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The Transparency Principle in the Framework of the WTO

Prof Dr. G.H. Addink¹

In this contribution, the way in which the transparency principle – as it has developed in Dutch and European administrative law – can contribute to the realisation of more openness as regards the WTO will be discussed. The transparency principle is one of the pillar principles of good governance, principles which spearhead Dutch foreign policy. The lack of openness concerning the WTO has long been a concern of the international community and now propositions are being made – in this contribution as well – to further form the transparency principle in the WTO.

Keywords: WTO, transparency principle, good governance

1. Introductory remarks, issue and approach

For a long time there has been talk with respect to the WTO and the desirability of giving further meaning to the transparency principle.² This talk has not only come from within the WTO but outside there are also many governments³, NGOs⁴, individuals and (European) institutions⁵ insisting on more transparency in the administration of the WTO as well as the processes that take place. In Cancun, 2003, it was ascertained that there is a great need for more democracy and transparency in WTO processes and procedures. An

¹ The author is current Profesoer at Administrative Law and Good Governance, Utrecht University, The Netherlands.

² Among others: R. Wolfe, Regulatory Transparency, Developing Countries, and the Fate of the WTO, March 2003; Watna Mori, The Role of Civil Society in the WTO-Transparency, Participation and Efficiency, Murdoch University E Law Journal, 2007, 2, p. 252-264.

³ In a response to the Seattle meeting, the Dutch government advocated more external transparency.

⁴ At the time of the WTO meeting in Seattle in December 1999, there was an appeal for more transparency in the WTO; in June 2005, a similar appeal was made from Belgian NGOs at the preparation of the WTO meeting in Hong Kong.

⁵ In 1994, the European Parliament demanded in a motion for maximum transparency of WTO activity; in 1997, a motion was accepted for an annual report to be handed to the parliament by the Commission regarding its WTO activity.

⁶ One task of the WTO is to mediate business disputes between members. The existing

end must be brought to the confusion between the legislative, executive and judicial powers of the WTO, to the secrecy surrounding the functioning of most WTO organs, to the "Green Room" and "mini-Ministerial Conferences" and to the sham democracy that is based on the method of implicit consensus. The critique on the lack of transparency at the WTO has become fiercer and, at the preparations for the meeting in Hong Kong in June 2005, there were further pleas made for revision of the conciliation mechanism⁶ to make it more transparent and accessible to the member states, thereby enhancing legal security through publicity and independence. The European Parliament has also insisted on reform of the WTO, not only in terms of more internal transparency, but also more external transparency in co-operating with other international organisations and developing countries.⁷

Despite the internal and external unrest and the associated political pressure, attempts at implementing the transparency principle with respect to the internal and external functioning of the WTO regulations have so far been unsuccessful.⁸ The usual explanation for this is that the transparency principle is a typically western product and that it is only beneficial to western countries, not to the other (poor) countries in the world. This argument then invariably leads to stagnation in the substantive exchange of thoughts on, arguments for, and the further development of, the transparency principle as it relates to the WTO.⁹ Whilst 1 January 2008 marks the multilateral trade system's 60th year of existence, a milestone in the history of GATT and its successor the WTO, the transparency principle as it relates to the WTO finds itself at an impasse.

It could prove useful to look outside the WTO, especially at the level of regional and national administrative law, to see the way in which the transparency principle is currently being executed and which substantive elements of the

GATT procedures for conciliation are, compared to the WTO, easier to execute more efficient. Individual WTO members cannot stop a decision made by the organ responsible for conciliation. Besides a direct appeal to the WTO to act as referee, a member state is also able to appeal to two specific regulations.

⁷ See the defence of member of the European Parliament, Van Hecke, on 5 March 2008.

⁸ The WTO regulations are concerned with the stipulations of the GATT and agreements that were made during several GATT rounds. This means that countries that want to become members of the WTO have to abide by all these GATT stipulations. In addition to the GATT agreements, the WTO covers a large set of further rules on trade in goods, agreements on disruptions in agricultural trade, among which are disciplines for market access and agricultural grants, as well as rules for trade in services and protection of so-called 'intellectual property'.

