public opinion and motivating participation, while sometimes they do not, whether because of a lack of time, the complexity of the issue, or even its breadth. In these situations, mechanisms for direct oversight by voters could be defended, but such mechanisms would not guarantee qualified involvement either.

The Anti-Federalists also believed in an 'identity gap' between representatives and their constituencies also compromised legitimacy. This could refer to either choices by representatives that are unpopular with their electors or the difficulty of isolating and evaluating the role and performance of the individual representatives in the legislative decision-making process.

[335] Borowiak, C.T. (2007). Accountability Debates: The Federalists, The Anti-Federalists, and Democratic Deficits. *The Journal of Politics*, 69(4), pp.998–1014.

Although conflicting interpretations of the relative powers of the executive and legislative branches in foreign policy have often come to a head in the United States ever since the ratification of its constitution, the episode known as the Iran-Contra affair is considered a cathartic moment that rivals Watergate in terms of political and constitutional controversy. The scandal specifically pertained to foreign policy issues and the constitutional allocation of competences related to it[336].

That United Kingdom, France and the United States, three of the five permanent members of the United Nations Security Council who have played central roles in defining standards for the conduct of international relations, have recently engaged in deep examination of parliamentary participation in foreign policy and executive oversight is revealing. It seems to confirm Petersmann's perception that parliaments currently represent a defective interface between internal and external order and are therefore unequipped to intermediate between the promising constitutional changes at the international level and the changes at the domestic level that must be made to make the former effective. This phenomenon may explain the disposition to give more weight to substantial democratic representation in dictating foreign policy. The reflection on the capacity of the parliamentary institutions to face the challenges that international cooperation present, the capacity to provide the necessary supervision and ensure democratic legitimacy, will tend to attract more attention to academics and practitioners.

Another finding that seems to converge with Petersmann's theory relates to the flaws in the international legal culture of the more important countries, from which it could be induced that only a form of international constitutionalism could guarantee economic liberalism. Take as an example the case of Brazil, one of the most active litigants of the DSB in terms of cases in which it is a plaintiff or defendant. As the highest court for adjudicating the legality of the country's international acts, the Brazilian Superior Court of Justice (hereinafter the STJ) has consistently confirmed the position of the country's litigators executive when reviewing executive actions involving international trade, even when those actions conflicted with international agreements. This points to a increasingly relevant need for the STJ to become more familiar with international agreements and assume more independence from the

[336] Fisher, L. (1988). *Foreign Policy Powers of the President and Congress*. The ANNALS of the American Academy of Political and Social Science, 499(1), pp.148–159.

executive branch. Recently, proposals have suggested creating specialized courts to handle issues linked to international trade. Doing so would represent a step towards alignment with the spirit of the Trade Facilitation Agreement.

Examples of the STJ jurisprudence can be singled out in connection with four particular measures that impact international trade. These examples are frequently the object of discussion at the WTO Dispute Settlement Body: antidumping measures (regulated by Article VI of the GATT and by the Antidumping Agreement); valuation for customs purposes (which falls under Article VII of the GATT and the Customs Valuation Agreement); uniform tax treatment for imported and similar national goods (the treatment rule for tax purposes as per Article II:2 of the GATT); equal treatment to national and similar imported goods (in regard to the laws, regulations and requirements provided by Article III:4 of the GATT).

Some specific rules in the Antidumping Agreement (Article 13) and GATT (Article X:3c) require judicial review by domestic courts. This research found the following decisions:

i) Discussion on the non-review of Antidumping Rights:

i.i) REsp 1237966, Rapporteur: Min. Humberto Martins, decision of Sep. 3, 2013. 1. The convenience and opportunity of initiating an investigation on dumping-practices, as well as on the application of antidumping rights, is a task of the Public Administration. The Judicial Branch is only responsible for expressing itself upon request in regard to the legality of such acts.

i.ii) REsp 1.105.993-PR, Rapporteur: Min. Eliana Calmon, decision of Feb. 4, 2010.

> The Judiciary Branch cannot substitute a technical body such as SECEX in the analysis of markets and price averages in the course of distinct periods. The Judiciary is only responsible for examining the observance of the legal provisions of SECEX' administrative procedures and their outcomes. In case of a necessity to question antidumping rights in the course of their pre-established term, a request of administrative review may be made for a specific case in conformity with article 59 of Decree 1,602/1995. Thus, the Appellate Court partially granted the appeal.

ii) Discussion on procedural reviews regarding Customs Valuation:

ii.i) REsp 1528204, Rel. Min. Humberto Martins, DJe 19/04/2017

> SPECIAL APPEAL. CUSTOMS. TAXES. CONCEPT OF CUSTOMS VALUE. IMPOSSIBILITY OF INCLUDING THE COSTS

> OF PORT SERVICES PROVIDED IN A COUNTRY OF ORIGIN AFTER ARRIVAL AT THE PORT OR IMPORT LOCATION.
>
> 1. A correct interpretation of article 8 of the Implementation Agreement of Article VII of the General Agreement on Tariffs and Trade - GATT 1994 (Customs Valuation Agreement) requires an analysis of the entire customs valuation system. There are six distinct ways of calculating the customs value, which must be resorted to in the following order: 1st) transaction value; 2nd) value of identical goods; 3rd) value of similar goods; 4th) value following the deductive method; 5th) value calculated by the computer method; and 6th) value according to the residual value. Although resorting to distinct methods, all of them strive to reach uniform results.
>
> 2. It does not make sense to imagine that the costs of port services in an importing country are not part of the customs valuation following the deductive and computer methods while being part of such valuation, in turn, according to the transaction value-method. The correct conclusion is: in all cases, the result must be uniform while excluding such customs valuation costs.
>
> 3. Thus, paragraph 3 of article 4 of Normative Instruction SRF 327/2003 countered articles 1, 5, 6 and 8 of the Implementation Agreement of Article VII of the General Agreement on Tariffs and Trade – GATT 1994 (Customs Valuation Agreement), as well as article 77, items I and II, of the Customs Regulations of 2009, by establishing that the expenses linked to unloading in the national territory should be included in the customs value. This paragraph illegally increased the tax-calculation basis on customs value, inasmuch as allowed the expenses in connection with loading and unloading of goods upon arrival at the customs port to be included in the valuation of the amounts due. In this regard, both Panels of the Superior Court of Justice have already decided in the REsp. n. 1.239.625-SC, First Panel, Rapporteur: Min. Benedito Gonçalves, decision of Sep. 4, 2014; and in AgRg of REsp. n. 1.434.650-CE, Second Panel, Rapporteur: Min. Herman Benjamin, decision of May 26, 2015.
>
> 4. Special appeal, not granted.

iii) Discussion on the non-uniform tax treatment for imported goods and similar national goods (the rule of national treatment for tax purposes established by Article III:2 of the GATT).

iii.i) Decision MS 022624, Rapporteur: Min. Humberto Matins, June 20, 2016

The topic is relevant considering the recent WTO decision on program INOVAR-AUTO (Dispute 472), which sentenced Brazil for violating national treatment provisions.

> CIVIL PROCEEDINGS. CONSTITUTIONAL LAW. TAXATION. ADMINISTRATIVE. INOVAR-AUTO. PROGRAM ADHERENCE. REQUEST OF INCONSTITUTIONALITY-DECLARATION OF A RESTRICTION. REQUEST NOT ENSURING AN EXTENSION. PRECEDENT OF THE SUPERIOR COURT OF JUSTICE. IMPOSSIBILITY OF EXTENSION IN CONFORMITY

> WITH UNIFORMITY-PROVISION. SUPERIOR COURT OF JUSTICE PRECEDENTS. ABSENCE OF FUMUS BONI IURIS. NON-DEMONSTRATION OF POTENTIAL DAMAGE. INEXISTENCE OF PERICULUM IN MORA. INJUNCTION DENIED.
>
> 4) Equal treatment between national and similar imported goods (in regard to laws, regulations and requirements, provided by Article III:4 of the GATT)

iii.ii) REsp 1374636 / RN, Rapporteur: Min. Humberto Martins, DJe Dec. 18, 2015

> 4. Accessory obligations are provided "in the interest of tax collection or tax inspections" in such way that the imposition of labels on foreign industrialized products, established by article 46 of Law 4,502/64, ascribes a legal status when this requirement agrees with the limits of the purpose of such obligations and their reasonable observance.
>
> 5. In casu, not controverted that the requirement of a label should inhibit sub judice imports; in conformity with the transcribed excerpts of the agreement in force while constituting an unreasonable measure, above all in cases of products subject to tax benefits at zero-rates, leading to disparities vis-à-vis national products not obliged under the same requirement. In disagreement with article III, part II, of the General Agreement on Tariffs and Trade, incorporated to our legislation by Decree 1,355/94. REsp 1320737/PR, Rapporteur: Min. ARI PARGENDLER, FIRST PANEL, decision of May 21, 2013, DJe Oct. 29, 2013.

iii.iii) AgRg in REsp 998654 / SP, Rapporteur: Min. Humberto Martins, DJe May 25, 2009

> CIVIL AND TAX PROCEEDINGS – IPI – VIOLATION OF ART. 535 CPC NON-EXISTENT – APPLICABILITY OF ARTICLE 557 OF THE CPC – POSSIBILITY – GATT CLAUSE – TERM OF COLLECTION – IMPORTED GOODS – NON-OPPOSITION.
>
> 1. Any eventual claim of annulling a decision based on article 557 of the CPC is overridden by the reassessments of appeals by collegiate bodies following an appeal ["agravo regimental"], in conformity with the discerning analysis of REsp 824.406/RS, Rapporteur: Min. Teori Albino Zavascki, May 18, 2006.
>
> 2. There is no violation of article 535 of the CPC when a court decision is attained in the correct measure of the deduced intention.
>
> 3. Moreover, the difference of IPI collection deadlines among national and imported products does not contradict the GATT clauses.

The risk of encroachment by corporate and ideological interests, personal aims and corrupt practices on the technical authority is more evident in the domestic realm, but it is not unlikely at the international level – even though the level of influence by technocrats at the international level is much lower.

At the international level, the jurisdictional and social control of administrative acts represents a considerable challenge because of the degree of technical discretion. An increasingly higher level of expertise is needed in the public services, as the public administration takes on more issues that require extremely specialized – if not advanced scientific – knowledge, both in terms of the the specific field and the meta-legal rationale behind the international system.

For Terso Gamella “the lack of preparedness of judges on extralegal issues would end up leaving at the discretion of legal experts the control of the technical decisions adopted by the Public Administration”. One may add to the legal experts all sorts of technicians who might be consulted in complex decision-making processes and issues related to jurisdictional control. Such circumstances could result in the judiciary’s inadvertent protection of corporate interest to the detriment of the public interest under the guise of impenetrable scientific technicalities[337].

The levels judicial self-restraint from or engagement with the technical and administrative merits of a case on behalf of the common good will always present challenges. For instance, the assistance of expert advice will not always suffice. Effective legal practice relies on responsive, efficient and efficacious dialectics of technical aspects in order to identify and assess the sophisticated axioms in technical or scientific reasoning that, in the layman’s eyes, may seem *prima facie* irrefutable. In order to avoid misleading claims based on apparently well-founded technical rationale from being used as a political weapon, it is essential that attention be paid to the above-mentioned dialectics in civil proceedings. It is also essential to safeguard the role of the Public Prosecutions Office as a guarantor of the legal order, and not as a mere de facto party in the legal proceedings – which, as is well-known, occurs not infrequently.

Similarly, administrative discretion is frequently impaired by control bodies as a result of conflicts of interpretation exclusively based on personal positions or convictions, thus configuring the willingness of a technical body to impose its own interpretative choices over the assessments of public officials. This process can be exemplified by the recurrence of situations when judges set a premium on their personal views against humane reproductive health procedures out of a concern with

[337] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p.18.

birth-related death or injury even though such procedures are included in the national health policies to reduce the number of hospital beds needed in the public health system to conform with the World Health Organization's guidelines. Nascimento observes that the exercise of discretion must not be impaired by control bodies except in cases of de facto or de jure mistakes by liable agents, and must be based upon objective, specific, clear and detailed assessments[338].

Beyond the executive protocols of investigative bodies and the need for a truly impersonal approach by judges to their activities, the discernment of legitimacy of an act subject technical discretion faces normative and doctrinaire challenges that will be described below (without any intention exhaust all relevant aspects of the matter). Sérgio Augustin believes it is a quasi-truism that the Brazilian legal order was shaped following a model of State based on an assumed separation of harmonious and independent powers capable of overseeing each other in order to avoid abuses regarding their autonomy. In other words, the Brazilian model is based on a system of checks and balances; i.e., the systematic mutual oversight among branches[339]. In his view, Incision XXXV of Art. 5 ("The law shall not exclude from the appreciation of the Judiciary Branch the infringement or threat of a right") establishes that the judiciary shall exercise the legal control of the acts of the public administration – in contrast to the French system, where the public administration has its own administrative tribunals. In this sense, one may affirm that the Brazilian Constitution expanded the judiciary's oversight powers over the other branches by founding its legitimacy on principles: legality, impersonality, morality, publicity and efficiency. For this reason, Lima – evoking Mariano Bacigalup – asserts that discretion has a constitutional character[340].

This is the point that separates legal scholars according to their views regarding the effective range of jurisdictional control over aspects requiring technical discretion. If, on the one hand, the principle of legality imposes on public managers the duty to observe the dictates of the law and the requirements of common good, on the other, there are cases in which the final cornerstone of a given matter hinges on

[338] Nascimento, A.R. (2016). *Conflito de interpretação normativa no controle interno da competência discricionária*. R. bras. de Dir. Público – RBDP, 14(52), p.128.
[339] Augustin, S. (2015). A Problemática dos Conceitos Indeterminados e da Discricionariedade Técnica. *Juris Plenum. Direito Administrativo*, 2(7).
[340] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p.4.

a factual analysis that may not be strictly founded on the legal science. In modern times, we must recognize that the principle of juridicity has imposed itself over the principle of legality under the Democratic Rule of Law. The principle of juridicity determines a much wider and more comprehensive understanding in the analysis both of an emerging rule and of administrative acts. It requires comparisons between a rule and its corresponding act under the normative framework in effect while observing the national legal order, which is not restricted to its laws. In a broad sense, the principle of juridicity requires conformity with the constitution, the laws (in whatever may be applicable) and the proper legislative process. However, in a strict sense, it requires that laws and rules contain the attributes of laws and rules, meet at all points the mandates of legality, conform with legal principles and respect technical aspects of the legislative process.

The attributes of a law are its novelty, abstractness, generality, urgency, enforceability; its obedience to the organic characteristics of the legal system; its necessity as a legal species; and its effectiveness. The administrative act would thus include, by means of example, the obligation to set appropriate and efficacious means, lest the act overstep its juridicity even in regulating a matter under its jurisdiction. However, the appreciation of either binding or discretionary administrative acts is weak when confronted with other juridicity -related aspects of rules beyond their legality. The adequacy of a rule to achieve its aim, i.e., its efficacy, is by and large an issue that has remained out of the purview of judicial control. At most, such an assessment would lead to a jurisdictional review of an utterly bureaucratized set of rules, which would work against the jurisdiction-matter. A similar liberal perspective is still uncommon in Brazil, although the motivation duty for public acts emerged from the obligation to compare the coherence and consistency of a rule with its substantiation.

Nobre Júnior partially agrees with this thesis, although his analysis only covers discretionary administrative acts. In his view, the judiciary tends to recognize undetermined legal concepts (which will be examined below) as opportunities for the exercise of a discretionary competence, especially when they are imbued with notions of value and require prognosis, since the evolution of science has increasingly required technical expertise from the public administration. In this sense, jurisdictional control must be restricted to supervising procedural compliance and

identifying flaws in the evidence and argument presented (factual assumptions of administrative decisions) within the realm of legality. Such an examination of coherence and consistency – two assumptions of efficacy and juridicity – must also be applied to associated/bound administrative acts[341].

This brings us to the notion of discretion itself, one of the most diverse legal concepts, considering its wide array of meanings in the subfield of Administrative Law. Discerning between bound acts and discretionary acts is the currently prevailing duality in the doctrine of administrative acts. According to Celso Antônio Bandeira de Mello apud Lima, "an administrative act is the declaration of the State (or of someone representing it) in the exercise of public prerogatives, expressed by legal measures that play a complementary role in relation to the law, to comply with it, which are subject to the legitimacy control of a jurisdictional body"[342]. Bound administrative acts provide their executors with a legally determined course of action. For their part, discretionary administrative acts are more polemic, since they require an analysis of merit (convenience and opportuneness) by the pertinent managers under the axiological values of the constitution in force. According to Heinen, Italian legal experts Alessi and Giannini identify two possible categories under the concept of discretion, namely administrative discretion and technical discretion. For Alessi, administrative discretion – i.e., the freedom of a public manager from judicial oversight – is only in order when State officials must decide amidst a diversity of technical criteria. Their options will be politically legitimate, provided that they are properly substantiated, inasmuch as a technical criterion requires an at least partially bound standard of conduct. Thus, technical discretion consists in a specialized rationale in accordance with the state-of-the-art of technical knowledge[343].

Discretion in administrative acts is a controversial topic in international and national legal doctrine, requiring careful and thorough reflection. For Lima, technical discretion – a notion particularly addressed in Italian doctrine – is a fertile area for disputes[344]. For Andreas J. Krell apud Júnior, the controversy first arose in Germany

[341] Nobre Júnior, E.P. (2016). Há uma discricionariedade técnica? *Revista do Programa de Pós-Graduação em Direito da UFBA*, 26(28).
[342] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p. 2.
[343] Heinen, J. (n.d.). Para uma Nova Concepção do Princípio da Legalidade em face da Discricionariedade Técnica. *Revista Forense*, 412. Estudos e Comentários, p. 458.
[344] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p.1.

– a country where the interpretation that prevailed from the late 19th century to the end of World War II was that concepts such as “public interest” were not subject to judicial review. That approach did not bear out well historically, as it led to countless forms of abuse involving public institutions culminating in various types of fascist cooptation[345]. After the end of the Nazi period, the idea of a necessary and effective jurisdictional basis for administrative acts was enshrined in the legal order of the recently-established Federal Republic of Germany. Expert attention was drawn to the search for parameters capable of restraining administrative discretion in connection with undetermined legal concepts. According to Augustin, the doctrine of undetermined legal concepts emerged with Bernatzik in Austria in the late 19th century. Bernatzik defined free discretion as the absence of relation with precise binding legal provisions. However, he argued that some situations covered by provisions including undetermined legal concepts such as “adequacy”, “utility” and “hazard” could only be taken up by means of an interpretative process that he called “technical discretion”. This process was necessarily often complex and cross-disciplinary yet even though it was strongly challenged by his opponents, it inspired much of Austrian jurisprudence and the Comparative Law doctrine[346].

Maria Sylvia Zanella di Pietro apud Lima asserted that the concept of technical discretion did not subsist in its countries of origin (Austria and Germany), but rather was further elaborated on in Italy and newly elaborated in connection with undetermined legal concepts[347]. Heinen illustrates how the resolution of problems in the fields of health and education, inter alia, require the valuation of technical elements essentially drawn from sciences outside the legal field. Thus, undetermined legal concepts rely on highly technical evaluations. Yet he questions whether such evaluations – known as technical discretion –correspond to real discretion[348]. Heinen invokes the ideas of Eduardo Ávila de Enterria and Tomás-Ramón Fernández, who affirm that undetermined legal concepts do not necessarily constitute discretion of administrative activities, since they can be technically or scientifically determined. By

[345] Nobre Júnior, E.P. (2016). Há uma discricionariedade técnica? *Revista do Programa de Pós-Graduação em Direito da UFBA*, 26(28), p.117.
[346] Augustin, S. (2015). A Problemática dos Conceitos Indeterminados e da Discricionariedade Técnica. *Juris Plenum. Direito Administrativo*, 2(7), p. 158.
[347] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p.8.
[348] Heinen, J. (n.d.). Para uma Nova Concepção do Princípio da Legalidade em face da Discricionariedade Técnica. *Revista Forense*, 412. Estudos e Comentários. Revista Forense, p. 457.

means of interpretation, they could point to a single solution for a case, whereas discretion would allow public managers to select from several options[349].

Whenever a technical interpretation allows for more than one course of action or unconclusive view in regard to the best option, Heinen recalls Maria Sylvia Zanena Di Pietro. According to Di Pietro, administrative discretion only exists in connection with undetermined legal concepts when such concepts are embedded in value-judgments on convenience, opportuneness, morality, economy and impersonality, among others[350]. In such cases, the judicial correction of an act would only be applicable to incontrovertibly unreasonable decisions by public managers, i.e., decisions evidently contrary to common sense. In this regard, Lima recalls the German doctrine and points to a certain margin for assessment by the Administration in its role as the initial applier of the concept, thus granting it the benefit of doubt[351].

For Oswaldo Aranha Bandeira de Mello apud Augustin, discretion either arises as a result of a rule, of a rule's command or of its purpose. The first case regards the possible flaws or blind spots in a law's anticipation of its hypothetical uses. The second grants action options to public officials. And the third prescribes that, in undetermined cases, one must follow the values expressed by multi-meaning concepts in the light of the specific rule and the overall constitutional framework[352].

In line with Edilson Pereira Júnior, such normative imprecision is a result of the process that gave rise to the current legal order – recalling Hans Kelsen's pyramid – and refers the issue in all its details and particulars to the discussion on infra-legal rules[353]. José Carlos Vieira de Andrade apud Lima support the understanding that administrative and even technical discretion have a much narrower framework than one might assume at first sight by affirming the material functionality of a legal space where the public administration must implement the law in concrete terms that are in agreement with the applicable legal principles (equality, impartiality, justice, proportionality and good faith, among many others)[354]. Therefore, when discretion

[349] *Idem*..
[350] Ibidem.
[351] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p. 6.
[352] Augustin, S. (2015). A Problemática dos Conceitos Indeterminados e da Discricionariedade Técnica. *Juris Plenum. Direito Administrativo*, 2(7), p. 157.
[353] Nobre Júnior, E.P. (2016). Há uma discricionariedade técnica? *Revista do Programa de Pós-Graduação em Direito da UFBA*, 26(28), p.113.
[354] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p.4.

involves technical analyses, it does not differ from administrative discretion "in general, even though it may require the precise solution for analyzing each specific case", according to Celso Antônio Bandeira de Melo apud Lima[355].

Luis Manoel Fonseca Pires apud Lima added that undetermined legal concepts involving technical and scientific elements from other disciplines that are reliable in terms of information, identity and persuasion (exams, field expertise, technical opinions and reports, and studies) allow managers to identify with greater confidence the best applicable action course from the logical, technical and social standpoints[356].

One may conclude that acts substantiated by technical discretion will only exceptionally lead to *strictu sensu* discretion by the public administration; and that jurisdictional control – both in terms of technical discretion and "unrestricted" discretion, may exceed and even lead to broad technical contradictions, all of which require prudence and must be informed by the experience that only an administrative authority can fully garner. Jurisdictional control may also take on narrow dimensions in the face of the universe of elements involved in juridicity -analyses.

Confirming the international trend, as already seen, another practical example is the Brazilian Parliament's reticence to take a firm stand or stir controversy in foreign policy questions. It routinely exercises its power and duty to review international acts less intensely than it is authorized to perform, often even failing to meet the level of review of its constitutional attributions. An illustration of this state of affairs can be found in the parliamentary procedures involving the Provisional Measure leading to Law 12,715 of September 17, 2012[357]. This law essentially substantiates the Brazilian

[355] Idem, p.3.
[356] Lima, A.J.A.V. de (2016). A discricionariedade técnica e seu controle pelo Poder Judiciário. *Revista Brasileira de Estudos da Função Pública-RBEFP*, 5(13), p.6.
[357] The Object of the Law was to which include "changes the rates of social security contributions collected based on salary statements for specific companies; establishes the Program to Promote Technological Innovation and Strengthen the Productive Chain of Automobiles, the Special Tax Regime under the National Broadband Program for Telecommunication Networks, the Special Regime to Promote Computers in Education, the National Program to Promote Oncological Attention and the National Program to Promote Health Assistance to Persons with Disabilities; reestablishes Program One Computer per Student; changes the Program to Foster the Technological Development of Semiconductor Industries, established by Law 11,484 of May 31, 2007; and changes Laws 9,250 (December 26, 1995), 11,033 (December 21, 2004), 9,430 (December 27, 1996), 10,865 (April 30, 2004, 11774 (September 17, 2008, 12,546 (December 14, 2011), 11,484 (May 31, 2007), 10,637 (December 30, 2002), 11,196 (November 21, 2005), 10,406 (January 10, 2002), 9,532 (December 10, 1997), 12,431 (June 24, 2011), 12,414 (June 9, 2011), 8,666 (June 21, 1993), 10,925 (July 23, 2004); Decree-Laws 1,455 (April 7, 1976), 1,593 (December 21, 1977); and Provisional Measure 2,199-14 (August 24, 2001); and establishes other provisions.

industrial policy disputed at the SCB after the European Union filed DS472 Brazil – Certain Measures Concerning Taxation and Charges. Despite the warnings of the Legislative Consultants serving the Brazilian Legislative Chambers, pointing that the provisions of this provisional measure violated WTO Agreements, its text was approved as a confirmation of the political will of the Executive Branch to the detriment of the country's international commitments. DS472: Brazil — Certain Measures Concerning Taxation and Charges. Needless to say, these measures resulted in the biggest Brazilian defeat by the DSB. In December 13, 2018, the Appellate Body circulated the report on DS472: Brazil — Certain Measures Concerning Taxation and Charges in which the AB upheld the finding of the Panel, among which it was found that ICT and INOVAR-AUTO programs were considered to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement; payment of subsidies were exclusively destined to domestic producers, among other findings.

Finally, the last characteristic of national systems that avoid mirroring international liberal constitutionalism lies in the appropriation of foreign affairs by specific power groups, such as technocrats or economic elites. For developing countries, the problem is more acute, for running a deficit bureaucracy facilitates appropriation of foreign trade policy by powerful interest groups. These lapses of representation, in addition to the appropriation or hijacking of foreign trade policy by pressure groups, power groups or technocracies make a thorough reform to improve transparency and legitimacy necessary and urgent. Moreover, such reform would advance the system's efficiency.

Cass makes another synthesis of Petersmann's doctrine to summarize his claims and ambitions:

> The first of these modes encompasses the claim that rights-based constitutionalization can improve the very structures of WTO law by improving transparency and participation. So Petersmann argues that participatory and representative mechanisms would be improved because, as well as providing individuals with directly enforceable rights, adoption of the approach would lead to other changes such as creating advisory committees or parliamentary bodies on a permanente basis; opening dispute settelements proceedings; and allowing individual parties advisory standing in cases where their interests are affected. These changes would follow because national governments do not necessarily represent all interests, are not always democratically legitimate, rarely supervise confidential trade

> rule-making by executives, and because the WTO itself has a democratic deficit in the absence of weighted voting[358].

Petersmann's theory is bold and resuscitates the canons of classical liberal thought, updating their projections. However, it suffers from both syllogistic reasoning and practical difficulties. If, in fact, representative democracy has enormous defects that prevent it from faithfully mirroring the various sectors of society and voicing, in a transparent manner and with the maximum legitimacy, their demands, imposing liberal constitutionalism from outside does not necessarily present a solution. External imposition does not make it more likely that the plethora of interests and demands identified locally will resonate internationally. Even for proponents, such as Bogdandy and Venzke, of a radical international reform agenda who would create the legal institute of cosmopolitan citizenship:

> The legitimation of international public authority should thus pick up on existing domestic pathways of democratic legitimation and supplement them with proper mechanisms. For international courts this means an intrinsic dependence on state-generated legitimation, which may well guide their work of interpretation, for example with doctrines like “margin of appreciation” or “subsidiarity”[359].

Petersmann identifies structural failures such as unsustainable institutional dysfunctionalities that are the object of reflection and maturation, even of institutional reform. In asserting the need for directly enforceable commercial rights as a path to further economic liberalization in favor of individual economic rights, the author overlooks the fact that the natural judge of International Law is the judge of first instance. Whether in a monist or dualist system, once the international act is internalized, it is directly enforceable. If a country’s legal tradition fails to incorporate International Law into the decisions of the first and second instance, the flaw is more cultural than structural.

Finally, ambitious constitutionalization cannot occur at the expense of non-economic objectives. The challenge of imbuing international regimes, which are thematically fragmented, with democratic representativeness requires some international parliament with the legitimacy to establish the contours of an

[358] Fisher, L. (1988). *Foreign Policy Powers of the President and Congress*. The ANNALS of the American Academy of Political and Social Science, 499(1), p. 168.
[359] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p.146.

international constitutionalism. That is what Habermas, Bogdandy and Venzke and many other international political and legal analysts maintain. Partial constitutionalism based purely on economic objectives may be ambitious, but also potentially disastrous. It could even be criticized as less legitimate than the current model of partial discipline[360].

Petersmann published his influential book *Constitutional Functions and Constitutional Problems of International Economic Law* three years after the fall of the Berlin Wall and the end of the bipolar Cold War world. In general, the academy was seized with increasing enthusiasm over the real possibility of the 'end of history' and the definitive victory of liberal democracy as the best path to realizing *thymos*, the human desire for recognition of one's dignity[361]. Such was the sensation of victory of the liberal project that, in the year following the publication of Petersmann's book, Thomas Frank published an article arguing that democracy had become so widespread and accepted among countries and economic blocs that it was on its way to becoming a global entitlement. Important economic blocs, such as the European Union[362] and Mercosur[363], erect democratic clauses to condition membership and some important international organizations, such as the Organization of American States (OAE) [364] have sanctioning mechanisms in place for breaches of their representative democracy requirements. This elevation of the status of liberal and representative democracy in the global environment has led many authors to believe that the classic theory of the recognition of states was evolving and that democracy would soon become one of the necessary elements for international recognition[365]. A strong boost in this regard was the Declaration on the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* (16 December 1991) that

[360] *Idem*, p. 134.
[361] Fukuyama, F. (2006). *The end of history and the last man*. New York London Toronto Sydney: Free Press.
[362] Council of the European Communities(n.d.). Treaty on European Union. [online] Available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf.
[363] Presidency of the Republic of Brazil (n.d.). Decreto No 4.210, de 24 de Abril de 2002. Promulga o Protocolo de Ushuaia sobre Compromisso Democrático no Mercosul, Bolívia e Chile. [online] www.planalto.gov.br. Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/D4210.htm [Accessed 18 Apr. 2020].
[364] Organization of American States General Assembly (n.d.). AGRES1080. [online] www.oas.org. Available at: https://www.oas.org/juridico/english/agres1080.htm [Accessed 18 Apr. 2020].
[365] Crawford, J. (2019). *Brownlie's Principles of Public International Law*. 9th ed. Oxford: Oxford University Press, p.142.

conditioned recognition on the establishment of a democratic regime[366]. Thus, the logic behind part of the legal engineering devised by Petersmann to solve the dilemmas of national constitutional democracies, their deficits in representation and democracy, and advance economic liberalism on a firm footing by closely associating it with political liberalism, is promising, and attends to the spirit of the time when it was written, but stalls in the face of practical difficulties.

2.3.2.3 Judicial Norm-Generation

The third and last model of constitutionalization discussed by Cass predicts that an international adjudicatory body will have to contribute to the creation of the new legal system. Here Cass refers, in short, to the kompetez-kompetez principle, that is, the competence of such an organ to determine its own competence, including the expansion of the norms and structures of the system in a fashion that is both coherent and consistent with its objectives.

This topic is extremely controversial, especially in the current historical moment in which the WTO Appellate Body is facing accusations of acting in a manner contrary to the original framework. In addition, there are a series of padlocks, both in the WTO agreements and in the sources of International Law aimed at their development (especially, the general principles of law) that make designating the power to oversee the constitutionalization of international trade and liberal order to the WTO itself questionable. If, on the one hand, it is true that the dispute settlement body has provided creative solutions that have helped develop international commercial law, on the other, these movements have reached the point of vertigo and the willingness of countries to accept such heady advance has diminished. Cass accepts that:

> The political institutions of the WTO are (…) not equipped to act in a manner consistent with a branch of government with a full complement of constitutional power. Armin von Bogdandy argues that the legislative function of the WTO is seriously deficient in comparison to its adjudicative function in terms of both democracy and efficiency. There is a 'serious mismatch between the cumbersome political institutions and procedures on the one hand and the WTO`s often far-reaching rules applied by compulsory adjudication on the other. Democracy is compromised by, for example an absence of a forum for open discussion of rule creations;

[366] European Community (1992). European Community: Declaration on Yugosvalia and on the Guidelines on the Recognition of New States. *International Legal Materials*, [online] 31(6), pp.1485–1487. Available at: http://www.jstor.org/stable/20693758 [Accessed 18 Apr. 2020].

> a powerful and autonomous WTO bureaucracy; national parliamentary deference to governmental measures issuing from international treaties; and efficiencies of information in national arenas about the WTO. Efficiency is compromised by slow and cumbersome treaty-making procedures; inadequate amendment procedures; and protection of economic sovereignty in cases where amendment alters the rights and obligations of members, by the provision that a member must agree to the particular amendment before it becomes obligatory for that member. (…) The WTO`s 'missing legislator' cannot be adequately replaced by functional equivalents for legislative efficiency or democracy because the alternatives are inadequate. Rulemaking by WTO organs has been weakened in the 1995 WTO Agreements as compared to the 1947 GATT, and 'out-sourcing' of rule-making by, for example, international standard-setting bodies, risks capture by private interests[367].

A point of natural transition has been reached where the discussion of adjudicatory transparency is particularly timely, if not imperative.

2.4 Legitimatory Problem of International Adjudication: Adjudicatory Transparency

> *Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial[368].*
>
> *Jeremy Bentham*

Today, there are twenty-three permanent international judicial bodies[369]. They are already part of the international reality; they have increased numerically over the years; they have already contributed enormously to the establishment of peace and to the progress of general and specific International Law – but their existence and performance have also been subject to great scholarly. *International courts are defined here as permanent international judicial bodies that meet the following criteria: (1) they decide the question(s) brought before them on the basis of international law; (2) they follow predetermined rules of procedures; (3) they issue*

[367] Cass, D.Z. (2005). *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. Oxford: Oxford Univ. Press, pp. 184-185.

[368] Bentham, J. (1843). The Works of Jeremy Bentham. [online] *Google Books*. W. Tait. Available at: https://books.google.com.br/books?id=QdEQAAAAYAAJ&pg=PP7&hl=pt-BR&source=gbs_selected_pages&cad=3#v=onepage&q&f=false [Accessed 18 Apr. 2020].

[369] Kuyper, J.W. and Squatrito, T. (2016). International courts and global democratic values: Participation, accountability, and justification. *Review of International Studies*, 43(1), pp.152–176.

legally binding outcomes; (4) they are composed of independent members; (4) they require at least one party to a dispute to be a state or an international organization[370]*.*

Mikael Rask Madsen, Pola Cebulak and Micha Weibusch have identified growing resistance to international courts, usually in the mild form of pushback. By pushback they refer to questioning of the courts' decisions without forasmuch demanding the end of the court or its fundamental mission. They also identify instances of backlash, referring to more radical and revolutionary challenges that dispute the very existence of these courts and their foundations. The authors use as examples the radical closure of the Southern African Development Community Court (SADC), which was suspended after a ruling on the polemic question of land rights in Zimbabwe and the reforms of the Brighton Declaration (2012) to the European Court of Human Rights (ECtHR)[371].

The demand for greater legitimacy and accountability from international courts is important because they can both be a channel for vocalizing public awareness as well as shape it. Unfortunately, no empirical studies explore the capacity of international courts to affect public opinion.

> (…) the intention behind international litigation may be precisely to shift public opinion. International criminal prosecution is often motivated by an attempt to change elite and public opinion in order to deepen the deterrence effect (…); human rights are litigated to enhance tolerance for a particular group or issue (…); while investment disputes are sometimes taken to international arbitration in order to chill enthusiasm for restrictive investment policies. On the latter, witness the aggressive global litigation of Philip Morris and its accompanying public reactions strategy seeks to sway both elite and public opinion on support for anti-tobacco regulations (...). Thus, if the goals of litigating parties is to change attitudes, it is likely that they will invest in appropriate strategies. This could involve addressing at least the three factors above – making specific legitimacy of a court, and embarking on awareness strategies to increase citizen comprehension. In this they may also be assisted by actors whose general strategy is to expand the influence of International Law and courts [372].

[370] *Idem*, p.161.

[371] Madsen, M.R., Cebulak, P. and Wiebusch, M. (2018). Backlash against international courts: explaining the forms and patterns of resistance to international courts. *International Journal of Law in Context*, [online] (118), p.4. Available at: https://www.cambridge.org/core/journals/international-journal-of-law-in-context/article/backlash-against-international-courts-explaining-the-forms-and-patterns-of-resistance-to-international-courts/BFFB3130BF448758B01FAACD60C50C6A.

[372] Langford, M. (2018). *International Courts and Public Opinion*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131863.

While no empirical studies accurately measure the capacity of international courts to affect public opinion, it is possible to support the conclusion by drawing from another context. The empirical analysis of the impact of the United States Supreme Court decisions on public opinion abounds in the scholarly literature, as do studies of the impact of public opinion on the Court's decision. The theories elaborated in the US context may perhaps inspire some deductions about the impact of international courts, which presents an agenda for future academic developments. However, *ad argumentandum*, we could also mention as reasons, in the form of theories, for the impact, nature and targeting of their decisions: (i) their unique legitimacy, which gives them authoritative and symbolic legitimation to change and shape public opinion ; (ii) their deliberative function, which *provides source credibility for a particular position*[373], forcing citizens *to re-evaluate their deeply held convictions in light of new arguments, new facts or the existence of a contrary opinion by an independent institution*[374]; (iii) thermostatic theory, holding that *there is a negative relationship between the ideological direction of court decision-making and public mood, creating a pendulum effect*[375] no matter the court's ideological direction; finally, the *polarization* theory, which points out that the negative effects of a decision have greater impact on public opinion than the positive ones, even though these are more numerous or qualitatively higher.

This spirit also relates to the current crisis in the DSB. Thomas M. Franck projected that the mandate of a third-party conflict resolution procedure comprising arbitration panels and a permanent Appellate Body established by the Final Act of the Uruguay Round, if fully implemented, would engender genuine fairness in the multilateral trade system.[376] Subsequent history demonstrated the failures of the DSB to provide the degree of fairness expected. It is widely accepted that the current crisis was sparked by the unilateral behavior of the United States. Despite the self-serving nature of the American attitude towards the DSB, however, other States and some academics concede that some of the criticism used by the US to justify its action

[373] Langford, M. (2018). *International Courts and Public Opinion*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131863, p. 5.
[374] *Idem*.
[375] Langford, M. (2018). *International Courts and Public Opinion*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131863, p. 5.
[376] Franck, T.M. (2002). *Fairness in International Law and institutions*. Oxford: Clarendon Press. Oxford University Press, pp.433–434.

is valid. Among the justifications cited are the alleged lack of adjudicatory transparency in the DSB, which is at the core of the US policy to block appointments that are necessary for the DSB to resume operation. The US criticism of the DSB can be summarized in five points:

1. Continued adjudication by persons whose term on the AB has expired, therefore who are no longer AB members in clear collision with the Rule 15 of the Working Procedures for Appellate Review;
2. AB neglect of the 90-day deadline for issuance of its Reports, which would, therefore, hamper the prompt settlement of disputes requirement as established by DSU 17:5, generate uncertainty as to the validity of the Report and impair transparency;
3. AB creation of excessive amount of *orbiter dicta* in its Reports, in Violation of DSU 17:6, (by which *an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel*) 17:12 (by which the AB shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding), undermining its function;
4. AB perverting the de novo standard of review, an infringement of the DSU 17:6; and
5. AB assertion that its Reports serve as precedent, in violation of DSU Article 3:2, that establishes that

> 2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements[377].

Ernst-Ulrich Petersmann sees compelling signs that the US administration is loath to engage in negotiations on DSU amendments because it cannot do so in good faith. In addition to the United States' hesitation about defining next steps for amending the

[377] World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press. Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, p. 355.

WTO treaties to resolve the complaints it uses to justify its action, five other observations indicate that the allegations are mere pretexts to allow the country to pursue a protectionist economic strategy: 1. No analytical evidence was submitted to justify the claim that the judicial AB interpretations have engaged in "persistent over-reach", for instance, proof of violation of the customary rules of treaty interpretation (arbitrarily misinterpretation of "the terms of the treaty" or misapplication of the duly interpreted treaty terms to the relevant facts established by the panel), or the quasi-judicial mandate of WTO dispute settlement bodies (e.g . by not addressing "each of the issues raised in accordance with paragraph (s) 6" and 12 of Article 17 DSU); 2. the fact that most of the alleged reasons for blocking appointments were longstanding matters of concern under scrutiny that predated significantly the blockade and, despite occasional manifestations of discontent with individual DSB decisions, the DSB's jurisprudence as a whole was never questioned; 3. the US claims that broaden the meaning of "national security" as to encompass "economic security" and thus avail itself of, by means of Article XX of the GATT, a wide avenue for justifying violations of multilateral trade rules outside the WTO purview of judicial review; 4. the US proposals for bilateral trade agreements with China that notably exclude third-party adjudication; 5. The fact that US "Section 301 trade sanctions" concerning China were introduced unilaterally and in disregard for WTO rules[378].

Primarily in light of Article IX:1 of the Marrakesh Agreement Establishing the World Trade Organization, this scenario justifies resorting to other paths that are already available and that, because they have not yet been triggered, draw attention to the political predicament of the WTO that shows a constitutional shortcoming in the Organization itself and an error in the premises of current international liberalism:

> - Initiation and completion—"by a majority of the votes cast" (Article IX:1 WTO Agreement) in the WTO General Council or WTO Ministerial Conference rather than in the DSB—of the WTO procedures for selection and timely appointment of vacant AB positions. This legally prescribed majority voting by the WTO Ministerial Conference or General Council is justified by the illegality of the US blockage of the administrative DSB duties to maintain the AB as prescribed in Article 17 DSU.38 The text of Article IX:1 confirms that the WTO Ministerial Conference and General Council are legally required ("shall") to overcome illegal "blocking" in the DSB

[378] Petersmann, E.-U. (2020). Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp. 28-68.

> of the filling of AB vacancies by such majority decisions in order to meet the collective WTO legal duties to maintain the AB as prescribed in Article 17 DSU, similar to the existing WTO procedures for appointing the WTO Director-General through a majority decision "where a decision cannot be arrived at by consensus".(…)
> - In order to pre-empt objections (e.g. by the US) to such a majority decision as mandated by Article IX:1 WTO, the WTO Ministerial Conference or General Council could also adopt an "authoritative interpretation" based on "a three-fourths majority of the Members" (Article IX:2 WTO) confirming their collective legal duties and existing WTO powers to fill "vacancies … as they arise" (Article 17 DSU) through majority decisions, for instance in view of Article XVI:3 WTO Agreement. This "authoritative interpretation" could also confirm that such majority decisions on meeting collective legal obligations of all WTO members do not establish a precedent for WTO decision-making on discretionary trade policy issues.
> - As such majority decisions of WTO bodies require diplomatic preparation in order to overcome resistance by US trade diplomats, WTO members might further confirm, and temporarily resort to, the availability of "arbitration within the WTO as an alternative means of dispute settlement" (Article 25.1 DSU)—also for agreed appellate review of WTO panel reports. Yet, such mutually agreed use of arbitration under Article 25 DSU to ensure the availability of appeals entails numerous problems that risk further undermining the WTO dispute settlement system. As consensus-based DSU reforms continue to be out of reach, and in order to pragmatically accommodate US power politics, a WTO majority decision on filling the AB vacancies could also acknowledge that—if the US government fails to support the filling of AB vacancies and does not propose a US AB member—the other WTO members will submit disputes to the newly composed AB only among each other without initiating AB proceedings against the USA[379].

The premise of an international, democratic and liberal peace is being deeply challenged on various chessboards of international relations. Democratic constitutionalism and WTO law have not prevented unilateral assaults on the multilateral trade order or properly addressed real problems behind part of the legitimate concerns of international economic actors, such as the market distortions produced by economies heavily subsidized by the government.

The offensive against the DSB is serious and could undermine the structure of the multilateral trading system itself, since rule of law will be put in jeopardy. The rule of law is a broad concept, and in order to achieve its most potent expression, it is necessary to comply with a series of requirements:

[379] Petersmann, E.-U. (2020). Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp. 28-68.

> WTO panel, AB and arbitration procedures serve multiple functions, for example for (1) dispute settlement through third-party adjudication; (2) impartial and independent rule-clarifications enhancing legal security ; (3) judicial rule-making (e.g. by elaborating panel, AB and arbitration working procedures as mandated by the DSU); (4) clarification and legitimization of " public reason " in multilevel trade governance through WTO jurisprudence and its critical discussion in the DSB; (5) protection of transnational rule of law and, thereby, (6) also of democratic legitimacy of trade policies as prescribed by democratic institutions in WTO member states when they approved the WTO legal and dispute settlement system for the benefit of their citizens and peoples[380].

Ernst-Ulrich Petersmann's grievance against the current world economic and trade order was once again on display in his response to the US complaints of the WTO which reinforces his thesis in favor of a rights-based approach to the reform of the system. In agreement with him, *the hegemonic abuses of trade policy powers indicate the political limits of "judicialization" of international economic law and the need for systemic, "ordo-liberal" reforms of the WTO in order to avoid disintegration of the world trading system*[381]. The ongoing crisis would be proof that GATT/WTO is more oriented to favor powerful nations than is admitted. Not that the WTO lacks mechanisms to curb the naked exercise of power. Judicial remedies and administrative majority decisions to fill vacancies in WTO institutions (like the Appellate Body) if consensus is arbitrarily impaired, among other means, would be one route to member-driven governance. This avenue ensures the protection of rule of law and could potentially lead to the promotion of higher levels of rights protection and social welfare.

Petersmann resumes the debate over the legitimacy of law and governance by assembling historical examples where agreed rules and principles of justice successfully restrained power. The author reminds that following World War II, the United Nations system created a *corpus juris* of multilateral treaties and other legal instruments that restrained multilateral governance of recognized public goods (or, should Petersmann prefer, "constitutionalized") "inalienable" human rights, democracy and rule of law. Conjointly, *the compulsory jurisdiction of the multilevel WTO dispute settlement system for legal and judicial protection of transnational rule of law at international and domestic levels of trade governance reflects a historically*

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[380] *Idem*, pp. 28-68.

[381] Petersmann, E.-U. (2020). Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp. 28-68.

unique achievement of legal civilization. The apogee of such process would occur when the *humanism underlying modern human rights law (hereinafter "HRL"), UN law and international economic law (…) leads to legal and democratic protection of ever more individual and democratic rights and judicial remedies in international investment and trade law , as illustrated by the "human rights clauses" by means of an approach led by European "ordo-liberalism".*

Although such architecture has not yet been created, Petersmann denounces the unilateral actions of the USA, in particular, but also those of any country that threaten the integrity of the multilateral trading system as abuse of power, since the foreign policy mandates guided by the Marrakesh treaties prohibit such interference. On this point, I partially disagree. In all presidential and republican countries inspired by the design of their division of powers and checks-and-balances structure of the US Constitution, the executive branch has primacy in the negotiation and conduct of foreign policy. So much so that international treaties can be denounced without congressional consent, although belonging party to a regime or a treaty necessarily depends on agreement. Determining the extent to which the executive branch debases the parliamentary mandate is very complicated.

To use wording from Cass, the solution preferred by Petersmann for the crisis of international legitimacy of the WTO is the 'evisceration of politics', which is neither practical nor possible, much less a safe way to avoid an even greater crisis of legitimacy. For these same reasons, the solution proposed by Bogdandy and Venzke, which will be taken up later, is the antipode Pettersman's.

Indirectly, Markus Wagner argues that much of the crisis of the "judiciary" of the WTO arises because of the inertia of its legislative function, and on that point he partially converges with Petersmann`s diagnosis[382]. The WTO has gone from a negotiation to a litigation-centered organization.

> Shortly after the creation of the World Trade Organization (...) the newly created Appellate Body (...) started to occupy a position of centrality in the governance of International Trade Law. Through its position at the apex of WTO dispute settlement (unforeseen at the time of its creation), its jurisprudence concerning non-economic values, and its realization of the importance of open and more transparent processes the AB has contributed greatly towards

[382] Markus, W. (2020). The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic? In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp. 105-140.

> improving the legitimacy of the WTO in general and the dispute settlement pillar in particular[383].

R. Rajesh Babu launched what he himself called a look from the South on the topic of DSB reform[384] and affirmed the opinion that the AB have *misused their discretion and improperly engaged in creating new WTO rules and procedures through techniques of "*filling legal gaps*", "*completing the analysis*", or "*clarifying ambiguity*"*[385]. The ongoing crisis is a chance "to introspect and restore democratic deficit and prevent judicial overreach, before losing institutional legitimacy and confidence of a vast majority of the WTO membership.[386]

Like the previously cited authors, Babu reiterates that WTO is a member-driven organization with two political bodies with the "exclusive authority to adopt interpretations" in case of conflict or ambiguities while implementing the provisions of the WTO covered agreements. This competence was not depicted as an appanage, but as the power to advance the understanding of the rule of law, as well as to bring and maintain consistency to the system.

> 2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X[387].

The inertia of the Ministerial Conference and the General Council in exercising institutional prerogatives would be, to a large extent, the reason for this crisis of legitimacy of the DSB. This competence was reaffirmed by WTO jurisprudence in Japan – Alcoholic Beverages II (DS8: Japan — Taxes on Alcoholic Beverages), US – Wool Shirts and Blouses (DS33: United States — Measures Affecting Imports of

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[383] Markus, W. (2020). The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic? In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp. 105-140.

[384]Babu, R.R. (2020). WTO Appellate Body Overreach and the Crisis in the Making: A View from the South. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp.141–168.

[385] *Idem*.

[386] Babu, R.R. (2020). WTO Appellate Body Overreach and the Crisis in the Making: A View from the South. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp.141–168.

[387] World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press.

Woven Wool Shirts and Blouses from India), Chile – Price Band System (DS207: Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products), EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas), US-Clove Cigarettes (US-Clove Cigarettes) and US – (DS108: United States — Tax Treatment for "Foreign Sales Corporations") [388].

In US-FSC the DSB went further and distinguished between the role of these political bodies and the Body itself in clarifying the rule of law:

> Under the WTO Agreement, an authoritative interpretation by the Members of the WTO, under Article IX:2 of that Agreement, is to be distinguished from the rulings and recommendations of the DSB, made on the basis of panel and Appellate Body Reports. In terms of Article 3.2 of the DSU, the rulings and recommendations of the DSB serve only 'to clarify the existing provisions of those agreements' and 'cannot add to or diminish the rights and obligations provided in the covered agreements[389].

The Panel Report of EC–Bananas III stated even more bluntly that *multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are most akin to subsequent agreements within the meaning of Article 31(3)(a) of the Vienna Convention*, by which any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account[390]. In practice, this manifestation of the Panel is the recognition that the interpretation coming from the political bodies of the WTO has such legitimacy and strength that it functions as a de facto amendment to the current treaties. *Whereas, the role of Panel and the Appellate Body under the WTO is limited to "clarification" of the covered agreements in cases where their implementation has resulted in a*

[388] World Trade Organization (n.d.). *WTO Analytical Index- WTO Agreement -Article IX (Jurisprudence)*. [online]. Available at: https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art9_jur.pdf.
[389] World Trade Organization (n.d.). *WTO Analytical Index- WTO Agreement -Article IX (Jurisprudence)*. [online]. Available at: https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art9_jur.pdf, p. 3.
[390] United Nations (2006). *Vienna Convention on the law of treaties (with annex)*. Concluded at Vienna *on 23 May 1969*. [online] Available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.

dispute, "in accordance with customary rules of interpretation of public international law" (Article 3.2, DSU)[391].

The understanding of the legitimate role of the DSB held by R. Rajesh Babu is quite different from the one vocalized by Petersmann. For the Indian author, the DSB is not a court of general jurisdiction competent to apply all pertinent international law. Like any regime specific adjudicatory body, the DSB does not, should not and would not have a constitutional role. Thereby, the DSB must observe its boundaries and show deference to political bodies for changes in the rule of law. It has a *narrowly defined function of settlement of disputes without upsetting the delicately negotiated balance* and its limited interpretative freedom is framed by rigorous criteria by the Member States. In this setting, judges and members of international adjudicatory bodies do not have legitimate representativeness because they are not accountable to any legal order or parameter[392].

Until the controversy is settled, Rajesh Babu argues that this state of affairs calls for boosting transparency in adjudicatory instances in order to buttress credibility. In this sense, many techniques and practices of self-restraint should be permanently introduced: (i) open court process not just for the WTO members, but also the public at large; (ii) dissenting and separate opinions should be encouraged, as the *practice is rooted in practices of most mature legal systems as well as that of the international adjudicating bodies* and because *fifty percent of the arguments raised in dissents at the panel level were adopted in whole or in part on appeal by the Appellate Body*; and (iii) the parties to the dispute should be given an opportunity to raise questions not only about the errors in facts and arguments, but also about the interpretation developed by the panels or the AB (Article 15, DSU)[393].

Niall Meagher, exploring the DSB's writing and argumentative style, especially that of the AB, looks for parameters in the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.* However, the DSU is silent with regards how much they should write in order to fulfil their mandates under the DSU.

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[391] Babu, R.R. (2020). WTO Appellate Body Overreach and the Crisis in the Making: A View from the South. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp.141–168.
[392] Babu, R.R. (2020). WTO Appellate Body Overreach and the Crisis in the Making: A View from the South. In: J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Singapore: Springer, pp.141–168.
[393] *Idem*.

Although the legal instrument removes any doubt about the DSB's need to express itself in writing to justify its findings and decisions, it notes that the parameters for acceptable written legal justification are not signaled by it.

The act of writing is vital for the system and for the establishment of the rule of law and for the sake of credibility, as it enhances transparency by bringing clarity and consistency. The AB's judicial writing style could be considered "pure" or "formalist", using Posner's characterization, in that it addresses the issue at hand in a *logical, impersonal, objective, constrained character of legal reasoning*. *The formalist firmly believes in right and wrong, truth and falsehood, and believes that the function of a judicial opinion is to demonstrate that the decision is right and true*[394]. For some analysts, the AB's style reaches the point of hermetic opacity due to its meticulous and thorough technicality.

Mitchel Lasser, in comparing the different textual styles of French, American and EU jurisprudence, concludes that assessing which is best in terms of transparency, control, and accountability is impossible[395], qualities that are often independent of length or thoroughness, formal or informal registry, or openness to contrary viewpoints. The same observation applies to the DSB style of writing. Nevertheless, there is a certain consensus that the reports would improve by emphasizing clearer, less hermetic reasoning that is more intelligible to laypeople and, thus, more easily appropriated, divulgated and assimilated by the epistemological community, understood as all those interested in foreign trade.

The *legitimatory problem of international adjudication,* a term coined by Armin von Bogdandy and Ingo Venzke[396], scrutinizes the notion in a creative and, as they themselves like to point out, realistic way. Their thesis was not meant as an apology or to be utopian, which is a clear reference to Martti Koskenniemis important essay "From Apology to Utopia" in which Koskenniemi delves into the structure of international legal argumentation. Kokesnniemi's analysis led him to conclude that most of the argumentative logic in International Law was rife with either naivety or cynicism. Although Bogdandy and Venzke did not explicitly cite Institutional

[394] Meagher, Ni. (2020). The Judicial Style of the Appellate Body. In: C. Lo, J. Nakagawa and T. Chen, eds., *The Appellate Body of the WTO and Its Reform*. Springer Singapore, pp. 209–248.
[395] Lasser, M. de S.-O.-l`E (2009). *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy*. Oxford; New York: Oxford University Press.
[396] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p. 101.

Managerialism or Rights-Based Constitutionalism, tacit points of dialogue with those approaches can be seen:

> With constitutionalist authors we share the conviction that the stock of principles of the democratic constitutional state is important to International Law –whether to its doctrinal reconstruction, to its doctrinal, political, or theoretical critique, or as an inspiration for future configurations. However, we are skeptical about ascribing constitutional functions to existing institutions. (...) We do not deny that this approach may lead somewhere with a few courts, specifically the supranational Court of Justice of the European Union, the European Court of Human Rights, and the Inter-American Court of Human Rights; however, (...) this attribution is not persuasive especially for the Appellate Body of the WTO, the International Court of Justice, and the ICSID arbitral tribunals
>
> If international courts could be interpreted as having a constitutional function for the domestic legal orders, it would be possible not only to justify their de-coupling from an effective legislature. Such an understanding would also legitimize a 'creative' and 'expansive' interpretation of the legal foundations.[397]

Based on the factual assessment that no international court possesses the competence to declare parliamentary acts inapplicable or to repeal legal rules of the municipal order, Bogdandy and Venzke conclude that, even though constitutional values are present in the international order – which, in effect, would be gauged in the San Francisco Charter, and notwithstanding the constitutional posturing of some courts (like the Inter-American Court of Human Rights, the European Court of Human Rights, and the International Criminal Tribunal for the Former Yugoslavia), they possess nothing like the competences of the supreme courts of the States, nor their legitimacy. The consolidation of constitutional values in the international order, despite advances, remains in a very preliminary phase. Even if consolidation had already reached an advanced stage, or if the existence of solid and undeniable international constitutional values and of the international order were admitted, it does not follow that constitutional adjudication would be admitted, established or delegated, in this case, to the International Court of Justice. In spite of the Court's potential and the scope of its jurisdiction, which is now the most comprehensive in relation to other international courts, the preparatory works of the UN Charter establish that constitutional adjudication was not supposed to devolve to the ICJ.

[397] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p. 129.

Nevertheless, the authors go on to argue, international courts do exercise public authority. It is a given that no international apparatus is directly obliged to execute their sentences. What could be considered the International Law enforcement mechanism demonstrates more dissimilarities than convergences with national experiences. ICJ decisions, if not followed, are submitted to the Security Council for execution. That body, for its part, is deeply political and the veto power of the five permanent members makes it virtually impossible to enforce decisions against one of them or any ot their close or strategic allies or when a critical interest is at stake. An additional factor that the authors argue reinforces the public authority of international courts is the weight of international court decisions. Although there is no *stare decisis* in International Law, their precedents are not inconsequential. Hardly any international jurisprudence falls completely into harmlessness.

Despite all these findings, the authors advance the thesis that only an international political power, some international legislative power, would have the ability to proceed in the creation of an international constitutional order with any legitimacy and, from there, erect an international constitutional adjudicatory power. So far, the legitimacy of this construction is indirect and occurs through the exercise of congressional diplomacy by national parliament, which faces a great difficulty in that parliamentary scrutiny on international acts is usually perfunctory[398]. In addition, national parliaments, with the exception of the US Congress, are utterly deferential to the executive on the matters of international relations. Therefore, [the] *democratic potential of parliamentary legitimation can develop less with an international treaty than with a domestic law*[399]. This is what Article 12 of the Treaty of European Union, the paradigm from which the authors build their proposal, states:

> Article 12
> National Parliaments contribute actively to the good functioning of the Union:
> (a) through being informed by the institutions of the Union and having draft legislative acts of the
> Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
> (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

[398] Cachapuz de Medeiros, A.P. (1983). *O Poder Legislativo e os tratados internacionais*. Porto Alegre: L & Pm.
[399] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p. 123.

> (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
>
> (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
>
> (e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
>
> (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union[400].

It should be noted that the European Union understood congressional diplomacy as the basic mechanism for the construction of its regional democracy, which supposes elevating the role of parliaments in foreign policy matters.

The most important question that thus remains is how Bogdandy and Venze hope to overcome the legitimation problem of international adjudication that is held hostage by the lack of democratic generality. They argue that the lack of an international legislature in a single space with recognized legitimacy makes democratic generality impossible. Democratic generality is not a a concept consecrated in political science or by law, nor clarified by the authors. From their construction, we can deduce that democratic generality is a qualified measure of the general will[401] in a complex environment where individuals are considered to be

[400] European Union (2012). Consolidated Version of The Treaty on European Union. [online] Official Journal of The European Union C 326/13, p.123. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.

[401] "The general will is by no means a pure and simple addition to particular wishes. General will is not simply the will of all or the majority. Here an element of "morality" must intervene, a word dear to Rousseau. The latter seems to distinguish two worlds, one comparable to the world of Sin, the other to that of Redemption. On the one hand, the world is suspicious of particular interest, of particular wills, of particular acts. On the other, the world of general interest, of the general will (to which the general interest is concerned and not the particular one), of the general acts (the laws). A radical difference, not in degree, but in nature, separates these two worlds.

Now, the people as a body, "the sovereign", could not want anything but the general interest, could not have anything but a general will. While each of the members, being simultaneously, as a result of the [social] contract, an individual man and a social man, can have two kinds of will. As an individual man, he is tempted to pursue, in accordance with his natural, selfish instinct, his particular interest. But the social man in it, the citizen, seeks and wants the general interest: it is an all-moral search, carried out "in the silence of the fishes". Freedom – natural freedom transformed, denatured – is precisely the faculty that each has to make his "general" will prevail, over his "general" will, which

multidimensional in that they respond to a multitude of values and legal interests, often in tension with each other, that must be contemplated by the constitutional order. The authors do not even explore most complex aspects of today's democracy, which are the identities that lead to multi-affiliations and multi-loyalties that transcend states that, in a way, was already predicted by John Rawls[402].

Steve Charnovitz reveals alternative perspectives for capturing democratic generality:

> (...) two different ideas—the pluralist and the civic republican—may be relevant. The pluralist will seek to open up governance and to provide opportunities for the participation of dueling interest groups in the decision-making process; the civic republican will seek governance decisions that relate to a public value discovered through deliberation. Both concepts infuse the ongoing debate about WTO transparency and participation of NGOs in the trading system[403].

With democratic generality as their objective and mirroring the European experience, the authors propose a construction based on basic, simple and practical principles found in Articles 9 to 12 of the Treaty of European Union (hereinafter TEU), whose core elements are citizenship, representation, transparency, deliberation, participation, responsiveness and control, and reorientation of domestic parliamentarism. All of these principles are implicit to democratic legitimacy, a value that has gained consistency and legal format over the history of the construction of the European Union.

As for citizenship, the authors refer to Article 9 of the TEU:

> PROVISIONS ON DEMOCRATIC PRINCIPLES
> Article 9
> In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

The authors propose a legal concept of cosmopolitan citizenship in addition to, not substitution for, national citizenship as carried out in the European Union.

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erases "love for himself" for his benefit "group love"". Chevallier, J.-J. (1995). *As Grandes Obras Politicas de Maquiavel a Nossos Dias*. 7th ed. Translated by L. Cristina. Rio de Janeiro: Agir, p. 167.

[402] Viotti, P.R. and Kauppi, M.V. (n.d.). *International Relations Theory*. 5th ed. Pearson, p. 425.

[403] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 20.

Cosmopolitanism is an ancient philosophical concept that has roots in the tradition of Stoicism. It is an interesting intellectual tradition, but one displaying enormous contradictions in its political expression. The Roman Stoics departed from the premise that human beings have the same potential, because they emanate from the same divine spark and, exercising their reason, show primary loyalty to God; secondary loyalty to Rome; and tertiary loyalty to family, ethnic group or identity[404]. Universalist sentiments overpower more particular ones and, therefore, an *imperium sine fine* would respect local morals but also somehow elevate new peripheral dependencies of Rome and tributary states to a philosophically superior regime.

The Stoics departed from the premise that human being has the same potential, for being a manifestation of the divine, exercising his reason, would have for primary loyalty to God; by secondary to the Roman State; and tertiary to your family, ethnic group or identity [405] . Universalist sentiments would overcome particularism and, therefore, *an imperium sine fine* would respect local morals but also elevate the periphery, the new dependencies of Rome and the tributary states, in some way, to a philosophically superior regime.

Several Stoics who had great opportunity to express their political beliefs, such as Marcus Tulius Cicero and Emperor Marcus Aurelius, were imperialists who did not shy from subjugating other cultures to Roman power, even though they were also great defenders of this notion of cosmopolitanism. It is also necessary to remember that, despite their cosmopolitanism, most Stoics were against granting equal citizenship status to naturals of the conquered provinces. Caesar's own death offers an emblematic message. It was precipitated by his designs to turn Italy into a province and creating unity in the Roman empire. Yet his decision to enlarge the Senate in an unprecedented fashion was also perceived by the patricians as debasing the notion of citizenship, tradition and precedence. Those all stray from the cosmopolitan logic[406].

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[404] Hill, L. (2000). *The Two Republicae of the Roman Stoics: Can a Cosmopolite be a Patriot?* Citizenship Studies, 4(1), p.2.

[405] Hill, L. (2000). *The Two Republicae of the Roman Stoics: Can a Cosmopolite be a Patriot?* Citizenship Studies, 4(1), p.2.

[406] "(…) Caesar was also granted the power to create new senators, and to grant patrician status as he felt necessary.

Even before the disruption and losses of the Civil War the censorship had failed to function properly in practice, often because of squabbles between the colleagues holding the post. Thus the ranks of the Senate were depleted.

Bogdandy and Venzke refer to the work of Michael Zürn to suggest an *aggiornamento* or modern concept of Stoic cosmopolitanism. Zürn distinguishes between four models of cosmopolitanism that already guides political action in the international arena: cosmopolitan intergovernmentalism; cosmopolitan pluralism; cosmopolitan federalism; and social cosmopolitan democracy. What all models and many political actors share are the normative principles that derive from the centrality of the individual, the principled equality of all humans, and the idea of global solidarity:

> On the level of principle, cosmopolitanism seems well established. The problems lie with the institutional implementation. (...) The intergovernmental model of a cosmopolitan orders sees the prerequisites of democratic order as present Cosmopolitan pluralism conceives of multilevel systems without an institutional anchoring point, reducing international democracy mostly to a deliberative mode of policy formation. Hence, cosmopolitanism by no means demands strong forms of institutionalization. Only cosmopolitan federalism champions forms of supranational institutionalization, following the example of the European Union. The model of a social cosmopolitan democracy aims additionally at global redistribution under the idea of distributive justice[407].

International regimes for the protection of human rights seem to be the courts that, today, are best placed to promote and instrumentalize such a concept of world cosmopolitanism.

Some scholars argue that it is possible, indeed recommended, for other courts like ICJ and the DSB to exercise juridicity that takes into consideration the legal aspects that affect individuals, which would reinforce the idea of international constitutionalism through cosmopolitanism. The concept is as riddled with

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Caesar appointed hundreds of new senators, compensating for the losses and then expanding the House dramatically. Sulla had doubled the Senate in size to around 600, but by the time of Caesar's death there were somewhere between 800–900 members. A few of these were men who had been expelled from its ranks in previous years, or whose families had been barred from public life because of their Marian sympathies. Most of the new members were from established equestrian families, including many who came from the local aristocracies of Italy, but they may also have included a few former centurions. There were also a few from citizen families outside Italy, including a number of Gauls from the Cisalpine, and probably also Transalpine, provinces. There were jokes at the time of the 'barbarians' taking off their trousers to put on a toga, and someone daubed up a slogan in the Forum proclaiming that it would be a good deed not to tell any of the new senators the way to the Senate House. It is unlikely that any of the 'foreigners' added to the Senate were not fluent in Latin, well-educated and in cultural respects little different from genuinely Roman aristocrats. A few of the appointments may have been unsuitable – as we have seen, Caesar is supposed often to have said that he would reward even criminals if they had helped him. A number of the men he appointed to provincial commands were subsequently charged with and condemned for corruption and extortion. Goldsworthy, A.K. (2006). *Caesar: The life of a colossus*. Weidenfeld & Nicolson, pp.579–580.

[407] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p. 144.

contradictions and practical difficulties at present as it was in the past: identitarian, particularistic loyalties coexist at the same level of importance, often toppling the supposed superiority of loyalty to national and universal identities. The idea of supplementing the domestic (parliamentary) instruments of legitimation of the international public authority with transnational instruments is interesting and may generate future convergence, as occurred in deeply divided and nationalist Europe in the post-World War II period. As a constructive endeavor, notwithstanding, the amount of time it will require is impossible to predict.

The second element is representation, more specifically democratic representativeness:

> Article 10
>
> 1. The functioning of the Union shall be founded on representative democracy.
>
> 2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
>
> 3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
>
> 4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 10 contemplates a bicameral system by which the federated entities are represented in the higher chamber and the in the lower one, which has power of review. The Article also mentions as a means of representation the Nation-State imbued with an obligation to foster a sentiment of European citizenship in the States and direct participation, which will be afforded by the openness and proximity of the Union's actions in relation to its citizens.

These Sections of Article 10 are complemented by sections of Article 11 that make the division between the aforesaid democratic values quite difficult. Conversely, they demonstrate the interdependent nature of concepts that are, why not say it, inseparable from deliberation, participation, responsiveness and control:

> Article 11
>
> 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
>
> (...)

> 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
>
> 4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

In regards to the democratic representativeness, the TEU's treatment is more even-handed than the Inter-American Democratic Charter, which broadly discusses the principles of representative democracy, offering clearer standards on democratic regularity and irregularity. The addressees of the Inter-American Democratic Charter are its States Parties, while the TEU addresses the EU itself. Although Article 10 does not directly impose representative democracy as a standard to be followed by members of the European space, it does so indirectly by imposing a series of obligations on States that will only be satisfied if they have a similar system. In this way, Article 10 reinforces the democratic commitments of European states. The question of representativeness eludes to Article 11 Section 1 of the TEU, when associativism is mentioned.

The authors acknowledge the debate over the formation of a world parliament and the potential gains from the formation of a supranational political forum through direct elections. They do not believe, however, that forming such a supranational political forum will be feasible in the near future, or that the lack of one poses a major obstacle to improving the standards of international legitimacy. If the system of indirect representation enjoys popular approval in Member States, it is difficult to deny it all legitimacy. While not the ideal way to bring together the many voices of society, it is not a form empty of merit either.

Transparency is mentioned in Article 11 Section 2:

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

It is mentioned only briefly and speaks generically about dialogue. It does not dictate concrete measure for the executive, legislative and judicial branches to follow. Thus,

although it clearly consecrates the principle of transparency in the EU, if anything it offers a very elusive formula for understanding how it should be implemented.

The authors, however, come to a very different understanding:

> Conceptually, one can chart a path here between utopia and apology by qualifying the broad notion of representation –as suggested by Article 10 Section 2 of the TEU – with further elements, in particular transparency, deliberation, and participation. By now the importance of these elements has come to be generally recognized, not as a replacement for, but as a supplement to democratic representation.
>
> (...)
>
> A first aspect is the transparency of the exercise of public authority. This is so important that the EU law ordains already, in Article I Section 2 of the TEU, that decisions be made 'as openly as possible' – that is, transparently. The democratic importance of transparency is underscored by Article 11 Section 1 and 2 of the TEU. As in Article 9 and Article 10 Section I of the TEU, the provision is not specific to any institution and therefore encompasses judicial action.
>
> This renders it advisable to conduct judicial procedures, for example, transparently- and this not just for the parties, but also for the wider public that might be affected. But a transparent reasoning, too, offers a strategy through which a court can contribute to its own democratic legitimation. Such a justification allows the scholarly and general public to engage much better with a judicial decision. Under Article II of the TEU, a deliberative public that engages with decisions taken by the European institutions is an objective of the European concept of democracy[408].

Based on this premise, the authors offer some proposals for greater transparency in the international judiciary.

The first would be ensuring the independence, impartiality and legal expertise of judges through a reform of the nomination and selection process for the nominees to international courts. At the moment, heads of state are given a wide margin of discretion to nominate candidates. Of course, those chosen ones are not without merit, yet no general standard or system for reviewing nominations is in place. The Rome Statute suggests that States Parties, when appointing judges, use the same procedure for appointing members to national high courts. At the ICJ, the deliberations are private and must remain secret.

A second avenue for increased transparency would be accountability mechanisms for these judges. The authors suggest enhancing the transparency of their decision, whether by televising sessions, publishing majority and dissenting

[408] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, pp.151-153.

votes, holding oral hearings, allowing individual opinions or amica curiae from civil society organizations, among other possibilities. The authors argue that, in the context of the WTO, the dispute procedure has stoked the demands for publicity and transparency, despite the cold, categorical letter of the DSU. In a situation specifically cited by the authors, the very parties to the dispute chose to open their expert meetings and further proceedings in the case Measures Affecting the Importation of Apples from New Zealand. Procedures and documents are often unnecessarily kept confidential, especially during panels where, according to the authors, an arbitration ethos prevails. Despite the progress in relation to other international courts, intervening parties in the WTO framework have no right to participate in all negotiation.

Another point highlighted is the need for a legal remedy that would allow the coordination and review of the decisions of international courts that are not hierarchically related. There is no appeal mechanism against an ICJ decision, for example. In this sense, the WTO may offer a creative solution. The AB has demonstrated that the existence of a legal remedy increases the likelihood that a normative interpretation will be established to assists security and predictability in addition to improving the generalized perception of the legitimacy of the process.

Great focus is devoted to the provision of judicial jurisdiction without reaching any peremptory conclusion. The authors understand that, in rendering their decision, judges ought to respect a judicial method that contemplates transparency and clarity and that obeys the bounds of discretion. Clearly delimiting these criteria, however, is difficult, which reinforces the need for a second degree of jurisdiction. Additionally, as mentioned previously when discussing the contrast between the American and French decision-making styles, there is no basis for determining that more summary sentences or opinions, drawn up in formal or informal style, lead to better decisions or decisions considered more legitimate. Nor can it be realistically expected that decision-making style will or will not promote incremental advances in international law, either by the strength of their *ratio deciendi* or by the persuasion of their *obiter dicta*, even without *stare decisis*. Even less arguable is the affirmation that judges will respect surgical boundaries on their legal analyses and interpretative approach, refraining from consulting sources of general international law, or soft law (e.g., good practices reports, and standards and understandings enshrined in specific

international thematic regimes)[409], thus avoiding the very common phenomenon of legal practice since time immemorial of cross-fertilization, a greater or lesser dialogue with and recognition of foreign law as an inspiring basis for legal argumentation. Legal science has been transnational in reach since its birth.

