The Legitimacy of the World Trade Organization Rulemaking Processes: A Case Studies Analysis

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Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
in partial fulfillment of the requirements
for the Doctorate in Philosophy (PhD) degree in Law

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Common Law Section
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ABSTRACT

In the last decade, World Trade Organization (WTO) Members have paid little attention to the WTO rulemaking processes and their functioning. Two high-levels commissions, as well as some scholars, have identified several areas of concerns with respect to the WTO rulemaking processes. Some of them have put forth proposals for their reform. However, the WTO has not proceeded with or even reflected upon any major reforms affecting the functioning of its rulemaking processes. The lack of attention by the Members regarding these issues motivated the focus of this thesis on the legitimacy of the WTO rulemaking processes. The principal research question of this thesis is: *Are the WTO rulemaking processes legitimate? To what degree?* Answering this first research question necessarily leads to a secondary one: *How can the WTO rulemaking processes be assessed*?

This thesis recognizes that there is no uniform way for assessing legitimacy both at the national and international levels. It borrows from David Beetham's legitimacy conception and advances that a conceptualization of legitimacy for the WTO specifically is dependent upon one's own vision of the WTO. Theoretical works on the WTO have put forth two antipodal conceptions regarding its nature. One conception views the WTO as a contract, bilateral in nature, with the aim to pursue progressive trade liberalization. The other conceptualizes the WTO as a constitution according to which Members' obligations are owned to a community and the objective is to generate outcomes that are distributive in nature.

This thesis assesses the legitimacy of the WTO rulemaking processes from the standpoint of WTO Members which vision, it is argued, falls under the contractual conception of the WTO. It builds a theoretical framework for assessing the legitimacy of the rulemaking processes on the basis of Members' conception of the WTO and the concepts of input and output legitimacy that have been frequently applied to the WTO and from which are derived four legitimacy criteria: legality, effectiveness, representativeness and openness. This thesis furthermore advances that legitimacy can only be effectively assessed as a matter of degree and, therefore, develops a *multidimensional interval scale* to allow a precise measurement of the four criteria of legitimacy as applied to the WTO rulemaking processes. In order to assess the rulemaking processes, it uses three cases that have led to the adoption of new rules or agreements. In fact, legitimacy matters

even more for the processes that led to actual rules due to the fact that they generate binding outcomes. These three cases are: the TRIPS and Public Health Case, the Basic Telecoms Case and the Trade Facilitation Case. Such a methodology based on case studies arguably provides a more accurate representation of the WTO rulemaking processes than the general processes that have been described in the secondary literature. The evaluation of the three cases studies focuses on the following questions.

With regards to legality:

- Do Members correctly follow the rulemaking rules and procedures?

With respect to effectiveness:

- Are the negotiated outcomes effective in addressing the goals set out in the negotiating mandate?
- Are the methods of implementation used effective to bringing the negotiated policy into effect?
- Are Members able to reach consensus in a timely and effective manner in light of the negotiating mandate and the nature of the issue needed to be addressed?

With regards to representativeness:

- Are the rulemaking processes inclusive and transparent?
- Does a representative group of Members, representing a balanced set of interests, participate in the rulemaking processes?
- Do the negotiating mandate and the final outcome reflect a balanced set of interests that were expressed?

With regards to openness:

- Is there easily accessible and timely information available for non-state actors regarding the rulemaking processes?
- Does the WTO provide non-state actors with adequate channels to express their views and opinions regarding the specific subject matter addressed in the negotiations?

The findings of this thesis suggest that, despite the various criticisms that have been made regarding the WTO rulemaking processes, they can be considered to be legitimate in a majority of instances. More importantly, it demonstrates that the degrees of representativeness and openness of the rulemaking processes have increased within the last decade. The rules and procedures about rulemaking and decision-making contain some limitations, but in some cases, Members have found ways to achieve their end goals through other means of implementation. However, in some other cases, the legality of the means of implementation employed is to be questioned. As the WTO Membership has continued to grow and the rulemaking processes have improved in inclusiveness, it is argued that they have lost efficiency. However, in recent years, the WTO has developed new practices to bolster the effectiveness of the rulemaking processes.

This thesis concludes by highlighting some avenues that could be considered for reform. However, it emphasizes that any work on the reform of the WTO rulemaking processes could entail the need of WTO Members to reflect and agree upon its mandate.

ACKNOWLEDGMENTS

I would like to express my deepest appreciation to my thesis supervisor Professor Debra Steger, who has been a tremendous mentor for me. I would like to thank her for being the source of inspiration for this research and for allowing me to grow as an academic. Words cannot express how grateful I am for her incredible and untiring devotion to my work during the last 5 years, her analytical rigour, and her contribution to the advancement of knowledge in this thesis. I would also like to thank my committee members Professor Errol Mendes and Professor Donald McRae, who have provided me with excellent insight for the development of my thesis project, as well as Professor Patrick Leblond, for his insightful methodological advice.

The achievement of this research would have not been possible without the immensely valuable financial and institutional support that I received from the Faculty of Graduate and Postdoctoral Studies and the Faculty of Law of the University of Ottawa, la Faculté de droit de l'Université de Sherbrooke, and le Fonds de recherche sur la société et la culture (FRQSC).

Je tiens à remercier chaleureusement un grand nombre d'amis et membres de ma famille qui m'ont encouragée et supportée de diverses façons pour mener ce projet à terme. Ma mère Berthe, pour son soutien, son aide assidue et infatigable et ses heures incomptables de travail. J'en serai éternellement reconnaissante. Mon père Michel, pour son soutien moral et financier indéfectible. Ma sœur Caroline, pour son génie créatif et la conceptualisation graphique des tableaux de cette thèse. Mon beau-père Robert, pour ses conseils et la conception et automatisation des tableaux de compilation de données. Mon oncle Ghislain, pour ses cours de lecture rapide et son travail et techniques d'entrées de données. L'équipe M'Seffar hors pairs, Maya & Jihane, pour leur support moral et la compilation de données. Catherine, pour son *cheerleading* inlassable et la présentation visuelle de cette thèse. Eliane, pour son soutien moral et psychologique. Taryn, my thesis soul mate, for always being there for me. Tania, pour son œil de lynx et la relecture et révision de cette thèse. Enfin, l'équipe du Groupe InfoPlus, en particulier, Benoit, Christian et Sébastien, pour leurs conseils et soutien technique hors pair.

Finally, I dedicate this thesis to my fiancé Shannon, who has believed in me, stood by me, and given me wings to accomplish this thesis.

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LIST OF ACRONYMS

ACP	African, Caribbean, and Pacific Group of States
ANOVA	Analysis of Variance
ASEAN	Association of Southeast Asian Nations
BRIC	Brazil, Russia, India and China
CPT	Consumer Project on Technology
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EU	European Union
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GBT	Group on Basic Telecommunications, 1996-1997
GPA	Agreement on Government Procurement
IDA	International Dairy Agreement
ILO	International Labour Organization
IMA	International Bovine Meat Agreement
IMF	International Monetary Fund
ITO	International Trade Organization
LDC	Least-Developed Country
LLDCs	Group of Landlocked Developing Countries
MERCOSUR	Southern Common Market (Mercado Común del Sur)
MFN	Most-favoured-nation
MSF	Médecins Sans Frontières
NGBT	Negotiating Group on Basic Telecommunications, 1994-1996

NGOs	Non-governmental organizations
NGTF	Negotiating Group of Trade Facilitation, Doha Development Round
OECD	Organisation for Economic Co-operation and Development
PCTF	Preparatory Committee on Trade Facilitation
PhRMA	Pharmaceutical Research and Manufacturers of America
QUAD	United States, European Union, Japan and Canada
S&D	Special and differential treatment for developing countries
SPS Agreement	Agreement on the Application of Sanitary and Physosanitary Measures
TAC	Treatment Action Campaign
TBT Agreement	Agreement on Technical Barriers to Trade
TPRM	Trade Policy Review Mechanism
TRIPS Agreement	Agreement on Trade-Related Aspect of Intellectual Property Rights
TWN	Third World Network
UNCTAD	United Nations Conference on Trade and Development
US	United States
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

PART I

INTRODUCTION

CHAPTER 1
THE RULEMAKING PROCESSES: WEAK LINK OF THE WTO?

1. INTRODUCTION

Too little attention has been paid to the structure and functioning of the World Trade Organization (WTO) rulemaking processes despite the fact that the WTO has undergone substantial changes over the last decade or two. The WTO membership has expanded dramatically since the GATT 1947.[1] It has nearly doubled in size since the launch of the Uruguay Round in 1986 leading to the establishment of the WTO.[2] Moreover, power relations within the organization, which had been dominated for over fifty years by the largest developed countries, such as the United States, the European Union, Japan and Canada (the QUAD), have shifted with the rise of new emerging developing powers, such as China, India, Brazil and Russia (the BRIC).[3] The subject matters that are being negotiated have also fundamentally evolved. Professor Cottier highlighted three different "generations" of trade measures since the GATT 1947: ranging from tariffs[4] in the first decades of the GATT 1947 to non-tariff barriers

[1] The GATT 1947 is the predecessor of the WTO, see: *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, Can TS 1847 No 27 (entered into force 1 January 1948) [GATT 1947]. It was terminated and replaced by the *Marrakesh Agreement Establishing the WTO,* see: *Marrakesh Agreement Establishing the World Trade Organization,* 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (entered into force 1 January 1995) [*WTO Agreement*]; *Transitional Co-existence of the GATT 1947 and the WTO Agreement* (Decision of 8 December 1994 adopted by the Preparatory Committee for the WTO and the CONTRACTING PARTIES to the GATT 1947), Doc PC/12; L/7583 at para 3, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> [*Transitional Co-existence of the GATT 1947 and the WTO Agreement*].

[2] *Ibid.* For the number of GATT 1947 contracting parties and WTO Members across the years, see Appendices 1 and 2.

[3] Amrita Narlikar, "Adapting to New Power Balances: Institutional Reform in the WTO" in Thomas Cottier & Manfred Elsig, eds, *Governing the World Trade Organization: Past, Present and Beyond Doha,* World Trade Forum (New York: Cambridge University Press, 2011) 111 at 111-14 ("Today, the old Quad has been radically reconstituted. It has undergone various permutations in the Doha Development negotiations: the 'new Quad' [is composed of] the EU, the USA, India and Brazil" at 114); Amrita Narlikar, "New Powers in the Club: The Challenges of Global Trade Governance" (2010) 86(3) International Affairs 717 at 717-20 [Narlikar, "New Powers"]; First Warwick Commission, *The Multilateral Trade Regime: Which Way Forward? The Report of the First Warwick Commission* (Coventry: University of Warwick, 2007) at 24, online: <http://www2.warwick.ac.uk/research/warwickcommission/archive/worldtrade/report/> [Warwick Report]. Russia only recently acceded to the WTO in August 2012, see: WTO, *Accessions: Russian Federation,* online: WTO <http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm> [WTO, *Accession of Russia*].

[4] Including, *inter alia,* tariff liberalization and the negotiation of measures applicable at the borders, such as safeguards and of payments.

during the Tokyo Round in 1972-79[5], and moving towards matters of domestic regulation and conditions of competition[6] at the conclusion of the Uruguay Round in 1994 and onwards.[7] The evolution of the trade measures towards progressive regulation of domestic markets is the result of increasingly more sensitive subject matters that are being negotiated, as they concern collective preferences underlying national values that affect citizens' interests more directly.[8] Despite all these new factors impacting the functioning of the WTO rulemaking processes, it appears that Members have essentially not changed their ways of negotiating since the GATT 1947.[9] Or have they?

In his inaugural speech to the WTO General Council in September 2013, Director-General Roberto Azevêdo made a warning call to the Members regarding the world's perception that the rulemaking processes may undergo a decrease in legitimacy:

> Our negotiating arm is struggling. We all know that this is just one part of the work that we do here. We all know that. But the WTO, as we know, has been defined by what we have been doing in the negotiating front. This is how the world sees us.

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[5] Including, *inter alia,* technical barriers to trade, sanitary and phytosanitary measures, subsidies and anti-dumping.
[6] Including, *inter alia,* domestic procedures in the area of trade remedies, ceilings of domestic farm support, minimal standards of intellectual property protection, pro-competitive conditions in the area of basic telecommunications, etc.
[7] Thomas Cottier, "From Progressive Liberalization to Progressive Regulation" (2006) 9(4) J Int'l Econ L 779 at 782-83 [Cottier, "From Progressive Liberalization"].
[8] The most "sensitive" measures are those in the areas of "trade in services, environmental and health protection, sanitary measures, and intellectual property", see Yves Bonzon, "Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues" (2008) 11(4) J Int'l Econ L 751 at 761 [Bonzon, "Institutionalizing Public Participation"]; Pascal Lamy, "Harnessing Globalisation, Do We Need Cosmopolitics?" (Public lecture delivered as part of the 'Global Dimensions' Programme, Centre for the Study of Global Governance, London, London School of Economics and Political Science, 1 February 2001) at 5-6, online: London School of Economics <http://old.lse.ac.uk/collections/globalDimensions/lectures/harnessingGlobalisationDoWeNeedCosmopolitics/transcript.htm>; Markus Krajewski, "Democratic Legitimacy and Constitutional Perspectives of WTO Law" (2001) 35(1) J World Trade 167 [Krajewski, "Democratic Legitimacy"]; Kobsak Chutikul, "Options for a Parliamentary Dimension of the WTO" (Discussion Paper presented at the Parliamentary Conference on the WTO, 17-18 February 2003), online: Inter-Parliamentary Union <http://www.ipu.org/splz-e/trade03/2c.pdf> [Chutikul, "Options for a Parliamentary Dimension"]; Julio Lacarte, "Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective" (2004) 7(3) J Int'l Econ L 683 at 686; Andrew T Guzman, "Global Governance and the WTO" (2004) 45 Harv Int'l LJ 303 at 303-05.
[9] Debra Steger, "Introduction: The House that WTO Members Built" in Debra P Steger, ed, *The World Trade Organization,* Critical Perspectives on the World Economy, Vol I (New York: Routledge, 2014) 1 at 5 [Steger, "The House"]; John Odell, "Chairing a WTO Negotiation" (2005) 8(2) J Int'l Econ L 425 [Odell, "Chairing"] ("At this writing, the GATT mode seems to have largely prevailed over any alternative. Most fundamentally, new members joined the old in deciding after Seattle to reaffirm the GATT norm that WTO decisions should normally be made by consensus rather than majority voting, especially regarding obligations that will be legally binding on each member state." at 446). For a description of the GATT 1947 and WTO rulemaking and decision-making rules, procedures and practices, as well as their evolution over time, see Chapter 2.

> There is no escaping that. It doesn't matter how much we say that we do more than negotiate, that we have a number of other things going on here, which are extremely important to the world even though the world doesn't know it. People only see us as good as our progress on Doha. That is the reality. And the perception in the world is that we have forgotten how to negotiate. The perception is ineffectiveness. The perception is paralysis.[10]

This is consistent with the findings of two high-level commissions composed of WTO experts and insiders that have been established to examine the future of the WTO. In 2003, the then Director-General Supachai Panitchpakdi commissioned a group of eight eminent persons to examine the institutional challenges the WTO was facing and to consider how the WTO could be strengthened and equipped to meet them. Chaired by former GATT Director-General Peter Sutherland, the Consultative Board found that the only means through which the WTO can fulfil its mandate is through "the efficient conduct of negotiations and the pursuit of multilateral consensus."[11] However, it emphasized the fact that, in recent years, the WTO "has sometimes given the impression of being unable to negotiate effectively" and it "has not always appeared able to deliver on the stated ambitions of its Member governments."[12] With respect to the rulemaking processes specifically, the Consultative Board set out in its Report (the Sutherland Report[13]) a wide range of modest recommendations that would not necessitate amendment to the existing rules about rulemaking and decision-making.[14]

First, the Consultative Board reflected on whether the consensus principle should be revised. It highlighted that the decision-making practice has been, so far, entirely by consensus, to the exclusion of voting. It explained this by the fact that there is a "larger sense of legitimacy for

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[10] WTO, General Council, *Azevêdo Launches "Rolling Set of Meetings" Aimed at Delivering Success in Bali* (9 September 2013), online: WTO <http://www.wto.org/english/news_e/news13_e/gc_09sep13_e.htm>. In the same vein, at the G-20 Cannes Summit of November 2011 the heads of government expressed the need to strengthen the WTO in order to contribute to a more effective, rules-based trading system", which should play "a more active role in improving transparency on trade relations and policies and enhancing the functioning of the dispute settlement mechanism", see G-20, *Cannes Summit Final Declaration (2011),* online: G-29 <http://www.g20-g8.com/g8-g20/g20/english/for-the-press/news-reseases/cannes-summit-final-declaration.1557.html>. Moreover, at the Geneva Ministerial Conference of December 2011, WTO Ministers emphasized "the value of the rules-based multilateral trading system and agree[d] to strengthen it", see: WTO, Ministerial Conference, *Elements for Political Guidance,* WTO Doc WT/MIN(01)/DEC/1,4th Sess, at para 10, online: WTO <http://docs.wto.org >.

[11] Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organization, 2004) at para 269, online: WTO <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm> [Sutherland Report].

[12] *Ibid* at para 270.

[13] Sutherland Report, *supra* note 11.

[14] See Debra P Steger, "The Culture of the WTO: Why it Needs to Change" (2007) 10(3) J Int'l Econ L 483 at 494.

proposals adopted by the consensus approach" considering that it requires that no Member opposes a proposal.[15] Moreover, it stressed that the voting alternative can be "manifestly unfair, given the existence of some large blocs of votes being available to some parties."[16] However, it found that the drawback of the consensus principle is the fact that "the majority's will" can be "blocked by even one country."[17] In the cases where the measure in question involves a "fundamental change", providing a veto to every single Member can be valuable as it adds a measure of "constitutional stability" to the WTO.[18] However, the Consultative Board argued that, in most cases, there are "non-fundamental measures at stake" and the measures proposed are for "fine-tuning to keep the rules abreast of changing economic and other circumstances."[19] As a result, in such cases consensus blockage renders the decision-making process "wholly inefficient", results in "treaty rigidity", and leads WTO Members to "take their business elsewhere" by turning towards bilateral and plurilateral trade agreements separate from the WTO.[20] The Consultative Board also stressed that consensus blockage is not that frequent in the WTO; however it argued that its possibility leads Members "to refrain from even making the attempt" to move proposals forward if they are "not ripe for consensus."[21] As a result, it made two recommendations: (i) that the WTO Members made distinctions for certain types of decisions, such as purely procedural issues, in light of the problems associated with achieving consensus; and (ii) that the General Council adopts a Declaration "that a Member considering blocking a measure which otherwise has very broad consensus support shall only block such consensus if it declares in writing, with reasons included, that the matter is one of vital national interest to it."[22]

Second, the Consultative Board recognized that the single undertaking principle[23] used in the current Doha Round negotiations is demanding due to the fact that there are "no opt-out options

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[15] *Ibid* at paras 280 and 282. See *WTO Agreement, supra* note 1, Article IX:1, n 1 and Chapter 2, Section 3.1.
[16] *Ibid* at para 286.
[17] *Ibid* at para 283.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid* at para 284.
[21] *Ibid* at para 285.
[22] *Ibid* at paras 288 and 289.
[23] The single undertaking is the principle according to which "every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately", see: WTO, *How the Negotiations Are Organized,* online: WTO <https://www.wto.org/english/Tratop_e/dda_e/work_organi_e.htm> [WTO, *Negotiations*].

available to WTO Members where new rules and agreements are being negotiated."[24] The alternative to negotiating under the single undertaking principle would be to pursue "variable geometry", i.e. where obligations would vary for different Members.[25] On the one hand, the Consultative Board stressed that variable geometry avenues could "take the multilateral trading system backwards" as non-participants "might quickly be left far behind or feel marginalized."[26] On the other hand, a plurilateral approach could allow a group of Members desiring to negotiate "more ambitious commitments" to do so and it could, at the same time, "dissuade the most powerful Members" from securing their trade agenda through regional and bilateral trade arrangements.[27] Therefore, the Consultative Board advised Members to re-examine the possible plurilateral approaches to WTO negotiations.[28]

Third, as for the case of the least-developed Members of the WTO for which new obligations and implementation burdens will "fall heavily" on them, the Consultative Board contended that the solution does not lie in a more radical approach to special and differential treatment for the WTO's poorest Members.[29] Instead, it recommended the inclusion in new agreements of provisions containing "a contractual right, including the necessary funding arrangements, for least-developed countries to receive appropriate and adequate technical assistance and capacity building aid as they implement new obligations."[30]

Fourth, the Consultative Board stressed that an increased presence of senior policy-makers from capitals at the WTO's headquarters in Geneva could bolster the effectiveness of the WTO rulemaking processes due to the fact that they would sustain positions "fully in tune with those being pursued in capitals."[31] As a result, it advised that a senior officials' consultative body, with no executive or negotiating powers, to be chaired and convened by the Director-General, be established to meet on a quarterly or bi-annually basis. It was further highlighted that, to be effective, such consultative body should have a membership of a maximum of 30 individuals

[24] Sutherland Report, *supra* note 11 at para 277.
[25] *Ibid* at para 292.
[26] *Ibid* at para 298.
[27] *Ibid* at paras 297 and 299.
[28] *Ibid* at para 300.
[29] *Ibid* at paras 305 and 308-10.
[30] *Ibid* at para 311.
[31] *Ibid* at para 321.

and be composed on a partly rotating basis, providing permanent seats to the major trading nations and rotating seats based, for instance, on geographical areas, regional trading arrangements, or mixed constituencies like those used in the International Monetary Fund and World Bank executive boards.[32]

In 2007, another high-level commission, chaired by the Honourable Pierre S. Pettigrew, former Canadian Minister for Foreign Affairs, was established to examine the governance of the world trading system and make recommendations for reforms. It produced the Warwick Report.[33] Regarding the rulemaking processes, the Warwick Commission examined three main approaches to decision-making: consensus, voting, and a relaxation of the single undertaking that it refers to as the "critical mass approach."[34] First, along with the findings of the Sutherland Report, the Warwick Commission found that the consensus principle can be "cumbersome" in cases where a single or a few Members block outcomes and restrain progress. While it recognized the legitimacy of preventing a decision from being taken where "vital interests are at stake", it equally found that blocking may lack legitimacy if its aim is rather "to prevent others from moving an agenda forward."[35]

Second, regarding the existing voting provisions according to which each Member is attributed one vote[36], the Warwick Commission explained two reasons why voting is avoided in the WTO as a decision-making mode. Firstly, Members have been reluctant to consider arrangements according to which they can be "overruled" in respect of a decision of vital importance to them.[37] Secondly, under the current voting rules, Members responsible for a "very large share of world trade" run the risk of being "outvoted" by a majority of Members with much smaller shares.[38] As a way of "mitigating this difficulty", the Warwick Commission considered the alternative of establishing a weighted voting system, which could be based on two thresholds in order to protect the interests of large and small Members alike: (i) Member size, i.e. percentage of global

[32] *Ibid* at paras 323-27.
[33] Warwick Report, *supra* note 3.
[34] *Ibid* at 28-32.
[35] *Ibid* at 29 ("In the history of GATT/WTO, there have undoubtedly been occasions where some parties have seen the action of others as less than fully legitimate in this regard." at 29).
[36] *WTO Agreement, supra* note 1, Article IX:1.
[37] *Ibid.*
[38] *Ibid.*

trade or global national income; and (ii) that a minimum number of countries voted in favour of a decision.[39] However, the Warwick Commission decided against recommending decision-making by vote because Members would have "great difficulty" to agree upon the appropriate thresholds, it would "formalise a *de facto* disenfranchisement of some countries every time a vote was taken" and, considering the "prevailing culture" in the WTO, it is unlikely that weighted voting would receive favourable consideration by Members.[40]

Third, the Warwick Commission considered and recommended a relaxation of the single undertaking principle in order to pursue variable geometry avenues based on some existing GATT 1947 and WTO practices of critical mass decision-making.[41] The Warwick Commission contended that the advantage of such flexible approach to decision-making is that it is "neither system-changing nor particularly radical."[42] It stressed that for considerations of justice and fairness, the benefits derived from critical mass agreements should apply to all Members on a most-favoured nation (MFN) basis and Members should define and follow substantive and procedural requirements for a decision based on critical mass to be adopted.[43] If such requirements are followed, the Warwick Commission argued that a critical mass approach to decision-making would have the effect of safeguarding "the integrity" of the WTO, protecting the "varied but legitimate interests" of all WTO Members, rendering decision-making more

[39] *Ibid.*
[40] *Ibid.*
[41] This was notably the case in the sectors of basic telecommunications, financial services, and information technology in the WTO. Moreover, all the Tokyo Round Codes (on standards, importing licensing, anti-dumping, subsidies and countervailing measures, and customs valuation) in the GATT 1947 were based on the critical mass approach, see *ibid* at 30-31.
[42] *Ibid* at 31.
[43] *Ibid* (The Warwick Commission put forth the following procedures: "(i) That new rules are required to protect or refine the existing balance of rights and obligations under the WTO and/or that the extension of cooperation into new regulatory areas will impart a discernible positive global welfare benefit; (ii) That the disciplines be binding and justiciable so as to attain the objectives laid out in the first criterion above; (iii) That the rights acquired by the signatories to an agreement shall be extended to all Members on a non discriminatory basis, with the obligations falling only on signatories; (iv) That Members shall consider any distributional consequences arising among Members from cooperation in new regulatory areas and shall consider means of addressing any such adverse consequences that they anticipate; (v) Given the objectives at hand and the international cooperation sought, no other international forum provides an evidently better venue for pursuing the cooperation than the WTO; (vi) That the WTO membership would collectively undertake to provide any necessary technical support, capacity building and infrastructural needs in order to favour the participation of developing countries so wishing to participate in an agreement and derive tangible benefits from such participation; (vii) That all Members not forming part of the initial critical mass shall have the unchallengeable and unqualified right to join the accord at any time in the future on terms no more demanding than those undertaken by signatories to the accord in question." at 31.).

"supple and efficient", and reducing "the risk" that Members find themselves "obliged to accept legal commitments they do not consider to be in their national interest."[44]

Some commentators have also expressed concerns regarding the WTO rulemaking processes and put forth proposals to strengthen them within the last decade.[45] Professor Bronckers contended that it is "practically impossible" and "very cumbersome" for Members "to review existing rules, or to impose deadlines for the adoption of new rules."[46] He worried that WTO Members rely too heavily on the dispute settlement organs to resolve difficult issues instead of the negotiations processes. The consequence of this, he stressed, is that it "undermines democratic control over international co-operation and rule-making, and it prevents a more broad-based participation of all stakeholders in the formulation of international rules."[47] Therefore, he argued that a solution may lie in an "agreement to disagree" i.e. writing down an agreement to the effect that "any such controversial issue cannot be litigated in the WTO."[48]

Professor Jackson, along with the findings of the Sutherland and the Warwick Reports, observed that there are advantages and disadvantages to the consensus-based decision-making processes. He noted: "One downside of requiring full consensus is that it may be a recipe for impasse, stalemate, and paralysis."[49] He suggested developing a practice where Members refrain from blocking consensus when a critical mass of Members, for example based on "an overwhelming majority of countries and an overwhelming amount of trade weight in the world, such as 90 percent of both these factors", support a proposed change.[50] Moreover, he argued that the proposed change should be consistent with the obligations of the treaty and apply on an MFN basis.[51]

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[44] *Ibid* at 31-32.
[45] For a taxonomy of various proposals that have been put forth in the last decade, see Carolyn Deere-Birkbeck & Catherine Monagle, *Strengthening Multilateralism: A Mapping of Proposals on WTO Reform and Global Trade Governance* (Geneva: ICTSD, 2009) at 71-102, online: ICTSD <http://ictsd.org/i/books/61814/>.
[46] Marco Bronckers, "Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO" (1999) 2 J Int'l Econ L 547.
[47] *Ibid* at 550.
[48] *Ibid* at 556.
[49] John H Jackson, "The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited" (2001) 4 J Int'l Econ L 67 at 74 [Jackson, "Mantras"].
[50] *Ibid* at 74-75.
[51] *Ibid* at 75.

Professors Cottier and Takenoshita argued that while the principle of one Member one vote[52] may reflect "sovereign equality", it fails to take into account factual differences in economic and political power of Members.[53] As a result, they recommended supplementing the WTO's consensus approach with a weighted voting system, for cases where consensus cannot be achieved. They proposed a weighted voting formula based on several variables, including contributions to the WTO, GDP, market openness in terms of the proportion of imports to GDP, population and basic votes.[54] They were in the opinion that such a weighted voting model could provide legitimacy to the WTO decision-making system, as it would achieve "simplicity, transparency, robustness to a changing economic climate and a Member's relative power, more balanced representation, and no veto power to any individual voting entity."[55] In addition, they claimed that it would provide "a reasonable balance of power between industrial and developing countries."[56]

Professor Steger contended that the difficulties of the rulemaking processes lie at the front end: "It is not the approval of proposals at the *end* of the process that seems to be the problem, but rather the lack of formal mechanisms and procedures at the *beginning* of and *during* the process that hampers decision making."[57] She argued that the WTO is in need of a management board for engaging in "strategic thinking" and to help "set priorities to further the mandate of the WTO"[58] She further recommended that such a management board should be comprised of 24 to 30 individuals drawn from Member countries selected from formal regional groups on a rotational basis, and it should be vested with "consultative, executive and supervisory

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[52] *WTO Agreement, supra* note, 1, Article IX:1.
[53] Thomas Cottier & Satoko Takenoshita, "Decision-making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting" in Stefan Griller, ed, *At the Crossroads: The World Trading System and the Doha Round* (Vienna: Springer, 2007) 181 at 193-96 [Cottier & Takenoshita, "Decision-making"]. For further literature promoting weighted voting at the WTO see: Gary Clyde Hufbauer, "Inconsistency Between Diagnosis and Treatment" (2005) 8(2) J Int'l Econ L 291 at 296 (arguing that weighted voting is absolutely necessary).
[54] Cottier & Takenoshita, "Decision-making", *ibid* at 201-02.
[55] *Ibid* at 220.
[56] *Ibid.*
[57] Debra P Steger, "The Future of the WTO: The Case for Institutional Reform" (2009) 12 J Int'l Econ L 803 at 814 [Steger, "The Future of the WTO"].
[58] *Ibid* at 814. For further literature on the establishment of a management board or an executive body, see: Richard Blackhurst & David Hartridge, "Improving the Capacity of WTO Institutions to Fulfil Their Mandate" (2004) 7(3) J Int'l Econ L 705 at 708-10 [Blackhurst & Hartridge, "Improving"]; Mitsuo Matsushita, Thomas J Schoenbaum & Petros C Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2003) at 14 [Matsushita et al, *the WTO*] (suggesting the establishment of an executive body endowed with decision-making power).

functions."[59] Moreover, in line with principles of good governance, she stressed that it should be "representative, accountable and transparent in its responsibilities and relations with Members as well as efficient and effective in its decision making."[60]

Professor Odell was concerned that the decision-making processes had been "less efficient" and "less legitimate" since 1997.[61] Additionally, he noted that both "the most powerful and the least powerful members alike" have complained about the WTO negotiation processes.[62] Considering that "WTO chairs seem to have limited but significant influence on the efficiency and legitimacy of negotiations and the resulting distribution of gains and losses", he proposed to provide a more defined role for the Chairs.[63]

Erika Mann, former Member of the European Parliament, proposed the addition of a parliamentary dimension to the WTO.[64] She noted that with the WTO's rules reaching more deeply into domestic affairs and with the decisions of the WTO judicial bodies having a binding character, the WTO now has "a direct impact on the lives of citizens and their societies" and "encroaches on some of the traditional prerogatives of legislators as the primary lawmakers in democracies."[65] Due to the fact that "the boundaries between domestic and foreign policy increasingly blur", she argued that political parties "fear that their views are not sufficiently taken into account when their governments negotiate at the international level."[66] As a solution to this concern, she recommended to "officially recognize and institutionalize the parliamentary

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[59] *Ibid* at 820-21.
[60] *Ibid* at 820.
[61] Odell, "Chairing", *supra* note 9 at 425.
[62] *Ibid.*
[63] *Ibid* at 445-47.
[64] Erika Mann, "A Parliamentary Dimension to the WTO: More than Just a Vision?!" (2004) 7(3) J Int'l Econ L 659 [Mann, "A Parliamentary Dimension"]. On the proposal to improve parliamentary participation in the WTO, see also: Steger, "The Future of the WTO", *supra* note 57 at 824-30; Meinhard Hilf, "How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made More Effective? The European Context" in Ernst-Ulrich Petersmann & James Harrison, eds, *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, 2005) 413 [Hilf, "Parliamentary Participation"]; Gregory Shaffer, "Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts" (2004) 7(3) J Int'l Econ L 629 [Shaffer, "Parliamentary Oversight"]; Krajewski, "Democratic Legitimacy", *supra* note 8 at 183-86; Markus Krajewski, "Legitimising Global Economic Governance Through Transnational Parliamentarisation: How Far Have We Come? How Much Further Must We Go?" in Cottier & Elsig, *supra* note 3, 82 [Krajewski, "Legitimising"]; Chutikul, "Options for a Parliamentary Dimension", *supra* note 8.
[65] Mann, "A Parliamentary Dimension", *ibid* at 659.
[66] *Ibid.*

dimension to the WTO" in order to "further enhance transparency and democratic legitimacy of WTO activities."[67]

Despite the concerted efforts of the two high-level commissions and some scholars to find solutions to strengthen the WTO rulemaking processes, there is no evidence that Members have even considered any of this scholarly literature. Moreover, no major formal changes in the rulemaking processes have been adopted.[68] Why have Members not reflected upon the issues highlighted in the Warwick and the Sutherland Reports? Are they of the opinion that the WTO rulemaking processes work properly?