⁹ The WTO is based on several principles, the most important of which are: the 'Most Favoured Nation' principle, the 'National Treatment' principle, the principle of preferred rates and the principle of conciliation.

transparency principle are currently being recognised in order to appreciate the arguments for the transparency principle.¹⁰ Inspiration could be drawn from this and ideas developed in order to look differently upon the transparency principle and the WTO. In this short contribution, the development of the transparency principle at the national level – Dutch in particular – and at the European level will be described and, from there, the developments within the WTO will be discussed and some suggestions for further progress will be made.

2. Content and meaning of the transparency principle in administrative law

In several publications¹¹ in the past, the transparency principle has been discussed in both a European and Dutch context, as being one of the key principles of good governance. Good governance refers to the set of binding legal principles to which administrative governments are to adhere, and which are supervised by judges and other supervisory bodies. The implementation of good governance principles has been taking place for a long time in several countries at a national level, but also at various regional levels across the globe, so that there have been world-wide developments on almost all continents.¹² It is important to note that whilst the terminology and implementation may differ significantly from country to country, the underlying idea of “principles of good governance as binding legal principles” has been clearly noticed in many countries and on most continents.¹³

¹⁰ Sue Arrowsmith sees that the lack of clarity regarding the content of the transparency principle is a fundamental obstacle to coming to a multilateral agreement on transparency in the area of public contracts: Sue Arrowsmith, *Transparency in Government: The Objectives of Regulation and the Boundaries of the WTO*, 37 *J. World Trade* 283 (2003).

¹¹ G.H. Addink, *Good Governance / goed bestuur. De rechtsbeginselen van de toekomst?* Lezing in het kader van een studiedag voor de VAR (vereniging voor bestuursrecht, June 2005, verslag *Nederlands Tijdschrift voor Bestuursrecht*, 2005, September 2005, 229 ff.; G.H. Addink, *Algemene beginselen van goed bestuur en de toepassing door de Algemene Rekenkamer*, NTB nr. 6, June 2005, p. 169-183 (ISSN 0921-3554); Henk Addink, *Principles of Good Governance: Lessons from Administrative Law*, in: *Good Governance and the European Union*, Deirdre Durkin and Ramses A. Wessels (eds.), Antwerp-Oxford-New York, 2005, *Over Algemene beginselen van goed bestuur en het transparantiebeginsel* (with J.B.J.M. ten Berge), in Th.G. Drupsteen et al. (ed.) *Weids Water*, Sdu: Den Haag 2006, p. 255-282.

¹² In the Bachelor course “Principles of Good Governance I” and the Master course “Principles of Good Governance II” this subject is exhaustively treated.

¹³ In international law, the transparency principle contextually appears in the following situations: as a principle that puts states under obligations for internal legislative regimes and procedures, as a principle that concerns relationships between international and national institutes, and as a principle in the relationship between international and national society.

The present-day requirements that legislators lay down for government action now go beyond the traditionally recognised principles of good management, reasonableness, specialty, equality, legal certainty, trust, reasonableness and motivation, to encompass the principles of good governance.¹⁴ These enhanced principles are also now used as criteria for examination by controlling and supervisory bodies. It is judicially relevant that the binding nature of the principles of good governance can now be ascertained both from legislation as well as case law and ombudsprudence, as this shows that the principles of good governance have entered both into law and administrative practice. Now, together with the requirements of the principles of good management, the principles of good governance demand transparency, participation, accountability and human rights and government. It is important to keep in mind that the merging of the principles of good management and good governance is a fluid process which may be more conceptual than if completely new requirements were formulated. However, it is of importance that these emerging requirements are presented as one consistent concept and in a coherent way that will add to their accessibility and unity.¹⁵

Focussing then on the transparency element of good governance, a question arises as to what exactly this requirement means. It is important to examine this question both to determine the content of the requirement, but also to get a clearer picture of what the boundaries and restrictions of the transparency principle are.

The word transparency means translucency and, in the context of administrative law, it refers to the translucency of the actions of those who carry out various tasks on behalf of the government. The terms 'translucency' and 'openness' are closely related. Publicity can be seen as the active form of openness. The focus then is not only on the open nature of the administrative organisation, but also on the publicity of particular administrative behaviour. With respect to publicity, the focus in administrative law is often on: 1. the publicity of administrative conferences and meetings; 2. the publicity of legal decisions and factual actions by the government; and 3. the publicity of information (of any form) that the government possesses. Through the elaboration of the transparency prin-

¹⁴ I will not further discuss the way and extent in which these principles of good management are codified because of important differences between the various countries.