Although the authors recognize the immensely creative potential of international courts, the authors stand against judicial activism by international courts, believing that:

> (...) In light of democratic principle, it may be advisable for international courts to refrain from the substantive interpretation of a contested norm and instead derive from it procedural guidelines that lead to a discursive handling of the conflict by the parties. This approach is well developed for constitutional adjudication. A constitutional court can serve the democratic principle precisely by promoting a fair political process. Accordingly, it can strengthen an international court`s democratic legitimacy when it turns the handling of the question- multilateral hedged- back over the contending parties [410].

In the same line, Kuyper and Squatrito identify democratic values to be promoted in world politics and adjudication in order to reduce the problems of democratic legitimacy. These would be equal participation, accountability, and public justification[411]. Transparency would be at the heart of accountability and public justification.

The Norwegian researchers have the merit of approaching the issue of participation in a more detailed fashion and addressing the most contemporary aspects of the political agenda. By equal participation the authors mean the participation of all people affected by the *authoritative exercise of public power, entailing equal capacity to set the agenda as well as shape the rules, laws, and regulations that will affect their lives*. As individuals may face significant obstacles to bringing their case to an international court, due to standing, lack of technical knowledge or even lack of resources, most often they will be represented by organizations such as interest groups, non-governmental organizations, think tanks and so on.

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[409] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p. 201.
[410] Bogdandy, A.V. and Venzke, I. (2019). *In whose name?: a public law theory of international adjudication*. Oxford: Oxford University Press, p. 206.
[411] Kuyper, J.W. and Squatrito, T. (2016). International courts and global democratic values: Participation, accountability, and justification. *Review of International Studies*, 43(1), p. 156.

In addition to numerous, complex identity groups, political interest groups, labelled by the authors as *demos*, should enjoy democratic representativeness, especially in particular cases in which their interests are directly affected. Identifying those groups, that is, delimiting the *demos*, is not always trivial. When dealing, for example, with a controversy involving indigenous rights, it is not always clear which are the authentic and pertinent groups that should have a voice. In multitribal contexts or those in which unmapped or supposedly extinct ethnicities interweave, a controversial topic in ethnographical debates and a circumstance that frequently occurs in Brazil, the delimitation of the *demos* will present a low reliability coefficient. What is already a Herculean task might well become Sisyphean.

Expanding participation requires expanding access to legal institutions. Ideally, as many stakeholders as possible should have adequate access. One form of access is the recognition of their legal standing as direct or indirect litigants (through the national court referral mechanism), or as third parties and observers. Admitting observers (members of the media, students, researchers, or representatives of civil society organizations) who have not been mentioned to this point would increase the size and quality of the epistemic community interested in the subjects at stake. In the 'new normal', the virtualization of occupations and workplaces allows greater transparency and popular participation by enabling the geographical and financial barriers to be overcome, barriers that until now have inhibited direct observation of hearings by litigant, third parties and interested groups[412].

Kuyper and Squatribo distinguish two types of review powers that give international courts the power of accountability: administrative review, whereby the courts scrutinize administrative acts by States; and constitutional review, already examined:

> Finally, with regard to public justification of legal reasoning, Wagner Artur de Oliveira Cabral defines as (...) a tool to assist public debate and to foster argumentation in general. In order to achieve that, a commonly shared set of information must be established, defining facts that will then be ideally employed on activities of persuasion. Without this shared set of knowledge, the participants of

[412] Kuyper, J.W. and Squatrito, T. (2016). International courts and global democratic values: Participation, accountability, and justification. *Review of International Studies*, 43(1), pp. 164-166.

> public debate will remain arguing about separate issues, in a cacophony without constructive consequence[413].

Cabral adopts the Rawlsian concept of Public Justification, which is related to the ideas of Reflexive Equilibrium and Overlapping Consensus. By Reflexive Equilibrium, Cabral means the efforts of a person to *harmonize his or her different spheres of public and private beliefs in a unified and comprehensive scheme*. When this person brings their personal scheme to bear with outer conceptions of justice, a more complex wider reflexive equilibrium is achieved. Overlapping Consensus refers to a shared public and political conception that would translate the diverse and private conceptions of values into the public sphere, allowing for some common, if minimum, public agreement to emerge despite the plethora of private concepts of fairness, intimate moral, religious, metaphysical convictions, thus maintaining a reasonable pluralism essential to the vitality of democracy.

Kuyper and Squatribo adopt a minimalist rather than Rawlsanian approach, one grounded in the externalization of judicial decisions. The authors highlight the ways this public justification usually occur: (1) delivered in open court; (2) published; (3) reasoned; (4) through the publication of separate opinions. The authors consider that combining the publication of decisions with explanations of the legal reasoning is the best way to foster democracy because those elements at least allow for some control on the use of discretion. If complemented with the publication of separate, divergent or concurring opinions, the result offers greater comfort to society by demonstrating acceptance of the final decision by as many judges as possible, helping to better contextualize and probe controversial and consensual aspects. In addition, public justification catalyzes public discussion and even alter public opinion.

Ingo Venzke points out that the creation of a strong international judiciary was a central demand of various movements throughout the nineteenth century. The Institut de Droit International, the International Law Association, the Interparliamentary Union all worked out drafts for court creation projects. The ideal suffered several setbacks until the Permanent Court of Arbitration, the Permanent Court of International Justice and, finally, the International Court of Justice were finally created. At the time, eminent jurists such as Lauterpatch and Hans Kelsen

[413] Cabral, W.A. (2019). *Legitimacy, Authority and Publish Reason. A case for international stability for the right reasons.* PhD Thesis. pp.84–85.

believed that the path to permanent peace lay the realization of law and universal, compulsory international adjudication. For most of them, the lack of a strong international legislature was not seen as an impediment to the creation of a strong international judiciary.

The present moment seems to bear witness to a curious inversion of vectors, in which international courts continue to flourish while encountering stiffening pushback and backlash. The level of public justification that they provide is under serious question and many internationalists now believe that only the advent of a strong, more representative international legislature would provide the necessary impetus to give the system greater legitimacy.

In the case of the DSB, many factors and many critiques have dulled the shine of the "crown jewel". Some even question its intrinsic value. Questions have been raised about its transparency, limits on discretion, argumentative resources and the legitimate sources of law available to it. Scholars have also eyed the effectiveness of its measure suspending concessions and other obligations to implement DSB recommendations[414] as well as the practical utility of the DSB for developing countries. Together, they comprise an assault on DSB credibility culminating, together with the unilateral disregard of the US, in the institutional crisis it now faces. If the jewel of the WTO crown has lost its luster, we might ask ourselves if it would not be time to leave all the silverware on the table and invite everyone over for a potluck.

2.5 Internal, External and Administrative Transparency

Polishing silver does not turn it into gold. Nevertheless, much can be achieved by enhancing composite transparency in Maria Panezis' opinion. Transparency has great democratizing potential and could help expand the WTOs normative space lato sensu[415]. The author analyses four dimensions of transparency, focusing primarily on the first three: internal, external, administrative and legal. Still, she builds her theory with five dimensions of WTO legitimation in mind: vertical legitimation (the national legitimacy processes of WTO member states' governments); executive

[414] de Oliveira, L.M. (2012). *A Eficácia da Medida de Suspensão de Concessões ou de outras Obrigações Para a Implementação das Recomendações do Órgão de Solução de Controvérsias (OSC) da Organização Mundial Do Comércio (OMC)*. PhD Thesis.

[415] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.49. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].

representation (internal transparency, consensus and meaningful decision-making); horizontal mutual control (legal and administrative transparency); associative and expert representation (external and administrative transparency); and indivisual rights-based legitimacy (external and legal transparency)[416].

2.5.1 Internal Transparency

For Pagagiotis Delimatsis, the agency costs imposed on the Parties of the WTO can be addressed through increased transparency and greater participation[417]. For other authors, participation is what guarantees genuine transparency. Panezi assumes that international transparency has as its object, first and foremost, the effective participation of developing countries in WTO decisions. The issue definitely made its way onto the agenda with the violent civil protests against the WTO Ministerial Conference in 1999[418]. The protests were partly sparked by the burdensome trade and economic adjustments imposed on developing countries by the WTO's market access logic, but also a consequence of the repeated practice of jettisoning the then leading powers in relation to these countries in the trade negotiations. The negotiation dynamics and results were, at that point, always more advantageous to the leading countries, by means of, e.g, construction like the single undertaking.

Ministerial Declaration WT/MIN (01)/DEC/1 of the WTO, of November 20, 2001, inaugurated a new round of negotiations for the liberalization of international trade, known as the Doha Round. In Paragraph 10 of the Document, known as the Doha Ministerial Declaration, internal transparency is addressed in the following terms:

> Recognizing the challenges posed by an expanding WTO membership, we confirm our **collective responsibility to ensure internal transparency and the effective participation of all Members**. While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through **more effective prompt dissemination of**

[416] *Idem*, p.133.
[417] Delimatsis, P. (2018). Institutional Transparency in the WTO. In: A. Bianchi and A. Peters, eds., *Transparency in International Law*. Cambridge, pp.134–137.
[418] Smith, N. (2014). *The Dark Side of Globalization: Why Seattle's 1999 Protesters Were Right The WTO demonstrators were the "Occupy" movement of the late-20th century—mocked, maligned, and mostly right*. [online] The Atlantic. Available at: https://www.theatlantic.com/business/archive/2014/01/the-dark-side-of-globalization-why-seattles-1999-protesters-were-right/282831/.

> **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. (emphasis added)

Many felt the language was too weak to address serious, deeply-ingrained challenges within the Organization.

Developing countries face systemic obstacles that handicap their representation in international fora. They lack financial resources and, because of that, sufficient staff with adequate training, material resources and the ability to maintain qualified physical presence at the negotiations. The most important and complicated negotiations can last several nights. More robust diplomatic teams take turns staffing these negotiations, but underrepresented delegations are forced to overburden their representatives. This is why the formation of building blocs among the developing countries was very common. The diplomatic teams of the countries that were present in one phase of the negotiation filled in the countries that were not able to take part directly. Even so, only the parties present take part in the final decision, as voting by proxy is not allowed. Moreover, their weaker respective internal administrative apparatus makes it difficult for them to adequately research the potential consequences of each negotiating position and each concession ahead of time, so many decisions have to be made before adequate information on the national impact of proposals can be ascertained. Disparities in terms of access to information and technology and the fact that the only three working languages are English, French and Spanish also add to the strains on the capacity of many diplomatic teams to represent their country on a par with the other teams.

Another disadvantage is the fragile negotiating position from which developing countries start. Pressing, immediate economic needs often makes them susceptible to pressure to accept agreements that are unfavorable to them in the medium and long term. Dependence on bilateral trade agreements is another weakness. Threats from a powerful country to withdraw from one can be an effective means of convincing a developing country to accept suboptimal offers. . The representative difficulties of the developing countries in the WTO are similar to those they face in other international fora.

These difficulties are not easily solved and can only be satisfactorily addressed through technical cooperation to strengthen the bureaucracies relevant to each

country's foreign trade. The underrepresentation of developing countries has noticeably impacted the quality of the standards agreed to and their sensitivity to the needs of these countries. Panezi assesses the effective participation of the countries in the negotiating mechanisms and dynamics.

Indeed, it is the lack of a proper definition of the WTO rather than self-identification as underdeveloped that comprises one of the issues at the heart of the current institutional crisis. However, we can confidently assert that, although the interdisciplinary dialogue has varied in several aspects, there has never been much doubt about the countries that warrant the label of developing countries during most WTO activities. It is only recently, with China entry as a new challenger to the international order and countries like Brazil at the forefront pushing several international economic agendas, that the reexamination of this definition started to demand greater rigor. I will argue that it will never be possible to include developing needs in multilateral trade negotiations without including developing countries in the dialogue as well.

For Panezi, the history of negotiations shows that it is impossible to include the legitimate interests of developing countries in the WTO agendas without their effective representation. In the analysis of representation in other scenarios, the thesis that reliably and efficiently addressing the interests of groups or countries is only possible through adequate political representation is shared by several theorists. Amartya Sen, for one, asserts the importance of the political right to leverage market mechanisms[419]:

> The ability of the market mechanism to contribute to high economic growth and global economic progress has been widely and rightly recognized in contemporary development literature. However, it would be a mistake to see the market mechanism only as a derivative. As Adam Smith noted, freedom of exchange and transaction is itself an essential part of the basic freedoms that people are right to appreciate. (...) The contribution of the market mechanism to economic growth is obviously important, but it comes after the recognition of the direct impotence of the freedom to exchange words, goods, gifts.
>
> (...) Five types of freedom seen from an "instrumental" perspective are investigated (...): They are: (1) political freedoms; (2) economic facilities; (3) social opportunities; (4) guarantees of transparency; and (5) protective security. Each of these distinct types of rights and opportunities helps to promote a person's overall ability.

[419] Sen, A.K. (2010). *Desenvolvimento como liberdade*. São Paulo (SP): Companhia De Bolso, pp.20–25.

Therefore, in addition to baseline economic conditions, real freedom of the market, that is, the effective insertion of the economic agent in the economy, relies on the freedom to trade, to negotiate, and even the enjoyment of political rights that give the agent an opportunity to voice demands in crisis situations, are all fundamental. Those are the fundamental elements without which circumstantial benefits (e.g., a boom crop or sudden rise in commodity prices) will only give rise to an economic disaster in the near future. To illustrate his point, Sen recalls the collective famines in which the lack of basic liberties caused or aggravated the precarious situation. In line with Sen, Yang Jisheng argues that the political fanaticism inspired by the Anti-Rightist Campaign of 1957 was responsible for the Mao's Great Famine, which lasted 4 years but had prolonged effects for generations. The Great Famine directly killed 36 million people, 450 times more than the Nagasaki bomb, more than World War I and nearly as many people who died in World War II, most of whom perished in a six-month period. This political fanaticism meant that out-quota measures, established by a local CCP secretary, were considered 'right-wing' politics. The fear in relation to the reactions of the Central Party caused the local government, the Xyniang prefecture, Henan province, hided the shortage of grains caused by the monsoon floods that year, the local government. Xyniang turned out to be the epicenter of food crisis. In the face of the difference between the actual and the projected foodstocks, the local population was forced to deliver almost all their grain supply[420]. Sen concludes by reaffirming the importance of economic incentives but stresses that they are no substitute for political freedoms, particularly in times of crisis:

> Public policy has the role not only of seeking to implement the priorities that emerge from social values and affirmations, but also of facilitating and guaranteeing the most complete public discussion. The scope and quality of open discussions can be improved by various public policies (...) Essential to this approach is the idea of the public as an active participant in change, rather than a docile and passive recipient of instructions or aid granted[421].

The risk of collective famines, until very recently, seemed past. However, even without famine, problems in the agricultural commodities market cause serious social problems.

[420] Jisheng, Y. (2013). *Tombstone: the untold story of Mao's great famine*. London: Penguin Books, pp.3-86.
[421] Sen, A.K. (2010). *Desenvolvimento como liberdade*. São Paulo (SP): Companhia De Bolso, p. 358.

> In early 2008, world prices of major agricultural commodities, including wheat, rice, maize and oilseed crops reached their highest levels in nearly three decades. Stocks of the major commodities had been reduced to their lowest levels, yet food prices continued to mount, straining the budget of low income households all round the world. This led to some political tensions too- as people took to the streets in more than 30 countries, demanding their governments take action. There were even violent food riots that toppled governments, such as the one in Haiti. What is puzzling, however, is that the rising food prices caught the world by surprise. Policymakers in developed and developing countries alike appeared ill-equipped to deal with the supply shortages and the corresponding market volatility which thus turned into a real "food crisis" [422].

The poorest households spend three-quarters of their budget on food and are therefore extremely vulnerable to fluctuations in food prices[423].

For Christian Haberli, food security is best assured by a combination of production, trade and aid policies[424]. She suggests the improvement of market access through scientific study with food security in mind, the reduction of the agricultural subsidies in rich countries that inevitably distort world prices and fresh specialized research on export competition (export subsidy and export credits). According to Melaku Geboye Desta[425]:

> The WTO agriculture package assumes that the Results of Uruguay Round is beneficial to the economic development, yet also recognizes that liberalization of agricultural trade has the potential to pose at least short-term food security dangers mainly to net food-importing developing countries. In order to forestall such possible dangers without compromising the liberalization process, the Uruguay Round has incorporated a separate instrument in the form of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries. However, the Decision, and through it, the entire WTO system on this issue, suffers from tow important deficiencies- legal and institutional.
>
> The legal deficiency pertains to the nature of the obligations created. The Decision does not create any mandatory obligation to make food or other assistance available to countries adversely affected by the implementation of the Uruguay Round commitments on agriculture. Institutionally, the Decision only refers the matter to systems falling totally outside the WTO framework and lacking in any effective enforcement mechanism. The food needs of LDCs and

[422] Karapinar, B. (2010). Introduction: food crises and the WTO. In: B. Karapinar and C. Haberli, eds., *Food Crises and the WTO*. Cambridge University Press, p.1.
[423] Martin, W. and Ivanic, M. (2010). The food price crisis, poverty and agricultural trade policy. In: B. Karapinar and C. Haberli, eds., *Food Crises and the WTO*. Cambridge University Press, pp.25-48.
[424] Haberli, C. (2010). Food security and WTO rules. In: B. Karapinar and C. Haberli, eds., *Food Crises and the WTO*. Cambridge University Press, pp. 297-322.
[425] Desta, M.G. (n.d.). Food Security and International Trade Law. An Appraisal of the World Trade Organization Approach. *Journal of World Trade*, 35(3), p.467.

> NFIDCs in this respect, which have been termed legitimate by the Decision, are left to the absolute caprice of only eight Members of the WTO that are Members of the FAC as well. There are no legal means by which the supposed beneficiaries of the Marrakesh Decision can influence the decisions taken by Members of the FAC.
>
> Technical and financial assistance designed to overcome short-term difficulties in financing normal levels of commercial imports are left to unilateral decision of donor countries and/or international financial institutions such as the IMF and the World Bank.

Notwithstanding the historical proximity of GATT and the great famines of the 20th century, it was only because of the commodity boom in the mid-2000s and ensuing crisis in the price of agricultural commodities, which also affected developed countries (though to a lesser extent), that these aspects of the Doha Development Agenda were revisited and food security made it on to the agenda during the Bali Ministerial Conference in December 2013. That collective famine did not make it onto the international trade agenda but food security did when the commodity prices drove up prices in rich countries is a convincing illustration of how greatly effective participation for developing countries is needed in the decision-making process.

The history of the GATT Part IV negotiation on trade and development demonstrates the difficulty faced by developing countries to put their needs on the agenda. In addition to the difficulty of the process, the end results were questionable, since no mandatory burden in Articles 36, 37 and 38. The language is evasive and leave a “best efforts” ground for non-compliance.

At some points of the Uruguay Round multilateral negotiations, particularly at the beginning, some concessions were apparently made. These concessions have always been branded as virtues of the system, proof that is capable of inclusiveness. Currently, they are seen as mere palliatives that address the symptoms but not the causes of the illness. Article 38 contains exceptions for the infant industry. Article 38 (B) anticipates exceptions when countries face balance of payment problems. Finally, Article 38 (bis) reduces the reciprocity requirements for developing countries. In conjunction with these articles, the Generalized System of Preferences mechanism and the special and differential treatment of developing countries bolster a spirit of equality and fairness in the system.

Meanwhile, the inclusion of textile and agriculture products in the Uruguay Round agenda did not generate the expected results:

> The new tariff schedules and their implementation reserved unpleasant surprises. First, agricultural concessions were entered

> into on an average basis. Compared to the less than 4% average tariffs of manufactured goods, agricultural products' tariffs were cut on average by 36% according to the Uruguay Round results. An average cut of 36% however does not entail significant liberalization, as countries can pick and choose products that are of lesser interest (or more difficult to grow, producing smaller volumes of exports) and eliminate tariffs completely, while keeping them intact for products that are of pivotal interests in domestic economies, as long as on average the cut amounts to 36%[426].

That the Doha Round has been stalled at an impasse for some time demonstrates that the developing countries have been able to reinforce their negotiation position. Panezi highlights two events that were center stage in 2003 and served as important milestones in the empowernment of the negotiation position of the Global South in the WTO: the creation of the G-20 and the granting of the EC-Tariff Preferences. In parallel to those milestones, Brazil, China, Russia and India all *rightfully demanded and gained a central position in WTO negotiations*[427].

The EC-Tariff Preferences report described the Generalized System of Preferences (hereinafter GSP) and the Enabling Clause in the following terms:

> First the Panel and Appellate Body discussed whether the Enabling Clause consists an exception to Article I:1 of the GATT, and thus the two are mutually exclusive, or Article I:1 applies to measures falling under the Enabling Clause. Article I:1, embodying one of the cardinal rules of the GATT provides for non-discrimination of like products originating from different member states when these products reach the market of a third member state. originating from different member states when these products reach the market of a third member state. If the Enabling Clause is an exception to Article I:1 then, any measures adopted within the Enabling Clause context do not need to be automatically extended to all developing countries in the WTO. However, if the Enabling Clause were found not to be an exception to Article I:1 but a self-standing commitment, then, Article I:1 would apply to it, as it does to all WTO commitments. Thus, any privileges granted to one developing country would automatically need to be extended to all developing countries[428].

Panezi indicates as two other important issues for internal transparency the issue of Preferential Trade Agreements (PTAs) and Accessions Protocol, which falls into the category of internal transparency lato sensu. As for the PTAs, Panezi's

[426] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.154. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].
[427] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.1. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].
[428] Ibidem, p. 159.

concern is shared by several scholars. They worry that the proliferation of free trade agreements (hereinafter FTAs) and customs unions (CUs) repeat, albeit in more refined form, what Jagdish Bhagwati observed during the interwar period: *a proliferation of commercial preferences* [as a] *result of an uncoordinated pursuit of protectionism itself aided by the breakdown of financial stability and macroeconomic equilibrium in the world economy*[429]*.* In the post-war period, a political movement rose to create a European economic space, and that history has left an influence that is still felt in discussions about whether or not to host PTAs at the WTO. Although the phenomenon of economic regionalism was not well regarded, it had to be accommodated.

PTAs and Regional Trade Agreements (herein after RTAs) are considered the most critical exception to Most Favored Nation (MFN) principle because it interrupts the logic of multilateralism. Few courts have questioned those arrangements, probably due in part to their complexity, even though they shift the burden of proof to the defendant. Despite two decisions from the Doha Round that were immediately applied concerning the monitoring the PTAs and RTAs, the supervision mechanism put in place is still considered flawed. The aforementioned decisions are the "Transparency Mechanism for Regional Trade Agreements" and "Transparency Mechanism for Preferential Trade Agreements", adopted, respectively, in 2006 and in 2010 by the General Council of the WTO.

The first decision established an early announcement requirement. It determined that members participating in new negotiations aimed at concluding an RTA, must deliver all non-restricted information about the agreement to the Secretariat of the Organization in electronic form. Also, the decision requires public notification of the RTA by the time the parties ratify it or make any "decision on the relevant parts of an agreement and before the application of preferential treatment between the two parties". Finally, it establishes procedures to enhance transparency in that members are allowed to submit considerations for a notified RTA within one year of its publication.[430]

[429] Bhagwati, J. (2008). *Termites in the trading system: How preferential agreements undermine free trade*. Oxford: Oxford University Press, p.11.

[430] World Trade Organization. Transparency Mechanism for RTAs https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm. WT/L/671. Transparency Mechanism for Regional Trade Agreements. Decision of 14 December 2006.

The second decision, "Transparency Mechanism for Preferential Trade Agreements", clarifies the role of the Secretariat in assessing the factual presentation of the RTAs[431]. The clear concern over PTAs is the potential for trade diversion and the reduction of world welfare to gain policy space[432]. Bhagwati notes that the proponents of PTAs are often self-righteous when rejecting the arguments about trade diversion and expresses the following reasons to support his observation:

> 1. There is evidence of fierce competition in many products and sectors today (…) even small tariffs are compatible with trade diversion as tariffs are removed from members of a PTA.
> 2. The thinness of comparative advantage also implies that today we have what I have called kaleidoscopic comparative advantage, or what in jargon we economists call "knife-edge" comparative advantage. Countries can easily lose comparative advantage to some "close" rivals.
> 3. While Article 24 requires that the external tariffs not be raised when the PTA is formed so as not to harm nonmembers, the fact is that they can be raised when the external (MFN) tariffs area bound at higher levels than the actual tariffs (…).
> 4. Article 24 freezes only external tariffs when the PTA is formed, with no increase in the external tariff allowed. But it does not allowed the modern reality that "administered protection" (i.e, antidumping and other actions by the executive) is both elastic and can be used and abused more or less freely in practice. (…)
> 5. There is plenty of evidence that trade diversion can occur through content requirement placed on member countries to establish "origin" so as to qualify for the preferential duties. (…)
> 6. Many analysts do not understand the distinction between trade diversion and trade creation and simply take all trade increase as welfare-enhancing. (…) But it is clear that even if one disregards other objections, the real problem with the analysis is that more trade between partners in a PTA can take place with both trade creation and trade diversion, so that one simply cannot infer trade creation alone from this procedure.(…)
> 1. 7. Several economists have suggested that we need we not worry about trade diversion and that beneficial effects will prevail if PTAs are undertaken with "natural trading partners".(…) There is no evidence that pairs of contiguous countries or countries with common borders have larger volumes of trade with each other than do pairs that are not so situated, or that trade volumes of pairs of countries arranged by distance between the countries in the pair will also show distance to be inversely related to trade volumes.(…)[433].

[431] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.182. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].
[432] Bhagwati, J. (2008). *Termites in the trading system: How preferential agreements undermine free trade*. Oxford: Oxford University Press, p.11.
[433] Bhagwati, J. (2008). *Termites in the trading system: How preferential agreements undermine free trade*. Oxford: Oxford University Press, pp.52-56.

For Robert J. Carbaugh, the analysis of the costs and benefits of PTAs must go beyond the static effects of economic integration that focus on productive efficiency and consumer welfare, and touch on important aspects of the dynamic effects of economic integration, namely economies of scale, greater competition and greater stimulus for investment[434]. Undoubtedly, PTAs are multidimensional and are not restricted to the mere facilitation of intraregional trade. The incentives for intra-block investments are extremely important and common, whether through the displacement of production factors or through the creation of subsidiaries or international joint ventures.

An analysis that covered 230 PTAs that entered into force between 1960 and 2017 revealed that 111 of them contained meaningful provisions on investment[435], and identified the following patterns:

> • The scope and depth of investment provisions has increased over time though at a modest rate.
> • Most PTAs extend national and MFN treatment in the pre-establishment phase while all provide for national treatment (and to a lesser extent MFN treatment) in the post establishment phase.
> • Likewise, a majority of PTAs offer investment protections in the form of provisions on expropriation and fair and equitable treatment.
> • Host-state flexibilities are ensured in the majority of PTAs through the inclusion of a broad "right to regulate" provision.
> • Provisions aimed at protection of the environment occur in more than three quarters of PTAs.
> • More than three quarters of PTAs provide for investor-state dispute settlement.
> • PTA families demonstrate a number of common characteristics particularly in regard to provisions on scope and definitions and investment liberalization and protection[436].

The same study points to an evolving trend of including a prohibition of obligations on performance requirements (hereinafter PRs). According to the authors, this would be de case of the North American Free Trade Agreement (hereinafter NAFTA), which was followed by a series of International Investment Agreements (hereinafter IIAs). Most of them, however, merely refer to Trade-Related Investment Measures Agreement (hereinafter TRIMs), which forbid “local content requirements, trade-

[434] Carbaugh, R.J. (2002). Economia internacional. : Thomson. ABDR, pp.291–293.
[435] Crawford, J.-A. and Kotschwar, B. (2018). *Staff Working Paper ERSD-2018-14 Investment Provisions In Preferential Trade Agreements: Evolution And Current Trends*. [online]. Available at: https://www.wto.org/english/res_e/reser_e/ersd201814_e.pdf [Accessed 19 Apr. 2020].
[436] *Idem*, p. 38.

balancing requirements, foreign exchange restrictions related to foreign exchange inflows attributable to an enterprise, and export controls".[437]

Whether analyzing the static or the dynamic effects of the PTAs, the trade diversion risks are considerable. Within the scope of a PTA or outside it, related issues such as local content requirements (hereinafter LCRs) have inspired very strict scrutiny by the DSB. As reported by Umberto Celli Junior, *the interpretation of the Panel and the AB on the use of LCRs that has led to an expansion of restrictions on this type of industrial policy that points to unequivocal jurisprudential tendencies*[438]. Under TRIMs, Articles 2.1 and 2.2, and the Agreement on Subsidies and Countervailing Measures (hereinafter SCM), notably Article 3.1 (b), the TRIMs agreement is considered to be *lex specialis* in relation to Articles 3 (national treatment) and 11 (quantitative restrictions) of GATT 1994 as it prohibits LCRs and export restrictions. Celli Junior's observation that LCRs are used by both developed and developing countries is quite timely. He notes that they are quite common in the sectors such as green economy (environmental goods and products[439]) and the automotive sector,

[437] Ibidem, p. 8.

[438] Celli Júnior, U. (2019). The Impact of WTO Case Law on the Use of Local Content Requirement. In: A. do Amaral Júnior, L.M. de O. Sá Pires and C.L. Carneiro, eds., *The WTO Dispute Settlement Mechanism: A Developing Country Perspective*. Springer, p.84.

[439] Up to the present negotiating moment, there has been no precise definition within the WTO of environmental goods and services. The definition proposals presented in Doha are clearly inspired by the concepts launched by the Organization for Cooperation and Economic Development (OECD) and the European Statistics Commission (EUROSTAT) dating from the 1990s. Different methodological cuts give rise to different definitions of such goods and services, each controversial: 1) as to its final utility; 2) as to its production method and process; 3) as to the relativity of its benefit in the face of different environmental conditions. There is also a classification problem between environmental goods (whose main purpose is to remedy an environmental problem) and environmentally preferable goods (of which some environmental benefits derive during the its productive cycle and its life cycle). As for the criterion of final utility of the environmental good, some countries understand that only those goods whose final utility is environmental, consequently excluding the goods for dual use. The justification would lie in the precaution to prevent, through tortuous ways, the illegitimate placing of goods of common use into markets under environmental pretexts. Brazil has protested against the inclusion of dual use goods in the list of goods. The WTO Committee on Trade and Environment chose to work with three basic approaches to the identification of environmental goods, contemplating for methods: (1) the search for a conceptual definition of environmental goods; (2) the proposed release of goods for use in environmental projects; (3) the elaboration of exhaustive lists environmental goods; (4) and the elaboration of lists of proposals and counter-proposals (offer and demand) for environmental goods. In: Simon, C.M. (2014). *Bens e Serviços Ambientais nas Agendas Legislativa e da Diplomacia Comercial: do Nominalismo ao Pragmatismo*. [online] Brasília, Distrito Federal, Brasil: Núcleo de Estudos e Pesquisas da Consultoria Legislativa, p.21. Available at: https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td-145-bens-e-servicos-ambientais-nas-agendas-legislativa-e-da-diplomacia-comercial-do-nominalismo-ao-pragmatismo [Accessed 19 Apr. 2020].
World Trade Organization Committee on Trade and Environment (2005). Initial List of Environmental Goods Proposed. [online]. Available at: http://jmcti.org/2000round/com/doha/tn/te/tn_te_w_048.pdf [Accessed 19 Apr. 2020].

which are both politically important, respectively, for the purpose of changing the energy matrix[440] and generating employment and income. The scenario becomes even more worrying in view of the recent signing of the largest free trade treaty in the world, between China and 14 other Pacific countries.

> The Regional Comprehensive Economic Partnership spans 15 countries and 2.2 billion people, or nearly 30% of the world's population (…). Their combined GDP totals roughly $26 trillion and they account for nearly 28% of global trade based on 2019 data.
>
> The deal includes several of the region's heaviest economic hitters aside from China, including Japan and South Korea. New Zealand and Australia are also partners, as are Indonesia, Thailand and Vietnam in Southeast Asia.
>
> The trade agreement was first proposed in 2012 as a way to create one of the world's largest free-trade zones.
>
> It's tough to gauge the immediate economic significance of the deal. The members of the Association of Southeast Asian Nations — a group of 10 countries that signed the agreement — said that it would eliminate tariffs and quotas on 65% of the goods that are traded in the region.

Chapter 10 of the Regional Comprehensive Economic Partnership (hereinafter RCEP), Article 10.6, is dedicated to the *numerus clausus* prohibition of performance requirements, which encompasses, among others, the prohibition of export a given

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International Centre For Trade and Sustainable Development (ICSTD) (2008). Liberalization of Trade in Environmental Goods for Climate Change Mitigation: The Sustainable Development Context. *Trade and Climate Change Seminar*, p.2.

[440] The global market for environmental goods and services is extremely promising. It was projected that it would surpass the figure of US $600 million in 2010, which is comparable to the pharmaceutical and information technology industries. It is still more auspicious in developing countries like Brazil, whose consumer market is expanding and whose competition in the sale of environmental goods and in the provision of environmental services is not strong. This indicates a scenario in favor of the bargaining power of developing countries, which should manage this negotiating advantage so as not to miss an important window of opportunity that can serve them doubly: 1. for the advancement of negotiating positions in international trade forums; 2. for overcoming the eternal problem of the investment gap aimed at improving its infrastructure, a fundamental condition for economic growth. Asian countries have demonstrated a great capacity for innovation and competitiveness in the environmental goods and service market. Data from the World Industrial Property Organization indicate that Japan presented the highest percentage number of patent applications under the Cooperation Treaty system in Patent Cooperation Treaty (PCT) in the fields of solar energy (33.8%) and fuel cell technologies (45.9%) from 2005 to 2009, while orders from United States accounted for a quarter of that total. In that same period, the Canadian share of patent applications with the System were relatively small with respect to cell technology fuel, however, in relation to the total number of orders in all sectors, had a ratio higher than the USA, France and Germany. Likewise, the Republic of Korea had the highest percentage of participation in total solar energy technology patent applications. Denmark, Germany and the USA performed similarly in terms of requests for patents for wind power technology.

Meirelles Neto, A.J., Rios, S.P. and Velloso, E. (2006). Negociações sobre Bens Ambientais na OMC. Confederação Nacional da Indústria, p.8.

Teodoro, A. (2012). *PIB: Precisa investir, Brasil*. [online] Brasil 247. Available at:http://www.brasil247.com/pt/247/economia/63190/ [Accessed 19 Apr. 2020].

level or percentage of goods and achieving a given level or percentage of domestic content. As Celli Junior analyzes in depth, LCRs are usually *associated "*with government procurement, publicly financed projects, price preferences awarded to domestic firms, mandatory minimum percentages required for the domestic goods and services used in the production, import licensing procedures (…), discretionary guidelines that both encourage domestic firms and discourage foreign firms*".* [441] Chapter 10 of RCEP therefore only represents a partial response to a structural concern.

The macroeconomic and legal scenarios demonstrate the burning importance of PTA transparency, to which the General Council decisions might guarantee a prompt response, although perhaps not an adequate or satisfactory one. The reporting mechanism has been heavily criticized, mainly because its results are less than desired, for institutional reasons and due to the very legal design of the notifications. Robert Wolfe reminds us that *[n]otification is a legal obligation, but compliance is voluntary in practice, with no tangible or coercive penalty for non-compliance* [442] . Bureaucratic incapacity, language barriers, the refusal to acknowledge that information is a public good, the lack of trust between trade negotiators and other government agencies in capitals and, finally, the failure to translate the obligations into in the WTO's sui generis language are considered the main reasons compliance of the notification requirements has been so low. [443]

As a final problematic issue regarding the WTO's internal transparency, Panezi mentions the Accession Protocol negotiations. Since 1995, 32 countries have joined the WTO. For the author, two pertinent questions relate to the negotiation of WTO Plus commitments and the work of Working Party Reports and Accession Protocols per se. Regarding the first topic, the author points out that, before the Uruguay Round, it was generally understood that future Members would not necessarily be bound by the obligations of the GATT. Article XXXIII of GATT 47, literally states that

[441] Celli Júnior, U. (2019). The Impact of WTO Case Law on the Use of Local Content Requirement. In: A. do Amaral Júnior, L.M. de O. Sá Pires and C.L. Carneiro, eds., *The WTO Dispute Settlement Mechanism: A Developing Country Perspective*. Springer, p.86.
[442] Wolfe, R. (2013). Letting the Sun Shine in at the WTO: *How Transparency Brings the Trading System to Life*. Economic Research and Statistics Division. Staff Working Paper ed. Geneva: World Trade Organization; Organisation Mondiale Du Commerce -03-06, p.18.
[443] Idem, pp. 18-19.

> A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may access to this Agreement, on its own name or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

The flexibility provided for in the Article was probably included to allow future members some negotiating margin to adapt the terms of their membership to their economic reality. It was intended as a positive incentive to join.

In the case of China, the accession negotiation followed the WTO-Plus Agreement standard, whereby the Member in the process of accession would be subjected to the entire Marrakesh package. In the case of China, much explored by Panezi, which was also submitted to additional parameters. Panezi considers those parameters discriminatory[444], as well as lacking transparency. She likens the entry requirements to blackmail to force economic policy changes[445]. Guiguo Wang emphasizes the great institutional and legal effort made by China to change and adapt the rules of the WTO and the Accession Protocol. Their dimension is even greater considering the Chinese legal tradition and its economic and social context. In addition to the transplantation of laws and legal concepts, new legal values had to be incorporated:

> Upon joining the WTO, China undertook to revise or annul, in a timely manner, administrative regulations which were inconsistent with its obligations under the WTO Agreement and the Protocol on Accession (…). China further confirmed that its Central Government would ensure that local governments at the sub-national level will observe the obligations under the WTO Agreement. Like other WTO Members, China has an obligation to ensure that the provisions of the WTO Agreement are applied uniformly throughout its customs territory, including the Special Economic Zones and other areas where special regimes for tariffs, taxes and regulations are established. In that regard, China promised that all individuals and entities in China should be able to bring to the attention of Central Government authorities cases of non-uniform application of China`s trade regime, including its commitments under the WTO Agreement and the Protocol. Such cases will be referred

[444] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.198. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].
[445] Charnovitz, S. (2007). *Mapping the Law of WTO Accession*. [online] papers.ssrn.com. Available at: http://ssrn.com/abstract=957651 [Accessed 19 Apr. 2020]. p.5

> promptly to the responsible government authorities and, when non-uniform application is established, the authorities must act promptly to address the situation, utilizing the remedies available under Chinese law taking into consideration China`s international obligations and the need to provide meaningful remedy[446].

It should be noted that, even before the entry into force of the Trade Facilitation Treaty, the China Accession Protocol already contained avant-garde provisions on the topic of transparency, such as provisions on enquiry points[447].

> Before it joined the WTO, China's legal system, laws, regulations and policies were frequently subject to criticisms for various reasons, one of which was lack of transparency. In order to ease such criticism, upon joining the WTO China agreed to establish an official journal for the publication of al its laws, regulations and other measures pertaining to trade in goods, services, intellectual property rights, the control of foreign exchange and so on. It also committed to allow a reasonable period for comment before such measures are implemented. With some limited exceptions, China agreed to publish the journal on a regular basis and to make copies readily available to individuals and enterprises.
>
> According to China`s Protocol, enquiry points must also be set up to provide information relating to the measures required to be published. Replies to requests for information must generally be provided within 30 days of the receipt of a request. In exceptional cases, replies may be provided within 45 days of the receipt of a request. Notice of the delay and the reasons therefore must be provided in writing to the interested party or parties. Replies to WTO Members must be complete and represent the authoritative view of the Chinese Government, whilst those to individuals and entities must be accurate and reliable. This contact point requirement serves as an additional guarantee and measures but also that it has an obligation to answer enquiries of both other WTO Members and foreign entities and individuals[448].

Naturally, the potential problem posed by the discriminatory attitudes in the Accession Protocols for the transparency of the multilateral system is their temporary duration. Because a time horizon of expiration is established, they may not be permanent.

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[446] Wang, G.W. (2011). *Radiating impact of WTO on its members' legal system: the Chinese perspective*. Hague Academy of International Law (Den Haag) ed. Leiden: M. Nijhoff, p.157.

[447] World Trade Organization General Council (2014). *WT/L/940. Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*. [online] docs.wto.org. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=128901&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [Accessed 19 Apr. 2020].

[448] Wang, G.W. (2011). *Radiating impact of WTO on its members' legal system: the Chinese perspective*. Hague Academy of International Law (Den Haag) ed. Leiden: M. Nijhoff, p.159.

However, the topic is relevant as a topic of general debate and helps improve our understanding the nature of the system and its flaws in terms of transparency.

2.5.2 External Transparency

The topic of external transparency is invariably connected to the assignment of observer status to Non-Governmental Organizations (hereinafter NGOs) in the scholarly literature[449]. It would be more precise to expand that category by referring to public participation or to participation of third-sector entities (NGOs, nonprofit organizations, civil society organizations, etc) in the WTO, since there is no unambiguous legal definition of NGOs. Nevertheless, this is the term used by the Marrakesh Agreement Establishing the World Trade Organization, encompassing all the previous entities and is common in global parlance. Regarding such organizations, Frank Loy offers an interesting historical remark:

> The NGO community clearly plays a role today as never before, but there is nothing new about non-governmental organizations attempting to influence government decision-making. As early as the 1800s, such organizations were actively promoting the passage of anti-slavery laws and treaties in England and elsewhere in Europe and, later in that century, they attacked human rights abuses in the Belgian Congo. By the turn of the nineteenth century, groups such as the Anglo-Oriental Society for the Suppression of the Opium Trade were part of an influential anti-drug movement that culminated in an agreement by states to approve the 1912 Hague Opium Convention. In 1945, NGOs were largely responsible for inserting human rights language into the United Nations Charter and, since then, have placed almost every major human rights issue on the international agenda.
>
> In 1947, the drafters of the International Trade Organization (ITO) included a role for NGOs in the structure of the organization[450].

To which Panezi adds:

> (…) At the London Preparatory Conference, the International Chamber of Commerce as well as the World Federation of Trade Unions expressed concerns for the status and content of the negotiations that eventually led to the GATT. Yet, no provision in the GATT alluded to non-state actors, even though the GATT had some informal relationships with NGOs. This changed when the WTO was created in 1995. Article V of the Marrakesh Agreement discusses the outreach of the organization. The first paragraph in particular

[449] Delimatsis, P. (2018). Institutional Transparency in the WTO. In: A. Bianchi and A. Peters, eds., *Transparency in International Law*. Cambridge, p.137.

[450] Loy, F. (2000). Public participation in the World Trade Organization. *United Nations University*, [online] p.116. Available at: https://archive.unu.edu/news/wto/ch06.pdf.

> briefly mentions the WTO's relationships with other intergovernmental organizations. The second paragraph, dealing with NGOs and other non-state actors (…)[451].

GATT 1947 does not contain any provisions on cooperation with NGO's or third-sector entities. The Marrakesh Agreement Establishing the World Trade Organization (herein WTO Agreement) offers a vague provision:

> Article V:2
> The General Council may make appropriate arrangements for consultations and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

In July 1996, the General Council adopted the "Guidelines for arrangements on relations with Non-Governmental Organizations"[452], according to which, among other points,

> II. (…) Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.
>
> III. To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents.
>
> IV. The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. (…)

The following paragraphs of the Guidelines, however, temper the expectations that could be created by the lines above:

> V. If chairpersons of WTO councils and committees participate in discussions or meetings with NGOs **it shall be in their personal capacity** unless that particular council or committee decides otherwise
>
> VI. (…) **there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings**. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making. **(emphasis added).**

[451] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.207. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].

[452] World Trade Organization General Council (1996). *WT/L/162. Non-Governmental Organizations (NGOs) - Guidelines on relations with Non-Governmental Organizations*. [online] https://www.wto.org/english/forums_e/ngo_e/guide_e.htm. Available at: https://www.wto.org/english/forums_e/ngo_e/guide_e.htm [Accessed 19 Apr. 2020].

As Rimantas Daujotas states, NGOs can interact with WTO in three main ways: formal access to information and participation in WTO legislative and executive processes; informal participation in those same processes; and indirect participation in dispute settlement by means of *amicus curiae* briefs[453].

There is a recalcitrancy against offering NGOs a decisive role in the WTO the way other international organizations have granted it, one that perhaps stems from the intergovernmental nature of the Organization[454]. The lack of transparency, however, bears its share of responsibility in the creation in this negative attitude. The WTO does not grant NGOs the right to take part of its decision-making processes, although they have been allowed to attend Ministerial Conferences and participate in certain events since 1996. NGO participates serves the interest of overcoming the transparency deficit, but in order to attend Plenary Sessions and Conferences, NGOs are asked, when registering for a specific event, to demonstrate how their activities relate to the issues to be discussed at the event[455]. In the EC – Asbestos dispute, the AB decided to invite all interested NGOs and non-state entities to submit *amicus curiae* briefs, and to do so it added new procedures under Rule 16 (1) of the Working Procedures, by which NGOs were to:

> (…) disclose and submit a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant. Also it needed to contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it had, or would, receive any assistance, financial or otherwise, from a party or a third party to this dispute[456].

It is important to remember that the participation of NGOs in international fora is (almost categorically) understood as axiomatically positive. In fact human rights NGOs have historically played a very positive role in improving protective standards

[453] Daujotas, R. (2011). *Defining the Extent of NGO's Participation in the WTO*. [online] papers.ssrn.com. Available at: https://ssrn.com/abstract=1866201 [Accessed 19 Apr. 2021]. p.3.
[454] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.49. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020]. p. 208.
[455] Daujotas, R. (2011). *Defining the Extent of NGO's Participation in the WTO*. [online] papers.ssrn.com. Available at: https://ssrn.com/abstract=1866201 [Accessed 19 Apr. 2021]. p.3.
[456] *Idem*, p. 19.

for fundamental rights across the world. However, discussion over the lack of transparency and accountability of NGOs has led some to question the credibility of many such organizations. These doubts strike a concerning note that has disrupted the favorable chorus of praise that has generally accompanied these entities that now number more than thirty-seven thousand, and many of which are extremely well-financed[457]. The skepticism ramped up after the terrorist attacks of 9/11[458]:

> After 9/11, however, the spectre of terrorists using NGOs as a front for their operations and some highly publicized cases of abuse have made this a critical issue that needs to be addressed by the NGO community.' In addition, the increasing power of NGOs has prompted scholars, governments, and the media to raise questions about the roles and responsibilities of these new global, non-state actors[459].

While questioning the transparency of NGOs is perfectly in line with the general spirit of current calls for greater transparency in the multilateral system, 'turning the table' on NGOs in this way may also in some cases be a strategical reaction against transparency by containing the expansion of the space for civil society participation in the international agenda. One must bear in mind that many of the allegations by authoritarian states of unscrupulous and illegal use of NGOs are, in fact, aimed at silencing mere national political opposition[460].

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[457] McGann, J. and Johnstone, M. (2005). The Power Shift and the NGO Credibility Crisis. *Brown Journal of World Affairs*, XI(2), p.161.

[458] *Idem*.

[459] Ibidem, p. 159.

[460] A recent and very rumorous case and subject of reproach in the European and Onusian systems is the persecution by the Turkish Movement of dissident groups assembled in NGOs and social movements. The Executive Branch of the Turkish Republic, in spite of the distribution of constitutional powers at the time, created the designation Fettulah Güllen Terrorist Organization (FETO) to designate Hizmet Movement, a Sunni inspired religious movment. That legal change serveu as the base of the suspension of the rights of the alleged members of the Movement, under the exceptions of International Law on Conflicts Armed, which do not grant to alleged terrorists the same status as prisoners of war. Furthermore, it motivated requests for extradition of the clergyman Fettulah Gullen and of the leading and non-leading members of the Gullenist Movement.

The Turkish Anti-Terror Act (Act No. 3713, published in the Official Gazette on April 12, 1991) has been amended throughout its existence. However, there is an intensification of the activity of amendment with the recrudescence of the Erdogan regime.

Article 3 of the Turkish Anti-Terror Law defines acts of terrorism as those defined in the Turkish Penal Code (Law No. 5237, approved on September 26, 2004, published in Official Gazette No. 25611, of December 12, 2004) in Articles 125 (defamation), 131 (investigation and prosecution condition), 146 (theft of use), 147 (state of need), 148 (plunder), 149 (qualified plunder), 156 (use blank account), 168 (sincere regret), 171 (public security risk through negligence) and 172 (spreading radioactive energy).

Article 4 of the same statute defines as offenses committed for terrorist purposes, the following violations: articles 145 (minor hole of property), 150 (conditions subject to minor punishment), 151 (damage to property), 152 (damage qualified to property), 153 (damage to temples and cemeteries), 154 (invasion), 155 (abuse of trust), 169 (imposition of precaution on legal entities) and second

> Certain features of legal systems can act to help or hinder the development and effective operation of NGOs. Although legal systems vary from country to country, governments have used similar legal restrictions to block the effective action of domestic NGOs. Human rights organizations are hampered by such governmental actions as the misapplication of laws prohibiting terrorist or counterrevolutionary activities to human rights NGOs, legal barriers to or restrictions on the official registration or licensing of NGOs, and restrictions of the receipt of foreign funds[461].

Tom Ginsburg is a leading voice denouncing the rise of authoritarian international law[462]. The author decries the practice of authoritarian regimes that use legal international regimes and authoritarian regional organizations for the political persecution of dissidents and to influence the development of International Law with their own features.

These practices by authoritarian governments do not invalidate the criticism regarding the need for NGOs to present more information about their funding and make clear not only their categorical but instrumental objectives, which could include hidden economic agendas, multiple identities and loyalties, and political commitments[463]. For many, they mask a certain political and party militantism[464]. Frank Loy goes even further:

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paragraph of Article 499 of the Turkish Penal Code and offenses defined in Article 9. Paragraphs b), c) and e) of Law 2845 on the Foundation and Criminal Procedure in the State Security Courts.

Finally, Article 7 (amended in the years 2013 and 2015, expanding its scope) defines as terrorist organizations any organizations under any name or that organize and lead activities considered terrorist, as above.

These and other passages of the Turkish law in force are repeatedly criticized by the United Nations and the European Union. Most terrorism charges are based on the crime of defamation, which, in fact, is only the exercise of freedom of expression and political criticism.

Another important event is the emergence (or resurgence) of authoritarian international law, the result of the greater role of authoritarian regimes in the international scenario and the creation of multilateral regimes between countries with authoritarian regimes, thus advancing legal criteria with authoritarian features of international cooperation. Ginsburg, T. (2020). *Authoritarian International Law? American Journal of International Law*, 114(2), pp.221–260.

[461] Posner, M.H. and Whittome, C. (1994). The status of human rights NGOs. *Columbia Human Rights Law Review*, 25(269), p.276.

[462]Ginsburg, T. (2020). *How Authoritarians Use International Law*. [online] Journal of Democracy. Available at: https://www.journalofdemocracy.org/articles/how-authoritarians-use-international-law/ [Accessed 19 Apr. 2020].

[463] Agam, H. (2002). Working with NGOs: A Developing World Perspective. *13 COLO. J. Int'l Envtl. L. & Pol'y 39.*

[464] In 2002, the Brazilian Federal Senate created a Parliamentary Inquiry Commission with the purpose of investigating the NGOs active in the Amazon, due to complaints sent to the Senate about illegal practices of these organizations, namely regarding the creation of or support for paramilitary groups in the region. The results of the debates of the Commission can be found in its report. In: Senado Federal. Relatório Final No, 2002. Comissão Parlamentar de Inquérito, destinada a apurar, no prazo de 180 (cento e oitenta) dias, as denúncias veiculadas a respeito da atuação irregular de Organizações Não-Governamentais – ONG's, nos termos do Requerimento nº 22, de 2001- SF. Brasília – 2002. Com base no Requerimento N° 22, de 2001, de Criação da Comissão Parlamentar

> (…) many object to the direct participation of NGOs in the WTO and charge that these organizations are not necessarily democratic, accountable, or even broadly representative, and are really nothing more than self-appointed representatives of themselves[465].

Noting this troubling phenomenon, McGanna and Johnstone refer to the exhortation of Kumi Naidoo, President of the civil society advocacy group CIVICUS, for NGOs to embrace and swiftly adopt proactive transparency and accountability measures in response to the crisis of legitimacy affecting NGOs across the globe[466].

In response, the WTO has already granted some concessions to the demand for greater external transparency by creating the Public Forum, Open Day, improving its website and by disclosing formerly confidential WTO documents[467]. Two other mechanisms of external transparency were also mentioned that are in use by the WTO: public hearings in Dispute Settlement procedures and admitting amicus curae briefs.

As for the first instrument, public hearings, their scope is still limited but, in the light of the "new normal", they show great potential for expansion. Since *EC-Hormones*, a series of public dispute settlement hearings have been held at the WTO. Members of the public who have registered to observe the hearings attend the procedures at the Organization's headquarters in Geneva or through closed-circuit television. There have been at least 12 different panel proceedings that produced approximately 20 different public hearings[468]. Since March 2020, following the decisions of various international organizations and the recommendations of the Swiss government, the WTO decided to suspend in-person meetings, replacing them by conference calls and online meetings[469].

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de Inquérito; no Requerimento Nº 481, de 2001, de Prorrogação dos seus Trabalhos; no Requerimento Nº 263, de 2002, de Prorrogação dos seus trabalhos; na Sugestão de Roteiro de Trabalho (Plano de Trabalho da Relatoria).

[465] Loy, F. (2000). *Public participation in the World Trade Organization*. [online] United Nations University, p.118. Available at: https://archive.unu.edu/news/wto/ch06.pdf [Accessed 19 Apr. 2021].

[466] McGann, J. and Johnstone, M. (2005). The Power Shift and the NGO Credibility Crisis. *Brown Journal of World Affairs*, XI(2),168.

[467] Daujotas, R. (2011). *Defining the Extent of NGO's Participation in the WTO*. [online] papers.ssrn.com. Available at: https://ssrn.com/abstract=1866201 [Accessed 19 Apr. 2021]. P.5.

[468] Stephens, R. (n.d.). *Open Dispute Hearing at WTO Reflects U.S. Transparency Effort | United States Trade Representative*. [online] ustr.gov. Available at: https://ustr.gov/about-us/policy-offices/press-office/blog/2013/march/open-dispute-us-transparency [Accessed 19 Apr. 2020]

[469] World Trade Organization Heads of Delegation (n.d.). WTO members discuss use of virtual platforms during COVID-19 lockdown. [online] www.wto.org. Available at: https://www.wto.org/english/news_e/news20_e/hod_17apr20_e.htm [Accessed 19 Apr. 2020].

The new experience in international organizations with online meetings has already garnered a great deal of criticism as well as praise, in fact most comments include both. Nick Asthon-Hart, for example, highlights some important and promising advantages all the while recalling the difficulties that the new model imposes. It constrains the ability to pick up clues and useful information by gauging the non-verbal language of the traders and adds to the necessary communicative skill of participants a new dimension of technical proficiency. Asthon-Hart also notes the greater difficulty of reaching compromises in non-personal approaches, especially during meetings where the agenda items are more technical than political. A mixed model of face-to-face and online meetings for such situations might decrease the cost of engagement of WTO member countries in the future, which in turn could lead to expanded institutional expertise, culture and memory. If so, this could contribute towards greater democratization in Member States and inclusivity in the international organizations themselves[470].

Concerning the second instrument, *amici curiae*, the history of DSB deliberations over the admittance of amicus curae briefs is full of turns and reversals:

> Overall, regardless of the switch in interpretation and the rejection of the *US-Shrimp dictum* that accepting *amicus curiae* briefs is prohibited by the DSU, the end result is that the information contained in such documents is only considered during WTO dispute settlement when submitted as part of the parties' submissions. When such briefs are simply annexed to the parties' memoranda they are taken into account only insofar the coincide with the main positions of the country at hand, otherwise they are dismissed. Only in *US-Tuna II* (Mexico) and *EC-Seals* has a Panel addressed the substantive contribution of a non-state amicus brief and used it in its reasoning. The other *amicus brief* examined on the merits so far has been the submission by Morocco in *EC-Sardines.* Thus, the somber truth remains: although the court refined its approach with respect to unsolicited briefs in the thirty or so disputes since *US-Shrimp* in 1998, in reality almost nothing has changed.[471].

Undeterred by some Parties' restrictive interpretation of DSB competences per the Dispute Settlement Understanding (hereinafter DSU), the DSB's jurisprudence on the acceptance of unsolicited amicus curae briefs has evolved. The DSB has granted the Panel and the AB the discretion to judge whether admitting of amicus curiae and

[470] Ashton-Hart, Ni. (2020). *Online Meetings Are Transforming International Relations*. [online] Council on Foreign Relations. Available at: https://www.cfr.org/blog/online-meetings-are-transforming-international-relations [Accessed 19 Apr. 2020].
[471] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.227. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].

briefs is convenient or appropriate to the case. However, despite condoning their acceptance, what has been perceived is that in practice this has rarely happened and when *amici curaie* were were accepted, hardly any of the arguments they conveyed were considered in Panel or AB decisions.

It is important to note an assumption on which part of the argument against the greater participation of civil society in formal and informal legislative and executive processes of the WTO rests. It is important to take note of it because this assumption simply does not hold. The assumption regards the supposed exclusively intergovernmental character of the WTO. Not only historically, but factually, the participation of private entities can be observed in the negotiation phase of important legal frameworks, participation that was permitted by the instruments in force. At its origin, the participation of the International Chamber of Commerce (hereinafter ICC) was central in the negotiation process that led to the aforementioned Customs Convention, which guided the most important provision on transparency in the multilateral trading system, Article 10 of GATT 47 and which, in pioneering manner, anticipated the Trade Facilitation Agreement[472]. Furthermore, although they are few in number, provisions in several WTO treaties provide for the participation of private economic actors in various stages of the legislative process:

> (…) The "principle of fundamental importance" articulated by the Appellate Body in the Cotton Underwear case that WTO members "and other persons affected, or likely to be affected, by governmental measures . . . should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures" applies just as much to WTO measures as it does to national measures.[473]
>
> (…) the Agreement on Safeguards states that a government's investigation shall provide for public hearings (or other appropriate means) in which importers, exporters, and other interested parties can present evidence and their views. The GATS states that where appropriate, WTO Members "shall work in cooperation with relevant intergovernmental and nongovernmental organizations towards the establishment and adoption of common international standards and criteria for recognition" for the practice of relevant services trades and professions. The Agreement on Technical Barriers to Trade (TBT) provides that before adopting a standard, a national standardizing body is to allow a period of at least 60 days for interested parties to submit comments on the draft standard (unless urgent problems

[472] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 4.
[473] *Idem*, p.15.

> arise). Furthermore, the standardizing body is required to "take into account" such comments. The Antidumping Agreement has an Article on "Public Notice and Explanation of Determinations" and also requires that the antidumping adjudication provide opportunities for interested parties to provide evidence and for consumer organizations to provide information. WTO member governments have gone even further in providing for private participatory rights in the context of accession agreements whereby governments join the WTO[474].
> (…)
>
> WTO entities have also refused to solicit public comments in ongoing rulemaking functions. For example, in April 2004, the WTO Appellate Body circulated a set of draft amendments to its Working Procedures and invited member governments to submit comments. The Appellate Body, however, did not ask for comments from the public or from private attorneys that regularly practice before it in representing governments. In 2000, the WTO's TBT Committee enacted a decision on "Principles for the Development of International Standards." Despite the implications of this decision for activities outside the WTO, the TBT Committee did not seek public comments.[475]

Lastly, there have been some efforts in the sense of upgrading the national parliaments' understanding of the WTO processes, the important rules and their impact[476]. Since the Seattle Conference, putting together the Standing Body of Parliamentarians was envisaged[477]. The WTO has institutional relationships with the Arab Inter-Parliamentary Union, the Assemblée Parlementaire de la Francophonie, the Commonwealth Parliamentary Association, the Inter-Parliamentary Forum of the Americas, the Inter-Parliamentary Union, the Parliamentary Confederation of the Americas, the Parlamento Latinoamericano, the European Parliament and the Parliamentary Assembly of the Mediterranean. Its Steering Committee is composed of representatives from various member parliaments of the Inter-Parliamentary Union (IPU), the European Parliament and other international organizations.

As far as is known, no studies have been performed to assess the effectiveness of such interparliamentary cooperation in qualifying national debates on WTO issues, and the data available do not bear a statistical induction of this

[474] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020. p. 11.
[475] *Idem*, p. 29.
[476] Ibidem, p. 31.
[477] World Trade Organization (n.d.). *WTO | Community - Parliamentarians*. [online] www.wto.org. Available at: https://www.wto.org/english/forums_e/parliamentarians_e/parliamentarians_e.htm [Accessed 19 Apr. 2020].

nature. The very availability of this line of cooperation, comprising part of the so-called congressual diplomacy on the realms of the multilateral trade system, however, reinforces the counterclaim that the purported intergovernmental character of the WTO is not a sufficient or convincing argument that prevents, blocks or should even hinder public access to the formal and informal phases of the Organization's legislative and decision-making processes or from engaging in other forms of collaborative participation. In other words, there is no congenital incompatibility between the WTO, or any intergovernmental body, and collaboration with international civil society organizations, especially if proper controls are in place to make sure those organizations meet requisite transparency and disclosure standards regarding their mission, activities, funding and agendas. In this scenario, excluding input and participation by proper international civil society organizations only obey the dictates of the convenience and opportunity of the States Parties[478].

Many of the arguments already advanced apply here as well. These include the arguments advocating transparency as a vector of international legitimacy in the history of the World Parliament, or the Parliament of Men, as a factor in correcting the low level of effective democratic representation in the political and bureaucratic elites of several different countries, as well as in observations of poor responsiveness to demands from all layers of society. For Charnovitz, it would not be ethical or practical to assert that democratic generality is faithfully represented in the governments of WTO member countries for six reasons. The first reason was already alluded to in this paragraph: the exclusion of relevant sectors of society and individuals by authoritarian regimes. The second is the exclusion of individuals who live in countries that are not yet part of the WTO, or whose country sees itself as effectively excluded from the system, whether because of remoteness or extreme cultural variance. The third reason is that the voice of individuals from unpowerful countries is muffled by the incapacity of those countries to make their demands heard in the multilateral arena. The fourth reason is that, advocacy aside, the participation of the public society in trade negotiation results in a de facto monitoring system of the governments and the decisions made in foreign trade policy. The fifth reason is that reinforcing the intergovernmental character of the WTO fortifies economic

[478] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 15.

nationalism at the expense of other social concerns, many of which are precisely at the core of the legitimacy crisis currently beleaguering the WTO. In synthesis, exclusive intergovermentality creates an incentive to endogenous thinking, based less on the competition of conceptions and ideas than on internal dynamics and culture, which impoverishes the debate. The author suggests a committee or some instance be created reflecting the experience of the Free Trade Area of the Americas (hereinafter FTAA), which created the Civil Society Committee[479].

In 1973, a professor of sociology at Harvard University anticipated that power relations would be determined by the equation between technical and political decisions in the post-industrial era[480]which is where we are now. Daniel Bell argued that the politician and the political public would have to become more and more versed in the technical nature of politics in order to comprehend the possible consequences of political decisions. As international regimes become more comprehensive and intrusive on national sovereignty, so increases the urgency of such knowledge. In this scenario, technocratic intellectualism will necessarily tend to yield to politics, since the rationale will be linked to political ends. It will generate resistance against bureaucracy or technocratic cantonment. The desire of society to participate in the decisions that affect it will grow and broaden the space for public politics. The participation revolution, as Bell puts it, will be one of the reactions to the "professionalization" of society through technocracy. "Participatory democracy", however, is no panacea, no is it even a return to some more pure and direct democracy. It needs to be guided by modern principles such as counter-majoritarian protections for minorities. Future politics will not be merely comprised of squabbles between functional groups of economic interests fighting for their share of the national product, Bell continues. The interests of the whole politically community, especially those of less favored groups, will be attended to. Responsible social ethics, particularly those of our leaders, will regain a central place in politics. For Bell, this arc of history brings the political debate back to the classic issues debated by the *polis* in ancient Greece.

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[479] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. pp. 22-29.

[480] Bell, D. (1977). *O advento da sociedade pós-industrial: uma tentativa de previsão social*. Translated by H. de L. Dantas. São Paulo: Cultrix, pp.402–405.

In the post-industrial society, sites, not the status, will constitute the units of interest. These relevant political units will be financial and commercial businesses, governmental bodies (executive, judicial and administrative bureaucracies), universities and research institutions, social facilities (hospitals, social service centers, etc.), and military. The social structure of post-industrial society will change, but not its general configuration. The economic sector would transition from manufacturing to services. Highly scientific industries would dominate the technological sector. In sociological terms, the rise of new technical elites and the advent of a new stratification principle, based on sites[481]. If our reality becomes more and more aligned with Bell's vision, political opening will be inevitable. Before the credibility of the regime is fatally eroded, proactive action is advisable. Perhaps the example of NAFTA might inspire the prospective endeavours of political openness, in which a civil society committee was created that facilitated rather than impeded negotiations.

2.5.3 Administrative Transparency

WTO structure mainly breaks down into the Ministerial Conference, the DSB, the General Council, the General Council meeting as Trade Policy Review Body, the Committees, Working parties and Working groups, the Council for Trade in Goods, the Council for Trade-Related Aspects of Intellectual Property Rights, the Council for Trade in Services and the Trade Negotiations Committee. The Administrative structure, in turn, consists of the Director-General and four Deputy Director-Generals, each charged with different competences[482].

There are mixed feelings about administrative transparency at the WTO. Panezi criticizes the relative lack of transparency in the selection process of WTO personnel and DSB experts, the accountability gap between diplomats and their legislatures and the lack of openness in the formal and informal phases of the DSB, although she recognizes the efforts to improve the review of information through

[481] Bell, D. (1977). *O advento da sociedade pós-industrial: uma tentativa de previsão social*. Translated by H. de L. Dantas. São Paulo: Cultrix, pp. 411-413,538.
[482] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.231-242. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].

greater circulation[483]. As we have already seen, Charnovitz[484], whose opinion on the administrative dimension of the WTO has already been explained, complements Panezi`s impression on the lack of administrative transparency by reminding us that the absence of judicial review for WTO actions make treating it as an authentic global administrative agency untenable, even if we concede that the WTO played a significant role in the development of Global Administrative Law (GAL)[485]. The classification and deductions drawn from the typology would therefore only partially apply to the WTO. Originally, however:

> The idea of judicial review of the multilateral trading system was discussed in the United Nations economic negotiations of 1946-48, and a provision was included in the ITO to permit Members to ask the International Court of Justice for an advisory opinion regarding a decision by the ITO Conference of all Members. Because the ITO did not go into force, this provision was never used. Nevertheless, one of the U.S. negotiators, Seymour Rubin—later a highly-respected figure in the community of U.S. international lawyers—anticipated that the "growth of international administrative agencies" would eventually draw upon legal developments at the domestic level in administrative law and judicial review.[486]

One after another, these findings consolidate the affirmation that the architects of the WTO have not offered convincing reasoning for the current model that contains so few mechanisms for transparency and accountability, except when politically expedient or convenient. As such, in the absence of well-reasoned structural reasons to deny greater openness, proposes to reconceive the WTO model ought to be considered.

[483] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.231-242. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020].
[484] Charnovitz, Steve. Transparency and Participation in the World Trade Organization. GW Law Faculty Publications & Other Works Faculty Scholarship. Scholarly Commons. 56 Rutgers L. Rev. 927.2004. pp
[485] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.49. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020]. p. 237.
[486] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 22.

Chapter 3
Transparency in Legal Thought and Legal Transparency

3.1. Transparency in Legal Thought

In legal philosophy, the concept of transparency appears as a corollary of the rule of law and due process. Rule of law and due process were concepts coined even before transparency was elaborated as value in political discourse, but the attribute of transparency has been added to the core of those concepts over time, first in a more basic manifestation and then in a more refined sense. Although the term and concept of rule of law was first employed in 17th century liberal literature, its characteristic features have a longer history. The seminal idea that legitimate power involves the preeminence of law over the discretion of rulers, that the ruler's self-restraint and respect of social adhesion are key to good governance has its earliest documented roots in Antiquity.

Before continuing in this line, we would do well to recall that the concept of Antiquity itself has been the object of dispute among historians, who consider the traditional approach conducive to errors and inaccuracies. The traditional approach underrates the achievements of Eurasian peoples and given wide-spread credence to the ethnocentric idea of ancient Greece as the birthplace of values such as humanism, democracy, freedom, individualism and rule of law. According to these recent historiographers, a more accurate hypothesis is that Greece was the most effective translator of these concepts for modern Europe, for "it was Greek writing provoked by the Athenian experience that the eighteenth and nineteenth centuries read (…)"[487]. Jack Goody[488] explains:

> Firstly, I will claim that studying Antique economy (or society) in isolation is mistaken, as it was part of a much larger network of economic exchange and polity centring on the Mediterranean. Secondly, neither was it as typologically pure and distinct as many European historians would have it; historical accounts had to cut it to the size consigned to it in a variety of teleologically driven, eurocentric frameworks. Thirdly, I will engage with the debate between 'primitivists' and

[487] Goody, J. (2012). *The theft of history*. Cambridge UK: Cambridge University Press, p. 50.
[488] *Idem*, pp. 26-28, 30-31, 50.

> 'modernists' which takes up this question economically, trying to point out the limitations in both these perspectives[489].

In the specific cases of democracy, freedom and rule of law, Goody`s premise, supported by many other authors, is that trade played a central role in diffusing across great distances cultures, ideas, and personnel in the classical world. In that world there was a constant flow of people, relative freedom of transit, and strong commercial connections. Slaves, as well as qualified workers, including educated doctors, scientists, and artisans often migrated, generating a significant degree of cultural syncretism[490]. The founding Roman mythology, for instance, recounts that the Romans are descendants of Hercules. Hercules himself, however, was not it in fact a theological product indigenous to the peoples of the Seven Hills, but rather a Phoenician god[491] who was incorporated into the local pantheon.

There are reasons supporting the affirmation that the Minoan civilization had at some point a system of deliberative tribal assemblies which, after the invasion, conquest and territorial stabilization undertaken by the Achaeans, coexisted, for a time, with the assemblies of tribal kings. That system established a "feudal hierarchy" and a confederation. Converging with their internal stabilization, tribal assemblies disappeared as a state body as a confederation of tribes emerged. The elective monarchical system, which characterized the tribes under the influence of the Minoan civilization, was gradually replaced by a hereditary monarchical governmental system[492]. Both the Minoan civilization, considered to be the first European civilization, and Athens on mainland Greece, were been influenced by the many cultures with which they maintained close and powerful business relationships, such as Egypt, Cyprus, Canaan and the Levantine coast, Anatolia and Greek civilization further up the mainland[493].

Important historical precedents that very likely influenced Athenian democracy, even if indirectly, include not only the Minoan civilization with its system of deliberative assemblies, but also the tribal democracies in early Mesopotamia; and the quasi-republican Assyrian city-state. We might also add the representative

[489] Goody, J. (2012). *The theft of history*. Cambridge UK: Cambridge University Press, p. 26.
[490] *Idem*.
[491] Saylor, S. (2016). *Roma. La Novela de la Antigua Roma*. La Esfera De Los Libros., Ch. II.
[492] Giordani, M.C. (1984). *História da Grécia. Antiguidade Clássica I*. 3rd ed. RIo de Janeiro: Editora Vozes, pp. 90-94.
[493] Goody, J. (2012). *The theft of history*. Cambridge UK: Cambridge University Press, p. 31.

systems occasionally practiced in Carthage and in the important Phoenician city of Tyre, although the denomination “democracy” for them might be strained[494]. Indeed, historians recognize a meaningful similarity between Phoenicians and Greeks[495].

Notwithstanding, the word “democracy” is Greek in origin and ancient Greece is where it acquired its basic features[496]. In archaic and ancient Greece, theorists considered the terms constitutional and legal as interchangeable and did not treat those questions as separable from political theory[497]. Although the autonomy of legal science in relation to political and moral thinking was postulated and established much later in history, particularly at the end of the 19th century and the beginning of the 20th century, the maturity of the legal concepts tested by various thinkers in diverse fields of knowledge, such as moral and, again, political philosophy in ancient Greece is clear.

Archeological findings suggest that, contrary to what was widely defended by fourth-century political theory, the codification of law was the exception rather than the rule in archaic Greece. In most cases legislation was limited to single laws or clusters of laws on specific subjects[498]. Nevertheless, the seminal idea of the rule of law can be identified. The formalization rules into written legislation and their publication was clearly a significant component of a strategy to reduce the arbitrary discretion of the ruler and maximize the citizens’ freedom of action[499].

For everything we owe to Plato, he did not develop a comparative sociological taxonomy of political formations in the Hellenic world. Plato’s contribution was more focused in a propositional theory of an ideal government. However, in his last and longest work, *Laws*, the Athenian philosopher introduced a powerful, advanced contribution to legislative theory with his postulate that laws must preceded by preambles, have a persuasive rationale and an educative purpose[500], without which they would be no more than commands backed by naked violence. In the work, Plato

[494] Goody, J. (2012). *The theft of history*. Cambridge UK: Cambridge University Press, p. 50, 53, 54.
[495] Idem, p. 54.
[496]Ibidem, p. 50.
[497] Cartledge, P. (2005). Greek Political Thought: the historical context. In: *The Cambridge History of Greek and Roman Political Thought*, p. 20.
[498] Raaflaub, K.A. (2005). Poets, lawgivers, and the beginnings of political reflection in archaic Greece. In: *The Cambridge History of Greek and Roman Political Thought*. p. 43.
[499] Idem, p. 44.
[500] Laks, A. (2005). Poets, lawgivers, and the beginnings of political reflection in archaic Greece. In: *The Cambridge History of Greek and Roman Political Thought*. p. 289.

refers to preambles as “the speeches” that preceded the law, or the outline of the law of a political regime[501]. The nature of those speeches would be not theological *per se*, nor poetic, although supplemented by “musical poetry”. It would be a persuasive piece by which the lawgiver would demonstrate for the worthy legal virtue not only in the face of divine sanctions by also because of the law’s consonance with what was the good for the individual[502].