The lack of attention by Members regarding these issues motivated the focus of this thesis on the legitimacy of the WTO rulemaking processes. From the standpoint and normative values of the WTO Members, are the WTO rulemaking processes legitimate as they are currently operating? To what degree? What are their strengths and weaknesses? This thesis explores these questions.

2. DEFINITION OF RULEMAKING PROCESSES

In the context of this thesis, *rulemaking processes* can be understood as the processes used to negotiate, implement and make a specific policy binding. They generally encompass three steps. The first step is the agenda-setting process, which consists of the process leading to the adoption of a mandate of negotiations which results in an official launch of negotiations regarding a specific subject matter.[69] The second step is the consensus-building process, which corresponds to the period of negotiations that usually takes place amongst the councils and the committees. This step begins at the official launch of the negotiation and ends with the adoption of a decision, which is reflective of the agreement on the text of a policy (such as an amendment, a new rule or an agreement) to be implemented.[70] Finally, the third step corresponds to the

[67] *Ibid* at 660-65. See also Steger, "The Future of the WTO", *supra* note 57 at 824-25.
[68] See e.g. Odell, "Chairing", *supra* note 9 at 446.
[69] Article X:1 provides for "the initiation of a proposal for amendment", whereas Article IX:3 (a) and (b) provides for "a request for a waiver", see: *WTO Agreement, supra* note 1, Articles IX:3 (a) and (b) and X:1.
[70] Article X:1 provides for a consensus-building period for the proposed amendment, whereas Article IX:3 (a) and (b) provides for the examination of the waiver request, see: *WTO Agreement, supra* note 1, Articles IX:3 (a) and (b) and X:1.

implementation process, which consists in the legal method used to implement and make the negotiated policy binding.[71]

The principle rules and procedures for negotiating and implementing policies are contained in Article IX and X of the *WTO Agreement.*[72] However, the definition of rulemaking processes also extends to other methods of implementation that could have been used by Members even if they are not specifically provided for in the *WTO Agreement*.[73]

3. OVERVIEW OF THE LITERATURE ON THE LEGITIMACY OF THE WTO: WHAT HAS BEEN DONE?

The contributions about WTO legitimacy have followed three different general approaches.[74] First, a handful of contributions have analyzed what the WTO is, its nature and purpose and whether it is equipped to fulfil its mandate. For example, Professor Broude examined the "asynchronicity" in the evolution of the WTO between its shift towards the pursuit of development goals and the "virtual standstill" of its institutional design to accommodate its new development objectives.[75] Professor Fakhri argued that the focus on improving the legitimacy of the WTO has moved the debates away from appreciating what the WTO's function and purpose are and to conceptualize what they should be. As a result, he studied the social, political and economic implications of the legitimacy debates to determine what is exactly at stake.[76] Professor Cottier assessed the legitimacy of WTO law while taking into account the different levels of governance that have an impact on its legitimacy, including the domestic and

[71] Article X:1-5 provides for (i) a decision to submit the proposed amendment to the Members for acceptance and (ii) the entry into effect of the amendment, whereas Article IX:4 provides for decision-making with respect to the request for a waiver, see: *WTO Agreement, supra* note 1, Articles IX:4 and X:1.
[72] *WTO Agreement, supra* note 1.
[73] For instance, it includes implementation of an agreement through entries in Schedules, as illustrated in the Basic Telecoms Case, see: Chapter 5.
[74] Some contributions have also focused exclusively on the legitimacy of the WTO dispute settlement system, but they are not examined here, see: Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomacy: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35(2) J World Trade 191; Jeffrey Dunoff, "The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution" (2002) 13 Am Rev Int'l Arb 197.
[75] Tomer Broude, "The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO" (2006) 45(1) Colum J Transnat'l L 221 at 221.
[76] Michael Fakhri, "Reconstruing WTO Legitimacy Debates" (2011) 1(1) Notre Dame Journal of International & Comparative Law 64.

international processes, as well as the outcomes.[77] Finally, Professor Howse analyzed three different kinds of power that the WTO exercises (i.e. the power of its rules, its bureaucratic power, and its judicial power) in order to understand the nature of WTO's legitimacy and how it can be strengthened.[78]

Second, some contributions provided a taxonomy of the different notions of legitimacy that can be applied to the WTO. Professor Elsig explained that legitimacy has different facets. He described the following conceptions from the political and legal perspectives that have been applied to the WTO: "a deliberate conception of democracy to improve political capacity of the citizenry"; "a pluralist conception concentrating on accountability"; "a libertarian conception as a means to protect individual liberties"; "a social-democratic conception to offset the power of concentrated wealth"; the constitutionalization debate; a traditional positive legal theory conception where "legitimacy is derived from the process defined by the legal order and which is characterized by a higher order norm to validate the system"; and a conception where elements of fair process and equitable outcome are linked.[79] Similarly, Professor Esty undertook a comprehensive review of various sources that can justify that a degree of authority be lodged with international bodies, especially the WTO. Essentially, his work identified five distinct sources of normative legitimacy that can independently act as the basis of justification for an international organization's decision-making authority. He defined each source of legitimacy with specific legitimacy criteria: (i) Rousseauian democratic legitimacy (representativeness and accountability); (ii) Weberian expertise-based legitimacy (rationality, efficacy, efficiency, neutrality); (iii) Fullerian order-based legitimacy (clarity and stability); (iv) Madisonian 'checks and balances' or systemic legitimacy (power, sharing, legality, fairness; (v) Habermasian procedural legitimacy (deliberation, transparency, participation and due process).[80]

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[77] Thomas Cottier, "The Legitimacy of WTO Law" in Linda Yueh, ed, *The Law and Economics of Globalisation* (Cheltenham: Edward Elgar, 2009) 11 [Cottier, "The Legitimacy of WTO Law"].
[78] Robert Howse, "The Legitimacy of the World Trade Organization" in Jean-Marc Coicaud & Viejo Heiskanen, eds, *The Legitimacy of International Organizations* (Tokyo : United Nations University Press, 2001) 355 [Howse, "The Legitimacy of the WTO"].
[79] Manfred Elsig, "The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?" (2007) 41 J World Trade 75 at 80-81 [Elsig, "The WTO's Legitimacy Crisis"].
[80] Daniel C Esty, "Good Governance at the World Trade Organization: Building a Foundation of Administrative Law" (2007) 10(3) J Int'l Econ L 509 at 512-13 [Esty, "Good Governance"]. See also Daniel C Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law" (2006) 115 Yale LJ 1490 at 1515-23.

Third, some scholars have elaborated specific criteria against which the legitimacy of the WTO could be evaluated and improved upon or developed new models of governance and institutional structure to provide greater legitimacy to the WTO. A number of scholars are of the view that the concept of legitimacy for the WTO needs to be grounded on elements of democracy and evaluated the WTO against this standard.[81] Professors Keohane and Nye advocated for a concept of legitimacy for the WTO based on input and output legitimacy. For them, input legitimacy, also called accountability, refers to the procedures that an international organization follows. Whereas, output legitimacy, also called effectiveness, corresponds to the results an international organization obtains.[82] Professor Petersmann also applied the concept of input and output legitimacy to the WTO, but he defined input legitimacy as containing safeguards, such as human rights protection and democratic procedures, and output legitimacy as ensuring the promotion of general consumer welfare.[83] Professor Krajewski described three other approaches of democratic legitimacy that can be applied to the WTO. The first approach of democratic legitimacy at the international level is based on the link between the decisions taken by the international organization and the popular will as expressed nationally in the general elections. The second approach is the cosmopolitan one. It assumes that democratic decision-making can "transcend national borders and can also be exercised in transnational constellations."[84] The third approach is based on Jürgen Habermas' theory of communicative action and rational discourse.[85]

As for Professors Howse and Nicolaidis, they advanced that, in order to enhance its legitimacy, the world trade system requires "greater democratic contestability and a more inclusive view of

[81] Krajewski, "Democratic Legitimacy", *supra* note 8; Rahul Singh, "The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit" (2008) 42(2) J World Trade 347 [Singh, "The WTO and Legitimacy"]; Jayati Srivastava, "World Trade Organisation at the Crossroads: The Legitimacy Dimension" (2007) 42(40) Economic and Political Weekly 4075 [Srivastava, "WTO at the Crossroads"]; Americo B Zampetti, "Democratic Legitimacy in the World Trade Organization: The Justice Dimension" (2003) 37 J World Trade 105.
[82] Robert O Keohane & Joseph Nye Jr, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy" in Robert O Keohane, ed, *Power and Governance in a Partially Globalized World* (New York: Routledge, 2002) 219 at 233-40 [Keohane & Nye, "The Club Model"].
[83] Ernst-Ulrich Petersmann, "Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO: Introduction and Summary" (2004) 7(3) J Int'l Econ L 585 at 588-89.
[84] Krajewski, "Legitimising", *supra* note 64 at 86.
[85] *Ibid* at 85-87.

those entitled to influence the shape of the system."[86] They argued for the institutionalization of a model of subsidiarity, which would incorporate three basic principles: institutional sensitivity, political inclusiveness, and top-down empowerment.[87] Yves Bonzon advocated the institutionalization of public participation mechanisms as a remedy to strengthen the legitimacy of the WTO decision-making processes. He provided an assessment of the institutional structure of the WTO and its different types of decisions and laid out specific recommendations regarding which decision-making procedures should be opened to public participation and how the mechanisms should be implemented in practice.[88] Finally, Professor Albin argued that the legitimacy of the WTO negotiations processes should instead be assessed against some criteria of procedural justice: transparency, fair representation, fair treatment and fair play, and voluntary agreement.[89] She further provided an evaluation of the various proposals for reforms of the WTO rulemaking processes on the basis of these four criteria.[90]

4. RESEARCH QUESTIONS

While the contributions about WTO legitimacy have shed light on the concept of legitimacy for the WTO and provided great insights of how it can be applied to it, in general, they have not provided a comprehensive evaluation of its legitimacy.[91] Instead, the focus has been

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[86] Robert Howse & Kalypso Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" (2003) 16(1) Governance 73 at 74 [Howse & Nicolaidis, "Enhancing WTO Legitimacy"].
[87] *Ibid.*
[88] Yves Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge: Cambridge University, 2014) [Bonzon, *Public Participation*]. On the participation of non-state actors as a means to strengthen the legitimacy of the WTO, see also: Elizabeth Smythe & Peter J Smith, "Legitimacy, Transparency, and Information Technology: The World Trade Organization in an Era of Contentious Trade Politics" (2006) 12(1) Global Governance 31 [Smythe & Smith, "Legitimacy"] (stressing "the role of information and communication technologies in facilitating the creation of NGO networks and increasing the speed and flow of information regarding trade policy and the WTO." at 32); Sungjoon Cho, "A Quest for WTO's Legitimacy" (2005) 4(3) World Trade Review 391 [Cho, "A Quest"]; Srivastava, "WTO at the Crossroads", *supra* note 81 (arguing that the WTO's problem of legitimacy is rooted in the stakeholder's model that the WTO has adopted and that the WTO needs to create "more open spaces and avenues wherein people rather than stakeholders can have a say in its policies and decision-making." at 4079).
[89] Cecilia Albin, "Using Negotiation to Promote Legitimacy: An Assessment of Proposals for Reforming the WTO" (2008) 84(4) International Affairs 757 at 763-66 [Albin, "Using Negotiation"].
[90] *Ibid* at 766-71.
[91] To the knowledge of this author, the contributions that aimed to provide an actual assessment of the legitimacy of the WTO include: Robert O Keohane, "Global Governance and Legitimacy" (2011) 18(1) Review of International Political Economy 99 at 99-104 and 106-07 [Keohane, "Global Governance"] (assessing the WTO on the basis of six criteria derived from liberal democratic principles: (i) minimal moral acceptability; (ii) inclusiveness; (iii) epistemic quality; (iv) accountability; (v) compatibility with democratic governance within countries; and (iv) comparative benefits); Cottier, "The Legitimacy of WTO Law", *supra* note 77 (providing an assessment of the legitimacy of WTO's law). For additional information, see Section 3 above.

predominantly on how to improve the legitimacy of the WTO. Moreover, they have not focused specifically on the rulemaking processes.[92] Considering, on the one hand, the findings of the Sutherland and the Warwick Reports and the contributions of various commentators regarding the reform of the WTO rulemaking processes, and on the other, the lack of attention of WTO Members regarding the issues raised[93], there is a need in the literature for a comprehensive evaluation of the legitimacy of the WTO rulemaking processes. This thesis tackles this undertaking.

The thesis' primary research question is the following: *Are the WTO rulemaking processes legitimate? To what degree?* Responding to this first research question entails the need for a secondary research question, which is: *How can the WTO rulemaking processes be assessed*? On what basis? According to which standards?

5. IMPORTANCE OF THE RESEARCH, ORIGINALITY AND CONTRIBUTION

This thesis presents the first large-scale evaluation of the legitimacy of the WTO rulemaking processes that has been conducted to date. It performs a legitimacy assessment based on cases that led to the creation or modification of actual rules in the WTO: the TRIPS and Public Health Waiver and Amendment[94], the *Basic Telecoms Agreement*[95] and the *Agreement on Trade Facilitation.*[96] While there have been various scholarly pieces of secondary literature that have described the general rulemaking and consensus-building processes in the WTO in detail [97], this

[92] With the exception of the contribution from Professor Albin, see: Albin, "Using Negotiation", *supra* note 89.
[93] See Section 1 above.
[94] *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (General Council Decision of 30 August 2003), WTO Doc WT/L/540, online: WTO <http://docs.wto.org> [*TRIPS and Public Health Waiver*]; *Amendment of the TRIPS Agreement* (General Council Decision of 6 December 2005), WTO Doc WT/L/641, online: WTO <http://docs.wto.org> [*Protocol Amending the TRIPS Agreement*].
[95] *Fourth Protocol to the General Agreement on Trade in Services,* 15 April 1997, 2061 UNTS 214, 32 ILM 354, WTO Doc S/L/20 (entered into force 5 February 1998) [*Basic Telecoms Agreement*].
[96] *Protocol Amending the WTO Agreement* (General Council Decision of 27 November 2014), WTO Doc WT/L/940, online: WTO <http://docs.wto.org> [*Protocol Amending the WTO Agreement*].
[97] See e.g. Robert Housman, "Democratizing International Trade Decision-Making" (1994) 27(3) Cornell Int'l LJ 699 [Housman, "Democratizing"]; Peter Nørgaard Pedersen, "The WTO Decision-Making Process and Internal Transparency" (2006) 5(1) World Trade Review 103; Margaret Liang, "Evolution of the WTO Decision-Making Process" (2005) 9 SYBIL 125; Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The Real World of Trade Negotiations – The Lessons of Cancun,* Updated Edition (London: Zed Books, 2004) [Jawara & Kwa, *Behind the Scenes*]; Mayur Patel, *New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO*, Global Economic Governance Programme Working Paper 2007/33, University College, Oxford

study provides an original contribution by focusing on the negotiation processes that led to the creation of actual rules. The focus on real cases arguably allows for a more accurate representation of the rulemaking processes. It is also crucial for evaluating legitimacy in that legitimacy is of greater importance for the processes that result in the creation of rules, due to the fact that they generate binding outcomes.

This thesis examines the *justification* of the WTO rulemaking processes by setting a minimal benchmark to assess them. Using an original methodology conceived on the basis of social sciences' research methods, it develops a *multidimensional interval scale*[98] which enables the precise measurement of key standards of legitimacy: legality, effectiveness, representativeness, and openness. Moreover, a portion of the assessment performed in this thesis comprises a large-scale quantitative analysis on the participation of WTO Members in the rulemaking processes.[99]

The findings of this thesis provide factual indications as to whether the rules and procedures about rulemaking and decision-making are actually followed in the WTO and if they are sufficiently flexible to allow Members to accomplish their policy objectives. It assesses whether the rulemaking processes are effective in addressing the mandated policy objectives and bringing them into effect in a timely manner. Furthermore, it evaluates whether the rulemaking processes are predictable, transparent and inclusive. It assesses whether a representative group of Members participate in the rulemaking processes and whether the outcomes represent a balanced set of the interests expressed. Finally, it also analyzes whether the rulemaking processes are transparent for non-state actors and if they provide adequate opportunities for public participation. Hence, this thesis contributes to form a common understanding about the legitimacy of the WTO rulemaking

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(September 2007), online: Global Economics Governance <http://www.globaleconomicgovernance.org/wp-content/uploads/Patel_Main%20text_new.pdf >; Markus Krajewski, *From Green Room to Glass Room - Participation of Developing Countries and Internal Transparency in the WTO Decision-Making Process* (Berlin: TradeWatch, 2000); Kent Jones, "Green Room Politics and the WTO's Crisis of Representation" (2009) 9(4) Progress in Development Studies 349 [Jones, "Green Room"].

[98] The methodology developed in this thesis can serve as a framework for future work on the legitimacy of international organizations in general.

[99] It presents a compilation of twenty years of data spanning from 1994 to 2014 related to all three case studies with respect to each WTO Member's oral interventions in the meetings of the councils and committees dealing with the specific subject matter of the case study and each written communication submitted. It resulted in a substantial amount of separate data entries (i.e. roughly eleven thousands or 11 191) regarding the participation of Members, which was then presented according to two different classifications: by level of development and by geopolitical groupings. These classifications enable the attribution of meaning to the data collected and can be readily referred to in future studies.

processes, which can be used as a basis for further institutional debates about WTO legitimacy and reform.

This research also complements some comprehensive studies that have been carried out on the WTO rulemaking processes and the legitimacy of the WTO. Indeed, the Sutherland and the Warwick Reports, as well as other scholarly contributions, reflected, *inter alia,* on the obstacles to the rulemaking processes' fairness and effectiveness, whether their structures and procedures were optimal, and whether they should be modified. However, while these Reports and contributions identified some areas of weaknesses, they have not reflected explicitly on their legitimacy and whether they ought to be justified normatively.[100] Additionally, some scholars have developed far-reaching conceptions for the legitimacy of the WTO and proposed standards that could be used to assess the rulemaking processes.[101] While these contributions provided tremendous assistance for the development of the theoretical framework, as well as the criteria and indicators used to assess the legitimacy of the rulemaking processes in this thesis, no other comprehensive evaluation of the legitimacy of the WTO has had the scope of the methodology as demonstrated in this thesis.

[100] See Section 1 above.
[101] See Section 3 above.

PART II

RULEMAKING AND DECISION-MAKING IN THE GATT 1947 AND THE WTO

CHAPTER 2
GATT 1947 & WTO RULEMAKING AND DECISION-MAKING RULES, PROCEDURES AND PRACTICES

1. INTRODUCTION

The WTO was established only twenty-years ago in 1995, with a brand new treaty and new rules about rulemaking and decision-making. However its history goes far back to the time of the GATT 1947. This Chapter focuses on the description of the GATT 1947 and WTO rulemaking and decision-making rules, procedures and practices. However, considering its pedigree, has the WTO been functioning as a brand new organization since its establishment in 1995? Or has the GATT 1947 influenced its rulemaking practice? This Chapter responds to these questions. It is divided in two main sections: the rulemaking and decision-making practice under the GATT 1947 (Section 1) and the WTO (Section 2). It examines the influence of the GATT 1947 on the WTO rulemaking practice.

2. RULEMAKING AND DECISION-MAKING PRACTICE UNDER THE GATT 1947

This Section demonstrates that, with its inherited flawed institutional structure, the GATT 1947 has shown to have "a strong tradition of flexibility" and has been remarkably capable of responding to the demanding and evolving challenges of the world economy.[102] It presents the rulemaking and decision-making rules and procedures that existed during the GATT 1947, as well as the rulemaking practices that developed over its history.

2.1. An Inherited Flawed Institutional Structure

The WTO was the product of the Uruguay Round negotiations, which was the eighth and last round of multilateral trade negotiations conducted within the framework of the General

[102] See e.g. Debra P Steger, "The World Trade Organization: A New Constitution for the World Trading System" in Marco Bronckers & Reinhard Quick, eds, *New Directions in International Economic Law: Essays in Honour of John H Jackson* (Kluwer International: The Hague 2000) 135 at 138 [Steger, "A New Constitution"].

Agreement on Tariff and Trade 1947 (GATT 1947), spanning from 1986 to 1994.[103] Until the establishment of the WTO in 1995, the GATT 1947 had acted as the central international forum for coordinating national policies on international trade for almost fifty years.[104] However, at the time of the creation of the GATT in October 1947, it was not foreseen that the GATT 1947 would play such a role. Instead, it was envisioned that the GATT 1947 would be "a specialized agreement" as part of the International Trade Organization (ITO) and "would depend on the ITO for institution support such as decisions, dispute settlement, membership obligations, and so on."[105] Considering the delays for the conclusion and ratification of the ITO, the GATT 1947 was applied "provisionally on an after 1 January 1948" by the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*.[106] However, history took a different turn and the ITO never came into force.[107] As a result, the GATT 1947 became, by default, the central multilateral instrument which regulated global commerce from 1948 to 1994.[108]

There have been various conceptions regarding the legal status of the GATT 1947. Some have said that it was merely a contract, whereas others are of the opinion that the GATT 1947

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[103] The GATT 1947 was terminated by a decision adopted by the Preparatory Committee for the WTO and the CONTRACTING PARTIES and a new treaty, the *WTO Agreement,* was signed on 15 April 1994, which established the World Trade Organization on 1 January 1995, following the ratification of the future WTO Members. See *Transitional Co-Existence of the GATT 1947 and the WTO Agreement, supra* note 1.

[104] John H Jackson, William J Davey & Alan O Sykes, Jr, *Legal Problems of International Economic Relations: Cases, Materials and Text,* 5th ed (St. Paul, MN: Thomson/West, 2008) at 219 [Jackson, Davey & Sykes, *Legal Problems*].

[105] John H Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006) at 93.

[106] *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, 10 October 1949, 55 UNTS 308.

[107] Jackson, John H, *Restructuring the GATT System* (New York: The Royal Institute of International Affairs, 1990) at 24 [Jackson, *Restructuring*] (The ITO never came into force, because the United States Congress refused to join a treaty on trade, which would have the attributes of an organization.); Jackson, Davey & Sykes, *Legal Problems*, *supra* note 104 (Nothing legally prevented the other countries to bring into force the ITO, however, "since the United States was the strongest economic in the post-war world, and since the initiative for an agreement came from the United States, other countries waited to see if the United States would accept the ITO." In other words, for the other countries, their participation in the ITO was conditional upon the United States' ratification of the draft charter. at 219). See also, GATT 1947 CONTRACTING PARTIES, *Future Administration of the General Agreement,* GATT 1947 Doc GATT/CP/86 (7 December 1950), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.

[108] The GATT 1947 remained applied on a provisional basis until its termination in 1996 (i.e. on year after the entry into force of the WTO), see: *Transitional Co-existence of the GATT 1947 and the WTO Agreement*, *supra* note 1 at para 3.

developed over the years into an international institution akin to an international organization.[109] Legally speaking, the GATT 1947 was an "international agreement concluded between States", which can be qualified as a treaty following the definition stated in Article 1(a) of the *Vienna Convention on the Law of Treaties* (VCLT). [110] However, it never entered into force because it was never formally accepted and ratified by the contracting parties.[110.1] Considering that the GATT 1947 never entered into force and was only applied by a protocol of provisional application, did the contracting parties need to respect its own normative hierarchy? In other words, could the GATT 1947, which itself had been applied by a different legal means than originally provided for, only be modified by its formal amendment procedure (contained in Article XXX) requiring acceptance and ratification?[111] Or, could it also be changed by the agreement by the parties to it (i.e. the contracting parties)?

In its first years of existence, while there were still hopes that the ITO would come into effect, the contracting parties treated the GATT 1947 as a formal treaty and carefully respected its rules and procedures. However, from its second decade on, the GATT 1947 has been applied with flexibility. The following statement of the then former GATT 1947 Director-General Olivier Long[112] in 1985 illustrates the atmosphere of informality which prevailed during the GATT 1947 years:

> In the absence of any political consensus leading to the establishment of legal norms at world-wide level, GATT, depending on the possibility of reaching agreement or compromise, has moved forward pragmatically, point by point, sometimes by trial and error.
>
> . . . In a strict legal sense, the changes that have taken place detract from the full application of the legal rules, either through increased flexibility and tolerance, or through permanent exemption from a particular rule or rules.
>
> However, the politico-legal analyst should be cautious. Any theoretically limitative effects of the changes should not be his primary concern. He should look upon them

[109] See generally Kenneth W Dam, "The GATT as an International Organization" (1969) 3(4) J World Trade 374 at 374 (focussing on the institutional developments of the GATT 1947 over the years, such as the intersessional procedures, the Secretariat, the rules for amendments and accession, etc).
[110] *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 1(a) [VCLT].
[110.1] VCLT, *ibid,* Article 16. See also, Jackson, *Restructuring, supra* note 107 at 1.
[111] These questions were raised by Professor Debra Steger in a discussion.
[112] Olivier Long was Director-General of the GATT 1947 from 1968 to 1980.

> as being positive response to economic and political realities. They represent without doubt 'improvements', not 'limitations', in the GATT framework and in reinforcing GATT's ability to promote world trade, trade relations and economic development. They meet with the political approval of the international community.[113]

What probably mattered the most for the GATT 1947 was not whether there was a sufficient legal basis for the rules and decisions that were adopted, but rather that the contracting parties agreed.[114] In fact, why the burden for amending a provision of the GATT 1947 ought to have been heavier than that for applying the GATT 1947 itself?

2.2. Legal Instruments Used for Rulemaking During the GATT 1947

The following sections show that during the GATT 1947 the CONTRACTING PARTIES have implemented their negotiated policies through the following instruments: amendments (Article XXX), collective waivers (Article XXV:5)[115]; decisions by means of joint action by the CONTRACTING PARTIES (Article XXV:1); and separate agreement ('Codes').[116]

2.2.1. General decision-making rule and procedure

Due to its *ad hoc* history, the GATT 1947 was not equipped with a strong institutional structure. The only governing body that was specifically established by the GATT 1947 was the CONTRACTING PARTIES, which designated the contracting parties "acting jointly".[117] Eventually, the CONTRACTING PARTIES established an *ad hoc* Committee for Agenda and Intersessional Business (the 'Intersessional Committee')[118] in 1951, and its successor, the Council of

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[113] Olivier Law, *Law and its Limitations in the GATT Multilateral Trade System* (Boston: Graham & Trotman / Martinus Nijhoff, 1987) at 13 [Long, *Law*].

[114] Claus-Dieter Ehlermann & Lothar Ehring, "The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice, and Possible Improvements" (2005) 8(4) J Int'l Econ L 803 [Ehlermann & Ehring, "The Authoritative Interpretation"] (emphasizing an expressive motto used by the WTO Secretariat: "What matters is not whether there is a sufficient legal basis, what matters is rather 'that the Members agree.'" at 809).

[115] 'Individual waiver decisions are not examined in this thesis because they applied only to a single contracting party, thus they are not considered as a rulemaking instrument for the purpose of this thesis. For further information on the difference between individual and collective waivers see Section 2.2.3.

[116] These rulemaking instruments also correspond to those identified by former GATT 1947 Director-General Olivier Long, see Long, *Law, supra* note 113 (Long argued that there were five methods for modifying the legal framework of the GATT 1947: 1) Amendments under Article XXX; 2) Separate agreements (the Codes); 3) Decisions by the CONTRACTING PARTIES; 4) Waivers; 5) Evolution through 'tolerance') at 17-19).

[117] GATT 1947, *supra* note 1, Article XXV:1.

[118] GATT 1947, *Second Report adopted by the CONTRACTING PARTIES on 24 October 1951,* GATT Doc GATT/CP.6/41, Vol II BISD (1951) 205 [GATT 1947, *Establishment of the Intersessional Committee*]; WTO,

Representatives[119] in 1960, which had the responsibility to ensure the effective operation of the GATT 1947 between the Sessions and dealt with matters expressly referred to it by the CONTRACTING PARTIES.

The general rule for decision-making was contained in paragraphs 3 and 4 of Article XXV of the GATT 1947.

> 3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.
>
> 4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

Article XXV:3 and XXV:4 provided that the decisions of the CONTRACTING PARTIES had to be taken by a majority of the votes cast (not of the CONTRACTING PARTIES) and that each contracting party was endowed with one vote. In addition, Rule 30 of the *Rules of Procedure of Sessions of the CONTRACTING PARTIES* provided that the required quorum was a simple majority of the members of a committee.[120] However, Rule 30 did not specify how votes had to be taken during the Sessions. Until 1961, votes were taken by show of cards by representatives present at the Sessions of the CONTRACTING PARTIES. However, in view of the difficulty of taking an accurate count of the vote taken by raising of cards, it was agreed that from 16 May 1961 on, voting would be done by ballot.[121] In 1952, the CONTRACTING PARTIES adopted procedures which allowed them to take decisions between the Sessions by airmail or telegraphic ballot, when the

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GATT Analytical Index: Guide to GATT Law and Practice (Geneva: WTO, 1995) at 1100, online: WTO <http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/gatt_ai_e.htm> [*GATT Analytical Index*].

[119] *Decision of 4 June 1960 Establishing the Council of Representatives*, 16th-17th Sess, 9th Supp BISD (1960) 8-9 [*Establishment of the Council of Representatives*].

[120] *Rules of Procedure for Sessions of the CONTRACTING PARTIES* (adopted on 16 August 1948), GATT Doc GATT/CP.2/3/Rev.1, Rule 30, online: WTO < http://www.wto.org/english/docs_e/gattdocs_e.htm> [*Rules of Procedure for Sessions of the CONTRACTING PARTIES*].

[121] When a formal vote was required, ballot papers were distributed and a ballot box was placed in the conference room. The result of each vote was announced on the same or on the following day and the ballot papers as well as the Executive Secretary's report was made available for inspection in the files of the Secretariat. It was agreed that it would remain open to any representative to request a vote by the raising of cards or, in accordance with normal practice, by roll call, see: GATT 1947, *Voting Procedures: Note by the Executive Secretary,* GATT Doc L/1477 (1961), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> [GATT 1947, *Voting Procedures*]. According to established practice, votes would have been taken "either by ballot, or by the show of cards or a roll-call, or on a few occasions by show of hands", see: *GATT Analytical Index*, *supra* note 118 at 1097; GATT 1947, *Summary Record of the First Meeting* (held on 3 December 1991), GATT Doc SR.47/1 at 7, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.

Council of Representatives (or the Intersessional Committee) did not have the authority to decide the matter in question.[122]

2.2.1.1. Transition of decision-making practice from voting to consensus

There is some evidence from the summary records of the meetings of the CONTRACTING PARTIES that as early as 1949, the representatives of the contracting parties "saw drawbacks in taking a vote."[123] As a result, progressively in time, with the exceptions of the decisions for waivers and accession, a new decision-making practice by consensus emerged among GATT 1947 bodies.[124] However, no formal decision appears to have been taken to this effect. The practice of decision-making by consensus did not equate unanimity: there was consensus only if no contracting party present at the meeting when a decision was taken formally objected to the proposed decision.[125]

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[122] The Chairman determined the date and hour by which votes had to be received. However, in exceptional circumstances, the Chairman could extend the time-limit for receipt of votes. Any contracting party from which a vote had not been received within such time-limit was regarded as not voting. The letter or telegram contained such information as the Chairman considered necessary and a clear statement of the question to which each contracting party was requested to answer 'yes' or 'no'. See *Procedures for Action on Matters Arising Under Articles XII to XIV between the Sessions of the CONTRACTING PARTIES*, GATT Doc GATT/CP.6/52, Part II, Vol II BISD (1952) 101; *Rules for Airmail and Telegraphic Ballots,* 21st Sess, 12th Supp BISD (1964) 16, Rules 1 and 3.

[123] GATT 1947, *Summary Record of the Thirty-Eight Meeting* (held on 9 August 1949), GATT Doc GATT/CP.3/SR.38, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> (At the 9 August 1949 meeting of the contracting parties, the representative of France stated that "[a]lthough he saw drawbacks in taking a vote on the Norwegian proposal, he saw no alternative unless the Cuban statement were withdrawn." at 1).