¹⁵ For the concept of good governance and the theoretic perspective, see the aforementioned articles "Principles of Good Governance: Lessons from Administrative Law" and "Algemene beginselen van goed bestuur en de toepassing door de Algemene Rekenkamer".

ciple, as one of the pillars principles of good governance, it is believed that corruption in areas like public contracts can be countered and prevented.¹⁶

The three aforementioned aspects, taking into account the importance of openness and publicity, deal with a standard – the transparency principle – that is to hold for the government itself. Another side of transparency is that translucent practices outside of the government, especially in society, for instance in economic behaviour, are advanced through government action. This means that by regulating social activities in such a way that they become translucent for others and for the government, the transparency principle is imposed on citizens and companies by the government. Social transparency as a public interest is often countered by the protection of the privacy of citizens and companies. It is conceivable that the government could prohibit certain civil actions, or only allow them when granted permission or when the actions are reported in advance because of the desirability of social transparency.

In the same vein, distinctions can be made between administrative transparency and social transparency and, further, within the concept of administrative transparency, between internal and external transparency. At the WTO, the transparency of economic markets can be categorised as social transparency. Internal transparency deals with the openness of internal organisation, and external transparency with the outward openness of government actions. This paper deals with transparency both in terms of internal WTO organisation and external decisions by WTO organs. It seems that in the area of the WTO, administrative transparency, both internal and external, and social transparency are often used interchangeably, or at least not sufficiently distinguished from each other. However, they are subtly different concepts. In administrative law, the standard of the transparency requirement becomes higher when the principle is implemented, and higher again as it becomes commonly recognised as a legal standard. Not only is this principle of fundamental importance in and of itself, it also complements the other principles of good governance such as those of equality and participation. The following paragraph will show that in national and European administrative law the transparency principle can already be seen as an independent legal principle. Its cohesion with other legal principles will also be briefly discussed.

¹⁶ Thomas Taro Lennerfors, *The Transformation of Transparency – On the Act on Public Procurement and the Rights to Appeal in the Context of the War on Corruption*. *Journal of Business Ethics* (2007), p. 381-390; G.H. Addink and J.B.J.M. ten Berge, *Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands*, in: J.H.M. van Erp and L.P.W. van Vliet (eds.), *Netherlands Reports to the Seventeenth International Congress of Comparative Law*, Intersentia: Antwerpen – Oxford 2006, p. 379-419 (ISBN 90-5095-5797).

3. The content and the forming of the transparency principle at the national and European level

Various aspects of the transparency principle have been legally established and further given form within the law. Accordingly, the transparency principle has now developed into an independent principle both in legislation and jurisdiction, and is sustained by law.

The Netherlands has regulations with respect to the three specific aspects of publicity mentioned above as well as with respect to more general aspects of the openness and publicity of government actions. With regard to conferences and meetings that take place within government, a distinction can be made between the codes of conduct for administrative organs, representative organs, and advisory organs.¹⁷ These codes stipulate which meetings are public and under which circumstances the chairperson can decide to have closed meetings. There is no general harmonised arrangement concerning these regulations and, consequently, differences can easily occur.

Secondly, various public decisions are made by the government, and contracts signed on behalf of the government. With regard to public legal decisions, especially in the case of orders, the *General Administrative Law Act* (Awb) lays down regulations concerning various phases of decision-making including the concluding phase. Not only must such decisions meet various requirements, but decisions that require participation are subject to legal rules of proclamation.¹⁸ Further, the Awb also contains specific requirements for the proclamation of other decisions. Whilst it does not include a general regulation regarding the proclamation of private legal transactions, these are usually disclosed as well.

Finally, with respect to public access to government information, the *Publicity Act* contains rules concerning the way in which requests for publicity can be submitted, and the way in which the government can publicise information itself. The Act further stipulates the circumstances in which requests for publicity can and, at times, must, be rejected. In the coming act on freedom of information a notable extension is a right to publicity. The publicity of legal decisions

¹⁷ See for instance the Code of Order of the Council of Ministers, the Dutch Houses of Parliament.