The Platonic “preambles” are not, then, examples of legal reasoning or legal motivation for public acts that foresee the surveillance of the State’s acts or the verification of abuse of authority to any explicit degree. Like their contemporary Plato, Xenophon and Isocrates supported the idea of enlightened monarchy, although they considered, as did Plato, that the true differential factor of a good regime was the knowledge and proper distribution of the civic space according to the merits of each citizen. This was the factor that ‘redeemed’ democracies. In fact, Plato and Aristotle admired Sparta’s government, which they found model. Xenophon even described the Constitution of the Spartans, which was basically the Law of Lycurgus, as an adaptation of the ancestral Athenian Constitution, from which he extracted the idea of an aristocratic form of democracy[503].

Contrary to Plato, Aristotle dedicated great effort to providing a comparative constitutional account of more than 150 of the 1,000 plus separate and competitive independent Greek polities. Lamentably, only one part of this ensemble, the one on the Constitution of Athens, survived the destruction of the Great Library of Alexandria, Egypt ordered by the Coptic Christian Pope Theophilus of Alexandria in 391 AD. According to Aristotle, the Athenian Constitution underwent certain changes since the Draco established Athen’s first written set of laws. The most important reforms of the ‘Draconian laws’ were carried out by Solon, Clistenes and Pericles. Solon sought to reduce social inequality and, according to Aristotle, reformed most of the harsh laws. The constitution was then codified and registered in the *curbis*, a pyramidal wooden structure that revolved around its center, symbolizing the new social contract[504]. Solon also strengthened the political rights of the masses by granting them the right

[501] Plato (1992). *The Laws of Plato*. Translated by T.L. Pangle. Chicago and London: University of Chicago Press. p.121.
[502] *Idem*, 447.
[503] Gray, V.J. (2005). Xenophon and Isocrates. In: *The Cambridge History of Greek and Roman Political Thought*. p.143-154.
[504] Aristóteles (n.d.). *Constituição de Atenas*. Translated by E. Bini. Edipro, p.48.

to litigate before courts. With this development, the people were considered to have become “sovereign in the government”[505]:

> (…) The first change [of the Athenian Constitution] occurred when Ion and his companions brought the population together into a community, when the population was first divided into the four tribes, and the kings of the tribes were appointed. The second government organization, (but the first successively that involved a constitutional aspect), was the reform that took place under Theseus, which differed superficially from royalty. This was followed by reform at the time of Dracon, when for the first time a code of laws was drafted. The third was that which followed the civil war in Solon's time, which marks the origin of democracy and its development. The fourth change was constituted by the tyranny of Psistrato; the fifth corresponded to the government of Clistenes, which succeeded the deposition of tyrants and which was more democratic than that of Solon. The sixth came after the war against the Persians, when the Aeropago Council ran the state. The seventh, following the reform outlined by Aristides, which was completed by Efialtes, when he overthrew the power of the Aeropago Council; during this period the nation was deceived by demagogues (it made many serious mistakes because of maritime dominance). The eighth consisted of the installation of the 400, followed by the ninth, the return of democracy. The tenth corresponded to the tyranny of the Thirty and the Ten. The eleventh and the one that followed the return of the exiles from File and Piraeus; from then on, and the Constitution resulting from this reform that prevails today, continually incorporating power from the point of view of the mass of the population (…) The proposal to pay for attendance at the Assembly was initially rejected. However, as the people did not attend the Assembly, in spite of the many expedients employed by the Pritanes to induce the population to appear for the ratification of the votes[506].

In Book IV of *Politics*, Aristotle argues that a good constitution must establish three elements to achieve a well-ordered social structure: how public affairs are to be executed, the manner by which magistrates are nominated and their competences determined, and judicial power[507]. It would be mistaken, however, to read into the text an argument for the modern notion of ‘checks-and-balances’. Additionally, Aristotle believed a good lawgiver would include the middle classes in the political arrangements to reinforcing the idea of popular sovereignty.

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[505] Aristóteles (n.d.). *Constituição de Atenas*. Translated by E. Bini. Edipro, p. 51.
[506] Idem, pp. 92-93.
[507] Aristotle (n.d.). *The Politics and The Constitution of Athens*. ed. Cambridge Texts and History of Political Thought, p.112.

The Spartan experience of political institutions formalized by law, called the "Great Rhetra", set an important precedent and inspired the idea of *eunomia* that embraced the notions of good order, crisis resolution, stability and integration. Solon introduced the idea of equality before the law which modified the concept of *eunomia.* Those elements played a decisive part in Athen's evolution to a full democracy in the first half of the fifth century BC[508].

Transparency itself was not a specific or explicit concern, yet it could be and was boosted in terms of other concepts and values. This was the case of the principal of political participation by direct democracy in Athens and the value placed on political checks-and-balances in the Roman Republic. These related concepts were introduced by the political and constitutional thinkers of the Helleniic ancient Roman periods. One aspect that both periods share, however, is the preeminence of the idea that moral and political philosophy were inseparable. Good governance was primarily considered an attribute or virtue of particular leaders rather than a quality arising from sound political and social arrangements[509].

In the Greek city-states that embraced monarchy, and at the beginning of the Roman period, kingship was absolute. The king embodied the law, and, as far as morality was observed, it was substantially modified in accordance to the tacit constitutional arrangement. If we believe Aristotle, the tyranny of Psistratus tyranny was moderate. This was because Psistratus maintained a government with constitutional forms and showed moderation, clemency, concern for social issues and self-restraint[510]. It should be remembered, as told by Cicero, that Lucius Tarquinius, or Tarquin the Proud, who was the last of the Etruscan kings, was deposed because of his immoral behavior, even though there was no written law against rape at the time[511].

The constitutional theory of Polybius emphasized legitimacy in terms of the configuration of relationships among individuals and checks and balances as the dual basis for constitutional stability. Constitutional stability, in turn, was the premise for

[508] Aristotle (n.d.). *The Politics and The Constitution of Athens*. ed. Cambridge Texts and History of Political Thought, p. 48.
[509] Garnsey, P. (2005). Introduction: the Hellenistic and Roman periods. In: *The Cambridge History of Greek and Roman Political Thought*. Cambridge University Press, p.404.
[510] Aristóteles (n.d.). *Constituição de Atenas*. Translated by E. Bini. Edipro, p. 60.
[511] Cicero (n.d.). *The Republic and The Laws*. Oxford World`s Classics, p.125.

the nation`s strength and success. The development of shared common values by the use of reasoning was the presumed criterion for legitimacy[512]. Morality was also a central concern in Cicero's political and legislative theory. In the theoretical system he developed, good laws were the ones that accorded with nature and nature provided the authentic guide for morality. Adherence to written laws was not considered to exhaust one's duties in the face of law. The elites in particular were to conduct their behavior in accordance to the *mos maiorum*, the moral code of the ancestors in personal, national and international matters.[513]

Stoicism was the leading philosophical school during the brief existence of the Roman Republic. Stoicism did not focus on State matters, but rather on the enlightened use of political power and lawmaking[514]. During the time Julius Caesar was Rome's consul and, later on, dictator, the *Acta Diurna* was established. While many see in it the origin of modern newspapers, it was actually more an official diary of the Republic. The *Acta Diurna* was an official daily gazette which contained the " (…) authorized narrative of noteworthy events at Rome. Its contents were partly official (court news, decrees of the emperor, senate and magistrates), partly private (notices of births, marriages and deaths)"[515]. Its seminal mission was systematically publishing the *Acta Senatus*, which were minutes of the debates held in the chamber that were never recorded until then. Although the *Acta Diurna* served as an official propaganda or mouthpiece of the regime, it also instilled in the Roman culture an appreciation for the transparency of public acts and the taste for political argument:

> It appears that all these publications were perfectly insufficient for an exact legal use. It would be natural to believe that the lawyers here had given some help and had assembled collections of legislative material in their driving schools for the purposes of their classes. However, that was not the case. (...) That in the republican and classical period such a great uncertainty about objective law was tolerable (...) this is clarified by the existence of a flourishing legal science, which is attributed the maximum confidence. (....) With the decline of legal science at the end of the third century, legal uncertainty becomes, of course, a calamity, which is sought to be

[512] Hahm, D.E. (2010). Kings and constitutions: Hellenistic theories. In: *The Cambridge History of Greek and Roman Political Thought*. Cambridge University Press, pp.464–470.
[513] Atkins, E.M. (2010). Cicero. In: *The Cambridge History of Greek and Roman Political Thought*. Cambridge University Press, pp.481–482.
[514] Centrone, B. (2010). Platonism and Pythagoreanism in the early empire. In: *The Cambridge History of Greek and Roman Political Thought*. Cambridge University Press, p.558.
[515] Encyclopaedia Britannica (2007). Acta Diurna. [online] web.archive.org. Available at: https://web.archive.org/web/20070701012839/http://www.1911encyclopedia.org/Acta_Diurna [Accessed 19 Apr. 2020].

> remedied through private and official collections. (...) The principle of publicity, which is of significance for legal security (…) has only a modest role in Roman law[516].

In the area of international treaties, however, the Greco-Roman contribution regarding the publication of public acts is more tangible:

> It must be noted that, *stricto sensu*, the interest of ancient Greece with regard to the international domain is quite limited: during the period of independence of the Greek cities, very few treaties were actually concluded between Greeks and communities not Greek, the latter being seen as *barbaroi*, and therefore intended to be enslaved by the Greeks.
>
> (...)
>
> However, it is certain that the Greeks seem to have cultivated conceptions in this regard which remained rudimentary, but which should not also make us forget that in the classical period, they knew many institutions of International Law (on treaties, institutions for the protection of foreigners, arbitration) and raises the problems of federalism quite early, under conditions which have, after all, little changed until today.
>
> Let us stop at some elements which clearly reveal the Greek contributions: first the treaties, then the institutions protecting foreigners and finally the question of arbitration.
>
> (...)
>
> As we said earlier at the outset, the various treaties concluded were engraved on stelae of stone or marble, or even bronze. The erection of these documents in the temples was explicitly aimed at ensuring their inviolability - the gods were directly taken as witnesses - and the publicity - the places chosen constituted a way of making these commitments known beyond those concerned: Olympia, Delphi, such places often visited by all of Greece, allowed information to the public which would then be liable to react to any violation[517].

In the first centuries of the Roman Empire, Platonism, a very broad label encompassing several currents of thought, won center stage. Philo of Alexandria and Plutarch of Chaeronea were the most important representatives of the school of thought, even though they only shared the Platonic conception that the divine realm is comprised of immutable forms and that served as the ideal model of the world. Political action, therefore, had to have as its target the reproduction of the ideal order in the “world of contingency”. Philo was from a wealthy, influential Jewish family in Alexandria. The doctrine he devised departed from the Greek tradition of political

[516] Schulz, F. (2020). Princípios do Direito Romano. Editora Filomática Sorocabana, pp.174–182.
[517] Gaurier, D. (2005). *Histoire du droit international: auteurs, doctrines et développement de l’Antiquité à l’aube de la période contemporaine*. Rennes: Presses Universitaires De Rennes, pp.52–58.

thought to find in Judaism the realization of the Platonic ideals. Moses, considered an archetype of the Philosopher King, the epitome of the law, a reason-guided lawgiver, the leader not bound to render accounts to anyone else but who restrained himself through moral rectitude[518]. Not much can be said about transparency as an attribute of the law or the lawmaking process in Philo's system. The revelation and codification of the ten commandments, known as the Mosaic laws, can be understood as a strategy to affirm the new values, a foundational act of a new order, that announced only a part, although a fundamental one, of a "Jewish constitution" in the old meaning (the stipulation of the social dynamics). Later on, other parts related to morality and even the social, economic and judicial organization of the Hebrew people (the Mishpatim book) were added to this foundational order through customary law, which were eventually codified in the Pentateuch (in a comprehensive book called the Torah). The Mishna (Shekalim, 3:2) interprets the verses: "and you shall be clean before G-d and Israel (Numbers, 32:22)" and "You shall find favor and understanding in the sight of G-d and Adam (Proverbs 3:4) to refer to doing whatever possible to minimize suspicion by means of transparency[519].

Contrary to Philo and many other Platonic thinkers, Plutarch did not conceive of politics as a minor or inferior affair, but instead as a necessary endeavor. He considered devoting life to politics to be the noblest service a man could pursue. Like Plato, he considered that the best political practices were those interconnected to morals. He also shared with Plato his preference for kingship or (whenever monarchy was impossible) oligarchy as political regimes, and he encouraged compromise for pragmatic reasons. The content of the law, however, was not one of his concerns[520].

The Jewish-Greek tradition exerted an extremely significant influence on Christian literature on politics and legal reasoning. For Josephus, Philo's successor, the lawgiver was above all an educator. Freedom was the product of discipline and submission and the Jewish politea was a hierocracy, the supreme rule of by the priesthood, with no lay judiciary[521]. The jurists, comprising a professional class of

[518] Gaurier, D. (2005). *Histoire du droit international : auteurs, doctrines et développement de l'Antiquité à l'aube de la période contemporaine*. Rennes: Presses Universitaires De Rennes, pp. 566-567.
[519] *Uri L'Tzedek: Orthodox Social Justice. http://utzedek.org/about-us/policies-values-transparency/.*
[520] *Idem*, 584.
[521] Rajak, T. (2010). Josephus. In: C. Rowe and M. Schofield, eds., *The Cambridge History of Greek and Roman Political Thought*. Cambridge University Press, p.591.

lawyers who were originally priests, and then secular jurisprudence compilers, grew in importance in ancient Rome as the legal advisers of magistrates and judges. The juridical sources were transmitted in Justinian's Digest:

> In the surviving writings of the Roman jurists there is no extended discussion of the nature of political society, the legitimacy of its rulers, or the laws which govern or ought to govern it. Nor is there any such discussion about justice, the sources of law, or the conflict between positive and natural law[522].

The jurists offered a theory for legitimate power, though considered superficial and an *ex post facto* justification for the emperor's unlimited powers. According to them, the people transferred their sovereignty to the emperor, therefore forfeiting their power, or *imperium*[523]. The jurists were certainly the source for the Hobbesian concept of social contract.

The spread and consolidation as a world religion of Christianity led to enormous debate about the sources of law, since its political philosophy likened the Church to an invisible empire whose internal organization mirrored the Roman State. Many of its symbols indeed hearken to the idea of the *Roman Imperium sine fine*[524]. However, virtually no debate focused on the intrinsic qualities of the legal system that would contain abuses or confer legitimacy through the process of enshrining common shared values or, more simply, allow those under the jurisdiction of the law to become acquainted with the limits of their own freedom.

Francisco de Vitoria (1483-1546) was the leading figure that inspired the Salamanca School, a prominent theological and legal institution during the Renaissance. In his reflection on the civil power, de Vitoria did not introduce the idea of rule of law *per se*, but something very akin to it can be glossed from the nuances he added to the core matrix of political and legal thinking. Among the main Vitorian corollaries and conclusions are notable iterations and novelties in Christian thinking. In one passage, Vitoria reaffirmed that "every public or private power by which the secular republic is administered is not only just and legitimate, but has God as its

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[522] Johnston, D. (2010). The Jurists. In: C. Rowe and M. Schofield, eds., *The Cambridge History of Greek and Roman Political Thought*. Cambridge University Press, p.617.
[523] Idem, p. 625.
[524] Young, F. (2010). Christianity. In: C. Rowe and M. Schofield, eds., *The Cambridge History of Greek and Roman Political Though*t. Cambridge University Press, p.649.
Poletti, R. (2009). *Conceito Jurídico de Império*. Brasília, Distrito Federal, Brasil: Editora Consulex, p.256.

author in such a way that not even by the consent of the whole world can it be suppressed". In another, he states:

> The laws and constitutions of princes in such a way oblige, that the transgressors are guilty of guilt in the forum of conscience, the civil laws binding even legislators and kings. The obligation of the law ceases with the termination of the material reasons that gave cause to the law. The laws enacted by tyrants are binding, despite their political illegitimacy, for reasons of pragmatism, to avoid social anomie. [525]

According to Kamali, Constitutional law is one of the most under-developed areas of Islamic law and jurisprudence, however the concept of rule of law, and thus the corollaries of the law under an accountable government, is sheltered in the Islamic system of rule.

> Islamic governance may be characterized as civilian (madaniyyah), which is, however, neither theocratic nor totally secular but has characteristics of its own. It is a limited, as opposed to a totalitarian, form of government with powers constrained by reference to the definitive injunctions and guidelines of the Qur'an and authenticated Sunnah (…) The state is elective in character and represents the community to which it remains accountable. The Islamic system of rule may also be described as a qualified democracy that is participatory and must conduct its affairs through consultation
>
> (…) Government is consequently a trust and its leaders and officials are all the bearer of that trust. Trust is signified, in turn, by the notion of accountability before God and the community.
>
> (…) The head of state is a representative (wakil) of the community by virtue of wakalah, which is a fiduciary contract
>
> (…) Islam advocates a limited government in which the individual enjoys considerable autonomy. There are, for example, restrictions on the legislative capabilities of the state, which may not introduce laws contrary to Islamic principles. Legislation must also meet the requirements of consultation and consensus[526].

The scope of the rule of law in the Islamic jurisprudence was already settled during the Middle Ages[527], a period when a few legal European texts refer to anything similar.

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[525] de Vitoria, F. (2007). Relecciones del estado, de los indios y del derecho de la guerra. Mexico: Porrúa, pp.1–21.

[526] Kamali, M.H. (2012). Constitutionalism in Islamic countries: between upheaval and continuity. In: RöderT.J., ed., *Constitutionalism in Islamic countries: between upheaval and continuity*. Oxford ; New York: Oxford University Press, p.22.
Baderin, M.A. (2016). *International human rights and Islamic Law*. Oxford: Oxford University Press, p.37

[527] Weeramantry, C.G. (1998). J*ustice without frontiers / Vol. 2, Protecting human rights in the age of technology*. The Hague: Kluwer Law International, Cop.

According to Jørgen Møller and Svend-Erik Skaaning, the historical origins of the notion of rule of law lie in medieval Europe[528] and were "solidly anchored in the supremacy of law, i.e., that rulers were bound by higher law and that law was therefore not made but discovered":

> The medieval milieu was pervaded with constitutionalist practices and thoughts (…) Not only did contractual relationships extend downwards through the social pyramid – every vassal or locality retained certain rights vis-à-vis his/their liege lord – it also extended 'sideways' into both the secular and ecclesiastical sphere. Institutionally, constitutionalism manifested itself in the existence of corporate rights, charters of liberties, and representative institutions in the form of nascent parliaments and diets. The concomitant ideological manifestation centered on doctrines such as the right to resistance, theories about corporations, limited monarchy, and the mixed constitution (…). Downing (…) defines medieval constitutionalism as follows: a system of decentralized government characterized by parliaments controlling taxation and matters of war and peace; local centers of power limiting the strength of the crown; the development of independent judiciaries and the rule of law; and certain basic freedoms and rights enjoyed by large numbers of the population. The rule of law only enters as one element among many in Downing's relatively 'thick' definition of constitutionalism.[529]

The "Walk to Canossa", or *L'umiliazione di Canossa*, was one of the most sensational episodes of medieval Europe. One outcome of that encounter between Pope Gregory VII and Henry IV was the loss of the secular ruler's power to "invest" bishops and other clergymen. This event reflected a crucial phase in constitutionalization during the Middle Ages when the need for a new system of checks-and-balances to deal with the centrifugal forces of medieval politics became pressing. However, centrifugal forces were not the only factor in the scenario. The Middle Ages seemed subject to systolic and diastolic forces. After the Walk to Canossa, another very important episode was the 'Babylonian Captivity, when the French crown set up a parallel papacy under its control in Avignon, France, where seven successive popes resided from 1309 to 1376. Disregarding the substance of the schism, these episodes demonstrate the importance of the power of investiture for secular rules and the influence of the controversy on the development of the rule of law in Europe:

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[528] Møller, J. and Skaaning, S.-E. (2014). *The rule of law: definitions, measures, patterns and causes*. Basingstoke: Palgrave Macmillan.

[529] Møller, J. and Skaaning, S.-E. (2014). *The rule of law: definitions, measures, patterns and causes*. Basingstoke: Palgrave Macmillan, Kindle Positions 532–687. Kindle Edition.

> By the thirteenth century, the principle of *ius proprium* or *iura propria* – namely, the practice of (male) self-organization and self-governance, including relations based on contractual relations – extended to almost all forms of known collective activity and undertaking throughout Western Europe. Each collective undertaking was organized as a universitas, and what distinguished one universitas from another were the tasks that each set for itself, with the result that almost every town[530].

The mosaic of powers in medieval society resulted in a multiconstitutional system. Figuring in this constellation of rights and duties, of economic and political enterprise were the fraternities and guilds; parishes; villages, comprising walled settlements (*castra*) and rural neighborhoods (*vicini* or *viciniae*); common property regimes, for instance, collective organization to regulate the use of non-arable land, water resources, and local churches; royal towns; and baronial jurisdictions (or manorial systems). It was in this scenario that the rule of law became even more urgent to maintain harmonious coexistence between overlapping jurisdictions. Additionally, this confluence gave rise to agreements between the forces and the creation of institutions like the Ständestaat (the polity of estates), which were embryonic forms of the modern unified State.

Along with the material conditions that created the opportune circumstances for a notion of rule of law to emerge, Roman Law had been doctrinally revised since the 11th century by scholars of the canon. The Through them, the Roman notion of republicanism was translated into the contemporary context. The struggle against arbitrary domination and the pursuit of liberty and civil liberties were the main legacy that the medieval scholars took from, the Roman jurists.

It was only at the end of the nineteenth century that A.V. Dicey popularized the term rule or supremacy of law. Dicey considered the rule of law the second key attribute of England's political institutions since the Norman Conquest, the first being central government. The rule of law would be *the security given under the English constitution to the rights of individuals looked at from various points of view*[531]*.* The expression would include at *least three distinct though kindred conceptions*: (i) *no*

[530] Møller, J. and Skaaning, S.-E. (2014). *The rule of law: definitions, measures, patterns and causes*. Basingstoke: Palgrave Macmillan, Kindle Positions 532–687. Kindle Edition.
[531] Dicey, A.V. (2018). *Introduction to the study of the law of the constitution*. 3rd ed. London and New York: Macmillan and Co, p.171.

man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint; (ii) *no man is above the law (…) every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdictions of the ordinary tribunals*; and (iii) *the general principles of the constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (…) given to the rights of individuals results, or appears to result from the general principles of the constitution*[532].

Møller and Skaaning demonstrate how the concept of the rule of law has become complex and controversial, incorporating minimalist and maximalist definitions, more formal or more substantial concepts. The authors summarize the central elements of the conceptions of three other thinkers regarding the rule of law. First, Lon Fuller defines rule of law through attributes. Law must possess generality and follow codifed promulgation. The law cannot be retroactive, must be clear and internally coherent (i.e., not contradict itself). For a system to comply with the mandates of the rule of law, the laws cannot require the impossible and demonstrate relative constancy over time and congruence between official action and declared rule. Joseph Raz characterizes rule of law as a prospective, open and clear body of laws. The laws must be stable, as must the process of making particular laws be guided by open, stable, clear, and general rules. The judiciary must be independent and follow the principles of natural justice. Courts must have review powers over the implementation of other principles and be easily accessible. Lastly, law enforcement agencies must not have a margin of discretion that allows them to pervert the law. Lastly, Finnis identifies the rule of law as a prospective body of law, that can be complied with, one that is promulgated, clear, coherent and sufficiently stable. The power to pass decrees is limited and the officials are held accountable for compliance to the rulers[533].

[532] Dicey, A.V. (2018). *Introduction to the study of the law of the constitution*. 3rd ed. London and New York: Macmillan and Co, pp. 171-176.
[533] Møller, J. and Skaaning, S.-E. (2014). *The rule of law: definitions, measures, patterns and causes*. Basingstoke: Palgrave Macmillan.

Finally, Møller and Skaaning propose a distinction between four different dimensions of the rule of law: (i) the shape or core of the rules, which refers to the requirements of formal legality; (ii) the sanctions of the rules and the existence of an effective system of checks-and-balances; (iii) the source of the rules, which should originate in the sovereignty of the people; and (iv) the substance of the rules, meaning positive and negative rights.

The relationship between the rule of law and due process is not as clear and direct as it might seem. The notion and the concept of due process first appeared in juridical parlance with clause 39 of the Magna Carta. In a way, the notion of due process, in the modern acceptation, formally precedes the notion of rule of law. Notwithstanding, due process is an element of the broader concept of rule of law. It relates to adjudicative procedures that guarantee the positive and negative rights granted in the scope of the rule of law to minimize arbitrary discretion. The new cataloguing of the rule of law operated by Møller and Skaaning apparently leaves out aspects related to due process. It defines the concept by means of four dimensions, each of which has specific attributes. None of them explicitly involve procedural criteria. It remains uncertain whether the authors tacitly include due process in the first dimension (shape or core) as an aspect of strict legality, or whether they assign due process obligations of the rule of law to a thicker, or maximalist, concept of rule of law.

Traditionally, rule of law and due process are invoked together. In the 2011 Report on the Rule of Law of the Council of Europe`s Venice Commission[534], following Resolution 1594(2007) of the Parliamentary Assembly, there is a direct association of “Rule of Law”, “Rechtsstaat” and “Etat de droit” or “prééminence du droit” to the principles of legality and of due process. Yet the authors, having offered their appraisal of the four dimensions of the rule of law, provide as an example of minimalist-maximalistic concepts of rule of law a tuning fork that has eight pitches, following the doctrine of Bingham: 1. The law must be accessible and so far as possible intelligible, clear and predictable. 2. Questions of legal right and liability should ordinarily be resolved by application of the law and not through the exercise

[534] Council of Europe (2016). *European Commission For Democracy Through Law (Venice Commission). Rule of Law Checklist*. [online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e [Accessed 19 Apr. 2020].

of discretion. 3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. 4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably. 5. The law must afford adequate protection of fundamental human rights. 6. Means must be provided for resolving without prohibitive cost or inordinate delay bona fide civil disputes which the parties themselves are unable to resolve. 7. Adjudicative procedures provided by the state should be fair. 8. The rule of law requires compliance by the state with its obligations in International Law as in national law.

According to Bingham, due process only enters the eighth layer of the rule of law. The rule of law, due process and transparency, whether mentioned as corollary or as independent concepts, are constantly referred to as principles of law, general principles of law and even principles of international economic law. Before going into detail on these concepts, it is necessary to understand the nature of the general principles of international law

3.2 Sources of Law and Sources of International Law

Before delving into the narrative on the emergence of the concept ‘sources of law’ in the 19th century, the historiography on international law, particularly from the French school, deserves mention. It marks as incontrovertible milestones certain contributions of ancient civilizations to the concept of sources of law, among which are the first sketches of the notion of general principles of international law. Dominique Gaurier identifies one such contribution from the ancient Mesopotamian and Egyptian civilizations. This would be the principle of divine protection afforded by agreements. In the Israeli and Jewish context, some of the "principles of the sons of Noah" that governed inter-tribal and inter-peoples relations were respect for life, property and other peoples’ form of political organization, in addition to respect for international treaties as a moral imperative. In other words, the principle of *pacta sunt servanda* is seen as emerging here. In ancient Greece, Guarier highlights the principle of oath and good faith, or *Pistis*, in honor of the deity Zeus Pistis. The principle would both impose the commencement and the confinements of the validity of obligations under treaties: the oath determines its beginning while the good faith

principle imposes the conditions and ultimately limits of such agreements. In the face of ambiguity and contradiction, obligations must be understood in accordance with common sense and as entailing the least costly burden for the parties bound to the agreement. The Romans, in turn, conferred through Fecial Law sacred status to treaties by means of religious rituals that marked these and other significant events in Rome's relations with external powers. The fecial ministry lost its strength and usefulness as a means of giving validity to the "international" conventions of the Roman Empire over time. In medieval Europe, despite the conditions that favored the birth of the notion of rule of law and constitutionalism (which would become, as will be further explained, important concepts in modern International Law) the advance of International Law *per se* was hindered by the transnational bonds of power, which does not mean, however, that International Law was irrelevant at the time.

During the late Middle Ages, the emergence of a thriving merchant class in northern Italy and northern Europe with strong business ties to the outside world revived the practice of treaties and modern diplomacy. *Ius ad bellum* flourished at the time, as did the practice of peace treaties. The intensification of commercial exchange led to an increased movement of traders between jurisdictions, raising the urgency of legally addressing cohabitation with different populations. Regardless those developments, the most enthusiastic historiography of International Law does go so far as to affirm that general principles of law were formulated and incorporated into the "international" experience of medieval times or even that principles of International Law *per se* were elaborated and incorporated into legal culture[535]. Giovanni da Lignano, Conrad Braun, Francisco de Vitoria, Francisco Suarez, Pietrino Belli, Balthazar de Ayala, Alberico de Gentili, Hugo Grotius, Christian Wolff, Vichel Emerich, Richard Zouche, Samuel Rachel, Johann Wolfgang Weber, Cornelius van Bynkershoek, Johann Jakob Moser and Georg Friedrich von Martens were all pioneering figures of International Law from the late Middle Ages through early modern times who made important contributions. The doctrine that emerged, however, but did not clearly establish consensus on several topics, among which are the general principles of International Law themselves[536].

[535] Gaurier, D. (2005). *Histoire du droit international: auteurs, doctrines et développement de l'Antiquité à l'aube de la période contemporaine*. Rennes: Presses Universitaires De Rennes, pp. 85-142.
[536] Idem, pp. 143-208.

Only in the 19th and 20th centuries did the parlance of International Law took on greater clarity. Until the establishment of the Statute of the PCIJ, the term "general principles of law" was used permissively, often to refer to mere institutes of law or simply rights[537]. The imprint of positivism on 19th century International Law is a matter of debate among scholars. Milos Vec significantly veers from the thesis that legal positivism was fundamentally mirrored in international law, maintaining a characterization of International Law that is essentially contradictory to the concept of legal positivism as internalized in municipal rights from then until the post-World War II period.

Milos Vec describes the 19th century as a period of *juridification, universalization and positivism in international law*[538]. He argues that medieval Western Europe was *not suitable for the development of international law*[539]*.* What became known as *Ius Publicum Europaeum*, with its undeniable preeminence in the construction of modern International Law was the result, first, of the emergence of the world state system following the Peace of Westphalia, but, more importantly, of the *increased diplomatic and violent intercourse and ever-changing alliances amongst European powers on the basis of [the principle of collective security], which was only to be temporarily abolished through the conquest of Europe by Napoleon*[540].

In the search for autonomy, efforts were made to vest International Law in scientific legitimacy. For this purpose, the natural law language through which International Law had hitherto been formulated, largely due to canonical thinking and the contribution of the Salamanca School[541], had to be abandoned in favor of a more secular logic. Substituting the logic of natural law by that of the philosophy of law was perceived as needed and possible by grounding international morality in abstract reason. The attempt was only partially successful. Natural law persisted as a source of International Law in the parlance of many regulatory fields for reasons that will be further explained.

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[537] Ibidem pp. 42, 46, 47, 57, 68.
[538] Vec, M. (2017). Sources of International Law in the Nineteenth-Century European Tradition. The Mith of Positivism. In: *The Oxford Handbook on The Sources of International Law*. Oxford University Press, p.122.
[539] Akehurst, M. (1992). *A modern introduction to International Law*. London: Routledge, p.10.
[540] *Idem*, p.11.
[541] Ibid, p. 15.

17th and 18th century thinkers, particularly Hugo Grotius and Emmerich de Vattel, made the first steps to changing the concept of natural law from a divine right to a right based on reason. Hugo Grotius went as far as claiming that natural law is dictated by reason, being "so immutable that it cannot be changed even by God himself. However immense may be the power of God"[542].

The return to Roman law for inspiration for the elaboration of the pre-modern and modern *ius gentium* was gradual, and was only definitely consolidated in the 19th century. In his seminal book, *The Jure Belli ac Pacis*[543], Grotius evokes several Roman writers who subscribed to the same idea when explaining the rational foundation of natural law:

> It is customary to prove in two ways that something is natural law: *a priori* and *a posteriori*. Of these two ways of arguing, the first is most abstract and the second, the most popular. It is proved *a priori* by demonstrating the necessary convenience or inconvenience of something with a racial and social nature. It is proved *a posteriori* by concluding, if not with infallible certainty, at least with great probability, that something is a natural right because it is considered as such in all nations or among those that are more civilized. In fact, a universal effect requires a universal cause and the cause of such an opinion cannot be other than the very sense that we call common sense.
>
> There is a phrase in Hesiod, praised by many "It is not an entirely vain an opinion that many people consecrate." Heraclito, who thought that common opinion is the best criterion of truth, said: "What usually seems so is assured". According to Aristoteles, "the greatest test is when everyone agrees with what we say". According to Cicero, "the consensus of all nations on the same thing must be considered a law of nature." Quintiliano says: "We must take for granted what is accepted by everyone's common opinion". It is not without reason that I said "the most civilized nations", as the same is accurately underlined by Porfirio: "There are savage and even inhuman peoples, about whom sensible judges must not take consequences to stand up against human nature". Andronico de Rodes says that "for men endowed with a just and healthy spirit, the right we call the right of nature is immutable"[544].

Emmerich de Vattel, in an attempt to reconcile natural law with positivism, admitted the existence of natural rights to States, understanding them nonetheless them as binding with *erga omnes* effect if codified[545].

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[542] de Grotius, H. (2004). O Direito da Guerra e da Paz (De Jure Belli ac Pacis). Ijuí: Ed. Unijuí, p.81
[543] de Grotius, H. (2004). O Direito da Guerra e da Paz (De Jure Belli ac Pacis). Ijuí: Ed. Unijuí, p. 85.
[544] I*dem*, p.86.
[545] de Vattel, E. (2004). *O Direito das Gentes*. Translated by V.M. Rangel. Brasília, Distrito Federal, Brasil: Fundação Alexandre de Gusmão. Instituto de Pesquisa em Relações Internacionais. Editora Universidade de Brasília, p.536.

> (…) in his 1758 The Law of Nations, de Vattel classified positive International Law (as opposed to domestic law) into three sources, but he did not refer to any of the sources as 'general principles of law' (or 'principles'). His classification was comprised of conventional law, which encompassed rules expressly agreed upon, customary law, which was represented by rules tacitly agreed upon, and voluntary law, which was comprised of rules of presumed consent. General principles could correspond to de Vattel's third category of rules of nations' presumed consent, especially if this category is interpreted to encompass rules that have been neither explicitly nor tacitly agreed upon but could nevertheless be considered to be recognised. However, de Vattel does not mention the phrase 'general principles of law' in his classification of sources of international law, which detaches the pre-1920 references to 'principles' from his third source of international law[546].

The 19th-century *esprit d'internationalité,* its plea for *religious tolerance, freedom of opinion, free trade, development of contacts between people*[547], were all branded at birth by contradiction. First of all, these *prima facie* laudable sentiments and causes all boomed in parallel to the rise of nationalism all over Europe. The great powers of the international system of the era – excepting interruptions during the Crimean War and the internal conflict for the dismemberment of the Ottoman Empire – were all Christian empires governed by absolute monarchies. Regarding foreign policy, their universal, or better put, liberal motivation was more pragmatic than ideological. Notwithstanding the clear tension between the tenets of legal science and the *realpolitik* of the great powers of the time, it is difficult to refute the argument that European International Law effectively provided a rational legal framework for conduct in the international society.

On the other side of the Atlantic, American internationalism initially evolved in less pragmatical fashion. By the late 19th century, Americans were in a position *to assume great power status* and *no less than Europeans had a vision of how the world should properly function* [548] . American religious nationalists, overwhelmingly Protestant, became the drivers of international initiatives. Heirs of missionary evangelicism became *proto-Wilsonians, early architects of a liberal world order of collective segurity and international organizations*[549]. They were expansionists who

[546] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p. 263.
[547] *Ibid*, p. 12.
[548] Preston, A. (2012). *Sword of the spirit, shield of faith: religion in American war and diplomacy*. New York, United States: Alfred A.Knopf, p.176
[549] *Idem*, p. 179.

perceived and anticipated a future of world interconnectivity and sought to disseminate religious, political, social, economical and, of course, religious values, such as human rights. Clearly, some of the leading figures had purely imperialistic aims, but most preached and practiced tolerance and ecumenism.

The numbers of adherents to Protestant evangelism skyrocketed between Reconstruction (the 13 years following the American Civil War) and World War I. Hundreds if not thousands of these idealistic missionaries dispersed throughout China, the Ottoman Empire and the Middle East, most of whom were more inspired by the vocation to perform good works than simply to convert "heathens" to the Christian fiath. This can be seen in the educational, health service and other social activities that were their primary occupation[550]. That spirit, together with the providential timing of their arrival in foreign countries often made the welcome in many countries, even ones where proselytizing was prohibited to proselitize. In other places, such as China, they were perceived as agents of humiliation and subservience and violently repudiated. After decades of negotiations, American missionaries were granted the priviledge of extraterritoriality. Some of the first international treaties signed by the young American nation were aimed at protecting religious missions.

The legacy of 19th century American internationalism lies in what Henry Kissinger described as the *intellectual and moral impetus*[551] that enabled the United States to shape the 20th century world order. Theodore Roosevelt and Woodrow Wilson, eminent American presidents of the first half of the 20th century mad no qualms about adopting religious tropes and rhetoric. The Fourteen Points, The Charter of the League of Nations, the Statute of the Permanent Court of International Justice and the American perception of International Law itself were very much influenced by the that ideological burden and sense of morality[552].

[550] Preston, A. (2012). *Sword of the spirit, shield of faith: religion in American war and diplomacy*. New York, United States: Alfred A.Knopf, p. 177. .
[551] Kissinger, H. (1994). *Diplomacy*.: Simon & Schuster, p.17.
[552] Preston, A. (2012). *Sword of the spirit, shield of faith: religion in American war and diplomacy*. New York, United States: Alfred A.Knopf, p. 178.

As for international trade, a bilateral treaty regime largely flourished in the second half of the 19th century, overcoming once and for all the steep protectionism that marked the years following the Napoleonic wars[553]:

> In Britain, the decline of trade barriers, which began in the 1820s and 1830s but were marked most famously by the Repeal of the Corn Laws in 1846, can be traced to diverse factors. The usual story is that manufacturers had obtained power relative to landowners, in part because of the economic changes brought on by the Industrial Revolution and in part because of political changes such as the Reform Bill of 1832. Manufacturers wanted to pay lower duties on imports of raw materials, and perhaps they also wanted their workers to have access to cheaper food. Landowners, of course, preferred to avoid foreign competition (…). Ideology, spiced with religion, also played a role in the decline of protectionism, as elites increasingly adopted Smith`s position on the relationship between international trade and national wealth
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> (…) In early nineteenth-century Britain, we find evidence that the reduction of trade barriers is not necessarily a matter of international cooperation; it can occur as unilateral policy[554].

The well-known iniquitous treaties signed by Britain with China (end of the 18th and beginning of the 19th century) and by Britain and Brazil (first decade of the 19th century), anticipated the phenomenon of the spread of free trade agreements with imbalanced terms.

In the case of China, the iniquitous treaties were legal acts that were signed subsequently to the five major wars that China was compelled to wage in approximately a century in response to foreign attempts to impose presence and trade in its territory: the First Opium War (1840-1842); the Second Opium War (1858-1860); the Sino-French War (1883-1885); the Sino-Japanese War (1894-1895); and the Eight-Nation Alliance or Boxer Rebellion (1900-1901). These aggressions deprived China of its conditions to govern effectively by removing its power of jurisdiction at different levels. In this sense, China's woes were a direct result of unbridled colonialism[555] in which Britain was the main, although not the only culprit.

In the case of Brazil, the iniquitous trade treaties with Britain had their origin in agreements for the compensation to the British Crown for its help in the Portuguese

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[553] Goldsmith, J.L. and Posner, E.A. (2005). The limits of international law. Oxford; New York: Oxford University Press, p.136.

[554] Goldsmith, J.L. and Posner, E.A. (2005). The limits of international law. Oxford; New York: Oxford University Press, p.136.

[555] Maia, C.C. (2019). A ária inconclusa: a aproximação China-Mercosul pela perspectiva do direito internacional. In: *Direito do Mercosul*. Brasília, Distrito Federal, Brasil: Instituto Ceub de Pesquisa e Desenvolvimento (ICPD). UniCeub Educação Superior, p.458.

court's escape to Brazil after Napoleon's army invaded the country. Later, in the 1820s, such agreements were agreed to in return for recognition of Brazil as an independent country. The political-legal equality and the reciprocity of rights on which the agreements were based were nominal. With very different economies and political projections, the treaties imposed draconian burdens on Brazil and were the subject of fierce political debate in the 1830s by the Brazilian parliament, which demonstrated extremely precocious political maturity. *There are mediocrities in the Assembly, but the intelligence, haughtiness and courage of the first legislature were classified as incomparable*[556]. In effect, that legislature included some of the highest intellectual figures in Brazil who, even today, are considered references in the country's political culture.

As the treaties reached their expiration in the middle of the century the young nation in its fifth and sixth parliamentary legislatures began to revise the constitutional parameters for harmonizing international treaties with its legal order and affirmed the Parliament's role as a source of political pressure in diplomatic matters. The iniquitous treaties played a part in reinforcing liberal ideals in Brazil but, in that peripheral country of the 19th century, contradictions were rife. While Brazilian intellectuals opposed Britain's intentions in the country, particularly the British-led campaign to abolish the slave trade, British incursions in the River Plate against the dictatorial and caudilhist regimes existing in Argentina and Uruguay were seen in a favorable light[557]. The large spectrum of 19th-century liberal thought and positions, both in political and commercial matters related to International Law will be the subject of much criticism.

At first, the spread of liberal approaches to international trade resulted from the change in the power dynamics of Britain, which was not yet the greatest world power, but was the ascending power of the time. The rise of the manufacturers' internal lobby in Britain contributed to the country's decision to reduce import duties unilaterally for the sake of cheaper raw materials to fuel the Industrial Revolution. Later, the liberal trade framework was oriented to encourage the production of commodities in poorer countries, thereby hobbling the technological progress of the

[556] Cervo, A.L. (1981). O Parlamento brasileiro e as relações exteriores (1826-1889). Brasília, Distrito Federal, Brasil: Editora Universidade de Brasília, p.31. Coleção Temas.
[557] Cervo, A.L. (1981). O Parlamento brasileiro e as relações exteriores (1826-1889). Brasília, Distrito Federal, Brasil: Editora Universidade de Brasília, p.49,58. Coleção Temas.

industrial revolution elsewhere and anchoring Britain's competitive advantage. The liberal economic ideology, which Adam Smith had already introduced to the world, was thus instrumentalized to serve the national interest[558].

In the second half of the 19th century, the practice of siging bilateral tariff reduction treaties became prevalent in Europe, especially among countries with complementary economies and different comparative advantages. Although treaties were often denounced and renegotiated, they remained fundamental instruments for the expansion of international trade. All had the foresight of including the most favored nation clause to avoid the nullification of negotiated advantages which, at first, resulted in the exponential multiplication of tariff reductions. Internation trade, regulated through bilateral treaties and driven by the technological revolution and industrialization that began to spread across Europe and the search for international markets grew notably in the 19th century[559].

This framework greatly influenced the 20th-century multilateral trade regime primarily focused on market access. The rapid expansion of international trade in the second half of the 19th century was not directly caused by the legalization of international relations, although the ubiquity of the most favored nation clause (hereinafter MFN) in international treaties definitely facilitated liberalism. Treaties were sealed and routinely denounced. They were understood as instruments for communicating expectations, not legal sources with the attributes of legality and juridicity that we assign to them today[560].

Neither the European nor the American versions of internationalism, nor even legal international trade practice developed to a sufficient level of maturity during the 19th century where they offered a comprehensive understanding or consensus with regards the concept of sources of law or resolved the internal contradictions and tensions of the practice. Friedrich von Savigny is considered to have coined the term "sources of law". Savigny's theory of legislation recognized three sources of law: popular law[561], a somewhat mystical concept that involves the spirit of the people, is

[558] Goldsmith, J.L. and Posner, E.A. (2005). *The limits of international law*. Oxford; New York: Oxford University Press, pp. 135-140.
[559] Goldsmith, J.L. and Posner, E.A. (2005). *The limits of international law*. Oxford; New York: Oxford University Press, pp. 142-143.
[560] *Idem*, p. 142.
[561] von Savigny, F.K. (1867). *System of the Modern Roman Law*. Madras: J. Higginbotham. Kindle Location 2626. Kindle Edition.

manifested in customary law and practice and for which jurisprudence as a kind of organ at its service; scientific law[562] was considered to be the contribution of the legal professionals to the legislation; and statute[563] considered to be the posited law. Later contributions regarding sources of law frequently confused them with fundamentals of law, such as historical facts, "materials", or what the Savigny himself would call juridical facts.

While treaties and customs were usual in the relations among the States and almost uncontroversial sources of international law, the general principles were mentioned in doctrine and in some treaties and applied in a non-uniform manner without an exact understanding of their role and the scope of their legal content. As Milos Vec highlights, they were formulated and postulated by international lawyers in abundance as a means of offsetting the many legislative gaps in international relations, of imbuing their respective views on the nature of international relations with a legal language and, finally, of orienting them according to their respective world views. Not that the general principles were conceptualized as mere enunciators of political decisions. The principles, even for jurists of the 19th century, would serve to justify the grounds of relevant obligations. However, as we shall see, it took time for the doctrine itself to draw the appropriate distinction between the basis of the obligation and the obligation itself[564].

19th century international lawyers and jurists identified themselves as positivists in the sense that they promoted treaties, codification and legal institutions. However, unlike *strictu sensu* positivists, they never fully omitted natural law, legal philosophy, reason, Roman law or the parlance of morality from International Law[565]. In matters of international trade, the legal parameters were instructed by pragmatical thinking.

Marija Đorđeska reminds that

> The pre-1920 scholarship that refers to the sources of International Law usually cited treaties and customary international law. D'Aspremont confirms that "general principles of law did not generally appear as a source of International Law in classical

[562] *Idem*, Kindle Location 901.
[563] Ibidem, Kindle Location 583.
[564] Vec, M. (2017). Sources of International Law in the Nineteenth-Century European Tradition. The Mith of Positivism. In: *The Oxford Handbook on The Sources of International La*w. Oxford University Press, pp.140-141.
[565] *Ibid*, p. 145.

> treatises of the late nineteenth century and beginning of the twentieth century". De Vattel in his 1758 treatise The Law of Nations, without referring to a third source of international law, explains that when a treaty did not apply customary International Law filled that gap.
>
> (…)
>
> The 'principles' referred to in the pre-1920 scholarship may be characterized as political or moral (i.e., non-legal) notions. Contemporary scholars note that pre-1920 International Law was comprised of treaties, customs, political maxims, and "precepts and doctrines of natural law".[566].

Even after the 1920s, several compendia of International Law carry the principles of International Law in their titles, by which they refer, however, to all sources of International Law and to all international regimes, perpetuating a tradition of typological confusion.

As for the seminal notions of the modern concept of general principles of international law, meaning the formal sources or intellectual elaborations of validity for the legal norms, the work of Koskenniemi suggests that they were, in part, vulgarized for indiscriminate ideological purposes by 19th century intellectuals without any sociological or even philosophical basis. The natural law paradigm was deeply entrenched in the discourse surrounding the principles. Milos Vec even goes as far as calling the 19th century "the century of principles". The lack of clear parameters for the scope of the "general principle of law" stoked the fear of the progenitors of the ICJ Statute that the space for judges' normative discretion would be both excessive and undemocratic:

> In fact, what sometimes happens in practice is that an international judge or arbitrator makes use of principles drawn from the legal system in his own country, without examining whether they are also accepted by other countries. The practice is obviously undesirable, but it is too common to be regarded as illegal. In the election of the judges of the International Court of Justice, the elector are required to bear in mind that "in the body as a whole the representation of the main forms of civilization an of the principal legal systems of the world should be assured[567].

3.2.1 The General Principles of Law

[566] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p. 27.
[567] Akehurst, M. (1992). *A Posner, M.H. and Whittome, C. (1994).* . London: Routledge, p.49.

In a recent contribution to an accomplished selection of texts over the sources of international law, Joost Pauwelyn[568] parses emerging source-related debates that challenge the dual Treaty-based/Member-driven[569] axiom of the WTO[570], *in verbis*: (i) who has the authority to make law; (ii) where law must be made; (iii) what the formal requirements for a source of law are. Those controversies do not seem to throw into serious question the self-contained, self-generating and self-reproducing notion of the multilateral trade regime under the WTO umbrella. Rather, they indicate, first, a tender though promising outgrowth of internal and external sources of influence of law establishment; in the first case, far from a development or even an essay of the application of implied powers doctrine. Second, it highlights the current expansion of the original strict margins of interactional or cognitive openness of the regime.

The UN and other international organizations developed their own jurisdiction by promoting the kompetenz-kompetenz doctrine, which was recognized by the ICJ in the Case *Reparation for Injuries Suffered in the Service of the United Nations*[571], which was influenced by the American constitutional doctrine and the famous *McCulloch v. Maryland* (1819) precedent[572]. On that opportunity, the Court understood that:

> Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication. as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B., No. 13, p. 18), and must be applied to the United Nations[573].

[568] Pauwelyn, J. (2017). Sources of International Trade Law. Mantras and Controversies at the World Trade Organization. In: S. Besson and J. d'Aspremont, eds., *The Oxford Handbook on The Sources of International Law*. Oxford: Oxford University Press, pp.1027–1046.
[569] See Art. XII.1 of the Marrakesh Agreement Establishing the WTO (Marrakesh Agreement) (Marrakesh, 15 April 1994, UNTS 154).
[570] Pauwelyn, J. (2017). Sources of International Trade Law. Mantras and Controversies at the World Trade Organization. In: S. Besson and J. d'Aspremont, eds., *The Oxford Handbook on The Sources of International Law*. Oxford: Oxford University Press, p.1031.
[571] International Court of Justice. *Reparation for injuries suffered in the service of the United Nations*. Advisory Opinion of April 11th, 1949. Reports of judgments, advisory opinions and orders. https://www.icj-cij.org/files/case-related/4/004-19490411-ADV-01-00-EN.pdf
[572] Trindade, A.A.C. (2003). *Direito das Organizações Internacionais*. 3a ed. Belo Horizonte: Del Rey.
[573] International Court of Justice. *Reparation for injuries suffered in the service of the United Nations*. Advisory Opinion of April 11th, 1949. Reports of judgments, advisory opinions and orders. https://www.icj-cij.org/files/case-related/4/004-19490411-ADV-01-00-EN.pdf, pp.12-13.

The path taken by the UN is not politically viable for the WTO, which is dealing with the current paralysis in the Round of Negotiations and of the DSB. Any bolder action on the part of the Secretariat to expand its own functions would risk causing a definitive rupture in the system.

Nevertheless, to borrow the title and the implicit idea of the famous work of Martii Koskenniemi[574], the praxis has proven to be a gentle and necessary moderator of the Nation's legislative monopoly. This addresses the first source-related debate. According to Pauwelyn, the strict State legislative control is tempered by the growing importance of the AB in law-making and of the WTO Secretariat and committees in the drafting of WTO rulings and other norms which, although non-binding, have soft-law power. Moreover, the influence of experts, whether individuals or entities, and of other IOs regularly consulted by WTO panels enlarges the scope of influence of other rationales.

The most obvious facet of the aforementioned phenomena is the AB *de facto* rule. Despite the fact that Article 3.2 of the Dispute Settlement Understanding (herein DSU) was crafted in language that might be seen as an impediment to judicial activism or to the consecration of *stare decisis* or a precedent-inspired system, by emphasizing that *[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements*, the AB tore a hole in this straitjacket. By means of its explicit statement, the AB manifested that *the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system and that absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case*[575]. WTO judicial reasoning has thus internalized the language of precedents. The Parties in the disputes usually refer to past cases, Panel findings, recommendations and rulings, demonstrating the recognition of the patterns that were carved out from precedents as conducive to legal security and predictability.

When it comes to the flourishing and indirect influence of committees, this development should not come as any surprise either. Whereas some committees

[574] Koskenniemi, M. (2001). The gentle civilizer of nations: the rise and fall of International Law 1870-1960. Cambridge: Cambridge University Press.
[575] WTO, US-Stainless Steel (Mexico), Appellate Body Report (30 April 2008) WT/DS344/Ab/R, para.160.

remain traditionally passive, others are more proactive. The former includes thematic committees that play more of a supervisory role over the agreements to which they are related where they intermediate Members' communications concerning national measures pertinent to the matters of the treaty, promoting adhesion and coherence to the multilateral norm by transparency and peer review. The latter include committees that have, although not a quasi-legislative capacity, a soft-law capacity, which with the requisite technical credibility and cooperation with the State's appointed experts to ensure the national perspective is considered, often results in a position that takes on the contours of consensus and becomes highly persuasive.

In the first category should be listed the Agricultural Committee[576]; the Committee on Technical Barriers to Trade[577]; the Committee on Trade-Related Investment Measures[578]; the Committee on Anti-Dumping Practices[579]; the Independent Review Procedures and the duty of notification to the Secretariat in case of norm change imposed by the Agreement on Preshipment Inspection[580] which lacks a proper committee; the Committee on Import Licensing[581]; and the Committee on Safeguards[582]. In the second, the most prominent example is the Committee on Sanitary and Phytosanitary Measures[583], charged with developing a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations, developing guidelines to further the practical implementation of the Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection with cooperation of the Members. The Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention are specifically mentioned as OIs with which the Committee should maintain close dialogue.

[576] World Trade Organization(1999). *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press, pp.33-58.
[577] *Idem*, pp. 121-142.
[578] World Trade Organization (1999). *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press, pp.143-146.
[579] Idem, pp. 147-171.
[580] Ibidem, pp. 201-210.
[581] Ibidem, pp. 223-230.
[582] Ibidem, 275-283.
[583] Ibidem, pp. 59-72.

Other instances might be mentioned, like the Technical Committee on Customs Valuation[584] whose duty is furnishing information and advice on any matters concerning the valuation of imported goods for customs purposes as may be requested by any Member or the Committee, in the form of advisory opinions, commentaries or explanatory notes might create patters to which further jurisprudence may refer to in the endeavor to assert a violation to the treaty. The Technical Committee on Rules of Origin[585] are responsible for examining specific technical problems arising in the day-to-day administration of the rules of origin of Members and to give advisory opinions on appropriate solutions based upon the facts presented; furnishing information and advice on any matters concerning the origin determination of goods as may be requested by any Member or the Committee; preparing and circulating periodic reports on the technical aspects of the operation and status of this Agreement; and annually reviewing the technical aspects of the implementation and operation. In so doing, the Committee also might offer the DSB technical parameters for a decision over breach of law.

The Committee on Subsidies and Countervailing Measures and Subsidiary Bodies[586] has a mechanism called the Permanent Group of Experts composed of five independent individuals who are highly qualified in the fields of subsidies and trade relations and may be requested to attend a panel or provide the Committee with advisory opinions on the existence and nature of any subsidy. The express duties of the Committee on Trade Facilitation[587] are developing procedures for the sharing relevant information among Members, including best practices and information on the implementation of international standards. When appropriate, the committee is also in charge of inviting relevant international organizations to discuss their work on international standards and identifying specific standards that are of particular value to Members.

Finally, according to Pauwelyn, judicial cross-fertilization is occurring with greater frequency in the WTO jurisprudence and doctrine, the second subsidiary

[584] Ibidem, pp. 172-200.
[585] Ibidem, pp. 211-222.
[586] World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press, pp.231-274.
[587] World Trade Organization (2014). WT/L/940. Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization. Agreement on Trade Facilitation. [online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/940.pdf&Open=True.

means of determination of rules, according to Article 38 of the Statute of the International Court of Justice (ICJ). As for the second source-related debate, although the DSB only has jurisdiction over claims of violations of WTO agreements, DSB reports have referred to agreements created by other international regimes, rules of international general law and decisions of other international courts, reflecting an effort to interpret treaties without overruling the WTO norms or presuming the rules are self-standing[588].

The author gathers information constructing a panorama that is quite removed from the one envisaged by Article 7(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), according to which only treaty-based complaints can be subject to consideration before the Dispute Settlement Body (DSB). That path would put the WTO system noticeably under the umbrella of a very restrictive legal positivist account, one extraneous to the current state of legal debates, namely the contribution of Neo-Constitutionalism to the theory of law and the assimilation of legal positivism itself by 19th-century elaborations of International Law. In the opposite direction:

> (…) WTO rulings have extensively applied or referred to general International Law (on e.g., treaty interpretation, burden of proof, evidence, due process, attribution, estoppel, waiver, countermeasures, and good faith) as well as non-WTO treaties (on e.g., customs, environmental, health, indigenous peoples, intellectual property, or monetary issues) and trade-related agreements made between all or a sub-set of WTO members outside WTO covered agreements (such as WTO declarations or waivers, free trade agreements, an EU-US bilateral agreement on aircraft subsidies, bilateral settlement agreements, or party agreements to hold open hearings despite explicit WTO provisions mandating that Appellate Body proceedings be confidential). Also, decisions, by other international tribunals have been referred to (especially the Permanent Court of International Justice and the ICJ, but also investor-State tribunals).
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> (…) it remains controversial whether rules outside WTO covered agreements can only be referred to in the process of treaty interpretation (with the likely result that such non-WTO rules cannot easily overrule a WTO norm) or also as part of the applicable law to decide on a claim of WTO violation (where non-WTO norm could then possibly operate as a self-standing defence to justify WTO

[588] Pauwelyn, J. (2017). Sources of International Trade Law. Mantras and Controversies at the World Trade Organization. In: S. Besson and J. d'Aspremont, eds., *The Oxford Handbook on The Sources of International Law*. Oxford: Oxford University Press, p.1034.

breach)[589].

References to general principles of law in WTO jurisprudence are clearly recurrent. But, as seen, this third formal source of international law, according to the ICJ Statute, has disputable contours.

The references to general principles of law are also longstanding in the doctrine of International Law and are common in many international regimes:

> Although general principles of law have long been the subject of theoretical debate, the varied fora and circumstances where these principles and processes have been and continue to be applied cannot be denied. As a recognized source of "international law," general principles have been invoked pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which calls for "any relevant rules of International Law applicable in relations between the parties" to be taken into account in treaty interpretation. They have also been applied under Article 42 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which provides for ICSID tribunals, in the absence of a choice-of-law provision, to apply domestic law and "such rules of International Law as may be applicable." The International Law Commission has recognized in its Model Rules on Arbitral Procedure general principles as a source of law applicable[590]

For Kotuby and Sobota[591], the *contemporary prominence of general principles of law in International Law is the product of a shift over a century ago from equity to concrete norms. Notions of equity played an important part in the early development of international law. They proved "helpful, some three centuries ago*, *in the eighteenth and nineteenth centuries.* Equity, as described by the authors, was an ordinary element in the International Law parlance of those centuries. The unprecedented carnage caused by the First World War raised the need for precise and explicit sources of International Law to settle wide-ranging disputes, since the treaties ending the War carried provisions about disputes involving private parties.

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[589] Pauwelyn, J. (2017). Sources of International Trade Law. Mantras and Controversies at the World Trade Organization. In: S. Besson and J. d'Aspremont, eds., *The Oxford Handbook on The Sources of International Law*. Oxford: Oxford University Press, p. 1034.
[590] Kotuby Jr., C.T. and Sobota, L.A. (2017). *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes. Center for International Legal Education*. University of Pittsburgh School of Law. CILE Studies ed. Oxford United Kingdom: Oxford University Press, p. 3.
[591] *Ibid*, p. 4.

Even under the PCIJ, equitable principles as such – considered to be general principles of justice and not mentioned as part of the general principles of international law, at least other than implicitly – were at the core of some decisions of the PCIJ, whose jurisprudence has matured to the point of considering them to be part of international law[592]. Equitable principles were considered independent sources of international law[593]. In American jurisprudence, equitable principles and principles of International Law were used in a certain form of identity relationship[594]. Celso D. Albuquerque Mello reminds us that:

> Alfred Verdross points out that the Committee of Jurists, in 1920, did nothing more than codify a source that was already enshrined in international jurisprudence. The inclusion of the general principles of law as a source in the PCIJ Statute is mainly due to Barao Descamps. It is true that in 1907 (Conference of The Hague) the German Christian Meurer already maintained that the arbitration jurisprudence was not merely positivist, that is, recognizing only treatise and custom (Verdross)[595].

Indeed, as reported by Ian Brownlie, the concept appeared in the 19th-century *compromis d'arbitrages*[596]. The principles continued to be mentioned in important international arbitrations during the 20th century up to this day.

International literature marks the year of 1920 as a watershed in relation to the status of general principles as a legal source. The Covenant of the League of Nations envisaged the creation of a new court in its Article 14. The Council of the League of Nations appointed an advisory committee composed of ten independent jurists with the task of drafting a statute for the future court[597]. The members of the ACJ were jurists of the nations that were already signatories or in the process of adhering to the Covenant of the League. An exception was granted to the United States, which representative and Nobel Peace Prize laureate Elihu Root played a prominent role in determining several aspects of the PCIJ.

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[592] *The Meuse Case* (Neth. v. Belg.) [1937] 70 (Permanent Court of International Justice P.C.I.J (ser. A/B)).
[593] *The Cayuga Indians Case* [1926] (American and British Arbitration). Nielsen Reports 203, 207.
[594] *Salimoff & Co. v. Standard Oi*l [1933] 186 N.E. 679 (Court of Appeals of New York).
[595] Mello, C.D. de A. (n.d.). *Curso de Direito Internacional Público*. 13a ed. Renovar, p. 304.
[596] Brownlie, I. (1998). *Principles of Public International Law*. 5a ed. Oxford: Clarendon Press, p. 15.
[597] Baldwin, S.E. (1921). The Evolution of a World Court. B.U.L, [online] 7. Available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5320&context=fss_papers.

The PCIJ was not the first international court of a permanent nature. The pioneer was the *Corte de Justícia Centroamericana* created by the General Treaty of Peace and Friendship, which was celebrated in Washington on the 20th of December 1907 by the respective plenipotentiaries of the governments of Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador. The Convention that created the Court granted it the power to establish its jurisdiction in each specific case, interpreting the Treaties and Conventions pertinent to the matter under dispute and applying the principles of International Law. Moreover:

> (…) Article XXII of the Convention for the Establishment of a Central American Court of Justice referred to 'principles of international law' to denote International Law that had not yet been codified[598].

However, the documented literature offers no clues as to how mature or evolved the reflection on the general principles of International Law was in the preparatory work for the Convention or in its jurisprudence[599]. Its successor, also named the *Corte Centroamericana de Justícia*, was founded on October 12, 1994. Its jurisprudence is broad, frequently mentioning the general principles of due process, prohibition of abuse of authority, good faith and, in a few cases, the principle of publicity and transparency[600]. The CCJ Documentation and Information Center does not provide

[598] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p. 29.
[599] Gutiérrez, C.J. (1978). *La corte de justicia centroamericana*. San José, Costa Rica: Juricentro, Cop, p.45.
[600] **Due process**: Expediente 27-07-03-03-2000; Expediente 30-10-18-07-2000; Expediente 23-03-26-10-1999; Expediente 41-07-19-06-2001; Expediente 43-09-19-06-2001; Expediente 45-11-21-09-2001; Expediente 25-05-29-11-1999; Expediente 46-12-08-10-2001; Expediente 61-03-18-02-2003; Expediente 66-01-30-04-2004; Expediente 68-03-04-08-2004; Expediente 69-01-03-01-2005; Expediente 61-03-18-02-2003; Expediente 66-01-30-04-2004; ; Expediente 68-03-04-08-2004; Expediente 69-01-03-01-2005; Expediente 61-03-18-02-2003; Expediente 66-01-30-04-2004; Expediente 68-03-04-08-2004; Expediente 69-01-03-01-2005; Expediente 75-0211-08-2006; Expediente 59-01-08-01-2003; Expediente 88-07-07-10-2008; Expediente 87-06-08-09-2008; Expediente 90-09-12-11-2008; Expediente 92-11-21-11-2008; Expediente 93-01-07-01-2009; Expediente 113-02-28-06-2011; Expediente 117-06-24-08-2011; Expediente 154-02-24-01-2014; Expediente 167-04-10-06-2015; Expediente 168-05-13-07-2015; Expediente 194-05-06-06-2019. **Abuse of power**: Expediente 33-13-31-10-2000; Expediente 34-14-01-11-2000; Expediente 37-03-03-04-2001; Expediente 38-04-04-04-2001; Expediente 69-01-03-01-2005; Expediente 69-01-03-01-2005; Expediente 69-01-03-01-2005; Expediente 167-04-10-06-2015. **Good faith**: Expediente 9-04-08-1996; Expediente 3-03-04-1995; Expediente 10-05-11-1995; Expediente 4-04-05-1995; Expediente 23-03-26-10-1999; Expediente 25-05-29-11-1999; Expediente 61-03-18-02-2003; Expediente 6204-20-06-2003; Expediente 66-01-30-04-2004; Expediente 69-01-03-01-2005; Expediente 62-04-20-06-2003; Expediente 66-01-30-04-2004; Expediente 69-01-03-01-2005; Expediente 61-03-18-02-2003; Expediente 62-0420-06-2003; Expediente 66-01-30-04-2004; Expediente 69-01-03-01-2005; Expediente 78-05-20-12-2006; Expediente 75-0211-08-2006; Expediente 59-01-08-01-2003; Expediente 8103005-12-2007; Expediente 87-06-08-09-2008;

full access for external consultation to its judgments and opinions, making exploratory research difficult. In light of the thesis advanced by Celso D. de Albuquerque Mello on the existence of an American International Law (more precisely, Latin American International Law) that was originally defended by the Chilean Alexandre Alvarez at the Third Latin American Scientific Congress held in Rio de Janeiro in 1905[601], perhaps the research meant to determine whether, as in the past, the regional International Law took center stage in the advancement of institutes and general principles that later became, or has the potential to become, established in general law. The intermittent character of the Court's research page, however, makes this comparative approach difficult.

Returning to the work of the ACJ by its ten independent jurists, one was from Brazil, Clovis Belivaqua, who was replaced by Raul Fernandes. Unfortunately, nothing can be adduced from the Brazilian jurists' works regarding the reflections that took place within the scope of the ACJ on the codification of sources of International Law and, thus, on the general principles of international law. Bevilaqua, in particular, devoted himself solely to analyzing treaties as sources of international law[602]. Fernandes did not produce any general and academic evaluation of international law, even less about its sources. The legal analyses of Fernandes that reached this author always focused on a factual legal problem and never took up debate over sources[603].

Expediente 83-02-18-01-2008; Expediente 82-01-16-01-2008; Expediente 90-09-12-11-2008; Expediente 94-02-01-04-2009; Expediente 97-05-19-06-2009; Expediente 98-06-14-08-2009; Expediente 104-01-18-02-2010; Expediente 105-02-26-03-2010; Expediente 115-04-04-08-2011; Expediente 119-09-23-09-2011; Expediente 123-12-06-12-2011; Expediente 128-05-27-01-2012; Expediente 132-09-20-06-2012; Expediente 150-07-23-10-2013; Expediente 158-06-30-05-2014; Expediente 159-07-02-06-2014; Expediente 171-08-25-11-2015; Expediente 179-02-24-03-2017; Expediente 189-03-20-07-2018; Expediente 195-06-13-06-2019. **Publicity**: Expediente 5-05-01-08-1995; Expediente 25-05-29-11-1999; Expediente 61-03-18-02-2003; Expediente 86-05-28-08-2008; Expediente 139-16-05-12-2012; Expediente 140-17-05-12-2012; Expediente 141-18-05-12-2012; Expediente 142-19-05-12-2012. **Transparency:** Expediente 68-03-04-08-2004; Expediente 68-03-04-08-2004; Expediente 68-03-04-08-2004; Expediente 197-08-16-08-2019. In: Centro de Documentación. Corte Centroamericana de Justicia. Sistema de Integración Centroamericana. cendoc.ccj.org.ni

[601] Mello, C.D. de A. (n.d.). *Curso de Direito Internacional Público*. 13a ed. Renovar, p. 178.

[602] Mello, C.D. de A. (n.d.). *Curso de Direito Internacional Público*. 13a ed. Renovar, p.9.

Bevilaqua, C. (1911). Direito Público Internacional: A synthese dos princípios e a contribuição do Brasil. Rio De Janeiro: Livraria Francisco Alves.

[603] Fernandes, R. (1947). A Posição do Brasil na discussão de Trieste. *Boletim da Sociedade Brasileira de Direito Internacional*, 3(5), pp.40–43

Fernandes, R. (1953). A Responsabilidade dos estados em direito internacional. *Revista forense*, 50(150), pp.9–21.

Fernandes, R. (1925). A Sociedade das Nações: sua gênese, seus fins, sua estructura, seus meios de acção e seus resultados. *Revista forense*, (45), pp. 245-264.

This apparent disdain for or disparagement of the sources of International Law on the part of the Brazilian jurists is perhaps explained by the ACJ's own dynamics. Marija Đorđeska acknowledges that

> In fact, the Committee drafted Article 35 (later Article 38) over the course of three brief meetings between 1 and 3 July, without discussing all the questions that had been raised. However, it is precisely its work on this Article – and on the general principles in particular – that makes Article 38 by far the most controversial of the Statute's provisions to date[604].

Đorđeska denounces the striking lack of clarity among the members of the ACJ concerning the general principles of law by the sequence of drafts that demonstrate waxing and waning of consensus and mixed the general principles with teachings of the most highly reputed jurists of each country, which became to form part of the fourth source of International Law[605]. The matter was submitted for consideration by a specific committee of the First Assembly of the League of Nations, which decided not to change the structure determined by the ACJ. Afterwards, the League decided to add mention of the Court's option to resolve litigation "ex acquo et bono" to paragraph 4 and, at other moment, subtracted the term "rules" from the heading and the original notion of hierarchy among sources that the ACJ wanted to impose[606]. Finally, during the San Francisco Conference in 1945, Article 38 of the future Statute of the ICJ, transplanted from the Statute of the PCIJ, was briefly discussed and, although its formulation was criticized, the decision was made not to change it[607]. However brief the consideration of the general principles of law might appear, it was extensive in relation to the discussion of other sources of international law[608].

Fernandes, Raul (1949). As modificações do conceito de soberania. *Revista forense*, 46(126), pp. 5-11.
Fernandes, R. (1947). Discursos em Montevidéu. *Jornal do Commercio*. Rio de Janeiro.
Fernandes, Raul (1947). Evolução necessária à ONU no sentido da aplicação da lei. Boletim da *Sociedade Brasileira de Direito Internacional*, 3 (6), pp. 5-10.
Fernandes, Raul (1953). 1877-. Pareceres do Consultor Geral da República. *A. Coelho Branco*.
Fernandes, Raul (1929). Relatório apresentado ao Ministro de Estado das Relações Exteriores pelo Presidente da delegação do Brasil na Conferência Internacional Americana. *Imprensa Nacional*.
Fernandes, Raul (1930). Responsabilidade do estado por dano irrogado aos estrangeiros. *Revista dos Tribunais*, São Paulo, 19(73), pp. 243-251.

[604] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p.10.
[605] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p.14.
[606] *Idem*, p. 15.
[607] Ibidem, p. 16.
[608] Ibidem, p. 18.

The literature, however, does convey some of the ideas behind the ACJ's work that were not uniformly accepted: 1. at the beginning, it did not intend to include general principles as sources of international law; 2. they were included to avoid *non liquet*; 3. there was, however, a fear that the general principles of law would increase opportunity for judicial activism[609]; 4. several different wordings were entertained during the *travaux preparatoires* concerning the general principles; 5. the victorious wording, which had already been suggested and discarded, mirrored to a certain extent the jurisprudence of the US Supreme Court at that time; 6. Despite the wording's allusion to cultural and social discrimination, the passage referring to "civilized nations" was allegedly meant to restricting the general principles to those already considered by the international bench representing the main world powers; 7. principles identified *in foro domestico* and transposable to the international order were not found sufficient for regulating inter-State relations[610] as the processes of elevation, transplantation and judicial creation were ways of authoritatively ascertaining International Law in general, and general principles of law in specific cases[611]; 8. the third source of International Law would be independent from treaties and custom; 9. General principles would apply to the international community as a whole, not only the Parties in dispute[612]; 10. they should be recurring[613]; and 11. They would not be subject to change by a State or group of States, though States are recognized as the main international law-makers[614].

Ole Spiermann summed up the dynamics that permeated all this work well. These dynamics notably involved the collision of the frames of reference of the chairman Baron Descamps (Belgium) and Albert De Geouffre De La Pradelle (France), on one hand, and Lord Justice Phillimore (England) and Mr. Root (United States) on the other. The pairs represented, respectively, civil law and common law systems[615]. Specifically with respect to the final wording on general principles of law,

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609 Scott, J.B. (2015). *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists*. Report and Commentary. Endowment Washington, p.107.
610 Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff. p.21.
611 *Idem*, pp. 40-43.
612 Ibidem, 43.
613 Ibidem, p. 52.
614 Ibidem, p. 47.
615 Spiermann, O. (2017). The History of Article 38 of the Statute of the International Court of Justice. "A Purely Platonic Discussion"?. In: *The Oxford Handbook on The Sources of International Law*. Oxford University Press, pp.170-173.

the compromise could only be reached after the wording proposed in Chairman Deschamps' draft was strongly rejected because of its explicit reference to the legislative powers conceded to the judges: "the rules of International Law as recognized by the legal conscience of civilized nations"[616]. According to Đorđeska and Spiermann, the final wording of Article 38 (I) (3) of the PCIJ represents a compromise reached between the Chairman and the common law jurists, Mr. Root and Lord Justice Phillimore, one which echoed American and British jurisprudence. In particular, American jurisprudence is considered to lie at the core of the wording "general principles of law as recognized by the civilized nations", having come up in the judgments *Thirty Hogsheads of Sugar v. Boyle*[617], *The Paquete Habana*[618] and *Hilton v. Guyot*[619]. James Brown Scott, however, offers a somewhat different picture.