[124] See e.g. GATT 1947 Working Party 3, *Working Party 3 on the Japanese Proposal, Report to the CONTRACTING PARTIES, adopted on 23 October 1953,* GATT Doc 6/55/Rev.1, 2d Supp BISD (1954) 117 at 118 (The Working Party was instructed to consider the association of Japan (a non-contracting party) to the work of the CONTRACTING PARTIES by participation in its meetings, the Working Party stated: ". . . it would not be possible from a strict legal point of view to grant full voting rights to Japan. In the normal course of business this would not be very important, since the contracting parties do not usually proceed to a formal vote in reaching decisions; generally, the Chairman takes the sense of the meeting); GATT 1947, *Summary Record of the First Meeting* (held on 16 October 1958), GATT Doc SR.13/1 at 3, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> (Regarding the participation of Switzerland in the work of the Thirteenth Session, the CONTRACTING PARTIES placed the following understandings on record: "In view of the working of the provisions of Articles XV and XXXII, it is not possible, from a strictly legal point of view, to give full voting rights to Switzerland. However, in the normal course of business this is not very important since the contracting parties do not usually proceed to a formal vote in reaching decisions; generally the Chairman takes the sense of the meeting . . ."); GATT 1947 Secretariat, *Information, Who Negotiates in GATT − And How?,* GATT Doc GATT/40/5 (1987), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> [GATT 1947 Secretariat, *Who Negotiates*] ("Generally, there is no voting in GATT bodies. Everything has to be agreed by consensus in order, among other things, for GATT decisions to have maximum political viability." at 1).

[125] See GATT 1947 Council, *Minutes of Meeting* (held on 16 June 1988), GATT Doc C/M/222, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> (At the 16 June 1988 Council meeting, the representative of Australia stated: "[I]f a contracting party chose to contest a consensus and to state its position that a consensus did not exist, it was then no possible for the Chairman of any GATT body to conclude that consensus did exist. As long as his assessment was not contested, any chairman could conclude

Consensus decision-making had the practical effect of giving a veto to every contracting party, i.e. an opportunity to object to a decision. For this reason, decisions taken by consensus were viewed as having maximum political viability: "when the results c[a]me they ha[d] a far greater weight than had they been achieved much earlier through an artificial majority vote."[126] According to the GATT Analytical Index, it appears that the last recorded decision of the CONTRACTING PARTIES adopted by vote (other than decisions on waivers or accession) was in 1959.[127]

2.2.2. Amendments

The principal legal instrument for creating new rules, amending or repealing existing rules was the amendment power contained in Article XXX of the GATT 1947. It provided:

> 1. Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.
>
> 2. Any contracting party accepting an amendment to this Agreement shall deposit an instrument of acceptance with the Secretary-General of the United Nations within such period as the CONTRACTING PARTIES may specify. The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

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that there was a consensus; but once that consensus was formally disputed, contested or objected to by a contracting party, the consensus could not be said to exist." at 12); GATT 1947, *Working Party I on Accession, Revised Report* (1949), 3d Sess, GATT Doc GATT/CP.3/37, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> (In the Report dated of 2 June 1949 of Working Party I on Accession, the representative of Cuba stated that "unanimous assent could in practice be inferred from the absence of objection and need not be embodied in a formal instrument." at 7); GATT 1947 Secretariat, *Who Negotiates, ibid* (describing the consensus decision-making practice as followed: "not everyone may be in wholehearted agreement but, at least, nobody is actually objecting" at 1).

[126] GATT 1947 Secretariat, *Information, Who Negotiates, ibid.*

[127] See *Freedom of Contract in Transport Insurance,* GATT CP Recommendation of 27 May 1959, 14-15th Sess, 8th Supp BISD (1960) 26; GATT 1947, *Summary Record of the Ninth Meeting* (held on 27 May 1959), GATT Doc SR.14/9 at 115, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> (adoption by 22-7 vote with 4 abstentions); *GATT Analytical Index*, *supra* note 118 at 1099.

Article XXX specified the required number of acceptances by the contracting parties in order for an amendment of the GATT 1947 to enter into force. However, there was no mention of the procedure to be followed in order to obtain agreement of the contracting parties on a specific draft protocol of amendment (the adoption of the text). In practice, two steps could be distinguished in the amendment process: (1) a consensus-building process leading to the adoption of a protocol of amendment; and (2) its implementation.

2.2.2.1. Consensus-building process leading to the adoption of a protocol of amendment

Prior to the adoption of a protocol of amendment, the first step for rulemaking was the negotiations. A complex process of negotiations took place among the contracting parties. Negotiations could take place at all hierarchal levels: from the official Sessions of the CONTRACTING PARTIES and their intersessional meetings to the various committees and sub-committees established by the CONTRACTING PARTIES. The rules did not provide much indication as to how the negotiation process should occur.

In 1948, the CONTRACTING PARTIES adopted the *Rules of Procedure for Sessions of the CONTRACTING PARTIES,* which clarified how the proposals and amendments had to be introduced. Rules 22 to 26 stated that the proposals had to be subject to "a vote" of the contracting parties.[128] However, they did not specify the type of majority or qualified majority which was necessary for a text to be adopted.[129] By a *Resolution of 26 February 1955*, the CONTRACTING PARTIES decided that the protocols of amendment to be submitted to the contracting parties for acceptance pursuant to Article XXX had to be preliminary approved by a majority of two-thirds of the votes

[128] Rule 22 of the *Rules of Procedure for Sessions of the CONTRACTING PARTIES, supra* note 120, provided that the proposals and amendments had to be normally introduced in writing and circulated to all representatives no later than twelve hours before the commencement of the meeting at which they were to be discussed. If there were two or more proposals related to the same question, Rule 23 provided that the most far-reaching proposal had to be first subject to a vote and, subsequently, the next most far-reaching proposal and so on. In the case where an amendment was moved to a proposal, Rule 24 stated that the amendment had to be put to the vote first and, if it was adopted, the amended proposal then had to be put to the vote. When two or more amendments were moved to a proposal, Rule 25 provided that the meeting had to vote first on the amendment farthest removed in substance from the original proposal, then, if necessary, on the amendment next farthest removed, and so on until all the amendments had been put to the vote. Finally, Rule 26 stated that a proposal could be voted on separately if a representative requested that the proposal be divided.

[129] However, Rule 27 stated that "[e]xcept as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting", see *ibid*, Rule 27.

cast.[130] It appears that only the CONTRACTING PARTIES, and not the Council of Representatives (or its predecessor, the Intersessional Committee), were authorized to adopt amendments.[131] The last protocol of amendment[132] to be adopted during the GATT 1947 would have been adopted by consensus, in 1965[133], instead of by a two-thirds majority vote as provided by the *Resolution of 26 February 1955*.

2.2.2.2. Implementation

Article XXX:1 required acceptance by unanimity of all the contracting parties for modifications of Article XXIX (Relation of the GATT 1947 to the Havana Charter[134]), Article XXX (Amendments) and Part I, i.e. Articles I (Most-favoured-nation Treatment) and II (Schedules of Concessions[135]) of the GATT 1947. The remaining provisions of the GATT 1947 could be amended upon acceptance by two-thirds of the contracting parties. However, it was provided that these amendments would become effective only in respect to those contracting parties which

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[130] GATT 1947, *Summary Record of the Thirty-Sixth Meeting* (held on 26 February 1955), GATT Doc SR.9/36 at 1-3, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>; GATT 1947, Administrative Steering Group for the Review, *Note on Procedure for Concluding Plenaries,* GATT Doc W.9/224 (23 February 1955), online: WTO < http://www.wto.org/english/docs_e/gattdocs_e.htm>; GATT 1947, *Summary Record of the Forty-Seventh Meeting* (held on 7 March 1955), GATT Doc SR.9/47 at 5, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.

This procedure was used for the adoption of the following three protocols of amendment: *Protocol Amending the Preamble and Parts II and III of the GATT,* 10 March 1955, 278 UNTS 1968 (entered into force on 7 October 1957) [*Protocol Amending the Preamble and Parts II and III of the GATT*]; *Protocol Amending Part I and Articles XXIX and XXX*, 10 March 1955 (abandoned on 31 December 1967) [*Protocol Amending Part I and Articles XXIX and XXX*]; *Protocol of Organizational Amendments to the GATT,* 10 March 1955 (never came into force) [*Protocol of Organizational Amendments to the GATT*].

[131] *Establishment of the Council of Representatives, supra* note 119 at 8-9 para 2(d) (providing that the Council of Representatives should not perform formal actions taken by the CONTRACTING PARTIES); GATT 1947, *Establishment of the Intersessional Committee*, *supra* note 118; *GATT Analytical Index*, *supra* note 118 at 1100.

[132] I.e. the *Protocol Amending the General Agreement to Introduce Part IV on Trade and Development,* 8 February 1965, 572 UNTS 320 (entered into force 27 June1966) [*Protocol Introducing Part IV on Trade and Development*].

[133] GATT 1947, *Summary Record of the Fifth Meeting* (held on 8 February 1965), GATT Doc 2SS/SR.5, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> (At the Second Special Session of the CONTRACTING PARTIES, held on February 1965, a delegation stated the following: "As had been pointed out by previous speakers, the new Part IV was not perfect. It bore the stamp of being a negotiated compromise. *It was negotiated and not voted by a majority*, because GATT derived its strength from being a forum for negotiations" at 8 [emphasis added]).

[134] The Havana Charter was the treaty establishing the International Trade Organization, which never came into force, see: *Final Act of the United Nations Conference on Trade and Employment,* E/Conf. 2/78 (24 March 1948), reprinted as UN Doc ICITO/1/4 (1948), online: WTO <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf>.

[135] GATT 1947, *supra* note 1, Article II(7) (providing that the Schedules are "an integral part of Part I" of the GATT 1947). See *GATT Analytical Index*, *supra* note 118 at 1005.

accepted them.[136] This meant that, once an amendment was accepted by two-thirds of the contracting parties, the amendment would come into force, however, solely for those contracting parties which accepted it.

This provision led to the possibility that there would be "two texts of the General Agreement in force for different contracting parties."[137] With respect to the contracting parties which had not accepted an amendment, the second paragraph of Article XXX provided that the CONTRACTING PARTIES could decide that it was of such a nature that any contracting party which had not accepted it within a specified period had "the choice to withdraw from the Agreement or, if the CONTRACTING PARTIES consent[ed], to remain party to it without applying the provisions contained in an amendment which it [did not] accept."[138]

Acceptance of protocol required each delegation to deposit its instrument of acceptance with the GATT Director-General (or its predecessor, the Executive Secretary).[139] Acceptance necessitated approval on the domestic level and, when applicable, the enactment of the necessary legislation to give domestic effect to the protocol in question.

2.2.2.3. Difficulties with the amendment procedure

Between the years 1948 and 1950, the CONTRACTING PARTIES adopted seven protocols of amendments, which came into force in the year following their adoption.[140] However, starting

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[136] GATT, *supra* note 1, Article XXX(2).
[137] *GATT Analytical Index*, *supra* note 118 at 1006-07.
[138] *Ibid* at 1008. See Conseil économique et social, *Deuxième Session de la Commission Préparatoire de la Conférence du Commerce et de l'Emploi de l'Organisation des Nations Unies: Note de la Délégation Française Relative à l'Interprétation de l'Article XXX,* Doc E/PC/T/245 (9 October 1947), online: WTO <http://www.wto.org/gatt_docs/e.htm>. As a Report of the Legal and Drafting Committee in the Review Session of 1954-55 stated, the procedure envisaged in paragraph 2 of Article XXX served the goal of ensuring that "the acceptance by all contracting parties of amendments requiring a two-thirds majority was not delayed indefinitely". However, this procedure did logically not apply to amendments requiring unanimity before they enter into force, since acceptance by all contracting parties was the requirement for their entry into force, see GATT 1947, Legal and Drafting Committee, *Report of the Legal and Drafting Committee on the Procedure for Submission of Amendments to the CONTRACTING PARTIES,* GATT Doc W.9/173 (1955) at 1-2, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>. The procedure provided in the second paragraph of Article XXX has never been used throughout the history of the GATT 1947.
[139] Se e.g. *Protocol Introducing Part IV on Trade and Development*, *supra* note 132 at 9 para 2.
[140] The following three protocols were signed in Havana in March 1948: *Special Protocol Modifying Article XIV of the GATT*, 24 March 1948, 62 UNTS 46 (entered into force 19 April 1948); *Special Protocol Relating to Article XXIV of the GATT*, 24 March 1948, 62 UNTS 56 (entered into force 7 June 1948); *Protocol Modifying Certain Provisions of the GATT*, 24 March 1948, 62 UNTS 30 (entered into force 24 March 1948). Two Protocols were signed at Geneva in September 1948: *Protocol Modifying Part II and Article XXVI of the GATT*, 14 September

from 1955 the CONTRACTING PARTIES began to experience difficulties with the acceptance and ratification process. Out of the four protocols of amendment that were adopted after 1954, one protocol was abandoned because of the refusal of the United States' Congress to ratify it.[141] Another protocol, which required acceptance from all the contracting parties, did not receive the sufficient amount of acceptances for its entry into force and was subsequently abandoned.[142] Two other protocols, which required acceptance by at least two-thirds of the contracting parties, entered into force, but at a slightly later period (up to approximately two years) than originally envisioned. However, it took considerably more time (up to respectively 14 and 15 years in both cases) to receive the acceptances of all contracting parties.[143] The CONTRACTING PARTIES did not attempt to adopt any other protocol of amendment after 1965. The change in power balances in the 1960s (with the formation of the Group of 77[144] and the establishment of UNCTAD[145]), as well as the growing number of contracting parties over the years (from 23 original contracting

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1948, 62 UNTS 86 (entered into force 14 December 1948); *Protocol Modifying Part I and Article XXIX of the GATT*, 14 September 1948, 138 UNTS 336 (entered into force 24 September 1952). One protocol was signed in Annecy in August 1949: *Protocol Modifying Article XXVI of the GATT*, 13 August 1949, 62 UNTS 113 (entered into force 28 March 1950). Another protocol was signed in Torquay in April 1951: *Torquay Protocol of the GATT*, 21 April 1951, 142 UNTS 34 (entered into force 19 October 1951) para 6 [*Torquay Protocol*].

[141] *Protocol of Organizational Amendments to the GATT*, *supra* note 130. This protocol contained a Charter for a formal international organization, which would administer the GAT 1947, called the Organization for Trade Cooperation (OTC), see: GATT 1947, Legal and Drafting Committee, *Draft, Protocol or Organizational Amendments for the General Agreement on Tariffs and Trade,* GATT Doc W.9/249 (1965), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>. However, this protocol never came into force. On the United States Congress' failure to ratify the draft OTC charter, see: *Hearings on H.R. 5550 Before the House Committee on Ways and Means,* 84th Cong, 1st Sess (1956); HR Rep No 2007, 84th Cong, 2d Sess (1957), cited in Robert E Hudec, *The GATT Legal System and World Trade Diplomacy,* 2d ed (Salem, NH: Butterworth Legal Publishers, 1990) at 73.

[142] *Protocol Amending Part I and Articles XXIX and XXX*, *supra* note 130; *Protocol Amending Part I, and Articles XXIX and XXX,* GATT 1947 CP Decision of 31 December 1967, 24th Session, 15th Supp BISD (1967) 65 [*GATT 1947 CP Decision of 31 December 1967*].

[143] *Protocol Amending the Preamble and Parts II and III of the GATT, supra* note 130; *Protocol Introducing Part IV on Trade and Development*, *supra* note 132.

[144] Robert E Hudec, *Developing Countries in the GATT Legal System* (Cambridge: Cambridge University Press, 2010) [Hudec, *Developing Countries*] ("The term 'Group of 77' refers to a 77-member voting bloc organized by developing countries for the 1964 UNCTAD Conference. . . . Not all Group of 77 members participate[d] in GATT affairs." at 51-52 and n 3).

[145] UNCTAD was an organization created for the less-developed countries and was established to address and tackle the "growing concerns about the place of developing countries in international trade", see: UNCTAD, *A Brief History of UNCTAD,* online: UNCTAD: <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx>. See also Kenneth W Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago, 1970) 237; Hudec, *Developing Countries*, *ibid* at 51; Hervé Cassan (en collaboration avec G Feuer), *Droit international du Développement,* 2d ed (Paris: Dalloz, 1991) at 13-16 and 521-29.

parties in 1948[146] to 65 at the end of 1965, the date of the last amendment proposed, and to 126 at the end of 1994[147]) could be potential explanations of why the amendment procedure became increasingly cumbersome.

The difficulties with the amendment procedure led the contracting parties to use different instruments to implement their negotiated policies: collective waivers, joint action by the CONTRACTING PARTIES, and separate agreements (codes). These instruments are described in the following sections.

2.2.3. Collective waivers

Under the GATT 1947, Article XXV:5 enabled the CONTRACTING PARTIES, in exceptional circumstances, to suspend an obligation imposed upon a contracting party by the GATT 1947, by a two-thirds majority, providing that such majority comprised more than half of the contracting parties. The waiver was a form of escape clause or a relaxation of the rules to be applied in exceptional circumstances. The waiver power could be granted to any obligations of the GATT 1947, including those contained in Part I, which required amendment by unanimity.[148]

The waiver provision provided for in Article XXV:5 stated:

> In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement: *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also may also by such a vote
>
> (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
>
> (ii) prescribe such criteria as may be necessary for this application of this paragraph.

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[146] Autar Krishen Koul, *The General Agreement on Tariffs and Trade (GATT)/World Trade Organisation (WTO): Law, Economics And Politics* (New Delhi, Satyam Books, 2005) at 15 [Koul, *The GATT/WTO*].
[147] See Appendix 1.
[148] *Applicability of the Provisions of Article XXV:5(1) to Obligations Defined in Part I of the General Agreement,* GATT 1947 CP Decision L/403 (7 September 1955), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>; GATT 1947, *supra* note 1, Article XXX. But see *Article XXV −Guiding Principles to be Followed by the CONTRACTING PARTIES in Considering the Applications for Waivers from Part I or Other Important Obligations of the Agreement* (Procedures adopted on 1 November 1956), 11th Sess, 5th Supp BISD (1956) 25 (calling the CONTRACTING PARTIES to proceed with caution when considering requests for a waiver of these important obligations).

Article XXV:5 provided that the CONTRACTING PARTIES could "waive an obligation imposed upon *a contracting party*"[149]; however it did not provide the possibility to waive an obligation for *multiple contracting parties*. Nevertheless, in some exceptional and limited cases, the CONTRACTING PARTIES used the provision of Article XXV:5 to suspend an obligation for a group of contracting parties or all contracting parties (referred as "collective waivers"[150]). In some of these cases, collective waivers were used as a legal instrument to create or modify rules for all contracting parties.[151] However, the use of collective waivers remained an exception. In fact, over the history of the GATT 1947, out of the 115 waivers that were adopted, only three were granted to a group of contracting parties or all of them.[152]

2.2.3.1. General procedure for the grant of a waiver

The usual procedure used for the grant of a waiver was the following. A contracting party (or a group of contracting parties) wishing to obtain a waiver for a specific obligation had to submit a request for a waiver to the CONTRACTING PARTIES. Subsequently, the CONTRACTING PARTIES would try to reach a consensus on the waiver text. If consensus could not be reached, a working party would be established to examine the measures for which the waiver was sought and draft a report and the terms of the waiver decision. Then, the report and the draft text of the waiver decision would be adopted by the Council of Representatives, which would recommend the adoption of the decision by the CONTRACTING PARTIES by a vote. During the years of the GATT 1947, a waiver vote took place either at a Session of the CONTRACTING PARTIES or by postal or telegraphic ballot.[153]

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[149] Emphasis added.
[150] This terminology was used by the WTO Secretariat: see WTO Secretariat, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Information on Waivers*, WTO Doc IP/C/W/387 (24 October 2002), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.
[151] This was the case of the following waivers: *Trade Negotiations Among Developing Countries* (GATT 1947 CP Decision of 26 November 1971), GATT Doc L/3636, 27th Sess, 18th Supp BISD (1971) 26 [*Preferences Among Developing Countries Waiver*]; *Generalized System of Preferences* (GATT 1947 CP Decision of 25 June 1971), GATT Doc L/3545, 27th Sess, 18th Supp BISD (1972) 24 [*1971 GSP Waiver*].
[152] These were: *Decisions and Resolution of the CONTRACTING PARTIES at the Fifth Session,* GATT 1947 CP Decision GATT/CP/94 (1951), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> [*Article XX, Part II Waiver*]; *Preferences Among Developing Countries Waiver*, *ibid*; *1971 GSP Waiver*, *ibid*. See also *GATT Analytical Index, supra* note 118 at 892 (for a list of all the waivers that were granted by the contracting parties under Article XXV:5 during the existence of the GATT 1947).
[153] *GATT Analytical Index, supra* note 118 at 883 (for a description of the waiver procedure under the GATT 1947).

2.2.3.2. Existence of exceptional circumstances

In order for waiver decisions to fit within the scope of the waiver power of Article XXV:5, they had to be justified by "exceptional circumstances." The CONTRACTING PARTIES never authoritatively defined the term 'exceptional circumstances.'[154] In addition, they did not make any decision under Article XXV:5 (i) and (ii), which enabled them to "(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver obligations, and (ii) prescribe such criteria as may be necessary for the application of this paragraph."[155]

2.2.3.3. Continuation of the adoption of waivers by voting

Waiver decisions were considered by the contracting parties to be of a special nature in contrast with other decisions of the CONTRACTING PARTIES taken pursuant to Article XXV:1. Contrary to other decisions of the CONTRACTING PARTIES which transitioned towards a practice of decision-making by consensus, waiver decisions were one of the few exceptional decisions that continued to remain adopted by vote.[156] Moreover, exceptionally, in comparison with other decisions taken pursuant to Article XXV:1, only the CONTRACTING PARTIES, and not the Council of Representatives, were entitled to adopt waiver decisions.[157] As a result, vote by postal ballot was used between the Sessions of the CONTRACTING PARTIES to adopt waiver decisions[158] and it was habitually also the preferred way for the Sessions of the CONTRACTING PARTIES.[159] The adoption of waivers by vote by postal ballot proceeded as follows. After the Council of Representatives

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[154] Isabel Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*, Cambridge International Trade and Economic Law (Cambridge: Cambridge University Press, 2012) at 182 [Feichtner, *The Law and Politics of WTO Waivers*].
[155] GATT 1947, *supra* note 1, Article XXV:5 (i) and (ii).
[156] When decision-making transitioned from voting to consensus as a day-to-day practice, it did not affect the waiver practice, which continued to proceed by majority voting, see: *GATT Analytical Index, supra* note 118 at 1098-99.
[157] *Establishment of the Council of Representatives, supra* note 119 at 8-9.See also GATT 1947, Special Group on GATT Organization, *Establishment of a Council of the contracting parties, First Report by the Special Group on GATT Organization*, GATT Doc L/1200 (1960), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> ("It is not contemplated that the CONTRACTING PARTIES would delegate to the Council the power to grant a waiver from the provisions of the GATT. It would nevertheless be helpful if requests for waivers were examined by the Council and were then submitted with the Council's recommendations to the CONTRACTING PARTIES." at 3).
[158] GATT 1947 Council, *Minutes of Meeting* (held on 12-13 May 1993), WTO Doc C/M/263 at 23, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.
[159] *Voting Procedures, supra* note 121.

reached consensus on a draft text containing the terms of the waiver decision, it would be submitted to the CONTRACTING PARTIES for voting. Once a draft waiver decision obtained a two-thirds majority of the votes cast, which comprises more than half of the total number of contracting parties, it would become officially adopted.[160] Voting by postal ballot had the advantage to ensure "that all contracting parties could cast a vote and not only those contracting parties that were present at the meeting of the CONTRACTING PARTIES thus increasing the likelihood that the required majority be reached."[161] Even though waiver decisions were adopted by vote, Feichtner observed that "great efforts were made to reach agreement on waiver requests and draft waiver decisions."[162] As a result, waiver decisions were "usually adopted with no or very few negative votes."[163]

2.2.3.4. Legal effect of the collective waivers

What was the legal effect of three collective waivers that was adopted during the GATT 1947? *Article XX, Part II Waiver* was an unequivocal temporary release of an obligation of the GATT 1947, whereas both the 1971 GSP Waiver and the *Preferences Among Developing Countries Waiver* were more akin to a genuine modification of the GATT 1947 legal framework. Indeed, the 1971 GSP Waiver provided an important exception to the MFN obligations contained in Article I to the extent necessary to permit prospective donor countries to accord preferential tariff treatment to products from developing countries without according such treatment to like products from other contracting parties.[164] It gave place to a new binding principle of preferential and non-reciprocal treatment in trade affairs.

As for the *Preferences Among Developing Countries Waiver,* it resulted in a major change of the GATT 1947 due to the fact that it had the effect of incorporating the *Protocol Relating to Trade Negotiations Among Developing Countries* into its legal framework. The Protocol was described by Professor Hudec as a "mini-GATT between developing countries": it contained "both a schedule of negotiated 'concessions' (discriminatory tariff preferences) and a collection of

[160] GATT 1947, *supra* note 1, Article XXV:5.
[161] Feichtner, *The Law and Politics of WTO Waivers, supra* note 154 at 217.
[162] *Ibid* at 217.
[163] *Ibid* at 218. See e.g. GATT 1947, CONTRACTING PARTIES, *Summary Record of the Sixteenth Meeting* (held on 30 November 1950), GATT Doc GATT/CP.5/SR.16 at 1-2, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> [*GATT 1947 CP Meeting of 30 November 1950*].
[164] *1971 GSP Waiver, supra* note 151 at 24, para (a).

GATT-like rules, some twenty-two in all, that provide a legal framework for the concessions."[165] It appears that in all three cases the CONTRACTING PARTIES would have made use of a collective waiver because it was perceived to be more efficient, expeditious and practical than the amendment procedure of Article XXX.[166]

2.2.4. Joint action by the CONTRACTING PARTIES

The power of joint action by the CONTRACTING PARTIES was found in Article XXV:1 of the GATT 1947, which stated:

> Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. . . .[167]

Decisions made by means of joint action by the CONTRACTING PARTIES were adopted by a majority of the votes cast following the general rule for decision-making contained in Article XXV:4. However, after 1959, decision-making was done by way of consensus.[168]

The power of joint action conferred a broad latitude of action to the CONTRACTING PARTIES. It provided that the contracting parties could meet for the purpose of "giving effect" to the provisions of the GATT 1947 and with a view to "facilitating the operation" and "furthering the objectives" of the GATT 1947.[169] The provisions of the GATT 1947 gave authority for a broad

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[165] Hudec, *Developing Countries, supra* note 144 at 103.
[166] For the adoption of *Article XX, Part II Waiver*, see: GATT 1947, *Report of the Working Party "F" on Amendment to Last Paragraph of Part II of Article XX,* GATT Doc GATT/CP.5/32 (1950) at 2, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> ("As regards the method to be adopted to give effect to the interim solution recommended by the Working Party, it is considered that the *most practicable and expeditious method* would be by way of a decision of the CONTRACTING PARTIES under Article XXV:5(a) waiving until January 1, 1952 under Part II of Article XX to discontinue them or seek the approval of the contracting parties for their continuance." [emphasis added]). For the adoption of the *1971 GSP Waiver,* see e.g. Hector Gros Espiell, "GATT: Accommodating Generalized Preferences" (1974) 8(4) Journal of World Trade Law 341 at 349, citing Technical Note by the Secretariat of February 1970 [unpublished in the WTO website] (stating: "in view of the practical difficulties involved for any immediate solution of the problem that this procedure should not be attempted. The amendment procedure of the General Agreement (Article XXX), a long, cumbersome one, could not be utilized to solve the problem with the urgency that was required." Instead, the Secretariat recommended implementing the negotiated rule pursuant to a waiver according to Article XXV:5 or a declaration outside of the session of the CONTRACTING PARTIES).
[167] GATT 1947, *supra* note 1, Article XXV:1.
[168] The general procedure for decision-making is described in Section 2.2.1 above.
[169] GATT 1947, *supra* note 1, Article XXV:1.

range of actions that could be performed pursuant to Article XXV:1.[170] As for the objectives of the GATT 1947, they were not specifically determined; however, they most likely at least included those provided in its preamble.[171]

Exceptionally, at the conclusion of the Tokyo Round in 1979, the contracting parties used their power of joint action to implement four so-called 'Framework Agreements'[172] pursuant to a decision of the CONTRACTING PARTIES under Article XXV:1: (1) *Differential and More Favourable Treatment and Reciprocity and Fuller Participation of Developing Countries* (the Enabling Clause)[173]; (2) *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*[174]; (3) *Safeguard Action for Development Purposes*[175]; and (4) *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*.[176]

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[170] These included: the authority to approve or authorize certain measures, agreements, arrangements, or renegotiations (Articles II:6(a), XIV:2, XV:7, XVIII:14, XVIII:19, XXIV:10, XXVIII:4, XXXIII); the authority to disapprove certain measures (Articles VI:6(c), XIX:3 and XX:(h)); the authority to request reports, reviews, information or consultations (Articles VII:1, VIII:2, X:3(c), XIII:4, XV:8, XVII:4(c), XVIII:12(d), XXIV:7(c) and XXVII); the authority to review certain measures (Articles XII;4(b), Article XVI:5,XVIII:12(b), XVIII:6, XX:(j)); the authority to consult regarding certain matters (Articles XVIII:12, XVIII:16, XVIII:22, XIX;2, XXII:2, XXXVII:2(b) and Annex I, *Ad* Article XVIII:15 and 16); the authority to make arrangements with the IMF (Articles VII:4(c) and XV:1, 2 3, 5 and 6); and the authority for various other actions, such as the authority to waive obligations (Articles VI:6(b) and XXV:5); the authority to determine inconsistency of certain measure sand to release other contracting parties (ArticleXII:4(c)); the authority to initiate discussions with respect to some measures (Article XII:5); the authority to determine 'substantial interests' (Article XVIII:7(a)); the authority to find offer of compensation adequate (Article XVIII:7(b)), the authority to investigate matters referred, consult, make recommendations, qualify certain actions and authorize certain measures (Articles XXIII:2, XXIV:7(a) and (b), XXX:2); the authority to sponsor tariff negotiations (Article XXVIII *bis:* 1); the authority to collaborate jointly to further certain objectives (Articles XXXVIII:1 and 2); the authority to change dates (Annex I, *Ad* Article XII:4); and the authority to determine certain negotiations (Annex I, *Ad* Article XXVIII:1). For more information see John H Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Indiana: Bobbs-Merrill Company, 1969) at 128-32[Jackson, *World Trade*].

[171] GATT 1947, *supra* note 1, Preamble (stating notably: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchanges of goods." "Being desirous of contribution to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce . . .").

[172] Rapport du Directeur général du GATT, *Les négociations commerciales multilatérales du Tokyo Round* (Genève: Avril 1979) at 115. Contrary to what was known as the 'Codes', the framework agreements were unique in their kind due to the fact they were adopted by all the contracting parties. By contrast, the 'Codes', which consisted of separate agreements, were only signed by a limited group of contracting parties, see Section 2.2.5 below

[173] *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries,* GATT 1947 CP Decision L/4903 (1979), 35th Sess, 26th Supp BISD (1980) 203 [Enabling Clause].

[174] *Declaration on Trade Measures Taken for Balance-of-Payments Purposes,* GATT 1947 CP Decision L/4904 (1979), 35th Sess, 26th Supp BISD (1980) 205.

During the negotiations of these four framework agreements, there were disagreements among the contracting parties regarding the legal method of implementation that should be used. A note by the Secretariat of 23 November 1979 stated that: "[s]ome delegations consider that such a text should appear as a new Article or set of provisions to be incorporated in the GATT 1947. Other delegations consider that it should be adopted by the CONTRACTING PARTIES as a Declaration or Decision."[177] No further information can be found regarding the arguments that were provided by the contracting parties or the reasoning behind their choice of legal instrument for the entry into force of these framework agreements. It appears that the recommendation to proceed pursuant to joint action by the CONTRACTING PARTIES (under Article XXV:1) might have been made by the Chairman of the CONTRACTING PARTIES and subsequently adopted by consensus by the CONTRACTING PARTIES.[178]

The framework agreements were considered to be important improvements to the GATT 1947 provisions.[179] Both the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* and the *Declaration on Trade Measures for Balance-of-Payments Purposes* were probably correctly applied following Article XXV:1 considering that they did not change the nature of any *legal obligation* between the states. However, both the Enabling Clause and the *Safeguard Action for Development Purposes* incorporated permanent exceptions to some obligations of the GATT 1947, and thus, should have been implemented by means of amendments.

2.2.5. Separate agreements (Kennedy & Tokyo Round Codes)

From the mid-1960s on, contracting parties have had increasing recourse to separate agreements (commonly referred to as 'Codes') for developing new subjects that went beyond the GATT

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[175] *Safeguard Action for Development Purposes,* GATT 1947 CP Decision L/4897 (1979), 35th Sess, 26th Supp BISD (1980) 209.
[176] *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,* GATT 1947 CP Decision L/4907, 35th Sess, 36th Supp BISD (1980) 210.
[177] GATT 1947, *Texts Prepared by Group 'Framework',* GATT 1947 Note by the Secretariat L/4885 (1979), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.
[178] See GATT 1947 Council, *Action by the CONTRACTING PARTIES on the Framework Texts,* GATT 1947 Council Draft Decision C/W/329 at 1 (1979), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>;

GATT 1947, *Summary Record of Fourth Meeting* (held on 28 November 1979), GATT Doc SR.35/4 at 61-62, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.
[179] Long, *Law*, *supra* note 113 at 18.