¹⁸ I would like to point out in this respect section 3.4 of the Uniform Public Preparation Procedure, and section 3.6, proclamation and information that are both included in the Awb. There are, however, many more sections in the Awb that concern such proclamation stipulations, like section 3.3 that deals with advices.

is subject to the same conditions of that act.¹⁹ Then there is the discussion at the national level about transparency in the context of ministerial accountability for supervisors and (other) independent administrative organs. Besides the general implementation of the transparency principle into the national administrative law, the principle also occurs in specific areas of administrative law such as contract law.²⁰ To summarise, the conclusion is that the publicity of government actions is generally the first matter of importance, and is provided for in law. Moreover, it becomes clear that sometimes restrictions regarding the publicity of government actions exist. Those restrictions can be in the public interest, or of a private nature. Finally, the question is asked to what extent and in what way supervisors and independent administrative organs should be transparent in their actions.

The transparency principle has now also made its entry on the European stage. Here it is also about increased publicity of the work of European institutions like the Council of Ministers and the European Commission as well as increased access to EU documents.²¹ The EU *Publicity Regulations*, effective since 1 December 2001, are very important in this respect. These Regulations primarily regulate access to documents in the hands of European institutions as well as contain restrictions. However, because there is an intensive exchange of documents between the EU and member states, many European documents are in the hands of member state governments. For this reason, the *European Publicity Act* also applies to European documents that are kept by the Dutch government, ministries and PBO organs among others. On 18 April 2007, the European Commission presented a green paper²² about the effects of Regulation 1049/2001 on public access to documents from the European Parliament, the Council and the Commission. This can be seen as an assessment of the impact of the law on the accessibility of documents. Meanwhile, experience has been gained with the Regulation and judicial decisions have been made explain-

¹⁹ For the appraisal of the rough draft of the transparency principle, see: G.H. Addink, J.B.J.M. ten Berge, *Over Algemene Beginselen van goed bestuur en het transparantiebeginsel*, in Th.G. Drupsteen e.a. (ed.) *Weids Water*, Sdu: Den Haag 2006, p. 255-282.

²⁰ II, 30501, nr. 1 ff., Regulations for granting government commissions through contract services and commissions by special-sector companies (Tender Law); see Article 21, which is the basis for further rules, concerning transparency among others.

²¹ R.J.G.M. Widdershoven et al., *De Europese agenda van de Awb*, Den Haag, 2007, p. 85 ff.; from which the following is derived; in addition, see S. Prechal & M. de Leeuw, *Dimension of Transparency: The Building Blocks for a New Legal Principle?*, *Review of European Administrative Law*, 0, 2007, p. 51-61.

²² COM(2007)185

ing the Regulation. The European Ombudsman has also published advice on this matter. In addition, in 2005, the Commission initiated the European transparency initiative which calls for the revision of the Regulation to facilitate increased publicity. The European Parliament has since called on the Commission for proposals regarding the Regulation's revision.²³ The transparency principle has further entered into specific areas of European administrative law, for instance, competition²⁴ and environmental law²⁵ and, it is also included in two European tender regulations.²⁶

Besides legislation, the Court's jurisdiction also pays attention to the transparency principle.²⁷ In some cases the transparency principle is connected to, or is part of, the principle of equality.²⁸ In other cases it is applied without violating the equality principle. It goes without saying that the transparency principle often precedes the principle of equality. The transparency principle can sometimes also be connected with the principle of legal certainty, although it can also be separate. The natural conclusion is that the transparency principle at the European level has grown from a principle of contract law, into a general legal principle especially in administration of justice. However, it still depends on, and is discussed in connection with, other legal principles like the principles of equality and legal certainty.

4. Content and the forming of the transparency principle at the WTO level

Complaints about the lack of democracy at the WTO, such as the lack of transparency in decision-making processes and other procedures of the organisation, were earlier discussed. The WTO will have to further engage in

²³ The consultation round on this green paper runs up to mid-July 2007. According to the Commission's schedule it will respond to the consultation in September and make propositions for any adjustments of the regulation as soon as October 2007.

²⁴ Articles 5 and 6 of Guiding Principle 2002/21 for market supervisors.