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[616] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff. p.11.

[617] In 1815, Mr. Chief Justice Marshall, speaking for the court in *Thirty Hogsheads of Sugar v. Boyle* said:

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decision of the Courts of every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

In 1900, Mr. Justice Gray said on behalf of the court in *The Paquete Habana*:

International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. In: Scott, J.B. (2015). *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists*. Report and Commentary. Endowment Washington, p.110.

[618] *Two fishing boats, each owned by Spanish citizens, regularly fished off the coast of Havana, Cuba. One boat was named "The Paquete Habana". Spain maintained control of Cuba until this control was challenged by the United States in the Spanish-American War of 1898. During the war, the United States created a blockade around Cuba. The owners of the fishing boats, however, had no knowledge of the war or the blockade. When they attempted to access the usual fishing port in Havana, the two ships were captured as prizes of war by the United States. Their cargo contained no arms or ammunition, but merely fresh fish. The ship owners brought suit against the United States in federal district court. The district court held the two fishing ships and their cargoes to be prizes of war*. Quimbee. https://www.quimbee.com/cases/the-paquete-habana. The ship owners appealed to Scouts. The right of innocent fishing was recognized as a general principal of international law. *The Paquete Habana*. United States Supreme Court. 175 U.S. 677 (1900).

[619] It is believed that this is an erroneous reference on the part of Spiermann, when quoting James Brown Scott, who invokes the case Ware v. Hylton is not the case with Hilton v. Guyot. In: Scott, J.B.

In highlighting the case law he considered as backing the final wording, Brown Scott only presents fragments in which the importance of the Law of the Nations is demonstrated. There is no mention in the excerpts offered of general principles of law recognized by the "civilized nations", with one exception. Instead, terms such "law of nations" and "practice of different Nations" are usual. Lord Chief Justice Alverstone, in *West Rand Central Gold Mining Company v. The King*, 1905, allegedly speaking on behalf of a unanimous court, declared:

> The second proposition urged by Lord Robert Cecil, that International Law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called International Law (…)[620].

With one exception, "general principles" are mentioned in all the jurisprudence presented[621]. This exception is the decision in *Ware v. Hylton*, 1796, brought to the Supreme Court of the United States (hereinafter SCOTUS), opportunity in which Mr. Justice Chase stated:

> The law of nations may be considered of three kinds, to wit, general, conventional, or customary. The first is universal or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on TACIT consent; and is only obligatory on those nations, who have adopted it[622].

However, as discussed earlier, the paradigm of European and American's belief in their moral and legal superiority over other nations in the world was well documented in their 19th-century internationalist movements. That prejudice throws doubt over the argument that the formulation "general principles of law accepted by civilized nations" was innocently mean as a way of containing any and all judicial activism[623].

(2015). *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists*. Report and Commentary. Endowment Washington, p.109.

[620] Scott, J.B. (2015). *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists*. Report and Commentary. Endowment Washington, p. 108.

[621] *Idem*, pp. 106-111.

[622] Ibidem, p. 109.

[623] Koskenniemi, M. (2002). *The gentle civilizer of nations: the rise and fall of International Law 1870-1960*. Cambridge: Cambridge University Press, p. 12.

Preston, A. (2012). *Sword of the spirit, shield of faith: religion in American war and diplomacy*. New York, United States: Alfred A.Knopf, p.176.

The PCIJ has considered general principles of law in important cases, examples being the Lotus case (France v. Turkey) before Permanent Court of International Justice. P.C.I.J. (ser. A) No. 10 (1927) [624] and the Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question by The International Committee of Jurists of the Council of the League of Nations[625]. During the lifetime of the PCIJ, international arbitration has continued to refer to general principles of International Law in many circumstances [626] and important SCOTUS jurisprudence has reinforced the status of such sources in International Law[627].

The Sixth Committee of the General Assembly of the United Nations, charged with drafting resolutions to the General Assembly with the aim of advancing the International Law, included in its Programme of Work a topic *on the third of the three principal sources of international law, which is contained in Article 38(1)(c) of the Statute of the International Court of Justice, under the title "General Principles of Law"*[628]. A long discussion took place during the *travaux preparatoires* of both the Statute the Permanent Court of International Law and the Statute of the International Court of Justice concerning the inclusion of the general principles of law, for slightly different reasons. As elucidated by Vázquez-Bermúdez,

> 7. (…) Some considered the inclusion of general principles of law as a rejection of the positivistic doctrine, according to which International Law consists solely of rules to which States have given their consent, whereas others reject the reasoning of "objective justice" and insisted that general principles of law could only be recognized in foro domestico and their function is limited to "fill the gaps" left by treaties and customary international law. Some have identified multiple origins from which general principles of law could be derived, which are not limited to those found in domestic laws.

Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, pp. 23-24.

[624] The Case of the S.S. Lotus (France v. Turkey) Permanent Court of International Justice. P.C.I.J. (ser. A) No. 10 (1927). https://www.quimbee.com/cases/the-case-of-the-s-s-lotus-france-v-turkey

[625] League of Nations Oficial Journal, Special Supp. No. 3 (1920)

[626] Trail Smelter Arbitration (United States v. Canada). Special Arbitral Tribunal. 3 U.N. Rep. Int'l Arb. Awards 1905 (1941). Jesse Lewis (The David J. Adams) Claim (United States v. Great Britain) Claims Arbitration under the Special Agreement of August 18, 1919, 1921, Nielsen Rep. 526 6 U.N. Rep. Int'l Arb. Awards 85.

[627] United States v. Flores. United States Supreme Court. 289 U.S. 137 (1933).

[628] Vázquez-Bermúdez, M. (2019). *First report on general principles of law*. A/CN.4/732. [online] United Nations General Assembly. International Law Commission. Available at: https://legal.un.org/docs/?symbol=A/CN.4/732 [Accessed 30 Apr. 2020].

> Controversies surrounding the nature of general principles of law were also reflected in the discussions on general principles of law as a source of jus cogens.
> (…)
>
> 12. Despite doctrinal uncertainties, international courts and tribunals have generally recognized general principles of law as an autonomous source of International Law and have applied it in practice. Although the PCIJ and the ICJ have been cautious to apply this source in an explicit manner, general principles of law have played a greater role in areas of International Law that involve non-State actors, e.g. international criminal law and international investment law.
>
> 13. The PCIJ has referred to general principles, explicitly or implicitly, on *ejus est interpretare legem cujus condere*, *nemo judex in re sua*, *restitution in integrum*, *estoppel* and *competence-competence*. Examples of the reference to general principles of law by the ICJ include *res judicata*, equality of parties, *pacta sunt servanda*. These are examples of general principles of law that commonly exist in almost all existing legal systems[629].

The ambition of such endeavor is to *clarify the nature, scope and method of identification of general principles of law as they have been used by States, by international courts and tribunals, and by international organizations and bodies*, and specifically, analyze

> (i) The nature and scope of general principles of law;
> (a) Scope and terminology with regard to general principles of law, particularly its relationship with concepts such as "general principles of law recognized by civilized nations", "general principles of international law" and "fundamental principles of law";
> (b) The nature and origins of general principles of law;
> (c) General principles of law as an autonomous source independent from treaties and customary international law;
> (d) The functions of general principles of law;
> (ii) The relationship of general principles of law with the other two principal sources of international law: i.e. treaties and customary international law; and
> (iii) Methods of identification of general principles of law;
> (iv) Other issues.

Some academics have hazarded theories about the concept, nature and scope of general principles of law. Particular consideration will be given to the elaborations of Humberto Ávila and Marija Đorđeska for the timeliness of their contributions.

[629] Vázquez-Bermúdez, M. (2019). *First report on general principles of law*. A/CN.4/732. [online] United Nations General Assembly. International Law Commission. Available at: https://legal.un.org/docs/?symbol=A/CN.4/732 [Accessed 30 Apr. 2020].

3.2.1.1 "What is your substance, whereof are you made, That millions of strange shadows on you tend?" The Evolving Sonnet of General Principles of International Law.

In a comparative study that explored the foreign use of general principles of law by the supreme courts of Canada, the United States, the United Kingdom, France and the Netherlands, growing engagement of the judges in comparative law studies was noted, as was the expectation that, with the *increasingly important role of the foreign law in national legal systems*[630] this phenomenon will stagger. The study also disclosed that courts have resorted to International Law both as a means to increase the persuasiveness of their arguments as well as a tool to give their decisions more authority. This usually occurred in cases in which the general principles mentioned shared historical roots with the jurisdiction in question or the specific branch of national law under scrutiny and the particularities of national legal systems and eventual collision of values were considered.

Besides legal structural factors, contextual facts also exercise influence. The comparative endeavor depends on the legal training of the judges, their inherent legal framework (globalism versus localism), the time frame for the votes and decisions versus the cost-benefit of the analysis, the size of their cabinet structures and the accessibility to good foreign databases. Despite all these factors, the researcher concludes that *the use of foreign legal sources by the highest courts in selected common law and civil law systems has become a common practice in the daily business of judging cases*[631], which reveals an interesting potential for cross-fertilization and the expansion of International Law via the general principles of law reinforced, among high courts, as principles of general acceptance. This conclusion is endorsed by Carpanelli, for whom:

> The transnational nature of a growing number of human activities inevitably raises issues that neither conventional nor customary rules are apt to face. Against this vacuum, it is likely that general principles of law and, more specifically, general principles of

[630] Mak, E. (2015). General Principles of Law and Transnational Judicial Communication. In: *General principles of law, the role of the judiciary*. Cham, Switzerland: Springer, p.58.
[631] Mak, E. (2015). General Principles of Law and Transnational Judicial Communication. In: *General principles of law, the role of the judiciary*. Cham, Switzerland: Springer, p. 65.

> International Law may increasingly play a fundamental role in the near future[632].

In parallel, in international adjudication, when a general principle of law is put forward, judges and decision makers often follow a different reasoning, according to Elena Carpanelli:

> As recently noted by Professor Ellis, the positivist approach to Article 38 (1) (c) of the Statute, although generating consensus, has been often disregarded by international adjudicators, who have asserted the existence of general principles of law based more on natural law assumptions than on comparative study of domestic legal systems[633].

This reinforces the assertion that several doubts remain regarding the parameters by which one can legitimately enshrine a general principle of law as such. Leonardo Marchettoni even proposes that:

> the pluralistic structure of global law is better reflected if we think of the process of elaborating new criteria of recognition as an endless endeavor to which each court offers its contribution without any hope of saying the last world. Criteria set by a given court may be discussed by other judges but in this transit from one court to another there is no common language that actors share. On the contrary, the tragedy of global law is that each actor must operate as if it were part of a shole that cannot- and will not ever be able to-materialize[634].

Where do we find the substance of international law? is one of the guiding questions of Rosalyn Higgins in her *Problems & Process: International Law and How we use it*. Higgins prescribes how the ICJ has treated the sources of International Law and advances a very frequent criticism by the literature:

> (…) the Court itself often seems to approach the question of sources with a certain looseness. In many judgements and opinions resolutions are referred to without any clear indication as to what legal purpose their invocation serves: are those resolutions mere historical events, or evidence of practice, or carrying some normative weight?[635]

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[632] Carpanelli, E. (2015). General Principles of International Law: Struggling with a Slippery Concept. In: *General principles of law, the role of the judiciary*. Cham, Switzerland: Springer, p.141.
[633] *Idem*, p. 126.
[634] Marchettoni, L. (2015). Recognition in International Law: From Formal Criteria to Substantive Principles. In: *General principles of law, the role of the judiciary*. Cham, Switzerland: Springer, p.76.
[635] Higgins, R. (1995). *Problems and Process: International Law and how we use it*. Great Britain: Oxford University Press, p.37.

Higgins' analysis, however, was centered on the reasoning of customs and their relationship with international treaties and resolutions of international organizations. Higgins even proposes the existence of high normativity rules that she believes are fundamental for the very existence of the international system. They would be principles of a minimal world order, a sort of *Grundnorm* related to the proscription of aggression, the use of force, protection of prisoners of war, prohibition of genocide and others considered in the literature as norms of *jus cogens*, which could not be limited or derogated and would be binding for the entire international community[636]. At this point of her analysis of the sources, however, she does not offer a review of the jurisprudence of the ICJ. She only offers her theoretical approach to what would be considered principles of international law. The questions she raises, however, about the laxity of the case law apply to all other sources of international law.

Undoubtedly, the proposals for reviewing and analyzing PCIJ and ICJ case law do not yield a coherent and consistent theory on general principles of law. At most, they systematize or propose a method for systematization. This is the case of the most comprehensive analysis on the jurisprudence of the PCIJ and ICJ to which this author had access. Marija Đorđeska pored over French, Hebrew, Polish, Slovenian and international literature on general principles to elaborate and offer her theoretical and conceptual collaboration on the subject. In her exploratory work, she concluded that literature on general principles of International Law was lacking and that what was available was usually outdated. The classic International Law manuals approach the subject superficially, as has already been analyzed [637].

Đorđeska begins her synthesis on the state of the debate on general principles of law by reminding readers that the introductory clause of Article 38 does not refer to “sources of international law”, although its interpreted applicability has gained consensus. As already discussed, the 19th century legal philosopher Friedrich Carl von Savigny was the first jurist to use the term but, according to Đorđeska, it had not yet reached the state of the art a century after its elaboration[638]. What today is called a source of law was previously considered to be a constitutive element of international

[636] Ibid, pp. 21-22.
[637] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p. 1.
[638] Ibid, p. 56.

law. As for the general principles of law, it was only in the 20th century that their nature began to take on slightly clearer contours. Many academics still consider them as auxiliary, not autonomous sources of law and international law. However, there is also a belief that they represent the fundamental values of the international community and, thus, are of utmost importance for the development of international law. Many scholars have already strongly argued that they would only gain the international legal order by transposing domestic law, but lately, a clear notion that there are general principles of the international order *per se* has gained traction. Other scholars choose to restrict themselves to a list of recurring principles mentioned by the jurisprudence of international courts while still others offer rational elaborations based on the implicit principles already applied or that they feel should be, in view of the rules in force of the international regimes[639].

From the literature review, Đorđeska reaches some conclusions and synthesizes them as follows: 1. General principles are "principles" and "rules"; 1.1. General principles are rules that may be either broad or specific; 1.2. General principles may have exceptions; 1.3. General principles may or may not have a name; 1.4. The Court's reference to the same general principle may vary throughout its jurisprudence; 1.5. Methods are not a modality of the sources of international law[640]; 2. General principles are "principles" and "rules" of international law[641]; 2.1. General principles are part of the positive (existing) International Law and do not form part of natural law; 2.2 The Court applies only international law; 2.3. Domestic laws, including 'domestic principles', are not part of international law; 2.4. Doctrine and theory do not constitute general principles because they are not part of international law[642]; 3. General principles apply to the entire international community[643]; 3.1. General principles are binding and form part of the general international law; 3.2. General principles create rights and obligations; 3.3 The Court's interpretation of International Law is valid for the entire international community; 3.4 General principles apply equally and universally to all States and other international actors[644];

[639] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, pp. 54-62.
[640] *Idem*, p. 63.
[641] Ibidem, p. 82.
[642] Ibidem, p.82.
[643] Ibidem, p. 92.
[644] Ibidem, p. 92.

4. General principles are ascertained with the Court`s *opinio juris;* 4.1. General principles are ascertained with the Court's *opinio juris*; 4.2 States do not actively participate in the Court's ascertainment of general principles; 4.3 Individual judges cannot find general principles for the entire international community.[645].

The first conclusion generates, from the academic point of view, the largest controversies. It is based on the drafting history of Article 38 (I) (3) of the PCIJ and its original text, from Chairman Deschamps, which mentioned "rules" instead of "principles" and on the ICJ`s Chamber on Gulf of Maine, which noted that the distinction between "rules" and "principles" lies in the concrete imperatives that each imposes[646]. For Đorđeska, all three sources of International Law manifest themselves as "rules" and "principles" or may embody them[647], or might contain both "rules" and "principles"[648]. Moreover:

> The predominant view among scholars – for example, Cheng, Gerald Fitzmaurice, Lloyd-Jones, Kolb, Kleinlein and Berry – is that the source termed 'general principles' cannot be in the modality of 'rules'. The variety of reasons stated to support their opinions is that general principles do not have a fixed meaning, are less specific than 'rules', are not binding as 'rules' but are merely persuasive, and that unlike 'rules' general principles do not specify the consequences that follow. Gerald Fitzmaurice, for example, makes an apparent distinction between general principles and the modality of 'rules', namely, that "[a] rule answers the question 'What'; a principle in effect answers the question 'why'" [649].

Additionally, Marija Đorđeska mentions authors who interpret the expression 'principles of law' as also standing for the 'rules of international law' (Allan Pellet); others for whom general principles generate 'rules' (Schwarzenberger); and others for whom 'rules' are the expressions of general principles[650].

> The Court sometimes refers to 'rules and principles' (or 'principles and rules'). This expression has two possible interpretations, namely, that the expression 'rules and principles' alludes to the modality of a norm in relation to its concrete imperative (or the absence thereof if it is a 'principle') or that by referring to 'rules and principles' the Court

[645] Ibidem, p. 96.
[646] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p. 64.
[647] *Idem*, p. 64.
[648] Ibidem, p. 71.
[649] Ibidem, pp. 69-70.
[650] Ibidem, pp. 70.

actually refers to ‘law’, in particular to international law.

Marija Đorđeska then presents her theoretical contribution represented visually in the form of the interaction among the most widely accepted characteristics of the general principles of law. The principle, represented as a ball, might swing in more than one dimension, those being: substantive general principles; procedural general principles, judicial underpinning; interpretative underpinning; international underpinning and domestic underpinning. An example given by the author herself is that of a procedural general principle with a domestic underpinning that could touch both sides of the cube, but might be more or less close to the boards depending on how the jurisprudence evolves, even being able to cross over to the other dimensions of the cube[651].

Substantive general principles would be the ones with a normative function; those that provide rights and obligations such as the freedom of navigation, the principle of equality of treatment in economic matters (Rights of Nationals of the United States of America in Morocco), and the principle of reparation (the Chorzów Factory case). Procedural general principles, in turn, *represent rules or principles additional to those in the Court's Statute and its Rules of Procedure that help to regulate the procedure before the Court*[652]*,* such as diplomatic protection (the Mavrommatis Palestine Concessions), effective nationality (Nottebohm). Interpretative general principles are applied by the Court to guide its identification of the applicable International Law but are not themselves applicable international law. Although most commonly associated with interpretation of treaties, they have a broader scope. (Jurisdiction of the Courts of Danzig). The general principle that a legal text should be interpreted in such a way that a reason and a meaning be attributed to every word in the text and *ut res magis valeat quam pereat, res judicata, non ultra petita* are examples of this last category of general principles.

The three underpinnings are the bases from which principles can arise. The domestic underpinning, not very habitual in internacional jurisprudence, could come into play when general principles verified *in foro domestico* are elevated to

[651] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, pp. 102-103.
[652] Ibid, p.107.

international status if considered appropriate to resolve disputes submitted to the scrutiny of international courts. Several methodological problems arise when admitting a general principle of domestic law as a general principle of law and a general principle of international law.

Based on this model, which organizes and categorizes general principles more than it explains their nature and ontological characteristics, Đorđeska identifies and offers a profusion of principles that, explicitly or implicitly, she managed to adduce from the review of the case law of PCIJ and ICJ. As already mentioned, the author identified 156 principles, categorized into three large groups (substantive principles of law, procedural principles of law and interpretative general principles[653]). No mention was made of transparency, publicity or clarity in this extensive list for the purpose of investigating the possible direct or indirect reference of PCIJ and ICJ to the principle of transparency, as an autonomous or corollary principle of another principle.

However, this author`s research singled out PCIJ and ICJ decisions that mention the concepts of equity, good faith, publicity, fair trial, due process, power abuse, principles of justice from transparency, of which transparency can be considered corollary, as well as references, though few, to transparency itself. Supporting the impressions of Higgins with which we opened this section, most of them lack any clear indication of the legal purpose their invocation serves.

Permanent Court of International Justice	
A05 Mavrommatis Jerusalem Concessions	Equity
A07 Certain German Interests in Polish Upper Silesia (Merits)	Publicity
A09 Factory at Chorzów (Jurisdiction)	Equity, good faith
A11 Readaptation of the Mavrommatis Jerusalem Concessions (Jurisdiction)	Equity
A13 Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)	Good faith
B01 Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference	Good faith
B02 Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture	Equity
B04 Nationality Decrees Issued in Tunis and Morocco	Equity

[653] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, p. 352

B06 German Settlers in Poland	Equity, good faith
B08 Jaworzina	Equity
B10 Exchange of Greek and Turkish Populations	Equity
B11 Polish Postal Service in Danzig	Equity

International Court of Justice	
2019	
Jadhav (India v. Pakistan)	Good faith, fair trial, due process
2018	
Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)	Good faith, good faith
Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)	Good faith
2016	
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)	Good faith
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)	Good faith
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)	Good faith
2015	
Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)	Good faith
Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)	Good faith
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)	Good faith
2014	
Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)	Transparency
2013	
Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)	Good faith
2012	
Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)	Due process
Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)	Fair trial
Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)	Good faith
Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development	Fair trial
2011	
Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)	Good faith

2010	
Certain Criminal Proceedings in France (Republic of the Congo v. France)	Publicity
Accordance with International Law of the unilateral declaration of independence in respect of Kosovo	Good faith
Pulp Mills on the River Uruguay (Argentina v. Uruguay)	Good faith
2009	
Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)	Good faith
Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)	Good faith
2008	
Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)	Good faith
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)	Publicity
2007	
Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)	Good faith
2006	
Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)	Good faith
2005	
Frontier Dispute (Benin/Niger)	Good faith
2004	
Legality of Use of Force (Serbia and Montenegro v. Belgium)	Good faith
Legality of Use of Force (Serbia and Montenegro v. Canada)	Good faith
Legality of Use of Force (Serbia and Montenegro v. France)	Good faith
Legality of Use of Force (Serbia and Montenegro v. Germany)	Good faith
Legality of Use of Force (Serbia and Montenegro v. Italy)	Good faith
Legality of Use of Force (Serbia and Montenegro v. Netherlands)	Good faith
Legality of Use of Force (Serbia and Montenegro v. Portugal)	Good faith
Legality of Use of Force (Serbia and Montenegro v. United Kingdom)	Good faith
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory	Good faith
Avena and Other Mexican Nationals (Mexico v. United States of America)	Good faith
2003	
Oil Platforms (Islamic Republic of Iran v. United States of America)	Good faith
2002	
Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)	Good faith

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)	Fair trial
Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)	Fair trial
2001	
LaGrand (Germany v. United States of America)	Good faith
Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)	Good faith
2000	
Aerial Incident of 10 August 1999 (Pakistan v. India)	Good faith
1999	
Kasikili/Sedudu Island (Botswana/Namibia)	Good faith
1996	
Legality of the Threat or Use of Nuclear Weapons	Good faith
1995	
East Timor (Portugal v. Australia)	Good faith
1994	
Territorial Dispute (Libyan Arab Jamahiriya/Chad)	Good faith
1992	
Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)	Good faith
1989	
Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)	Due process
1988	
Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947	Good faith
1987	
Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal	Good faith
1986	
Frontier Dispute (Burkina Faso/Republic of Mali)	Good faith
1985	
Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)	Good faith, equitable principles
1984	
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)	Equitable principles
1982	
Continental Shelf (Tunisia/Libyan Arab Jamahiriya)	Equitable principles
1980	
Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt	Good faith
1978	
Aegean Sea Continental Shelf (Greece v. Turkey)	Good faith
Nuclear Tests (Australia v. France)	Good faith
Fisheries Jurisdiction (United Kingdom v. Iceland)	Good faith
Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)	Good faith

1973	
Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal	Due process
1971	
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)	Good faith
1970	
Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)	Publicity
1969	
North Sea Continental Shelf (Federal Republic of Germany/Netherlands)	Principles of Justice and good faith
1966	
South West Africa (Ethiopia v. South Africa)	Publicity
1962	
Temple of Preah Vihear (Cambodia v. Thailand)	Publicity
1960	
Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)	Good faith
Right of Passage over Indian Territory (Portugal v. India)	Good faith
1956	
Admissibility of Hearings of Petitioners by the Committee on South West Africa	Good faith
1952	
Rights of Nationals of the United States of America in Morocco (France v. United States of America)	Good faith
1950	
Asylum (Colombia v. Peru)	Publicity
1948	
Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)	Good faith

In *Certain German Interests in Polish Upper Silesia*, the Government of the German Reich filed suits to the PCIJ concerning interests related to the application of Articles 2 and 5 of the Polish law of July 14th, 1920. These involved, to begin with, the deletion from the land registers of the name of the Oberschlesische Stickstoffwerke Company (hereinafter "Oberschlesische") as owner of plot of land in Chorzow, and the entry, in its place, of the Polish Treasury. Going on, a delegate of the Polish Govemment, who had been a former employee of the factory, took control of the German company's nitrate factory operations at Chorzow. He also took possession of the movable property and patents, licences, etc., of the Bayerische Stickstoffwerke Company (hereinafter "BayerischeJ'). Lastly, the complaints denounced the notice given by the Government of the Polish Republic to the owners of certain large agricultural estates that it intended to expropriate their properties. In

that regard, the Government of Germany questioned the lack of individual notification of the intention of notification, which was one of the general requirements of the duty of notification established by the German–Polish Convention on Upper Silesia, also known as the Geneva Convention. Article 15 of the Convention, *in verbis*, states only that:

> The right of optants to retain immovable property in Poland shall not be affected in any way by laws, ordinances or other measures which are not also applicable to Polish nationals, unless such property is situated in the area of a fortified place or in the frontier zone 10 kilometers in depth, in which case such property shall be treated as property belonging to aliens[654].

It can reasonably be inferred that the German Government, in light of the obligation expressed in Article 15, deduced a duty to notify, in the interests of good faith, publicity and transparency. More specifically, it extracted a duty to notify the individuals to be affected by any measures that would confront Article 15, which itself does not mention any notification requirement. The PCIJ manifested the same understanding, although it deciding that the duty of notification had been fulfilled:

> Article 15 of the Convention makes no special provision for the form in which notice is to be served. The procedure adopted by the Polish Govemment includes a notice served on the individual and the publication of an announcement in the Monitor Polski. This procedure seems indeed to fuifill the spirit of the Conwntion, for, whilst it is certain that the owner must be directly informed of the Govemment's intention to expropriate his property, the consequences which the notice is destined to produce, both as regards the German Governrrient (Article 23, paragraph 11, and as regards third parties (Article 20), require that notice to the party immediately concerned should be accompanied by certain measures of publicity. It sbould also be observed that, since the Monitor Polski is official in character, an announcement published therein can hardly be regarded as having never been made, even if, in the absence of other essential factors, it is unable to attain its end[655].

In *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), lack of transparency was alleged for the application of standard of review to JARPA II Research Plan, specifically regarding Japan's use of lethal methods for its research

[654] German–Polish Convention Concerning Questions of Option and Nationality, signed at Vienna, August 30, 1924. http://ungarisches-institut.de/dokumente/pdf/19240830-1.pdf

[655] Permanent Court of International Law. Collection of Judgments Publications of The Permanent Court of International Justice. No 7. Case concerning certain German interests in Polish Upper Silesia (The Merits). Serie A-No 7. Leyden. A. W. Sijthoff`s Publishing Company. 1926. https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf

and the method used to determine specific sample sizes for the number of whales needed for particular research projects. Here lack of transparency was not found a sufficient or isolated reason for an unfavorable decision to Japan[656].

> The Court notes that a lack of transparency in the JARPA II Research Plan and in Japan's subsequent efforts to defend the JARPA II sample size do not necessarily demonstrate that the decisions made with regard to particular research items lack scientific justification.

In the case referred to as *Concerning Certain Criminal Proceedings in France*, the Republic of Congo denounced the French proceedings which publicized certain criminal investigations. The case was dropped in November 16, 2010, but not before it had brought to light another facet of transparency, which is the duty of non-transparency or non-disclosure in cases determined reserved[657].

In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), the lack of publicity regarding the boundaries of the areas of Pedra Branca/Pulau Batu Puteh where petroleum exploration was authorized played an important role in the Court's decision:

> (g) A Malaysian Petroleum Agreement 1968
> 251. In 1968 the Government of Malaysia and the Continental Oil Company of Malaysia concluded an agreement which authorized the Company to explore for petroleum in the whole of the area of the continental shelf off the east coast of West Malaysia south of latitude 5° 00′ 00″ North "extending to the International Boundaries wherever they may be established"; the southern limits of the area were defined at"1° 13‴ and "1° 17′ (approx.)", "but excluding the islands of the States [of Johore, Pahang and Trengganu] and an area three miles from the base lines from which the territorial waters of such islands are measured". According to counsel for Malaysia, the limits broadly followed the anticipated boundaries of the 1969 Indonesia-Malaysia Continental Shelf Agreement.
> 252. Malaysia submits that the Agreement is evidence of its appreciation that the entire concession area fell within its continental shelf, that it is actual conduct, conduct *à titre de souverain*, and that the agreement was concluded openly and was widely published; Singapore nevertheless made no protest. Singapore replies that it had no reason to protest. The map did not show Pedra Branca/Pulau Batu Puteh, not a matter of surprise since islands and their territorial

[656] International Court of Justice. Reports of Judgments, Advisory Opinions and Orders. Whaling in The Antarctic (Australia V. Japan: New Zealand Intervening). Judgment of 31 March 2014 2014. ISBN 978-92-1-071178-4. Sales number 1062. https://www.icj-cij.org/public/files/case-related/148/148-20140331-JUD-01-00-EN.pdf

[657] International Court of Justice. Case Concerning Certain Criminal Proceedings in France. (Republic of The Congo V. France). Request for the Indication of Provisional Measure. Order of 17 June 2003. Reports of Judgments, Advisory Opinions and Orders Case. https://www.icj-cij.org/public/files/case-related/129/129-20030617-ORD-01-00-EN.pdf.

> waters were expressly excluded. Moreover, the description of the area covered was without prejudice to the question of boundaries where they had not been agreed. Further, the co-ordinates were not published and no exploration ever occurred in the area near Pedra Branca/Pulau Batu Puteh, an area which was part of a larger portion of the concession relinquished by the oil company.
> 253. Given the territorial limits and qualifications in the concession and the lack of publicity of the co-ordinates, the Court does not consider that weight can be given to the concession[658].

In *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) *(New Application: 1962),* the Court decided that the International Law denial of justice *lato sensu* for the Spanish courts was *vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination*, for, among other reasons:

> (3) The judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code; [659]

In *South West Africa* (Ethiopia v. South Africa), two proceedings against the Government of the Union of South Africa were opened regarding "the continued existence of the Mandate for South West Africa and the duties and performance of the Union, as Mandatory (…)" without respect for the premise of publicity of international acts, fundamental to the League of Nations expressly mentioned in its constitutive pact. Transparency appears as an explicit duty of the Pact and not as a principle:

> It has been argued that the Mandate in question was not registered in accordance with Article 18 of the Covenant [of the League of Nations] which provided: "No such treaty or international engagement shall be binding until so registered." If the Mandate was ab initio null and void on the ground of non-registration it would follow that the Respondent has not and has never had a legal title for its administration of the territory of South West Africa; it would therefore be impossible for it to maintain that it has had such a title up to the discovery of this ground of nullity. (…) Moreover, Article 18, designed to secure publicity and avoid secret treaties, could not apply in the same way in respect of treaties to which the League of Nations itself

[658] International Court of Justice. Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore). Reports of Judgments, Advisory Opinions and Orders. Judgment Of 23 May 2008. I.C.J. Reports 2008, p. 12ISBN 978-92-1-071046-6. Sales number: 937. https://www.icj-cij.org/public/files/case-related/130/130-20080523-JUD-01-00-EN.pdf

[659] International Court of Justice. Case Concerning the Barcelona Traction, Light And Power Company, Limited (New Application: 1962) (Belgium v. Spain). Second Phase. Judgment of 5 February 1970. Reports of Judgments, Advisory Opinions and Orders. I.C.J. Reports 1970, p. 3. Sales number: 337. https://Www.Icj Cij.Org/Public/Files/Case-Related/50/050-19700205-Jud-01-00-En.Pdf

> was one of the Parties as in respect of treaties concluded among individual Member States. The Mandate for South West Africa, like all the other Mandates, is an international instrument of an institutional character, to which the League of Nations, represented by the Council, was itself a Party. It is the implementation of an institution in which all the Member States are interested as such. The procedure to give the necessary publicity to the Mandates including the one under consideration was applied in view of their special character, and in any event, they were published in the Official Journal of the League of Nations[660].

In *Temple of Preah Vihear* (Cambodia v. Thailand), both parties claimed territorial sovereignty over the ruins of a Hindu temple. Central to the dispute was the question of whether the Parties adopted Annex 1 of the map of the Commission of Delimitation between Indo-China and Siam[661]. Thailand denied that it had. It admitted having acted passively, which would not constitute acquiescence but, at most, failure to object. For the Court, Thailand's duty to contest the boundaries was ostensibly imposed by its acceptance of the map, when it might raise any objection. Thailand's failure to act at that moment deprived it of the right to invoke disagreement *a posteriori* as to the map that was unfavorable to it in the dispute in question:

> (…) This was no mere interchange between the French and Siamese Governments, though, even if it had been, it could have sufficed in law. On the contrary, the maps were given wide publicity in all technically interested quarters by being also communicated to the leading geographical societies in important countries, and to other circles regionally interested; to the Siamese legations accredited to the British, German, Russian and United States Governments; and to all the members of the Mixed Commission, French and Siamese[662]

Publicity, invested with the characters of public display in venues that targeted interested international, national and technical actors, was considered as constituting rights and not as a mere attitude without legal consequences.

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[660] International Court of Justice. South West Africa Cases (Ethiopia V. South Africa; Liberia V. South Africa). Preliminary Objections Judgment of 21 December 1962. Reports of Judgments, Advisory Opinions and Orders. I.C. J. Report; 1962, p. 319. Sales number: 270. https://www.icj-cij.org/public/files/case-related/47/047-19621221-JUD-01-00-EN.pdf

[661] International Court of Justice. Reports of Judgments, Advisory Opinions and Orders. Case Concerning The Temple Of Preah Vihear (Cambodlav. Thailand). Preliminary Objections. Judgment of 26 May 1661. I.C. J. Reports 1961, p. 17. Sales number: 245. https://www.icj-cij.org/public/files/case-related/45/045-19610526-JUD-01-00-EN.pdf

[662] International Court of Justice. Reports of Judgments, Advisory Opinions And Orders. Case Concerning The Temple of Preah Vihear (Cambodia v. Thailand). Merits. Judgment of 15 June 1962. I.C. J. Reports 1962, p. 6. Sales number: 260. https://www.icj-cij.org/public/files/case-related/45/045-19620615-JUD-01-00-EN.pdf

In *Asylum* (Colombia v. Peru), the publicity issue was incidental and was checked because it was instrumental to the principle of non-retroactivity of criminal law[663]. In *Corfu Channel*, the duty to notify the existence of a minefield in the territorial waters of Albania in order to warn British ships of the danger was instrumental to the elementary considerations of humanity, referenced as a general principle to justify the Court's decision[664]. In none of these cases were advertising or transparency addressed as general principles of law, but rather as a result of rules established within the framework of agreed upon acts from which the disputes occurred.

In the 1990s, M. Cherif Bassiouni stood in contrast to the academic enthusiasm for expanding International Law through general principles of law and the factual application of this source by international courts. He argued that such a stance demonstrates parsimony and insecurity on the part of judges as to the appropriate methodology for enshrining a principle or a concept as a general principle of law. Bassiouni maintains that the original flaws in the definition of this source of law are the reasons why its performance has not met expectations[665]. The author does not take into account, however, the escalation of codified international law, which may have provided an important variable to narrow the margin of expansion of International Law through the general principle of law[666].

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663 "It is true that successive decrees promulgated by the Government of Peru proclaimed and prolonged a state of siege in that country; but it has not been shown that the existence of a state of siege implied the subordination of justice to the executive authority, or that the suspension of certain constitutional guarantees entailed the abolition of judicial guarantees. As for the decree of November 4th, 1948, providing for Courts-Martial, it contained no indication which might be taken to mean that the new provisions would apply retroactively to offences committed prior to the publication of the said decree. In fact, this decree was not applied to the legal proceedings against Haya de la Torre, as appears from the foregoing recital of the facts. As regards the future, the Court places on record the following declaration made on behalf of the Peruvian Government: "The decree in question is dated November 4th, 1948, that is, it was enacted one month after the events which led to the institution of proceedings against Haya de la Torre. This decree was intended to apply to crimes occurring after its publication, and nobody in Peru would ever have dreamed of utilizing it in the case to which the Colombian Government clumsily refers, since the principle that laws have no retroactive effect, especially in penal matters, is broadly admitted in that decree. If the Colombian Government's statement on this point were true, the Peruvian Government would never have referred this case to the International Court of Justice."
International Court of Justice. Reports of Judgments, Advisory Opinions and Orders. Asylum Case (Colombia / Peru). Judgment of November 20th, 1950. I. C. J. Report 1950, p. 266. Sales number: 50. https://www.icj-cij.org/public/files/case-related/7/007-19501120-JUD-01-00-EN.pdf. p. 285.

664 Carpanelli, E. (2015). General Principles of International Law: Struggling with a Slippery Concept. In: *General principles of law, the role of the judiciary*. Cham, Switzerland: Springer, p. 131.

665 Bassiouni, M.C. (1990). A Functional Approach to "General Principles of International Law." *Michigan Journal of International Law*, 11(3).

666 Garcia, M.P.P. (2008). A terminação de tratado e o Poder Legislativo à vista do direito internacional, do direito comparado e do direito constitucional internacional brasileiro. PhD Thesis.

For Martti Koskenniemi, the standards of argument about general principles of law have changed little since 1920[667]. The ICJ has explicitly recognized only a few principles: the principle of freedom of maritime communication, good faith, estoppel, the principle that maritime delimitation must proceed by agreement, the principle of effective nationality and the principle of the inviolability of the diplomatic agents[668]. In the 1970s, unanimous approval by the UNGA of the "Friendly Relations Declaration" Resolution added seven other consensually recognized governing principles of international relations: 1) the principle of non-use of force; 2) the principle of peaceful settlement of disputes; 3) the principle of non-interference in the internal affairs of other States; 4) the principle of cooperation in accordance with the UN Charter; 5) the principle of equal rights and self-determination of peoples; 6) the principle of sovereign equality of States; 7) the principle of good faith in the fulfillment of the obligations of the UN Charter[669]. Rather than creating convergence on the nature and contours of this source of international law, continued reference to and use of the resolution were made in at least four different ways: 1. as standards for all (or almost all) national legal systems; 2. as standards of International Law itself; 3. as some of the most basic standards of international law; and 2. as standards of Natural Law.

Koskenniemi also highlights the expansive and constructivist potential of the general principles of law, which he contrasts with the low frequency with which recourse to them is taken in international decisions. In the absence of a consummate theory on the general principles of law, the author proposes focusing on the role of general principles in the discursive contexts of international legal practice and theory.

The author reminds us that in *Gulf of Maine,* the ICJ used the word “principle” synonymously with “norm” and that their loose semantic scope are often referred as the main difference in relation to rules. For some scholars, the principles would not have independent force, which would diminish their normative applicability. It would reduce them to the scale of guidelines, often related to the ambition to fulfil the international community’s perceived, inferred or assumed values. In *Concerning the*

[667] Koskenniemi, M. (n.d.). General Principles: Reflexions on Constructivist Thinking in International Law. In: M. Koskenniemi and R. McCorquodale, eds., *Sources of International Law*. London and New York: Routledge Taylor and Francis, p.359.
[668] *Ibid*, p. 362.
[669] Koskenniemi, M. (n.d.). General Principles: Reflexions on Constructivist Thinking in International Law. In: M. Koskenniemi and R. McCorquodale, eds., *Sources of International Law*. London and New York: Routledge Taylor and Francis, p.362.

Application of the Convention of 1902, the ICJ came to assume such an ostensible position regarding its role of reverberating social values. The Court noted that it could not make an interpretation that could stand as an "obstacle to social progress"[670].

In the view of Koskenniemi, these criteria for defining and distinguishing general principles of law are flawed. Rules themselves are not always automatically applicable, and the judge must construct a theory to elaborate their application of any rule invoked. Kokenniemi concentrates on the process of building this theory. Background theory is the internalized view that justifies the totality of the legal order, as well as individual, apparently unrelated practices and that justifies the protection of certain values[671]. Legal rationality seeks to ensure that the decisions reached in the judicial process are coherent with the values and goals of the legal order.

The most traditional background theory, that of the will or voluntarism of the State, is riddled with fallacy. Voluntarism as a theory of judicial rationality runs up against the methodological problems inherent in the difficulty in assessing the will of any State, not to mention the problem of assessing the hypothetical speculations drawn from official manifestations, when they exist[672]. The background theory goes as follows. Legal order is perceived as a totality of norms, or the normative system, expressed in the if-then form. In parallel to this system operates a totality of propositions of the evaluative type, called the axiological system (AS). The normative system is closed while the axiological system is open. From the initial propositions of the AS (those which transform perceived norms into axiological propositions) inferences are made which ultimately allow the formulation of elementary propositions – evaluative propositions of a very general nature which are supported by the initial propositions but cannot be justified by propositions of a more general nature. The system of propositions would correspond to the judge's background theory: it would explain the totality of the norms of the legal order as a meaningful whole by investing norms with value and goal rational meanings[673]:

> Hence, there is something wrong with any background theory. Principles based on them seem to remain either devoid of coverage or of critical content. This is, obviously, due to the fact that the

[670] *Idem*, p. 359.
[671] Koskenniemi, M. (n.d.). General Principles: Reflexions on Constructivist Thinking in International Law. In: M. Koskenniemi and R. McCorquodale, eds., *Sources of International Law*. London and New York: Routledge Taylor and Francis, p. 375.
[672] Idem, p. 377.
[673] Ibidem, p. 378.

> postulation of goals and values at the background of the international legal order is a mere fiction. No consensus on such values and goals exists. As judicial rationality requires that legal activity should reach for coherence with the values and goals of the legal order it requires the use of a fiction - no coherence exists in the real world.
>
> (…) International legal discourse would be seen as a transformation of the "deep structure" of the international community whose contradictions it would contain and seek to legitimize contradictions would be the over-legitimizing and under-legitimizing role of principles in legal discourse. Principles seem over-legitimizing because they are used for the formal legitimation of almost any conceivable practices. They seem under-legitimizing because incapable of substantively legitimizing anything[674].

This panorama makes it difficult to assimilate the distinction proposed between rules and principles with the ones conceived by the traditional academic typologies. With Humberto Ávila's explanation in mind, the one that takes up the different currents of thought regarding the distinction between rules and principles, the concepts presented by Đorđeska seems to belong to the first doctrinal school, that of the classical theory of Public Law. The first school maintains that the principles are highly abstract and general norms that therefore demand significant discernment for their application, which necessarily brings in a high degree of subjectivity of the applicator. Rules in this school, in contrast, have little or no degree of abstraction and generality and, therefore, require little subjectivity. This current could be inconsistent in neglecting to give due consideration to the degree of abstraction and generality that rules share with norms. The second doctrinal current, that of the modern theory of Public Law, a current led by Dworkin and Alexy, argues that the principles are norms that have to be applied proportionately by weighing them against the other pertinent principles. This proportionality opens room for differing degrees of application, which differentiates them from rules.

According to Humberto Ávila, norms cannot be reduced to their expression in legal documents, nor the conception that can be induced from the set of legal texts. Instead, they are reconstructed senses. They encompass rules and principles. Norms may or may not carry provisions and are divided into first-degree norms (principles and rules) and second-degree norms (normative postulates). In the light of current literature, there are four ways of distinguishing rules from principles: 1. The

[674] Ibidem, p. 399.

hypothetical-conditional character criteria, by which rules involve two nuclei, the "hypothesis" and the "consequence" that predetermine the decision, being applied on an "if-then" basis whereas the principles only indicate the fundamentals that will frame the rule to be applied in a specific case[675]; 2. The final application method by which rules are applied absolutely, all or nothing, and the principles gradually, to greater or lesser degree[676] ; 3. Normative conflict, by which resulting from direct conflict or antinomy between the rules, which must be resolved by declaring the invalidity of one of the rules or creating an exception, while the relationship between the principles consists of a hierarchical relationship that allows the competing interest to be weighed[677]; 4. The axiological approach, by which principles, not the rules, provide the axiological foundations for decision making[678].

For Ávila, the aforementioned criteria, although traditional, do not suffice to distinguish rules from principles because, respectively: 1. The first criterion conveys the erroneous idea that, in the definition of the norm, rules are more important than principles; 2. Principles can have normative consequences and hypotheses of incidence; 3. There may be cases in which the antinomy of rules might not be resolved by subsumption and, contrariwise, cases in which the collision among principles requires the submission of one in relation to other; and 4. The content of principles and rules should both be fully accomplished[679].

Ávila's alternative theoretical proposal comprises: 1. The criterion of the nature of the prescribed behavior, by which the rules are immediately descriptive norms, insofar as they establish obligations, permits and prohibitions by describing the conduct to be adopted, and indirectly finalistic, and principles are immediately finalistic norms, since they establish a range of things for which the adoption of certain behaviors is necessary[680]; 2. The interpretation and application of the rules requires an assessment of the correspondence between the conceptual construction of the facts and the conceptual construction of the norm and the purpose that supports it,

[675] Ávila, H. (2019). *Teoria dos Princípios: da definição a aplicação dos princípios jurídicos*. 19th ed. Malheiros, p.60.
[676] *Idem*, p. 65.
[677]Ávila, H. (2019). *Teoria dos Princípios: da definição a aplicação dos princípios jurídicos*. 19th ed. Malheiros, p. 86.
[677]*Idem*, p. 73.

[679] Ibidem, p. 86.
[680] Ibidem, p. 96.

whereas the interpretation and application of the principles demand an evaluation of the correlation between the state of things and the effects resulting from the conduct deemed necessary[681]; 3. The contribution of principles to the decision, inasmuch as they only partially cover the aspects relevant to a decision-making, does not generate a specific solution or contribute, alongside other reasons, to the decision-making[682]. Ávila's proposal to distinguish concepts of rules and principles is phrased as follows:

> Rules are immediately descriptive norms, primarily retrospective and with the intention of decidability and comprehensiveness, for whose application the evaluation of correspondence is required, always centered on the purpose that supports them or on the principles that are axiologically overlying them (…)
>
> Principles are immediately finalistic norms, primarily prospective and with the pretension of complementarity and partiality, for whose application an assessment of the correlation between the state of affairs to be promoted and the effects resulting from the conduct taken as required for its promotion is required[683].

For Ávila, the normative force of the principles is not provisional, and does not await consideration. In this he diverges directly from the second school of thought, led by Dworkin and Alexy. Not only principles, but also rules, can be weighed. This does not mean that the set of principles is monolithic in nature. There are no absolute principles, not all have the same function (some prescribe the scope and mode of state action, while others the content and purposes of the current state), not all are at the same level of importance, not all have the same efficiency (some are merely interpretive), some are structural and others are instrumental. What, in essence, distinguishes the principles from the rules is not their defectibility, but their structural indeterminacy: they do not exhaustively list the facts in the presence of which they produce the legal consequence. They demand the concretization by another rule, in different and alternative ways. They are prescriptive norms of ends to be reached and that serve as a foundation for the application of others. Although rules and principles lack soups, as well as reasons for their application, they do not undergo the same discursive, argumentative and justification process for their application[684].

The second-degree norms (normative postulates) are meta-standards, or

[681] Ibidem, pp. 98-99.
[682] Ibidem, p. 102.
[683] Ávila, H. (2019). *Teoria dos Princípios: da definição a aplicação dos princípios jurídicos*. 19th ed. Malheiros, p. 104.
[684] *Idem*, pp. 151-162.

meta-norms, that is, rules on the application of other rules. They work differently from the principles and rules first because they are not at the same level (principles and rules are norms subject to application and postulates guide the application of others), they do not have the same recipients (those are addressed to the Public Power and its members and this to the interpreter of law), are not related in the same way to other norms (those are reciprocally implicated, these guide them without conflict). Examples would be hermeneutic postulates of unity of the legal order, coherence and hierarchy; the normative postulates applied, conditions for the concrete understanding of the Law and appear to solve contingent, concrete and external antinomies, thus being principles of legitimation (such as proportionality, reasonableness, prohibition of excess, equality)[685].

Ávila offers a robust theoretical support and differentiates principles from postulates, which does not correspond to international practice. Ávila's contribution is consistent to the point of explaining why two of the principles most frequently mentioned as general principles of law and general principles of International Law (due process and good faith) are normative, despite their generality, explained by the need to adapt to the concrete case. They would be finalistic commands that demand norms to reach them, corresponding perfectly to the Avilian general theory of principles.

The question of whether the principles are general, universal or international remains[686]. General principles are the *shared legal corpus* (…) *promoting a fundamental and international concept, (…) ignoring peculiar manifestations in different regimes* and defining common denominators.[687]. General principles are universal when they are expressly or tacitly consensual among the members of international society[688]. International general principles are universal general principles transposable to international litigation[689]. For Gianluigi Palombella and others, the former also encompasses the *principles bearing substantive raison d`etre*

[685] Ávila, H. (2019). *Teoria dos Princípios: da definição a aplicação dos princípios jurídicos*. 19th ed. Malheiros, pp. 167-207.
[686] Kotuby Jr., C.T. and Sobota, L.A. (2017). *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes. Center for International Legal Education*. University of Pittsburgh School of Law. CILE Studies ed. Oxford United Kingdom: Oxford University Press, p.17.
[687] *Ibid*, p. 21.
[688] *Ibibid*, pp. 21-22.
[689] *Ibibid*, p. 29.

of the international legal order[690], like those that express *deeper political morality*[691].

As previously indicated, the jurisprudential review shows that publicity, a radial concept of transparency, comes into play due to the assumption of violation of a duty of publicity resulting from an international treaty, and not as a consequence of the existence of a general principle of law of publicity or transparency. Exception is made in relation to the case *Certain German Interests in Polish Upper Silesia*, in which the Court affirmed a duty to notify that did not expressly exist in the provisions of the German–Polish Convention on Upper Silesia.

According to Bin Cheng, the general principles of law applied by international courts and tribunals are the principle of self-preservation, the principle of good faith (in treaty relations, in the exercise of rights and other applications), the principle of responsibility (individual responsibility, fault, integral reparation, proximate casuality) and the principles in judicial proceedings (jurisdiction, power to determine the extent of jurisdiction, *nemo debet esse judex in propria sua causa*, *audiatur et altera pars*, *jura novit curia*, proof and burden of proof, *res judicata*, extinctive prescription)[692].

For Kotuby and Sobota, the modern applications of the general principles of law are good faith in contractual relations (*pacta sunt servanda*, good faith in excusing contractual performance and good faith as a factor in remedying nonperformance) and abuse of rights and the principle of proportionality (estoppel, the prohibition on advantageous wrongs and unjust enrichment, corporate separateness and limited liability, the principles of causation and reparation and princples of responsibility and fault). The modern applications of the principles of international due process are notice and jurisdiction, judicial impartiality and judicial independence, procedural equality and rights to be heard, condemnation of fraud and corruption, evidence and burdens of proof and *res judicata*[693].

The principles of due process and good faith are repeatedly invoked in PCIJ and ICJ case law, as well as in the literature. These principles potentially trigger transparency components. Transparency would be, in such cases, radial concepts of

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[690] Palombella, G. (n.d.). Principles and Disagreements in International Law (with a view form Dworkin`s Legal Theory). In: L. Pineschi, ed., *General Principles of Law- The Role of the Judiciary. Ius Gentium: Comparative Perspectives on Law and Justice*. Springer, p.7.
[691] *Idem*, p. 15.
[692] Cheng, B. (2006). *General principles of law as applied by international courts and tribunals*. Grotius Publications ed. Cambridge; New York: Cambridge University Press.
[693] Mitchell, A.D. (2011). *Legal principles in WTO disputes*. Cambridge: Cambridge University Press, pp. 87-197.

those principles, or, in other words, corollary to them. For this reason, this author proceeds with the analysis of these principles and their connections with transparency.

3.2.1.1.1 Due Process

Due process is a general principle of law that regulates the exercise of sovereign or adjudicative powers, and therefore applies only to States and international tribunals[694]. Also referred to as "fundamental fairness", "procedural fairness" or "natural justice", the principle of due process is difficult to define because fairness depend on the circumstances[695]. The principle is so fundamental to the international legal conscience that the [d]*enial of acess to justice, even in pursuing the legitimate ends of* [international] *peace and security, is deemed disproportionate to achieve those objectives*[696]. The aim of due process is the fair resolution of disputes.

Like transparency, it has older historical roots and radial concepts, although the modern republican movement is the common milestone in the similarly modern conception of due process. In this same study it was pointed out that, in the political sciences, Jeremy Bentham had already argued for the need to impose due process rules that would guarantee the impartiality of the judges and parity between the litigants. Conceptually, however, it is older than is assumed.

Kotuby and Sobota identify the Lex Duodecim Tabularum (or Twelve Tables), codified Roman law dating back to 450 B.C, as the first legal instrument denoting

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694 Kotuby, Jr., Charles T.; Sobota, Luke A.; University of Pittsburgh School of Law, Center for International Legal Education (CILE). General Principles of Law and International Due Process (Cile Studies). Oxford University Press, p. 17.

695 Mitchell, A.D. (2011). *Legal principles in WTO disputes*. Cambridge: Cambridge University Press. p. 145.
Kotuby Jr., C.T. and Sobota, L.A. (2017). *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes. Center for International Legal Education*. University of Pittsburgh School of Law. CILE Studies ed. Oxford United Kingdom: Oxford University Press, p.65.

696 The European Court of Human Rights (ECtHR), analyzing cases (*Al-Dulimi* and *Al-Jedda*) in which the UN Security Council Resolutions conflicted with the Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) considered that the denial of access to justice is unjustifiable even under the objective of guaranteeing international peace. More proportionate means should be used. In: Palombella, G. (n.d.). Principles and Disagreements in International Law (with a view form Dworkin`s Legal Theory). In: L. Pineschi, ed., *General Principles of Law- The Role of the Judiciary. Ius Gentium: Comparative Perspectives on Law and Justice*. Springer, p. 17.

aspects of due process, from where it entered canon law and radiated into European legal knowledge:

> Tables I and II articulated adjectival requirements such as the right of parties "to state their cases…by making a brief statement in the presence of the judge, between the rising of the sun and noon; and, both of them being present, let them speak so that each party may hear "; the obligation of the judge to " render his decision in the presence of the plaintiff and the defendant" before "[t]he setting of the sun"; and the ability of "anyone [who] is deprived of the evidence of a witness…[to] call him with a loud voice in front of his house, on three market - days." Although the Twelve Tables were limited in scope, praetors and other magistrates would interpret and apply them to fill lacunae, and those decisions would then be followed in subsequent decisions, allowing the creation of an evolving body of law reflected in various edicts. Major efforts to codify existing law were made under Hadrian in the Perpetual Edict in the second century A.D. and under Justinian in the Corpus iuris civilis of the sixth century A.D. The latter purported to be exhaustive and, although issued after the fall of the Western Roman Empire, became the cornerstone of the civil law tradition.
>
> As Christianity spread during the last centuries of the Roman Empire, different versions and iterations of what were originally purported to be the canons on morality, liturgy, and religious life accepted by the Apostles became the basis for the law of the Roman Catholic Church, regulating both the clergy and "Christ's faithful" on a wide range of procedural and substantive issues. A decisive stage in the development of fundamental principles of procedure was reached after the revival of Roman law in the eleventh century and the nearly simultaneous rise of the study of canon law within the Roman Catholic Church. (…) Evidence of this scholarly interest in due process is seen in the appearance of the legal genre of the ordo iudiciarius, a manual specifying the procedure to be followed in different types of proceeding (…).
>
> (…) Another influence on the civil law conception of due process was the issuance, circa 1265, of Livro de las Legies by King Alfonso X of Castilla, Leon, and Galicia. Known today as the Partidas, it was a compilation of procedural, substantive, and organizational rules prepared by a commission of prominent jurists. Not unlike the Magna Carta sealed at Runnymede 50 years earlier, (…) The Partidas had great significance in Latin America after 1492, and was especially influential in the post-emancipation codification movement (1822-1916)[697].

Most scholarship, however, points to Article 39 of the Magna Carta with its elements of due process, commonly referring to it as the most remote source of due

[697] Kotuby Jr., C.T. and Sobota, L.A. (2017). *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes. Center for International Legal Education*. University of Pittsburgh School of Law. CILE Studies ed. Oxford United Kingdom: Oxford University Press, p. 55.

process related to criminal law [698]. Still others refer to the French Revolution and the adoption of the 1791 Constitution as the milestone for the subjection of the authorites, primarily the King, to the rule of law, which included creating security triggers to deal with the distrust of the existing aristocratic courts, enabling redress for administrative excess through the process of judicial review[699]. Due process gained prominence in the Fifth and Fourteenth Amendments of the United States Constitution [700]. The influence of French and American constitutionalism on other countries was notable, as nearly all other political charters incorporate elements of the principle of due process. Currently, due process is a fundamental part of several regional human rights regimes, bilateral investment protection regimes, treaties and some free trade agreements.

In line with Mitchell's account, due process has three facets: bias rules, hearing rules and a "no evidence" rule. The first is related to the search for the impartiality of judges and decision makers. The second deals with rules to maintain equal opportunities for the defense and presentation of reasons and counterarguments of the disputing parties, or equality of arms. The third relates to "logically probative evidence"[701] or, in other words, the rule that a decision-maker must deal with the substantial points raised by the parties[702].

3.2.1.1.1.1 Due Process as a principle of WTO law

For Andrew D. Mitchell

> Due process is a necessary component of any legal system seeking legitimacy and effectiveness. The dispute settlement system of the WTO is no exception. Howse suggests that 'the further removed the decision-maker is from responsibility to a particular electorate, the greater the extent to which legitimacy depends on procedural fairness itself. This suggests an increased need for due process in the WTO. (…) power differences between WTO Members all

[698] Mitchell, Andrew D. Legal Principles in WTO Disputes. Cambridge Studies in International and Comparative Law. Cambridge University Press. 2008. pp. 151-152.
[699] Kotuby Jr., C.T. and Sobota, L.A. (2017). *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes. Center for International Legal Education*. University of Pittsburgh School of Law. CILE Studies ed. Oxford United Kingdom: Oxford University Press, pp. 59-60.
[700] Mitchell, A.D. (2011). *Legal principles in WTO disputes*. Cambridge: Cambridge University Press, p. 146.
[701] Mitchell, A.D. (2011). *Legal principles in WTO disputes*. Cambridge: Cambridge University Press, pp. 148-149.
[702] *Idem*, p. 157.

heighten the need for fair rule enforcement in the WTO[703].

Graham Cook clarifies that:

> While the term "due process" does not appear in the text of the DSU or the other covered agreements at the time of writing, it has been referred to over 2,3000 times in 189 different WTO reports, awards and decisions (…) The Appellate Body has equated due process with fairness, and has clarified that it is a fundamental and inherent right in international dispute settlement proceeding, and has explained that due process requires a balancing of interests on a case-by-case base. The Appellate Body and panels have also articulated several elements of due process in international dispute settlement proceedings, including the right of response, compliance with established procedural requirements, the prompt and clear articulation of claims and defences impartiality in the decision-making process, and the issuance of reasoned decisions[704].

The breach of the due process principle underpinned the decisions in *EC-Hormones*, *EC- Tariff Preferences*, *Australia-Apples*, *EC—Fasteners*, *Thailand-Cigarrettes* (Philippines), *Australia-Salmon*, *Canada-Aircraft Credits and Guarantees*, *Chile-Price Band Systems*, *US-Tuna II*, *Argentina-Textiles and Apparel*, *US-Stainless Steel*, *Brazil-Desiccated Coconut*, *Thailand-H-Beams*, *EC-Computer Equipment*, *US-Gambling*, *US/Canada-Continued Suspension*, *Mexico-Corn Syrup*, *EC-Selected Customs Matters*, *US-Underwear* and *US-Shrimp*.

For Mitchell, due process, as a principle of WTO law, has two dimensions: due process before the WTO tribunals and the member`s obligations to observe due process in their respective administrative and judicial instances[705]. Graham Cook extracts from the WTO case law five aspects of the principle of due process: right of response, compliance with established procedural requirements, prompt and clear articulation of claims and defences, impartiality in the decision-making process and issuing reasoned decisions[706]. The first dimension of Mitchell`s account is oriented by two legal instruments: the Understanding on Rules and Procedures Governing the

[703] *Ibidem*, p. 146.
[704] Cook, G. (2015). *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*. Cambridge University Press, p. 108.
[705] Mitchell, A.D. (2011). *Legal principles in WTO disputes*. Cambridge: Cambridge University Press. p. 153.
[706] Cook, G. (2015). *A digest of WTO jurisprudence on public International Law concepts and principles*. Cambridge, United Kingdom: Cambridge University Press, pp.108–115.

Settlement of Disputes (hereinafter DSU or Understanding)[707] and the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter Rules of Conduct)[708]. They enumerate bias rules, hearing rules and "no evidence" rules[709].

Some DSU provisions address those three aspects of due process: Article 4.4, Article 6.2, Article 7, Article 8.2, Article 9, Article 12.6, Article 14.1, Article 15.1, Article 17.2, Article 17.3, Article 17.9, Article 17.10, Article 17.12, Article 18.1, and Article 18.2. Those provisions, respectively, impose the duties of 1. notification; 2. the written form of the request for establishment of Panel, along with legal justification and exposition of facts; 3. the scope of the terms of reference of the request for a Panel, from which the Panel cannot deviate, although it might address only specific and sufficient concerns in the name of judicial economy; 4. selecting the members of the Panel *with a view to ensuring the independence of the members*; 5. balancing judicial economy with the right of defense of multiple compainants; 6. presenting written submissions to the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute; 7. imposing the confidentiality of Panel deliberations; 8. following the consideration of rebuttal submissions and oral arguments, the duty of the Panel to issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute and the right of the parties to submit their comments in writing in a established period; 9. imposing a four-year term to the AB members; 10. incorporating into the AB persons with no affiliation with any government, with recognized authority, expertise in law, international trade and the subject matter central to the dispute, and who will be forbidden to participate in whatever activity that might create a direct or indirect conflict of interest; 11. limiting the AB to the issues of law covered in the Panel report and legal interpretations developed by the Panel; 12. keeping the proceedings of the AB confidential and its reports being drafted without the presence of the parties to the dispute; 13. the duty of the AB to address each of the issues raised by the panel report; and 14. prohibiting

[707] World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press. Annex 2. Understanding on Rules and Procedures Governing the Settlement of Disputes, p. 354.
[708] World Trade Organization. *Rules of conduct for the understanding on rules and procedures governing the settlement of disputes*. Dispute Settlement: Rules of Conduct. WT/DSB/RC/1. (96-5267). 11 December 1996. https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm
[709] Cook, G. (2015). *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*. Cambridge University Press, pp. 108-115.

ex parte communications.

In Appendix 3 of the Working Procedures of the DSU, transparency is explicitly mentioned in the following terms:

> 10. In the interest of **full transparency**, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties. **(emphasis added)**

The second dimension of the due process principle in WTO law is the duty of the members to observe the principle in their respective administrative and judicial instances. It was already explored in the section in which institutional managerialism was detailed and has its foundations on Article X (3)(b) of the GATT 47, which states that

> b) **Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose**, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts. **(emphasis added)**

Article 4(1)(a) and (b) of the Agreement on Trade Facilitation establishes the duty that each Member offer any person to whom customs issues an administrative decision, within its territory: an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision; and/or a judicial appeal or review of the decision[710].

The rationale of this provision still radiates throughout the Results of the Uruguay Round Multilateral Trade Negotiations. Article 41 (5) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (herein TRIPs) exempts the

[710] World Trade Organization (2014). *WT/L/940. Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*. Agreement on Trade Facilitation. [online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/940.pdf&Open=True

Parties to create a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general[711]. Yet it settles the duties to establish procedures that promote fair, equitable, reasonably costly and timely enforcement; and of writing and reasoned decisions, based on evidence in relations to which the interested parties are offered the opportunity to be heard. The Agreement on Import Licensing Procedures (hereinafter LIC)[712] provides that the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter Anti-Dumping Agreement, or ADP Agreement)[713] and the Agreement on Agreement on Safeguards (hereinafter SG Agreement)[714] have extensive provisions that are supposed to address issues of due process and transparency. They are not, however, exempt from criticism.

Safeguard measures provided by Article XIX of GATT 1994, related to the Emergency Action on Imports of Particular Products. Article XIX (2) and (3), were established to mitigate the risk of abuse in the exercise of Article XIX:1(a). Paragraph 2 addresses two transparency requirements, waived only under critical circumstances, in which the delay could lead to damage that will be difficult to be repaired: notification prior to the imposition of the measure, with the purpose of alerting the interested parties; an instance or opportunity for clarifications or compensation for the introduction of the safeguard measure. Paragraph 3 allows the affected contracting parties to adopt countermeasures[715]:

> The AS [Agreement on Safeguards] is a regulatory improvement from Article XIX [of the GATT 47]. However, there are still pending tasks, such as the clarification of key concepts (e.g., the notions of 'investigated product', 'like or directly competitive' product, the period of investigation (POI), 'unforeseen developments'), further guidance on how to conduct certain assessments (e.g., a proper methodology on causation and non - attribution) and the development

[711] World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press. Annex 2. Understanding on Rules and Procedures Governing the Settlement of Disputes. p. 321.
[712] *Idem*, p. 223.
[713] World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press. Annex 2. Understanding on Rules and Procedures Governing the Settlement of Disputes. p. 231.
[714] *Idem*, p. 275.
[715] Piérola, F. (2016). *The Challenge of safeguards in the WTO*. Cambridge: Cambridge University Press, p.32.

> of new rules (e.g., evidentiary requirements for the initiation of a safeguard investigation, due process guarantees, etc.)
>
> In the absence of a continuous legislative process, the task of clarification and reinforcement of existing disciplines has rested upon the adjudicating bodies of the WTO (i.e., the AB and Panels) (…). The case law has been largely instrumental in clarifying various unclear notions of Article XIX and the AS.[716].

Fernando Piérola identifies weaknesses and strengths in terms of due process and transparency of the current AS regime. On one side, the definition of "unforeseen developments" is difficult to ascertain, and it would be advisable to elaborate the parameters to determine when this threshold is reached [717]. Additionally, the procedural rules of due process in the AS have flaws, as a clear framework of the process is lacking, as are even rules on the management of information, encompassing the access terms to all relevant documents, *the use of facts available in the absence of cooperation by a party, or the provision of 'essential facts' similar to those provided in anti-dumping or countervailing duty investigations*[718]. Regarding confidential information, a broad margin of discretion is left to the investigating authorities[719]. Finally, the consultation mechanism is considered, in practice, an ineffective way of providing a genuine opportunity for the negotiation of compensation, since a safeguard mechanism on an MFN basis implies that multiple countries may be affected. Therefore, coordination and transaction costs are likely to be higher. Certainly, when a large number of countries are involved, the granting of adequate means of trade compensation becomes more complicated.

On the other side, the author recognizes that the AS regime improved notification mechanisms comprising the duties of notification of the initiation of investigation; of a finding of serious injury or threat thereof; of the decision to apply or extend a safeguard; of the decision to apply a provisional safeguard; of the exclusion of imports from developing countries under Article 9.1; of results of consultations, mid-term reviews, and of 'any form of compensation' and 'proposed' retaliation; and of the cessation of a safeguard[720]. Another AS mechanism provides an important level of transparency to the regime. Article 3.1 rules that the investigating

[716] *Idem*, p. 81.
[717] *Ibidem*, p. 365.
[718] Piérola, F. (2016). *The Challenge of safeguards in the WTO*. Cambridge: Cambridge University Press, p. 367.
[719] *Idem*, pp. 366-367.
[720] Ibidem, p. 342-349.

authorities must present findings and reasoned conclusions on "all pertinent issues of fact and law"[721].

The AS also addresses relevant provisions on domestic procedures. Articles 3.1, 3.1, 3.2 and 4.2 (c) require that safeguard investigations be conducted by the competent national authorities and according to the rule of law, initiated with a public notice and in respect of due process guarantees, e.g, rebuttal arguments and public hearings[722]. In some of those cases, the nature of due process was explored. In others, only some of its elements were examined, such as the right of response, compliance with established procedural requirements, the prompt and clear articulation of claims and defences, the impartiality in the decision-making procese, the need for issuing reasoned decisions and, finally, the observance of due process in the administration of domestic law. That last characteristic is the one that matters for this study. It refers to Article X of the GATT, which, as we insist, imposes that: 1. measures of general application must be published promply and in such a manner as to enable governments and traders to become acquainted with them; 2. measures of general application may not be enforced before such measure has been officially published; and 3. Members must maintain independent judicial, arbitrator or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action.

Due process is also identified, *verbatim* or by means of jurisprudential elaboration, in many other instances of the multilateral trade system's treaties. Art. 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures[723]; Article 6.10 of the Agreement on Textile and Clothing (hereinafter ATC)[724]. Onfive occasions the DSB mentioned the introductory clause to Article X, and its paragraphs related to due process: *EC-Selected Customs Matters*, *EC-IT Products*, *US-Underwear*, *US-Shrimp* and *Thailand-Cigarettes*. In some of them, the principle of transparency is presented as an element of due process:

> The title as well as the content of the various provisions of Article X

[721] Ibidem, pp. 150-151.
[722] Ibidem, p. 326.
[723] World Trade Organization Legal Affairs Division (2012). *WTO Analytical Index*. 3rd ed. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Mexico City: Cambridge University Press, p.1162.
[724] World Trade Organization. *The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press. Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes. p. 73.

> of the GATT 1994 indicate that that Article, at least in part, is aimed at ensuring that due process is accorded to traders when they import or export[725].
> (…) Paragraph 1 also reflects the "due process" concerns that underlie Article X as a whole. In particular, Article X:1 addresses the due process notion of notice by requiring publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them[726].
> [W]ith respect to neither type of certification under [the measure at issue requiring certification] is there a transparent, predictable certification process that is followed by the competent United States government officials.
> (….)
> It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here[727]..
> (…) The Appellate Body referred to this due process objective in EC-Selected Customs Matters. In that vein, the panel in EC-Selected Customs Matters states that Article X:3(b) seeks administrative agency has the ability to have that adverse decision reviewed". In Appellate Body has found that this provision establishes certain minimum standards for transparency and procedural fairness in Members` administration of their trade regulations[728].

In others, notably *US-Underwear*, the Appellate Body considered the principle of transparency as independent from due process, notwithstanding granting some relation with it:

> Article X:2 General Agreement, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private person and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions[729].
>
> 541. In US – Underwear , the Appellate Body held that prior publication of a measure, as required under Article X of GATT, could not, in and of itself, justify the retroactive effect of applying import quotas with respect to imports during a period starting before the quota's publication date: "[W]e are bound to observe that Article X:2 of the General Agreement , does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure. The presumption of prospective effect only does, of course, relate to the basic principles of transparency

[725] World Trade Organization. Panel Report, EC-Selected Customs Matters, para. 7.107.
[726] World Trade Organization. *Panel Reports, EC- IT Products*, para.7.1015.
[727] World Trade Organization. *Appellate Body Report, US-Shrimp*, paras. 180-3.
[728] Appellate Body Report, Thailand-Cigarettes (Philippines), paras. 202-3 (citing Appellate Body Report, EC- Selected Customs Matters, para. 302; Pnael Report, EC- Selected Customs Matters, para. 7.536; Appellate Body Report, US-Shrimp, para. 183.
[729] Appellate Body Report, US-Underwear, p. 21.

> and due process, being grounded on, among other things, these principles.

Steve Charnovit sums up the interpretation in this way:

> Article X:2, General Agreement, may be seen to embody a principle of fundamental importance - that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously [sic] due process dimensions. Moreover, the Appellate Body sees a "due process" dimension to transparency, and seems to suggest that Article X has implications not only for WTO Members but also for "other persons" who should have a reasonable opportunity to acquire the information about a customs measure that will enable them either to adjust their activities or to go to a government "to seek modification of such measures."
>
> This is the first caselaw of the WTO to explicitly make the connection between information transparency for the public and the ability of the affected individual to act on the information by participating in a government's administrative review process.
>
> 53 The Appellate Body returned to GATT Article X in the United States - Import Prohibition of Certain Shrimp and Shrimp Products case.54 At issue was whether the U.S. import ban on shrimp could be justified under the General Exceptions in GATT Article XX.55 Sua sponte, the Appellate Body stated that GATT Article X:3 could aid in the interpretation of Article XX because Article X:3 "establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations . . . . "56 The issue of procedural fairness had arisen because the Appellate Body had found that the U.S. government denied "basic fairness and due process" to foreign governments applying for certification under the U.S. shrimp-turtle regulation [730].