1947.[180] The Codes consisted of separate treaties: they had their own separate signatory clauses, their own institutional measures, their own supervisory committees, and their own dispute settlement mechanisms.[181] The possibility to negotiate and adopt side agreements was not anticipated in the GATT 1947. The Codes were negotiated on the contracting parties' own initiative. When the Codes were initially adopted, the CONTRACTING PARTIES had no authority over these Codes. The rights and obligations deriving from the Codes extended only to the countries that accepted them.[182] The adoption of Codes thus had the advantage of being an efficient way to respond to pressing issues of international trade due to the fact that the Codes were not subject to Article XXX's demanding qualified majority rules for acceptance in order to come into force.[183] Moreover, the adoption of Codes did not necessitate the approbation of those

[180] The Kennedy Round led to the adoption of the Anti-Dumping Code, which came into force on 1 July 1968, see: *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade,* 24th Sess, 15th Supp BISD (1968) 24 [*Agreement on Implementation of Article VI*]. The Tokyo Round resulted in the adoption of nine codes, which came into effect in 1980: *Agreement on Technical Barriers to Trade,* 35th Sess, 26th Supp BISD (1980) 8; *Agreement on Government Procurement,* 35th Sess, 26th Supp BISD (1980) 33 [Government Procurement Code]; *Agreement on Interpretation and Application of Articles VI, XVI and XXIII,* 35th Sess, 26th Supp BISD (1980) 56; *Arrangement Regarding Bovine Meat,* 35th Sess, 26th Supp BISD (1980) 84 [*Arrangement Regarding Bovine Meat*]; *International Dairy Arrangement,* 35th Sess, 26th Supp BISD (1980) 91 [*International Dairy Arrangement*]; *Agreement on Implementation of Article VII,* 35th Sess, 26th Supp BISD (1980) 116; *Agreement on Import Licensing Procedures,* 35th Sess, 26th Supp BISD (1980) 154; *Agreement on Trade in Civil Aircraft,* 35th Sess, 26th Supp BISD (1980) 162 [Trade in Civil Aircraft Code]; *Agreement on Implementation of Article VI,* 35th Sess, 26th Supp BISD (1980) 171. Additionally, several temporary agreements were negotiated and concluded outside of the course of a round of trade negotiations in the textiles sector, the latest being the *Arrangement Regarding International Trade in Textiles,* which came into effect on 1 January 1974: *Arrangement Regarding International Trade in Textiles,* GATT Doc Tex.NG/1, 30th Sess, 21st Supp BISD (1975) 3. This arrangement was a major departure from the basic GATT 1947 rules and particularly the principle of non-discrimination. It provided for the application of selective quantitative restrictions when surges in imports of particular products caused, or threatened to cause, serious damage to the industry of the importing country. It was intended to be a temporary derogation from the GATT 1947 rules; however it remained into force until the end of 1994. See Long, *Law, supra* note 113 at 31-36; WTO, Textiles Monitoring Body*, The Agreement on Textiles and Clothing*, online: WTO <http://www.wto.org/english/tratop_e/texti_e/texintro_e.htm>.

[181] See Jackson, *World Trade, supra* note 170 at 75-78 and 81-82.

[182] However, it was unclear as to whether non participants could benefit from the advantages conferred by them on a MFN basis.

[183] See e.g. Long, *Law, supra* note 113 (Former GATT 1947 Director-General Olivier Long explained: "attempts to amend the General Agreement can give rise to difficulties. They are exacerbated by the fact that the agreements are of substantive interest to a certain number of countries but not to others. While the other countries might not obstruct a consensus, they would certainly hesitate before embarking on the cumbersome process of ratification if it were of little national trade interest. This is one of the reasons why the negotiation of separate agreements has progressively superseded the process of formal amendments. Practical considerations were also important in the Tokyo Round. Time became of the essence. The results of the negotiations had to be finalized at the latest by 3 January 1980, the date on which the American legislation giving the United States Administration authority to negotiate expired. Moreover, a successful outcome to the Tokyo Round was increasingly at risk with the continued deterioration in the economic climate. It was important to conclude the negotiations before it became politically impossible to do so." at 29).

who were not going to be parties to these agreements. Therefore, dissenting contracting parties were not in a position to obstruct consensus.

During the GATT 1947, the Codes have been principally used to deal with non-tariff barriers[184], which had taken increasing importance from the mid-1960s on. The Codes have dealt with several problems related to non-tariffs barriers by contributing to their transparency and elimination.[185] Despite their success with respect to non-tariff barriers, the Codes were the subject of many critiques regarding issues of transparency in the operation of the agreements, consistency within the GATT 1947 system and preservation of existing rights and obligations of the contracting parties. In response to these critiques, the CONTRACTING PARTIES adopted a Decision on 29 November 1979, which recognized that the existing rights and benefits under the GATT 1947 of contracting parties, which were not parties to these Codes, were not affected by the Codes. Additionally, it brought the Codes under the supervision of the CONTRACTING PARTIES.[186]

In summary, even though the Codes were separate agreements, they were part of the multilateral trading system. Several Codes are, in fact, the predecessors of a number of important WTO agreements.[187]

2.3. An End that Justifies the Means?

The GATT 1947 provided that it could only be amended pursuant to the amendment procedure contained in Article XXX. However, the preceding sections demonstrated that in the early 1950s the contracting parties already began to recognize that the amendment procedure of Article XXX was too cumbersome and impracticable. As a result, the CONTRACTING PARTIES employed creativity and flexibility and used other legal instruments to accomplish their policy objectives, such as collective waivers (Article XXV:5)[188], joint action by the CONTRACTING PARTIES (Article

[184] Non-tariffs barriers are trade barriers, that have the effect of restricting imports, but which are not in the usual form of a tariff. They can be government laws, regulations, policies or practices that can take various forms, such as quotas, antidumping practices, standards, domestic assistance, programs, administrative fees, etc.
[185] Koul, *The GATT/WTO, supra* note 146 at 19.
[186] *Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations,* GATT 1947 Decision L/4905, 31st Sess, 26th Supp BISD (1980) 201; Long, *Law, supra* note 113 at 26-28.
[187] See Section 3.5 below.
[188] The first collective waiver intending to have the effect of an amendment was adopted in 1950, see: *Article XX, Part II Waiver*, *supra* note 152.

XXV:1)[189] and Codes[190]. These latter instruments were perceived to be more efficient, expeditious and practical than the amendment procedure of Article XXX to amend or create new rules.

The rulemaking and decision-making dynamic changed over the years as the number of contracting parties increased exponentially: from 23 original contracting parties in 1948, to 74 at the end of the 1960s, and 126 at the end of 1994.[191] Moreover, the power dynamics also shifted as the number of developing countries surpassed that of developed countries, and with the creation of the Group of 77 and UNCTAD in the mid 1960s, which represents the very beginning of the coalition-based negotiations within the multilateral trading system. These changes arguably influenced the development of certain rulemaking practices.

First, the procedural aspect for reaching decisions transitioned over time from voting to consensus in the late 1950s (with the exception of decisions on waiver and on accession).[192] Second, the CONTRACTING PARTIES amended the GATT 1947 a number of times following the procedure set out in Article XXX, especially in its first decade, between the years 1948 and 1955.[193] However, after 1955, only one protocol of amendment was adopted, in 1965.[194] It entered into effect in 1966, but it took until 1979 to be accepted by all contracting parties.[195] The CONTRACTING PARTIES did not attempt to adopt any other protocol of amendment for the following nearly 30 years of existence of the GATT 1947. In fact, as early as in 1951, less than four years after the entry into force of the GATT 1947, the CONTRACTING PARTIES had already begun to experience difficulties to bring amendments into force.[196] Several reasons can explain

[189] In 1979, the CONTRACTING PARTIES used their power of joint action to adopt the four Framework Agreements, see Section 2.2.4 above.
[190] The first code was adopted in 1967, see *Agreement on Implementation of Article VI, supra* note 180.
[191] See Appendix 1.
[192] See Section 2.2.1.1 above.
[193] The GATT 1947 has been amended eight times between the years 1948 and 1957, see Section 2.2.2.3 above.
[194] *Protocol Introducing Part IV on Trade and Development*, *supra* note 132.
[195] See Section 2.2.2.3 above.
[196] In 1951, it became apparent to the contracting parties that the unanimity requirement for Article XXX was cumbersome with respect to the need of rectifying or modifying the text of the Schedules. See GATT 1947, *Preparation of First Protocol of Rectifications and Modifications and of First Protocol of Supplementary Concessions,* GATT Doc GATT/CP.6/40, Vol II BISD (1951) 146 (The Report of the Working Party on Preparation of First Protocol of Rectifications and Modifications and of First Protocol of Supplementary Concessions stated: "The working party noted that, since the third session of the CONTRACTING PARTIES, no protocol of rectifications or of modifications, has come into force owning to the impossibility of obtaining the acceptance of all the contracting parties. Clearly, it was never the intention of Article XXX to place difficulties in the way of making rectifications of

the contracting parties' lack of use of the amendment procedure: "[t]he delay required by the treaty acceptance process, the difficulty of obtaining the required number of acceptances, the shift in bargaining power involved under the amending procedure in the context of a large membership and the fact that even when an amendment is effective it would not apply to countries which did not accept it."[197]

As a result of the difficulties experienced with the amendment procedure, the CONTRACTING PARTIES used alternative legal instruments to accomplish their goals. On three occasions, once in the early 1950s and twice in the early 1970s, the CONTRACTING PARTIES used collective waivers, pursuant to Article XXV:5, to create important exceptions to the rules.[198] In 1979, they resorted to their power of joint action contained in Article XXV:1 in order adopt four 'Framework Agreements'.[199] As a result of the Kennedy and Tokyo Rounds in the 1960s and 1970s, some contracting parties concluded plurilateral agreements (or 'Codes') within themselves, which only applied to those contracting parties who had accepted them.[200]

The amendment procedure provided that the rules could only be modified upon the acceptance of two-thirds (or unanimity in certain cases) of the contracting parties.[201] Similarly to the amendment procedure, the adoption of a collective waiver had to be done by a two-thirds majority of the votes cast, provided that such majority comprised more than half of the contracting parties. However, the rules could be waived for all or a group of Members without the cumbersome process of formal acceptance and ratification.[202] Such was also the case for the creation of some framework agreements, which were adopted by consensus of the CONTRACTING PARTIES.[203] Decisions taken by consensus gave each contracting party the power to oppose the adoption of such decisions; however, in order to do so, a contracting party had to openly formulate a formal objection. As a result, rulemaking by simple decision of the CONTRACTING

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an entirely non-substantive character, or to prevent agreed modifications of the concessions contained in the schedules to the General Agreement." at para 2). By 1967, the Protocol Amending Part I and Articles XXIX and XXX of the General Agreement, signed in 1955 by the contracting parties was abandoned due to failure to gain the required acceptance by all the contracting parties, see: *GATT 1947 CP Decision of 31 December, supra* note 142.

[197] Jackson, Davey & Sykes, *Legal Problems*, *supra* note 104 at 220.

[198] See Section 2.2.3.4 above.

[199] See Section 2.2.4 above.

[200] See Section 2.2.5 above.

[201] GATT 1947, *supra* note 1, Article XXX. For additional information, see Section 2.2.2 above.

[202] *Ibid*, Article XXV:5. For additional information, see Section 2.2.3 above.

[203] *Ibid*, Article XXV:1 and 4. For additional information, see Section 2.2.4 above.

PARTIES did not provide the contracting parties with the advantage of a secret vote by ballot. Nonetheless, in practice, these differences did not seem to matter significantly because it appears that the CONTRACTING PARTIES attempted to reach consensus on all decisions, whether formally adopted by way of vote or by consensus. Indeed, in the majority of cases, the decisions that were adopted by way of vote actually obtained unanimity. Nevertheless, on a few occasions, some contracting parties did vote against the adoption of a decision.[204]

It has been recognized that the GATT 1947's success was in large part due to the ingenuity of its actors combined with its tradition of flexibility.[205] Under the GATT 1947, it seems that the attitude was 'the end justified the means'. At a few occasions, the trade diplomats may have had to work around the rules to accomplish their goals. But the lesson to remember is that it allowed the GATT 1947 legal framework to evolve substantially over the years to be capable of dealing effectively with the surfacing challenges of the world economy. Indeed, the GATT 1947 surpassed all expectations in its ability to promote world trade, trade relations and economic development.[206] Without its tradition of flexibility, it is doubtful that the GATT 1947 could have sustained for nearly fifty years as the principal forum for international trade.

Moving forward, what was the impact of the GATT 1947 rulemaking practice on the WTO? Did the WTO maintain the same rules and procedures for rulemaking and decision-making? Did it continue some previous rulemaking practices? The following section explores these questions.

[204] Feichtner, *The Law and Politics, supra* note 154 at 218. See e.g. *GATT 1947 CP Meeting of 30 November 1950, supra* note 163 at 1-2.
[205] Long, *Law, supra* note 113 at 13; Steger, "A New Constitution", *supra* note 102 at 138.
[206] Long, *Law, supra* note 113 at 13.

3. RULEMAKING AND DECISION-MAKING RULES AND PROCEDURES UNDER THE WTO

This Section describes the WTO rules and procedures about rulemaking and decision-making that have been created for the WTO: amendments; interpretations; waivers; and plurilateral trade agreements.

3.1. General Decision-making Rule and Procedure

The general rule for decision-making is contained in Article IX:1 of the *WTO Agreement.* It provides:

> The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote.

Article IV:2 of the *WTO Agreement* grants the authority to the General Council to carry out the day-to-day workings of the WTO and conduct the functions of the Ministerial Conference in the intervals between meetings. Therefore, references to the Ministerial Conference in the *WTO Agreement* should also be understood as including the General Council.[207]

3.1.1. General decision-making rule by consensus

Under the WTO, the general rule for decision-making is consensus. However, consensus is not the equivalent of unanimity. Following a footnote to Article IX:1 of the *WTO Agreement,* there is consensus "if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."[208] Rule 16 of the *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council* provides that a simple majority of the Members should constitute a quorum.[209] The quorum applies for the Sessions of the Ministerial

[207] *WTO Agreement, supra* note 1, Article IV:2.
[208] *Ibid*, Article IX:1, note 1.
[209] *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council* (adopted by the General Council on 31 January 1995), WTO Doc WT/L/28, online: WTO <http://docsonline.wto.org >. [*Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*].

Conference, the meetings of the General Council and of other councils and committees[210]; however several committees have decided to not adopt a quorum rule.[211] This means that

[210] See e.g. *Rules of Procedure for Meetings of the Council for Trade in Goods* (adopted by the General Council on 31 July 1995), WTO Doc WT/L/79, online: WTO <http://docsonline.wto.org> [*Rules of Procedure for Meetings of the Council for Trade in Goods*]; *Rules of Procedure for Meetings of the Council for TRIPS* (adopted by the Council for TRIPS on 21 September 1995), WTO Doc IP/C/1, online: WTO <http://docsonline.wto.org > [*Rules of Procedure for Meetings of the Council for TRIPS*]; *Rules of Procedure for Meetings of the Council for Trade in Services* (adopted by the Council for Trade in Services on 4 October 1995), WTO Doc S/L/15, online: WTO <http://docsonline.wto.org > [*Rules of Procedure for Meetings of the Council for Trade in Services*]; *Rules of Procedures for Meetings of the Committee on Trade and Development* (adopted by the Committee on Trade and Development on 5 July 1995), WTO Doc WT/COMTD/6, online: WTO <http://docsonline.wto.org >.

[211] See e.g. *Rules of Procedure for Meetings of the Trade Policy Review Body* (adopted by the Body a on 6 June 1995), WTO Doc WT/TPR/6 at para 9, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Sanitary and Phytosanitary Measures* (approved by the Council for Trade in Goods on 11 June 1997), WTO Doc G/L/170 at para iv, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Subsidies and Countervailing Measures* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/144, Rule 16, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Anti-Dumping Practices* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/143, Rule 16, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Safeguards* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/145, Rule 16, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Technical Barriers to Trade* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/150, Rule 16, online: WTO <http://docsonline.wto.org> (Rule 16 provides: "The Chairperson may consider postponing a meeting in the event that he or she feels that doing so may result in a more representative level of participation by WTO Members."); *Rules of Procedure for Meetings of the Committee on Agriculture* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/142, at para iv, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Customs Valuation* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/146, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Rules of Origin* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/149, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Import Licensing* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/147, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Market Access* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/148, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Trade-Related Investment Measures* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/151, at para vi, online: WTO <http://docsonline.wto.org>.

[211] See e.g. *Rules of Procedure for Meetings of the Trade Policy Review Body* (adopted by the Body a on 6 June 1995), WTO Doc WT/TPR/6 at para 9, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Sanitary and Phytosanitary Measures* (approved by the Council for Trade in Goods on 11 June 1997), WTO Doc G/L/170 at para iv, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Subsidies and Countervailing Measures* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/144, Rule 16, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Anti-Dumping Practices* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/143, Rule 16, online: WTO <http://docsonline.wto.org >; *Rules of Procedure for Meetings of the Committee on Safeguards* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/145, Rule 16, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Technical Barriers to Trade* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/150, Rule 16, online: WTO <http://docsonline.wto.org> (Rule 16 provides: "The Chairperson may consider postponing a meeting in the event that he or she feels that doing so may result in a more representative level of participation by WTO Members."); *Rules of Procedure for Meetings of the Committee on Agriculture* (approved by the Council for Trade in Goods on 22 May 1996), WTO Doc G/L/142, at para iv, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Customs Valuation* (approved by the Council for Trade in Goods on 1

decisions can be taken within certain committees where less than the majority of the Members are present.

3.1.2. Fallback provision to majority voting

Where a decision cannot be arrived at by consensus, Article IX of the *WTO Agreement* provides that the matter at issue can be decided by voting. In such a case, it is provided that each Member has one vote.[212] Unless specifically provided elsewhere in the *WTO Agreement* or in a relevant multilateral trade agreement annexed to it ('Multilateral Trade Agreement'[213]), majority voting (i.e. a majority of the votes cast) applies for the adoption of decisions of the Ministerial Conference and the General Council.[214] In practice voting has only been referred to in the very first years of the WTO for the adoption of decisions on waiver and on accession[215], which was a continuation of the GATT 1947 practice.[216] Since 1997, all WTO business has been done by consensus exclusively.

3.2. Amendments

The general procedure for amendments is lengthy and "extraordinarily complex."[217] It is laid out in Article X of the *WTO Agreement*, which encompasses four steps that need to be performed

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December 1995), WTO Doc G/L/146, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Rules of Origin* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/149, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Import Licensing* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/147, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Market Access* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/148, at para vi, online: WTO <http://docsonline.wto.org>; *Rules of Procedure for Meetings of the Committee on Trade-Related Investment Measures* (approved by the Council for Trade in Goods on 1 December 1995), WTO Doc G/L/151, at para vi, online: WTO <http://docsonline.wto.org>.

[212] *WTO Agreement*, *supra* note 1, Article IX:1 (For the specific case of the European Union, Article IX:1 specifies that it "shall have a number of votes equal to the number of [its] member States which are Members of the WTO.").

[213] For a list of the Multilateral Trade Agreements annexed to the *WTO Agreement*, see: WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Cambridge: Cambridge University Press, 2010) at vi-vii [*The Results of the Uruguay Round*]

[214] *WTO Agreement, supra* note 1, Article IX:1.

[215] Voting has only been used in the very first years of the existence of the WTO. It has been used eight times in 1995 for the adoption of waivers and once for the accession of Ecuador in 1996. For the waiver decisions adopted by voting, see note 264 under Section 3.4.3 below. The only decision on accession that was adopted by voting was: *Accession of Ecuador*, WTO General Council Decision WT/ACC/ECU/5 (22 August 1996), online: WTO <http://docsonline.wto.org>.

[216] For the GATT 1947 decision-making practice, see: Sections 2.2 and 2.2.3.3.

[217] ACWL, *Giving Legal Effect to the Results of the Doha Round: An Analysis of the Methods of Changing WTO Law,* Background Paper for ACWL Members and LDCs (Geneva, 2006) at 4, online: ACWL

before the text of the WTO provisions can be modified or that a new agreement be added into the Annexes of the *WTO Agreement*: (1) the initiation of a proposal for amendment; (2) consensus-building period for the proposed amendment; (3) the decision to submit the proposed amendment to the Members for acceptance; and (4) the entry into effect of the amendment.

3.2.1. Initiation of a proposal for amendment

The first step for an amendment pursuant to Article X of the *WTO Agreement* is the submission of a proposal for amendment to the Ministerial Conference.[218] Amendment proposals of the provisions of the *WTO Agreement* or the agreements contained in Annexes 1A (Multilateral Agreements on Trade in Goods), 1B (*General Agreement on Trade in Services* (GATS)), and 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement*)) can be initiated by any WTO Member or, alternatively, by the Council which oversees the functioning of the agreement containing the provisions in question.[219]

3.2.2. Consensus-building period for the proposed amendment

The second step takes place once a proposal has been tabled formally with the Ministerial Conference. The Ministerial Conference is then given a period of at least 90 days to attempt to reach consensus on submitting the proposed amendment to the Members for acceptance.[220] The *WTO Agreement,* as well as the *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*[221], are silent as to how consensus should be reached or how the consensus-building processes should be organized. In practice, consensus is not negotiated within the Ministerial Conference (or the General Council). Instead, consensus-building processes have taken place within the relevant councils and committees. In general,

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<http://www.acwl.ch/e/documents/ACWL%20Paper%20Giving%20Legal%20Effect%20to%20the%20Results%20of%20the%20Doha%20Round.pdf> [ACWL, *Giving Legal Effect*].

[218] *WTO Agreement, supra* note 1, Article X:1.

[219] *Ibid*, Article X:1 and 8 (i.e. the Council for Trade in Goods, the Council for Trade in Services, or the Council for TRIPS).

[220] *Ibid,* Article X:1.

[221] *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*, *supra* note 209.

once consensus has been reached on an amendment proposal, it is then sent to the Ministerial Conference (or the General Council) for approval with little or no additional formality.[222]

3.2.3. Decision to submit the proposed amendment to the Members for acceptance

Article X:1 of the *WTO Agreement* provides that if consensus is reached, the Ministerial Conference must submit the proposed amendment to the Members for acceptance.[223] However, if consensus is not reached after the expiry of the consensus-building period of at least 90 days, the Ministerial Conference must proceed with the third step and decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance.

With the exception of a few cases[224], the decision must specify whether the proposed amendment is of a nature that *would* or *would not* alter the rights and obligations of the Members. Article X:1 of the *WTO Agreement* sets forth a presumption that an amendment is considered to be of a nature that *would alter* the rights and obligations of WTO Members, unless the Ministerial Conference decides by a three-fourths majority that it is not.[225] The *WTO Agreement* does not provide further indication as to the type of amendments that *would not* alter the rights and obligations of WTO Members. The Advisory Centre on WTO Law argues that "[t]he reference in Article X:4 to 'rights and obligations *of the Members*' suggests that the provision applies to amendments of a purely institutional procedural nature that alter only the rights and obligations of the WTO or one of its organs, but not of its Members."[226] Anyhow, the Ministerial Conference gets to decide on a case-by-case basis.

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[222] For the case of the adoption of the *Amendment of the TRIPS Agreement,* see Chapter 4, Section 2, and for the adoption of the *Agreement on Trade Facilitation,* see Chapter 6, Section 2.
[223] Article X:1 provides that "[u]nless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. Ministerial Conference can decide on a longer period, see *WTO Agreement, supra* note 1, Article X:1.
[223] *Ibid,* Article X:1 (Article X:1 provides that "[u]nless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply [i.e. whether it consists of amendments to provisions of a nature that would or would not alter the rights and obligations of the Members]").
[224] The exceptions are the proposed amendments that fall under paragraphs 2 , 5 and 6 of Article X of the *WTO Agreement.* They are described in Section 3.2.6 below.
[225] *WTO Agreement, supra* note 1, Article X:1.
[226] ACWL, *Giving Legal Effect, supra* note 217 at 6 [emphasis in the original].

3.2.4. Entry into force of the amendment

The fourth step deals with the entry into effect of the proposed amendments, for which different requirements apply depending upon the nature of the provisions and the agreement. Amendments to certain exceptional provisions (i.e. regarding rules on decision-making and amendments, as well as guaranteeing MFN treatment)[227] take effect only upon acceptance by all Members.[228]

For the *General Agreement on Trade in Services* (GATS)[229], amendments to Part I (Scope and Definition), Part II (General Obligations and Disciplines) and Part III (Specific Commitments) of the GATS and the respective Annexes take effect for the Members that have accepted them upon acceptance by two-thirds of the Members and thereafter for each Member upon acceptance by it.[230] Amendments to Part IV (Progressive Liberalization), Part V (Institutional Provisions) and Part VI (Final Provisions) of the GATS and the respective Annexes take effect for *all Members* upon acceptance by two-thirds of the Members.[231]

For the amendments to the remaining provisions of the *WTO Agreement* and of the agreements in Annex 1A (Multilateral Agreements on Trade in Goods[232]) and Annex 1C (*TRIPS Agreement*[233]) two situations are to be distinguished:

(i) the amendments of a nature that *would* alter the rights and obligations of the Members, which shall take effect for the *Members that have accepted them* upon acceptance by

[227] These provisions include: Article IX (decision-making) and Article X (amendments) of the *WTO Agreement*; Part I: Article I (MFN) and Article II (MFN) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994); Article II:1 (MFN) of the *General Agreement on Trade in Services* (GATS); and Article 4 (MFN) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (*TRIPS Agreement*).
[228] *WTO Agreement, supra* note 1, Article X:2.
[229] *General Agreement on Trade in Services,* 15 April 1994, *WTO Agreement, Annex 1B,* 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995) [GATS].
[230] *WTO Agreement, supra* note 1, Article X:5.
[231] *Ibid*, Article X:5.
[232] For a list of the Multilateral Agreements on Trade in Goods under Annex 1A, see generally: *The Results of the Uruguay Round*, *supra* note 213 at vi-vii.
[233] *Agreement on Trade-Related Aspects of Intellectual Property Rights,* 15 April 1994, *WTO Agreement, Annex 1C,* 1869 UNTS 299, 33 ILM 1197 (entered into force 1 January 1995) [*TRIPS Agreement*].

two-thirds of the Members and thereafter for each other Member upon acceptance by it[234]; and

(ii) the amendments of a nature that *would not* alter the rights and obligations of the Members, which take effect for *all Members* upon acceptance by two-thirds of the Members.[235]

When acceptance by two-thirds of the Members is required for the entry into force of a protocol of amendment, Article X of the *WTO Agreement* is silent as to whether the phrase 'the Members' refers to the Members at the time of its adoption or whether it also includes all Members that accede the WTO afterwards.[236] Therefore, it can only be concluded that "the denominator refers to the total number of Members as they stand from time to time."[237] Thus, acceptance by two-thirds of the current total of 161 Members corresponds to 107 Members. Finally, acceptance of amendments by Members is to be performed by the deposit of an instrument of acceptance with the WTO Director-General within the period of acceptance specified by the Ministerial Conference.[238]

3.2.5. Incorporation of new multilateral agreements

While the *WTO Agreement* specifies how new plurilateral agreement are to be added[239], it does not indicate specifically how new multilateral agreements are to be incorporated into the *WTO Agreement*. New multilateral agreements would need to be incorporated into the Annexes of the *WTO Agreement.* Thus, the implementation of a new multilateral agreement requires an

[234] *WTO Agreement, supra* note 1, Article X:3 [emphasis added] (In some instances, the Ministerial can decide by a three-fourths majority of the Members (currently 121 Members) that the acceptance of an amendment, considering its nature, is conditional for membership in the WTO. In such a case, any Member which has not accepted the amendment within a period specified by the Ministerial Conference "shall be free to withdraw" from the WTO or to remain a Member with the consent of the Ministerial Conference. at para 5).
[235] *Ibid*, Article X:4 [emphasis added].
[236] This issue was not clarified in either the *Protocol Amending the TRIPS Agreement* or the *Protocol Amending the WTO Agreement* (which incorporates the *Agreement on Trade Facilitation*). Both decisions introducing these protocols of amendment only refer to Article X:3 of the *WTO Agreement* without providing any explanation regarding the phrase 'the Members', see: *Protocol Amending the TRIPS Agreement, supra* note 94 at para 3; *Protocol Amending the WTO Agreement*, *supra* note 96 at para 3.
[237] For a comprehensive analysis on this issue, see: Matthew Kennedy, "When Will the Protocol Amending the TRIPS Agreement Enter into Force?" (2010) 13(2) Journal of International Economic Law 459 at 463-66 [Kennedy, "When Will the Protocol"].
[238] *WTO Agreement, supra* note 1, Article X:7.
[239] Plurilateral agreements are dealt with in Section 3.5 below.

amendment of one of the Annexes of the *WTO Agreement* and should follow the general amendment procedure set out in paragraphs 1 and 3 of Article X.[240]

3.2.6. Special amendment procedures

Amendments of agreements or provisions that do not create any legal obligations between the Members can take effect following a simplified procedure. Amendments proposals to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU)[241] and the *Trade Policy Review Mechanism* (TPRM)[242] can be submitted by any Member to the Ministerial Conference.[243] Both these amendments can take effect without the requirement by national governments to deposit instruments of acceptance with the Director-General of the WTO. Approval of amendments to the DSU is to be made exclusively by consensus, whereas approval of amendments to the TPRM is to be done by consensus, but if consensus cannot be reached, by majority of the votes cast of the Ministerial Conference.[244] Amendments to both the DSU and the TPRM take effect for all Members upon approval by the Ministerial Conference.[245]

In a similar manner, amendment proposals pursuant to Article 71:2 of the *TRIPS Agreement,* which aim to incorporate into the *TRIPS Agreement* higher levels of intellectual property rights that have already been accepted by all Members under other multilateral agreements, can be submitted to the Ministerial Conference upon consensus of the Council for TRIPS. Such amendments take effect upon the adoption by the Ministerial Conference by consensus (or by majority voting if consensus cannot be achieved) without further formal acceptance process.[246]

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[240] See Matthew Kennedy, "Two Single Undertakings - Can the WTO Implement the Results of a Round?" (2011) 14(1) J Int'l Econ L 77 at 92-93. This procedure has been laid out for the implementation of the *Agreement on Trade Facilitation,* following which, upon the entry into force of the Protocol of amendment in question, Annex 1A of the *WTO Agreement* will be amended by the insertion of the *Agreement on Trade Facilitation* (which will be placed after the *Agreement on Safeguards*), see *Protocol Amending the WTO Agreement, supra* note 96 at para 1.
[241] *Understanding on Rules and Procedures Governing the Settlement of Disputes,* 15 April 1994, *WTO Agreement, Annex 2,* 1869 UNTS 401, 33 ILM 1144 (entered into force 1 January 1995) [DSU].
[242] *Trade Policy Review Mechanism,* 15 April 1994, *WTO Agreement, Annex 3,* 1869 UNTS 480 (entered into force 1 January 1995).
[243] *WTO Agreement, supra* note 1, Article X:8.
[244] *Ibid*, Article IX:1.
[245] *Ibid*, Article X:8.
[246] *Ibid* Article X:6; *TRIPS Agreement*, *supra* note 233, Article 71:2.