²⁵ A separate regulation has since been effected concerning access to environmental information (VERORDENING 1367/2006). It is based on implementation of the treaty of Aarhus.

²⁶ Art. 2 of Guiding Principle 2004/18, co-ordination of the procedures for placing government commissions for works, provisions and services; Article 10 of Guiding Principle 2004/17, co-ordination of the procedures for placing commissions in the departments of water and energy supply, traffic and postal services.

²⁷ For the first time, Case C-87/94, *Commission v. Belgium*, Jur. 1996, p. I-2043 (Waalse bussen).

²⁸ Cases C-275/98, *Unitron*, Jur. 1999, p. I-8291; C-470/99, *Universale Bau*, Jur. 2002, p. I-11617; and C-448/01, *Wienstrom* Jur. 2003, p. I-14527.

discussions with social organisations, without losing its character as an inter-governmental organisation. Moreover, it will have to pay significant attention to existing issues regarding the environment, health and fundamental work standards connected to international trade. The WTO has acquired a conciliation mechanism and, thanks to this mechanism, the law of the jungle does not apply. However, the capacity and quality of conciliation needs to be investigated, especially the effectiveness in reality of this mechanism for developing countries. The problem is how compliance with panel jurisdiction can be ensured. Revision of the conciliation process within the WTO is currently thought to be needed in terms of which conciliation panels and hearings of the board of appeal should be opened to the public. UN agencies should play a role in the panels. In short, a revision of the conciliation mechanism so that it becomes more translucent and accessible to all member states would increase legal security in the area of publicity and independence.

These seemingly secondary aspects keep the WTO from doing its actual job which is to stimulate trade. This is achieved by encouraging countries to negotiate the lowering of import duties, the abolition of rules that restrict trade and by applying the same rules for all countries. The WTO cannot make rules itself; decisions can only be made if all countries are in agreement. It was hoped that there would be agreement in 2005, but negotiations are still going. These negotiations are called the Doha round because it was in that city in 2001, that ministers from all member countries of the WTO came together. The Dutch government has recently declared that there should be a WTO trade agreement in 2008.

The foregoing makes it appear as if the WTO pays little attention to the transparency principle, however, this is not the case. For this reason the current elements of the transparency principle at the WTO will be discussed in order to determine which additions and adjustments are possible and desirable.

In the original GATT were a number of articles that implied a requirement of transparency.²⁹ First, Article X stipulated that certain regulations and judicial decisions were to be published quickly and in such a way that the governments and trade organisations could become acquainted with them. The second clause stated the same regarding measures that could influence international trade and agreements. The third clause stipulated that measures were to be applied in a uniform, impartial and reasonable way.

²⁹ Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, Michigan Journal of International Law, 2006, Vol. 27:579, p. 579-627.

Besides these mainly procedural requirements for publicity in Article X, there were some more substantive references to the transparency principle. Article XI:1 stated that all duty free borders should be removed. This was also stipulated in Article VIII:1b and 1c, which stated that parties should recognise the need to limit the number and diversity of duties and taxes. This was also concerned with lifting duty free borders.

Thirdly, the more recent WTO agreements contain obligations for publishing that go further than those contained in the GATT. These requirements are not only to publish standards that are agreed upon, but also to supply them together with reasonable explanations and to provide ample opportunity for foreign governments to comment, in advance, on proposed standards.

Fourthly, the deals that were made during the Uruguay round of negotiations elaborate further on the content of the transparency principle. According to these deals, standards should be based on achievements of products and on scientifically accepted assumptions.

The foregoing does not alter the fact that the transparency principle has been a controversial subject on the WTO agenda since 1996. That year the controversy led to the establishment of the "Working Group on Transparency in Government Procurement" which was tasked with conducting a study on the meaning of the transparency principle in public contract practice. Within the WTO it is clear that whilst some countries are very sceptical and only class a limited number of cases under it (India, Pakistan, Malaysia and Egypt), other countries that already have much further advanced systems want to class more cases under the regulations (countries from the EU and the United States). It appears that the second group ultimately gained the upper hand.

5. Propositions for specifying the transparency principle at the WTO level

The transparency principle, with respect to the WTO, could be specified through the three aforementioned paths, and concrete suggestions that fit within the WTO developments could be made from the experience of the European and Dutch development of the transparency principle.