In conclusion, the essential principle of International Law and WTO law, due process, has clear canonical and transparency aspects, making it one of its corollaries. The dictionary sense of corollary is *something that will also be true if a particular idea or statement is true, or something that will also exist if a particular situation exists*[731].

3.2.1.1.1.1.1 Good Administration of Justice

Judicial economy is considered *a general canon of adjudication*[732]*.* For Julien Cazala, it is corollary to the proper administration of justice, and the same author

[730] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 8.

[731] *Macmillan English Dictionary for Advanced Learners*. (2007). 2nd ed. MacMillan, p.330.

[732] Cook, G. (2015). *A digest of WTO jurisprudence on public International Law concepts and principles*. Cambridge, United Kingdom: Cambridge University Press, p. 173.

even qualifies it as a principle related to the first. Proper administration of justice has as epithets *fair administration of justice, sound administration of justice, effective administration of justice, correct administration of justice, accurate administration of justice, bonne administration de la justice (in French and English decisions), better administration of justice, interests of the due administration of justice, the overriding interests of justice, and the requirements of the judicial process*[733]. Sometimes proper administration of justice is also referred to as judicial economy or procedural judicial economy. Here I will refer to good administration of justice.

In agreement with Đorđesk, good administration of justice, or sound administration of justice, is a general principle of law explored in six cases before the ICJ: *Continental Shelf* (Tunis./Libya), Judgment [1982] i.c.j. 18 (24 Feb.); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v.U.S.), Judgment [1986] i.c.j. 14 (27 June); *Legality of Use of Force* (Yu. v. U.S.), Order [1999] i.c.j. 916 (2 June); *Certain Questions of Mutual Assistance in Criminal Matters* (Djib. v. Fr.), Judgment [2008] i.c.j. 177 (4 June); *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), Judgment [2010] i.c.j. 639 (30 Nov.); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Request for Advisory Opinion), Advisory Opinion [2012] i.c.j. 10 (1 Feb.); and *Certain Activities carried out by Nicaragua in the Border Area* (Nicar. v. Costa Rica), Order [2013] i.c.j. 184 (17 Apr.)[734]. From the author's analysis of the ICJ case law, judicial economy is a policy objective, not a characteristic, an element or even a corollary of the principle of sound administration of justice.

This author has not identified any literature or jurisprudential element that supports the affirmation that good administration of justice is a principle transposed into WTO law. Graham Cook considers judicial economy a concept in WTO law invoked in 24 cases[735].

Good administration of justice is defined by the purpose of engendering

[733] Cazala, J. (2019). Good Administration of Justice. In: *Oxford Public International Law*. Max Planck Encyclopedias of International Law [MPIL].
[734] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff. pp.537-540.
[735] Cook, G. (2015). *A digest of WTO jurisprudence on public International Law concepts and principles*. Cambridge, United Kingdom: Cambridge University Press, p.173.

effectiveness and efficiency in judicial decision-making and is related to due process, having some overlap, but not even partial identity. The approaches of both principles are different, although they may eventually reinforce each other[736]. Good administration of justice has as features timely jurisdictional benefit, reasonable court costs, equality of the disputing parties and judicial economy. The characteristics are not exhaustive and the sound administration of justice depends on the convergence of multiple factual conditions.

Judicial economy is the ability of the courts and tribunals to adapt the rules of procedure in order to optimize chances for or even ensure a fair result, according to the parameters of celerity, equity between the parties, reasonableness of costs, among other possible elements that the concrete case presents. For the sake of judicial economy, courts can *refrain from making "multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute" (Canada – Wheat Exports and Grain Imports, 2004, para 133)*; join multiple cases in a single proceeding; decide on counter-claims[737].

At times, judicial economy affected the criterion and principle of transparency and, thus, also due process. These circumstances might or not affect the judicial economy. Transparency thus arises, not as an absolute principle whose existence modern legal literature vehemently denies, but as sufficiently important to preempt its subjugation before any perfunctory analysis of judicial policy convenience.

In *Canada-Autos*, the AB did not question the merits of the Panel's decision to abstain from issuing a determination on the European Communities (hereinafter EC) alternative claim relating the CVA requirements after finding the EC had violated other provisions. Instead, the claim of lack of clarity and transparency in communicating its reasons was the reason for the AB's reprimand of the Panel[738]. The lack of transparency was not considered to be a threat to due process in the case.

In *Australia-Salmon*, *Japan-Agricultural Products*, *US-Large Civil Aircrafts (2nd*

[736] Cazala, J. (2019). Good Administration of Justice. In: *Oxford Public International Law*. Max Planck Encyclopedias of International Law [MPIL].
[737] Cazala, J. (2019). Good Administration of Justice. In: *Oxford Public International Law*. Max Planck Encyclopedias of International Law [MPIL].
[738] Cook, G. (2015). *A digest of WTO jurisprudence on public International Law concepts and principles*. Cambridge, United Kingdom: Cambridge University Press, p.176.

complaint), however, serious blemishes were found in the decisions of the rules of procedure that could only nominally be justified by the interest of judicial economy. They were, in effect, false pretenses of judicial economy employed to effect partial or at least insufficiently comprehensive resolution of the dispute. The deficiency in requisite analysis of the legal issue was determined to lead to material injustice[739]

3.2.1.1.2 Good Faith

For Bin Cheng, good faith is one of the general principles of law applied by international courts and tribunals[740]. The duty of notification, a radial concept of transparency, would be one application of this principle. Pursuant to Cheng, the legal interest to be protected by notification is the maintenance of the trust and confidence between the parties. This author considers that the political target is the ultimate beneficiary of the principle, the immediate benefit being the protection of the legitimate expectations generated by the explicit or tacit agreements.

The *Blockade of Portendic* case (1843) is mentioned as an example in which the duty of notification, as an extension of the principle of good faith, justified an award for losses and damages to the British government by France, which did not properly notify the government of that country of its intention not to close the port city. The British government's reasonable and legitimate expectations of continuing trade via the port at Portentic was affected by a decision that, because of the communication failure, removed the possibility of restructuring its trade strategy and trade flow. The uncommunicated decision was deemed the cause of unfair losses. Cheng notes three aspects of the notifications: they must be made by official means, so that they are imputable to the State; the duty to notify does not affect the validity or legality of the decision to act; and the duty is a command for the State to notify of any imminent change in policy. Cheng even considers the duty to notify as a guarantee.

Marion Panizzon defines good faith as *a legal concept about the substance and the process of communication between individuals and among states. It requires states to enter into relationships "honestly and fairly" and be guided by truthful*

[739] Idem, pp. 176-177
[740] Cheng, B. (2006). *General principles of law as applied by international courts and tribunals*. Grotius Publications ed. Cambridge; New York: Cambridge University Press.

motives and purposes. [741] Its complex nature leads good faith to be associated with concepts of equity, such as aquiescence and estopppel, *pacta sunt servanda*, and prohibition of *abus de droit*[742]. Moreover, good faith in WTO law has three features: substantive good faith, interpretative good faith and procedural good faith. Regarding the last aspect, transparency emerges as an attribute of good faith in negotiations[743]. This author did not identify in the WTO case law jurisprudence that explored the relationship between transparency and the principle of good faith. Apparently, unlike general international law, as pointed out by Bin Cheng, the DSB had not yet had the opportunity or perceived the need to explore this relationship.

Petros C. Mavroidis and Mark Wu treat transparency as a general and fundamental obligation of the WTO law, reflected in several legal acts.

> [The general obligation of] [t]ransparency covers both notifications as well as publication of laws. WTO Members have to observe 176 distinct obligations to notify information to the WTO. Of these, 42 are recurring obligations, in the sense that WTO Members are expected to provide notification reports on a regular basis (e.g., semi-annual, annual, bi-annual, triennial, etc.)[744].

At this point, it seems relevant to delve more deeply into the features of the obligations of publicity and notification in the WTO law in the quest to ascertain their nature and potential.

3.2.1.1.3 The Three Generations of Transparency in the WTO

> "(…) as for legends and omen, it would be enough to open the windows wide and let in the sun."
>
> Eça de Queirós[745]
>
> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman
>
> Brandeis, 1914, 92

Besides constituting the third pillar of the WTO framework, the others being the formal negotiating rounds and the dispute settlement mechanism, transparency and accountability mechanisms are perhaps the most fruitful means for the system

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[741] Panizzon, M. (2006). *Good Faith in the Jurisprudence of the WTO. The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*. 1st ed. Hart Publishing, p.20. Studies in International Trade Law. Oxford and Portland. p.20.
[742] *Idem*, p.21.
[743] Ibidem, p. 367.
[744] Mavroidis, P.C. and Wu, M. (2013). *The law of the World Trade Organization (WTO): documents, cases & analysis*. 2nd ed. St. Paul, Mn: West, p.267. American Casebook Series.
[745] de Queirós, E. (2019). *Os Maias*. Mimética, Kindle Position, 2. Kindle Edition.

to engender order, coherence and cohesion to the international trade regime, even more so than the other two pillars[746]. For Wolfe, transparency has a constructive power in the adjustment and progress of the institutions[747]. While the first two dimensions of the WTO framework are vulnerable to political disputes, as current facts demonstrate, the standards of legal transparency that spread all over the WTO regime operate as technical mechanisms with low political visibility and sensitivity that are capable of generating consistent practical results for the discreet advancement of the rule of law and the promotion of convergence, avoiding increased litigation.

The systematization of transparency over three generations has been described and theorized by many influential scholars. Mavroidis and Wolfe take the following approach: duty of information; duty of monitoring and surveillance; and collaborative transparency, which largely corresponds to internal, external and administrative transparency[748]. The last generation has already been the focus of previous sections of this study.

Wolfe, in an individual study, based on Faung, Graham and Weil, categorized the generations for the purpose of explanation as follows: (1) the right-to-know generation, based on the principle of access to most government processes and files with the general aim of informing the public and guarding against arbitraty government action, which would allow governments and economic actors to be appraised of the trade policy environment at home and abroad; (2) targeted transparency through monitoring and surveillance, based on the principle of mandated access to precisely defined and structured factual information from private or public sources with the aim of furthering particular policy objectives, which would move government action in the direction of consistency with implicit norms and explicit obligations for the trading system; and (3) collaborative transparency, or reporting and engagement, based on the utilization and leveraging of new technologies to combine information from first- and second-generation policies with a new user-centered orientation, which combines the results of the previous

[746] Mavroidis, P.C. and Wolfe, R. (2015). From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO. *SSRN Electronic Journal*.
[747] Wolfe, R. (2013). *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life*. World Trade Organization; Organisation Mondiale Du Commerce -03-06, p.3. World Trade Organization. Economic Research and Statistics Division. Staff Working Paper.
[748] Wolfe, R. (2013). *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life*. World Trade Organization; Organisation Mondiale Du Commerce -03-06, p.2. World Trade Organization. Economic Research and Statistics Division. Staff Working Paper.

generations in a user-friendly format so that the information necessary for the public to understand the behavior of states and firms is more readily available[749].

Marianna B. Karttunen offers another characterization of the same three generations: right-to-know transparency, in which availability of information is at the epicenter; target transparency, in which the access to information is the focus; and interactive transparency, which gives room to regulatory dialogue or even cooperation[750]. This author recalls Andrea Bianchi's already described skepticism of the condition of transparency as a customary rule of international law, to which Maria Panezi adds:

> It remains unclear whether transparency at any level has acquired customary law status. Such a theory has neither been articulated nor has it been tested during adjudication.

This author's focus is not on the international custom nature of the transparency criterion, but on its potential as a principle of law. This author analyzes the most influential bibliography on the subject of what Panezi calls the “legal transparency” of the WTO, which refers to the transparency provisions in the WTO Agreements[751] in light of the derived general principles doctrine examined in this study. Legal transparency is a concept that corresponds to the first two generations of Mavroidis and Wolfe’s systematization and to the three generations of Karttunen`s approach, although there are certain aspects of the third generation of transparency that are also legal rather than merely institutional.

According to Wolfe, the three generation principles are the following: (1) First generation: publication of international obligations and of laws and regulations, enquiry points for trading partners and economic actors, independent administration and adjudication, including rights for foreign firms, and notification through WTO; (2) Second generation: general clarity in domestic trade policy, peer review and third party adjudication; (3)Third generation: internal transparency for Members, external transparency for citizens and economic actors and role for NGOs[752]. Mavroidis and

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[749] I*dem*, p. 8.

[750] Karttunen, M.B. (2020). *Transparency in the WTO SPS and TBT agreements: the real jewel in the WTO’s crown*. Cambridge, United Kingdom New York, NY, USA Cambridge University Press, pp.4–7.

[751] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.49. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020]. p. 277

[752] Wolfe, R. (2013). *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life*. World Trade Organization; Organisation Mondiale Du Commerce -03-06, pp. 8-14. World Trade Organization. Economic Research and Statistics Division. Staff Working Paper.

Wu express this breakdown differently. According to the authors, the first generation of transparency, born in GATT-era, was comprised of the obligations to publish trade-related information and notify the GATT of measures coming under its purview. During the Tokyo Round, the right to request information was at the core of the second-generation transparency provisions. Finally, the third-generation transparency provisions, which were also agreed upon in the Tokyo Round, consisted of instituting cross-notifications, with an upgraded role of the WTO Secretariat in monitoring transparency. A Central Registry of Notifications (CRN) was created and a Working Party on Notifications Obligations and Procedures was established[753].

The meaning and direction of the WTO's generations of transparency is to broaden the parameters or radial elements of transparency, which, in its minimal expression, incorporates the publicity of acts, the point from which transparency starts to integrate and incorporate maximum standards that allow the measurement and the promotion of regulatory and normative standards for coherence, consistency, convergence, clarity and predictability.

3.2.1.1.3.1 Information or Right-to-Know Transparency

All the authors consulted, regardless of the essential values attributed to the first generation of transparency in their analyses, point to the legal framework of Article X of GATT 47 as the system's umbrella. Padideh Ala'I refers to GATT Article X as:

> (…) the oldest good governance provision at International Trade Law, and a close study of its history and evolving jurisprudence contributes to an understanding of the emerging role of the WTO as a potential supra-national regulatory body and final arbiter of appropriate administrative and regulatory structures. (…)
>
> The WTO is no longer a system simply based on consensus, reciprocity and balancing of concessions. Rather, it is a system based on rules that reflect the reality of the administrative state. A goal of the multilateral trading system is no longer free trade (if it ever was) but rather trade that is regulated in a WTO-consistent manner. As a result, the good governance provisions of the WTO, those addressing transparency and due process, are increasingly central to WTO disputes. [754].

[753] Mavroidis, P.C. and Wu, M. (2013). *The law of the World Trade Organization (WTO): documents, cases & analysis*. 2nd ed. St. Paul, Mn: West, pp.282-283. American Casebook Series.

[754] Ala'i, P. (2010). From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance. In: D.P. Steger, ed., *Redesigning the World Trade Organization for the twenty-first century*. Ottawa Cairo Dakar Montevideo Nairobi New Delhi Singapore: Wilfrid Laurier University Press, p.178.

In fact, GATT 47 Article X is the grandfather of all transparency devices in the WTO[755].

With the end of the Uruguay Round and the creation of the WTO, GATT Article X was maintained without amendment and provided a model for the addition of similar provisions throughout the WTO agreements. This author presents the panorama on how the Marrakech agreements incorporated provisions on transparency

The Agreement on Agriculture (hereinafter AG), Part III, Article 5, provides that the operation of the special safeguard shall be carried out in a transparent manner and establishes the duty of notification in writing and including relevant data within ten days of the implementation of such action. SPS Article 7 is specifically dedicated to transparency and establishes the duty to notify changes in their sanitary or phytosanitary measures and to provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B, which disciplines publication of regulations, enquiry points, notification procedures and general reservations. Annex B(1) repeats the first paragraph of GATT Article X and determines that Members shall promptly publish sanitary and phytosanitary measures in a way to enable the Members to become acquainted with them and, unless there are urgent circumstances, a reasonable interval between the publication and the entry into force must be given for the adaptation of the exporters, particularly those of developing countries. (Annex B(2)). Annex B(3) sets the duty of creation or designation of one enquiry point responsible for answering all reasonable questions from interested Members as well as providing relevant documents related to: (a) any sanitary or phytosanitary regulations adopted or proposed within its territory; (b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory; (c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection; (d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems,

[755] Zahrnt, V. (2019). The WTO`s Trade Policy Review Mechanism: How to Create Political Will for Liberatization? [online] European Centre for International Politics Economy (ECIPE). Available at: https://ecipe.org/wp-content/uploads/2014/12/the-wto2019s-trade-policy-review-mechanism-how-to-create-political-will-for-liberalization-1.pdf, p. 3.

as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements. Under Annex B(4), Members shall ensure copies of documents are requested to be supplied at the same price (if any), apart from the cost of delivery, as to the nationals of the Member concerned.

The provisions from Annex B(5) to Annex B(10), discipline the notification procedures. Annex B(5)(a) establishes that Member shall publish a notice of any regulation that might have significant effect on trade at an early stage as to enable interested Members to become acquainted with them. Annex (5)(b) orders the Members to notify the Members, through the Secretariat, of the products to be covered by the regulation, along with a brief motivation and rationale of the regulation. Annex B(5)(c) sets the duty of the Members to, upon request, provide copies of the regulation and to identify where they substantially deviate from international standards, guidelines or recommendations. Annex B(5)(d) is the culmination of the discipline of regulatory dialogue and determines the Members to allow the others to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account. Annex B(6) exempts the Members of such steps in case of urgent problems of health protection provided that the Member immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, duly motivated and with a description of the nature of the urgent problem(s); furnishes, upon request, copies of the regulation to other Members; and allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account. Annex B (7) determines that notifications to the Secretariat shall be in English, French or Spanish and, if requested by other Members, copies must be provided or, in case of voluminous documents, summaries (Annex B (8)). Under Annex B(9), in case of notifications relating to products of particular interest of specific Members or interested international organizations, copies of the notification shall be promptly circulated to them. Annex B(10) establishes that Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures. Annex B(11) refers to the general reservations of non-requirement for the notifying State to submit versions in non-discriminated languages

and non-requirement for Members to disclose confidential information which could impede enforcement of sanitary or phytosanitary legislation or which could prejudice the legitimate commercial interests of particular enterprises.

The Agreement on Textiles and Clothing (hereinafter ATC) has a plethora of provisions with notification duties (Article 2(2), Article 2(7)(a)(b), Article 2(15), Article 3(1)(3)(4)(5), Article 6(1)(5)(11)(15), Article 7(2)(3), Article 8(3)). The TBT refers explicitly to transparency in Article 15.4 which establishes that no later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee on Technical Barriers to Trade (hereinafter TBT Committee) shall review the operation and implementation of the TBT, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations. Article 2, in practice, like the SPS, establishes that any measure of impact on trade must be notified *at an early appropriate stage*, as to enable interested parties in other Members to become acquainted with it and notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a motivation. Article 5 states that conformity assessment procedures must also be notified *at an early appropriate stage*, as to enable interested parties in other Members to become acquainted with them when amendments can still be introduced and comments taken into account from the other Members. Article 5 also requires notification of other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, with a motivation and, upon request, that they provide to other Members particulars or copies of the proposed procedure and *identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies*. Article 7 applies quite the same guidance of Article 5 to Procedures for Assessment of Conformity.

Article 10 establishes the duty of developed country Members to, if requested, provide, in English, French or Spanish versions of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents. The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to

products of particular interest to them. The notifications to the Secretariat shall be in English, French or Spanish and the Members shall designate a single central government authority that is responsible for the implementation on the national level and, if, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

Article 6 of the Agreement on Trade-Related Investment Measures (hereinafter TRIMs) is specifically focused on transparency and creates the duty to notify the Secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories. Additionally, [e]*ach Member shall accord* ***sympathetic consideration*** *to requests for information, and afford adequate opportunity for consultation, on any matter arising from this Agreement raised by another Member* (emphasis added).

Under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the ADP or Anti-Dumping Agreement), the initiation of an anti-dumping investigation must be notified and a public notice shall be given, as well as public of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Provisional measures also must be be subject of notice. In the same vein, a public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain detailed information on the rationale and the factual basis. Annex II, under the name “Best Information Available in Terms of Paragraph 8 of Article 6”, states that [i]*f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations*.

The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (hereinafter Customs Valuation, or CV) imposes the duty to

inform the rate of exchange to be used where the conversion of currency is necessary (Article 9).

The *Consideranda* of the Agreement on Preshipment Inspection (hereinafter PSI) brings the recognition of the need to provide transparency of the operation of preshipment inspection entities and of laws and regulations relating to preshipment inspection. For that reason, the agreement dedicates a series of provisions on transparency, among which are the following: (1) user Members shall ensure that preshipment inspection activities are conducted in a transparent manner and all the information which is necessary for the exporters to comply with inspection requirements; (2) the preshipment inspection entities shall provide the actual information when so requested by exporters, including references to the laws and regulations of user Members relating to preshipment inspection activities, among other information, that ***shall be made available to exporters in a convenient manner***, and that the preshipment inspection offices maintained by preshipment inspection entities serve as information points where this information is available; (3) all applicable laws and regulations relating to preshipment inspection activities shall be published promptly in such a manner as to enable other governments and traders to become acquainted with them; (4) treat all information received in the course of the preshipment inspection as business confidential to the extent that such information is not already published; (5) the duty to provide information to Members on request on the measures they are taking to give effect to preshipment inspection measures, which shall not require any Member to disclose confidential information; (5) the duty of all User Members to ensure that preshipment inspection entities do not divulge confidential business information to any third party, except that preshipment inspection entities may share this information with the government entities that have contracted or mandated them; (6) that laws and regulations relating to preshipment inspection activities are applied in a non-discriminatory manner.

The Agreement on Rules of Origin (hereinafter RO) also offers in the Consideranda a recognition that providing transparency of laws, regulations, and practices regarding rules of origin is desirable. Part III, Article 5(2) imposes the duty of notification in case of modifications, other than *de minimis* modifications, to the rules of origin or in case of the introduction of new rules of origin, at least 60 days before the entry into force of the modified or new rule in such a manner as to enable

interested parties to become acquainted with it, unless exceptional circumstances arise or threaten to arise for a Member, in which case the publication must be made as soon as possible.

The Agreement on Import Licensing Procedures (hereinafter LIC) has an extensive discipline on notification, with basic guidelines for prompt publication of laws and regulations and their modifications and requirement of opportunity for other parties to have their concerns heard and responded to.

The Agreement on Subsidies and Countervailing Measures (hereinafter SCM) Article 22 addresses public notice and explanation of determinations. Notifications are expected in the cases of initiation of an investigation, imposition of provisional measures, conclusion or suspensions of an investigation. All relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking must also be given with due regard for the requirement for the protection of confidential information. Moreover, notification must be made concerning the termination or suspension of an investigation.

The Agreement on Safeguards (hereinafter SG) provisions on information, transparency and notification were already explored in the section on due process.

Along with these agreements, Annex 3 introduced the Trade Policy Review Mechanism, whose purpose is *to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members*[756]*.*

The TPR consists in periodic reviews of national laws, norms and regulations in order to raise strengths, weaknesses, controversial points and the evolution of the regulatory environment, allowing the parties to resolve doubts and, thus, avoiding litigation and also raising the quality of the disputes considered to be inevitable, after the opportunity for clarification and, eventually, voluntary correction of the countries' policies. The TPR is also considered an important mechanism for national regulatory transparency.

Members recognize the inherent value of domestic transparency of

[756] World Trade Organization. *The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations*. Cambridge University Press. 1999, p. 380.

> government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems[757].

Wolfe does not identify the generations as products of the legislative evolution of the international trade regime and, therefore, does not understand them in terms of the GATT-WTO chronology. Recapturing part of the summary provided in the last paragraphs of the former section, the author holds the right to know principles and provisions as the following: (1) publication of international obligations: GATT Article II, General Agreement on Trade in Services (hereinafter GATS) Article XX (schedules), trande agreements; (2) Publication of laws and regulations: GATT Article X, GATS Article III:1, TRIPS Article 63; (3) Enquiry points for trading partners and economic actors: SPS; TBT; GATS Article III:4; (4) Independent administration and adjudication, including rights for foreign firms: GATT Article X, GATS Telecoms reference paper, Agreement on Government Procurement, Articles XVIII and XIX; (5) Notification through WTO: classified by the form they take or by the use to which they are put in the WTO[758].

For Mavroidis and Wolfe, the first generation is restricted to laws of "general application" related to the unveiling of information[759]. For Karttunen, the first generation is focused on the right-to-know transparency, which prescribes a decentralized system for transparency, a requirement addressed to the Members for the publication of their measures that are related to trade. In this sense, according to Karttunen, the first generation has little impact on the quality of the national regulations[760].

Indeed, starting with GATT Article X, the AB, in relation to the Panel Report in the case of *European Communities - Measures Affecting Importation of Certain Poultry Products* (EC - Poultry), Applicant: Brazil, WT / DS69 / AB / R, para. 115, has

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[757] Ibid.

[758] Wolfe, R. (2013). Letting the Sun Shine in at the WTO: *How Transparency Brings the Trading System to Life*. Economic Research and Statistics Division. Staff Working Paper ed. Geneva: World Trade Organization; Organisation Mondiale Du Commerce -03-06, p. 9.

[759] Mavroidis, P.C. and Wolfe, R. (2015). From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO. *SSRN Electronic Journal*.

[760] Karttunen, M.B. (2020). *Transparency in the WTO SPS and TBT Agreements: the real jewel in the WTO's crown*. Cambridge, United Kingdom New York, NY, USA Cambridge University Press, p. 6.

determined that Article X refers to the publication and administration of 'laws, regulations, court decisions and administrative decisions of general application", not to the substantive content such measures[761]. That was changed later in *European Communities-Selected Customs Matters*, occasion on which the AB *widened the scope of Article X by blurring the distinction between administrative challenges – those addressing the lack of due process, procedural fairness, or transparency in the administration or application of a measure – and substantive challenges – those addressing the consistency of the substance or text of a provision with WTO obligations*[762].

What is observed, however, is that the legal provision is, *verbatim*, more comprehensive than what the authors consider. Article X(1) imposes the duty of prompt publication of laws, regulations, judicial decisions and administrative rulings of general application, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or **other charges**, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or **affecting** their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing **or other use**. Publication must also be made in a manner as to **enable governments and traders** to become **acquainted** with them.

Article X(2) prohibits the effectiveness of measures of general application from occurring before official publication.

Article X(3)(a) imposes the duty of uniform, impartial and reasonable administration of the aforementioned measures.

Article X(3)(b) stipulates to duty of instituting and maintaining independent judicial, arbitral or administrative tribunals or procedures with the competence of, *inter alia*, review and correct administrative actions found out inconsistent with GATT

[761] Thorstensen, V. and de Oliveira, L.M. eds., (n.d.). Releitura dos Acordos da OMC Como Interpretados Pelo Órgão de Apelação. Efeitos na aplicação das regras do comércio internacional. Acordo Geral sobre Tarifas e Comércio 1994 (GATT 1994). [online] Escola de Economia de São Paulo da Fundação Getúlio Vargas Centro do Comércio Global e Investimento. Available at: https://ccgi.fgv.br/sites/ccgi.fgv.br/files/file/Publicacoes/02%20Acordo%20Geral%20sobre%20Tarifas%20e%20Com%C3%A9rcio%201994%20%28GATT%201994%29.pdf. p. 94.

[762] Ala'i, P. and D'Orsi, M. (2014). Transparency in international economic relations and the role of the WTO. In: *Research Handbook on Transparency*. Cheltenham, UK. Northampton, MA, USA: Edward Elgar, p. 381.

discipline. The administrative agency whose decision has been reviewed may appeal to higher courts or to file lawsuits in other courts, *if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.*

Article X(3)(c) makes note that Article X(3)(b) does not constitute a permission to the WTO require the Members the elimination or substitution of procedures in force in their territory. In compensation, these Members will have a duty to fully inform, upon request, the WTO about the procedures and measures under scrutiny.

For Ala'i and D'Orsi,

> The scope of the transparency provisions contained in the WTO covered agreements, like that of any other provision in the agreements, is dependent upon the mandate of the WTO. Is the WTO's mandate focused solely on trade liberalization? Or is it also focused on the promotion of sustainable development, rule of law, and good governance? As no consensus exists concerning the true nature of its mandate, the WTO is currently in the midst of an identity crisis.
>
> (…) Even if we assume that the WTO`s mandate is limited to promoting procedural due process for the benefit of private traders, the due process and transparency provisions of the WTO implement the model of good governance that seeks uniformity and harmonization[763].

Article X represents the first foray into the countries' regulatory framework through the imposition of the duty to create and maintain an independent judicial and administrative structure, whether specialized or not to judge the disputes that arise from the application of GATT. In addition, the duty of uniformity, impartiality and reasonableness in the application of the rule of law imposes the duty. But most importantly, for the purposes of this research, it is the fact that the language of the introductory clause, in *apertus clausus* and using generic terms, seems to indicate the translation of a general principle, even under the guise of a rule. As already discussed in the section on the evolving features on the general principles of international law, some general principles are not mentioned as such, some are not even verbalized, but are tacitly referenced in the PCIJ-ICJ jurisprudence and others,

[763] Ala'i, P. and D'Orsi, M. (2014). Transparency in international economic relations and the role of the WTO. In: *Research Handbook on Transparency*. Cheltenham, UK. Northampton, MA, USA: Edward Elgar, p. 368.

and still others appear in the guise of rules[764]. The same seems to apply in the case of Article X.

Recalling the systematization of the differences between principles and rules offered by Humberto Ávila, this author exposes the schematic picture offered by Ávila from which one can adduce the principle nature of Article X[765]

	Principles	Rules
Immediate Duty	Promoting an ideal state of affairs	Adoption of the described conduct
Mediate duty	Adoption of the necessary conduct	Maintaining loyalty to the underlying purpose and superior principles
Justification	Correlation between conduct effects and the ideal state of affairs	Correspondence between the concept of the norm and the concept of fact
Pretentiousness of decidability	Competition and bias	Exclusivity and scope

> Values constitute the axiological aspect of norms, insofar as they indicate that something is good and, therefore, worthy of being sought or preserved. In this perspective, freedom is a value, and, therefore, it must be sought and preserved. The principles constitute the deontological aspect of the values, because, in addition to demonstrating that something is worth looking for, they determine that this state of affairs should be promoted[766].

This author identifies the nature of principle of law in Article X, although in the form of a rule for transmitting as an immediate duty the promotion of an ideal state of affairs that would be a situation of instrumental transparency, capable of duly informing the parties, a scenario in which the information serves its purpose and the actors are capable of participating beneficially in the WTO. Numerous authors refer to transparency as the basis of the multilateral trade regime itself. Information must be expeditious, provide sufficient data for the analysis of the suitability of the parties' conduct, clear, and be subject to review, either through direct questioning by the Parties, or through a formal hearing process if the clarifications of the adopting Party are considered insufficient or unsatisfactory. Above all, the justification for Article X is precisely *the correlation between conduct effects and the ideal state of affairs.*

[764] Đorđeska, M. (2020). *General principles of law recognized by civilized nations (1922-2018): the evolution of the third source of International Law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Leiden; Boston: Brill Nijhoff, pp. 54-62.
[765] Ávila, H. (2019). *Teoria dos Princípios: da definição a aplicação dos princípios jurídicos*. 19th ed. Malheiros, p. 104.
[766] Ávila, H. (2019). *Teoria dos Princípios: da definição a aplicação dos princípios jurídicos*. 19th ed. Malheiros, p. 186.

In the view of this author, although the case law of the DSB did not contemplate or articulate Article X as a vehicle of a general principle, in light of Ávila's arguments, it is just that, a vehicle with creative potential for the "expansion" of WTO law by looking at this provision from another angle. Article X has greater potential than is recognized and applied by the DSB. *The broad language of Article X allows the WTO to review domestic administrative legal regimes based on interpretation of the terms: uniform, impartial and reasonable*[767]. And this reasonableness criterion gives the transparency measurement exercise a power of consistency, coherence and convergence that is promising as well as relevant. This is in line with the abovementioned conclusions of Ala'i about the (underestimated) role of Article X in promoting the integrity of the multilateral trading system. In legistics, the coherence and integrity of the legal regime is called juridicity. Transparency would, in this aspect, not only be a principle under Ávila's approach, but also might be a postulate, a norm that discerns how the other norms are applied. This author will resume examination of the link between legistics, transparency, principles and postulates in the conclusion of this study.

From 1947 to 1984, no GATT panel dispute report made reference to Article X. In 1984, the U.S complained of violations of Article X of the GATT on some occasions. In that and subsequent decades, the panels stated that it was not necessary to address transparency claims under Article X, such as lack of publication or independent judicial review, because the measures under scrutiny were found to be in violation of other GATT provisions[768].

Then the scenario slowly began to change:

> From 1948 to 1995, only one case occurred in which government's trade measure was challenged pursuant to GATT Article X and found to be a violation. That was the 1989 decision in European Economic Community – Restrictions on Imports of Apples, a complaint by the United States. One charge in that dispute was that the European Economic Community ("EEC") had imposed a quota on apples effective February 14, 1988 yet did not publish the regulation until April 20, 1988. While noting that such publication met Article

[767] Ala'i, P. (2010). From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance. In: D.P. Steger, ed., *Redesigning the World Trade Organization for the twenty-first century*. Ottawa Cairo Dakar Montevideo Nairobi New Delhi Singapore: Wilfrid Laurier University Press, p. 181.

[768] Ala'i, P. and D'Orsi, M. (2014). Transparency in international economic relations and the role of the WTO. In: *Research Handbook on Transparency*. Cheltenham, UK. Northampton, MA, USA: Edward Elgar, p. 371.

> X:1's requirement that measures "be published promptly," the panel, nevertheless, held that the EEC's quota violated Article X:1 because (as the panel saw it) the provision prohibits "back-dated quotas"[769]

From 1995 until 2014, the DSB settled an estimated 29 disputes involving challenges under Article X of GATT 1994[770]. The United States was the Respondent in a good part of them which concerned the administration of safeguards, anti-dumping, and countervailing duty laws[771].

In total, from 1995 until 2019, of the 593 (five hundred and ninety-three) disputes opened with the DSB, 62 (sixty-two) cases were opened disputes, among others, questioning possible breaches to GATT Article X chapeau[772]; 44 to (forty-four)

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[769] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 8.

[770] Ala'I Padideh and D'Orsi, Matthew. Transparency in international economic relations and the role of the WTO. In: Ala'I, Padideh and Vaughn, Robert G. (Edited by). Research Handbook on Transparency. Edward Elgar. Cheltenham, UK. Northampton, MA, USA. 2014. p. 375.

[771] Idem, p. 171.

[772] DS1 Malaysia — Prohibition of Imports of Polyethylene and Polypropylene; DS13 European Communities — Duties on Imports of Grains; DS16 European Communities — Regime for the Importation, Sale and Distribution of Bananas; DS27 European Communities — Regime for the Importation, Sale and Distribution of Bananas; DS44 Japan — Measures Affecting Consumer Photographic Film and Paper; DS 49 United States — Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico; DS56 Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and other Items; DS66 Japan — Measures Affecting Imports of Pork; DS69 European Communities — Measures Affecting Importation of Certain Poultry Products; DS72 European Communities — Measures Affecting Butter Products; DS74 Philippines — Measures Affecting Pork and Poultry; DS81 Brazil — Measures Affecting Trade and Investment in the Automotive Sector; DS99 United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea; DS100 United States — Measures Affecting Imports of Poultry Products; DS102 Philippines — Measures Affecting Pork and Poultry; DS103 Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products DS111 United States — Tariff Rate Quota for Imports of Groundnuts; DS116 Brazil — Measures Affecting Payment Terms for Imports; DS118 United States — Harbour Maintenance Tax; DS133 Slovak Republic — Measures Concerning the Importation of Dairy Products and the Transit of Cattle; DS149 India — Import Restrictions; DS161 Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef; DS183 Brazil — Measures on Import Licensing and Minimum Import Prices DS184 United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan; DS198 Romania — Measures on Minimum Import Prices; DS206 United States — Anti-Dumping and Countervailing Measures on Steel Plate from India; DS210 Belgium — Administration of Measures Establishing Customs Duties for Rice; DS211 Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey; DS229 Brazil — Anti-Dumping Duties on Jute Bags from India; DS234 United States — Continued Dumping and Subsidy Offset Act of 200; DS237 Turkey — Certain Import Procedures for Fresh Fruit; DS244 United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan; DS258 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS260 European Communities — Provisional Safeguard Measures on Imports of Certain Steel Products; DS262 United States — Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany; DS268 United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina; DS275 Venezuela — Import Licensing Measures on Certain Agricultural Products; DS279 India — Import Restrictions Maintained Under the Export and Import Policy 2002-2007; DS281 United States — Anti-Dumping Measures on Cement from Mexico

DS282 United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico; DS288 South Africa — Definitive Anti-Dumping Measures on Blanketing from Turkey; DS291 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products

Article X:1[773]; 18 (eighteen) to Article X: 2[774], 44 (forty-four) to Article X:3[775]; and 62

[773] DS44 Japan — Measures Affecting Consumer Photographic Film and Paper; DS55 Indonesia — Certain Measures Affecting the Automobile Industry; DS64 Indonesia — Certain Measures Affecting the Automobile Industry; DS72 European Communities — Measures Affecting Butter Product; DS113 Canada — Measures Affecting Dairy Exports; DS210 Belgium — Administration of Measures Establishing Customs Duties for Rice; DS284 Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua; DS291 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS292 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS302 Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes; DS315 European Communities — Selected Customs Matters; DS334 Turkey — Measures Affecting the Importation of Rice; DS342 China — Measures Affecting Imports of Automobile Parts; DS345 United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties; DS348 Colombia — Customs Measures on Importation of Certain Goods from Panama; DS355 Brazil — Anti-dumping Measures on Imports of Certain Resins from Argentina; DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines; DS375 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products; DS376 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products; DS377 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products; DS389 European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States; DS394 China — Measures Related to the Exportation of Various Raw Materials; DS395 China — Measures Related to the Exportation of Various Raw Materials; DS398 China — Measures Related to the Exportation of Various Raw Materials; DS438 Argentina — Measures Affecting the Importation of Goods; DS444 Argentina — Measures Affecting the Importation of Goods; DS445 Argentina — Measures Affecting the Importation of Goods; DS446 Argentina — Measures Affecting the Importation of Goods; DS448 United States — Measures Affecting the Importation of Fresh Lemons; DS457 Peru — Additional Duty on Imports of Certain Agricultural Products; DS465 Indonesia — Importation of Horticultural Products, Animals and Animal Products; DS477 Indonesia — Importation of Horticultural Products, Animals and Animal Products; DS478 Indonesia — Importation of Horticultural Products, Animals and Animal Products; DS484 Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products; DS501 China — Tax Measures Concerning Certain Domestically Produced Aircraft; DS512 Russia — Measures Concerning Traffic in Transit; DS513 Morocco — Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey; DS526 United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights; DS527 Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS528 Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights; DS532 Russia — Measures Concerning the Importation and Transit of Certain Ukrainian Products; DS568 China — Certain Measures Concerning Imports of Sugar; DS583 Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products; DS592 Indonesia — Measures Relating to Raw Materials

[774] DS210 Belgium — Administration of Measures Establishing Customs Duties for Rice; DS334 Turkey — Measures Affecting the Importation of Rice; DS345 United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties; DS375 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products; DS376 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products; DS377 European Communities and its Member States — Tariff Treatment of Certain Information Technology Products; DS444 Argentina — Measures Affecting the Importation of Goods; DS445 Argentina — Measures Affecting the Importation of Goods; DS446 Argentina — Measures Affecting the Importation of Goods; DS498 India — Anti-Dumping Duties on USB Flash Drives from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; DS512 Russia — Measures Concerning Traffic in Transit; DS513 Morocco — Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey; DS526 United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS527 Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights; DS528 Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights; DS532 Russia — Measures

(fity two) to Article: 3(a)[776].

Concerning the Importation and Transit of Certain Ukrainian Products; DS568 China — Certain Measures Concerning Imports of Sugar; DS583 Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products

[775] DS44 Japan — Measures Affecting Consumer Photographic Film and Paper; DS179 United States — Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea; DS210 Belgium — Administration of Measures Establishing Customs Duties for Rice; DS211 Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey; DS217 United States — Continued Dumping and Subsidy Offset Act of 2000; DS234 United States — Continued Dumping and Subsidy Offset Act of 2000; DS249 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS251 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS252 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS254 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS257 United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada; DS258 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS259 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS264 United States — Final Dumping Determination on Softwood Lumber from Canada; DS296 United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea; DS299 European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea; DS302 Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes; DS315 European Communities — Selected Customs Matters; DS323 Japan — Import Quotas on Dried Laver and Seasoned Laver; DS325 United States — Anti-Dumping Determinations regarding Stainless Steel from Mexico; DS336 Japan — Countervailing Duties on Dynamic Random Access Memories from Korea; DS342 China — Measures Affecting Imports of Automobile Parts; DS355 Brazil — Anti-dumping Measures on Imports of Certain Resins from Argentina; DS366 Colombia — Indicative Prices and Restrictions on Ports of Entry; DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines; DS384 United States — Certain Country of Origin Labelling (COOL) Requirements; DS394 China — Measures Related to the Exportation of Various Raw Materials; DS395 China — Measures Related to the Exportation of Various Raw Materials; DS398 China — Measures Related to the Exportation of Various Raw Materials; DS409 European Union and a Member State — Seizure of Generic Drugs in Transit; DS438 Argentina — Measures Affecting the Importation of Goods; DS445 Argentina — Measures Affecting the Importation of Goods; DS446 Argentina — Measures Affecting the Importation of Goods; DS448 United States — Measures Affecting the Importation of Fresh Lemons; DS484 Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products; DS488 United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea; DS506 Indonesia — Measures Concerning the Importation of Bovine Meat; DS532 Russia — Measures Concerning the Importation and Transit of Certain Ukrainian Products; DS545 United States — Safeguard measure on imports of crystalline silicon photovoltaic products; DS546 United States — Safeguard measure on imports of large residential washers; DS562 United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products; DS574 United States — Measures relating to trade in goods and services; DS575 Colombia — Measures concerning the distribution of liquid fuels

[776] DS55 Indonesia — Certain Measures Affecting the Automobile Industry; DS64 Indonesia — Certain Measures Affecting the Automobile Industry; DS155 Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather; DS254 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS284 Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua; DS293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS302 Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes; DS323 Japan — Import Quotas on Dried Laver and Seasoned Laver; DS334 Turkey — Measures Affecting the Importation of Rice;;; DS343 United States — Measures Relating to Shrimp from Thailand; DS348 Colombia — Customs Measures on Importation of Certain Goods from Panama; DS366 Colombia — Indicative Prices and Restrictions on Ports of Entry; DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines; DS384 United States — Certain Country of Origin Labelling (COOL) Requirements; DS386 United States — Certain Country of Origin Labelling Requirements; DS397 European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China; DS405 European Union — Anti-Dumping Measures on Certain Footwear from China; DS407 China — Provisional Anti-

In the Report issued by the AB in February 10, 1997 concerning the case *United States Panel Report - Restrictions on Imports of Cotton and Man-made Fiber Underwear,* the principle of transparency was first mentioned in an articulation that cabined it as a policy rather than a legal principle[777]:

> (…) Article X:2 represents the principle of transparency, which relates to the principle of due process. Its essential implication is that Members and others affected by government measures that impose restrictions, requirements or other burdens should have the opportunity to access information about such measures to protect themselves or seek to change them. In this sense, the Appellate Body noted that Article X does not address the possibility of giving retroactive effect a safeguard restriction measure, that is, if there is no authority that allows its retroactive effect, such deficiency is not remedied just by prior publication of such measure[778].

There was no elaboration in the literature of the reasons why the AB invokes

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Dumping Duties on Certain Iron and Steel Fasteners from the European Union; DS431 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum; DS432 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum; DS433 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum; DS55 Indonesia — Certain Measures Affecting the Automobile Industry; DS64 Indonesia — Certain Measures Affecting the Automobile Industry; DS155 Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather; DS254 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS284 Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua; DS293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS302 Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes; DS323 Japan — Import Quotas on Dried Laver and Seasoned Laver; DS334 Turkey — Measures Affecting the Importation of Rice; DS343 United States — Measures Relating to Shrimp from Thailand; DS348 Colombia — Customs Measures on Importation of Certain Goods from Panama; DS366 Colombia — Indicative Prices and Restrictions on Ports of Entry; DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines; DS384 United States — Certain Country of Origin Labelling (COOL) Requirements; DS386 United States — Certain Country of Origin Labelling Requirements; DS397 European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China; DS407 China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union; DS431 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenu; DS432 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum; DS433 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum; DS55 Indonesia — Certain Measures Affecting the Automobile Industry; DS64 Indonesia — Certain Measures Affecting the Automobile Industry; DS155 Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather; DS254 United States — Definitive Safeguard Measures on Imports of Certain Steel Products; DS284 Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua; DS293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS302 Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes; DS323 Japan — Import Quotas on Dried Laver and Seasoned Laver; DS334 Turkey — Measures Affecting the Importation of Rice.

[777] United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear (US-Underwear). WT/DS24/AB/R. p. 20-21.

[778] Thorstensen, V. and de Oliveira, L.M. eds., (n.d.). Releitura dos Acordos da OMC Como Interpretados Pelo Órgão de Apelação. Efeitos na aplicação das regras do comércio internacional. Acordo Geral sobre Tarifas e Comércio 1994 (GATT 1994). [online] Escola de Economia de São Paulo da Fundação Getúlio Vargas Centro do Comércio Global e Investimento. Available at: https://ccgi.fgv.br/sites/ccgi.fgv.br/files/file/Publicacoes/02%20Acordo%20Geral%20sobre%20Tarifas%20e%20Com%C3%A9rcio%201994%20%28GATT%201994%29.pdf. p. 94.

the principle of transparency, which is also in this instance linked to the due process principle, in a fashion that assigns it characteristics of a principle of law. This author considers that the Report was purposely ambiguous. While recognizing the existence of the legal principle of transparency, it does not wish to compromise its jurisprudence by asserting that transparency would be a general WTO law, but had to concede its existence and centrality in Article X, so it sought an oblique approach. Moreover, the AB recognized the incidence of the legal provision on *Members and private persons and enterprises, whether of domestic or foreign nationality*.

> This is a significant interpretation because very few of the disciplines in GATT are generally thought to encompass persons and enterprises of domestic nationality vis-à-vis their own government. Here the Appellate Body recognizes the fundamental nature of the transparency principle in GATT Article X:2 and its importance to private persons and enterprises on both sides of a transborder transaction[779].

Maria Panezi goes further in asserting that Article X, by directly making informational and adjudicatory resources for traders obligatory, exhibits elements of individual-rights based legitimacy[780]. The protection of the expectations of traders became a *distinguishing feature of the WTO-era Article X jurisprudence*, as *United States-Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (US-Oil Country Tubular Goods Sunset Reviews) and *Argentina-Hides and Leather* reveal[781].

The case law on the GATS provisions for transparency broadens its radial concepts. Transparency as a means of ensuring clarity, security and predictability was articulated by the DSB. In *US-Gambling,* the Panel, concerning the interpretation and application of the GATS preamble`s reference to transparency, found that *the scope of the United States' commitment in its GATS Schedule on "Other recreational services, except sporting" extends to gambling and betting services*[782] for the

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[779] Charnovitz, S. (2005). *Transparency and Participation in the World Trade Organization*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=710522 [Accessed 1 Jul. 2020]. p. 8.

[780] Panezi, M. (2015). *Through the Looking Glass: Transparency in the WTO*. [PhD Thesis] p.49. Available at: https://digitalcommons.osgoode.yorku.ca/phd/15/ [Accessed 1 Jul. 2020]. p. 28.

[781] Ala'i, P. (2010). From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance. In: D.P. Steger, ed., *Redesigning the World Trade Organization for the twenty-first century*. Ottawa Cairo Dakar Montevideo Nairobi New Delhi Singapore: Wilfrid Laurier University Press, pp. 173-174.

[782] World Trade Organization Legal Affairs Division (2012). *WTO Analytical Index*. 3rd ed. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Mexico City: Cambridge University Press, p. 2339.

Schedules are integral part of the GATS and must be interpreted according to Article 31 and 32 of the Vienna Convention on the law of treaties[783].

> The Panel referred to the requirement of "transparency" found in the preamble to the GATS, as supporting the need for precision and clarity in scheduling, and underlining the importance of having Schedules that are "readily understandable by all other WTO Members, as well as by services suppliers and consumers[784].

Also, for the sake of clarity and specification, in *China–Publications and Audiovisual Product*, the Panel summarized the guidance provided by the AB on the various instruments that have potential value in the interpretation of GATS schedules, apart from the WTO Agreement and its constituent parts: the 1991 United Nations Provisional Central Product Classification (hereinafter CPC) and the GATT Secretariat document "Services Sectoral Classification List" (MTN.GNS/W/120, hereinafter W/120)[785].

The need for clarity and specification was also behind the decision of the Council for TRIPS to adopt the rules of procedure for notification under Article 63.2, *including a possible format for listing of "Other Laws and Regulations" and a Checklist of Issues on Enforcement*. Article 2 of the Agreement between the World Intellectual Property Organization (hereinafter WIPO) and the WTO have provisions about notifications and translation of laws and regulations under the former Article[786] as well.

The first function of transparency is to mitigate information asymmetry, which accentuates power imbalances[787]. The first generation of WTO transparency basically addresses this question. Luciana Pires Dias[788] reminds that the Austrian School of Economics was the first to approach the economic importance of knowledge and information. Hayek, in particular, by challenging the Pure Logic of Choice school, questions the meaning of the state of equilibrium and how it can be

[783] World Trade Organization Legal Affairs Division (2012). *WTO Analytical Index*. 3rd ed. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Mexico City: Cambridge University Press, p. 2339.
[784] *Idem*.
[785] Ibidem.
[786] Ibidem.
[787] Wolfe, R. (2013). Letting the Sun Shine in at the WTO: *How Transparency Brings the Trading System to Life*. Economic Research and Statistics Division. Staff Working Paper ed. Geneva: World Trade Organization; Organisation Mondiale Du Commerce -03-06. p. 5.
[788] Dias, L.P. (2014). *Transparência como Estratégia Regulatória no Mercado de Valores Mobiliários: um estudo empírico das transações com partes relacionadas*.

disturbed[789]. For Hayek, the apparent subsidiary hypotheses or assumptions that people learn from experience and can reasonably acquire relevant knowledge to inform their transactions is brought to the forefront and questioned because of its inconsistency with practical life experience. Hayek even names this condition the Division of Knowledge structure, which he maintains is as important as the Division of Labor. Economists customarily stress the importance of knowledge of prices. Hayek reveals that prices are but a partial aspect of the economic reality.

Beth Allen explains that the demand for information is usually derivative. Traders desire it for the sake of optimizing their profits and attaining greater certainty in an undefined scenario. Since a good amount of relevant information of trade is public and the information is free of charge, many are recalcitrant to invest time or money in information production[790].

As Dias reckons:

> Hayek (...) noticed three important phenomena: information and economy relationships. First, when questioning the formal models of classical economists and their premises - particularly that of the rational man - (...) he noted that knowledge and information influence economic decisions, just as the state of knowledge of individuals affects the economic balance.
> According to Hayek, the actions of economic agents are formulated on a subjective plane that depends on the knowledge of each individual and how he absorbs and deals with the information he receives. (...)
> A second finding by Hayek is that information and knowledge are not one: each individual has his own knowledge and preferences, and such knowledge is far from perfect or complete. (...) [Knowledge is fragmented by the market and [is] constantly changing. (...) [Finally], the market and its characteristic decentralization of the price system were the best instrument to resolve this multiplicity of knowledge and preferences.[791].

The idea of information as a *commodity*, *lato sensu*, is now well grounded in economics as well as law. The imbalance of information of countries and parties about the world regulatory ambiance reinforces the asymmetry conditions identified by Hayek and the balance-of-power among nations. Transparency mechanisms in

[789] Hayek, F.A. von (1937). Economics and Knowledge. *The London School of Economics and Political Science*, 4(13), pp.33–54.
[790] Allen, B. (1990). Information as an Economic Commodity. *The American Economic Review*, [online] 80(2), pp.268–273. Available at: https://www.jstor.org/stable/2006582 [Accessed 19 Apr. 2020].
[791] Dias, L.P. (2014). *Transparência como Estratégia Regulatória no Mercado de Valores Mobiliários: um estudo empírico das transações com partes relacionadas*. p. 17.

the WTO are, therefore, providential for small countries and small firms and a fundamental step to effectively achieve parity of arms [792].

The market correction brought by transparency is not the only advantage of enshrining it as a policy principle:

> (…) in a perfectly transparent system, all Members would, in the first instance, have equal opportunities to try to solve issues at an informal level, either bilaterally or in Committee meetings. Second, Members would have equal insight into and knowledge of other Members' trade regimes and potentially trade-restrictive measures, and each would therefore have a similar chance to weigh the opportunity costs of litigating or not. And finally, if it decides to pursue litigation and having progressed through of litigating or not. And finally, if it decides to pursue litigation and having progressed through the three generations of transparency, any WTO Member should have accumulated the necessary information with which to build a solid legal case against another Member whose measure is affecting trade[793].

As already mentioned more than once, transparency brings coherence and consistency to the system, in addition to integrity. Transparency enables regulatory dialogue and voluntary and non-litigious adjustments to conduct, whether through bureaucratic-institutional learning or due to negotiations at the bureaucratic level. In this sense, and as already noted, there is a fact of order and cohesion of the system, that is, a principle of legality, or even a postulate, in addition to a general principle of law.

Reasonability is, according to Avila, a specific postulate. And, according to Article X of the GATT, transparency allows regulatory review based on reasonableness. Transparency would thus be the precondition for the assessment of reasonableness. It needs to be qualified because the mere publication of acts, without the necessary specification, clarity and involvement of the actors in the definition of their terms, does not always offers the appropriate instruments for measuring reasonableness. Thus, transparency would also be, apart from a general principle, a normative postulate and structural duty in the order of the WTO for establishing the link between elements and the imposition of a certain relationship between them. Transparency would be an unspecified postulate, a mere general idea devoid of

[792] Mavroidis, P.C. and Wolfe, R. (2015). From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO. *SSRN Electronic Journal*, p. 5.
[793] Karttunen, M.B. (2020). *Transparency in the WTO SPS and TBT Agreements: the real jewel in the WTO's crown*. Cambridge, United Kingdom New York, NY, USA Cambridge University Press, p. 11.

guiding criteria for application. By contrast, reasonability is a specific postulate, one which requires consideration of the relationship of specific elements[794].

3.2.1.1.3.1.1 First Generation Shortcomings

This study has already argued that the numerical and technical deficiencies of human resources in the least developed and developing countries are recurrent reasons for underreporting. However, even developed countries fails in respecting WTO reporting rules. By way of example, only 77 of the 164 members of the WTO presented notifications to the WTO about their emergency measures related to COVID-19[795]. In 2011, 71 Members failed to issue that year's required notification[796].

Mavroidis and Wolfe have identified three other reasons for underreporting: it opens more room for criticism of them and potentially provides future plaintiffs with evidence against themselves; the lack of trust between trade negotiators and other government agencies; and, finally, the ambiguity about what information ought to be disclosed when the technical terms of the WTO agreements are poorly understood. In addition, there is a shared feeling that no other remedy for the lack of transparency exists other than the imposition of the duty of transparency, which makes any victory in litigation pyrrhic, as such judgments do not correct the harm done and do not convincingly guarantee future compliance with the transparency requirements[797].

For Valentin Zahrnt, *little is known about the actual quality and effectiveness of the TPRM. The self-assessments of the Trade Policy Review Body offer much praise and no evidence, while the academic literature is largely descriptive and*

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[794] Ávila, H. (2019). *Teoria dos Princípios: da definição a aplicação dos princípios jurídicos*. 19th ed. Malheiros, pp. 184-186.

[795] Only 300 notifications were made to the WTO related to COVID-19: Albania (1), Antigua and Barbuda (2), Argentina (16), Australia (9), Bangladesh (6), Benin (4), Botswana (1), Burkina Faso (4), Brazil (37), Cabo Verde (4), Canada (3), Chile (4), China (4), Chinese Taipei (10), Czech Republic (2), Colombia (13), Costa Rica (9), Cote d'Ivoire (4), Denmark (2), Dominican Republic (10), Ecuador (11), Egypt (27), El Salvador (9), European Union (18), Gambia (4), Georgia (2), Ghana (4), Guatemala (5), Guinea (4), Guinea-Bissau (4), Honduras (5), Hungary (3), Indonesia (2), Israel (12), Jamaica (3), Japan (2), Kazakhstan (1), Kenya (20), Kyrgyz Republic (2), Liberia (4), Mali (4), Mauritius (2), Mexico (1), Myammar (2), Morocco (2), Namibia (1), Nicaragua (5), Niger (4), Nigeria (4), New Zealand (3), North Macedonia (2), Norway (2), Panama (5), Paraguay (9), Peru (11), Philippines (14), Republic of Korea (14), Republic of Moldova (2), Russian Federation (6), Saint Kitts and Nevis (2), Saint Lucia (2), Saint Vincent and the Grenadines (2), Saudi Arabia (1), Senegal (4), Sierra Leone (4), Singapore (2), South Africa (8), State of Kuwait (17), Switzerland (7), Thailand (11), Togo (4), Turkey (1), United Arab Emirates (1), Uganda (3), Ukraine (7), United States (18), Vietnan (3). In: WTO members' notifications on COVID-19. https://www.wto.org/english/tratop_e/covid19_e/notifications_e.htm

[796] Mavroidis, P.C. and Wolfe, R. (2015). From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO. *SSRN Electronic Journal*, p. 4.

[797] *Idem*, pp. 3-4.

outdated [798] . The three steps (preparation of reports, review meeting and dissemination) of Trade Policy Review (herein TPR) explains Zahrnt's positive appreciation of the mechanism, an opinion not shared by most mass media outlets or by specialized academics, which has diminished Zahrnt's own interest in the topic. More critical voices denounce the mechanism as having *no matterial effect on quality of trade policies*[799].

The Trade Policy Review Mechanism (hereinafter TPRM) has huge potential for facilitating negotiations, focusing international attention and influencing domestic politics, mainly by solving the problem of collective action in developing countries where bureaucratic games and weakly republican environments usually lead to overlapping administrative bailiwicks, which can often undermine the formal legal and administrative logic. For Zahrnt, improvements in the TPR reports would include: 1. Clearer, sharper, and more consistent structures in order to make the TPRs easier to read and understand; 2. TPRs could be better compared across time and countries; 3. Establishing a detailed outline for reports could help to make them more succinct and comparable; 4. It could make reports more complete and avoid unpleasant aspects being omitted; 5. Such an analytical grid (qualitative description, quantitative description, analysis of trade and welfare effects, issues raised by trading partners and policy making procedures) would secure greater consistency in the severity of criticism across TPRs; 6. It could guide countries as to what information is expected from them and, over the long term the information, once routines for their collection have been created, could be provided on a regular basis independently of TPRs[800].

3.2.1.1.3.2 Notification and Surveillance or Targeted Transparency

Following Wolfe's classification, the principles and provisions of the second generation of transparency in WTO are: (1) general clarity in domestic trade policy, whose examples are the Trade Policy Review Mechanisms (herein TPRMs), country reviews, annual and monitoring reports; (2) peer review, whose examples are

[798] Zahrnt, V. (2019). The WTO`s Trade Policy Review Mechanism: How to Create Political Will for Liberatization? [online] European Centre for International Politics Economy (ECIPE). Available at: https://ecipe.org/wp-content/uploads/2014/12/the-wto2019s-trade-policy-review-mechanism-how-to-create-political-will-for-liberalization-1.pdf. pp.11-12.
[799] Idem, p. 5.
[800] Ibidem, pp. 11-12.

committee reviews, “specific trade concerns” in SPS 12:2 and TBT 13:1 and a similar procedure in Agriculture 18:6 and 18:7, ASCM 25:8, and ILP 4; (3) Third party adjudication, whose example is the Dispute Settlement System[801]. In this generation, transparency gains an element of fairness and legitimacy. Mavroidis and Wolfe argue that notification obligations expanded in the 1980s with the Tokyo Round[802] and took shape with the WTO.

Kartunnen, referring to Fung, defines the second generation of transparency as encompassing “mandates access to precisely defined and structured factual information from private or public sources with the aim of furthering particular policy objectives” and aims to provide “facts that people want in time, places, and ways that enable then to act.”[803] Notification and monitoring and surveillance mechanisms certainly are steps forward in the search for qualified transparency. The desired benefit is not only the extension of the duty to inform (through notifications about the entry into force of new laws, rules and regulations or their modifications) but also the prospect of improved regulatory quality. This is because better practices and consistency, coherence and convergence to WTO rules will be indirectly demanded through peer review and eventually litigated if there is the perception that the country’s performance is not in accordance with the multilateral regime. It is the inception of regulatory cooperation that marks another step further in the endeavor towards that characterizes this next generation.

The regular (42) and *ad hoc* (134) notification obligations have spread out to virtually all WTO agreements. They make up 176 notification obligations, which open different channels for communication, clarification and eventual correction of directives, making recourse to the DSB indispensable, or at least making adjudication more qualified if litigation arises. They also open greater opportunity for mutual learning and exchange of experiences between the actors in the search for a more rational national regulation, placing in perspective the decision-making power of

[801] Wolfe, R. (2013). Letting the Sun Shine in at the WTO: *How Transparency Brings the Trading System to Life*. Economic Research and Statistics Division. Staff Working Paper ed. Geneva: World Trade Organization; Organisation Mondiale Du Commerce -03-06. p. 12.
[802] Mavroidis, Petros C. and Robert Wolfe. From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO. RSCAS. Policy Papers. European University Institute. Robert Shcuman Centre for Advanced Studies. Global Governance Programme. 2015. p. 2.
[803] Karttunen, Marianna B. *Transparency in the WTO SPS and TBT Agreements. The Real Jewel in the Crown*. Cambridge University Press. International Trade and Economic Law. p. 6.

bureaucratic agents in face of political agents in regulatory decisions[804]. After the Great Recession of 2008, the WTO began issuing periodic crisis monitoring reports, a practice still in force that has picked up during the COVID pandemic.

3.2.1.1.3.3 Reality Check, Interactive Transparency, Report and engagement: Information Enabling Dialogue

The legal architecture of WTO concerning transparency is three-fold, a result of three generations of rules, according to Mavroidis and Wolf[805]: 1. The original GATT policies on information; 2. The monitoring and surveillance mechanisms; 3. The management of an enlarged WTO and in response to the perceived need for greater openness to the public. Wolfe summarizes the principles of this generation of transparency by referring to internal and external transparency and the role of NGOs.

Kartunnen defines transparency as the collaborative, interactive aim to improve the efficiency of procuring information. For the author, enquiry points and specific trade concerns belong to this generation. As we have reviewed the essential characteristics of these principles, we will not make any major interpretations to this generation.

For Karttunen, in her remarkable book about transparency in the WTO SPS and TBT agreements, the notifications are responsible for easing litigation in the WTO, which meets the procedural economic policies and reduces the financial burden on potential parties who, having to prepare to instruct cases, invariably, they should hire onerous law firms. Furthermore, for the author, the notification system, when qualifying doubts, would make an eventual litigation more objective and specific and, especially for countries with less financial and personnel resources, would help in the formation of the legal argument.

The *ex ante* transparency, meaning the effective access to useful information about all Member`s policies, encouraging regulatory dialogue and co-operative rule-making, is a potential transparency substitute for dispute settlement. In fact, Kartunnen provides evidence that the transparency filters of the SPS and TBT

[804] Mavroidis, P.C. and Wu, M. (2013). *The law of the World Trade Organization (WTO): documents, cases & analysis*. 2nd ed. St. Paul, Mn: West, p.267. American Casebook Series. pp.267-268.
[805] Mavroidis, P.C. and Wolfe, R. (2015). From Sunshine to a Common Agent. The Evolving Understanding of Transparency in the WTO. *SSRN Electronic Journal*.

agreements has an anti-litigation effect. The SPS and TBT disputing pyramid, from 1995 to 2018, with its 7 filters (domestic measures affecting trade, bilateral comment or enquiry, specific trade concern, hiring lawyer, request for consultations, Panel and Appellate Body) evidences a significant decrease between the base of the pyramid (domestic measures affecting trade) and its top (AB). At the base, during the period analyzed, 57624 were notifications of domestic measures; 1023 specific trade concern; 103 requests for consultations; 47 panels; and 25 AB triggered on these measures[806]. Those filters refine mutual and even self-understanding, since many bureaucracies learn about the dysfunctionalities of their own norms and non-conformity to the WTO rules.

STC (Specific Trade Concerns) can raise more than on issue of concern, since a national norm might contradict more than one aspect of the multilateral trade law. In the period slightly inferior to the one considered for the presentation of the numbers above (2010-2014), 25% of the SPS STCs questioned the transparency of the national norms or requested further information or clarification. 47% of the TBT STCs addressed transparency issues and 81% requested more information or clarification[807].

Numbers also demonstrate the increased engagement of the Members in SPS and TBT notifications, revealing both the willingness to properly adhere to the WTO rules and also the awareness that transparency enhances reputation as a credible trade partner[808].

To sum up, numbers also reveal an increase in the absolute number of TBT STCs regarding non-notified measures, demonstrating first that they serve to raise awareness about those measures, but also indicating the potentiality of regulatory debate[809].

For Karttunen, transparency is the real jewel in the WTO crown. This author rescues the joke already presented: if it is not the jewel in the crown, it is, at the very least, the silver of the house and allows diners to serve themselves as a rewarding banquet for exchanging experiences and initiating regulatory cooperation.

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[806] Karttunen, Marianna B. *Transparency in the WTO SPS and TBT Agreements. The Real Jewel in the Crown*. Cambridge University Press. International Trade and Economic Law. p. 135.
[807] *Idem*, p. 176.
[808] Ibidem, pp. 158-159.
[809] Ibidem, p. 158.

Chapter 4
Possible Ways To Improve Transparency Standards In The Multilateral Trade Regime

Transparency is unfathomable to the multilateral trade regime, whatever its radial manifestation. It is an assumption of the rule of law, it supports the due process and good faith, it is dressed in the guise of rule in various WTO agreements and, finally, when these rules demonstrate evasion of means, they nevertheless signal the desired end and denounce, with this, the existence of a principle of the multilateral trade regime.

Transparency is also an institutional policy not only desirable for the correction of information asymmetries, but also essential for overcoming the legitimacy crisis that international institutions have faced, as well as for advancing the rule of law without the involvement of political actors. and, therefore, without the usual impasses arising from high political agendas. By making regulatory dialogue possible, it facilitates regulatory cooperation and, therefore, greater regulatory coherence, consistency and convergence, a topic of the highest importance in the current generation of non-tariff barriers.

As a promoter of the integrity of the system, transparency is a structural principle and postulate that fosters coherence. And this is of inestimable relevance in the legislative activity.

Celebrating transparency as one of the defining principles of the rule of law and even or even as a principle of law in the multilateral system of trade (as a source of law), although in its radial aspect, offers elements in the political and legal discourse on the conception permissible good and virtue[810], but it is not a solution to the still existing problem of flaws in the transparency mechanism.

The shortcomings of the notification system have many origins, from the practical difficulties some countries face in notifying, due to due to insufficient human and material resources or lack of specific training of public officials in charge of the notification mission. Furthermore, the notion of information as potentially strategic may keep some officials and governments from recalcitrant in accusations of changes in internal regulations that have an impact on international trade [811] . The

[810] Rawls, J. (2011). *Liberalismo político*. Translated by Á. de Vita. Torino: WMF Martins Fontes, p.224
[811] Karttunen, Marianna B. *Transparency in the WTO SPS and TBT Agreements. The Real Jewel in the Crown*. Cambridge University Press. International Trade and Economic Law, pp. 147-155

consequences are basically two: underreporting or notifying or unclear and intelligible national norms, even for the epistemic foreign trade community.

Ways of tackling both problems have divided analysts. The US and the European Union have been postulating the addition of teeth to the transparency rules in the WTO, by creating administrative penalties in case of non-compliance. This represents the most extreme proposal.

In the famous documents JOB/GC/204/Rev.3 and JOB/CTG/14/Rev.3 and its addenda[812], also called “Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements”, a large building block, leaded by the United States and the European Union, defends and architecture of administrative penalties composed of 2 phases. In Phase 1, after one year the expiration of the notification deadline, WTO Member in arrears would be subject of the following measures: (i) Shall be designated as a "WTO Member with notification delay"; (ii) Shall be called upon to speak in WTO formal meetings after all other WTO Members have taken the floor, but before any observers; (iii) Shall be identified as a "Member with notification delay" when offered the floor in the General Council; (iv) Shall have its overall notification compliance reported upon annually by the Secretariat in the Council for Trade in Goods; and (v) Shall not have its representatives be nominated to preside over WTO bodies. In Phase 2, the following measures should be applied in relation to the Member: (i) shall have its notification performance reported upon by the Secretariat annually at General Council Meetings; (ii) may pose questions during Trade Policy Reviews, but Members shall not be obliged to respond; and(iii) shall be assessed a charge to its next annual contribution, and each annual contribution until the relevant notification is submitted. The charge shall be set at the rate to be defined of its normal assessed contribution to the WTO budget per outstanding notification. Phase 1 and 2 Measures shall be immediately rescinded when the Member has submitted the relevant notification(s).

The previous versions of the document brought as a trigger for the penalties

[812] Argentina, Australia, Canada, Costa Rica, The European Union, Israel, Japan, New Zealand, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and The United States (2020). *General Council Council for Trade in Goods Draft General Council Decision Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements Decision of X Date*. [online] Geneva, Switzerland: World Trade Organization. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/204R3.pdf&Open=True [Accessed 20 Mar. 2021].

of phases one and two, in relation to developing countries, the absence of a request for assistance to the WTO after the verification of the non-compliance with the transparency rules. The withdrawal of the trigger in the current version and the maintenance of the fine forecast make the document (even more) insensitive to the administrative difficulties peculiar to developing countries. These measures aim to bring the character of coercivity to the obligation of transparency.

Ontologically, the lack of coerciveness in International Law has always raised questions about its legal nature or character, also called, in some countries, juridicity. Dihn, Daillier and Pellet[813] present three streams of deniers of the juridical character of the International Law: radicals, moderates and those that identify the International Law to the external public law of the State. The third idea would bring International Law closer to the notion of International Administrative Law in the meanings attributed to it in the first decades of the twentieth century.

For Crawford, effectiveness was not even at the center of the debate:

> The classification of a system as legal does not predetermine its effectiveness: witness various national law systems in greater or lesser disarray. The question is whether the rules, traditions, and institutions of a given system enjoy at least some salience within the relevant society, meet its social needs, and are applied through techniques and methods recognizably legal- as distinct from mere manifestations of unregulated force. There is no reason to deny to such systems the classification of being legal – recognizing, however, that this leaves many questions open.
> During the twentieth century, this understanding of International Law has been further articulated through sociological theories, as well as, latterly, by the resurgence of a more rigorous and pragmatic natural law approach[814].

In municipal law, coerciveness is only one element of juridicity, although a very important one. Bills that do not contain it only succeed in the legislative process if they address to another rule of the same legal status or of an inferior one the duty to regulate the penalties attributable in the case of disobedience of their commands.

Juridicity has a *lato sensu* meaning and a *strictu sensu* one. Luciano de Oliveira explains that the law demands organicity. Law should be characterized as a system, as a set of elements coordinated with each other, forming an organized structure for a common purpose. Juridicity would be, therefore, the compliance with

[813] Dinh, N.Q., Daillier, P. and Pellet, A. (1992). *Direito Internacional Público*. 4th ed. Translated by V.M. Coelho. Lisboa: Fundação Calouste Gulbenkian, pp.78–79.
[814] Crawford, J. (2019). *Brownlie's Principles of Public International Law*. 9th ed. Oxford United Kingdom: Oxford University Press, p.11.

the juridical system, its principles and rationale.

> A matter is legal if it is in accordance with the Constitution, laws, legal principles, jurisprudence, customs, in short, with the Law as a whole. Juridicality represents a condition of admissibility of the processing of legislative proposals. We can understand the legality in the broad sense of a proposition like their constitutionality, their accordance to the Congress rules and procedures and their legality in terms of in a strict sense, it covers the fulfillment of the attributes of the legal norm, the legality, adherence to legal principles and observance of legislative technique, in addition to other aspects of legality[815].

Juridicity in the broad sense (*lato sensu*) encompasses: conformity with the Constitution; consonance with the Congress rules and procedures; and observance to others legal aspects, called juridicity *stricto sensu*.

Juridicity *strictu sensu* is related to the attributes of the legal norm, such as communication with the current laws and the municipal law rationale, abstraction, novelty and, as stated above, the adherence to legal principles and potential coercitivity.

The emergence of regulatory institutions, at national and international level, took place in the nineteenth century[816]. In the 1930's, the dizzying increase in regulation in the world was witnessed.

In the 1960s, as a consequence of the regulatory phenomenon, legal design began to be the object of concern and analysis by the legal community. Lon L. Fuller shone lights on the parameters of legal design resorting to the instruments of philosophy. For Fuller, law design must be inspired by the morality of law itself. Morality is understood in the Greek sense: the achievement of maximum excellence or the fullest capacity[817]. In order to achieve its morality, law must attend the following requirements: (1) permanence, as opposed to *ad hoc* nature; (2) publicity; (3) not abuse retroactive effects; (4) be understandable; (5) be coherent, not contradictory; (6) require conduct beyond the powers of the affected parties; (7) be not frequently changed so the subjects can orient themselves by it; (8) congruence between the

[815] Oliveira, L.H.S. (n.d.). Análise De Juridicidade De Proposições Legislativas. [online] Senado Federal. Consultoria Legislativa. Núcleo de Estudos. Brasília, Distrito Federal, Brasil: Núcleo de Estudos e Pesquisas da Consultoria Legislativa. Available at: https://www2.senado.leg.br/bdsf/bitstream/handle/id/502897/TD151-LucianoHenriqueS.Oliveira.pdf?sequence=1 [Accessed 19 Apr. 2020].
[816] Baldwin, R., Cave, M. and Lodge, M. (2012). *Understanding regulation: theory, strategy, and practice*. New York: Oxford University Press, p.4.
[817] Fuller, L.L. (1969). *The morality of law*. New Haven: Yale University Press, p.5.

rules as announced and their actual administration.[818] The same decade also witnesses the exordial moments of the Law and Economics approach, which will have more impact on the bureaucratic world in the 1980s and 1990s.