3.3. Interpretations

Article IX:2 of the *WTO Agreement* confers the exclusive authority to the Ministerial Conference (and the General Council) to adopt interpretations of the *WTO Agreement* and of the Multilateral Trade Agreements.[247] In the case of an interpretation of a Multilateral Trade Agreement in Annex 1A, 1B or 1C[248], the Ministerial Conference must exercise its authority on the basis of a recommendation by the Council overseeing the function of that Agreement.[249]

Article IX:2 of the WTO Agreement further provides that the decision to adopt interpretations must be taken by a vote of three-fourths majority of the Members (i.e. currently 121 Members). It is however unclear whether Members should first attempt to reach consensus pursuing to Article IX:1 before having recourse to the special majority voting provision for interpretation.[250] Moreover, due to the fact that interpretations are an innovation of the WTO (they did not exist under the GATT 1947[251]) and that they have never been used in the history of the WTO, it is not possible to refer to past practices to interpret this provision.[252]

3.3.1. Legal effect of interpretations

The legal effect of an interpretation is not spelled out in the *WTO Agreement* or the DSU. Article IX:2 explicitly provides that the power to adopt interpretations should "not be used in a manner that would undermine the amendment provisions in Article X"[253], however there is no further

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[247] *WTO Agreement, supra* note 1, Article IX:2. Such provision did not exist under the GATT 1947.
[248] For a list of the Multilateral Trade Agreements incorporated in Annex 1 see: *The Results of the Uruguay Round, supra* note 213 at vi-vii.
[249] *WTO Agreement, supra* note 1, Article IX:2.
[250] The General Council has adopted procedures for the adoption of waiver and accession decisions, which stipulate that consensus should first be attempted to be reached pursuant to Article IX:1 of the *WTO Agreement* before having recourse to the special majority voting provisions for waivers and accessions provided for in Article IX:3 and XII:2 respectively, see: *Decision-Making Procedures Under Articles IX and XII of the WTO Agreement, Statement of the Chairman,* General Council Decision WT/L93 (adopted 15 November 1995), online: WTO <http://docsonline.wto.org> [*Decision-Making Procedures Under Articles IX and XII*]. However, similar procedures have not been adopted for interpretations. See also Ehlermann & Ehring, "The Authoritative Interpretation", *supra* note 114 at 805-07 (contending that Article IX:1"arguably applies" so that "voting becomes possible only where a decision cannot be arrived at by consensus" at 806).
[251] Authoritative interpretations were not expressly provided for in the GATT 1947. However, in the early days of the GATT 1947, the Chairman of the CONTRACTING PARTIES often resolved questions of interpretation through rulings that were tacitly or expressly accepted or put to a roll-call vote, see: See *GATT Analytical Index*, *supra* note 118 at 875.
[252] See Ehlermann & Ehring, "The Authoritative Interpretation", *supra* note 114 at 813-18 (describing the only (failed) attempt that Member have made to adopt an interpretation).
[253] *WTO Agreement, supra* note 1, Article IX:2.

indication as to what the legal effect of an authoritative interpretation should be. On that note, the comprehensive analysis of former Chairman of the WTO Appellate Body, Claus-Dieter Ehlermann, and former WTO Secretariat legal officer, Lothar Ehring, on authoritative interpretations can help to reflect on this issue.[254] They argue that "it is relatively clear" that an authoritative interpretation "is legally binding on all WTO Members."[255] Moreover, panels and the Appellate Body, in Elhermann's and Ehring's opinion, are required to follow such interpretation.[256] They further contend that an authoritative interpretation "*may* add to or diminish rights and obligations of Members under the WTO Agreement", such as in situations "where existing rules are ambiguous or contains gaps, or rules that have proven in practice to be very difficult or even impossible to apply."[257] Furthermore, they add that it must "somehow be linked to the pre-existing rules and agreements", and hence, by definition, must "relate to (and interpret) one of the WTO agreements."[258] To the question as to where exactly the last sentence of Article IX:2 "draws the line of 'undermining' the amendment provisions", they argue that "it is clear that there is a limit on the possibility to develop completely new obligations, especially if the area in question was not previously covered by one of the WTO agreements."[259]

3.4. Waivers

Article IX:3 of the *WTO Agreement* enables the Ministerial Conference (or the General Council), in exceptional circumstances, to suspend an obligation imposed on a Member by the *WTO Agreement* or any of the Multilateral Trade Agreements contained in Annexes 1A, 1B or 1C. Article IX:3 of the *WTO Agreement* states:

> In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.
>
> (a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period,

[254] See generally Ehlermann & Ehring, "The Authoritative Interpretation", *supra* note 114.
[255] *Ibid* at 807.
[256] *Ibid* at 807-08.
[257] *Ibid* at 807-12 (for an analysis of the legal effect of an authoritative interpretation) [emphasis in the original].
[258] *Ibid* at 812.
[259] *Ibid*.

which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

Following Article IX:3 of the *WTO Agreement,* three steps are to be distinguished for the granting of a waiver: 1) the waiver request; 2) the examination of the waiver request; and 3) decision-making.

3.4.1. Request for waiver

Article IX:3 of the *WTO Agreement* does not specify who can submit a request for waiver.[260] Paragraphs (a) and (b) of Article IX:3 of the *WTO Agreement* provide that a request for waiver concerning the *WTO Agreement* shall be submitted to the Ministerial Conference for consideration, whereas a request for waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration.[261] The *WTO Agreement* does not specify what a request for waiver should contain. However, the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* provides that a request for waiver (or for an extension of an existing waiver) shall describe: (a) the measures which the Member proposes to take; (b) the specific policy objectives which the Member seeks to pursue; and (c) the reasons which prevent the Member

[260] In practice it has been most frequently performed by the Member seeking a suspension of its legal obligation, and in some exceptional cases, by other Members non beneficiaries of the potential waiver. See: WTO, Council for Trade in Goods, *Request for a WTO Waiver, New ACP-EC Partnership Agreement,* WTO G/C/W/187 (2 March 2000), online: WTO <http://docsonline.wto.org> (request for waiver for trade preferences under the Cotonou Agreement by the EC, but also by the delegations of Tanzania and Jamaica on behalf of the ACP countries). For additional information see: Feichtner, *The Law and Politics of WTO Waivers*, *supra* note 154.

[261] But see Feichtner, *The Law and Politics of WTO Waivers*, *supra* note 154 (Feichtner has observed that, in practice, requests for a waiver are submitted either to the General Council (they are rarely submitted to the Ministerial Conference), a specialized council, or even a committee, which is competent for the matter in question, even though the submission of requests to a committee is not foreseen in Article IX: of the *WTO Agreemen*t. In practice "requests which concern a matter that falls within the mandate of a particular committee are submitted to this committee." at 204).

from achieving its policy objectives by measures consistent with its obligations under GATT 1994.[262]

3.4.2. Examination of the waiver request

Once a waiver request has been submitted, paragraphs (a) and (b) of Article IX:3 of the *WTO Agreement* provide that the Ministerial Conference (for a request for a waiver concerning the *WTO Agreement*), and the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS (for a request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C, respectively) is given a time-period of maximum 90 days to consider the request. At the end of the time-period, it is further provided that the relevant Council must submit a report to the Ministerial Conference.

3.4.3. Decision-making

For a request for waiver concerning the *WTO Agreement,* paragraph (a) of Article IX:3 of the *WTO Agreement* provides that if consensus is not reached during the examination period, the Ministerial Conference shall decide by a vote of three-fourths of the Members whether the waiver should be granted. Contrary to paragraph (a), paragraph (b) does not specify whether the Ministerial Conference should attempt to reach consensus on the request for a waiver (concerning the Multilateral Trade Agreement in Annexes 1A or 1B or 1C) and/or whether a vote should take place. However, the chapeau of Article IX:3 states that the Ministerial Conference "may decide to waive an obligation imposed on a Member . . . provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph."[263]

This provision seems to have led to some confusion with respect to the procedure for adopting waivers of obligations contained in the Multilateral Trade Agreements in Annexes 1A, 1B or 1C.

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[262] *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* in *The Results of the Uruguay Round, supra* note 213, 37 at para 1. The *Understanding in Respect of Waivers under the GATT 1994* is included in the GATT 1994, see *General Agreement on Tariffs and Trade 1994*, 15 April 1994, *WTO Agreement, Annex 1A,* 1867 UNTS 187, 33 ILM 1153 (entered into force 1 January 1995) [GATT 1994], Introductory Note of GATT 1994, 1(c)(v). Even though the requirement for a reasoned request strictly applies to GATT 1994 obligations, in practice, it is also done for the request for waiver of any other obligations of the WTO agreements, see: Feichtner, *The Law and Politics of WTO Waivers*, *supra* note 154 at 198.

[263] *WTO Agreement, supra* note 1, Article IX:3.

In the first year of existence of the WTO, decisions on waiver (which all concerned the Multilateral Trade Agreements in Annexes 1A, 1B or 1C) were adopted automatically by vote by postal ballot, without a preliminary attempt to reach consensus on the subject matter.[264] This procedure appears to correspond to the intention of the drafters as it followed the GATT 1947 decision-making practice for waivers, according to which waivers were automatically adopted by vote of the CONTRACTING PARTIES.[265]

Towards the end of 1995, there have been some discussions concerning the manner in which the General Council should take decisions in relation to waivers (and also accessions), which centered on whether the General Council should seek to adopt such decisions by consensus or whether it should proceed automatically to a vote. After some wide-ranging consultations, the General Council adopted on 15 November 1995 the *Decision-Making Procedures under Articles IX and XII of the WTO Agreement* (*Decision-Making Procedures under Articles IX and XII*), which provided that that the General Council should adopt waivers by consensus, in accordance with Article IX:1 of the *WTO Agreement* and, where a decision cannot be arrived at by consensus, the matter at issue should then be decided by a vote of three-fourths of the Members, (unless otherwise provided) following Article IX:3 of the *WTO Agreement.*[266] Former Director of the Legal Affairs Division of the WTO Secretariat, Pieter-Jan Kuijper, explains that this procedure was adopted due to "the difficulty, if not impossibility, to have two-thirds or three-

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[264] See *Bangladesh - Establishment of a New Schedule LXX - Extension of Time-Limit,* WTO Decision WT/L/80 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>; *Guatemala - Establishment of a New Schedule LXXXVIII - Extension of Time-Limit,* WTO Decision WT/L/81 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>; *Israel - Establishment of a New Schedule XLII - Extension of Time-Limit,* WTO Decision WT/L/82 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>; *Jamaica - Establishment of a New Schedule LXVI - Extension of Time-Limit,* WTO Decision WT/L/83 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>; *Morocco - Establishment of a New Schedule LXXXI - Extension of Time-Limit,* WTO Decision WT/L/84 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>; *Senegal - Renegotiation of Schedule XLIX* , WTO Decision WT/L/85 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>; *Sri Lanka - Establishment of a New Schedule VI - Extension of Time-Limit,* WTO Decision WT/L/86 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>; *Trinidad and Tobago - Establishment of a New Schedule LXVII - Extension of Time-Limit,* WTO Decision WT/L/87 (31 August 1995) at 1, n 1, online: WTO <http://docsonline.wto.org>.

[265] See *GATT Analytical Index*, *supra* note 118 at 1099. See also Section 2.2.3.3 above.

[266] *Decision-Making Procedures Under Articles IX and XII*, *supra* note 250 ("On occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the WTO Agreement respectively, the General Council will seek a decision in accordance with Article IX:1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting under the relevant provisions of Articles IX or XII.").

quarters of the WTO Members represented and present at meetings of the [General Council]."[267] He further points out that "it was felt and expressed in a Chairman's statement of 15 November 1995 that consensus would be sufficient and in conformity with the spirit of the WTO on such occasions."[268]

The *Decision-Making Procedures under Articles IX and XII* also state that the procedure "does not preclude a Member from requesting a vote at the time the decision is taken."[269] It is further provided that this decision has the implication that any interested Member has to ensure its presence at the meeting in which the matter will be considered. The absence of a Member will be "assumed to imply that it has no comments on or objections to the proposed decision on the matter."[270]

3.4.4. Exceptions

There are some exceptions to the decision-making procedure as agreed on 15 November 1995. Firstly, a decision to grant a waiver in respect of "any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period" must be taken "*only* by consensus."[271] Secondly, the procedure also does not apply to the suspension of obligations under a Plurilateral Trade Agreement, which must be governed by the provisions of that agreement.[272]

3.4.5. Conditions: exceptional circumstances and temporary

Article IX:4 of the *WTO Agreement* further provides that a decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision. Like Article XXV:5 of the GAT 1947, paragraphs 3 and 4 of Article IX of the *WTO Agreement* do not define the type of circumstances that may qualify as 'exceptional circumstances'.

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[267] Pieter Jan Kuijper, "WTO Institutional Aspects" in Daniel Bethlehem et al, eds, *Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 79 at 96.
[268] *Ibid.*
[269] *Decision-Making Procedures Under Articles IX and XII, supra* note 250.
[270] *Ibid*.
[271] *WTO Agreement, supra* note 1, Article IX:3(a), n 4 [emphasis added].
[272] *Ibid*, Article IX:5.

Article IX:4 further provides that the waiver decision must state the terms and conditions governing the application of the waiver[273], and the date on which the waiver shall terminate. In addition, it indicates that in the cases where a waiver is granted for a period of more than one year, it shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates.[274] The mention that the waiver decision should state the date on which the waiver must terminate is new to the WTO. It shows the intention of the drafters that a waiver be granted for a temporary period of time only. This rule is a continuation of a practice that existed in the GATT 1947 where most waivers were granted for a specified period of time.[275]

3.5. Plurilateral Trade Agreements

The results of the Uruguay Round included four plurilateral codes which existed under the GATT 1947[276] and annexed them to the *WTO Agreement*: the *Agreement on Trade in Civil Aircraft*[277], the *Agreement on Government Procurement* (GPA)[278], the *International Dairy Agreement* (IDA) (which terminated at the end of 1997)[279], and the *International Bovine Meat*

[273] For information on the type of conditions that have been imposed with the granting of waiver decisions, see: Feichtner, *The Law and Politics of WTO Waivers*, *supra* note 154 at 228-34.
[274] *WTO Agreement, supra* note 1, Article IX:4 (Article IX:4 specifies that "[i]n each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met." Article IX:4 specifically authorizes the Ministerial Conference (or the General Council in the interim) to "review, extent, modify or terminate the waiver" on the basis of the annual review.).
[275] Feichtner, *The Law and Politics of WTO Waivers*, *supra* note 154 at 223-24.
[276] Under the GATT 1947, the codes covered nine subject matters: (1) anti-dumping; (2) customs valuation; (3) import licensing; (4) subsidies; (5) technical barriers to trade; (6) government procurement; (7) trade in civil aircraft; (8) dairy products; and (9) bovine meat, see: Section 2.2.5 above. Under the WTO, the first five of these policy areas are now covered by Multilateral Trade Agreements in Annex 1A, whereas the latter four are covered by Plurilateral Trade Agreements in Annex 4, see *The Results of the Uruguay Round, supra* note 213 at vi-vii.
[277] *Agreement on Trade in Civil Aircraft,* 15 April 1994, *WTO Agreement, Annex 4(a),* 1186 UNTS 170 (entered into force 1 January 1995), as amended by *Protocol (2001) Amending the Annex to the Agreement on Trade in Civil Aircraft* (adopted on 6 June 2001), WTO Doc TCA/4, online: WTO < http://www.wto.org/english/docs_e/legal_e/air-79_e.pdf> [*Agreement on Trade in Civil Aircraft*]. This agreement is identical to *Trade in Civil Aircraft Code,* supra note 180.
[278] *Agreement on Government Procurement,* 15 April 1994, *WTO Agreement, Annex 4(b),* 1915 UNTS 103 (entered into force 1 January 1996) [GPA]. On 30 March 2012, the *Protocol Amending the Agreement on Government Procurement* was adopted, however it has not yet received the required number of acceptance for its entry into force, see *Protocol Amending the Agreement on Government Procurement* (adopted on 30 March 2012), WTO Doc GPA/113 at 3, online: WTO <http://docs.wto.org> [*Protocol Amending the GPA*]. See also: Government Procurement Code, *supra* note 180.
[279] *International Dairy Agreement*, 15 April 1994, *WTO Agreement, Annex 4(c),* 1895 UNTS 294 (entered into force 1 January 1995) [IDA], as terminated by *Termination of the International Dairy Agreement: Decision Pursuant to*

Agreement (IMA) (which terminated at the end of 1997)[280]. Under the WTO, these agreements of limited membership are referred to as 'Plurilateral Trade Agreements.' They form an integral part of the *WTO Agreement* and are included in its Annex 4.[281] Paragraphs 9 and 10 of Article X of the *WTO Agreement* provide for the possibility to add new plurilateral trade agreements to Annex 4 or to delete or amend an existing Plurilateral Trade Agreement from Annex 4.[282] They state:

> 9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.
>
> 10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Overall, the procedure for adding new plurilateral trade agreements can be summarized as follows. Members may negotiate a new plurilateral trade agreement. Once such an agreement is reached, and upon the request of the Members which are parties to that trade agreement, the Ministerial Conference can, by consensus, add that new plurilateral trade agreement to Annex 4 of the *WTO Agreement*.[283] Even though a plurilateral trade agreement only binds a limited number of Members (i.e. the parties to the plurilateral agreement), a consensus is required from the Ministerial Conference (or the General Council) to add that new plurilateral trade agreement to Annex 4 of the *WTO Agreement*. In addition, for that new plurilateral trade agreement to be enforceable by the DSU, the DSU would need to be amended by consensus of the Ministerial Conference[284] to include that new agreement in the list of Plurilateral Trade Agreements in

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*Article VIII:3,*WTO Doc IDA/8 (1997), online: WTO <http://docs.wto.org>. For the Dairy Code under the GATT 1947, see: *International Dairy Arrangement*, *supra* note 180.

[280] *International Bovine Meat Agreement*, 15 April 1994, *WTO Agreement, Annex 4(d),* 1895 UNTS 249 (entered into force 1 January 1995) [IMA], as terminated by *Termination of the International Bovine Meat Agreement: Decision Pursuant to Article VI:3,* WTO Doc IMA/8 (1997), online: WTO <http://docs.wto.org>. For the Bovine Meat Code under the GATT 1947, see: *Arrangement Regarding Bovine Meat, supra* note 180.

[281] *WTO Agreement*, *supra* note 1, Article II:3.

[282] *Ibid*, Articles X:9 and X:10.

[283] *Ibid*, Article X:9.

[284] *Ibid*, Article X:8 (providing that amendment to the Multilateral Trade Agreement in Annex 2 (i.e. the DSU) shall be made by exclusively by consensus of the Ministerial Conference).

Appendix I of the DSU, which contains the list of 'covered agreements.'[285] Since the establishment of the WTO in 1995, no new plurilateral trade agreement has been added to Annex 4 of the *WTO Agreement*.

The Ministerial Conference has also the power to delete an existing Plurilateral Trade Agreement under Annex 4, upon the request of the Members parties to that Plurilateral Trade Agreement.[286] Additionally, amendments to a Plurilateral Trade Agreement are governed by the provisions of that agreement.[287]

4. CONCLUSION

Despite the fact that the history of the GATT 1947 rulemaking practice has shown that the CONTRACTING PARTIES experienced difficulties with its amendment procedure, it is interesting to note that some of the rules about rulemaking and decision-making remain essentially similar to those that existed under the GAT 1947. Did the drafters of the WTO think that putting a new hat on the GATT 1947, without making significant changes to the rules about rulemaking and decision-making, would resolve all of its previous difficulties?

Nonetheless, it should be noted that some new rules about rulemaking and decision-making containing flexibilities and options have been created for the WTO, such as those on interpretations, on Plurilateral Trade Agreements, and the fallback voting provisions for decision-making. Have WTO Members fully made use of these flexibilities? Or have they

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[285] DSU, *supra* note 241, Article 1(1) (providing that the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 [the 'covered agreements.']").
[286] *WTO Agreement, supra* note 1, Article X:9. The following two Plurilateral Trade Agreements have been deleted following this procedure at the end of 1997: IDA *supra* note X; IMA, *supra* note 280. Both plurilateral agreements contained a clause providing that the agreement would remain into force for a period of three years (i.e. until 31 December 1997), and that it would be extended for further periods of three year at a time, unless the Council supervising the agreement decides otherwise 80 days prior to each date of expiry, see: IDA, *supra* note 279, Article VIII:3; IMA, *supra* note 280, Article VI:3. However, the DSU was not amended to delete both these plurilateral agreements from the list of 'covered agreements' contained in Appendix 1 and, thus, they are still listed as part of the covered agreements by the DSU, see: DSU, *supra* note 241, Appendix 1.
[287] *WTO Agreement, supra* note 1, Article X:10. The two Plurilateral Trade Agreements that are currently into force under Annex 4 of the *WTO Agreement*, the *Agreement on Trade in Civil Aircraft* and the GPA, contain little indication regarding the procedure required to be performed for their amendment. They provide that amendments should not enter into force for any Signatory/Party of that agreement until it has been accepted by such Signatory/Party and that Signatories/Parties should deposit their instrument of acceptance with the Director-General, see: *Agreement on Trade in Civil Aircraft*, *supra* note 277, Articles 9.5.1 an 9.10.1; GPA, *supra* note 278, Articles 9 and 14.

preferred to resort to their previous rulemaking practices under the GATT 1947? Part IV of this thesis provides answers to these questions.

PART III

THEORETICAL FRAMEWORK AND METHODOLOGY

CHAPTER 3
HOW THE LEGITIMACY OF THE WTO RULEMAKING PROCESSES OUGHT TO BE ASSESSED?

1. INTRODUCTION

Are the WTO rulemaking processes legitimate? What standards should be used to assess their legitimacy? Can there be different valid frames of reference to evaluate the legitimacy of the rulemaking processes? Section 2 addresses these questions. Section 3 argues that the conceptualization of legitimacy for the WTO rulemaking processes depends upon one's own conception about the nature of the WTO. If the nature of the WTO is to be assimilated to that of a contract or a simple trade agreement, then the legitimacy of its rulemaking processes should be limited to the participation of Members and its mandate, agenda and outcomes should reflect whatever the Members have agreed upon. In contrast, if its nature is akin to a 'constitution' or a 'community', then its rulemaking processes should provide a framework for arguing (instead of bargaining), its mandate, agenda and outcomes should potentially extend to trade regulation and distributive justice, and its subjects should include non-state actors.

Section 4 adopts an approach borrowed from realistic theories that takes into account the limitations conferred by the sphere of public international law. It elaborates a framework to assess the rulemaking processes from the viewpoint of WTO Members (i.e. their shared normative values), which arguably falls under the contractual vision of the WTO. Hence these normative values constitute a minimum threshold for evaluating legitimacy. It presents a *multidimensional interval scale* which will be used to measure the degree of legitimacy of the WTO rulemaking processes.

2. WHAT DOES LEGITIMACY MEAN? THREE PERSPECTIVES OF LEGITIMACY

What does legitimacy mean? What does it mean in the context of the WTO? As of today, there are no universally recognized theories of legitimacy for the WTO or even for international

organizations in general.[288] Scholars have borrowed from concepts of legitimacy applied to national institutions in order to conceptualize legitimacy for the WTO.[289] Therefore, in order to understand what legitimacy means for the WTO, it is essential to comprehend how it has been defined and applied in the domestic context.

In national contexts, legitimacy has been the object of research of a great variety of disciplines, such as philosophy and political science, law, as well as sociology.[290] Each discipline of social sciences offers its unique way of understanding reality, and therefore, its own definition and methodology for studying the concept of legitimacy. Legitimacy is traditionally understood according to three different perspectives: the legal perspective, the normative perspective and the sociological perspective[291], which can be distinguished as follows:

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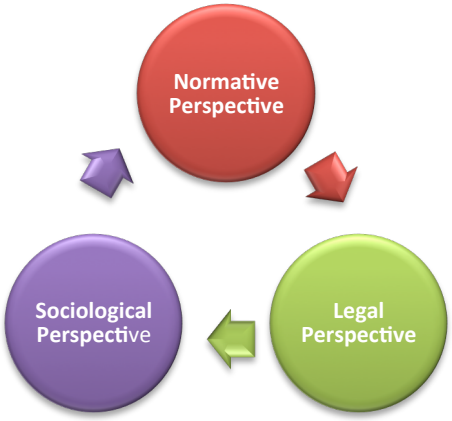
[288] See e.g. Lukas H Meyer & Pranay Sanklecha, "Introduction: Legitimacy, Justice and Public International Law. Three Perspectives on the Debate" in Lukas H Meyer, eds, *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009) 1 at 2-4 [Meyer & Sanklecha, "Introduction"]; Viejo Heiskanen, "Introduction" in Coicaud & Heiskanen, *supra* note 78 at 6-8.

[289] See e.g. Keohane & Nye, "The Club Model", *supra* note 82 at 234 (using the concept of input and output legitimacy as traditionally applied to democratic governments to evaluate the legitimacy of the WTO); Albin, "Using Negotiation", *supra* note 89 at 763-66 (using Leventhal's criteria of procedural justice to evaluate WTO negotiations processes); Ilan Kapoor, "Deliberative Democracy and the WTO" (2004) 11(3) Review of International Political Economy 522 [Kapoor, "Deliberative Democracy"] (arguing for a Habermas' inspired model of deliberative democracy to be applied to the WTO).

[290] Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (Cambridge: Cambridge University Press, 2002) at 10 (legitimacy is not an object of study, which is "the exclusive property of any one discipline); Steven Bernstein, "Legitimacy in Global Environmental Governance" (2005) 1(1-2) Journal of International Law & International Relations 139 [Bernstein, "Legitimacy in Global Environmental"] ("[E]xiting scholarship on legitimacy draws on diverse disciplinary literature in political science and philosophy, law, and sociology, which has produced confusion over its meaning and dynamics." at 140). A number of authors argued that the very first discussions relating to the legitimacy of a political authority go back to at least the times of Hobbes and Locke. While Hobbes and Locke never directly addressed the concept of legitimacy in their writings, the quest of their philosophy was to justify the notion of a political authority considering the liberal premise that men are free and rational individuals, see: David Beetham, "Legitimacy" in E Craig, ed, *Routledge Encyclopedia of Philosophy* (London: Routledge, 1998) [Beetham, "Legitimacy"]. This pursuit for the justification of a political authority has also been the central object of interest of other prominent political philosophers, such as Rousseau, Bentham, Weber, Madison, Rawls, Habermas, to name a few, see: Beetham, "Legitimacy", *ibid*; Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 AJIL 596 at 596 [Bodansky, "The Legitimacy of International Governance"].

[291] Some have argued that there is a fourth perspective, the instrumental perspective, which consists in "an instrumental condition [i.e. a specific outcome] that needs to be satisfied for [an] institution[s] to be legitimate", see Meyer & Sanklecha, "Introduction", *supra* note 288 at 7. In this thesis, the instrumental perspective is dealt with under the normative perspective of legitimacy (Section 2.2) due to the fact that both perspectives are focused on the *justification* of an institution.

Legal perspective:	An institution is legitimate if it was formed and acts in conformity with legal rules.
Normative perspective:	An institution is legitimate if it has *the right to rule* according to pre-defined normative principles.
Sociological perspective:	An institution is legitimate if it is widely *believed* to have the right to rule.



From a theoretical standpoint, these legitimacy perspectives seem disconnected from each other. However, in practice they reciprocally influence each other in a circular manner[292], which operates as follows. Beginning with the *normative perspective*, the job of the political philosopher is to prescribe what a legitimate authority should consist of, or in other words, which norms could justify an authority.[293] Once political philosophers have identified which norms should be in place to justify an authority, then at some point, legality comes into play with the codification of these norms. This is when norms become law or rules. This shows the value of the *legal perspective*: the focus on rules, which consist in codified norms. Once norms have been codified into rules, this is not the end of the story because what is normatively acceptable for those addressed by an authority evolve over time, following socio-economic and political changes in society. It is then the task of the sociologist to find out if new norms have socially emanated. In this way, following the *sociological perspective*, an authority is legitimate if it is accepted as justified by those subject to it at a particular point in time. Once the sociologist can confirm (with more or less certainty) that new norms have socially emerged,

[292] See e.g. Shane P Mulligan, "The Uses of Legitimacy in International Relations" (2006) 34(2) Journal of International Studies 349 [Mulligan, "The Uses of Legitimacy"] ("[I]n efforts to separate a descriptive from a normative legitimacy the break is never completely made; the signaling functions cannot really abandoned. As a result, each realm is infected by the other." at 368).
[293] Historically, this has been the role of various influential political philosophers, such as Hobbes, Lockes, Rousseau, Madison, and so forth.

then such norms cannot be ignored by the political philosopher.[294] And eventually, they might form part of legality.[295] Therefore, the relationship between normativity, legality and sociology evolves in a 'never-ending spinning wheel'. These three perspectives are presented in further details in the following sections.

2.1. Legal Perspective: *Tunnel Vision*

The legal perspective of legitimacy is essentially strictly focused on legality.[296] This perspective corresponds to its etymology. In fact, the Latin root *lēg-* means "law", and the word *lēgitimus*

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[294] See e.g. Robert O Keohane, "Discussion Following Presentations by Helen Keller, Armin von Bogdandy and Daniel Bodansky" in Rüdiger Wolfrum & Volker Röben, eds, *Legitimacy in International Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol 194 (Heidelberg: Springer, 2008) 319 [Keohane,"Discussion"] ("For example, the theory of legitimacy . . .[links the *ex ante* procedures with *ex post* results]. It makes the claim that if you follow democratic procedures you will in the long run get better results, even if in any given situation, a dictator might have been given you a better policy. So, the theory is that there is a link between the *ex ante* and the *ex post,* which connects normative with sociological legitimacy." at 319); Daniel Bodansky, "The Concept of Legitimacy in International Law" in Wolfrum & Röben, *ibid*, 309 [Bodansky, "The Concept of Legitimacy"] (Citing Professor Keohane, Professor Bodansky stated "[i]n considering social legitimacy we need to consider the social contract under which international institutions operate. As [Professor Keohane] notes, this social contact changes over time, leading to changes in the bases of social legitimacy." at 313); Beetham, "Legitimacy", *supra* note 291 ("[S]ocial science can . . . make its own distinctive contribution to the study of legitimacy: through a comparative analysis of different legitimating principles and processes in different societies and epochs, and of the way these are embedded in institutional structures and practices; through an identification of the gaps that may develop between the underlying principles of a regime and their supporting beliefs, on the one hand, and its actual practice on the other; and through an examination of the processes of de-legitimation which herald its collapse."); Bernstein, "Legitimacy in Global Environmental", *supra* note 290 ("[I]t is unlikely that a universal formula to satisfy all legitimacy concerns will emerge. This conclusion is contrary to the tendency to develop abstract criteria of legitimacy for global governance, usually derived exclusively from the democratic legitimacy literature. Rather, insights from the sociological perspective suggest that criteria of legitimacy ultimately are contingent on historical understandings at play and the shared norms of the particular community or communities granting authority." at 162).

[295] See e.g. Michael Bothe, "Discussion Following Presentations by Helen Keller, Armin von Bogdandy and Daniel Bodansky" in Wolfrum & Röben, *ibid*, 322 ("[L]egitimacy is to a large extent a historical concept. It is about perceptions of relevant actors at any given time. Let me explain by taking as an example the question of the legitimacy of governments in the age of enlightenment. The absolute monarchs were perfectly lawful governors. But the grace of God no longer provided enough legitimation. A new concept of legitimation was developed, mainly compact or contract theories. What was the result? History changed. A few revolutions happened. Law changed as a consequence. This is a continuous problem. It is still with us today, and these questions which are behind the legitimacy discourse: to maintain the law as it is because it is legitimate or to change the law because it is not legitimate." at 322-23).

[296] Bernstein, "Legitimacy in Global Environmental", *supra* note 290 at 152; David Beetham, *The Legitimation of Power,* 2d ed (New York: Palgrave Macmillan, 2013) [Beetham, *The Legitimation of Power*] at 3-4; Steven Bernstein, *The Elusive Basis of Legitimacy in Global Governance: Three Conceptions,* Institute on Globalization and the Human Condition, GHC 04/2 (2004) at 10, online: Mc Master <http://www.religiousstudies.mcmaster.ca/institute-on-globalization-and-the-human-condition/documents/IGHC-WPS_04-2_Bernstein.pdf> [Bernstein, *The Elusive Basis*]. See e.g. Inis Claude, Jr, "Collective Legitimization as a Political Function of the United Nations" (1966) 20(3) International Organisation 367.

stands for "lawful."[297] Hence, etymologically, the word legitimate "expresses a status which has been conferred or ratified by some authority."[298] Then as well, the *Oxford English Dictionary* provides the following definition: "conformable to law or rule; sanctioned or authorized by law or right; lawful; proper."[299] The *Black's Law Dictionary* also links legitimacy to legality by defining "legitimate" in that which is "lawful" or "[c]omplying with the law."[300]

According to the legal traditional perspective, the rules and decisions of an institution are *ipso facto* legitimate if they were adopted in conformity with what H.L.A. Hart referred to as the institution's "secondary rules" about norm creation, or at the very least, they enjoy a strong presumption of legitimacy.[301] Following the legal perspective, legitimacy ensures the respect of legal rules; that power is exercised in conformity with legal rules.

2.2. Normative Perspective: *The 'Truth' of the Philosopher*

The normative perspective of legitimacy is rooted in the discipline of political philosophy. It commonly defines a legitimate institution as having "*the right to rule.*"[302] In other words,

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[297] The Oxford English Dictionary, 2d ed, sub verbo "legitimate, adj. and n.".
[298] *Ibid.*
[299] *Ibid.*
[300] *Black's Law Dictionary,* 8th ed, *sub verbo* "legitimate". See also GCA Junne, "International Organizations in a Period of Globalization: New (Problems of) Legitimacy" in Coicaud & Heiskanen, *supra* note 78, 189 [Junne, "International Organizations"] (Junne argues that "correct procedure" is one of at least five different sources of legitimacy: "legitimacy can be bestowed upon a government through the process by which it has been formed. If this process has been carried out according to the law, a government is accepted as legitimate." at 191).
[301] HLA Hart, "Positivism and the Separation of Law and Morals", 1958, reprinted in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49 [Hart, *The Concept*] (H.L.A. Hart stated: "nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential law-making procedures" at 59).
[302] Allen Buchanan & Robert O Keohane, "The Legitimacy of Global Governance Institutions" in Meyer, *supra* note 288, 29 at 29 [Buchanan & Keohane, "The Legitimacy of Global Governance"];Klaus Dingwerth, *The New Transnationalism: Transnational Governance and Democratic Legitimacy* (New York: Palgrave Macmillan, 2007) [Dingwerth, *The New Transnationalism*] ("the main interest of the normative understanding of legitimacy is in the *acceptability* of authority" at 14 [emphasis in the original]); Richard E Flathman, "Legitimacy" in Robert E Goodin, Philip Pettit & Thomas Pogge, eds, *A Companion to Contemporary Political Philosophy,* 2d ed (Oxford Blackwell, 2007) 678 at 678; Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005) at 11.

according to this view, a legitimate institution is "morally justified in attempting to govern"[303]; it has a right to exercise authority − while an illegitimate one does not.[304]

What does it concretely means for an institution to have the *right to rule* or be morally justified? This is the task of the political philosophers to determine. Indeed, legitimacy is sometimes referred to as "the truth of the philosopher."[305] In a similar vein, the *Oxford English Dictionary* defines 'normative' as that which "constitutes . . . a norm or standard."[306] Therefore, normative legitimacy implies the formulation of a norm or standard for legitimacy.