First, there is the need to specify the possibilities for more internal transparency. This involves making the internal organisational structure more transparent, especially the publicity of the processes taking place and the procedures followed. There are a number of organs involved in the execution of agree-

ments between member states of the WTO including the Ministerial Conference (MC), the General Council (GC) and the Secretariat. There should be regulations on the publicity of MC and GC meetings and the preparations for them (as well as afterwards). National parliaments should also debate publicly on the subjects beforehand and afterwards. This type of publicity would enable citizens, companies and NGOs to discern which aspects will be under discussion. After the, according to the Dutch government positive, experience with the EU Publicity Regulations, our country should – as was concluded in June 2006 regarding more publicity of Council meetings – take the initiative to apply the same to the MC and GC. The MC and GC's Code of Order would need to be adjusted to such an extent that all MC and GC meetings with a public interest would be public. The Netherlands would have to follow this process closely and make an active contribution to it. Such government regulations for MC and GC meetings would then have a positive effect on the democratic legitimacy of the WTO.

Secondly, the publicity of WTO documents should be regulated in a more precise way. The current regulations contained in Articles X:1, X:2 and X:3a are imprecisely formulated, and they should also focus on external transparency in the narrow sense. The EU Publicity Regulations and the experience gained from them can be taken as an example. The Dutch government thinks it highly important to further increase the transparency of government through measures including access to documents. This is not only in the interests of democratic legitimacy but would also increase people's confidence in the WTO. The Netherlands has always been in favour of the regulations, and has played an active part in the establishment of the Publicity Regulations at the European level. It is desirable that the Netherlands plays the same part with the WTO and aims for a regulation that holds a similar degree of publicity as the *Publicity Act*.

Thirdly, some specific regulations regarding the transparency principle as part of the WTO must be developed. The following subjects should be taken into account in any case: a. the transparency principle as part of the WTO conciliation process; b. the transparency principle in regional trade agreements; and c. the transparency principle in public contracts.

- a. the transparency principle as part of the WTO conciliation process
Revision of the conciliation process within the WTO so that conciliation panels and hearings of the board of appeal are opened to the public is desirable. UN agencies should also play a role in the panels. Revision of the conciliation mechanism to make it more translucent and accessible to

all member states will result in more legal certainty in the area of publicity and independence.

b. the transparency principle in regional trade agreements.

Within the scope of the Doha development agenda (DDA), negotiations are held to clarify and improve existing WTO regulations for regional trade agreements (RTAs) which concern transparency procedures. On 26 June 2006, the negotiators reached agreement on a draft text for an RTA transparency mechanism. The RTA transparency mechanism implies the establishment of a uniform procedure for notification and research, based on factual reports from the WTO Secretariat, for all RTAs. This strengthens the capacity and role of the WTO as supervisor of developments in the area of RTAs throughout the world. The General Council of the WTO formally approved the transparency mechanism on 10 October 2006.

c. the transparency principle with respect to public contracts.

In the past, Sue Arrowsmith³⁰ has made propositions concerning the affect of WTO agreements on public contracts. The following proposals for such agreements are based on her article. Such agreements should have a broader content than the GPA. Rules governing contractual procedures should be published. Publicity should be given to contractual opportunities. Rules should be established to restrict the discretionary power of contract services. These rules must be controlled and maintained.

6. Conclusions employment of transparency principle at the WTO

The conclusions of this contribution can be summarised briefly. In Dutch and European administrative law, the transparency principle as a legal principle and as a principle of good governance has developed a great deal in the last few years. It is especially relevant with respect to the following three subjects: publicity of meetings, publicity of government behaviour and publicity of information. Given the highly positive experiences at the national and European levels, it is time that the Dutch government put forward concrete motions regarding these three issues to further particularise the transparency principle as it applies to the WTO. In this contribution the various propositions were identified and a specification was given, so that – through interaction between national, European and international administrative law – the transparency principle in WTO law can be established more firmly.

³⁰ Sue Arrowsmith, *Towards a Multilateral Agreement on Transparency in Government Procurement*, *International and Comparative Law Quarterly*, Vol. 47, p. 793-816; Sue Arrowsmith, *Government Procurement in the WTO*, Kluwer Law International, 2003.