In the second half of the twentieth century, more specifically during the 1980s and 1990s, with the movements of simplification, rationalization and de-bureaucratization of the State, much emphasis was placed on the problems of the costs of regulation[819]. And, by the turn of the millennium, the appropriateness of regulatory strategies and structures became the focus of legal design. The new approach to legal design came to be called logistics, a term that, apparently, arises from European doctrines, mainly Swiss and Italian[820]. The term has gained space and momentum among the epistemic communities of congressional and regulatory studies. Helen Xanthaki, naming Legistics as legislative drafting, even raises it to the status of a new sub-discipline of law[821].

> In the last three decades, there has been a growing and particular European academic interest in the process of drafting legislation. The starting point of this credibility gain of a so-called science of legislation in Europe, frequently mentioned by contemporary scholars, constitutes the publication, in 1973, of the work authored by the Swiss penalist Peter Noll, entitled "Science or Doctrine of Legislation".
>
> The work carried out by Peter Noll, who taught the discipline of the same name in Germany, contributed to the proliferation of other academic initiatives, such as the emergence of teaching and research centers such as that developed at the Faculty of Law of the University of Geneva, led by Charles- Albert Morand and Jean-Daniel Delley.
>
> The emergence of new scientific approaches to the legislative phenomenon, paradoxically, occurred at the same time as the law, and, as a consequence, its sources, like the law itself, entered a crisis situation from which there is no prospect of overcoming.
> (…)
>
> The growing appreciation of the quality of normative action arises in a context of legislative inflation, in which governments, "unable to achieve their social objectives, end up under greater pressure in the sense of resorting to the regulation of private activity,

[818] *Idem*, p. 39.
[819] Fuller, L.L. (1969). *The morality of law*. New Haven: Yale University Press, p. 5.
[820] Salinas, N.S.C. (2008). *Avaliação Legislativa no Brasil: Um Estudo de Caso sobre as Normas de Controle das Transferências Voluntárias de Recursos Públicos para Entidades do Terceiro Setor*. MSc Thesis. p.23-27.
[821] Xanthaki, H. (2013). Legislative drafting: a new sub-discipline of law is born. *IALS Student Law Review*, [online] 1(1). Available at: https://core.ac.uk/download/pdf/20116711.pdf [Accessed 19 Apr. 2020].

in order to achieve the intended effects. "[822].

The efficiency of the norm, that is, the ability to achieve its objectives with the least possible intrusion on economic freedom and other fundamental rights of economic actors, became a common element of the various currents that proposed to think about legal design[823]. In this sense, coercibility, or the State's command-control-punishment capacity, has become less important than its ability to induce behavior.

Very much based on the Coase theorem, whereby “under the right conditions parties to a dispute over property rights will be able to negotiate an economically optimal solution, regardless of the initial distribution of the property rights”, the game between positive and negative incentives has become more important than the negative incentive (the penalty) itself. The economic analysis of the law is in tune with the alternative solutions for dispute settlement and the negotiating capacity of the parties. The theory of rational choice is the premise of the economic analysis of law and the parties, being the direct interests, would be more capable than the state to pursue their well-being.

Behavioral economics brought elements that challenged the premises of the rational choice theory. The human capacity to make an informed, uncoerced and beneficial choice was challenged by the findings of the sciences of the mind. Most commonly, human beings have bounded rationality, bounded willpower and bounded self-interest, Thus, any inference about human behavior in the market must take into account the nuances of this behavior and the group biases. For behavioral economics, heuristics is central to understand market.

Neither the economic analysis of law nor the behavioral economy has been able to consistently influence the analysis of International Law or its reflection on the

[822] Salinas, N.S.C. (2008). *Avaliação Legislativa no Brasil: Um Estudo de Caso sobre as Normas de Controle das Transferências Voluntárias de Recursos Públicos para Entidades do Terceiro Setor*. MSc Thesis. p.22.

[823] According to Xanthaki, the drafting process encompasses five stages: (1) receipt and reading of drafting instructions compiled by the policy and legal instructing officers of the department that requests the drafting of legislation;(2) compilation of a legislative plan, also known as a legislative research report, which includes the analysis of the bill’s probable cost and benefits; (3) structuring the legislative text in a manner that facilitates understanding, and consequently invites implementation; (4) the drafting of substantive provisions requires application of the rules for words and grammar that are considered to serve the intelligibility of the text; and (5) verification or review of the legislative text Xanthaki, H. (2013). Legislative drafting: a new sub-discipline of law is born. *IALS Student Law Review*, [online] 1(1). Available at: https://core.ac.uk/download/pdf/20116711.pdf [Accessed 19 Apr. 2020], pp. 58-62.

design of international contracts, treaties or regimes.

Realism – the Theory of International Relations or, in Viotti and Kauppi`s jargon, image of international relations - already had as premise the rational choice of the state actor in the anarchic system. The anarchic international system, whose characteristic is the lack of hierarchy of authority or central power at international level, is another premise of realistic thinking in international relations, and leads to the perception of Law as an epiphenomenon. As such, international regulation does not serve as a control or a barrier to the exercise of political power[824]. So, there is no lacking reasons, at first glance, for a deeper reflection on the international legal structure and the legislative process.

In contrast to International Law, scholars of Realism inspiration, as well as of the other images or theories of inter-national relations (Liberalism, economic structuralism and the English School), have been engaged in an intense dialogue with behavioral psychology and behavioral politics, although noting the difficulties in transposing its conclusions it makes about human behavior to understand and predict the behavior of States[825].

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[824] Viotti, P.R. and Kauppi, M.V. (n.d.). *International Relations Theory*. 5th ed. Pearson, pp. 39-117.

[825] "IR theory has not been untouched by behavioral economics or psychology, respectively. On the contrary, in the handbooks of IR, there has always been an overlap of psychology onto IR; the beginning of this line of research is usually ascribed to the seminal article by Robert Jervis. Political psychologists in IR challenge realist theories which assume that states maximize power or security as well as institutionalist theories which assume that states maximize wealth or utility. They do not stop there but extend criticism to constructivists (who usually assume that everything depends on how human beings construct their world and their normative understanding). However, they assume that at a foundational level constructivism is more compatible with political psychology. The call for "behavioral IR" is well articulated. Political psychologists in IR take the cognitive biases described above into account, arguing that bounded rationality and emotions as well as procedural and distributive justice should be included and tested in IR theories. They test whether they have better explanations than either realists or institutionalists, both of which use the RC paradigm. The defining characteristic of the political psychology approach is the focus on the individual level, that is, on central or elite decisionmakers. They stress the contextual effects: history, development and learning are assumed to be important to dynamic political processes. Uniqueness of situations, and the condition and contextual aspects of a particular decisionmaker with a unique history in a specific situation is the subject of analysis. Explanation, rather than prediction, is the goal of the exercise.

There are some shortcomings of the political psychology approach in IR: first, the analysis is mostly confined to international conflict situations focusing on security issues using mainly prospect theory and framing. This is just a small part of international law. Furthermore, IR theory applies those theories almost exclusively to individual decisionmakers, not states as corporate actors. Implicit in this argumentation is that there are certain individuals, such as presidents or dictators, who are crucial for foreign policy decisions. Most important, norms have no room in the analysis—International Law plays no role.

Political psychologists have challenged some RC approaches, namely game theoretical approaches to conflict as well as the notion of reputation, both crucial to International Law and economics and compliance theories. Let us turn first to issues of conflict and security (1.) and thereafter to the role of ideas". van Aaken, A. (2013). Behavioral International Law and Economics. *SSRN Electronic Journal*, (55). pp. 16-18.

The reification, or the treatment of state entities as unified entities (such as the image of the billiard ball from Realism) and moral, is an usual abstraction, but it is superficial and inaccurate. Countries have different cultures, religions, understandings of life, habits, dynamics and bureaucratic and technical capacities. In some countries, the distance between economic and bureaucratic elites and the people further deepens the difficulty of understanding the decision-making process of each country[826]. Considering the peculiarities of internal and bureaucratic dynamics, and social diversity, especially in democracies, the study of decision-making processes are complicated, making it difficult to compare national entities with individual decision-makers or even less with the "average decision-maker", a category that is difficult to elaborate in the society of nations[827]. Attributing standards of behavior or morality to States, even if based on their history, is an approach fraught with misunderstandings and blind spots.

Thus, the contribution of behavioral economics or behavioral policy to International Law and International Relations is limited to "[e]nriching rational choice models with insights [which] might not only further refine our understanding and explanations of public international law, possibly contradicting or confirming insights from International Law and economics, but may also help to better design International Law as a fundamental de-biasing mechanism[828].

The actual influence of nudges in international behavior can only be speculative. There are unbearable methodological difficulties in establishing a causal relationship between a nudge and a change in behavior between countries. Thus, the ambition of the nudge as a factor in reengineering relationships is, for the moment, modest.

Bearing this in mind, I evoke a behavioral economics approach called "nudge" to try to devise alternative paths to the punitive proposal of the documents circulated in the WTO, mentioned above, JOB/GC/204/Rev.3 and JOB/CTG/14/Rev.3 and its addenda, and, nevertheless, to achieve the results of improving the WTO's regulatory dialogue system and the levels of transparency. I start from the premise that the pandemic scenario, which has depressed international

[826] Teichman, D. and Zamir, E. (2019). Nudge Goes International. *The European Journal of International Law*, 30(4), pp.1264–1265.
[827] van Aaken, A. (2013). Behavioral International Law and Economics. *SSRN Electronic Journal*, (55). pp. 22-29.
[828] *Idem*, pp. 30-31.

trade and national economies, will make it even more difficult for developing countries to keep their financial contributions to international organizations up to, even less if to these contributions are added administrative fines for underreporting or inadequate notification. Such a proposal tends to stretch the violin string too far to the point of rupture and not to the tuning. At a time when the new WTO leadership appears with the promise of renewing multilateral efforts, divisive or very severe measures are not advisable.

According to Richard Thaler and Cass Sunstein:

> A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives[829].

In other words, nudge would be 'low-cost, choice-preserving, behaviorally informed approaches to regulatory problems[830].

Using the notion of nudge, the authors propose the Libertarian paternalism approach, being a "relatively weak, soft, and nonintrusive type of paternalism because choices are not blocked, fenced off, or significantly burdened[831]. The golden rule of libertarian paternalism would be offer nudges that are most likely to help and least likely to inflict harm.

Much of the nudge's efforts are to create positive incentives strong enough to reallocate the actors' utility matrix and get them to act in a certain direction. Another way of inducing behavior is to redesign the legal architecture in such a way as to reveal and possibly remove the bias or the default of the usual behavior.

Teichman and Zamir identify three nudge-generating sources in international arena[832]: (i) within each country, as one actor attempts to influence the decision-making of another or when diplomats who negotiate a treaty nudge the politicians in charge of ratifying the treaty towards a certain decision.; (ii) when one country seeks to influence the decisions of other countries – either as part of a treaty or unilaterally (e.g, by means of ranking vis-à-vis national policies); (iii) by means of international

[829] Thaler, R.H. and Sunstein, C.R. (2008). *Nudge: improving decisions using the architecture of choice*. New York: Penguin Books, p.5.
[830] Sunstein, C.R. (2013). *Nudges.gov: Behavioral Economics and Regulation*. [online] papers.ssrn.com. Available at: https://ssrn.com/abstract=2220022 [Accessed 21 Nov. 2020]. p.1.
[831] Thaler, R.H. and Sunstein, C.R. (2008). *Nudge: improving decisions using the architecture of choice*. New York: Penguin Books, p.5.
[832] Teichman, D. and Zamir, E. (2019). Nudge Goes International. *The European Journal of International Law*, 30(4), pp.1263–1279.

organizations, by setting out various non-binding goals. The authors also identify three common examples of nudge in the international arena: (i) opt-out arrangements in multilateral treaties; (ii) loss aversion and goal setting; (iii) and social comparison, meaning rankings[833].

Considering the menu of options presented by the authors, the improvement of the transparency standards through the notifications in the WTO could go through the restructuring of the treaties, inducing the reinforcement of the conscience and the commitment of the authors in relation to the notification duties. However, this author believes that it is an innocuous measure, as there are no objections from WTO Members to the duty to notify *per se*. There are no attempts to suspend these duties or consistent criticisms of them. What does exist, however, is the repeated information about the difficulties of notification and perhaps eventual and punctual resistance to notify in the hypothesis of sensible information or measures already understood and potentially colliding with international rule of law.

In view of the ineffectiveness of a new legal design based on nudge to address the issue at hand, this author would choose another nudge strategy: the creation of positive lists of better and most frequent WTO notifiers that, in communication with the World Bank records, would serve as a one of the variables in the methodology of measurement of the international trade ambiance.

> Credible publications of a country's international ranking can spur that country's elite decision-makers to action since a country's performance in international rankings can affect their self-esteem. Given its simplicity and salience, a country's ranking can also serve as a focal point of media coverage[834].

For now, the Doing Business report methodology sticks to recording the time and cost associated with the logistical process of importing and exporting goods, associated with three types of procedures - compliance with documentation, compliance with border requirements and domestic transport[835].

The international reputation can serve as a powerful stimulus for changing bureaucratic culture. This author justified the present study, among other reasons, in the lack of normative clarity of the rules of animal health in Brazil, due to an inflated,

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[833] Teichman, D. and Zamir, E. (2019). Nudge Goes International. *The European Journal of International Law*, 30(4), pp.1269–1278.
[834] *Idem*, p. 1275.
[835] The World Bank. *Doing Business. Medindo a regulação do ambiente de negócios*. https://portugues.doingbusiness.org/pt/methodology/trading-across-borders

unreasonable and not transparent normative production, which gave opportunity to a great corruption scheme. Overturned, this scheme called into question the credibility of animal health standards in the animal protein production chain in Brazil, which greatly affected Brazilian exports. The rationalization of specific regulations met, at that time, great bureaucratic resistance.

The National Committee for Trade Facilitation - Confac, created in July 2016, under the umbrella of the Brazilian Foreign Trade Chamber was already in activity when the “Carne Fraca” Operation revealed the corruption scheme. However, its first work plan was published in April 2021 and foresees efforts for the transparency of rules related to foreign trade, coming from all relevant ministries. Certainly, Confac responds to the validity of the Trade Facilitation Agreement in Brazil, which occurred with the promulgation of the Presidential Decree No. 9.326, of April 3, 2018. However, there is a shared perception among public agents that monitor foreign trade issues in Brazil, especially agribusiness, that the measure is also an attempt to achieve greater normative rationality and, thus, avoid other future crises that have normative inaccuracy as a causal or intervening variable.

The review of legal design does not need to imply a review of the international acts resulting from the Uruguay Round. It would be sufficient, by means of an agreement between the WTO and the World Bank to establish a form of information exchange that would allow the Bank to incorporate the important imputs related to transparency and notification that the WTO can offer to its report systems and rankings. A cooperation is even possible and potentially positive between WTO and OECD, potentially creating an additional standard of excellence for access to the latter Organization, which would be compliance with the totality or part of the WTO rules. This logic slightly reverses the self-absorption, self-referentiality and even self-sufficiency of which WTO has always praised itself for.

At a time when there is still a world-wide economic crisis and an international-scale struggle for the role of international leadership, it is advisable that creative and less divisive alternatives be imagined.

CONCLUSION

Transparency is a pervasive principle in law. From the perspective of radial concepts, it has always been present since the most remote manifestations of legal orders, from the society of rites, through Roman society (which greatly influenced contemporary law) up to current municipal and international law.

In the context of the multilateral trade regime, transparency is important both to optimize international trade flows *per se*, streamlining the understanding of norms and allowing commercial actors to participate in their elaboration, preventing them from becoming more restrictive than necessary to international trade. It also serves to reduce asymmetries between competitors, democratizing effective access to information. It is estimated that the lack of effective regulatory transparency, among other factors, harms the international competitiveness of countries such as Brazil. In this sense, it is important to understand the status of transparency in internationalist thought, as well as in International Law, in order to suggest new paths for its promotion. There are scholars who defend that transparency is not a general principle of law, much less a repeated practice of the States, foreseeing a strong difficulty in making it a priority agenda in the multilateral trade regime. There are other scholars who argue that improving the levels of transparency is fundamental for the survival of the multilateral trade regime, which recurrently suffers from crises of legitimacy, of the effectiveness of its supervision capacity and the establishment of future agendas.

International relations, as a branch of knowledge derived from political science, still benefits from the dialogue with its matrix. We resorted to the historiography of the concept of transparency in Political Science to locate the social values that transparency aimed to protect. Of Chinese origin, incorporated by Scandinavian thought and influencing American constitutionalism, transparency established itself as a vehicle for promoting the rule of law and civil rights.

The very emergence of the science of International Relations stems from the strong social questioning regarding the lack of transparency of the Chancellery in its foreign policy decisions. In the epistemology of International Relations, International Relations Theory and non-theoretical elaborations (transcivilizational thought matrices) present some possible answers to the importance of transparency in international governance. In its phenomenology, the principle of transparency does not perform and does not appear in multilateral and regional elaborations on the

general principles of international relations.

Nevertheless, the literature on International Relations highlights, since the 1990s, a crisis of legitimacy in multilateralism and an urgency to reform international regimes that often touch on the issue of lack of internal transparency (among Member States themselves) and external (to civil society) as an element of mitigation of the legitimacy of these regimes.

I bring again the excerpt by Maria Panezi that summarizes certain accomplishments in International Law scholarship during the 1990s and early 2000s:

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

This research, after revisiting the reference bibliography of these major areas of research in International Law, as well as the theme of adjudicatory legitimacy, developed by Armin von Bogdandy and Milos Vec, raises some questions about the paths signaled by this research and the real potential of its approaches to promoting transparency in the international arena. Additionally, we explore the dimensions of internal and administrative transparency (in relation to WTO Member States) and external (in relation to civil society) to gauge the potential of these dimensions to improve international transparency.

Approaching the last layer of analysis of transparency in International Law, namely, transparency as a rule of law or principle of law, I take a step back to historiograph the emergence of transparency as an institute, originally auxiliary to other institutes, today a principle autonomous *in nascendi*.

The jurisprudence of the PCIJ, the ICJ and the WTO were analyzed in an attempt to understand the role attributed to transparency in these instances, with a view to projecting whether it is a general principle of law.

The important principles of good faith and due process, understood as general principles of international law and principles of multilateral trade law, have transparency as an auxiliary principle.

Within the scope of the WTO, the principle of transparency has gone through three generations, the current one, guided by the Trade Facilitation Agreement, being the most modern, including bureaucratic simplification, regulatory impact analysis and participatory legislation. Despite this progress, deficiencies in the rules of transparency of older generations, especially in the rules of notification, generate a crisis of legitimacy for the WTO. Despite these shortcomings, the notification mechanism has proven extremely positive in ensuring the WTO rule of law, though not through dispute resolution, rather filtering out cases that need to reach the point of litigation.

DSB reform proposals are extremely polarized. Again and again, countries like the US and Europeans are seeking to create sanction mechanisms for countries that fail to notify their new or changed administrative trade measures to the Secretariat. In our understanding, a draconian measure would tend to become innocuous due to the Secretariat's limited ability to review this material. Furthermore, several countries with genuine difficulties in terms of personnel in the public service, in terms of quantity and quality, would be punished without the sanction inducing a behavioral change due to a lack of material possibilities. In the face of this impasse, we resort to the theory of behavioral economics of nudge, anticipating, however, that it may not represent a panacea and the solution to all obstacles.

ANNEX I

Source of the tables: Author`s own based on WTO, Chronological list of disputes, between the years of 1995 and 2019.

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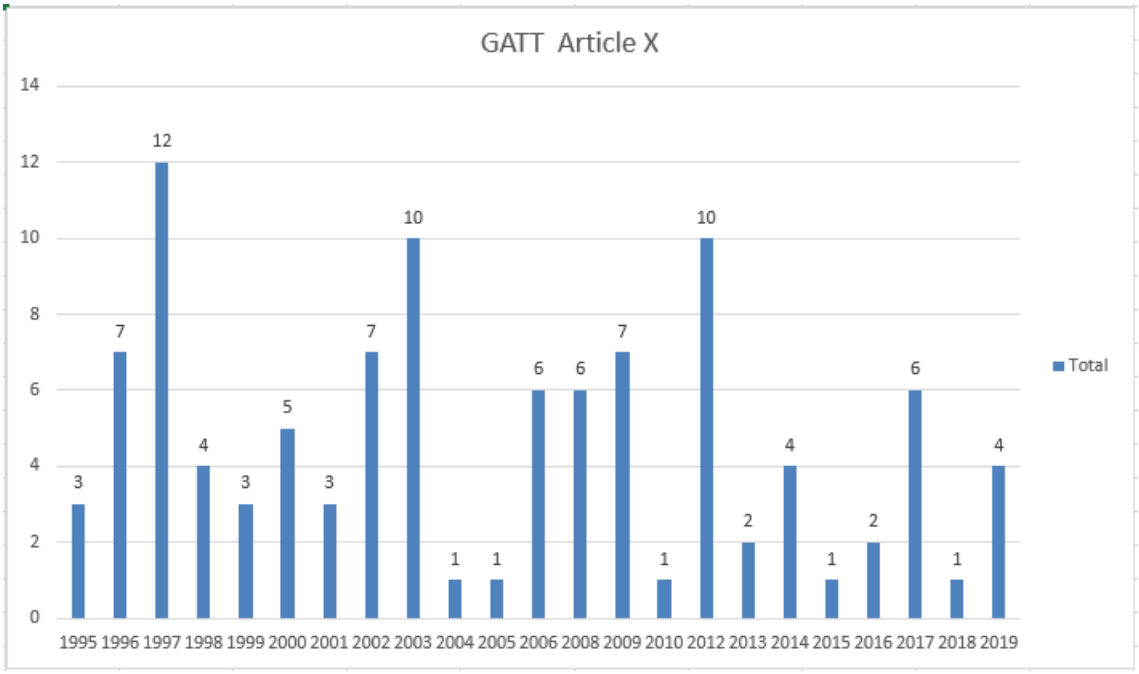