In recent years, two schools of thought have developed within the field of political philosophy, which has become known as "the debate on ideal and non-ideal theory."[307] For the study of legitimacy, ideal and non-ideal theory can be framed as "utopian vs. realistic theories."[308] A utopian theory of legitimacy refers to an *ideal* representation of how an institution should be constituted and how it should govern. It rests on an ideal reality. Political philosophers following this view are not concerned with the *feasibleness* of their conceptions of legitimacy; what matters is purely their moral justification.[309] By contrast, a realistic theory of legitimacy examines an institution's legitimacy through *realist* lens. It does not demand the impossible for an institution to meet the standard of legitimacy. It takes into account the *status quo* within

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[303] Allen Buchanan, "The Legitimacy of International Law" in John Tasioulas & Samantha Besson, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 79 at 85. See also Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 601 ("'legitimacy' can also have a normative meaning, referring to whether a claim of authority is well founded − whether it is justified in some objective sense.").

[304] Daniel Bodansky, "Legitimacy in International Law and Relations" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012) 321 at 324.

[305] Tilo Schabert, "Power, Legitimacy and Truth: Reflections on the Impossibility to Legitimise Legitimations of Political Order" in Athanasios Moulakis, ed, *Legitimacy = Légitimé,* Proceedings of the conference held in Florence 3 and 4 June 1982 (Berlin: 1986) 96 at 102. See also Tom R Tyler, "Psychological Perspectives on Legitimacy and Legitimation" (2006) 57 Annual Review of Psychology 375 [Tyler, "Psychological Perspectives"] ("A legitimating ideology is a set of justifications or 'legitimizing myths' that lead a political or social system and its authorities and institutions to be viewed as normatively or morally appropriate by the people within the system. A wide variety of forms of legitimation are found through history and across societies and cultures." at 378).

[306] The Oxford English Dictionary, 2d ed, sub verbo "normative, adj.".

[307] Laura Valentini, "Ideal vs. Non-ideal Theory: A Conceptual Map" (2012) 7(9) Philosophy Compass 654 [Valentini, "Ideal vs. Non-ideal"] ("Driving this [ideal and non-ideal theory] 'methodological turn' in political philosophy has been a frustration with the subject's perceived lack of influence on real world politics. Some voiced the concern that the dominant – Rawlsian – paradigm in the discipline was somehow too detached from reality to guide political action. From this perspective, much of the current work in political philosophy is defective because it is of little (possibly no) practical help." at 654). See also Keohane, "Discussion", *supra* note 294 at 319.

[308] Valentini, "Ideal vs. Non-ideal", *ibid* at 657-58.

[309] See e.g. Luc B Tremblay, "Le Normatif et le Descriptif en Théorie du Droit" (2002-03) 33(1-2) RDUS 70 at 74.

which an institution resides, such as the current socio-economic political context, the institutional structure in place, as well as existing rules and procedures.[310] Jürgen Habermas' definition of legitimacy can be said to fall under the realistic category as it offers a less demanding account for it: "there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition. *Legitimacy means a political order's worthiness to be recognized.*"[311] In summary, both utopian and realistic theories of legitimacy have for aim the prescription of standards that might 'justify' an institution[312]; however the difference rests on the degree of feasibility of the standards applied (i.e. how demanding the standards are).

What type of standards can normatively justify a rule or a decision? It can vary from any pre-determined − more or less demanding − standards of justice, fairness, morality, and so forth, which are found through history and across societies and cultures.[313] Historically, there have been extensive theoretical debates and practical disagreements regarding what can normatively justify an authority, beginning with Plato and Aristotle, and so forth with the theories of Hobbes, Locke, Rousseau, and contemporary theorists.[314] Over the course of time, different 'sources of legitimacy' have been put forth by political philosophers as sufficient justifications of an authority, such as divine right, religion, God, tradition, the King or dictators, charismatic leadership, rule by the natural elite, consent, expertise, unanimity, majority voting, legality,

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[310] See e.g. Steven Wheatley, *The Democratic Legitimacy of International Law* (Portland: Hart Publishing, 2010) ("The argument is for a different reading of the system, not its reconstruction. It does not, for example, propose an end to sovereignty, or the establishment of new global institutions, or the radical transformation of existing institutions." at 11).

[311] Jürgen Habermas, *Communication and the Evolution of Society,* translated by William Rehg (Boston: Beacon Press, 1979) at 178 [emphasis in the original].

[312] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 601.

[313] Mulligan, "The Uses of Legitimacy", *supra* note 292 ("legitimacy is most often presented as a question of whether some practice or institution accords with a particular set of criteria according to which it, or its legitimacy, will be judged" at 351); Allen Buchanan, *Justice, Legitimacy, and Selfdetermination: Moral Foundations for International Law* (New York: Oxford University Press, 2004) ("under what conditions are persons justified in wielding political power" at 290); Krajewski, "Legitimising", *supra* note 64 at 83; Meyer & Sanklecha, "Introduction", *supra* note 288 at 2; Tyler, "Psychological Perspectives", *supra* note 305 at 378.

[314] Peter G Stillman, "The Concept of Legitimacy" (1974) 7(1) Polity 32 [Stillman, "The Concept of Legitimacy"] ("[S]ince Plato and Aristotle, the idea if not the term legitimacy has always had a primary importance in political reflection. To some extent, all political philosophy can be seen as trying to answer the question to which *The Social Contract* was Rousseau's answers: 'What makes a government legitimate?' Similarly, the concept of legitimacy is pervasive in the writings of many modern social scientists, from Max Weber to contemporary theorists as diverse as Robert Dahl, Karl Deutsch, David Easton, Carl Friedrich, Seymour Lipset, Lucian Pye, W.G. Runciman, and Johan Schaar." at 32-33).

democracy, justice, etc.[315] In the modern world, democracy has become "the hallmark of legitimate government."[316] While democracy is a widely accepted standard for the legitimacy of a government, its definition is equivocal. Democracy can be composed of various elements, but it is not clear which ones are required. For instances, does democracy refers to models of popular democracy or representative democracy? Does it imply majority decision-making? Should it involve deliberation about the public good?[317] There is no uniform understanding regarding the requirements of democratic legitimacy at the national level.

2.3. Sociological Perspective: *In the Eyes of Those Addressed*

The sociological perspective, also commonly referred to as a 'positive' or a 'descriptive' perspective of legitimacy, is traditionally concerned with the *societal acceptability* of a polity, an authority or an institution.[318] An institution is legitimate if "the subjects to whom it is addressed *accept it* as justified."[319] Professor Hurd advances that "we *must* call [an institution] legitimate if its audience has internalized its authority and accepts it as right, regardless of whether the institution's values conform to those of the outside observer. Legitimacy does not rely on serving the 'real' interests of the actor, and false consciousness is certainly a possibility."[320]

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[315] See generally Mulligan, "The Uses of Legitimacy", *supra* note 292. See also Stillman, "The Concept of Legitimacy", *ibid* at 37; Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 612; James Brassett & Eleni Tsingou, "The Politics of Legitimacy Global Governance" (2011) 18(1) Review of International Political Economy 1; Junne, "International Organizations", *supra* note 300 at 191; Daniel Bodansky, "Legitimacy" in Daniel Bodansky, Jutta Brunnée & Hellen Hey, eds, *The Oxford Handbook of International Law* (Oxford: Oxford University Press, 2008) 704 at 705 [Bodansky, "Legitimacy"]; Beetham, "Legitimacy", *supra* note 291.

[316] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 612. See also Bernstein, "Legitimacy in Global Environmental", *supra* note 290 ("legitimacy requires democracy because it is the central principle in contemporary politics that justifies authority"); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995).

[317] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 613.

[318] Beetham, *The Legitimation of Power, supra* note 296 at 6. Christian Reus-Smit, "International Crises of Legitimacy" (2007) 44(2) International Politics 157 [Reus-Smit, "International Crises"] ("Legitimacy is a social concept in the deepest sense − it describes a phenomenon that is inherently social." 159); Dingwerth, *The New Transnationalism, supra* note 302 at 14.

[319] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 601 [emphasis added]. See also Bernstein, "Legitimacy in Global Environmental", *supra* note 290 ("Legitimacy can be defined as the acceptance and justification of shared rule by a community." at 142).

[320] Ian Hurd, *After Anarchy: Legitimacy & Power in the United Nations Security Council* (Princeton: Princeton University Press, 2007) at 33-34 [emphasis in the original] (For Hurd, legitimacy "does not carry ethical content that would allow outsiders to declare whether an institution *ought* to be seen as legitimate by its audience or to judge whether an act or an institution is legitimate in the abstract. These judgements can only be made from the inside." He adds: "To use the term 'legitimate' in my approach says nothing about rightness or goodness; rather, it refers only to actors' internal perceptions of rightness and goodness." at 33-34 [emphasis in the original]).

The pioneer of this view was Max Weber, one of the founding fathers of twentieth-century social sciences. He defined legitimacy as "the *belief in legitimacy* on the part of the social agents; and power relations as legitimate where those involved in them, subordinate as well as dominant, believe them to be so."[321] For Weber, the role of the social scientist in determining whether a given power relation is legitimate is to make a report about other people's *beliefs*. Contrary to the political philosopher, the social scientist should abstain to make a moral judgment about a power relation's legitimacy. People's beliefs are the paramount factor on which Weber's definition of legitimacy is based: "[p]ower is legitimate where those involved in it believe it to be so; legitimacy derives from people's belief in legitimacy."[322]

Studies of procedural justice in domestic contexts resulted in considerable advancements for the understanding of legitimacy.[323] They demonstrated that, to obtain support for an organization or institution, people's opinions about the procedural side of distribution (i.e. the process and procedures followed) frequently outweigh the distributive side (i.e. the outcomes).[324] Hence, they brought awareness to the fact that a person might feel that a rule or a decision "is misguided, or inequitable, or even unjust, *but still accept it as legitimate*"[325] for different reasons based on a person's belief (e.g. on the ground that it was duly enacted by a democratically-elected legislative, was made by a court with proper jurisdiction or by an institution which operates "in accordance with generally accepted principles of right process"[326]). In the words of

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[321] Beetham, *The Legitimation of Power, supra* note 296 at 6 (paraphrasing Weber). Weber's sociological perspective on legitimacy can be found in Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1968) at 212-92.

[322] Beetham, *The Legitimation of Power, supra* note 296 at 8. See also Meyer & Sanklecha, "Introduction", *supra* note 288 at 2.

[323] In order to determine people's *beliefs* social scientists generally use the means of empirical studies and survey people's opinions through questionnaires, see Ian Clark, "Legitimacy in a Global Order" (2003) 29(S1) Review of International Studies 75 at 79.

[324] Allan E Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Springer Science+Business Media, 1988) at 26 and 215 [Lind & Tyler, *The Social Psychology*]; John Walter Thibaut & Laurens Walker, "A Theory of Procedure" (1978) 66 Cal L Rev 541 [Thibault & Walker, "A Theory of Procedure"]; Tyler, "Psychological Perspectives", *supra* note 305 at 378; Gerald S Leventhal, "What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships" in Kenneth Gergen, Martin S Greenberg, & Richard H Willis, eds, *Social Exchange: Advances in Theory and Research* (New York: Plenum Press, 1980) 27 [Leventhal, "Equity Theory"].

[325] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 602 [emphasis added]. See also Meyer & Sanklecha, "Introduction", *supra* note 288 ("It is possible . . . for a political authority to be legitimate in the [sociological] sense while being illegitimate in the normative sense." at 2-3).

[326] Franck, Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990) at 24 [Franck, *The Power of Legitimacy*].

Professor Bodansky: "Legitimacy does not depend on whether a rule or a decision is substantively correct (judged by whatever standard); rather, it reflects more general support for a regime, which makes subjects willing to substitute the regime's decisions for their own evaluation of a situation."[327]

3. WHICH PERSPECTIVE OF LEGITIMACY SHOULD BE USED TO EVALUATE THE WTO RULEMAKING PROCESSES?

When evaluating the WTO rulemaking processes, the selection of the perspective of legitimacy is dependent upon the objective being pursued. The goal of this thesis is to examine the legitimacy performance of the rulemaking processes within their actual institutional context while taking into account the existing limitations inherent to the sphere of public international law in which the WTO revolves and the states' underlying systems of governance.[328] This objective does not exclusively fall within one of the three perspectives of legitimacy used in domestic contexts. Indeed, all three perspectives are relevant to evaluate the legitimacy of the WTO rulemaking processes, but each of them has a different objective. The *sociological perspective* helps to explain why states actually participate in the WTO; why they actively engage in the negotiating forum and comply with its rules and decisions. The *normative perspective* determines why, and upon which conditions, states should participate in the WTO and comply with its rules and decisions. Finally, the *legal perspective* assesses whether the exercise of 'authority' by the WTO is legal, i.e. if its rules and decisions are in conformity with Hart's secondary rules of norm creation. As a result, for the purpose of this thesis, David Beetham's conception of legitimacy, representing a mix of all three perspectives of legitimacy, offers the most useful framework for the conceptualization of legitimacy for the WTO rulemaking processes.[329]

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[327] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 602.

[328] This approach is in line with realistic theories of normative legitimacy, see Section 2.2 above. See also Cottier, "The Legitimacy of WTO Law", *supra* note 77 ("In assessing the legitimacy of rules of international law, we need to take the complex and imperfect nature of international law into account. . . . International law . . . functions in an environment where many of its subjects do not fully live up to the ideals of democracy. Thus, the ideal benchmark cannot be set. When assessing the legitimacy of a particular international organisation, we need to relate it to the realities of underlying systems of governance, taking into account all their deficiencies." at 19-20).

[329] Fabienne Peter, "Political Legitimacy" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), online: Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/archives/win2014/entries/legitimacy/>.

3.1. David Beetham's Conception of Legitimacy: A Blend of Perspectives

In his seminal work *The Legitimation of Power,* Beetham[330] heavily criticises the sociological perspective of legitimacy characterized by Weber's conception regarding what makes power legitimate in particular societies. For him, the central problem with Weber's concept of legitimacy is that it "transform[s] the issue of legitimacy from a question about the actual characteristics of a system of power into one concerning the beliefs people hold about it."[331] Instead, Beetham proposes the following conception: "[a] given power relationship is not legitimate because people believe in its legitimacy, but because it can be *justified in terms* of their beliefs."[332] Therefore, according to Beetham, the role of the social scientist is not to make a *report* about people's beliefs in legitimacy, but to make an *assessment* on the actual characteristics of a regime, such as its conformity to people's values, its ability to satisfy their interests, and so on.[333]

Beetham proposes that power can be said to be legitimate to the extent that it fulfils three conditions: (i) it conforms to established rules; (ii) the rules can be justified by reference to beliefs (or values) shared by both dominant and subordinate; and (iii) there is evidence of consent by the subordinate to the particular power relation."[334] How can Beetham's conception apply to the WTO rulemaking processes? The first and third conditions (i.e. legality and consent)

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[330]David Beetham is both a political philosopher and a social scientist, see Beetham, *The Legitimation of Power, supra* note 296 at 9.
[331] *Ibid* at 9.
[332] *Ibid* at 11.
[333] *Ibid* at 11. Other scholars sharing Beetham's conception of legitimacy include: Krajewski, "Democratic Legitimacy", *supra* note 8 ("[A] norm can be called legitimate in any political or societal system if it is based on fundamental principles or values adhered to by the subjects of that system. These principles can either define certain procedural conditions of the law-making process (*input-legitimacy*) or material conditions measuring the results of the norm (*output-legitimacy*)." at 169; Howse, "The Legitimacy of the WTO", *supra* note 78 ("[S]ocial legitimacy is itself bound up with elements of substantive legitimacy; the empirical acceptance by citizens of formally valid rules as legitimate depends significantly on their conformity with values and "interests broadly shared among those citizens." at 363); Mark C Sutchman, "Managing Legitimacy: Strategic and Institutional Approaches" (1995) 20(3) Academy of Management Review 571 (defining legitimacy as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions" at 574); Reus-Smit, "International Crises", *supra* note 318 ("when we say that an institution is . . . legitimate, we are saying that its norms, rules, and principles are socially endorsed" at 159); Bernstein, "Legitimacy in Global Environmental", *supra* note 290 (To be legitimate, and institution must be "compatible or institutionally adaptable to existing institutionalized rules and norms already accepted by a society." "[T]here is a constant interaction of rules with the social purposes and goals of relevant audiences. Legitimacy therefore depends on the historically continent values, goals, and practices of the relevant society." at 156-57).
[334] Beetham, *The Legitimation of Power*, *supra* note 296 at 15-16.

correspond to the legality perspective of legitimacy (Section 3.1.1), whereas the second condition refers to shared normative values by the WTO's constituents (Section 3.1.2).

3.1.1. Conformity to established rules and evidence of consent

Legality and consent are two important preconditions for the legitimacy of the WTO (and its rulemaking processes). Indeed, from a traditional legal perspective, consent of sovereign states is the basis for the legitimacy (but also the legality) of international law and organizations.[335] Consent acts as the primary condition for a state to become subject to an international organization's rules and decisions, such as the WTO.[336] Legitimacy through the act of consent can be justified by the fact that the WTO's authority is "self-imposed"; it "rests on the consent of the very states to which it applies."[337]

How do Members consent to the WTO rulemaking processes? By becoming Members of the WTO, states give their consent to the rules of the organization contained in the *WTO Agreement,* which provides rules about decision-making (Article IX) and rulemaking (Article X).[338] Consequently, the consent of states is encompassed in the *WTO Agreement* and, thus, the

[335] See e.g. VCLT, *supra* note 110. See also Volker Röben, "Röben, "What About Hobbes"? Legitimacy as a Matter of Inclusion in the Functional and Rational Exercise of International Public" in Wolfrum & Röben, *supra* note 294, 353 ("States − this is a basic tenet of international law as any student of it will learn −are the (sole) comprehensively competent makers of international law to the exclusion of other entities." at 354); Dominik Zaum, "International Organizations, Legitimacy, and Legitimation" in Dominik Zaum, ed, *Legitimating International Organizations* (Oxford: Oxford University, 2013) 3 ("International organizations are legitimized from below through the consent that states express by joining an institution and accepting its rules and regulations. In addition, they are legitimized by the day-to-day practices of their member states confirming their recognition of an institution's authority." at 11); Rüdiger Wolfrum, "Legitimacy of International Law from a Legal Perspective" in Wolfrum & Röben, *supra* note 294, 1 ("Authority can be legitimated by its source of origin. For public international law legitimacy rests − at least according to the traditional view − in the consent of the States concerned. According to this view international law is based upon the assumption that States have the ability to negotiate and to adhere to international agreements. By doing so they accept obligations *vis-à-vis* the other partners to that agreement or *vis-à-vis* a larger community. They also have the ability to commit themselves unilaterally." at 6); Bernstein, "Legitimacy in Global Environmental", *supra* note 290 at 153; Bodansky, "The Concept of Legitimacy", *supra* note 294 at 311; Buchanan & Keohane, "The Legitimacy of Global Governance", *supra* note 302 at 36; Howse, "The Legitimacy of the WTO", *supra* note 78 at 356 and 359; Bodansky, "Legitimacy", *supra* note 315 at 710.

[336] Krajewski, "Legitimising", *supra* note 64 at 84; Howse, "The Legitimacy of the WTO", *supra* note 78 at 356 and 359; Bodansky, "Legitimacy", *supra* note 315 at 710; Andreas Ziegler & Yves Bonzon, *How to Reform WTO Decision-Making? An Analysis of the Current Functioning of the Organization from the Perspective of Efficiency and Legitimacy?,* NCCR Working Paper 2007/23 (May 2007) at 11, online: NCCR <http://phase1.nccr-trade.org/images/stories/publications/IP2/Working%20Paper%20No%202007_23.pdf> .

[337] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 597; Singh, "The WTO and Legitimacy", *supra* note 81.

[338] For a description of the WTO rules and procedures about rulemaking and decision-making, see Chapter 2, Section 3.

legitimacy of the WTO's rules and agreements depend upon whether they were adopted in conformity with what H.L.A. Hart referred to as the organization's "secondary rules" about norm creation.[339]

3.1.2. Shared normative values by the WTO's constituents

According to Beetham's legitimacy conception, power must be justified by reference to shared beliefs by both dominant and subordinate. As applied to the WTO rulemaking processes, it means that the rulemaking processes must be justified in relation to the WTO's constituents' shared normative values. Who are the WTO's constituents or stakeholders? What are their shared normative values?

To respond to these questions, one has to reflect upon the nature of the WTO. What is the WTO? Commentators have put forth two contrasting views in an attempt to describe the nature of the WTO. Under the first conception, the WTO can be defined as a contract consisting primary of obligations that are bilateral in nature and which promotes the pursuit of individual preferences and economic welfare (i.e. cost-benefit) considerations, such as trade liberalization.[340] It is the result of rational preprogrammed "choices", such as "incorporation of international standards, judicial balancing, delegation to markets, national deference, and process-based review."[341] Following this vision, the subjects of the WTO are limited to the Members, which are the only 'parties to the contract'. Holders of this view see the WTO as a continuation of the GATT 1947, which was merely a trade agreement that was governed by 'contracting parties' acting jointly.[342]

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[339] Hart, *The Concept*, *supra* note 301 (H.L.A. Hart stated: "nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential law-making procedures" at 59). See also Buchanan & Keohane, "The Legitimacy of Global Governance", *supra* note 302 at 36. For additional information, see Section 2.1 above.

[340] Gregory Shaffer & Joel P Trachtman, "Interpretation and Institutional Choice at the WTO" (2011) 52(1) Va J Int'l L 103 at 105-20 [Shaffer & Trachtman, "Interpretation and Institutional Choice"]. For an excellent analysis of Shaffer and Trachtman's conception of the WTO see: Sungjoon Cho, "Beyond Rationality: A Sociological Construction of the World Trade Organization" (2011) 52(2) Va J Int'l L 321 at 330-34 [Cho, "Beyond Rationality"]. See generally Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?" (2003) 14(5) EJIL 907-51 [Pauwelyn, "A Typology"] (arguing that WTO obligations are essentially bilateral in nature).

[341] Cho, "Beyond Rationality", *ibid* at 327, citing Susan Park, "Norm Diffusion within International Organizations: A Case Study of the World Bank" (2005) 8(2) Journal of International Relations and Development 111 at 113.

[342] GATT 1947, *supra* note 1, Article XXV:1. For more information on the legal nature of the GATT 1947, see Chapter 2, Section 2.1.

In contrast, other commentators contend that the WTO is of the nature of a 'community' or a 'constitution', where obligations are owed to the *entire* membership (i.e. collective in nature).[343] Under this sociological framework, the WTO is seen as "an evolving entity based on sedimented discourses."[344] These normative discourses, which include various institutional rules and practices, are influenced by history. Such a "cognitive-communicative reconstruction" of the WTO may give rise to the view that the mandate of the WTO extends to trade regulation[345] or even distributive justice.[346] Under this evolving framework, the progressive integration of the global market calls upon "a communitarian paradigm shift" in the WTO where the main actors cannot afford to be limited to the Members anymore.[347] Instead, WTO stakeholders must extend to various economic players, such as suppliers, manufacturers, importers, distributors, wholesalers, retailers, shippers, bankers, insurers, and consumers who participate in and now drive the development of the international trading community.[348]

Although such theoretical debates do not formally take place within the WTO, it would appear that Members' views about the nature of the WTO are closer to that of a contract.[349] Professor

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[343] Chios Carmody, "A Theory of WTO Law" (2008) 11(3) J Int'l Econ L 527 at 531 [Carmody, "A Theory of WTO Law"]. For scholars that have referred to the WTO as a 'constitution', see: John H Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998); Gail Evans, *Lawmaking under the Trade Constitution* (Boston: Kluwer Law International, 2000) at 44; Deborah Z Cass, *The Constitutionalization of the World Trade Organization* (Oxford: Oxford University Press, 2005); Peter M Gerhart, "The Two Constitutional Visions of the World Trade Organization" (2003) 24(1) U Pa J Int'l Econ L 1; Jeffrey L Dunoff, "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law" (2006) 17(3) EJIL 647.

[344] Cho, "Beyond Rationality", *supra* note 340 at 327.

[345] Steger, "The Future of the WTO", *supra* note 57 at 805; Cottier, "From Progressive Liberalization", *supra* note 7 at 782-83.

[346] See generally Peter M Gerhart, "Slow Transformations: The WTO as a Distributive Organization" (2002) 17(5) Am U Int'l L Rev 1045 [Gerhart, "Slow Transformations"]; Cho, "Beyond Rationality", *supra* note 340 at 328; Carmody, "A Theory of WTO Law", *supra* note 343 at 532 and 544; Amrita Narlikar, "Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO" (2006) 29(8) World Economy 1005 at 1005-28; Cottier, "The Legitimacy of WTO Law", *supra* note 77 at 13.

[347] Cho, "Beyond Rationality", *supra* note 340 at 343; Cottier, "The Legitimacy of WTO Law", *supra* note 77 at 14.

[348] *Ibid.*

[349] See e.g. Appellate Body Report, *Japan − Taxes on Alcoholic Beverages,* WT/DS8/AB/R, adopted 1 November 1996, DSR 1996:I, 97 [*Japan − Taxes on Alcoholic Beverages*] ("The *WTO Agreement* is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement." at 15). Moreover, several Members have referred to this view, see e.g. Statement by Brazil in Appellate Body Report, *European Communities − Measures Affecting Importation of Certain Poultry Products,* WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031 (describing the *WTO Agreement* as "an international treaty laying down *contractual* obligations and not *erga omnes* obligations" at para 15 [emphasis added]); Statement by Argentina in WTO, DSB, *Minutes of Meeting* (held on 13

Jackson has identified some "mantras" held by Members, which include: consensus is "great or even sacred"; the WTO is an organization that is "government to government"; the organization is "member driven"; national-state sovereignty must be preserved; and the most-favoured-nation (MFN) clause is a "sacrosanct" principle.[350] These mantras arguably correspond to Beetham's legitimacy's conception's shared beliefs by both dominant and subordinate'. When dealing with entities, such as states, the term "beliefs" is not appropriate. Instead, the reference should be to WTO Members' shared normative values.

What do these mantras say about Members' shared normative values regarding the rulemaking processes? First, there is the notion of 'procedural equality', which is reflected in the 'sacredness' of the consensus and the MFN principles. Both these principles focus on the procedural equality of Members.[351] Under the consensus rule, each Member, no matter the size of its economy, is attributed a veto (i.e. the right to object to the adoption of a decision).[352] As for the MFN principles, they prevent Members from "arbitrarily discriminating" among themselves.[353] Second, the emphasis regarding a 'Member-driven' organization indicates that Members believe they should be the ones that decide upon the issues to be added on the WTO's agenda, as well as the content of the outcomes. The agenda and outcomes should not be derived from some constitutional-based conceptions of fairness or distributive justice, but should reflect what Members together agreed upon. Third, the stress on a 'government to government' or intergovernmental organization implies that non-state actors "have no role" in the rulemaking

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February 1998), WTO Doc WT/DSB/M/42, online: WTO <http://docs.wto.org> (referring to SPS obligations as "*contractual* international obligations" at 14 [emphasis added]). See also Sutherland Report, *supra* note 11 (The WTO is "in large measure a negotiating machine" at para 269).

[350] Jackson, "Mantras", *supra* note 49 at 71-73.

[351] Sutherland Report, *supra* note 11 (Consensus "is the WTO's way of ensuring that the poorest and weakest cannot be overridden by the rich and powerful. It has been a cornerstone of the trading system over more than five decades; it is the procedural equivalent of the most-favoured-nation principle that ensures the weakest trading nations receive, unconditionally, the best conditions of market access offered in the WTO by the strongest." at para 281).

[352] *WTO Agreement, supra* note 1, Article IX:1, n 1 ("The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."). Moreover, Article IX:1 confirms the normative value of equality, i.e. it provides for the 'one Member, one vote' principle. For an analysis of the value of egalitarian justice within the WTO, see: Darrel Moellendorf, "The World Trade Organization and Egalitarian Justice" (2005) 36(1-2) Metaphilosophy 145 at 146-47 [Moellendorf, "The WTO an Egalitarian Justice"].

[353] See e.g. GATT 1994, *supra* note 262, Article I; GATS, *supra* note 229, Article II; *TRIPS Agreement*, *supra* note 233, Article 4. See also Cottier, "The Legitimacy of WTO Law", *supra* note 77 at 14; Carmody, "A Theory of WTO Law", *supra* note 343 at 544; Moellendorf, "The WTO an Egalitarian Justice", *ibid*; Sutherland Report, *supra* note 11 at para 281.

processes.[354] Fourth, the emphasis on nation-state sovereignty indicates that the WTO should not impact the delicate allocation of powers as it currently exists in the sphere of public international law.[355]

In summary, following Beetham's legitimacy conception, the rulemaking processes should be legitimate if they: (i) respect the rules and procedures about rulemaking (first and third conditions); and (ii) can be *justified in terms* of Members' normative values, i.e. if they are based on equality, Member-driven, limited to the exclusive participation of Members, and preserve nation-state sovereignty. How to assess whether the rulemaking processes can be justified in terms of these normative values? There is a need of an analytical framework to evaluate the legitimacy of the rulemaking processes and analyze whether they can be justified in terms of Members' values. On that respect, Section 3.2 below examines how the concept of legitimacy has been applied in the WTO.

3.2. Legitimacy as Applied to the WTO: Input and Output Conceptions

Many commentators have framed the issue of WTO legitimacy in terms of input and output legitimacy.[356] *Input legitimacy* focuses on the fairness of the processes followed to create a rule

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[354] Jackson, "Mantras", *supra* note 49 at 71-72. See also *WTO Agreement, supra* note 1, Article II:1 ("The WTO shall provide the common institutional framework for the conduct of trade relations *among its Members*" [emphasis added]); *Guidelines for Arrangements on Relations With Non-Governmental Organizations* (General Council Decision of 18 July 1996), WTO Doc WT/L/162, online: WTO <http://docs.wto.org> [*Guidelines for Arrangements With NGOs*] ("As a result of extensive discussions, 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."); Gabrielle Marceau & Peter N Pedersen, "Is the WTO Open and Transparent?" (1999) 33(1) J World Trade 5 at 12-14 [Marceau & Pedersen, "Is the WTO Open"].

[355] Jackson, "Mantras", *supra* note 49 at 72.

[356] Keohane & Nye, "The Club Model", *supra* note 82 at 282; Krajewski, "Legitimising", *supra* note 64 at 84; Smythe & Smith, "Legitimacy", *supra* note 88 at 33-34; Krajewski, "Democratic Legitimacy", *supra* note 8 at 169-73; Esty, "The WTO's Legitimacy Crisis", *supra* note 79 at 9; Matthew Eagleton-Pierce, "Reflections on Legitimacy and the WTO System" in Kalypso Nicolaidis, Matthew Eagleton-Price & Emily Jones, eds, *Building Blocks for a Global Trade Ethics: A compendium of the Oxford Programme on Global Ethics* (Oxford: Oxford University and German Marshall Fund, 2009) 15 at 17-18, online Center for International Studies, Oxford University <http://cis.politics.ox.ac.uk/research/Projects/Global_Trade_Ethics_BB.pdf> [Eagleton-Pierce, "Reflections"]; Amrita Narlikar, "Law and Legitimacy: The World Trade Organization" in David Armstrong, ed*, Handbook of International Law* (London: Routledge, 2008) 294 at 295; Amrita Narlikar, "Moving Beyond Fairness: Improving the Legitimacy of the World Trade Organization" in Matthew Eagleton-Price, Emily Jones & Kalypso Nicolaidis, eds, *Building Blocks for a Global Trade Ethics: A compendium of the Oxford Programme on Global Ethics* (Oxford: Oxford University and German Marshall Fund, 2009) 22 at 24, online Center for International Studies, Oxford University <http://cis.politics.ox.ac.uk/research/Projects/Global_Trade_Ethics_BB.pdf> [Narlikar, "Moving"]; Sarah Joseph, "Democratic Deficit, Participation and the WTO", in Sarah Joseph, David Kinley & Jeff Waincymer, eds, *The World Trade Organization and Human Rights*, Vol 313 (Edward Elgar Publishing, 2009),

or reach a decision. It also extends to issues of public accountability. Alternatively, *output legitimacy* is related to the substantive results of a rule or a decision. It is often described as referring to the effectiveness of the organization in the achievement of its goals, the production of public goods or fair outcomes, or also, on its overall efficiency.