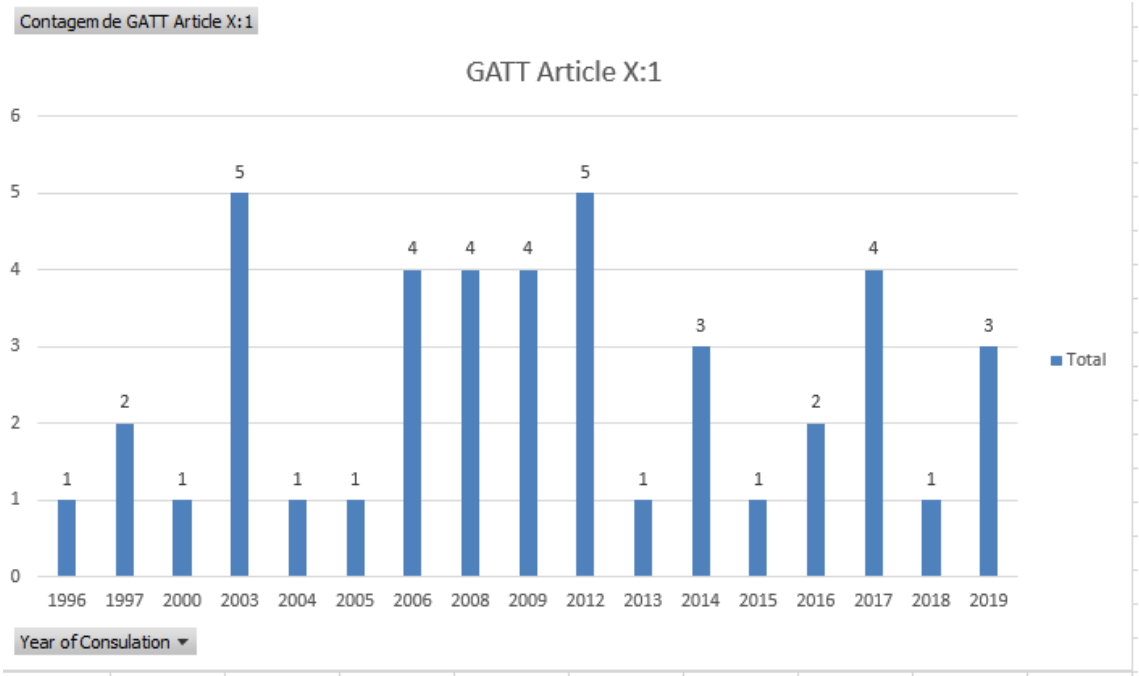

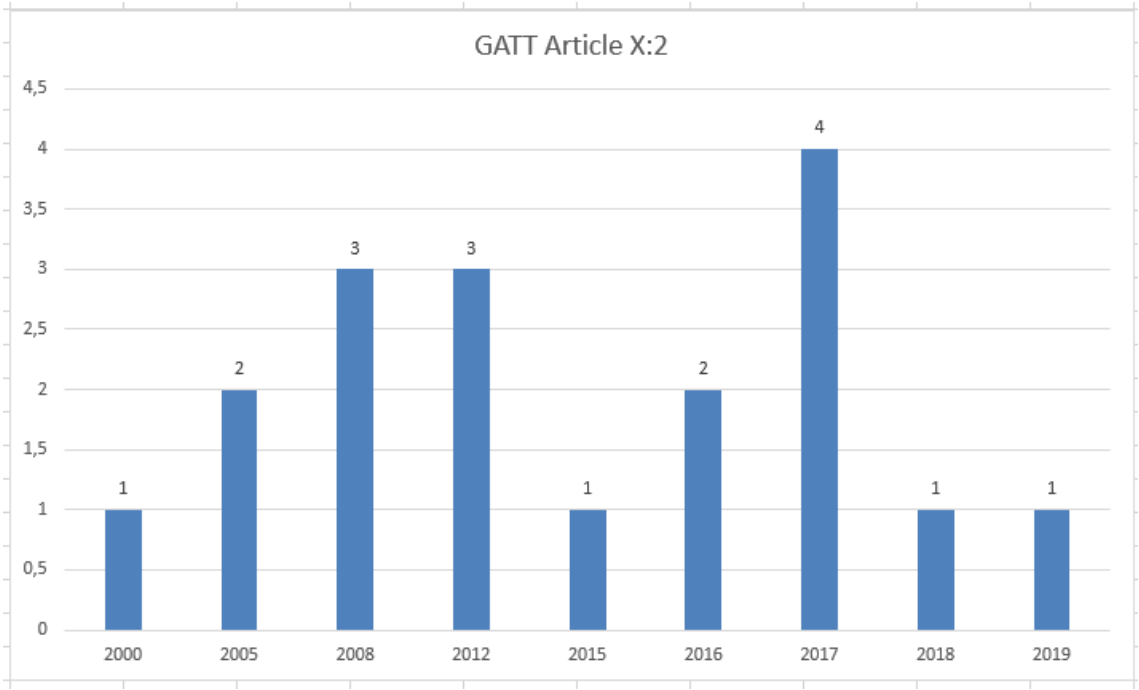
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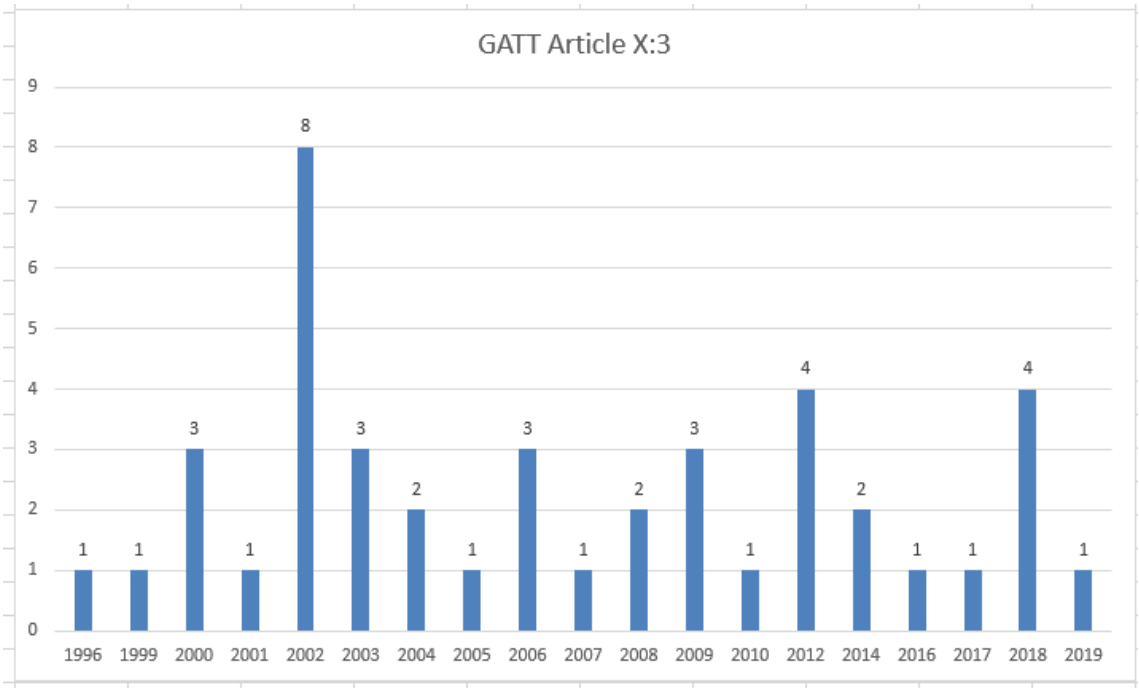
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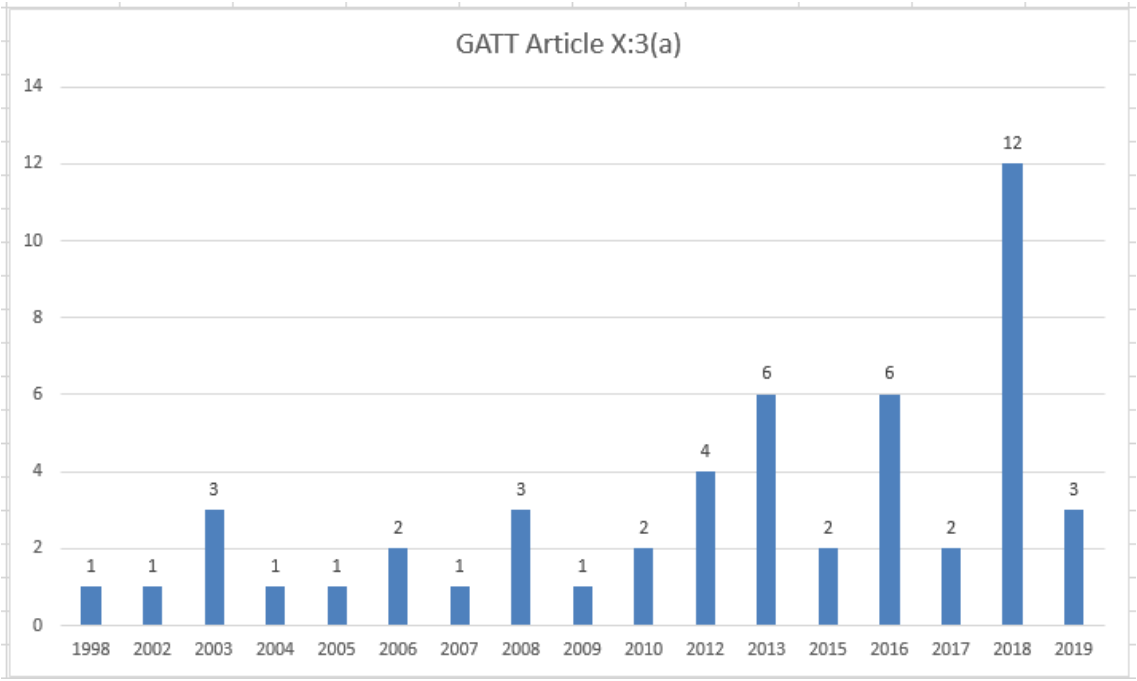
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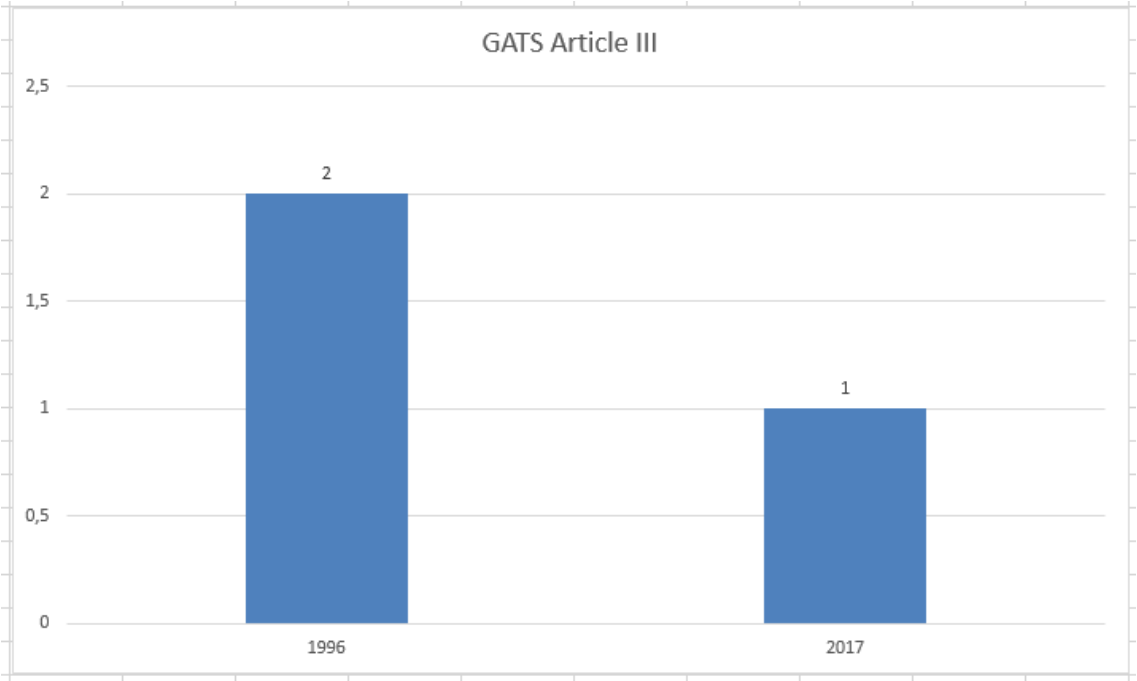
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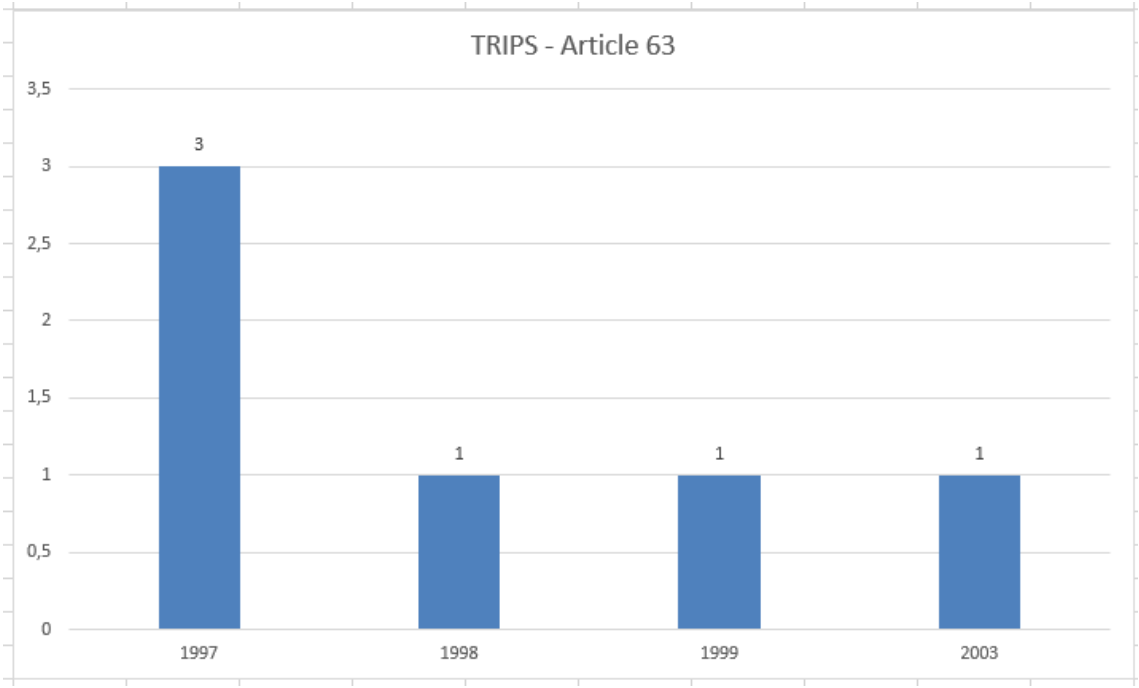
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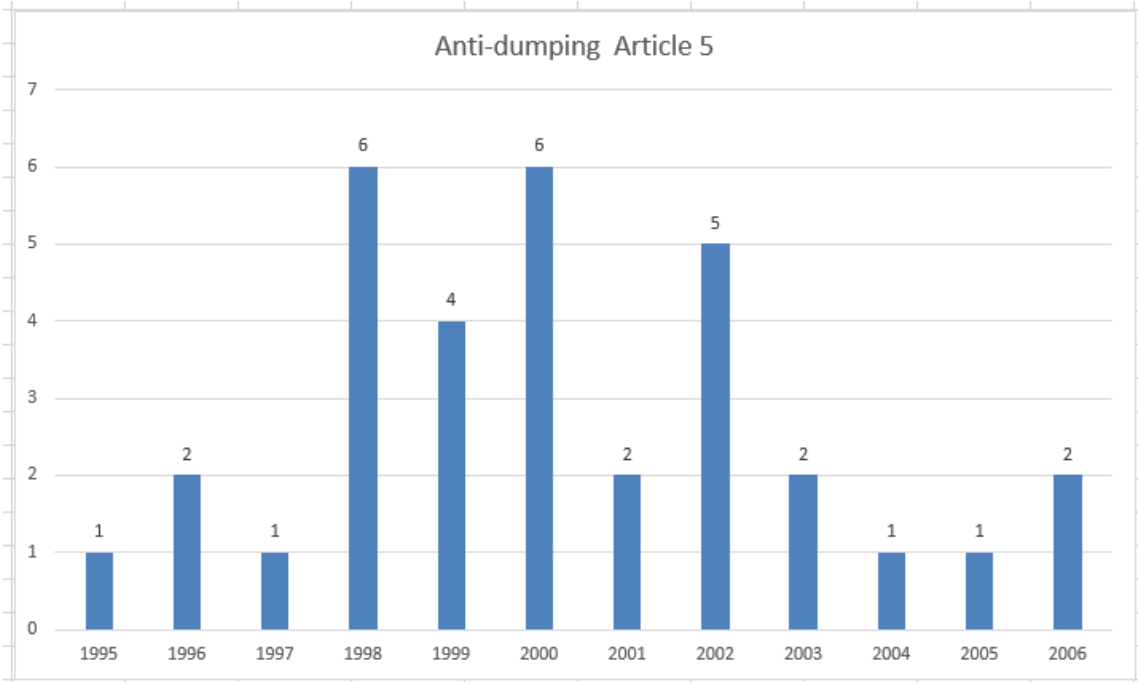
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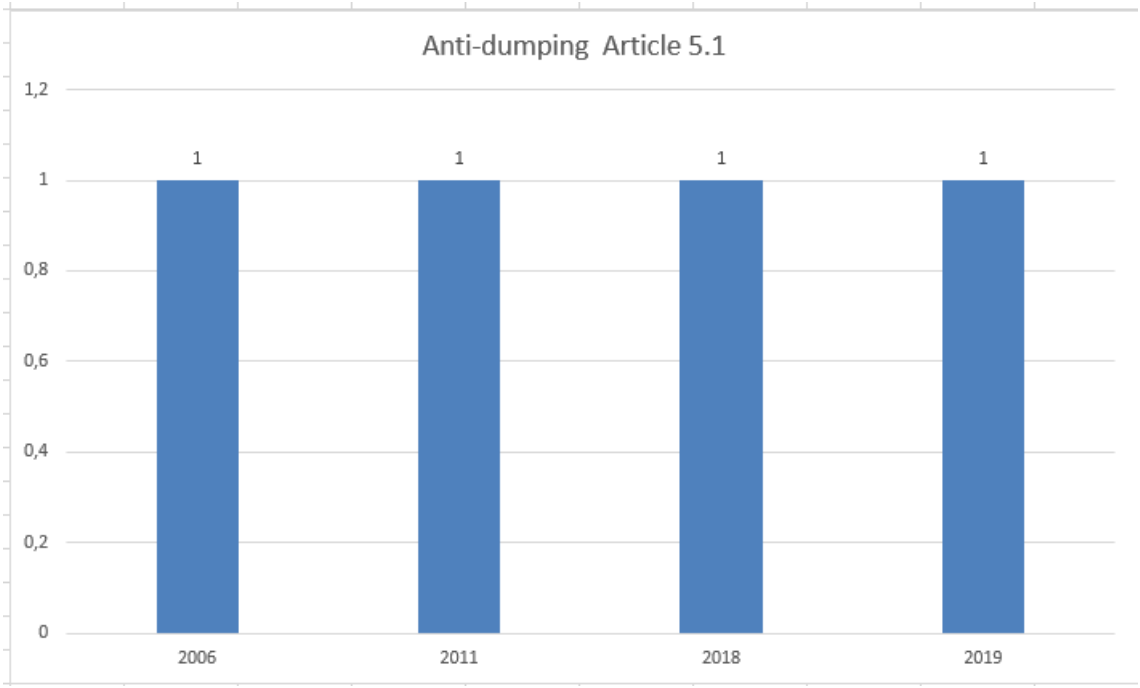
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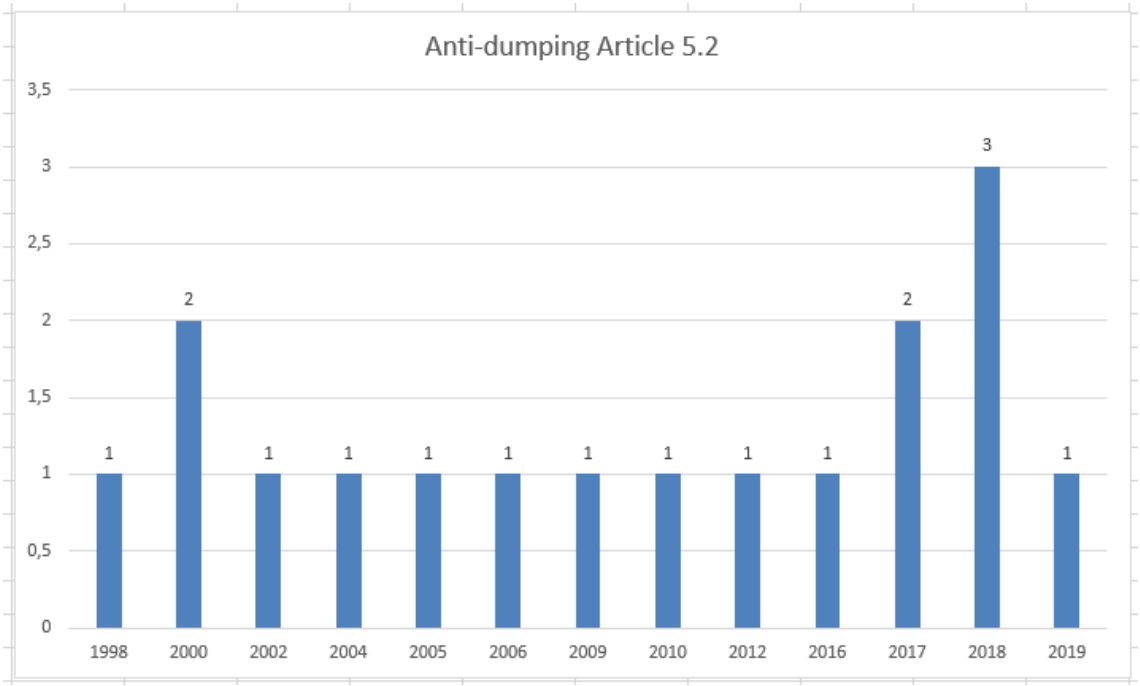
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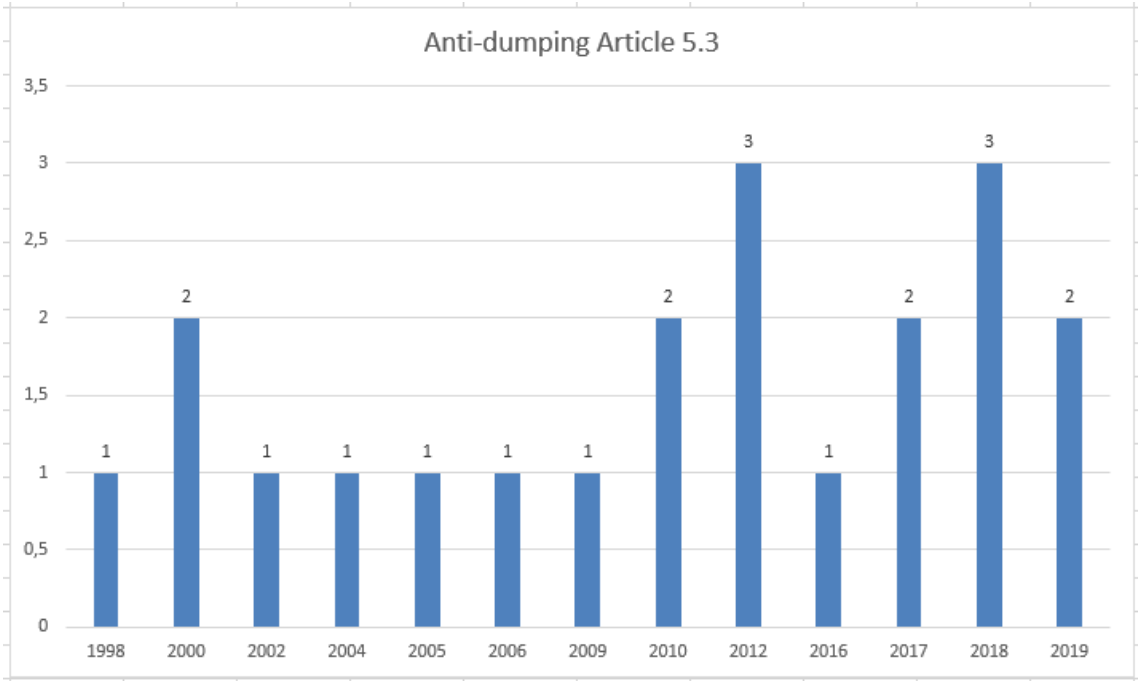
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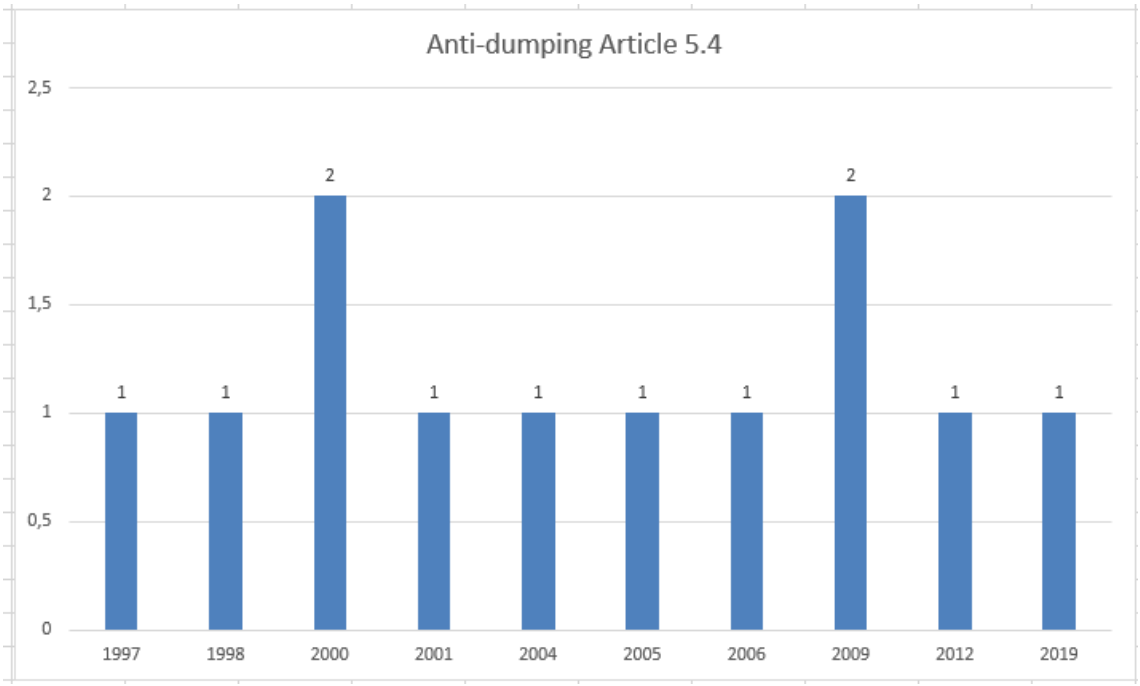
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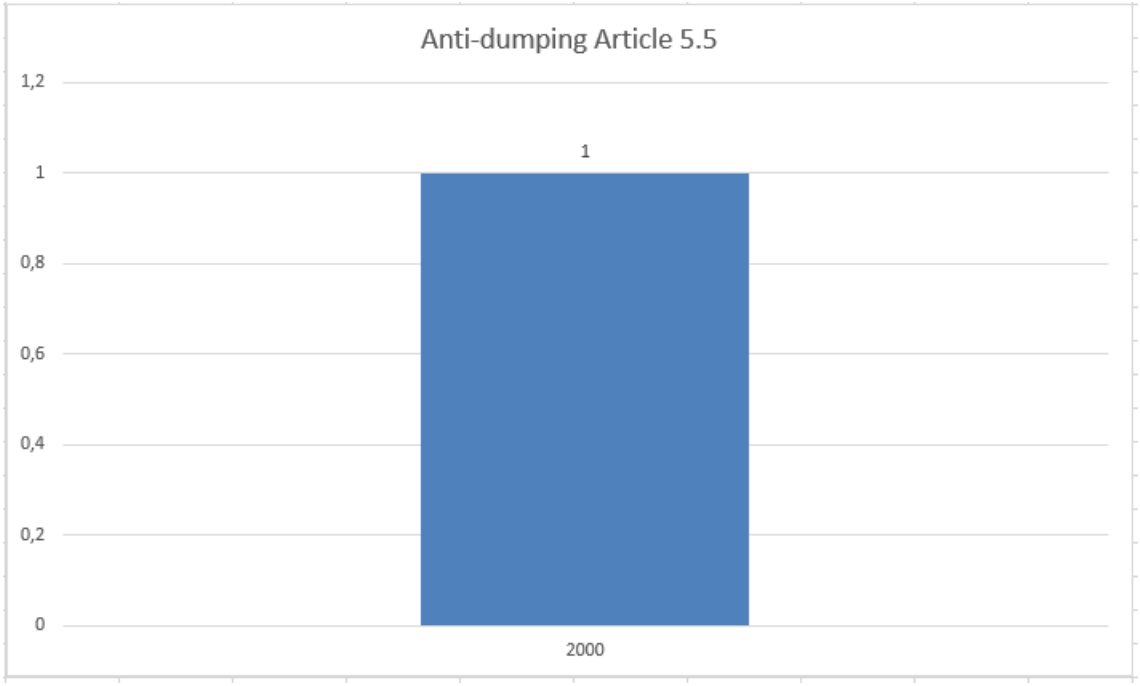
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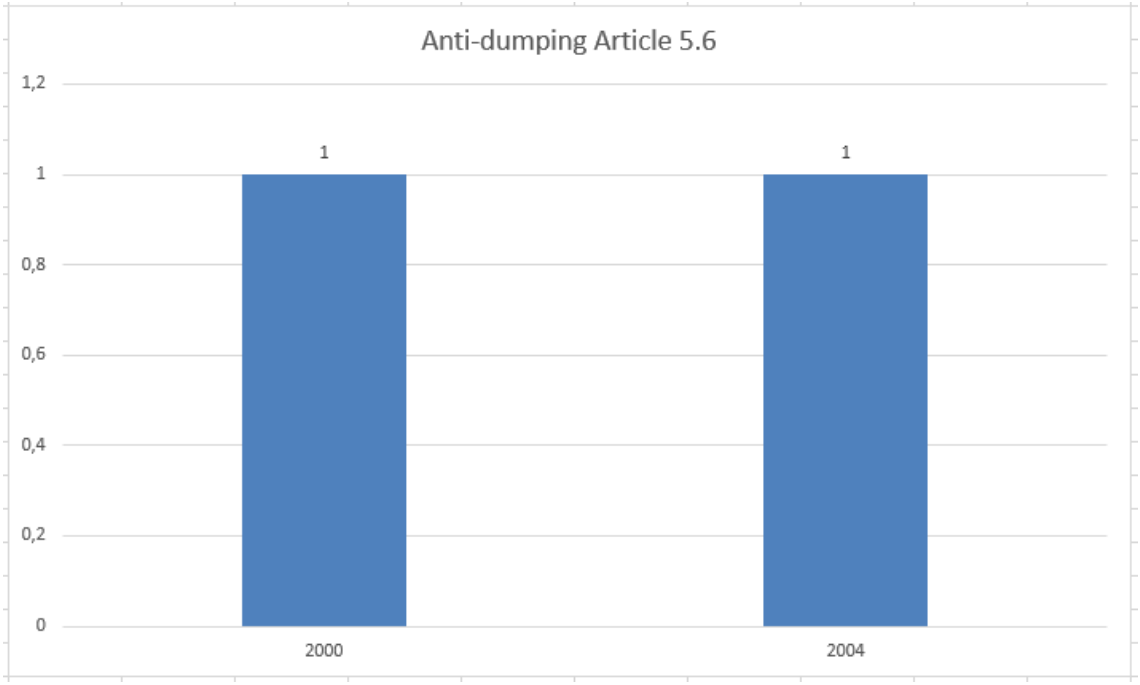
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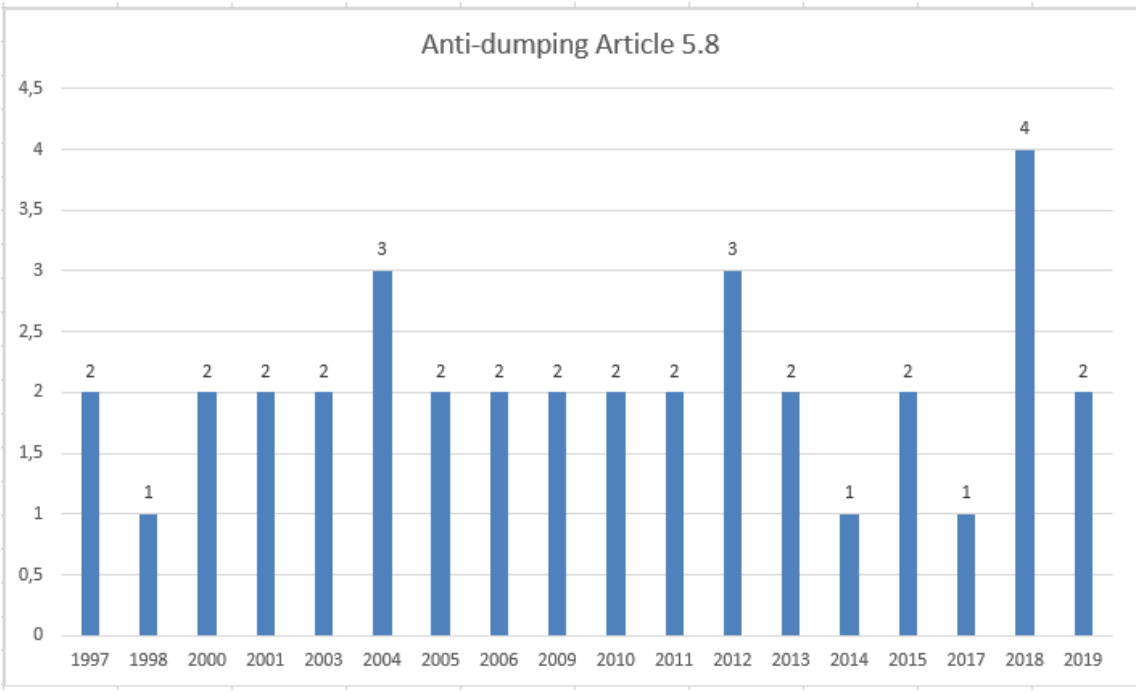
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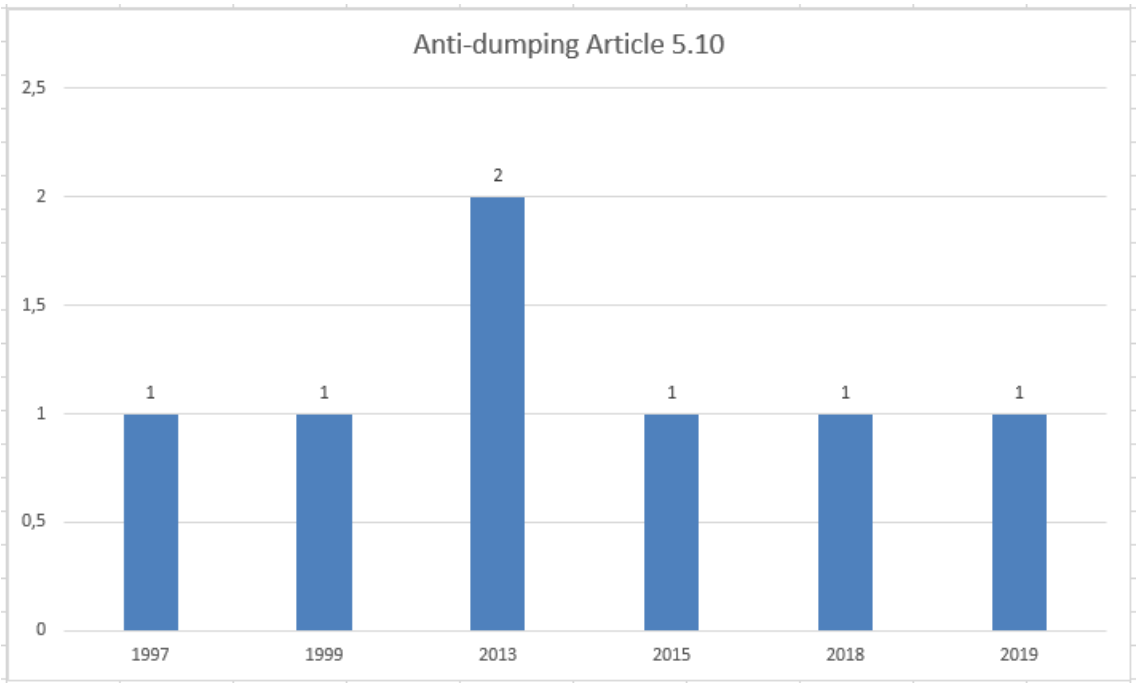
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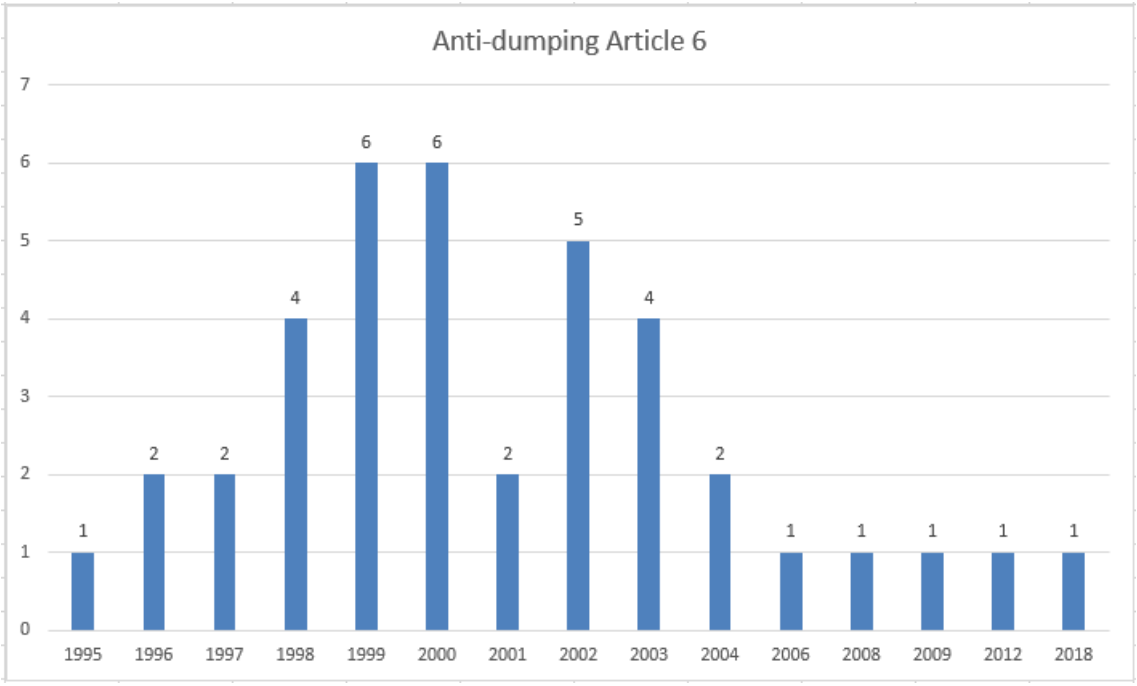
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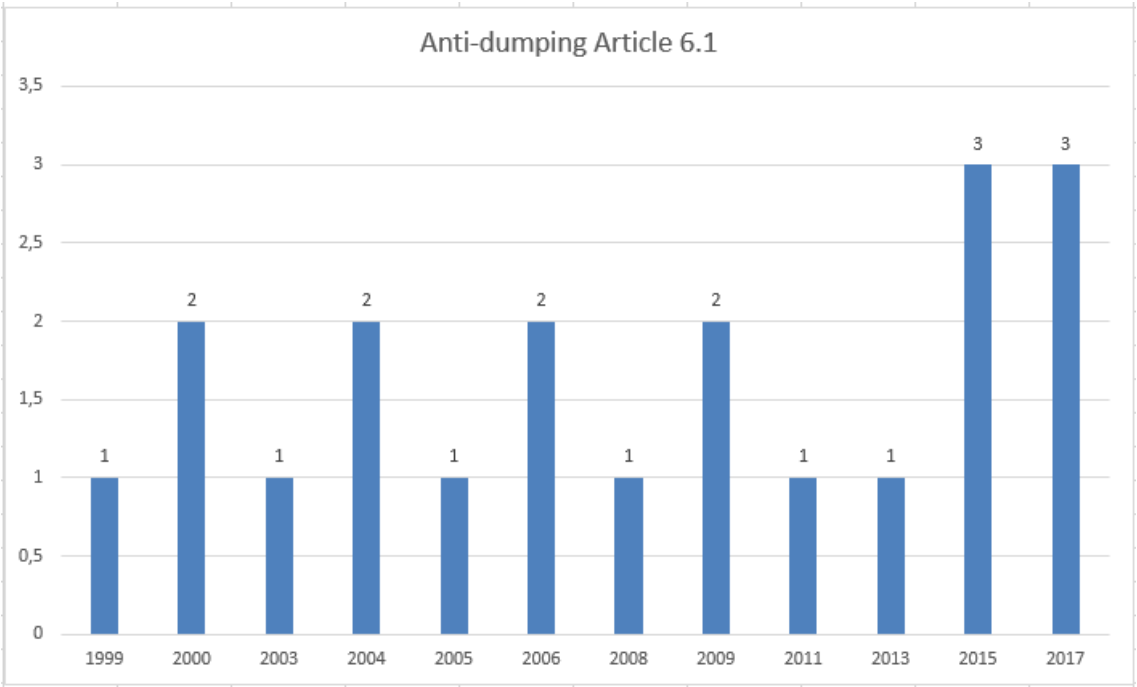
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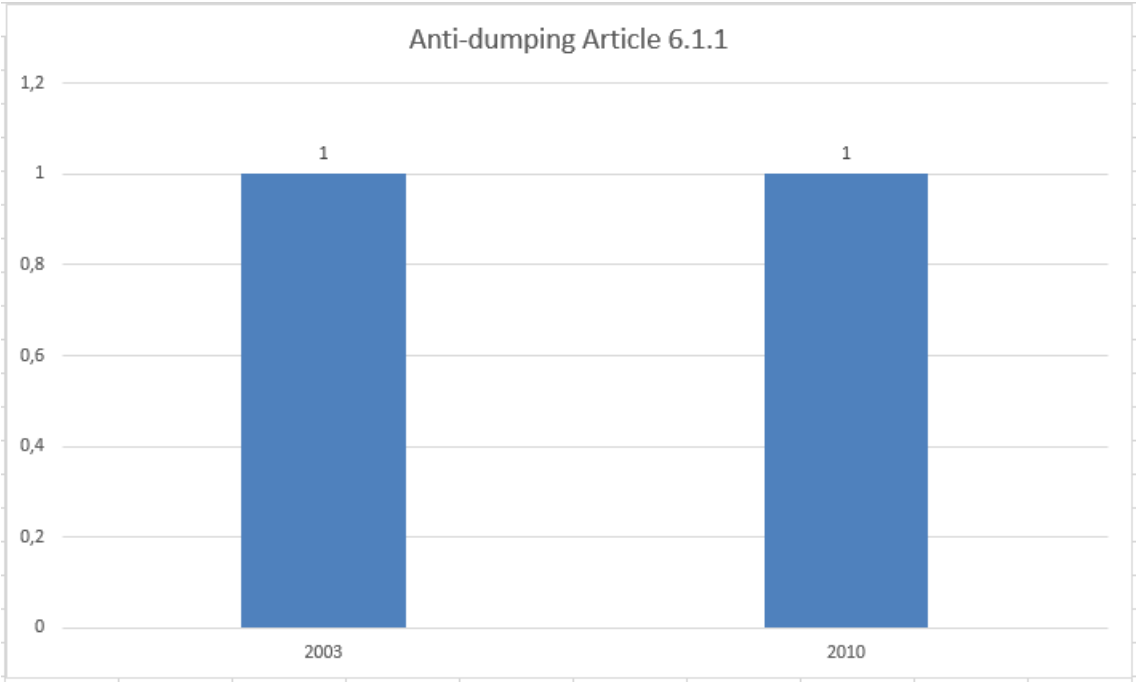
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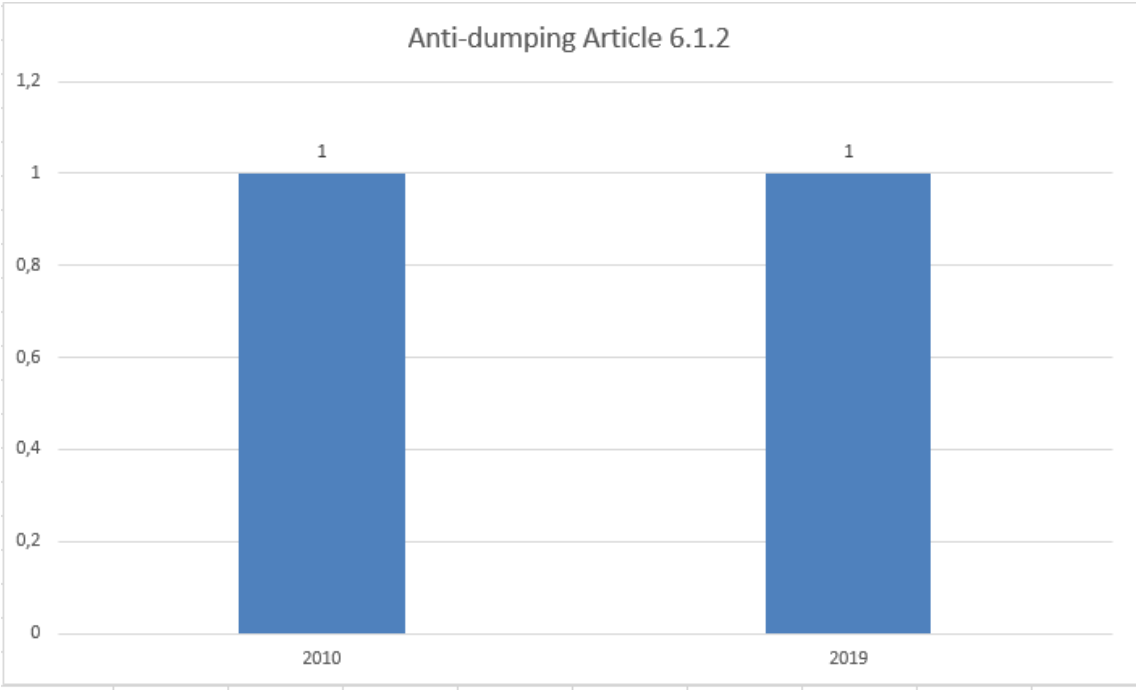
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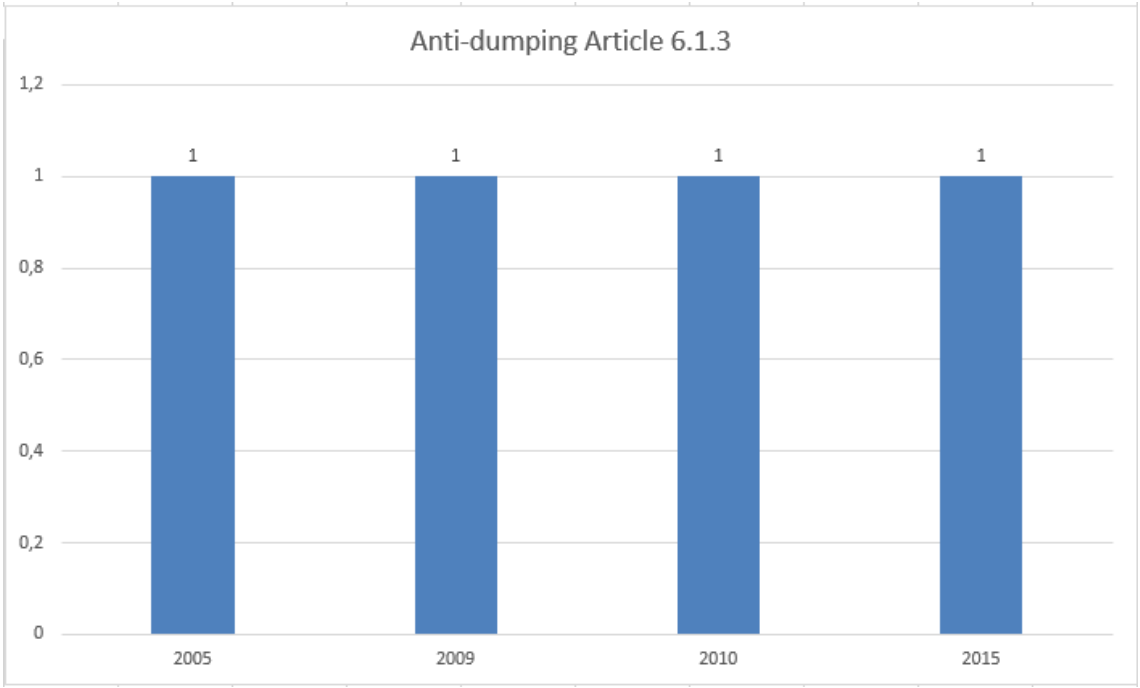
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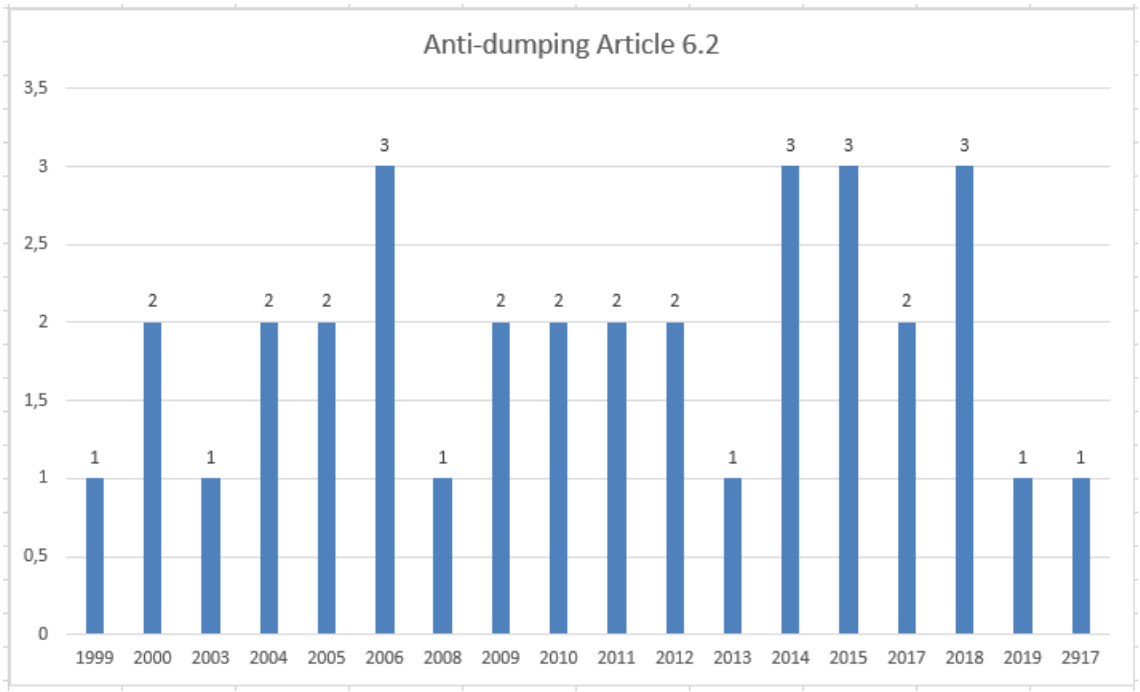
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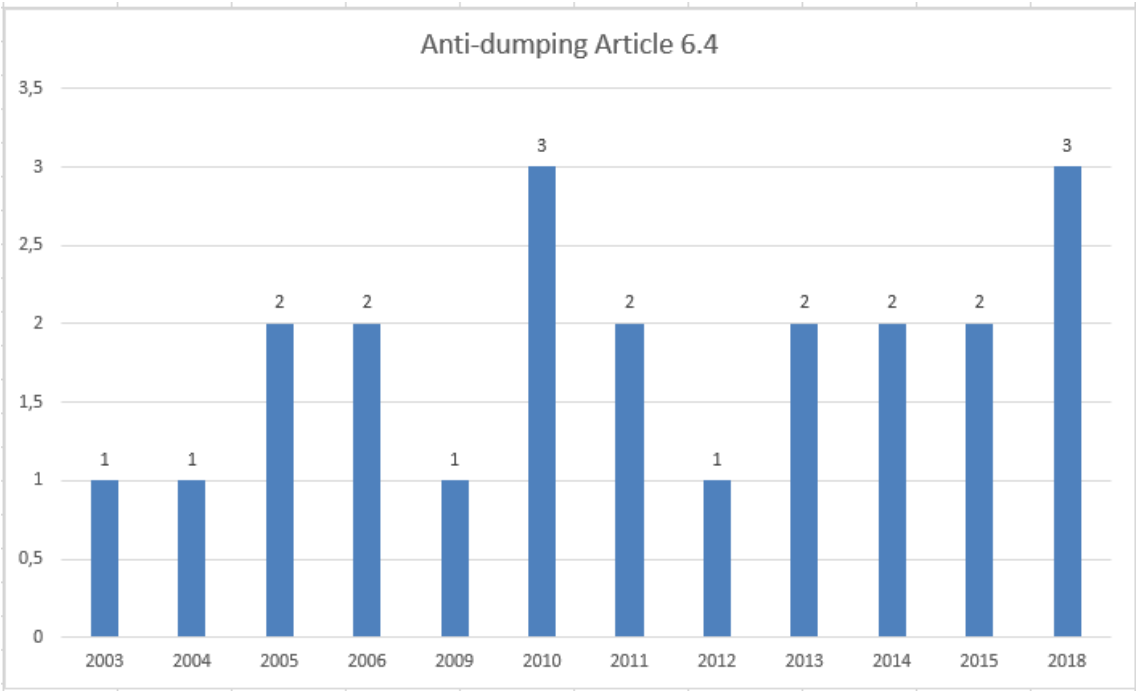
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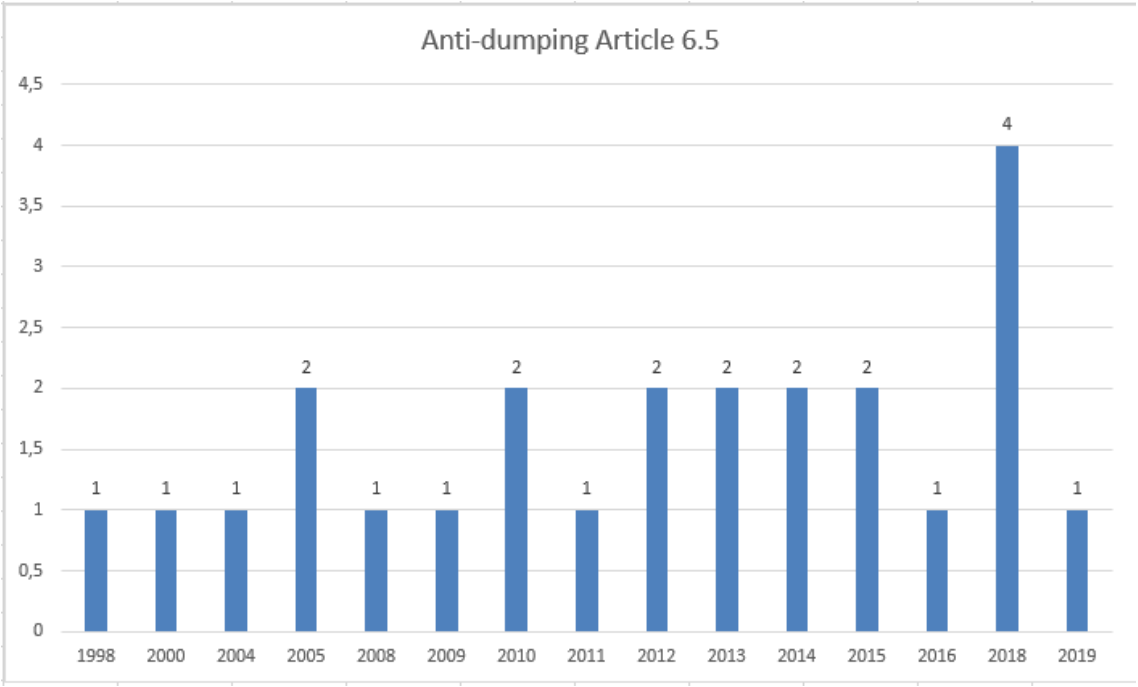
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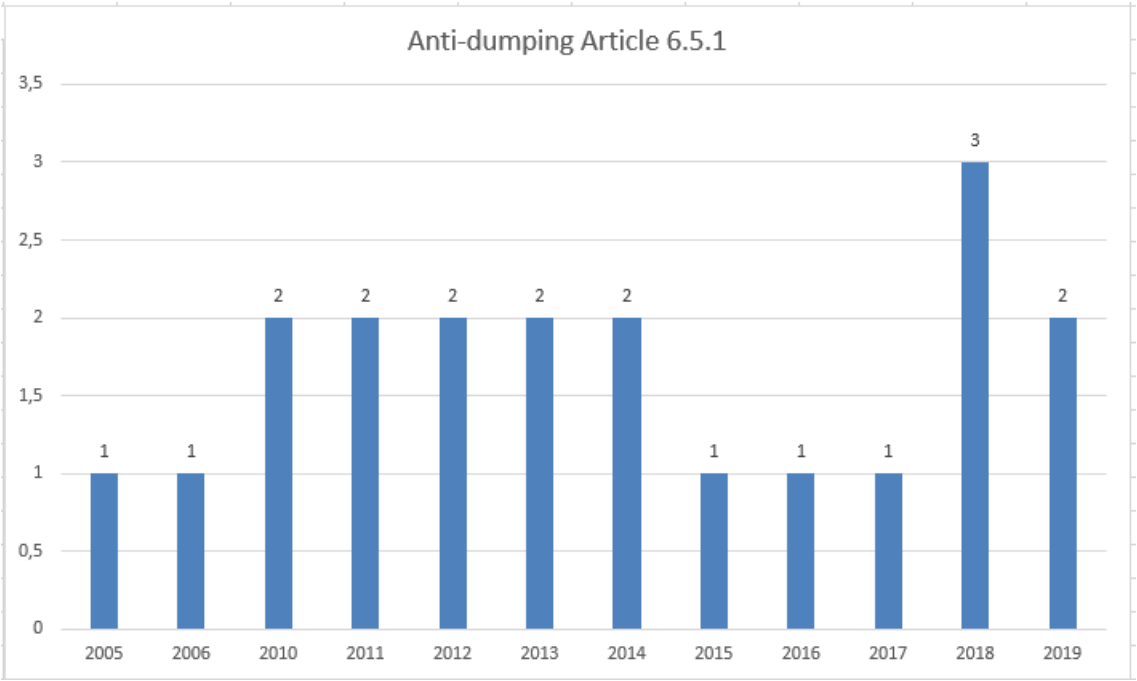
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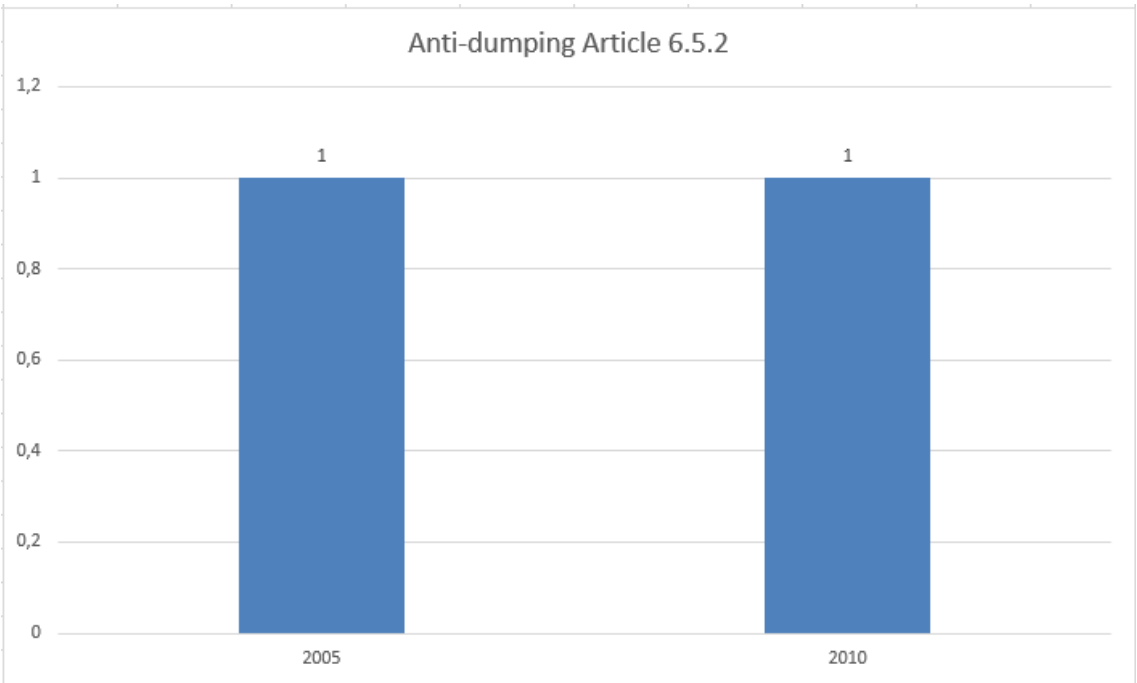
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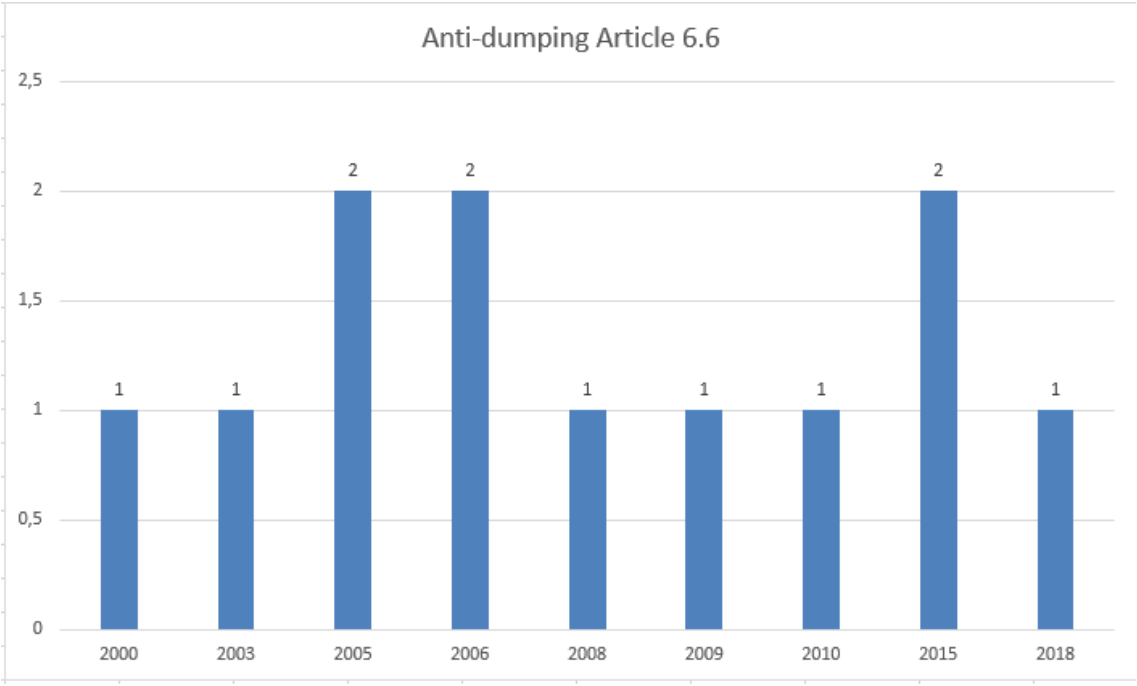
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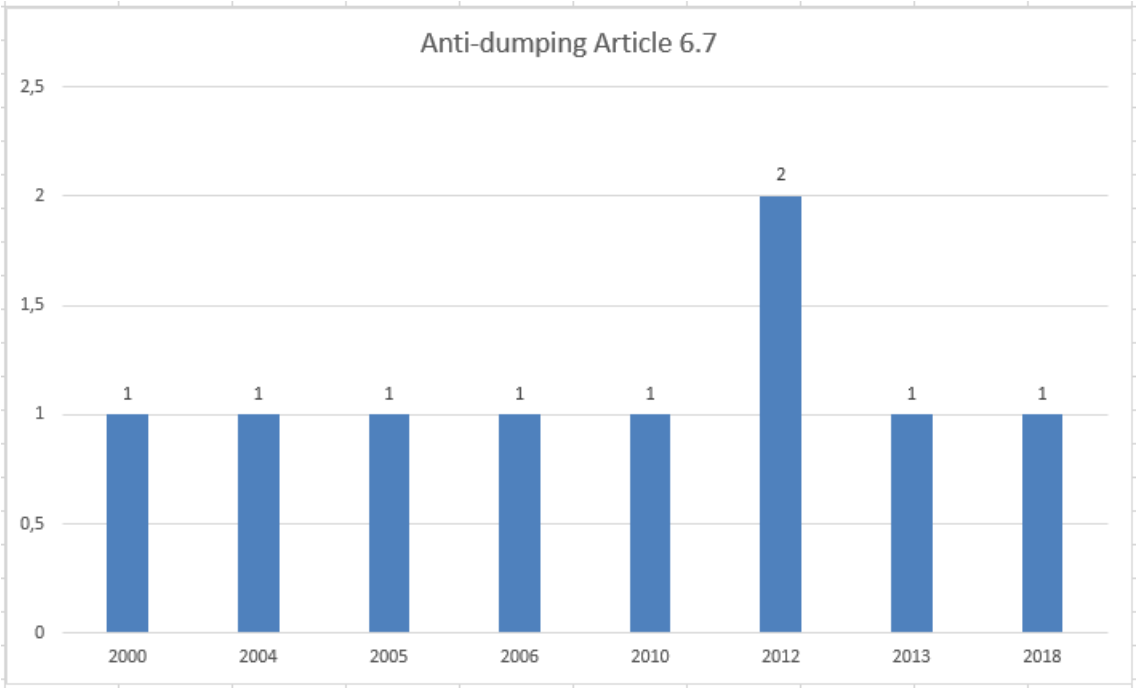
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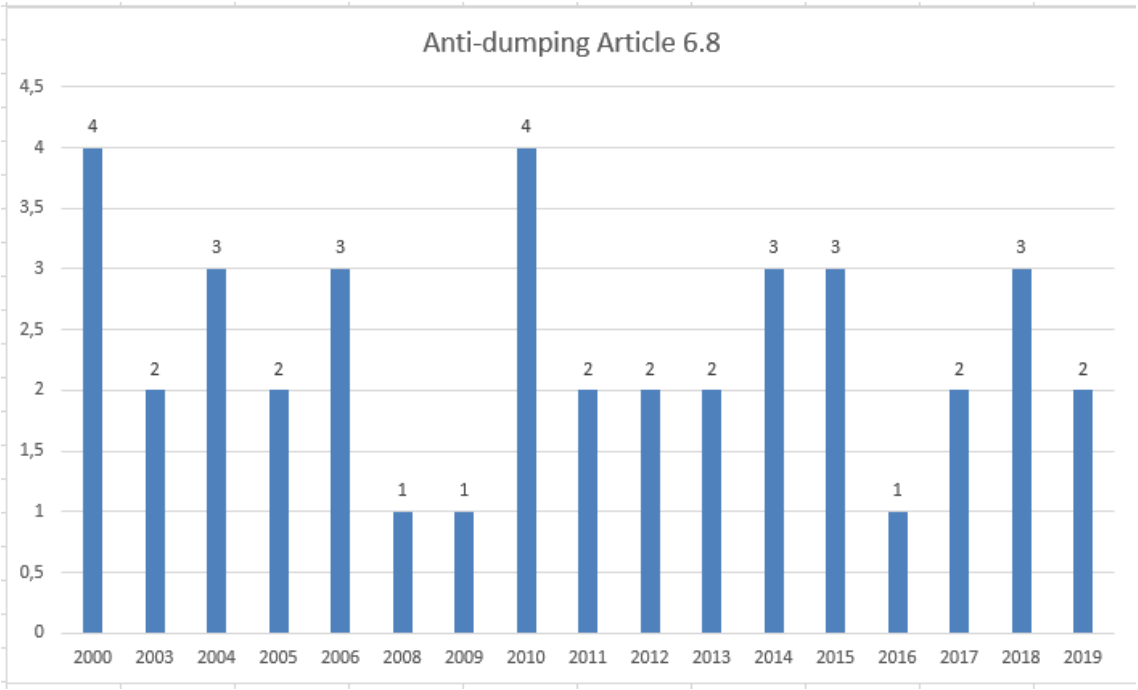
Anti-dumping Article 6.8
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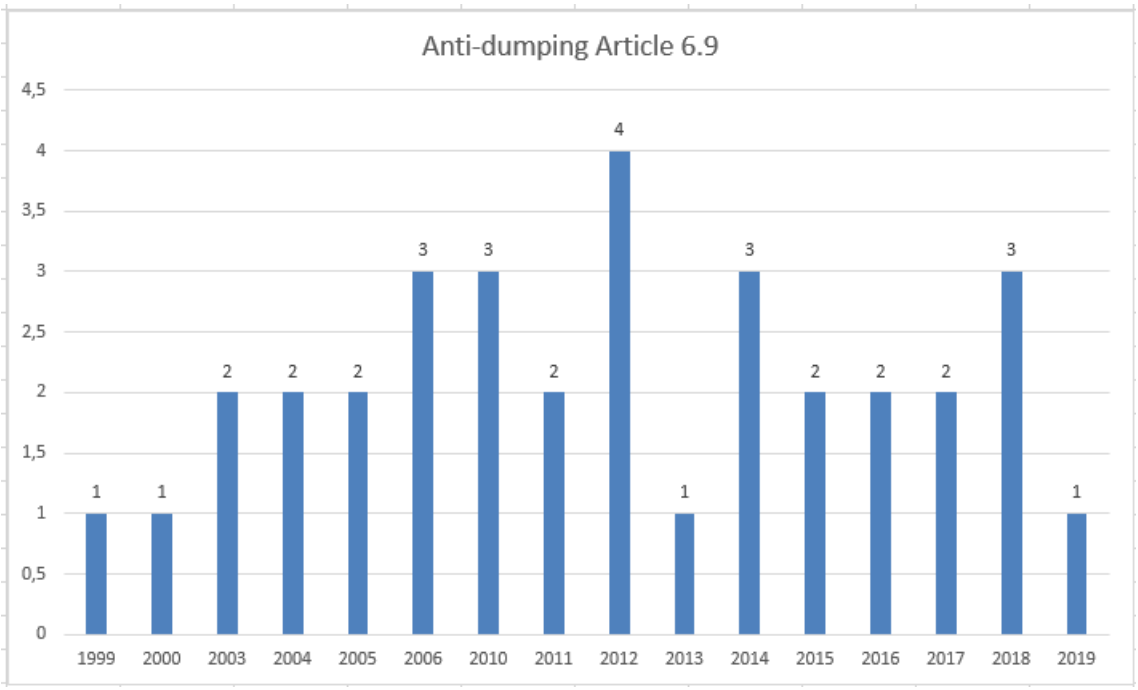
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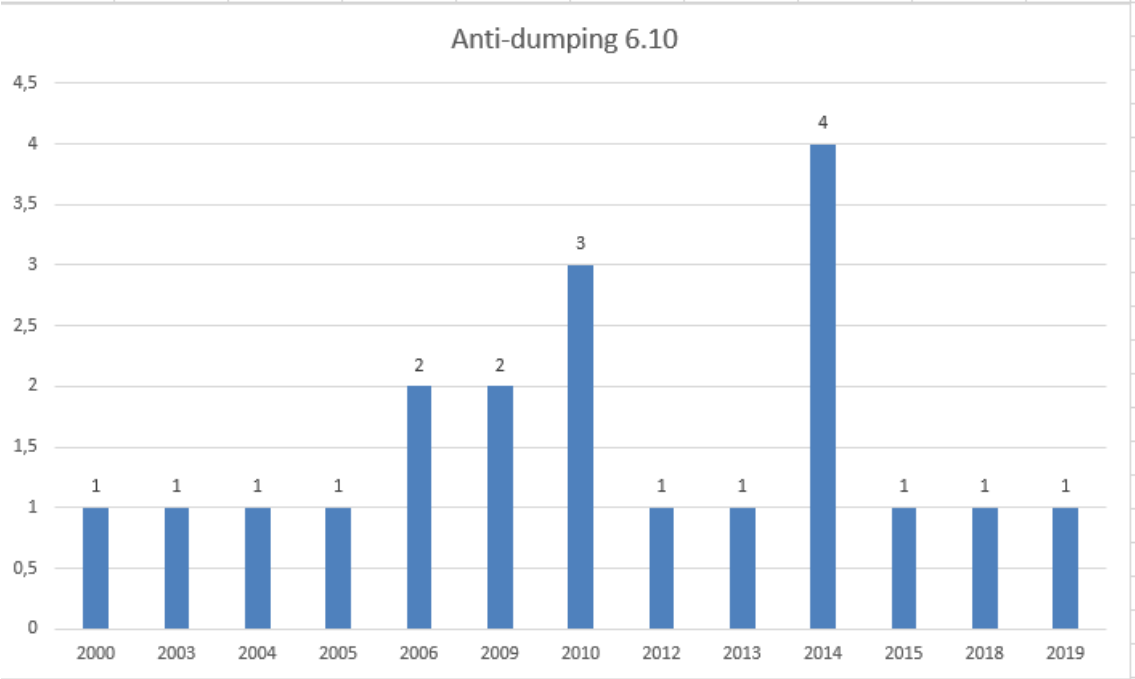
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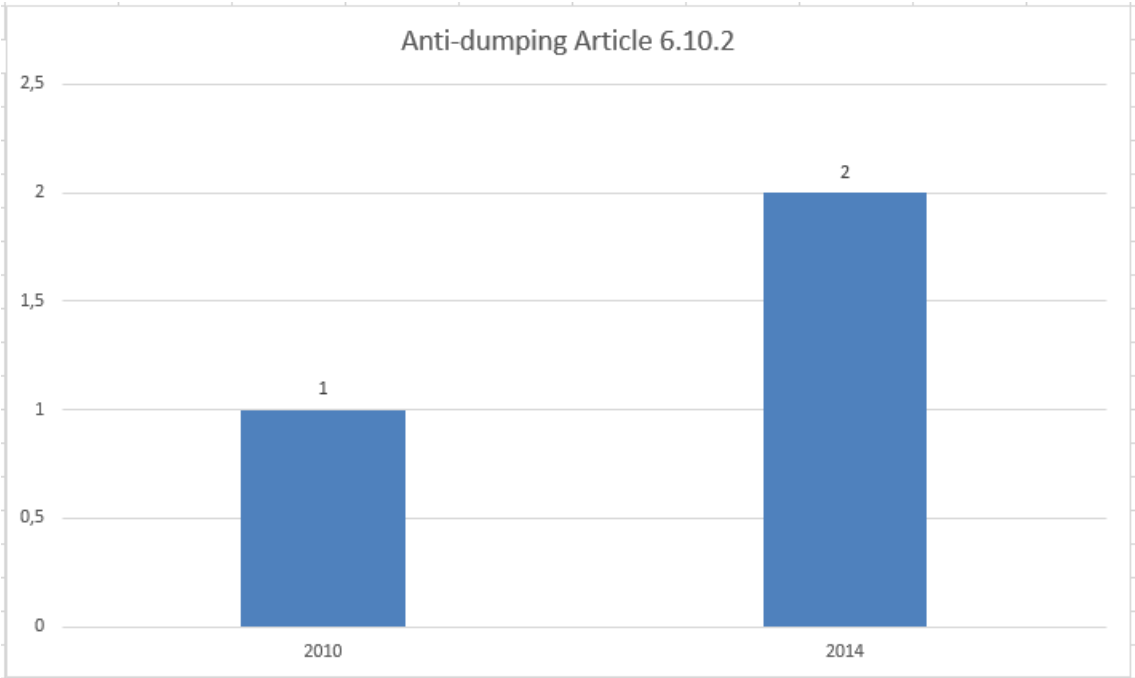
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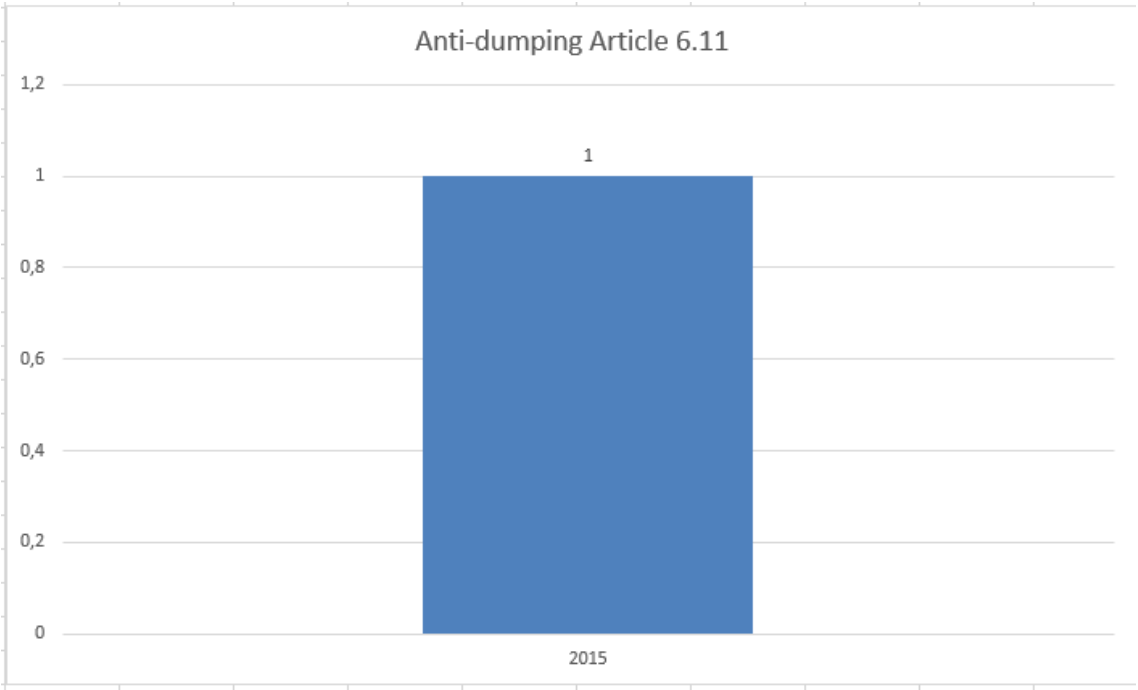
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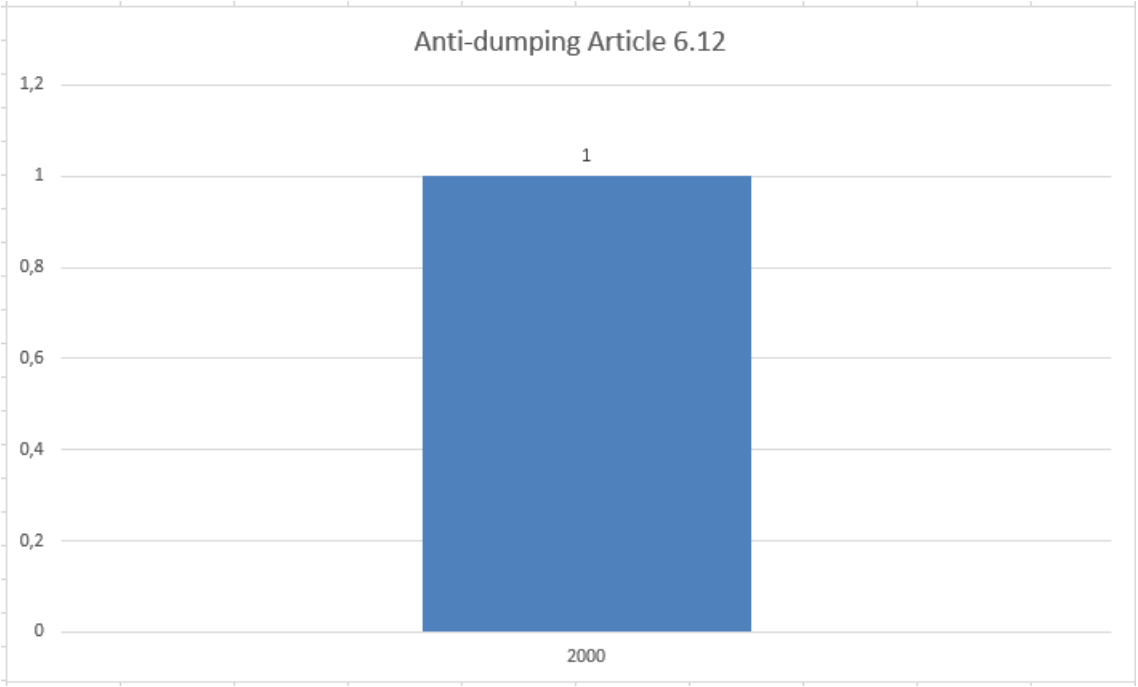
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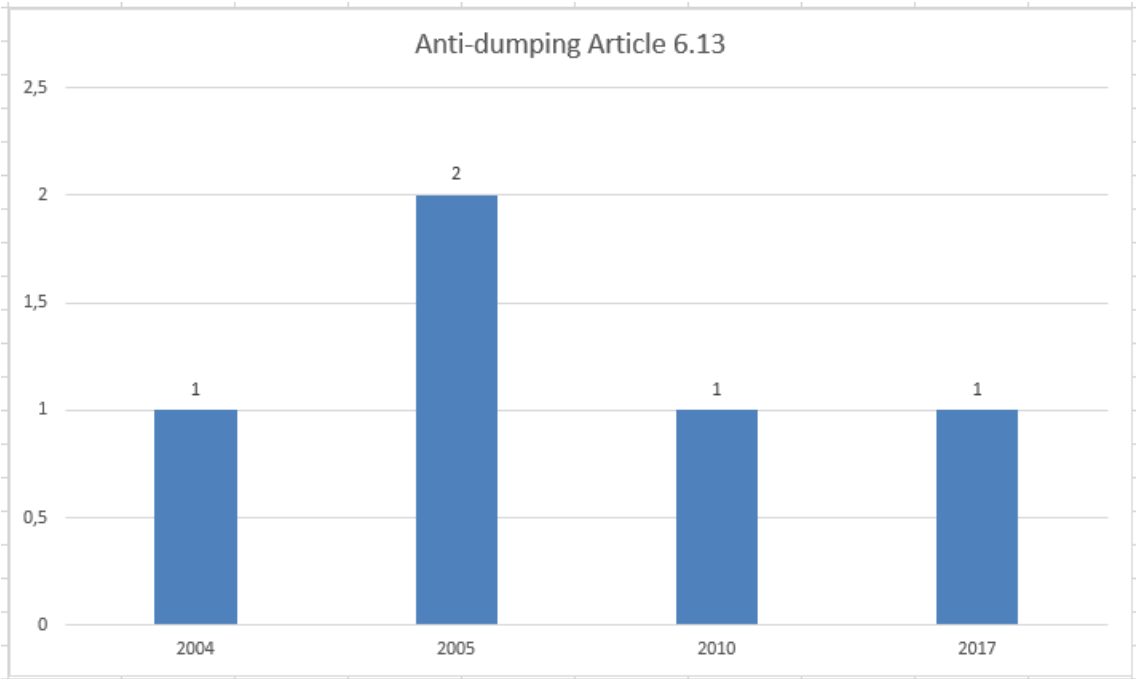
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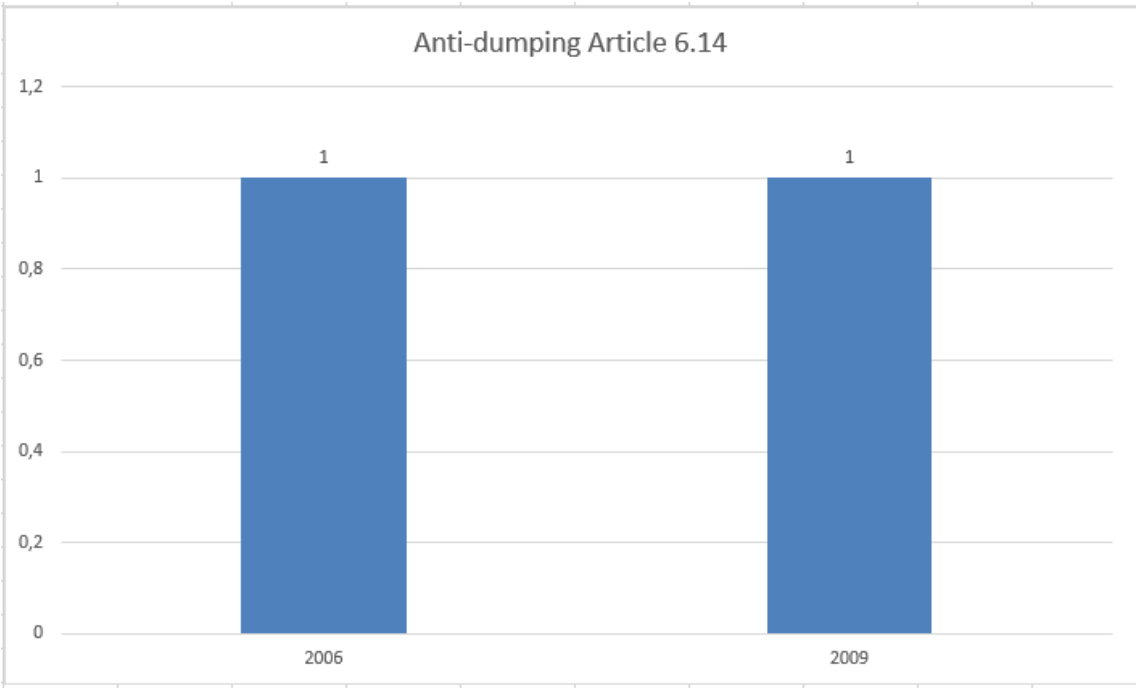
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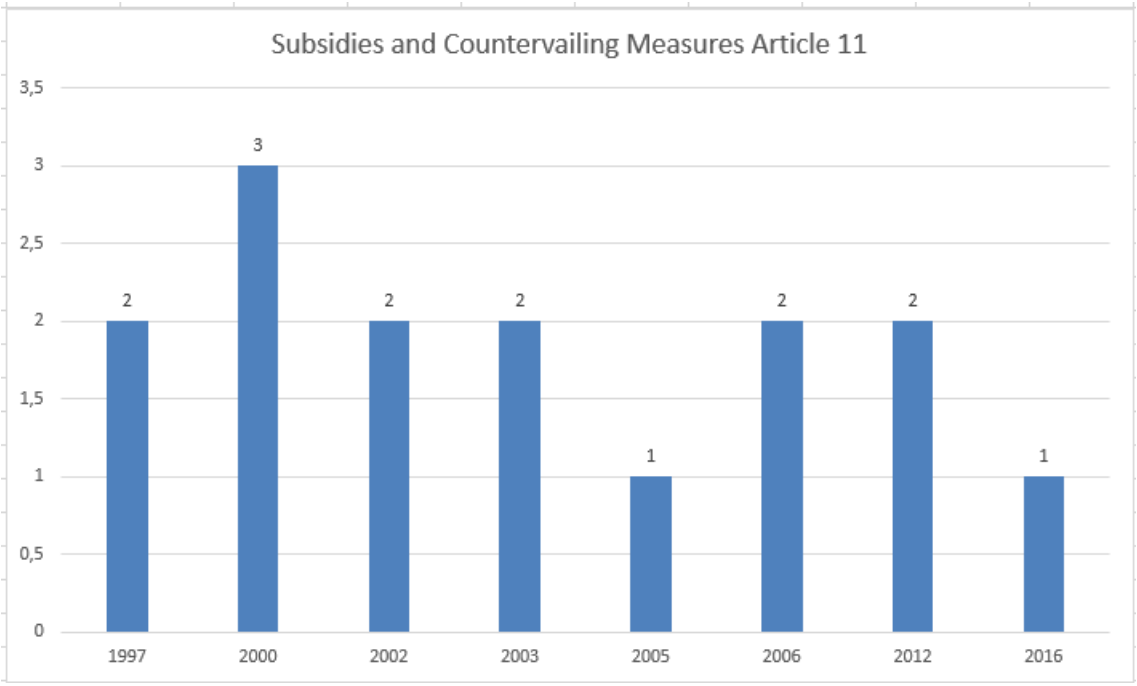
Subsidies and Countervailing Measures Article 11
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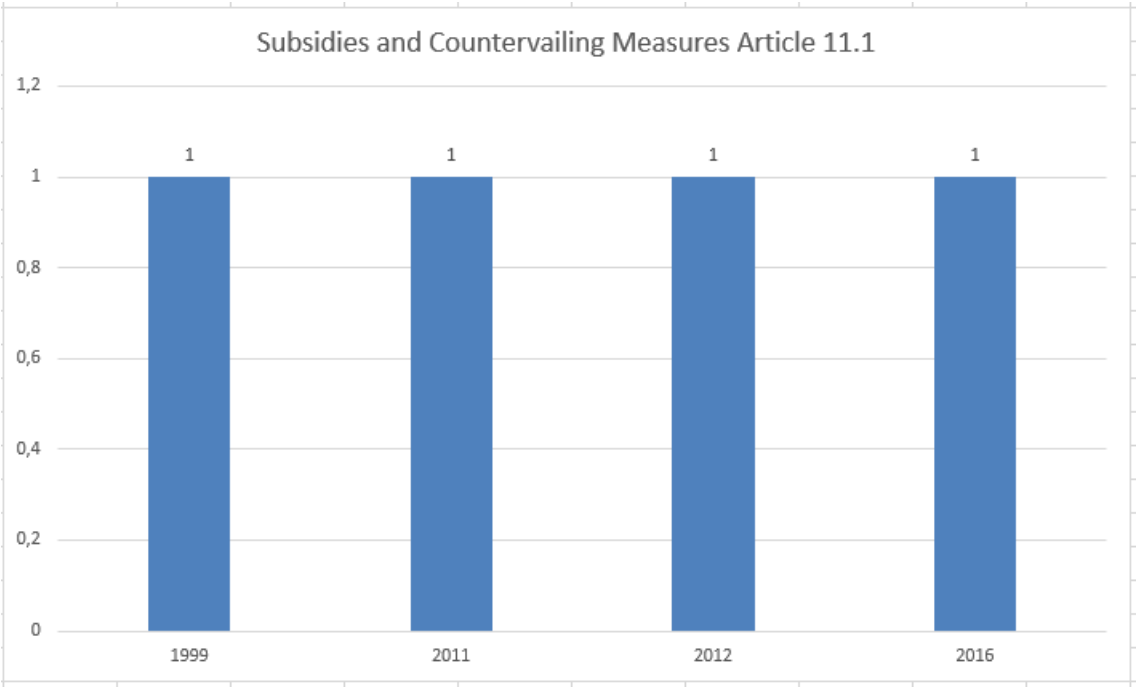
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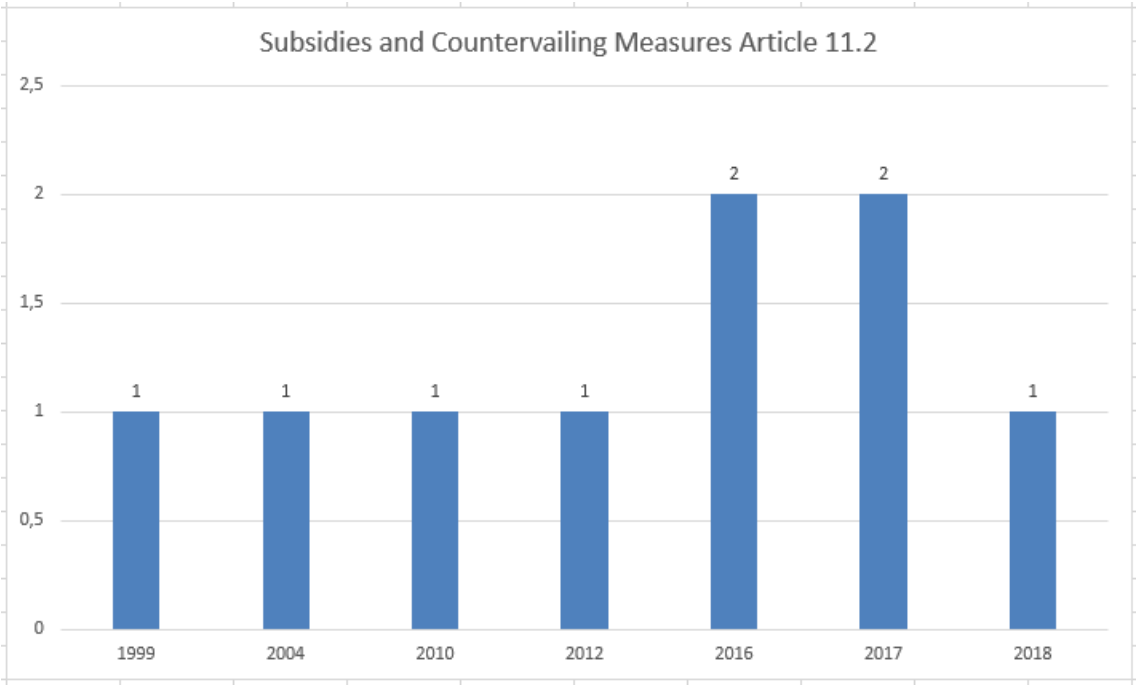
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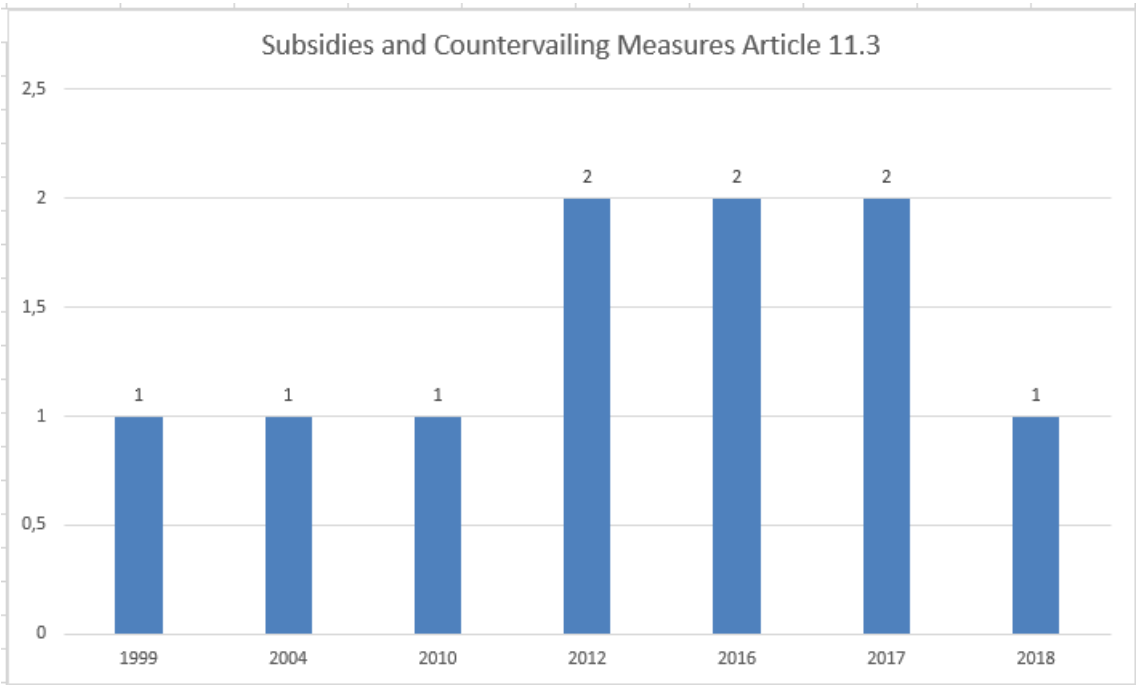
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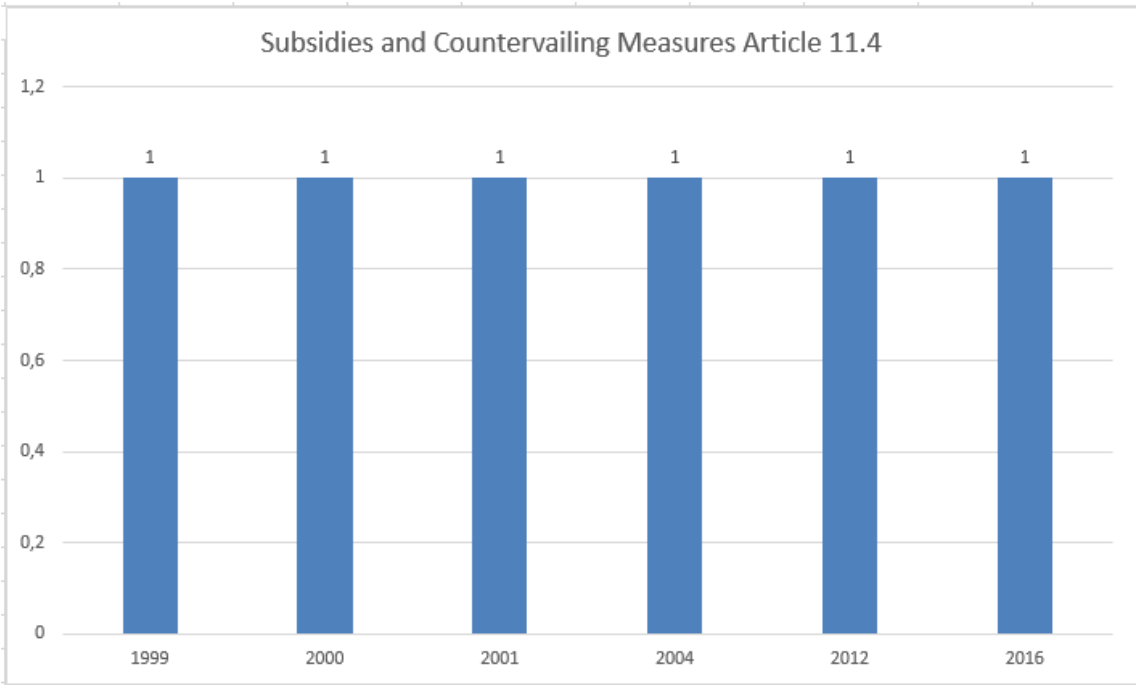
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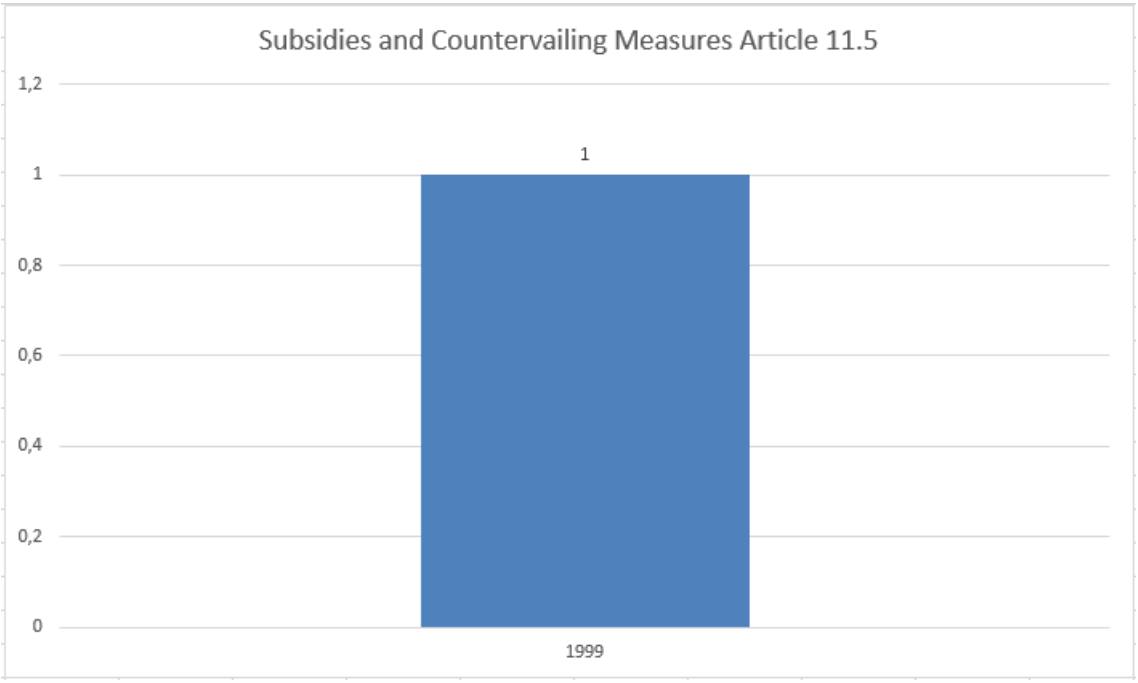
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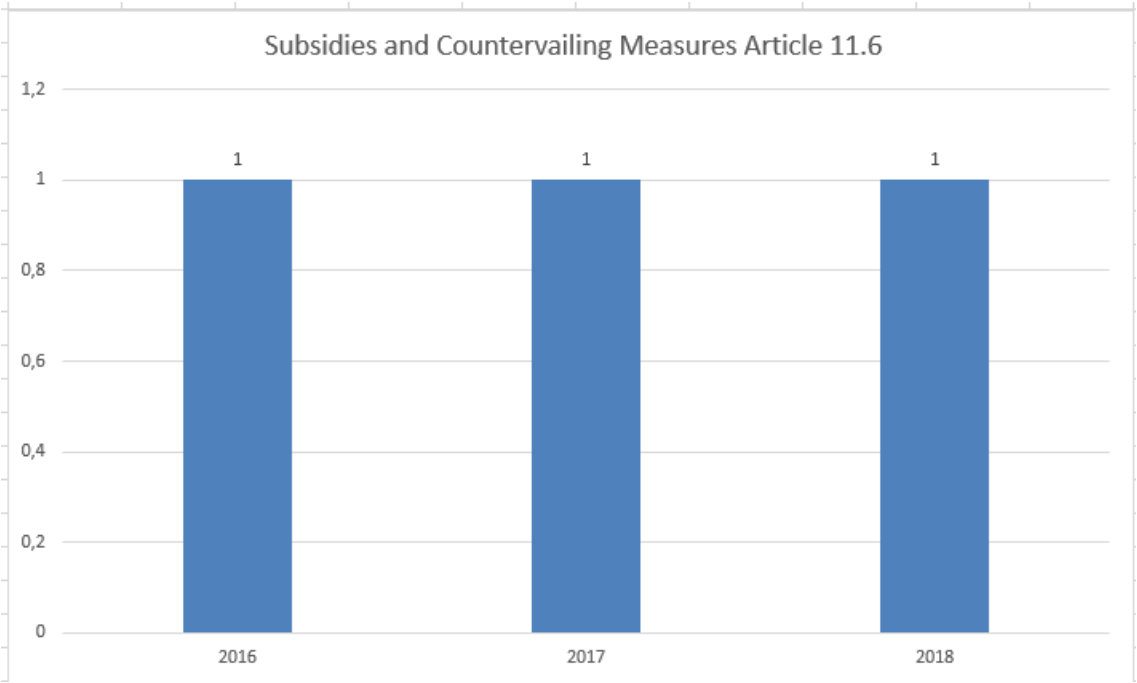