3.2.1. Input legitimacy

The two components of input legitimacy are procedural fairness and public accountability. Procedural fairness is centered on the participation of WTO Members (i.e. internal transparency and participation). According to this view, it is the fairness *per se* of the decision-making processes which confers legitimacy to the WTO. This view is inspired largely by sociological studies' findings according to which legitimacy is not dependent upon the perception of fairness or correctness of the *outcomes*, but on whether the *processes* were fair or correct.[357] The fairness of the processes on its own bolsters the acceptance of the outcomes and the degree of perceived legitimacy of the WTO.

Some commentators have advanced that procedural fairness should be complemented with a *qualitative* requirement, such as Habermas-inspired decision-making by deliberation and rational discourse.[358] For Habermas, it is not enough to have fair procedures, but legitimacy is also dependent upon the existence of a dialogue, which consists in "the exchange of information and arguments by advancing, supporting and criticizing different proposals and offering reasons for

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Monash University Faculty of Law Legal Studies Research Paper No 2009/48 at 314, online: <SSRN http://ssrn.com/abstract=1899405> [Joseph, "Democratic Deficit"]; Alexia Herwig & Thorsten Hüller, "Towards Normative Legitimacy of the World Trade Order" in Christian Joerges & Poul Kjaer, eds, *Transnational Standards of Social Protection – Contrasting European and International Governance* (Oslo, University of Oslo, 2008) 223 at 232 [Herwig & Hüller, "Towards Normative Legitimacy"]; Elsig, "The WTO's Legitimacy Crisis", *supra* note 79 at 84-86.

[357] See e.g. Lind & Tyler, *The Social Psychology*, *supra* note 324 at 26; Thibault & Walker, "A Theory of Procedure", *supra* note 324; Tyler, "Psychological Perspectives", *supra* note 305 at 378; Leventhal, "Equity Theory", *supra* note 324; Jonathan GS Koppell, *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (Chicago: University Chicago Press, 2010) at 58 [Koppell, *World Rule*].

[358] Krajewski, "Democratic Legitimacy", *supra* note 8 at 171; Cottier, "The Legitimacy of WTO Law", *supra* note 77 at 19; Kapoor, "Deliberative Democracy", *supra* note 289 at 523-25. Habermas' concept of legitimacy has both a qualitative and a procedural element. It calls upon the need of a 'public sphere' in which citizens deliberate dialogically that is based on (i) reasoned dialogue which allows better arguments in various forms of deliberation and (ii) procedures that secure fair bargaining processes, see: Kapoor, "Deliberative Democracy", *supra* note 289 at 523-24, citing Jürgen Habermas, "Three Normative Models of Democracy" in Seyla Benhabib, ed, *Democracy and Difference* (Princeton: Princeton University Press, 1996) 21 at 24.

the positions taken."[359] It is a dialogue based on "arguing" and "not bargaining."[360] Consensus should be reached only "through the (unforced) 'force of the better argument', that is, only when every participant accept explanations and decisions as reasonable."[361] In others words, following Habermas' concept, some commentators advance that it is the *quality* of consensus-making (i.e. the reasoned dialogue) which can lead to WTO legitimacy and bring about just and democratic outcomes.[362] As applied to the WTO rulemaking processes, the qualitative element would require that the process of consensus building leading up to the creation of rules and decisions be carried out through a reasoned dialogue, by way of arguing and not bargaining, until every participant accepts the explanations and the results as reasonable.[363] This view falls under the 'community' or 'constitution' conception of the WTO. It does not reflect WTO Members' vision regarding the nature of the WTO[364] and, therefore, should be discarded for evaluating the rulemaking processes in this thesis.

The second component of input legitimacy is public accountability. Political scientists have argued that state consent and fair participation was not a sufficient condition for the legitimacy of international organizations, including the WTO.[365] Professors Buchanan and Keohane advanced that consent as the basis of a legitimacy theory for the WTO is weakened by the fact that there are some obvious economic disadvantages of not being a member of the major international economic institutions, such as the WTO, which makes it a nonviable option for a state. They state: from the standpoint of a particular weak state, participation in the WTO "is

[359] Krajewski, "Democratic Legitimacy", *supra* note 8 at 173.
[360] *Ibid* at 173.
[361] Kapoor, "Deliberative Democracy", *supra* note 289 at 524.
[362] *Ibid*. See also Eagleton-Pierce, "Reflections", *supra* note 356 at 21.
[363] Krajewski, "Democratic Legitimacy", *supra* note 8 at 173; Kapoor, "Deliberative Democracy", *supra* note 289 at 524. Similarly, Professors Howse's and Nicolaidis' view about WTO legitimacy also contains some qualitative elements in that it requires some important levels of "democratic contestability" and the inclusion of the views of those "who are entitled to influence the shape o the system", see: Howse & Nicolaidis, "Enhancing WTO Legitimacy", *supra* note 86 at 74.
[364] See Section 3.2 above.
[365] Buchanan & Keohane, "The Legitimacy of Global Governance", *supra* note 302 at 39 ("A more reasonable position would be that there is a *strong presumption* that global governance institutions are illegitimate unless they enjoy the ongoing consent of democratic states. Let us says, then, that ongoing consent by rights-respecting democratic states constitutes *the democratic channel* of accountability." [emphasis in the original]); Howse, "The Legitimacy of the WTO", *supra* note 78 at 360; Bernstein, *The Elusive Basis*, *supra* note 296 at 11; Bodansky, "Legitimacy", *supra* note 315 at 710; Meyer & Sanklecha, "Introduction", *supra* note 288 at 2-5.

hardly voluntary, since the state would suffer serious costs by not participating."[366] Additionally, they argue that there is a gap between consent given by states who participate in the WTO and the will of the people. In fact, state consent is usually given by the executive branch of government, which is not democratically elected by the people. Therefore, on its own, the executive branch of government does not have the requisite legitimacy to consent to the creation of rules that bind national citizens.[367] Even if one can justify the chains of delegation stretching from the individual citizen to government representatives, Professors Buchanan and Keohane contend that "at some point the impact of the popular will on how political power is used becomes so attenuated as to be normatively anemic."[368] Hence, this debatably 'democratic gap' between state consent and the will of the people have led scholars to argue that legitimacy of the WTO is dependent upon the existence of some degree of accountability to the general public.[369]

Accountability to the public is, indeed, arguably a necessary criterion for the legitimacy of the WTO. In fact, in the last decades, there have been increasing demands, from both the civil society and some commentators, for a need of a more direct link between the WTO and the public.[370] The WTO's agenda, which was traditionally focused on simple tariff elimination, has had a growing focus on the reduction of non-tariff barriers to trade, which in turn implies the adoption of measures that require the coordination of policies involving social values. These measures, linked with social values and aimed at the reduction of non-tariff barriers, can not

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[366] Buchanan & Keohane, "The Legitimacy of Global Governance", *supra* note 302 at 37. Professor Howse also shares this view, see: Howse, "The Legitimacy of the WTO", *supra* note 78 ("the value of consent on its own terms" . . . "turns out to be inherently limited or insufficient. . . . [T]he WTO context poses a number of problems . . . relat[ing] to the complexity of the relationship between multilateral rule-creation, coercion, and sovereign inequality." at 360).

[367] See also Joseph, "Democratic Deficit", *supra* note 356 ("There is commonly little democratic input into a State's decision to join the WTO, even though that decision generates binding WTO obligations which can have a profound impact on people's livelihoods. For example, ratification is often a function of the executive government, rather than the more representative legislative arm of a national government." at 315).

[368] Buchanan & Keohane, "The Legitimacy of Global Governance", *supra* note 302 at 37-38. See also Krajewski, "Legitimising", *supra* note 64 at 87.

[369] See e.g. Joseph, "Democratic Deficit", *supra* note 356 at 315; Buchanan & Keohane, "The Legitimacy of Global Governance", *supra* note 302 at 37-38; Krajewski, "Legitimising", *supra* note 64 at 87; Daniel C Esty, "Linkages and Governance: NGOs at the World Trade Organization" (1998) 19(1) U Pa J Int'l Econ L 709 at 716-26 [Esty, "Linkages"]; Daniel C Esty, "We the People: Civil Society and the World Trade Organization" in Bronckers & Quick, *supra* note 102, 87 at 89-99.

[370] See e.g. Daniel C Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion" (1998) 1(1) J Int'l Econ L 123 at 123-26 [Esty, "NGOs at the WTO"]; Esty, "Linkages", *ibid* at 716-26; Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17(1)U Pa J Int'l Econ L 331 at 331-40; Steve Charnovitz, "Opening the WTO to Nongovernmental Interests" (2000) 24(1&2) Fordham Int'l LJ 173 at 173-84 [Charnovitz, "Opening"].

only potentially conflict with national values, but they also exert a more direct effect on individuals.[371] On the basis that citizens are finding themselves more directly affected by the measures negotiated at the international level, it becomes increasingly difficult to justify a model of legitimacy for the WTO strictly based on the consensual participation of states without any link to the public. Thus, a concept of normative legitimacy for the WTO necessarily requires a certain degree of public accountability, while also taking into account Members' normative value about the intergovernmental nature of the WTO.

3.2.2. Output legitimacy

Output legitimacy is related to the outcomes of the WTO's rules and decisions. From a sociological perspective, it has been advanced that output legitimacy was significant as it can assist the WTO to gain authority and public acceptance based on "*reason* and the efficacy of the outcomes it generates."[372] Output legitimacy comprises three components: (i) achievement of WTO's objectives; (ii) fairness of the outcomes; and (iii) efficiency.

First, commentators have argued that, on the output side, the legitimacy of the WTO can be measured by the effectiveness of the rule or organization in achieving its goals and in contributing to the achievement of specific policy objectives.[373] Some have said that there is a need to ensure that the WTO can provide "the right answer from the trade perspective" and also that it is "capable of cross-issue balancing where other values (for example, environmental concerns) are at play."[374]

Second, some scholars have advanced that the standard of output legitimacy is higher and should be assessed in regard to the ability of the WTO to: (i) deliver fair outcomes (such as the provision of certain public goods[375], the fair sharing of the benefits of the system[376] or the

[371] Bonzon, "Institutionalizing Public Participation", *supra* note 8 (The most "sensitive" measures are those in the areas of "trade in services, environmental and health protection, sanitary measures, and intellectual property". at 761); Cottier, "From Progressive Liberalization", *supra* note 7 at 779-83; Krajewski, "Democratic Legitimacy", *supra* note 8; Chutikul, "Options for a Parliamentary Dimension", *supra* note 8.
[372] Esty, "The WTO's Legitimacy Crisis", *supra* note 79 at 9 [emphasis in the original]; Smythe & Smith, "Legitimacy", *supra* note 88 at 33. For an analysis of WTO's output legitimacy, see: Howse, "The Legitimacy of the WTO", *supra* note 78 at 363-70.
[373] Keohane & Nye, "The Club Model", *supra* note 82 at 237; Krajewski, "Legitimising", *supra* note 64 at 84; Joseph, "Democratic Deficit", *supra* note 356 at 314; Eagleton-Pierce, "Reflections", *supra* note 356 at 18.
[374] Esty, "The WTO's Legitimacy Crisis", *supra* note 79 at 18.
[375] Krajewski, "Democratic Legitimacy", *supra* note 8 at 169; Narlikar, "Moving", *supra* note 356 at 24.

generation of outcomes that comport community's values and traditions[377]); (ii) take into account the distribution of costs and benefits resulting from governance[378] or (iii) reliably consider basic freedoms and the securing of basic material needs.[379]

The third component of output legitimacy is efficiency. It relates to the capacity of the WTO to efficiently resolve the problems that it was created to address, in terms of time and resources (human and monetary) invested. In the words of Professor Narlikar, "[e]ven if an institution manages to acquire a reputation of ensuring fair process and fair outcomes, its members would find it very difficult to legitimize their commitment to it if the time and/or resources spent in reaching these goals are disproportional to the accrued benefits."[380] Professor Koppell's empirical study also corroborates that efficacy is a component of social legitimacy, however to a less demanding extent. Indeed, its findings revealed that key actors of global governance believe that an international organization should produce "a state of affairs better than that which would have existed in the absence of the organization."[381]

Overall, output legitimacy is not only limited to whether the WTO achieves its goals and produces common goods, but also if it is able to achieve desired outcomes in a "resource-efficient and timely fashion."[382] It should be noted that the definitions of WTO's objectives and the fairness of its outcomes is, however, largely dependent upon one's vision about the nature of the WTO (whether it is a community/constitution or a simple contract).[383]

3.3. A Model of Legitimacy for the WTO Rulemaking Processes?

The concepts of input and output legitimacy should be used as a framework to evaluate the legitimacy of the WTO rulemaking processes and the WTO Members' shared normative values

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[376] Rubens Ricupero, "Rebuilding Confidence in the Multilateral Trading System: Closing the 'Legitimacy Gap'" in Gary P Sampson, ed, *The Role of the World Trade Organization in Global Governance* (Tokyo: United Nations University Press, 2001) 37 at 38.
[377] Esty, "The WTO's Legitimacy Crisis", *supra* note 79 at 18.
[378] Narlikar, "Moving", *supra* note 356 at 24.
[379] Herwig & Hüller, "Towards Normative Legitimacy", *supra* note 356 at 252; Koppell, *World Rule, supra* note 357 at 58.
[380] Narlikar, "Moving", *supra* note 356 at 24.
[381] Koppell, *World Rule, supra* note 357 at 58-59.
[382] Narlikar, "Moving", *supra* note 356 at 24.
[383] See e.g. Steger, "The Future of the WTO", *supra* note 57 at 805-07.

should serve as benchmarks to assess the degree of legitimacy of the rulemaking processes, i.e. whether they can be *justified* in terms of Members' shared normative values.

The concepts of input and output legitimacy can be broken down into three general legitimacy criteria, which can easily be applied to the rulemaking processes. Input legitimacy comprises the criteria of *representativeness* of Members (as it relates to procedural fairness) and *openness* (which refers to public accountability). As for output legitimacy, its components can be encompassed by the criteria of *effectiveness* (i.e. relating to the achievement of WTO's objectives and efficiency) and *representativeness* (i.e. regarding the fairness of the outcomes, which will be evaluated from a procedural fairness standpoint). A fourth criterion should be added to the framework for evaluating the legitimacy of the WTO rulemaking processes, which is *legality*. As explained in Section 3.1, legality corresponds to Beetham's legitimacy conception's first condition (conformity to established rules) and third condition (evidence of consent).

As for the Members' shared normative values, they should serve as benchmarks for assessing each of these four criteria. The criterion of *representativeness* should be evaluated with respect to the standard of 'procedural equality' of Members, including equality in participation and in inputs. The criterion of *openness* should take into account the intergovernmental nature of the WTO, i.e. the principle according to which Members should remain the principal subjects and stakeholders of the WTO at the expense of non-state actors' participation, and the value of nation-state sovereignty, i.e. that the WTO should not impact the states' modes of national representative decision-making including their representation at the international level. Finally, the criterion of *effectiveness* should be assessed on the basis of the Member-driven nature of the WTO. Indeed, WTO's objectives should be defined as the ones that the Members together decide upon. As for the fairness of the outcomes, if the WTO is to be seen as a contract or a simple trade agreement, then *la loi des parties* (i.e. the law of the contracting parties) should apply. Accordingly, what should be considered as fair is whatever the Members agree upon.[384] Therefore, the fairness of the outcomes should be evaluated from a procedural fairness

[384] Ehlermann & Ehring, "The Authoritative Interpretation", *supra* note 114 ("what matters is that the Members agree" at 809 and n 17).

standpoint: procedural equality of Members in inputs as reflected in the final outcomes (which will be addressed by the criterion of *representativeness*).

Following this framework, the WTO rulemaking processes can be said to be legitimate, if their scope of legality, effectiveness, representativeness and openness can be *justified* in terms of Members' shared normative values, i.e. procedural equality, Member-driven, nation-state sovereignty and intergovernmental nature of the WTO. The following section presents the methodology that will be used for assessing the WTO rulemaking processes.

4. HOW TO ASSESS THE LEGITIMACY OF THE WTO RULEMAKING PROCESSES? METHODOLOGY AND DATA ANALYSIS

How can the legitimacy of the WTO rulemaking processes be evaluated? It has been generally recognized in the literature that legitimacy can only be evaluated as a matter of degree.[385] Indeed, the legitimacy of the WTO rulemaking processes is not something that can be assessed as a matter of all or nothing. Legitimacy is not a question that can be answered by 'yes' or 'no'. Instead, it is a concept that can be more easily judged on a spectrum, as a matter "of more or less."[386]

As a result, this section develops a *multidimensional interval scale (interval scale)* (illustrated in Table 3.1 below), derived from social sciences research methods, according to which the legitimacy of the WTO rulemaking processes will be evaluated in a case studies analysis to be performed in the following chapters.[387] The development of the *interval scale* is an original contribution of this thesis. What is 'scaling'? And why is it appropriate for evaluating the legitimacy of the WTO rulemaking processes? Scaling, according to Professors William Trochim and James P. Donnelly, "is the branch of measurement that involves the construction of an instrument that associates *qualitative constructs* with *quantitative metric units.*"[388] It allows

[385] Franck, *The Power of Legitimacy, supra* note 326 at 26; Keohane, "Global Governance", *supra* note 91 at 101.
[386] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 623. See also, Keohane, "Global Governance", *supra* note 91 ("[L]egitimacy expresses a threshold value, in a non-ideal world, for the conditions under which an institution has the right to rule." at 100. . . . "In evaluating the legitimacy of an institution, we do not merely assess whether it is legitimate, but how far above or below the threshold of legitimacy it falls." at 101).
[387] Chapters 3, 4 and 5.
[388] William Trochim & James P Donnelly, *The Research Methods Knowledge Base,* 3d ed (Mason, Ohio: Atomic Dog, 2006) at 132 [Trochim & Donnelly, *The Research Methods*] [emphasis added].

the measurement of "unmeasurable constructs"[389], such as legitimacy, which is a creation of theoretical definitions. Scaling is, in other words, the "assignment of object to numbers according to a rule."[390]

Table 3.1: Multidimensional Interval Scale for the Legitimacy of the WTO Rulemaking Processes

CASE STUDY											
CRITERIA	**Weight (%)**	**Indicators**	**Weight (%)**	**Interval Scale**					**Criteria Score (%)**	**WEIGHTED SCORE**
				1	2	3	4	5		
LEGALITY	20	Ind #1	100							
		Rating	100							
EFFECTIVENESS	25	Ind #1	33.3							
		Ind #2	33.3							
		Ind #3	33.3							
		Rating	100							
REPRESENTATIVENESS	35	Ind #1	33.3							
		Ind #2	33.3							
		Ind #3	33.3							
		Rating	100							
OPENNESS	20	Ind #1	70							
		Ind #2	30							
		Rating	100							
TOTAL / RATING	100									
RATING STANDARD										

In this thesis, the 'qualitative constructs' are four legitimacy criteria (legality, effectiveness, representativeness and openness) that were derived from the input and output conceptions of legitimacy.[391] In order to facilitate the evaluation, each criterion will be broken down into a

[389] *Ibid* at 132.
[390] *Ibid* at 133.
[391] This method is referred as 'translation validity' or 'content validity'. It is used when there is a good, detailed definition of the construct (i.e. here legitimacy as applied to the WTO rulemaking processes) and that the researcher can check the operationalization (i.e. here the WTO rulemaking processes) against it, see: Trochim & Donnelly, *The Research Methods, supra* note 388 at 67.

number of indicators and each indicator will be attributed a weight in relation to its importance for the specific criterion of legitimacy.[392]

The indicators for each criterion of legitimacy will be evaluated on a scale. The level of measurement used for the scale will be based on 'interval', from 1 to 5 inclusively, with '1' corresponding to the least degree of congruity with the indicators of legitimacy and '5' corresponding to the maximum degree of congruity with the indicators of legitimacy. The *interval scale* will not have a meaningful 'absolute zero', because legitimacy can only be evaluated as a matter of more or less. It is not an absolute measure.[393] However, the distance between the different attributes *does* have meaning; it will provide an indication of different 'degrees' of legitimacy which are interpretable (as explained in Section 4.3 below).[394]

The *interval scale* is 'multidimensional' because the legitimacy of the WTO rulemaking processes has four dimensions (i.e. four criteria): legality, effectiveness, representativeness and openness. However, each criterion does not have the same weight with respect to its significance for the legitimacy of the WTO rulemaking processes as a whole. As a result, each criterion will be attributed a specific weight as a translation of its importance for the overall legitimacy of the WTO rulemaking processes (Section 4.2). Thus, this is how the *interval scale* allows the 'qualitative constructs' (i.e. the four criteria of legitimacy) to be evaluated with 'quantitative metric units'.

Finally, the data used to evaluate the 'WTO rulemaking processes' will be the rulemaking processes that have led to the adoption of the following rules or agreements: the *TRIPS and Public Health Case*, the *Basic Telecoms Agreement* and the *Agreement on Trade Facilitation* (described in Section 4.4).

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[392] The four legitimacy criteria and their specific indicators are presented in Section 4.1 below. Trochim & Donnelly, *The Research Methods, supra* note 388 at 67.
[393] Bodansky, "The Legitimacy of International Governance", *supra* note 290 at 623. See also, Keohane, "Global Governance", *supra* note 91 ("[L]egitimacy expresses a threshold value, in a non-ideal world, for the conditions under which an institution has the right to rule." at 100. . . . "In evaluating the legitimacy of an institution, we do not merely assess whether it is legitimate, but how far above or below the threshold of legitimacy it falls." at 101); Franck, *The Power of Legitimacy, supra* note 326 at 26.
[394] Trochim & Donnelly, *The Research Methods, supra* note 388 at 104.

4.1. Legitimacy Criteria Applied to the WTO Rulemaking Processes (the 'Qualitative Constructs') and their Indicators of Legitimacy

The assessment of the legitimacy of the WTO rulemaking processes will consist of an application of the four legitimacy criteria (i.e. legality, effectiveness, representativeness and openness), as well as their specific indicators of legitimacy, that will be used as the 'qualitative constructs' to conduct this analysis. The following sections describe these criteria and indicators, as well as the methodology that will be used to apply them.

4.1.1. Legality

The first criterion against which the legitimacy of the rulemaking processes will be evaluated is *legality.*

4.1.1.1. Analysis

The criterion of legality fulfils two conditions of Beetham's legitimacy conception.[395] First, it ensures that the rulemaking processes conform to existing rules and procedures about decision-making and rulemaking laid out in Article IX and X of the *WTO Agreement.* Second, it acts as evidence of Members' consent to be bound by the outcomes produced by the rulemaking processes. Indeed, by acceding to the WTO, Members have consented to the rules of the organization, including those about rulemaking and decision-making. Thus, if those rules are followed, it can be found that there is evidence of Members' consent regarding the rulemaking processes.

4.1.1.2. Indicator of legitimacy and methodology

4.1.1.2.1. *Legality − Correctness of rule and procedure*

The criterion of legality will comprise only one indicator of legitimacy, accounting for the entire weight (100 percent) of the criterion:

[395] See Section 3.1.

LEGALITY	Weight
Indicator:	
1. *Was the correct rulemaking rule or procedure followed for the implementation of the negotiated policy?(Legality − Correctness of rule and procedure used)*	100%

The methodology for the application of the indicator of legality is straightforward: it will evaluate whether the correct rule or procedure was followed for the creation of the rule or agreement (i.e. the negotiated policy) assessed by the case study. The methodology consists simply of a basic legal analysis.[396]

4.1.2. Effectiveness

The second criterion against which the legitimacy of the WTO rulemaking processes will be evaluated is *effectiveness*.

4.1.2.1. Analysis

The criterion of effectiveness will be based on two components of WTO's output legitimacy: its ability to achieve its own objectives and its efficiency. [397] How these two factors can apply to the WTO rulemaking processes? What minimum threshold should apply to *justify* the rulemaking processes' effectiveness in terms of Members' shared normative values? First, considering that Members value a Member-driven organization, the rulemaking processes should be evaluated with respect to the specific objective laid out in the negotiating mandate for the implementation of a policy which, in practice, is adopted by consensus of the Members. Therefore, if it is found that the negotiated outcome addressed the goal set out in the negotiating mandate, it can be implied that the rulemaking processes met their 'Member-determined' objectives.

[396] The legal analysis will be performed in light of the WTO rulemaking and decision-making rules and procedures described in Chapter 2, Section 3.
[397] These are described in Section 3.2.

Second, efficiency should be evaluated by analyzing whether Members were able to reach consensus in a timely and effective manner in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate, including its mandated time frame.[398]

4.1.2.2. Indicators of legitimacy and methodology

The criterion of effectiveness will be measured against the following three indicators, all accounting for an equal weight in the pondering of the entire criterion of effectiveness, considering that they are all equally essential in the determination of effectiveness:

EFFECTIVENESS	Weight
Indicators:	
1. *Did the final negotiated outcome address the goal as set out in the negotiating mandate? (Effectiveness − Mandate)*	33.3 %
2. *Did the rule/agreement or the negotiated policy come into effect? (Effectiveness − Policy)*	33.3 %
3. *Were Members able to reach consensus in a timely and effective manner in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate? (Effectiveness − Process)*	33.3 %

4.1.2.2.1. *Effectiveness − Mandate*

The first indicator of effectiveness, *Effectiveness − Mandate,* will evaluate the output legitimacy of the negotiated outcome, i.e. whether the negotiated outcome addressed the objective laid out in the negotiating mandate. It focuses on whether the rule or the agreement agreed upon accomplishes the objectives that were originally anticipated in the negotiating mandate.

[398] See e.g. Koppell, *World Rule, supra* note 357 at 40. Efficiency can be sometimes defined in terms of costs relative to benefits, however, in this study the benefits are covered by the other three criteria, and efficiency deal only with the costs (in terms of time and human resources), see e.g.: IEO, IMF, *Governance of the IMF: An Evaluation* (2008) at 4, n 5, online: IEO, IMF <http://www.ieoimf.org/eval/complete/pdf/05212008/CG_main.pdf>; Esty, "Good Governance at the WTO", *supra* note 80 at 518.

4.1.2.2.2. *Effectiveness − Policy*

The second indicator of effectiveness, *Effectiveness − Policy,* will assess whether the rule or the agreement came into effect or, in the case where they did not, whether the negotiated policy came into force through other legal means. This indicator is only focused on whether, at the end of the day, the rule, the agreement or the negotiated policy was into effect, regardless of how or through which means it entered into effect.

4.1.2.2.3. *Effectiveness − Process*

The third indicator, *Effectiveness − Process,* is focused on the effectiveness of the *process* that was used to arrive at the conclusion of a rule or an agreement. It will evaluate whether the process was carried out in a timely and effective manner, in light of the difficulty of the subject-matter that needed to be addressed and the time frame (and its flexibility, if applicable) that was set out in the negotiating mandate. This will be assessed by examining the negotiation processes that were followed by a specific council or committee, which are generally reported publically by the Chair. The analysis will also focus on whether Members made an effective use of the rules considering the following elements: Did they use the flexibilities provided by the rules about rulemaking and decision-making? Was the time frame urgent to address the specific policy objective? Did the policy object have to come into effect within a specific time period?

4.1.3. Representativeness

The third criterion against which the legitimacy of the WTO rulemaking processes will be evaluated is *representativeness.*

4.1.3.1. Analysis

The criterion of representativeness is derived from two components of input and output legitimacy: procedural fairness and fairness of the outcomes.[399] Procedural equality should constitute the minimum threshold to *justify* the rulemaking processes' representativeness in terms of Member's shared normative values. As a result the rulemaking processes should be: transparent and open to the participation of all Members (section 4.1.3.1.1); representative of all

[399] See Section 3.2.

Members (section 4.1.3.1.2); and the outcomes should reflect inputs from a balanced set of interests expressed by the Members (section 4.1.3.1.3).

4.1.3.1.1. *Internal transparency*

For the WTO rulemaking processes, internal transparency means easily available information regarding every stage of the rulemaking processes, including more specifically the agenda-setting and consensus-building processes.[400] It should assess whether the rulemaking processes were clear, predictable, known in advance by all WTO Members, and upheld vigilantly.[401] Members should be able to know beforehand how the rulemaking process for a specific subject matter will take place (i.e. the processes that will be used), what the role of WTO officials will be (chairpersons, the Director-General and the Secretariat), how the agenda will be agreed, how consensus will be built, how decisions will be reached and how the results will be implemented.[402]

Inclusiveness means the ability of every WTO Member to participate in the meetings related to every stage of the rulemaking processes.[403] It should assess whether all Members wishing to be included were allowed to attend all meetings, whether of a plenary or informal nature.[404] It should also focus on whether the use of informal processes was predictable and known in advance by all Members in order to allow all Members to prepare adequately and manifest their intention to participate in such processes.[405]

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[400] See e.g. Albin, "Using Negotiation", *supra* note 89 at 764; Herwig & Hüller, "Towards Normative Legitimacy", *supra* note 356 at 252 ("publicity").
[401] Smythe & Smith, "Legitimacy", *supra* note 88 at 33; Koppell, *World Rule, supra* note 357 at 58.
[402] See e.g. Esty, "Good Governance at the WTO", *supra* note 80 ("The legitimacy of governance depends in no small part on having those who are governed understand how decisions are made and why a particular outcomes emerge." at 520).
[403] See e.g. Albin, "Using Negotiation", *supra* note 89 at 764; Koppell, *World Rule, supra* note 357 at 58 (arguing that the rulemaking body should make its interactions with interested parties known to all other such parties).
[404] Blackhurst & Hartridge, "Improving", *supra* note 58 (Blackhurst & Hartridge argue for the internal and external credibility of the WTO all Members wishing to be included in a small group of informal meeting should have the capacity to do so. And when the number of Members wishing to be included is too large to be accommodated in a small group setting, the "*basis for putting together such a sub-group, for deciding which delegations will be in the room and which delegations are excluded*" should be changed. "*The new basis needs to be one that is fully transparent, predictable, equitable, and legitimate in the eyes of all WTO Members*." at 708 [emphasis in the original]).
[405] Singh, "The WTO and Legitimacy", *supra* note 81 at 354. As regards the sociological perspective, Professor Bohne's empirical study on the WTO concluded that representatives of NGOs view the prevalence of informal decision-making processes in the WTO as detrimental to the legitimacy of the organization, see Eberhard Bohne,

4.1.3.1.2. *Representativity*

The factor of representativity should be evaluated in regard to the participation and representation of the interests of all Members expected to be affected and/or bound by the outcome in all stages of the rulemaking processes with respect to a specific subject matter.[406] Three forms of participation/representation, from the more to the less onerous, will be distinguished:

'Direct participation'	*A Member directly participates in the meetings dealing with the specific subject-matter or submits an individual communication.*[407]
'Direct representation'	*A Member's interests are directly represented by another Member on its behalf.*
'Balanced representation'	*A representative/even-handed group of Members are present and participate in the process. Every Member may not be present or involved in every single stage of the process or decision, but a balanced set of interests are represented.*[408]

The optimum and most demanding form of participation is 'direct participation', which requires the direct participation of Members in the processes.[409] Second, to a lesser demanding degree, 'direct representation' stands for Members that are directly represented by other Members, which are in most cases part of an official coalition. Third, the minimum standard of participation is 'balanced representation'. In such case, a Member does not participate directly in the processes and is also not directly represented through a coalition. Instead, its interests are indirectly represented through the participation of other Members with interests alike or with a similar level of economic development or part of a similar geopolitical grouping. Thus, there is

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The World Trade Organization: Institutional Development and Reform (New York: Palgrave Macmillan, 2010) at 162-63. See also Esty, "Good Governance at the WTO", *supra* note 80 ("No one wants to participate in a decision process where the rules of the game are constantly shifting." at 521).

[406] See e.g. Albin, "Using Negotiation", *supra* note 89 at 764; Herwig & Hüller, "Towards Normative Legitimacy", *supra* note 356 at 252.

[407] Albin, "Using Negotiation", *supra* note 89 at 764.