Subsidies and Countervailing Measures Article 11.6
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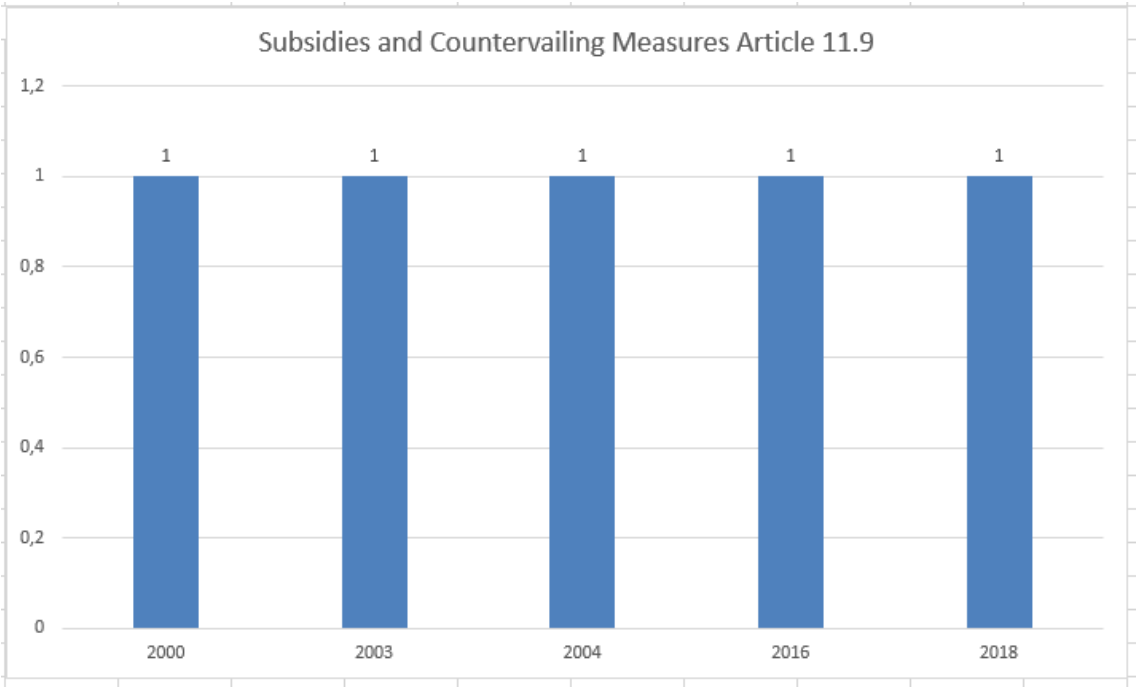
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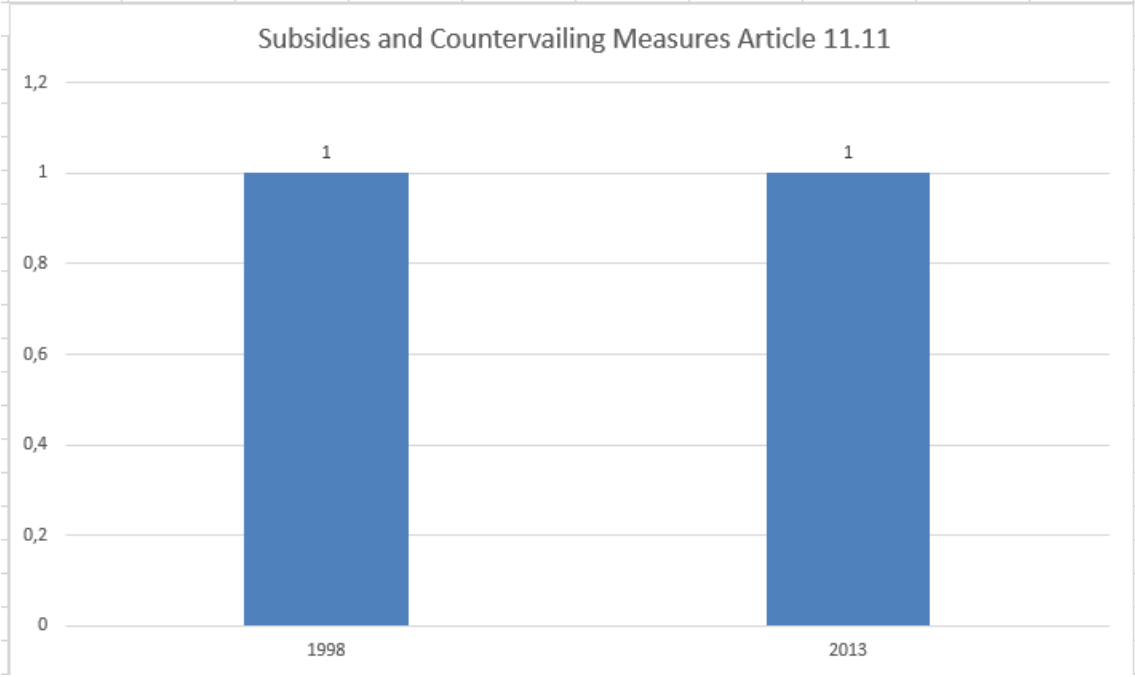
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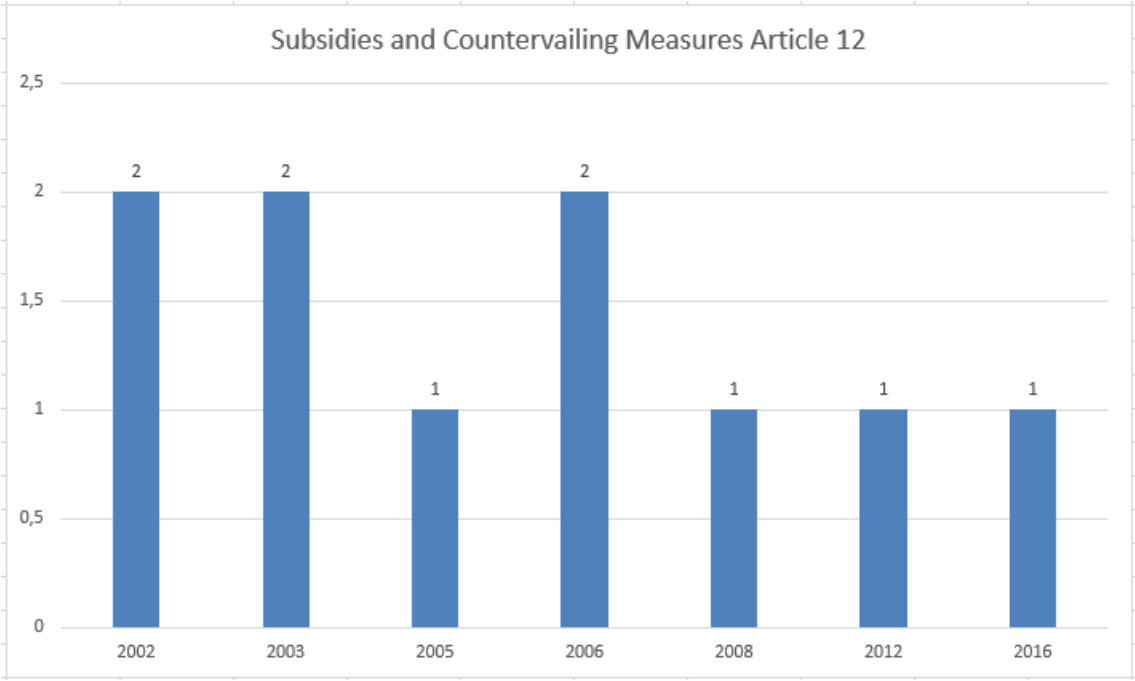
Subsidies and Countervailing Measures Article 12
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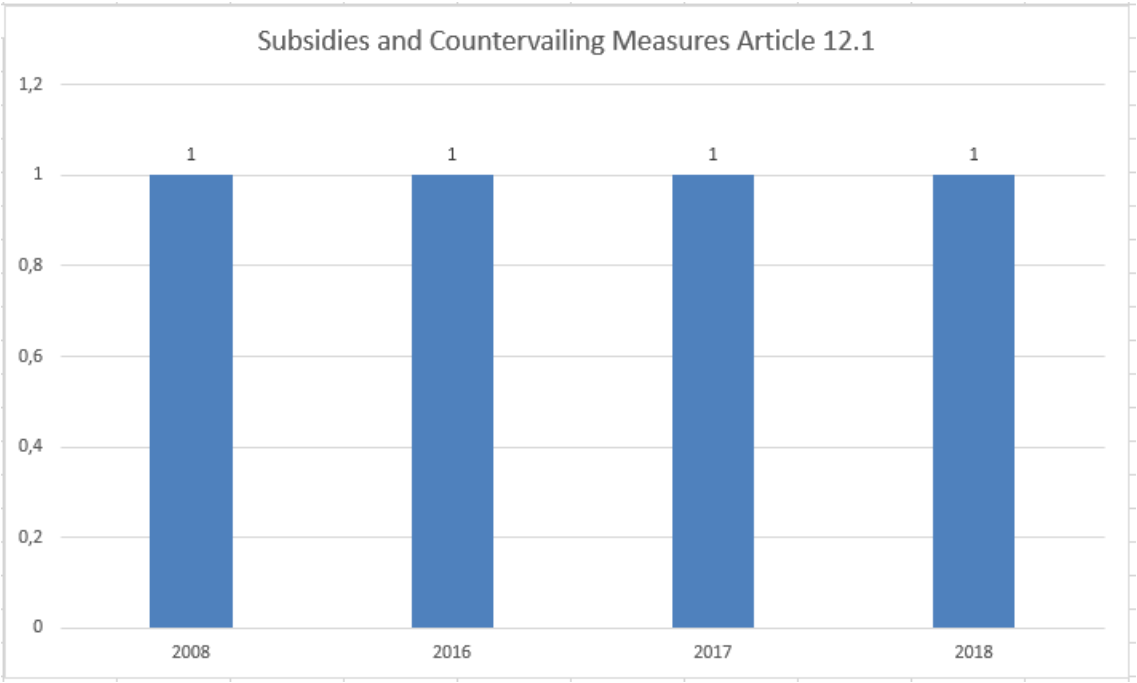
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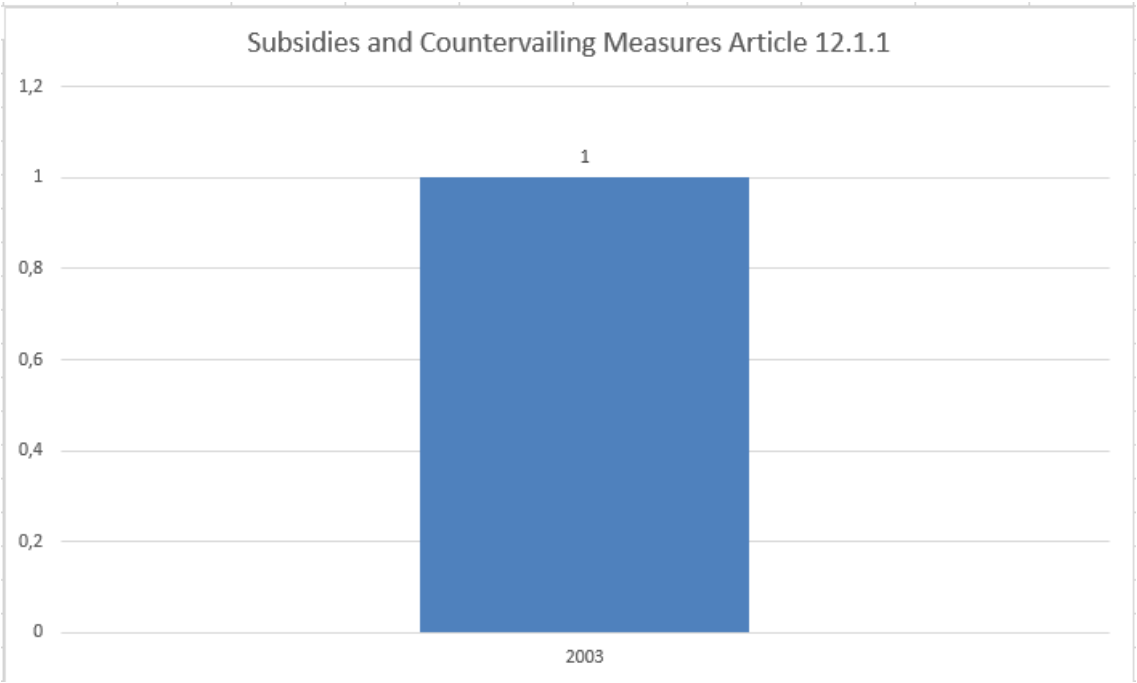
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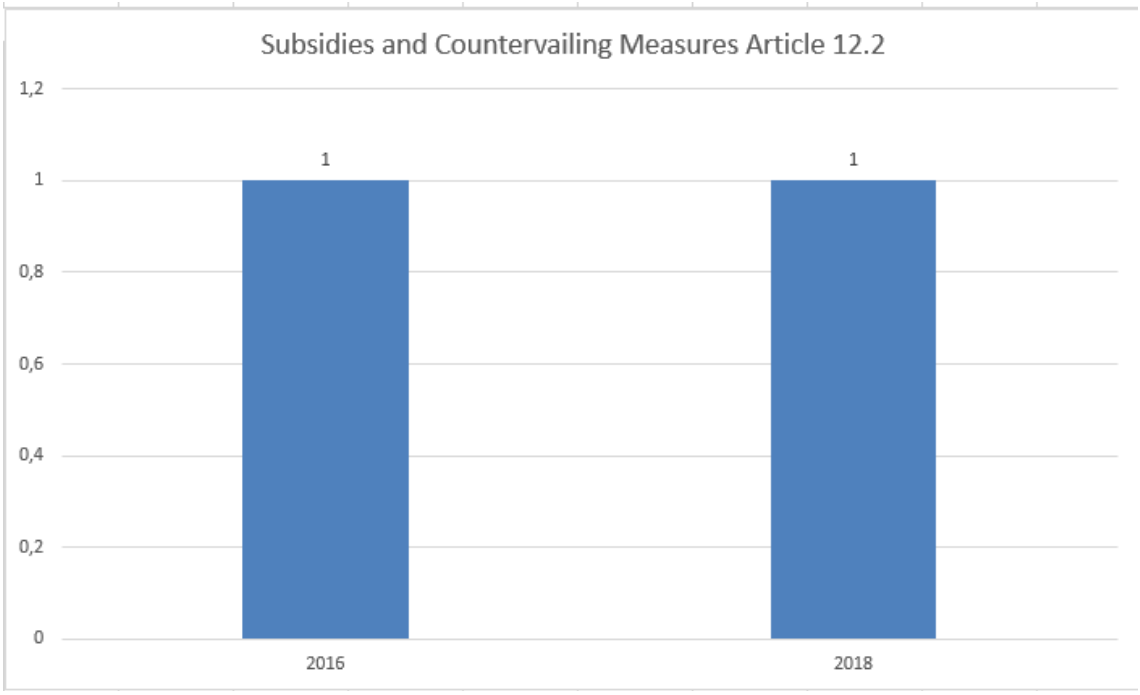
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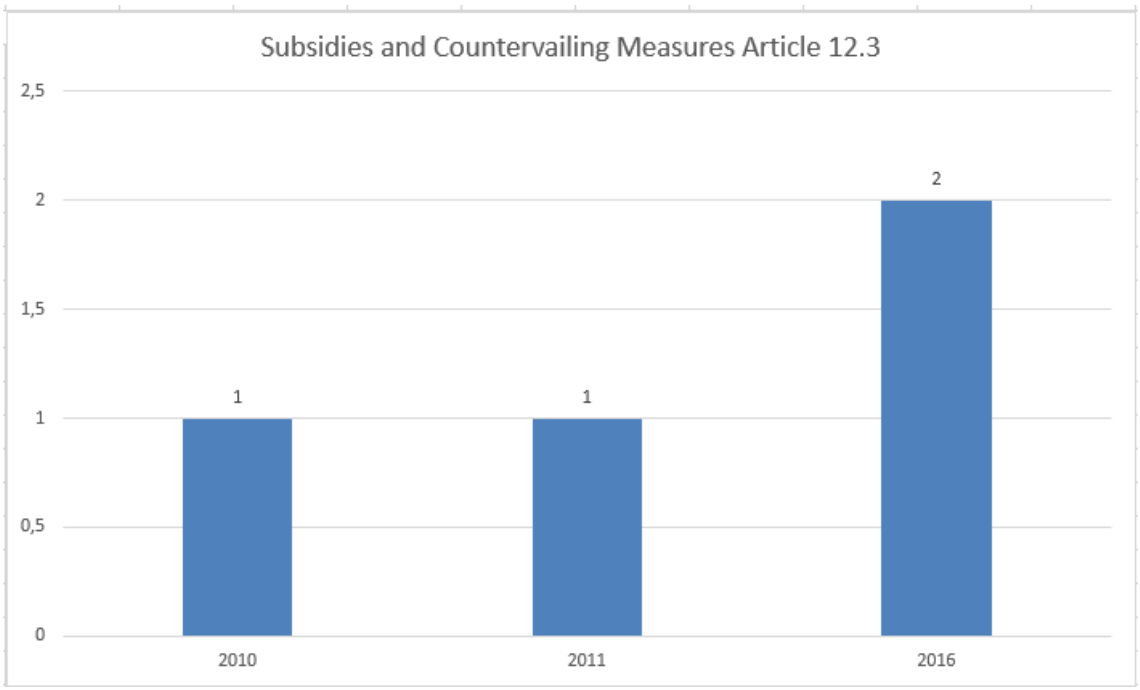
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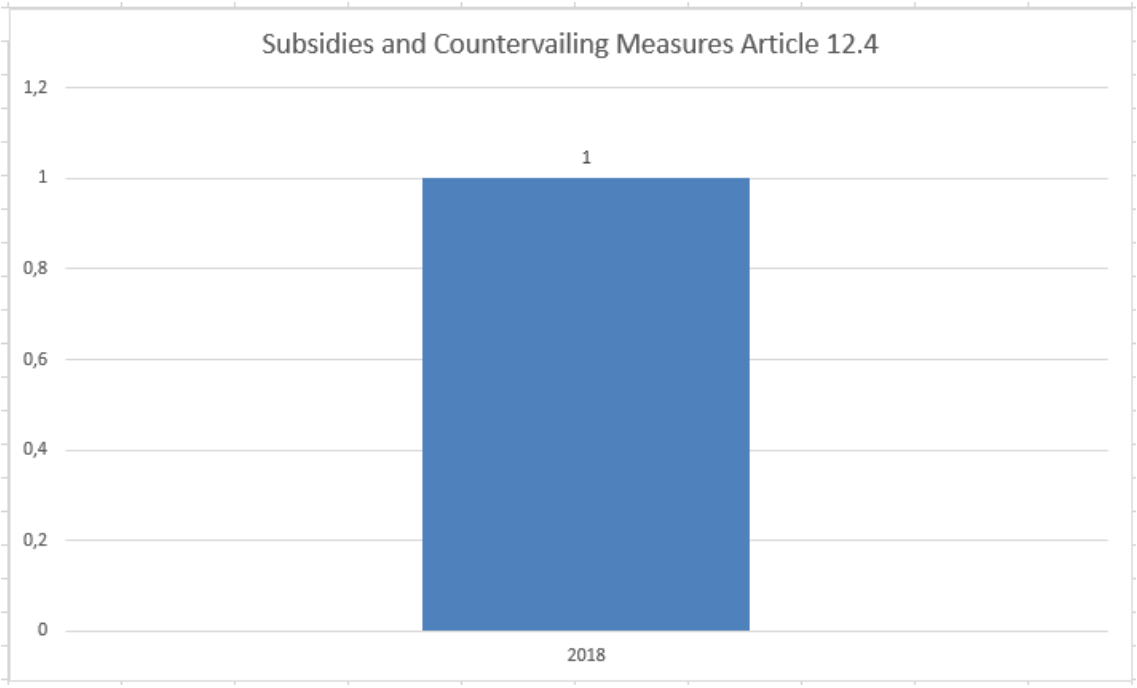
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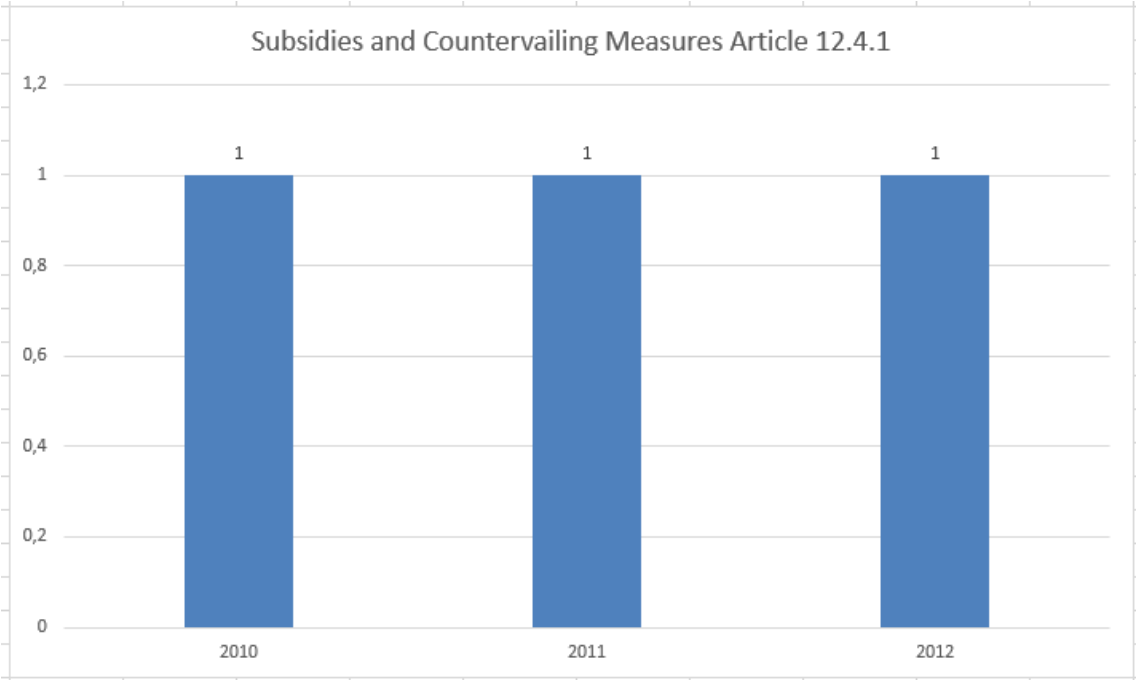
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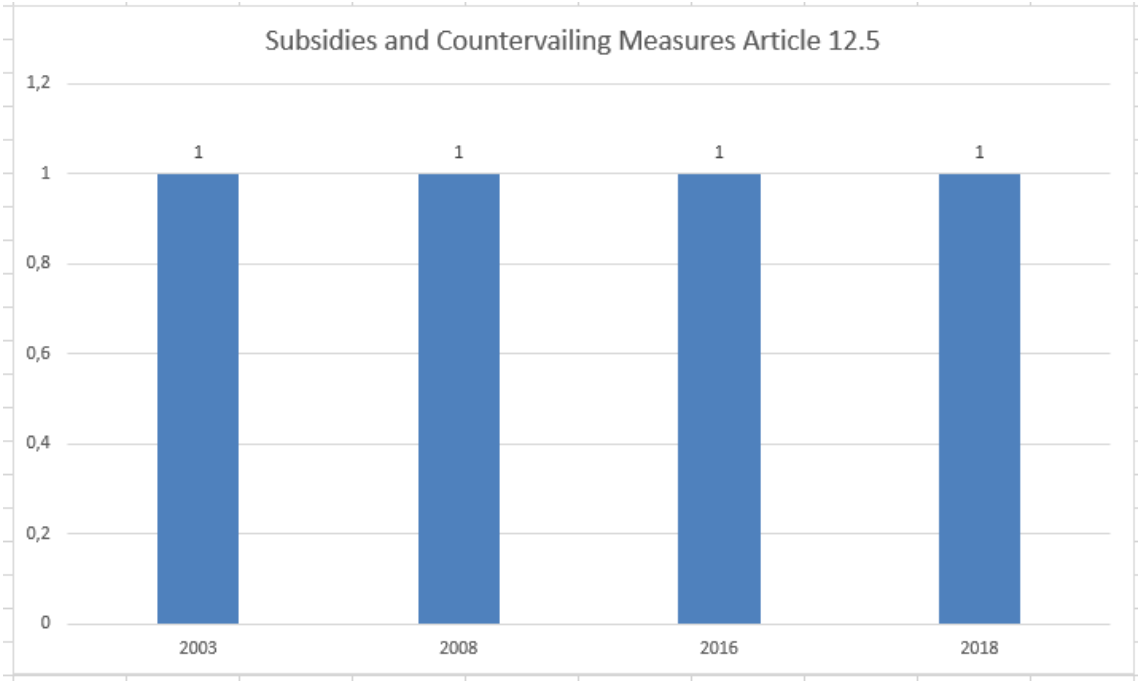
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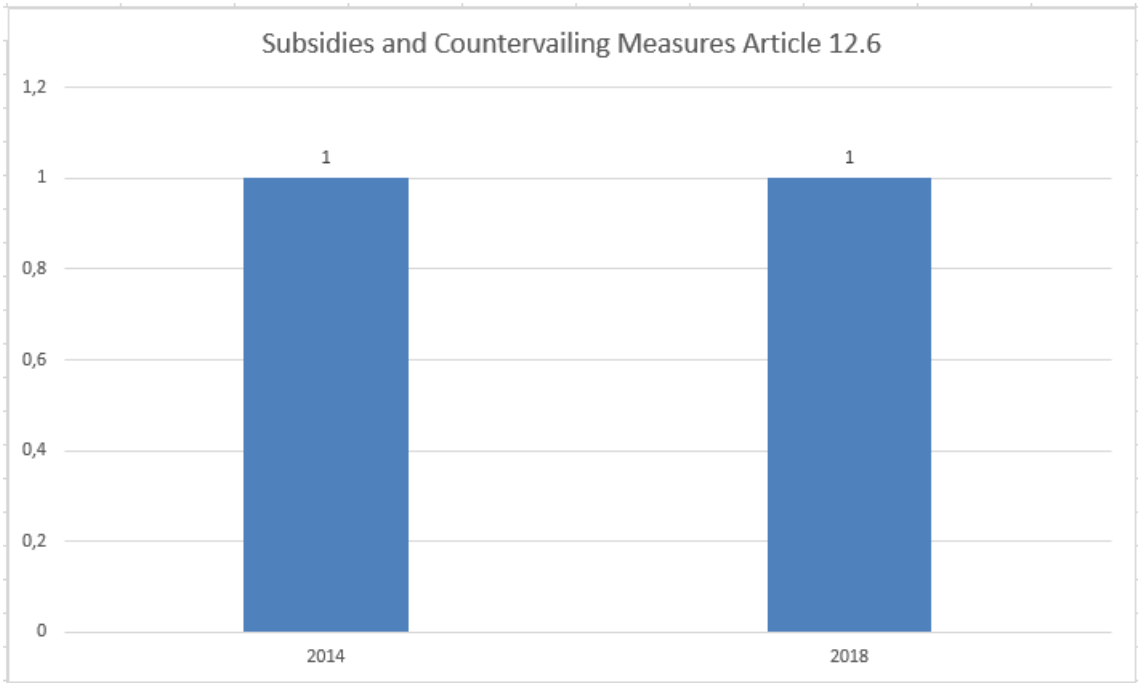
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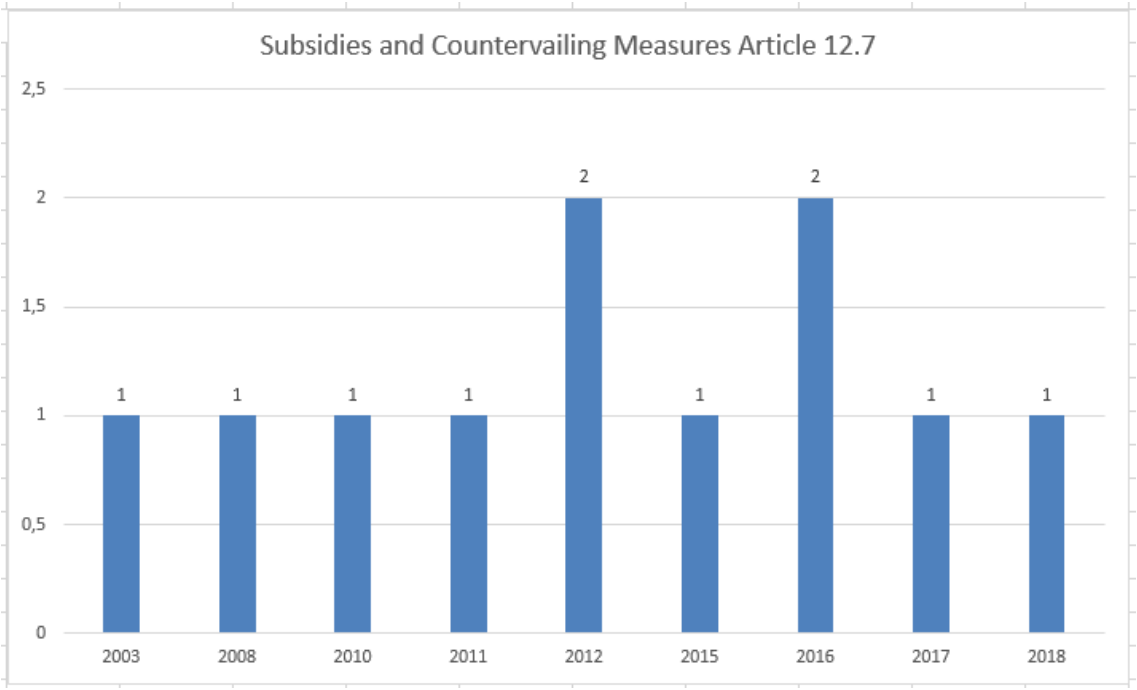
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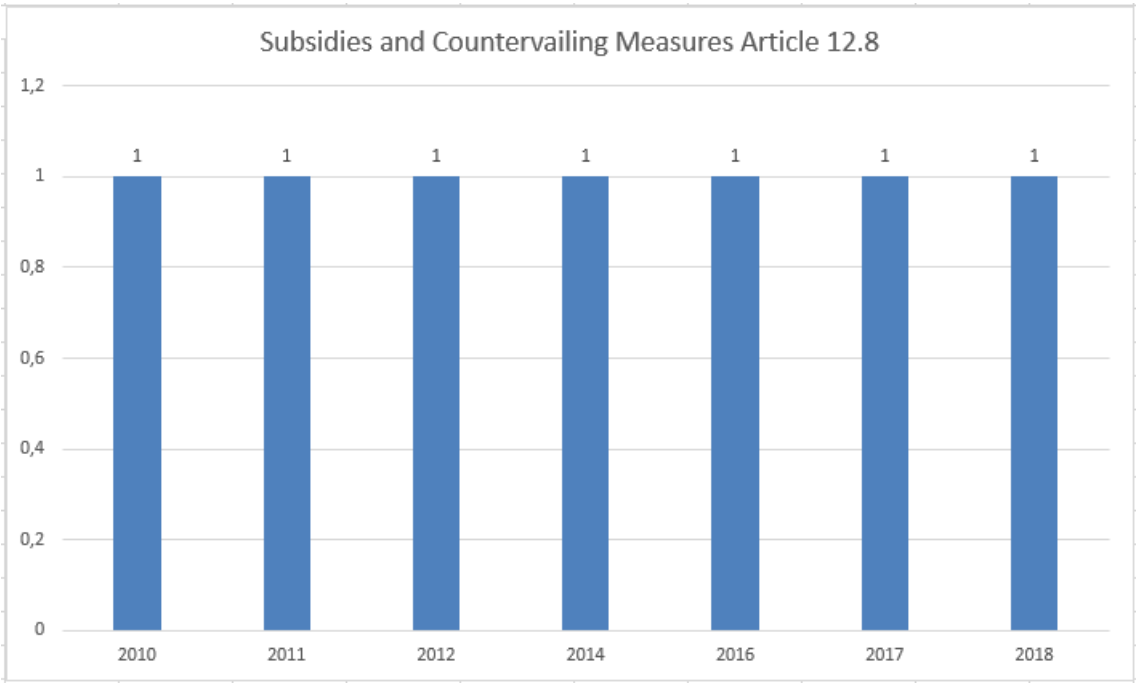
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Subsidies and Countervailing Measures Article 22
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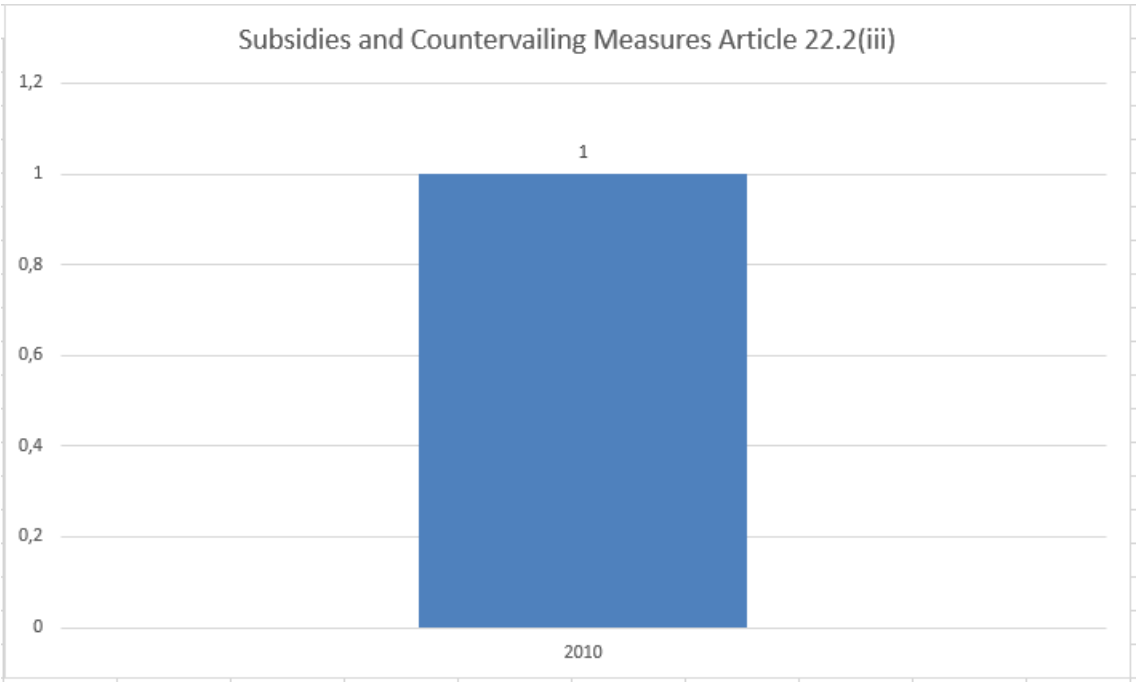
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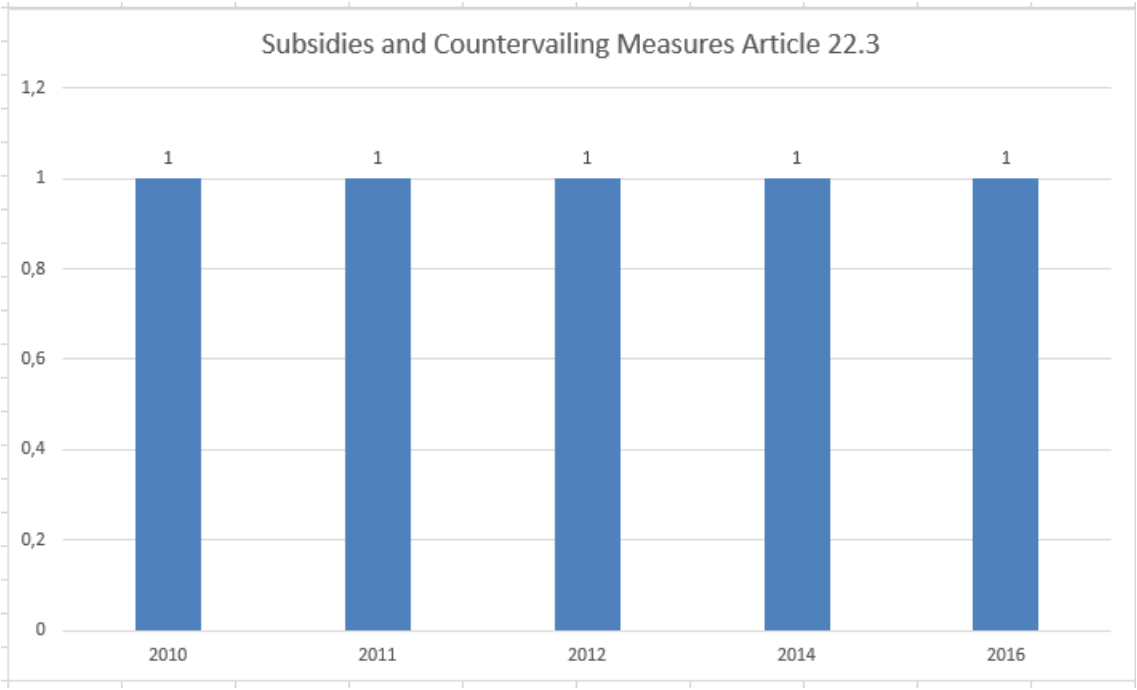
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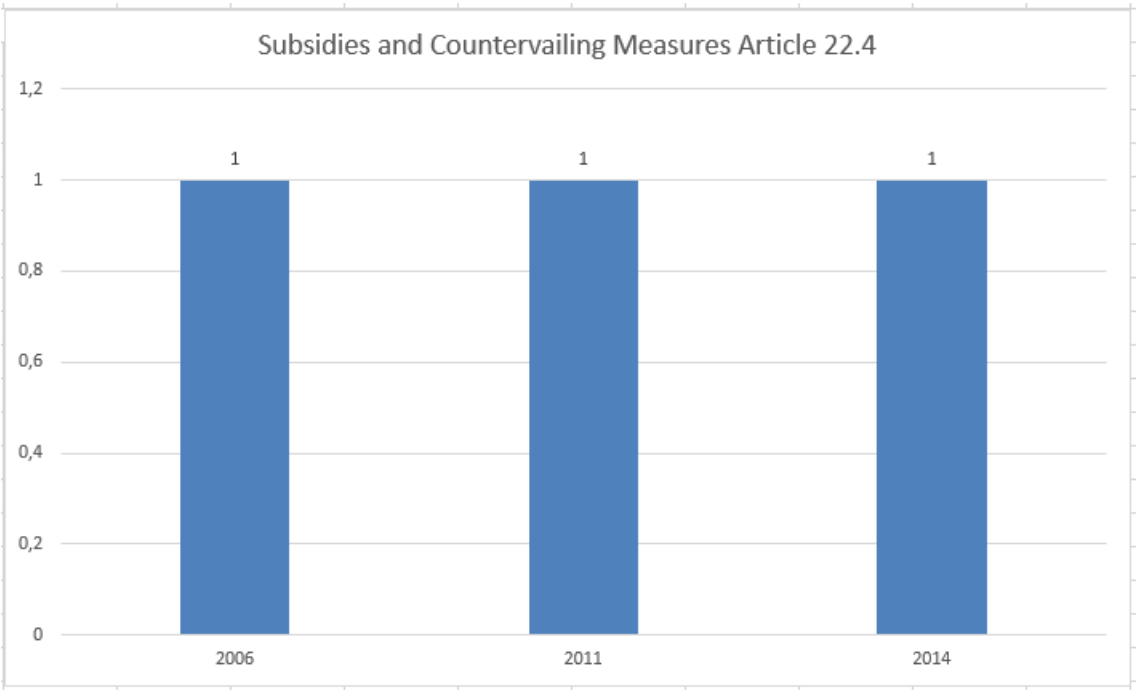
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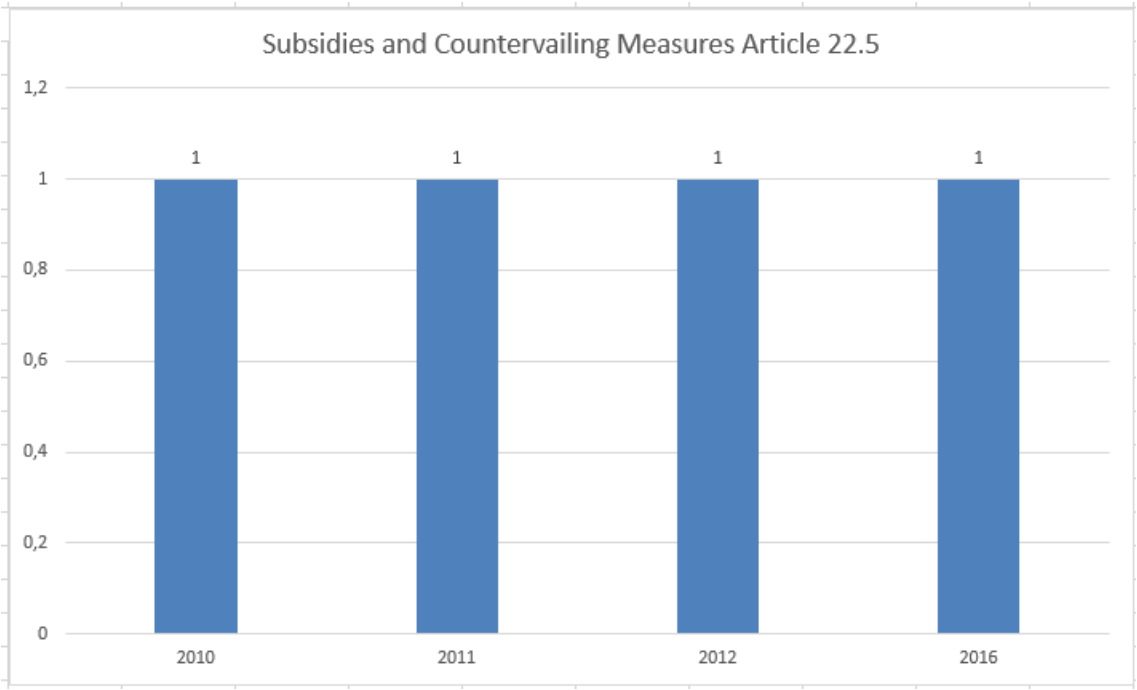
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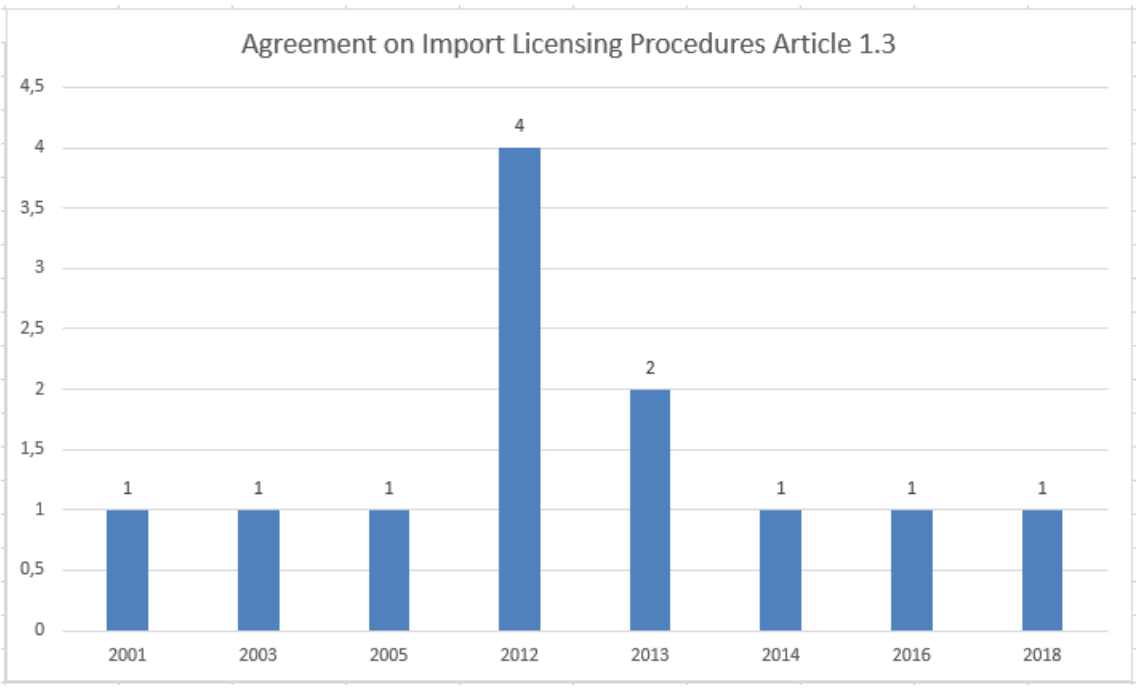
Agreement on Import Licensing Procedures Article 1.3
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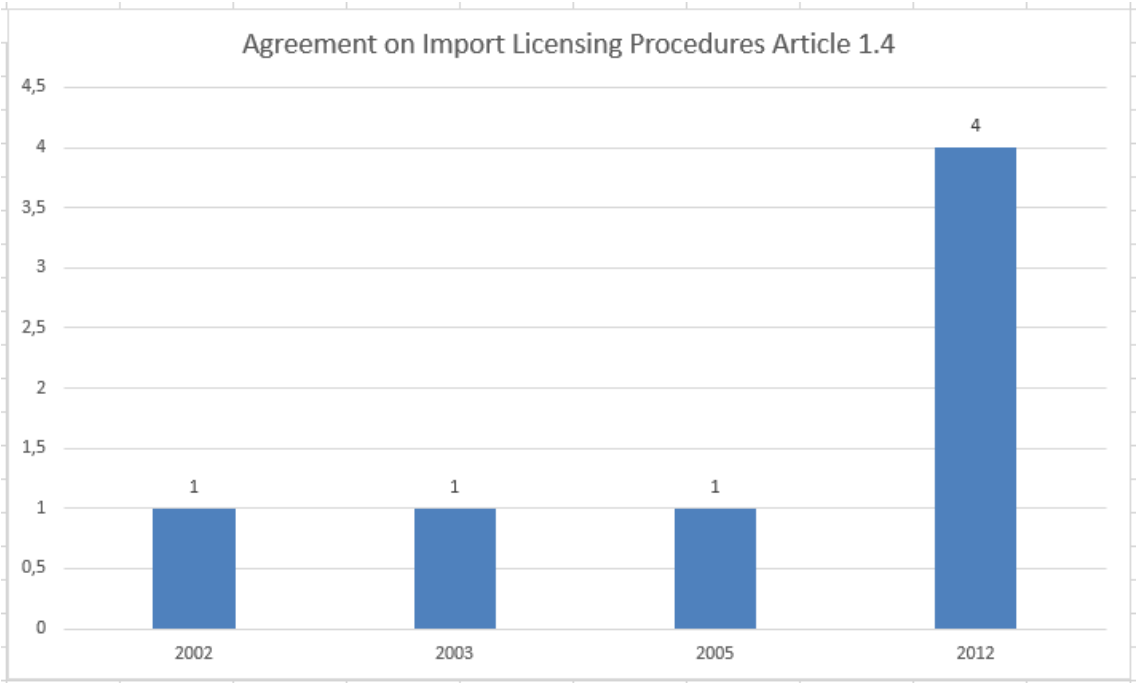
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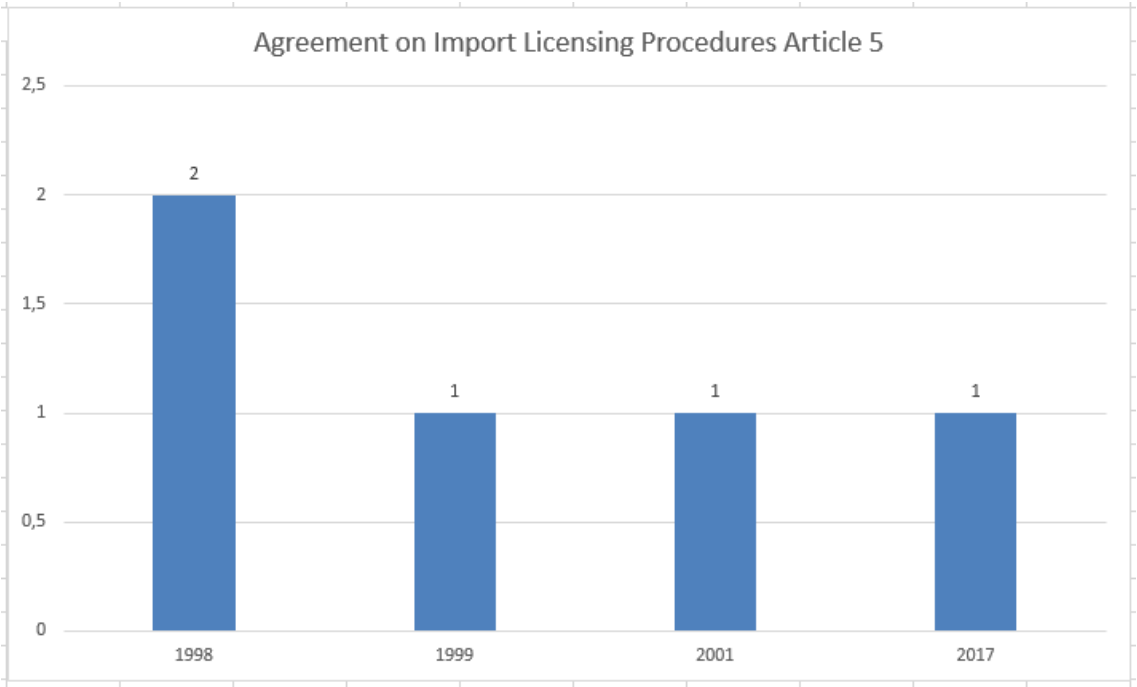
Agreement on Import Licensing Procedures Article 5
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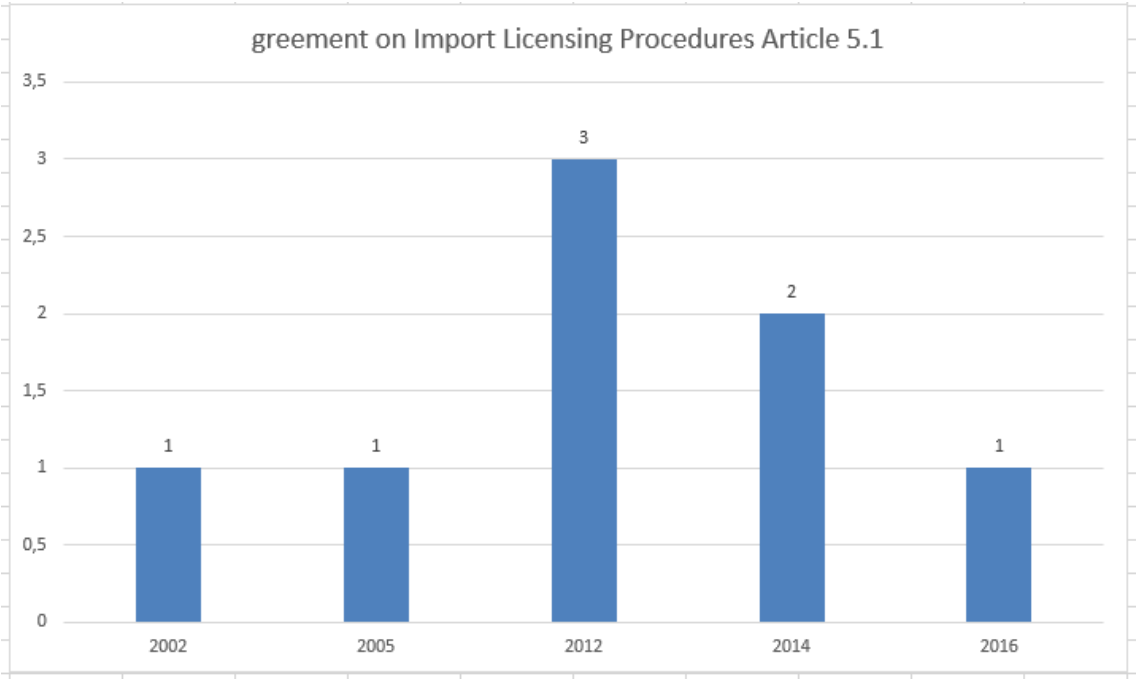
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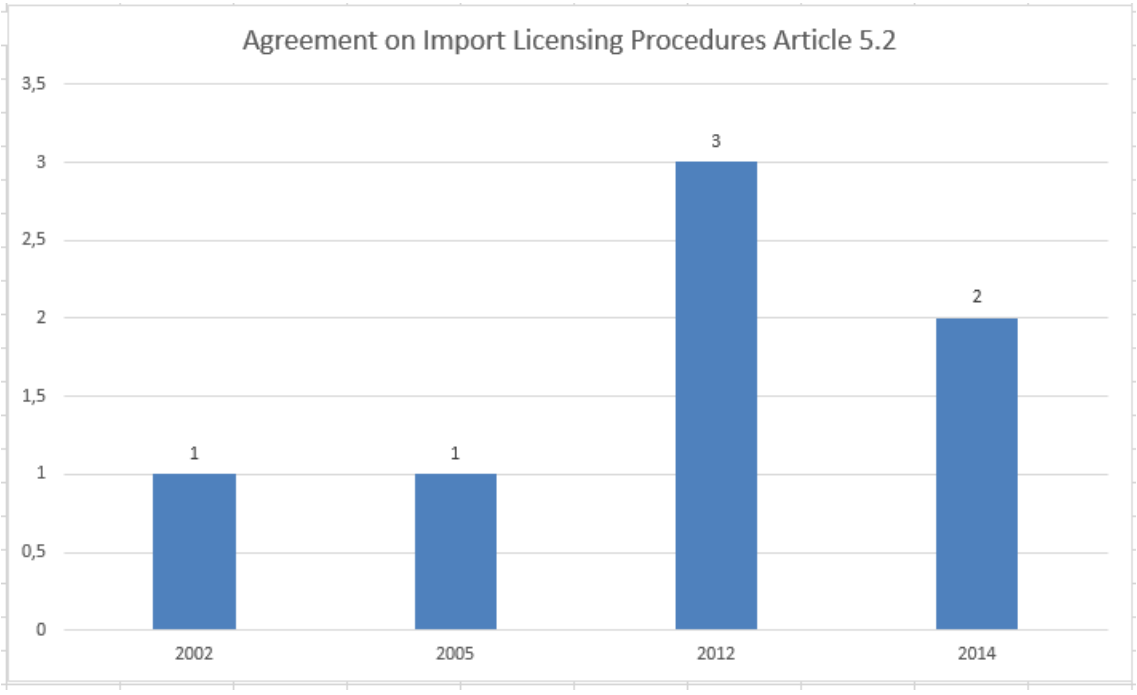
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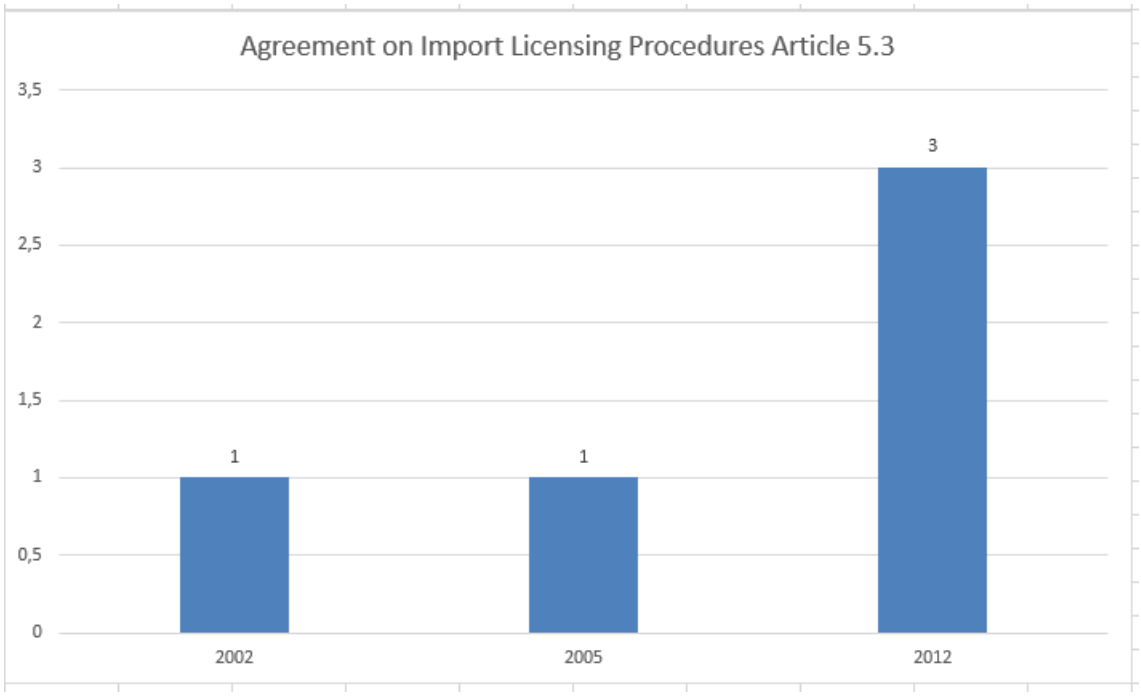
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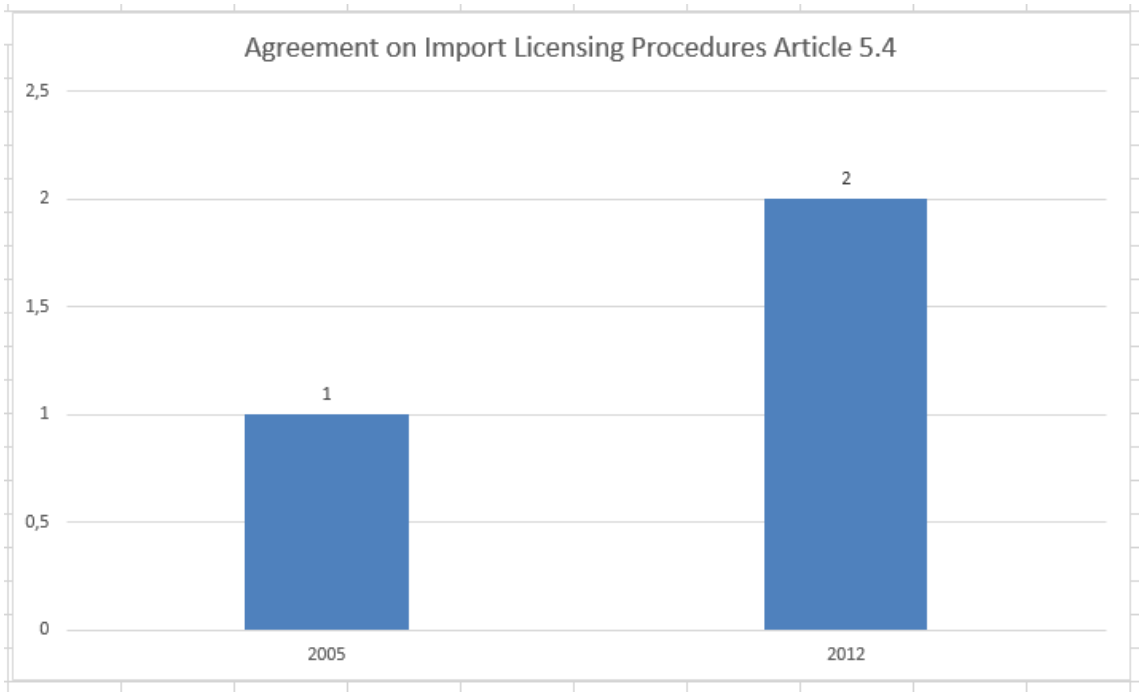
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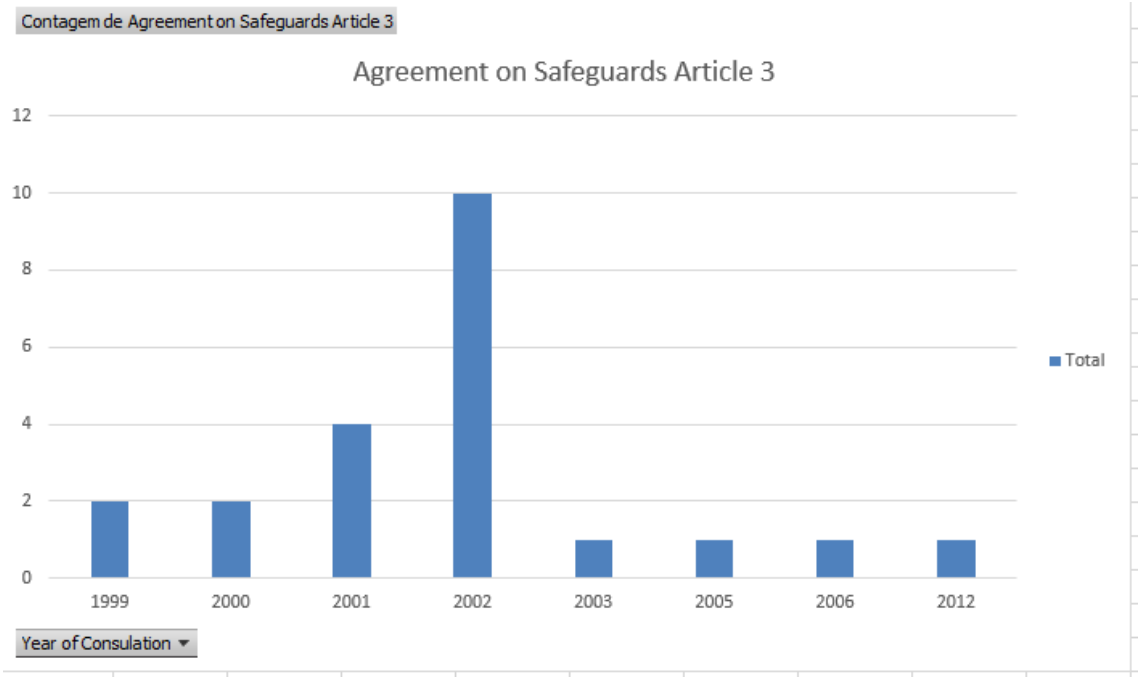
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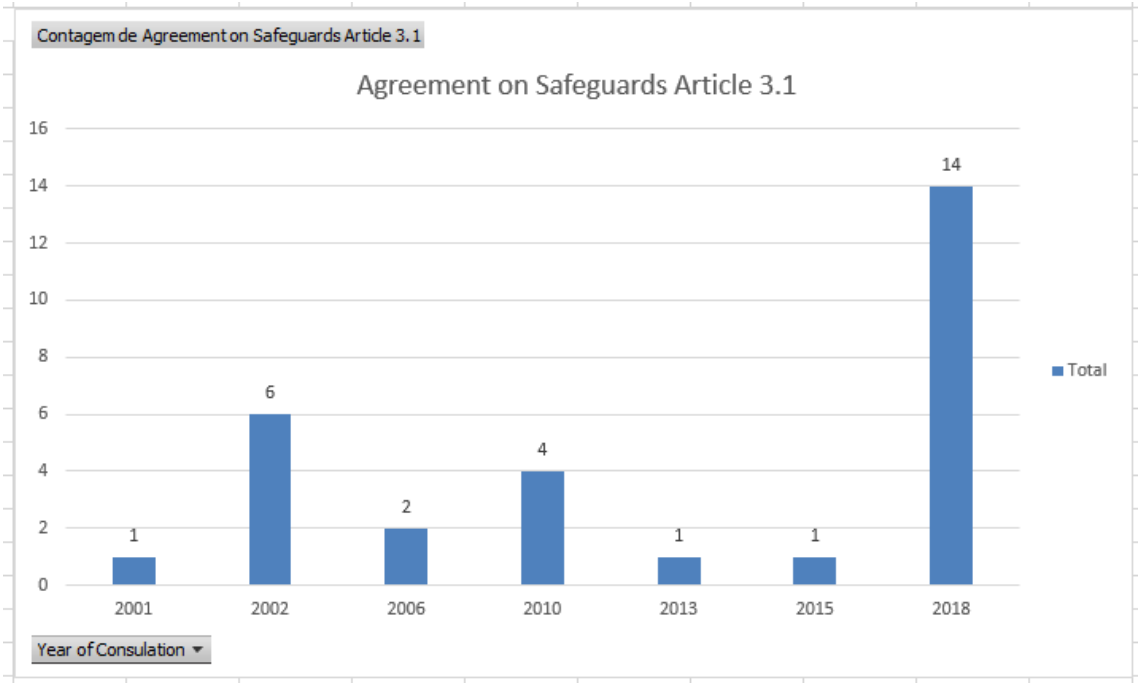
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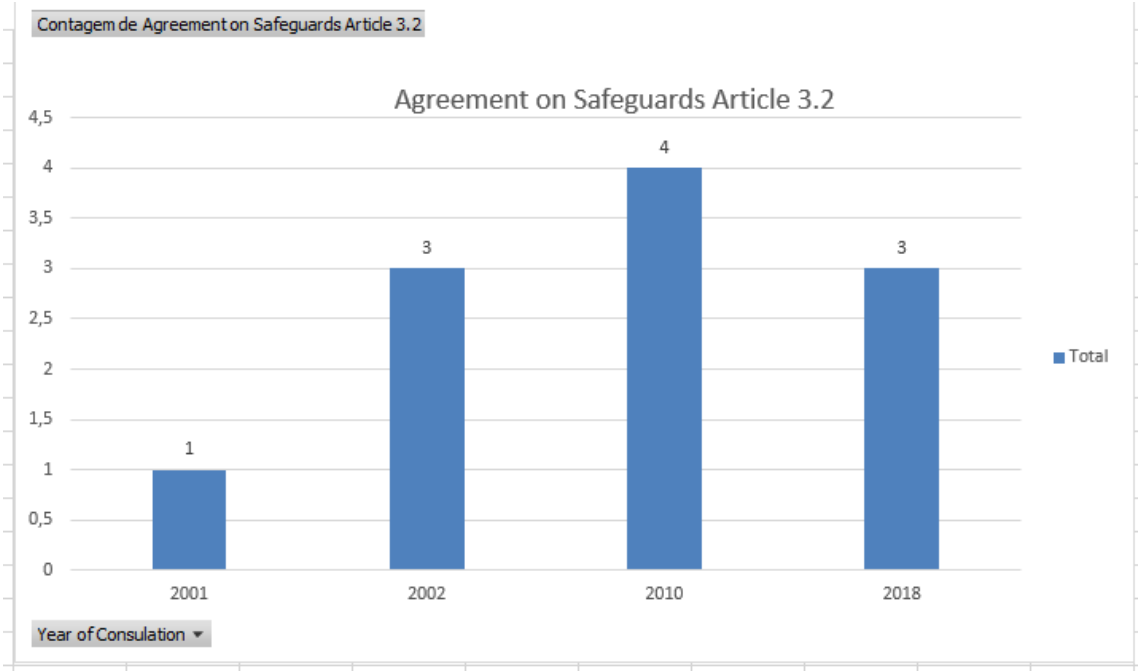
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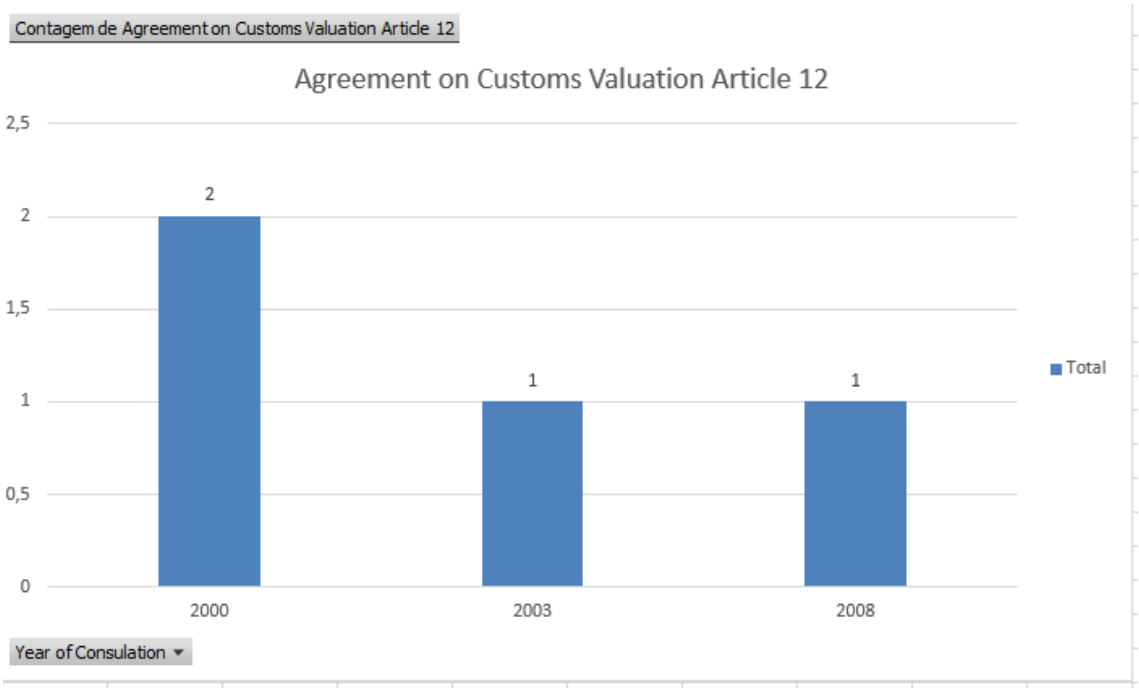
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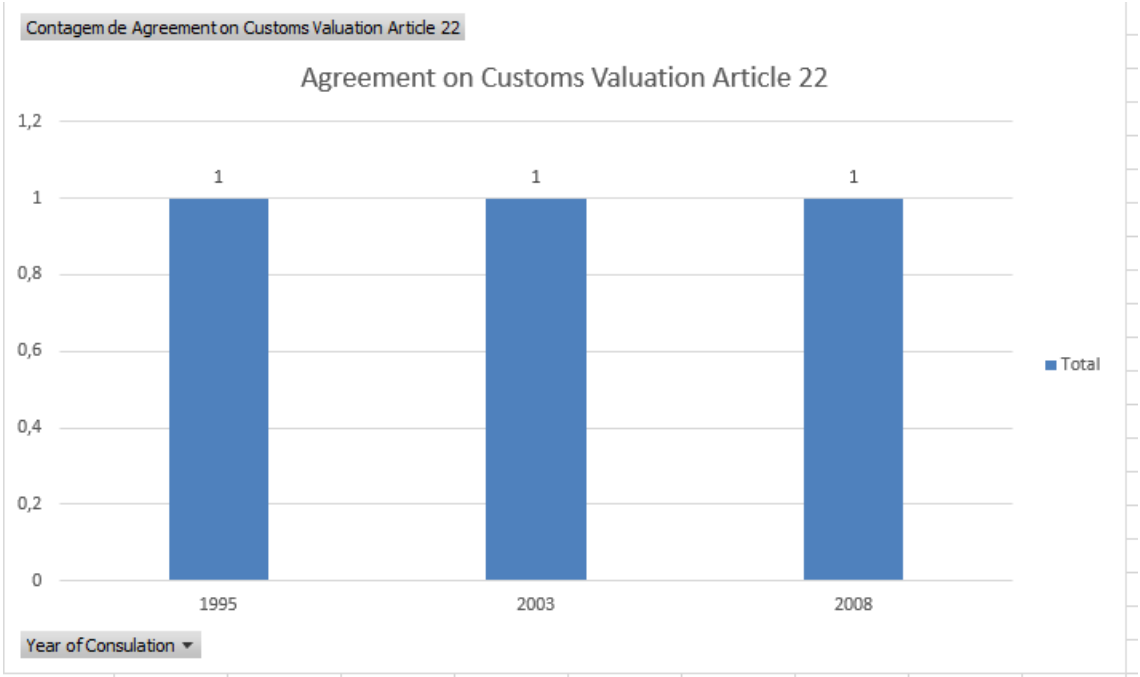
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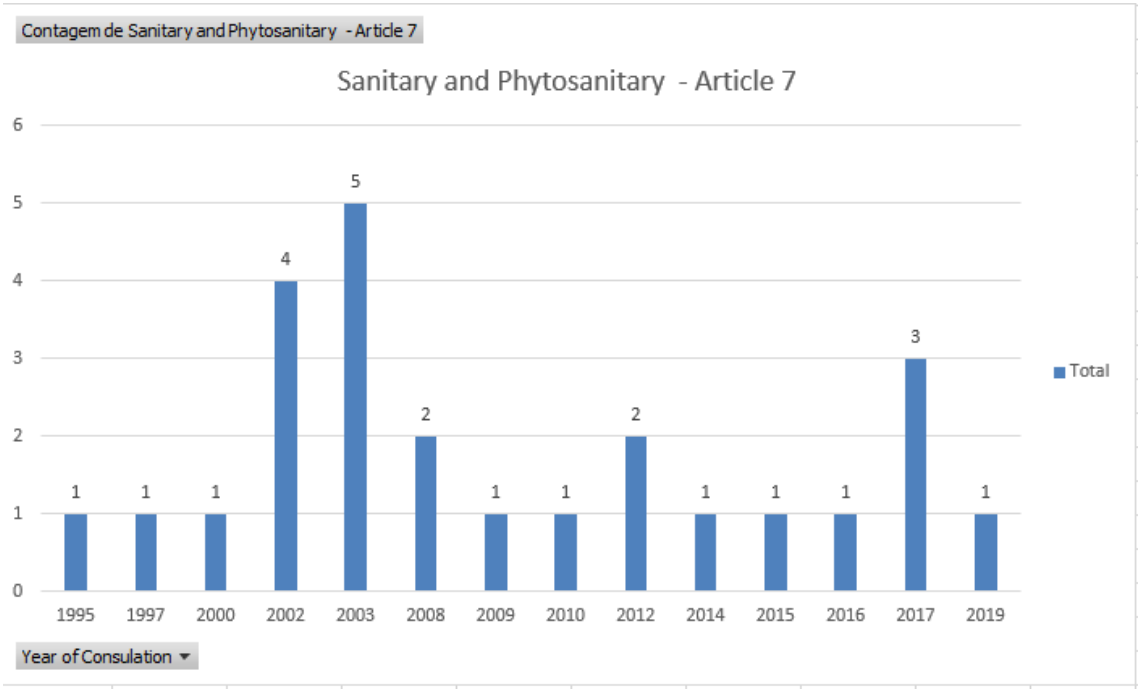
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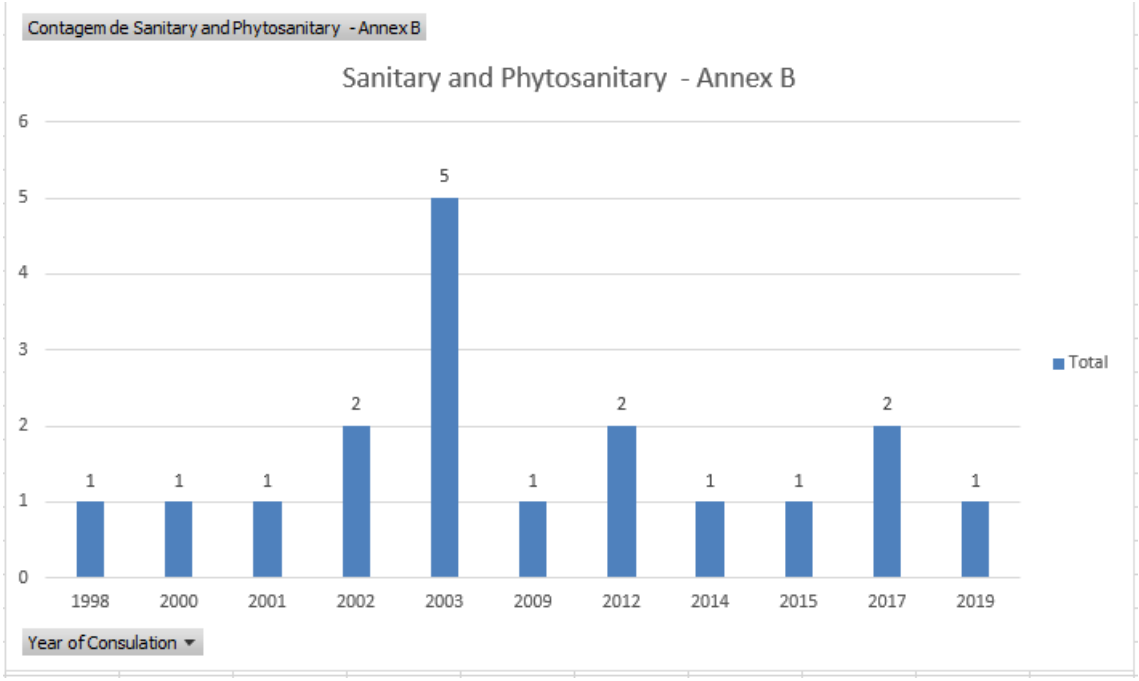
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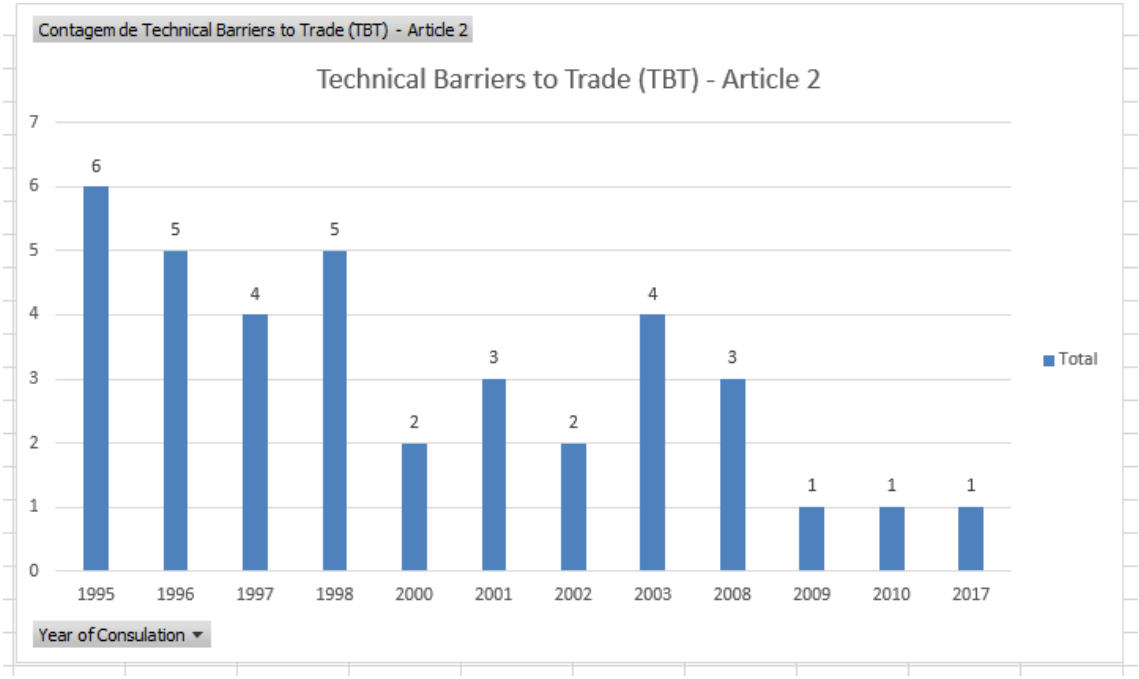
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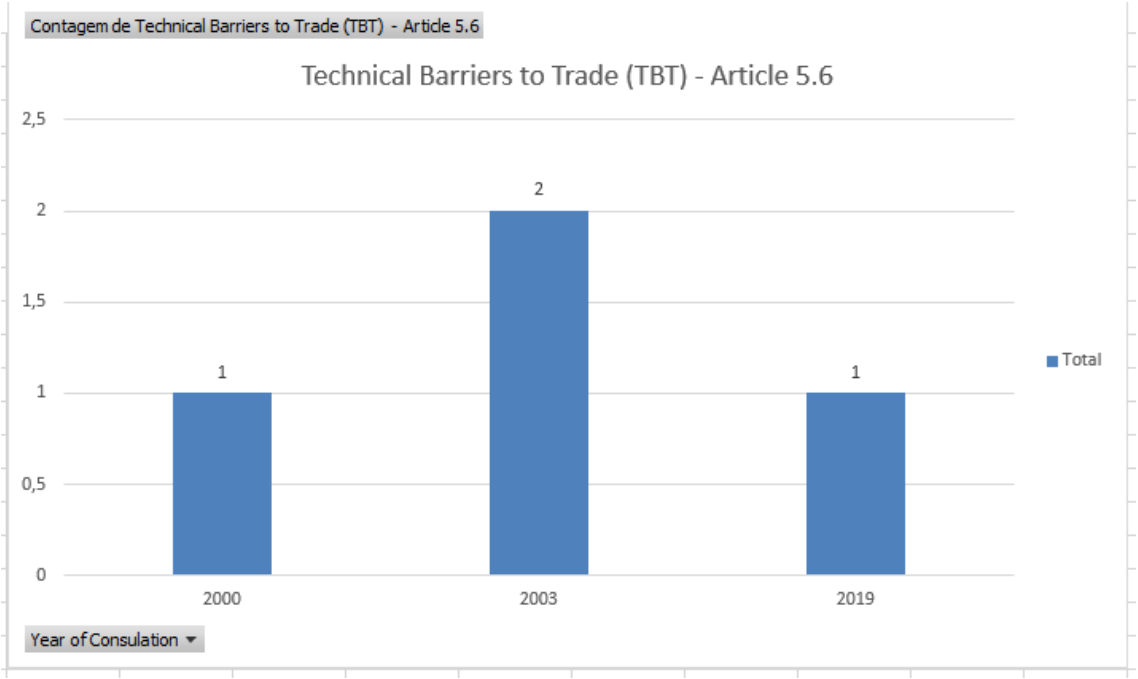
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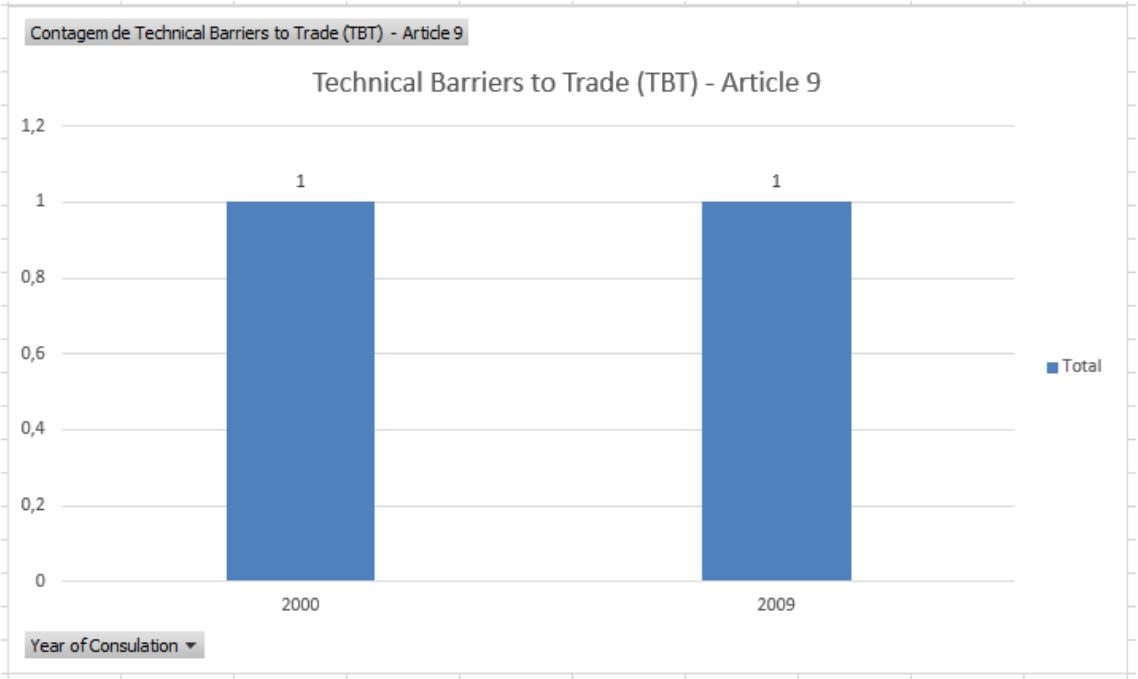
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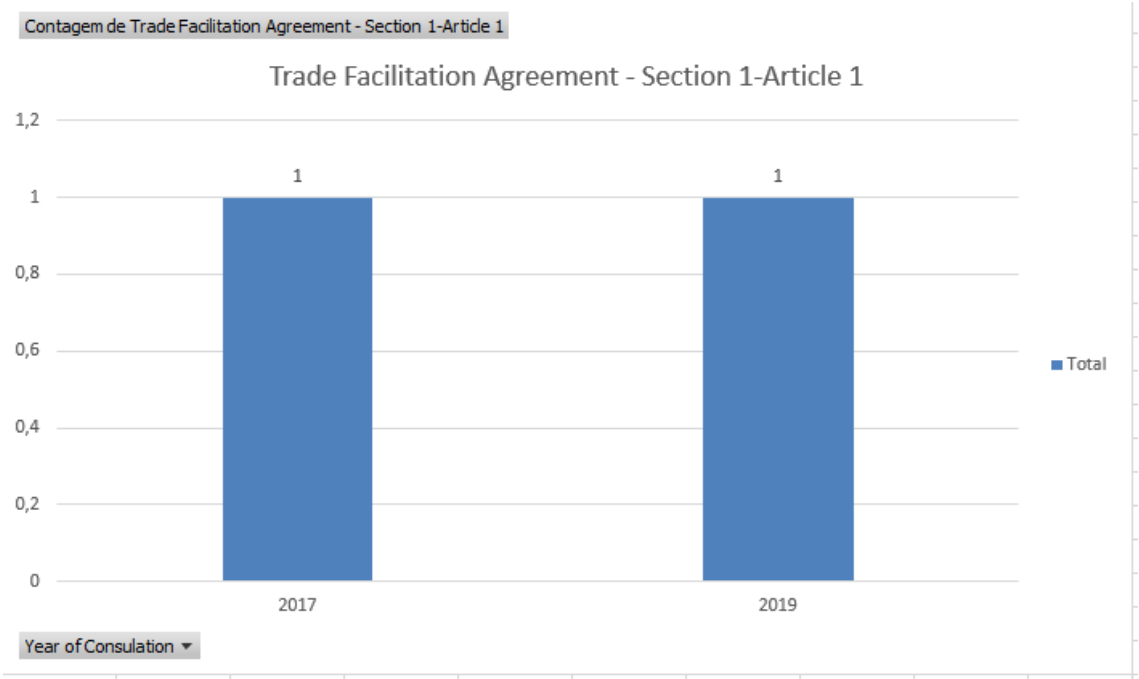
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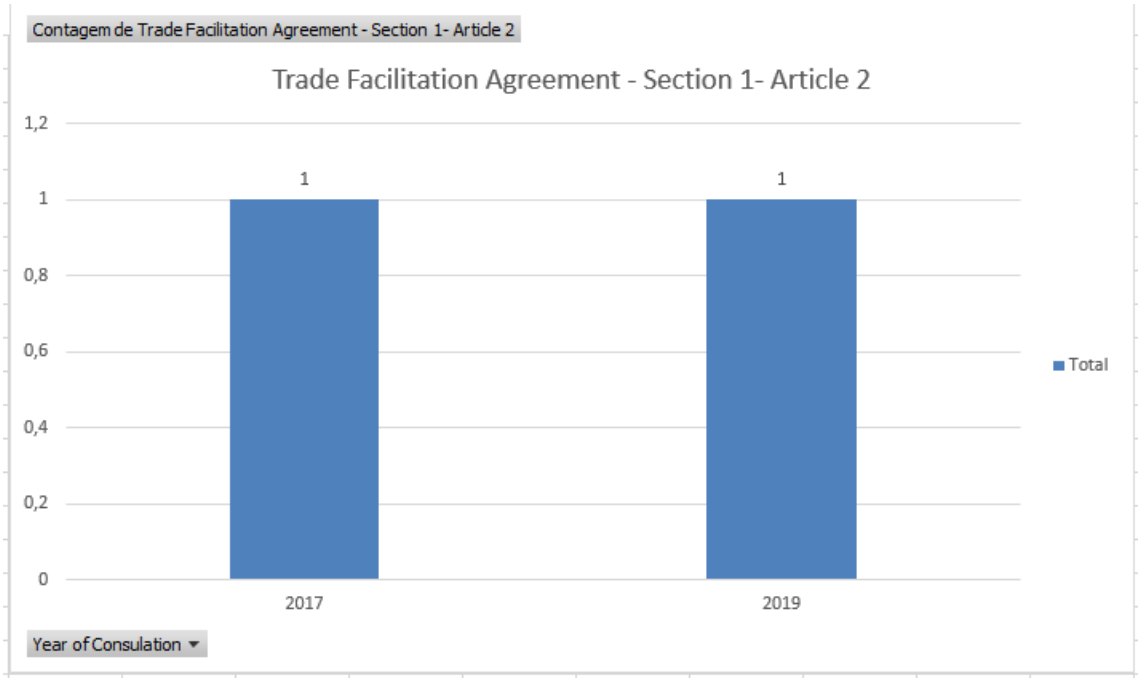
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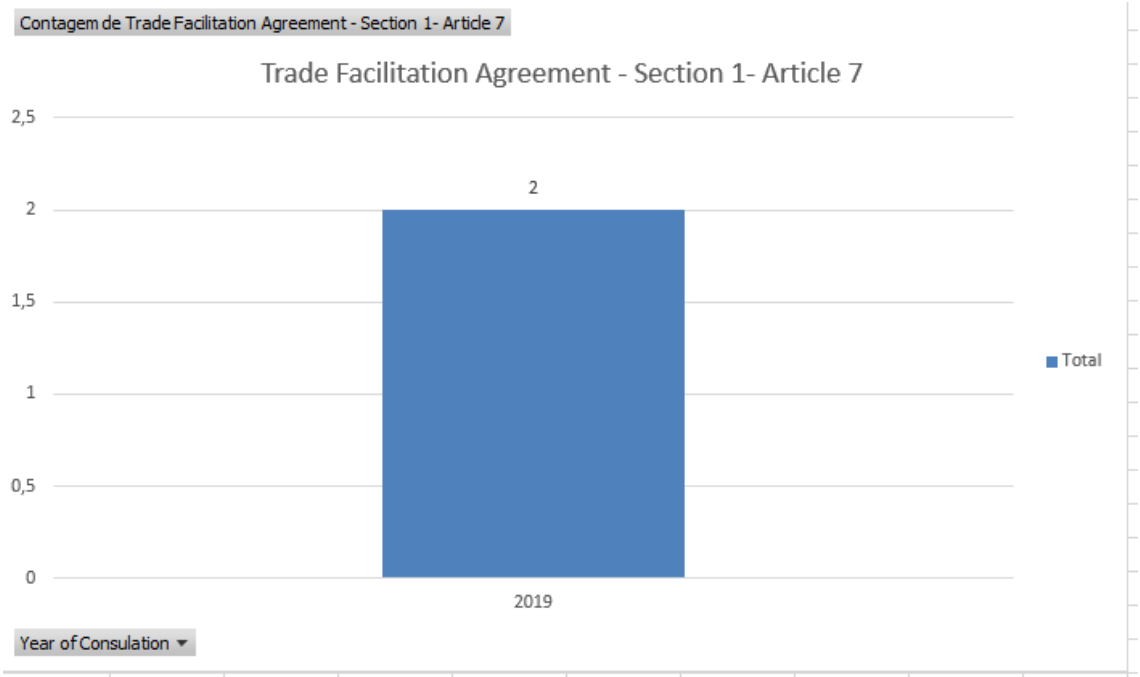
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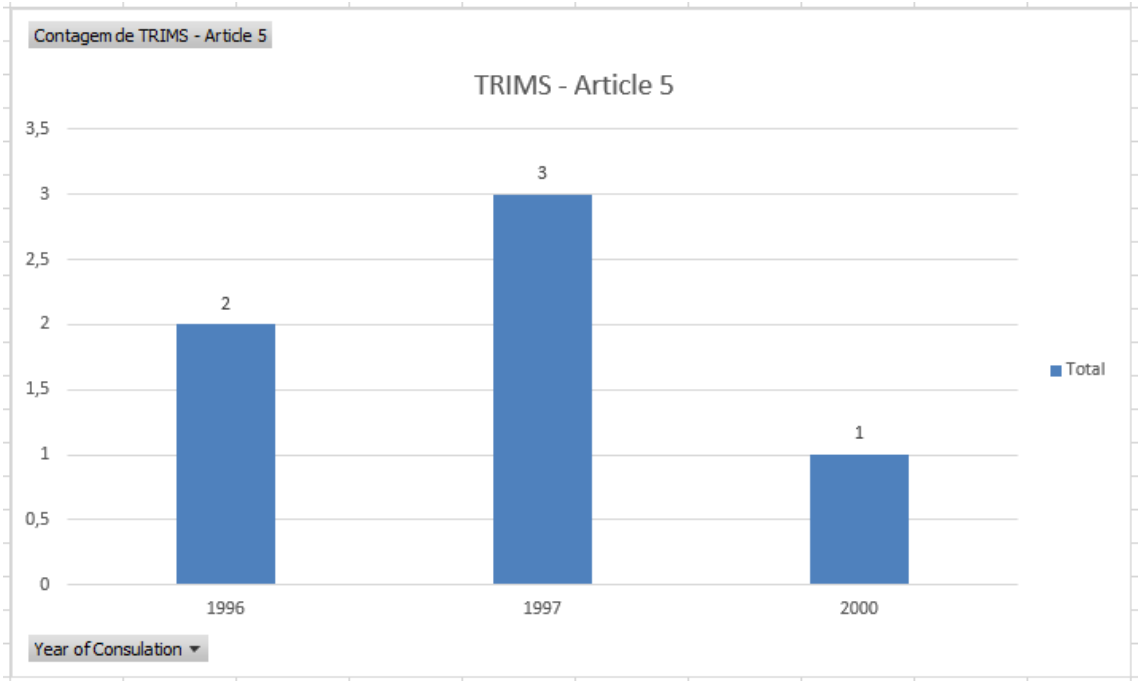
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