[408] *Ibid.*

[409] *Ibid.*

'balanced representation' when a representative group of Members, representing a balanced set of interests, are present and participate in the processes.[410]

4.1.3.1.3. *Effective participation*

Effective participation should focus on whether the content of the negotiation mandate and the final outcome represent a balanced set of interests that were expressed, including those from Members from all levels of development and geopolitical groupings. It should also examine the extent to which Members are free to accept or reject the result of a decision.[411]

4.1.3.2. Indicators of legitimacy and methodology

The criterion of representativeness will be composed of the following three indicators, all accounting for an equal weight in the pondering of the assessment of the criterion of representativeness, considering their equal importance in the evaluation of the degree of representativeness:

REPRESENTATIVENESS	Weight
Indicators:	
1. *Was the rulemaking process open and transparent for all Members expected to be bound by the outcome at all stages of the process? Were the meetings announced in advance? Were they open to participation from all Members expected to be bound by the outcome? Were these Members given an opportunity to review and comment on draft texts? (Representativeness −Internal transparency)*	33.3%
2. *Did a representative group of Members, representing a balanced set of interests, participate in the various meetings and submitted written communications at all stages of the process? (Representativeness − Representativity)*	33.3%
3. *Did the negotiating mandate and the final outcome represent a balanced set of interests that were expressed? Were Members free to accept or reject the results of a decision? (Representativeness − Outcome)*	33.3%

[410] *Ibid.*
[411] *Ibid* at 765 (arguing for the requirement of "voluntary agreement", i.e. "the acceptance and agreement of one's own volition, freedom from imposition"). See also Lind & Tyler, *The Social Psychology, supra* note 324 at 215.

4.1.3.2.1. *Representativeness − Internal transparency*

The first indicator of representativeness, *Representativeness − Internal Transparency,* evaluates the degree of internal transparency and inclusiveness of the rulemaking processes leading up to the adoption of the rule or agreement in each case at all stages of the process (agenda-setting, consensus-building and implementation, if applicable). Part of this indicator will assess whether the meetings were announced in advance and whether they were open to participation from all Members expected to be bound by the outcome and wishing to be included in these meetings.

The evaluation of *Representativeness − Internal Transparency* will take into account the following rules of procedure or established practices which governed the scope of internal transparency for all three case studies. As regards the meetings being announced in advance, from the evidence of the data collected, all the official meetings of the councils and committees that will be assessed in the three case studies[412] generally follow Rules 2 and 3 of the *Rules of Procedure for Meeting of the General Council*[413]*,* which provide that meetings should be convened by a notice issued at least ten days prior the date set for the meeting together with a list of the items proposed for the agenda of the meeting. It will be assessed whether these rules were respected in practice.

As to whether the meetings were open to participation from all Members expected to be bound by the outcome, from the evidence of the data collected, the following formats of meetings have taken place in the three case studies:

(i) *Formal meetings:* In formal meetings, Members generally state their official position for public record on the issue discussed. By default, all formal meetings of the councils and committees are open to all Members[414], or in the case of the meetings of the

[412] I.e. the meetings of the General Council, the Council for TRIPS, the Council for Trade in Services, the Council for Trade in Goods, the Group on Basic Telecommunications (GBT), the Negotiating Group on Basic Telecommunications (NGBT), the Negotiating Group of Trade Facilitation (NGTF), and the Preparatory Committee on Trade Facilitation (PCTF), see Section 4.4 below; *Rules of Procedure for Meetings of the Council for TRIPS*, *supra* note 210; *Rules of Procedure for Meetings of the Council for Trade in Services*, *supra* note 210; *Rules of Procedure for Meetings of the Council for Trade Goods*, *supra* note 210.
[413] *Rules of Procedure for Meetings of the General Council*, *supra* note 209.
[414] See e.g. *ibid*, Rules 8 and 9.

Negotiating Group on Basic Telecommunications (NGBT), they were open to all Members expected to be bound by the outcome.[415]

(ii) *Open-ended informal meetings*: Open-ended informal meetings are meetings that were held by the Chair of the council or the committee. Although there is no official documentation or clear data to this effect, it appears that these meetings were also open to all Members, but they provided an off-the-record setting for real negotiations, i.e. floating ideas and exploring potential areas of compromises. The Chair usually announced in advance in the preceding official meeting that an informal meeting would be held, and he would generally report the outcome of the informal meeting at the subsequent official meeting.

(iii) *Consultations*: Consultations, whether of a bilateral, small group or large group format, were held either between Members within themselves, or conducted informally by the Chair. In most cases in the three case studies, the Chair announced in advance that consultations would be held at a certain period of time in the near future. There has been no record, either formal or informal, of the discussions held during the consultations.

(iv) *Mini-ministerial meetings*: Mini-ministerial meetings are informal meetings held to provide leadership for WTO's future work. They are conducted outside the walls of the WTO and are generally attended by ministers or senior capital-based officials where participation is "meant to be somehow representative of the full WTO Membership."[416] From the evidence of the data collected for the three case studies, these meetings have been rarely considered as 'WTO meetings'[417], with a few exceptions during the negotiations of the TRIPS and Public Health Case, where they were attended by the WTO Secretariat and the Director-General.

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[415] The meetings of the NGBT were only open to those Members that had manifested their interest to participate in the negotiations or to attend as observers, see e.g. WTO, NGBT, *Report of the Meeting* (held on 6 May 1994), WTO Doc TS/NGBT/1 at paras 3-4, online: WTO <http://docs.wto.org> [*NGBT Meeting of 6 May 1994*].

[416] Robert Wolfe, "Informal Political Engagement in the WTO: Are Mini-Ministerials a Good Idea?" in John M Curtis & Dan Ciuriak, eds, *Trade Policy Research 2004* (Ottawa: Minister of Public Works and Government Services, 2004) 27 at 38 [Wolfe, "Informal Political Engagement"] (providing an excellent discussion about mini-ministerial meetings).

[417] See Statement by former WTO Director-General MikeMoore in BG Chidyausiku, "Effective Participation of Developing Countries in the WTO Process", *Third World Network,* online: twnside.org <http://www.twnside.org.sg/title/twr153b.htm> [Chidyausiku, "Effective Participation"].

Representativeness − Internal Transparency will also assess whether Members expected to be bound by the outcome were given an opportunity to review and comment on draft texts at all stages of the rulemaking processes. This will be done by examining the negotiation processes that were followed by a specific council or committee, which are generally reported publicly by the Chair. Considering that a major portion of the rulemaking processes took place in informal meetings, part of the methodology used for the application of this indicator will also consist in an examination of the statements made by the representatives of the Members as to whether they had felt that the process was open and transparent. This methodology contains some limitations as it is restricted to the views of those representatives that made these statements and may be insufficient or not reflective of the overall process. However, from the evidence of the data collected in all three case studies, it has been proven to be a useful tool to provide general indications regarding the degree of internal transparency of the processes.

4.1.3.2.2. *Representativeness − Representativity*

The second indicator of representativeness*, Representativeness − Representativity,* assesses whether a representative group of Members, representing a balanced set of interests, participated in the various meetings and submitted written communications at all stages of the meetings. To evaluate whether there was participation by a 'representative group of Members', the analysis will focus on the participation of Members by level of development (section a) and by geopolitical groupings (section b). In addition, the methodology used for the evaluation of the participation and representation of Members in WTO meetings and through written submissions will be composed of a mix of quantitative (section c) and qualitative (section d) methodologies, as detailed below.

(a) classification of Members 'by level of development'

The classification of Members 'by level of development' (hereinafter 'categories of Members') will be divided into five groups, as described in the table below: Developed Members, BRIC Members, Developing Members, Least-Developed Country (LDC) Members, and EC/EU Members.[418]

[418] The exact Members composing each of these categories are described in Appendix 3 to this thesis.

Category of Members	Description
Developed Members & EC	*Considering that there no official classification for developed country Members in the WTO, for the context of this case studies analysis, the category of 'Developed Members & EC' will refer to the list of Organisation for Economic Co-operation and Development (OECD) Members[419], with the inclusion of the European Communities (EC)/European Union (EU) (but not including the EC/EU Members) and excluding Mexico and Korea, which designate themselves to be developing countries.[420]*
EC/EU Members	*The EC/EU Members will be placed in a separate category because they participate in the WTO only through direct representation by the EC/EU.[421]*
BRIC Members	*The BRIC Members consist of Brazil, Russia, India and China. However, since China and Russia only acceded the WTO respectively in December 2001[422] and August 2012[423], this category is referred to as 'Brazil & India' between the years 1995 and 2002 and as the 'BIC' (for Brazil, India and China) between 2002 and August 2012.*
LDC Members	*The LDC Members category corresponds to the one used in the WTO, which refers to those Member states designated as such by the United Nations Economic and Social Council.[424]*

[419] The list of OECD countries can be found in: OECD, *List of OECD Member Countries − Ratification of the Convention of OECD,* online: OECD <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm>.
[420] There is no official list of developing countries in the WTO system, rather the 'self-election practice' stands, see WTO eCampus <https://ecampus.wto.org/admin/files/Course_179/Module_538/ModuleDocuments/eWTO-M9-R1-E.pdf>. In addition to Korea and Mexico, Israel and Turkey also designate themselves as developing countries, see: Food and Agriculture Organization, *WTO Domestic Support Disciplines: Options for Alleviating Constraints to Stockholding in Developing Countries in the Follow-up to Bali,* FAO Commodity and Trade Policy Research Working Paper No 45 (Rome: FAO, 2014) at 3 n 5, online: FAO <http://www.fao.org/3/a-i3819e.pdf`>. However due to the fact that they are also OECD Members, they will remain part of the 'Developed Members & EC' category for the purpose of this thesis.
[421] Additional details on the reason why the EC/EU Members are treated as separate are provided below in this section.
[422] See WTO, *Member Information: China and the WTO,* online: WTO <http://www.wto.org/english/thewto_e/countries_e/china_e.htm>.
[423] WTO, *Accession of Russia, supra* note 3.
[424] The list of LDC WTO Members can be found in: WTO, *Least-Developed Countries,* online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm>.

Category of Members	Description
Developing Members	*The list of 'Developing Members' will be composed of the remaining Members, which are not part of the LDC Members and Developed Members categories.*

(b) classification of Members 'by geopolitical groupings'

The classification of Members 'by geopolitical groupings' (hereinafter 'groupings') will not be composed of the entire membership, but will include some groupings of Members classified according to their geopolitical identification along with some preeminent geopolitical coalitions that exist in the WTO as described in the table below: the QUAD, 'Other Developed Members', the EC/EU Members, BRIC Members, MERCOSUR, the African Group, and ASEAN.[425]

Geopolitical grouping	Description
QUAD	*The QUAD is composed of the United States, the EC/EU (excluding its Member states), Japan and Canada, which were actively involved as a coalition in the first decade of the WTO.*
EC/EU Members	*The EC/EU Members will be placed in a separate category because they participate in the WTO only through direct representation by the EC/EU.*[426]
'Other Developed Members'	*The 'Other Developed Members' grouping includes all of the Members from the 'Developed Country Members' category (described above), with the exclusion of the four QUAD Members and the EC/EU Members.*
BRIC	*The BRIC Grouping is identical to the BRIC category (described above).*

[425] The exact Members composing each of these groupings are described in Appendix 4 to this thesis.
[426] Additional details on the reason why the EC/EU Members are treated as separate are provided below in this section.

Geopolitical grouping	Description
MERCOSUR	*MERCOSUR is composed of Argentina, Bolivia, Paraguay, Uruguay and Venezuela.*[427] **Brazil is also a permanent Member of this coalition, however since it is already part of the 'BRIC' grouping, for the purpose of this thesis it will be excluded from the MERCOSUR grouping. Nonetheless, during some parts of the analysis, explicitly provided for, the participation of Brazil will also be counted as indirectly representing the interests of MERCOSUR Members (in the form of 'balanced representation', as defined below).*
African Group	*The African Group refers to the official list of Members part of this coalition posted on the WTO website.*[428]
ASEAN	*ASEAN refers to the official list of Members part of this coalition posted on the WTO website.*[429]

To evaluate the participation of Members in the rulemaking processes, both quantitative and qualitative methodologies will be used as discussed below.

(c) quantitative analysis

The quantitative analysis performed in this thesis is a significant contribution of this research.[430] Its methodology for the data collection is based, with some adaptations, on that used by Håkan Nordström from the Sweden National Board of Trade for a study on the participation of

[427] MERCOSUR, *MERCOSUR: En Pocas Palabras,* online: Mercosur.int <http://www.mercosur.int/t_generic.jsp?contentid=3862&site=1&channel=secretaria&seccion=2>. [MERCOSUR, *En Pocas Palabras*].
[428] WTO, *Groups in the WTO* (updated 10 September 2014), online: WTO <http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf>.
[429] *Ibid.*
[430] It consists in the compilation of twenty years of data spanning from 1994 to 2014 related to all three case studies with respect to each WTO Member's oral interventions in the meetings of the councils and committees dealing with the specific subject matter of the case study and each written communication submitted. It results in roughly eleven thousands (approximately 11 191) separate data entries regarding the participation of Members, which is presented according to two different classifications: by level of development and by geopolitical groupings.

developing countries in the WTO based on the 2003 official records.[431] The methodology used for the quantitative analysis in this case studies analysis consists of a compilation of all Members' oral interventions reported in the official minutes of the meetings that dealt with the specific subject matter of the case study in question, as well as all of the written communications that were submitted by Members. This quantitative analysis will disregard the *quality* of the content of each oral intervention or written communication; it will be purely *quantitative.* Considering that the most decisive negotiations took place in informal settings where little data is available, the quantitative analysis is useful to provide a certain indication (or a reflection) of the Members that were the most active in the processes. Indeed, the data collected reveals a certain degree of correlation between Members' participation in formal settings (the quantitative data) vs. their participation in informal settings, as reported in the secondary literature.

Both types of participation by means of oral interventions and written communications are significant. Participation by means of oral interventions provides an indication that a Member was actively involved in the rulemaking processes: it attended meetings (which is also an indication of its capacity) and had the opportunity to exchange views, dialogue and debate with other Members. Participation by means of written communications is also equally important as it provides the opportunity for Members to submit formal proposals reflecting a pre-established position and propose language, which may find its way in the text of the final outcome. Considering their nature, it is normal to expect that the number of oral interventions will be significantly higher than that of written communications for all categories/groupings of Members.

As regards the compilation of oral interventions, it will distinguish between 'direct participation' (the oral interventions that were made directly by the Member concerned) and 'direct representation' (the Members whose interests were voiced by another Member on their behalf). Thus, where a Member made a statement on the behalf of a group of Members (for e.g. the African Group composed of 42 Members), it will be counted as one 'direct representation' for each of the single 42 Members part of the African Group. Similarly, the written submissions will be separated between individual communications made by single Members and those that were

[431] Håkan Nordström, *Participation of Developing Countries in the WTO*, mimeo (2006) at 7, online: Noits <www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf> [Nordström, *Participation of Developing Countries*].

made jointly by co-sponsors. For example, a joint paper comprising 20 co-sponsors will attribute one 'joint communication' (i.e. in the form of 'direct representation') for each of the 20 co-sponsors. The compilation of written communications will only include the documents that were posted on the WTO online database 'WTO Documents Online'.[432] Therefore, some documents may be missing from the compilation, such as informal 'non-papers' distributed as room documents.

In general, direct representation by means of oral interventions and joint communications are indicators of two different possibilities: (i) that Members were directly represented principally because they lacked the capacity to participate directly in the WTO rulemaking processes, such as is fundamentally the case of some small developing and LDC Members; or (ii) that Members negotiated within themselves prior to a meeting or before submitting a joint communication in the form of a coalition to come up with a pre-established and unified position.

The values obtained in the quantitative analysis will be presented according to the three forms of participation/representation (i.e. direct participation, direct representation, and balanced representation), following the methodology described in the table below.

Form of participation/ representation	**Methodology**
Direct participation	*'Direct participation' will be calculated from the total of compiled individual oral interventions and individual written communications for each category/grouping, divided by the number of Members[433] composing each category/grouping.*

[432] The online database can be access at WTO, *WTO Documents Online,* online: WTO <http://docs.wto.org> [*WTO Documents Online*].
[433] For the Basic Telecoms Case, specifically, 'direct participation' will be calculated from the total of compiled individual oral interventions and individual written communications for each category/grouping, divided by the number of *participants* composing each category/grouping. For more information, see: Chapter 6, Section 3.3.2.1.

Form of participation/ representation	Methodology
Direct representation	*'Direct representation' will be calculated from the total of compiled direct representations by means of oral interventions and written communications for each category/grouping, divided by the number of Members composing each category/grouping.*
Balanced representation	*'Balanced representation' will be based on the total of compiled individual oral interventions, as well as combined individual and joint written communications, for each category/grouping without taking into account the number of Members forming each category/grouping.*[434] *It will evaluate whether the Members that participated in the processes (through individual oral interventions and combined individual and joint written communications) were well-balanced between all the categories/groupings.*[435] **Exceptionally, under the form of 'balanced representation', the participation of Brazil will be counted as representing the interests of MERCOSUR Members, considering that it is a permanent Member of this coalition (but treated separately for the purpose of this thesis)*[436]

The case of the participation of the EC/EU Member states will be treated separately because since the establishment of the WTO, their participation in the WTO has been quasi-exclusively

[434] For the evaluation of 'balanced participation', only the total of compiled direct oral interventions will be taken into account, and not those made by direct representation due to the fact that 'balanced representation' examines whether the Members that were present and participated in the process consisted of an even-handed representative group of the whole Membership. Those Members that were represented through 'direct representation' were not present in the meetings and, therefore, this data is irrelevant for evaluating the degree of 'balanced participation'. Indeed, it is difficult to see how a Member that was 'directly represented' could at the same time provide balanced representation for other Members. However, the case is different for individual vs joint written communications. Instead of evaluating whether Members were 'present' in the meetings, participation by means of written communications assesses the written communications that were submitted. Thus, a written communication that was submitted 'individually' or 'jointly' has the same impact in terms of its degree of 'balanced participation'. In both these cases, 'balanced participation' evaluates whether the written communications submitted represented the views of an even-handed representative group of Members.

[435] For the qualitative analysis, explained in section (d) below, 'balanced participation' will also assess, when applicable, whether a balanced set of interests were indirectly represented through the participation of this even-handed group of Members.

[436] See MERCOSUR, *En Pocas Palabras, supra* note 427.

by means of 'direct representation' by the EC/EU.[437] In theory, EC/EU Members should be treated as Members part of the Developed Country Members category and the QUAD geopolitical grouping. However, in the context of this study, their data needs to be represented separately because, otherwise, it would misrepresent the results, giving an impression that Developed Country Members and QUAD Members participated to a high degree by means of 'direct representation' in the WTO, which is actually the opposite.[438] In order to reflect their proper legal designation throughout the years, until the year 2009 inclusively, they will be referred to as 'European Communities (EC) Members', and after 2009, 'European Union (EU) Members'.[439]

(d) qualitative analysis

The qualitative analysis will focus on the Members that were directly involved in the most decisive moments of the negotiations that had an actual impact on the final outcomes. It will assess whether these Members that participated in the most decisive moments represented a balanced set of Members' interests (outside of the categorization by level of development or by geopolitical groupings) or, when such an analysis cannot be made conclusively[440], whether they constituted an even-handed balance of all the different categories/groupings of Members (in the form 'balanced representation').

Considering that the most decisive moments took place in informal settings, the qualitative data will be limited to what have been reported in the official minutes of the meetings or in the

[437] WTO, *The European Union and the WTO*, online: WTO <http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm> [WTO, *European Union*] ("While the member states coordinate their position in Brussels and Geneva, the European Commission — the EU's executive arm — alone speaks for the EU and its members at almost all WTO meetings and in almost all WTO affairs."). This is also evidenced according to the data collected.

[438] Members part of the Developed Members category and the QUAD grouping participated mostly by means of 'direct participation'.

[439] WTO, *European Union, supra* note 437 ("Since 1 December 2009 "European Union" has been the official name in the WTO as well as in the outside world. Before that, "European Communities" was the official name in WTO business for legal reasons, and that name continues to appear in older material.").

[440] This will be only possible in the TRIPS and Public Health Case (where Members' interests were mainly clearly defined into categories: (i) a group of developing and LDC Members; and (ii) Members home of the major patent-holding pharmaceutical companies) and, to some extent, in the Trade Facilitation Case (where Members' interests could be distinguished between those of: (i) a group predominantly composed of developed countries demanding binding rules on trade facilitation; (ii) a group mostly composed of developing countries resisting to binding rules and asking for S&D treatment as well as technical assistance and capacity-building; and (iii) a moderate group standing in between the other two, but mainly in favour of trade facilitation negotiations). For more information, see: Chapter 4, Section 3.3.3 and Chapter 6, Section 3.3.3.

secondary literature. For this reason, the qualitative analysis is insufficient *per se* and its combination with the quantitative analysis is essential.

(e) methodology used to assess the degree of representativity of Members

The methodology used to assess the degree of representativity of Members in the rulemaking processes will take into account the fact that 'direct participation' and 'direct representation' are the two most optimum forms of participation.[441] Therefore, if a category/grouping of Members obtains a sufficiently high degree of participation under one of these two forms, the standard will be considered to be met for the quantitative part of the analysis.

Participation by means of 'direct representation' of Members' interests is considered to be complementary to 'direct participation' considering that if a Member enjoyed high degrees of direct participation in the rulemaking processes, it is expected that the degree of direct representation of its interests will be less due to the fact that the Member in question predominantly represented its own interests directly. Under the quantitative analysis, the degree of 'balanced representation' will be examined only in last resort for those categories/groupings of Members which did not have an adequate degree of 'combined direct participation and direct representation'.

Following these guidelines, the analysis of the degree of representativity of Members under the indicator *Representativeness − Representativity* will be performed according to the following three steps. The first two steps will follow the quantitative analysis, whereas the third step will be done on the basis of the qualitative analysis.

[441] See e.g. Blackhurst & Hartridge, "Improving", *supra* note 58 at 708 (arguing that all Members should be able to participate in the different meetings, and when a too great number of Members cannot be accommodated, 'direct representation' could be acceptable); Albin, "Using Negotiation", *supra* note 89 at 764.

Step 1 (quantitative analysis)	First, the degree of 'direct participation' will be evaluated for each category/grouping of Members at all stages of the rulemaking processes. For those categories/groupings of Members, which obtained a lower degree of 'direct participation' than that of their counterparts constituting the benchmark[442], it will be evaluated whether they got a sufficiently high degree of 'direct representation' to offset their lower degree of 'direct participation'.
Step 2 (quantitative analysis)	Second, for those categories/groupings of Members, which after the first step was performed, still had a lower degree of 'combined direct participation and direct representation' than the established benchmark, it will be evaluated whether their degree of 'balanced representation' was sufficiently high[443] at all stages of the rulemaking processes to counterbalance their poor degree of combined direct participation and direct representation.
Step 3 (qualitative analysis)	The third step will assess whether a balanced set of interests was represented in the most decisive moments of the rulemaking processes or, if not possible to determine conclusively, whether all categories/groupings of Members were represented. It will be evaluated whether there was a sufficiently high degree of 'balanced representation' following the qualitative analysis.

How will the degree of participation of a category/grouping of Members be assessed under the quantitative analysis? There will be three different degrees of participation: (i) sufficient; (ii) moderately lower; and (iii) significantly lower. They will be determined[444] as followed:

[442] Members with the highest degrees of participation will form a 'benchmark', which will be established following the methodology described below in this section.
[443] According to another established benchmark as described below in this section.
[444] The method of measurement for the three degrees of participation aims to create a statistical model similar to an ANOVA ('Analysis of Variance'). However, the quantitative analysis in this thesis was based on an insufficient sample size to use a full ANOVA analysis and obtain a robust finding. Nonetheless, this methodology should be deemed adequate for the purpose of the assessment of *Representativeness − Representativity* in this thesis. For an introduction to and description of ANOVA-based statistical models, see David M Lane et al, *Introduction to Statistics,* Online Statistics Education A Multimedia Course of Study, Project Leader: David M Lane, Rice University, at 518-73, online: onlinestatbook <http://onlinestatbook.com/Online_Statistics_Education.pdf>; Jeff Miller & Patricia Haden, *Statistical Analysis with the General Linear Model* ©1988–1990, 1998–2001, 2006, version: 16 February 2006, at 9-15, online: University of Valencia <http://www.uv.es/~friasnav/librofactorial.pdf>.

Degree of participation	Description
Sufficient	*Degree of participation not under 40 percent lower than the benchmark** **The benchmark is formed of the combined average of the degrees of participation of the categories/groupings of Members that obtained a degree of participation not under 40 percent lower than the single category/grouping of Members that had the highest degree of participation*
Moderately lower	*Degree of participation between 40 and 60 percent lower than the benchmark*
Significantly lower	*Degree of participation more than 60 percent lower than the benchmark*

What is the necessary threshold to meet the standard of *Representativeness − Representativity* (i.e. the degree of representativity of Members in the rulemaking processes)? What will be considered as exceeding such threshold? The standard of *Representativeness − Representativity* will be considered to be met or exceeded respectively according to the following conditions.

Performance	Indicator's standard (degree of representativity of Members)
Meets the standard	(i) a sufficiently high degree of 'combined direct participation and direct representation' (Step1), or alternatively, a sufficiently high degree of balanced representation (Step 2) following the quantitative analysis (i.e. meeting the quantitative analysis' standard); in addition to (ii) a sufficiently high degree of balanced representation under the qualitative analysis (Step 3) (i.e. meeting the qualitative analysis standard)

Performance	Indicator's standard (degree of representativity of Members)
Exceeds the standard	(i) a sufficiently high degree of 'combined direct participation and direct representation' under the quantitative analysis (Step 1); in addition to (ii) a sufficiently high degree of balanced representation under the qualitative analysis (Step 3)

Due to the fact that the forms of direct participation and direct representation are the greatest forms of participation, the degree of representativity of Members will be considered to exceed the standard of the *Representativeness − Representativity*[445], only if there was a sufficient degree overall of 'combined direct participation and direct representation' under the quantitative analysis (in addition to also meeting the standard of the qualitative analysis). However, sufficient degrees of balanced representation under both the quantitative and qualitative analysis will be deemed satisfactory on their own to meet the standard of *Representativeness − Representativity.*

4.1.3.2.3. *Representativeness − Outcome*

Finally, the third indicator of representativeness, *Representativeness − Outcome,* assesses whether the negotiating mandate and the final outcome represented a balanced set of interests that were expressed and if Members were free to accept or reject the results of a decision. The first part of the evaluation will be done by analyzing the final outcome of the negotiations, i.e. the rule or the agreement, and evaluating whether it is based on a representative set of proposals that were made by WTO Members or interests that were expressed. Therefore, this methodology allows tracing back each portion of the rule or agreement agreed upon and finding out from which Member (or group of them) it originated.

As to whether Members were free to accept or reject a certain outcome, it will be evaluated from both a legal and a political perspective. The legal perspective will be assessed on the basis of the rulemaking and decision-making rules contained in Article IX and X of the *WTO Agreement*.[446] As for the political perspective, it will be analyzed whether all Members could politically afford

[445] Under the rating system described in Section 4.4 below a score of 4/5 means that the performance met the standard of the indicator of legitimacy, whereas a score of 5/5 signifies that it exceeded it.
[446] As described in Chapter 2, Section 3.

to block the adoption of an outcome. This analysis will be performed exclusively on the basis of the data collected, which may be limited in the case of the assessment of the political perspective.

4.1.4. Openness

The fourth criterion against which the legitimacy of the rulemaking processes will be evaluated is *openness*.

4.1.4.1. Analysis

The criterion of openness is based on public accountability, which has been argued to be an essential component of input legitimacy for the WTO.[447] How can the factor of public accountability be reconciled with Members' normative values regarding nation-state sovereignty and the intergovernmental nature of the WTO?

Commentators have suggested various criteria that should act as standard for public accountability in the WTO, including representative decision-making[448] or the use of small chains of representative delegation between the public and the trade representatives,[449] including the implementation of a parliamentary dimension in the WTO.[450] Such requirements would infringe with Members' value of nation-state sovereignty. They would have the effect of linking the democratic legitimacy of states with that of the WTO while the WTO does not have any control over the democratic or not constitutions of its Members, including their representation at the international level.[451]

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[447] See Section 3.2 above.
[448] Krajewski, "Democratic Legitimacy", *supra* note 8 (Professor Krajewski argues that a "legitimate system of representation" requires "that the governed [i.e. national citizens] are represented completely and without exception by the representatives." In other words, there needs to be "*congruence* between the objects and the subjects of governance." at 171-72). See also Esty, "The WTO's Legitimacy Crisis", *supra* note 79 at 13.
[449] Narlikar, "Moving", *supra* note 356 at 24; Keohane & Nye, "The Club Model", *supra* note 82 at 235.
[450] See e.g. Mann, "A Parliamentary Dimension", *supra* note 64; Hilf, "Parliamentary Participation, *supra* note 64; Shaffer, "Parliamentary Oversight", *supra* note 64; Krajewski, "Democratic Legitimacy", *supra* note 8; Krajewski, "Legitimising", *supra* note 64.
[451] This view falls under the realistic theories of normative legitimacy. Requiring some representative decision-making or small chains of representative delegation as a way to achieve the standard of public accountability is akin to demanding the WTO to be something that it is not, i.e. a world parliament, see Section 2.2 above. See also Cottier, "The Legitimacy of WTO Law", *supra* note 77 ("In assessing the legitimacy of rules of international law, we need to take the complex and imperfect nature of international law into account. We cannot simply refer to concepts of legitimacy developed for mature domestic systems, such as the Westminster model of deliberative

Others have proposed less encroaching standards, such as external transparency and public participation, for responding to the 'democratic gap' between states' consensual participation and the will of the people. It is argued that a sufficient degree of external transparency could strengthen electoral accountability by providing an opportunity to citizens to: (i) "judge whether their government, operating within the international institution, is carrying out its mandate"[452]; and (ii) be able to "observe and understand the decision-making process" in order for them to have "the chance to revoke a certain decision-maker if they perceive him or her as no longer representing their will."[453]

For some scholars, along with external transparency, WTO legitimacy requires some degree of *actual* participation of the public, as it allows citizens and citizen groupings to have inputs in the shaping of world trade policies[454] and opens policies debate to the spectrum of views of non-state actors.[455] Public participation can improve social acceptability in that it "enhances visibility and communicativeness" with respect to a larger audience and it provides opportunities to members of the public to have their interests heard when not properly represented by their state representatives.[456] For Yves Bonzon, the principles of external transparency and public

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democracy, or even to those of direct democracy where final decisions rest with the majority of citizens. International law . . . functions in an environment where many of its subjects do not fully live up to the ideals of democracy. Thus, the ideal benchmark cannot be set. When assessing the legitimacy of a particular international organisation, we need to relate it to the realities of underlying systems of governance, taking into account all their deficiencies." at 19-20).

[452] Keohane & Nye, "The Club Model", *supra* note 82 at 235-36; Housman, "Democratizing", *supra* note 97 (calling for citizens and NGOs to receive full observer status at trade negotiations and meetings of trade organizations).

[453] Krajewski, "Democratic Legitimacy", *supra* note 8 at 173. See also Smythe & Smith, "Legitimacy", *supra* note 88 at 37; Panagiotis Delimatsis, *Transparency in the WTO Decision-Making,* TILEC Discussion Paper No. 2012-006 (February 9, 2012) at 3, online: SSRN <http://ssrn.com/abstract=2001919 or http://dx.doi.org/10.2139/ssrn.2001919>.

[454] Cho, "A Quest", *supra* note 88 at 391-93; Koppell, *World Rule, supra* note 357 at 58; Esty, "The WTO's Legitimacy Crisis, *supra* note 79 at 14.

[455] Esty, "The WTO's Legitimacy Crisis", *supra* note 79 at 16.

[456] Cho, "A Quest", *ibid* at 393. Professor Charnovitz argues that it is problematic to limit a NGO to express its interests only through its government. He states: "Many NGOs concerned about the WTO's activities engage in transnational relationships . . . [f]or the WTO to send transnational environmental groups or business groups down (or back) to their 'own' governments is tantamount to denigrating the causes they espouse.", see Charnovitz, "Opening", *supra* note 370 at 206-07. In the words of Professor Esty, "[t]elling these groups that they must exert influence only at the national level is to deprive them of their transnational essence", see Esty, "NGOs at the WTO", *supra* note 370 at 141. See also Marcos A Orellana, "WTO and Civil Society" in Daniel Bethlehem et al, eds, *Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 671 (Legitimacy "does not rest solely upon the accountability of WTO Members; rather, legitimacy also flows from the ability of the organization to conduct its operations in a transparency and participatory fashion. . . . [D]ecisions adopted by global institutions addressing problems shared by the community involve matters of global public interest that thus go beyond the interests of any particular government." at 679); Wolfgang Benedek, "Developing the Constitutional

participation cannot be dissociated considering that they are largely interrelated. On the one hand, relevant and timely information is essential for participation to be meaningful and, on the other, a "dialectic interaction" with the decision-maker may be necessary to identify relevant information to be requested. [457]

The factors of external transparency and public participation are well suited as standards of public accountability for the WTO rulemaking processes considering that they take into account Members' normative values of nation-state sovereignty and the intergovernmental nature of the WTO and the heightened demand from civil society to provide accountability to the public. Indeed, following the 'contractual conception' of the WTO, many Members hold the view that direct participation by non-state actors in decision-making is actually "incompatible" with the intergovernmental character of the WTO.[458] It is argued that the WTO does not have the institutional capacity to balance the interests of the various stakeholders or decide which ones should have their interests heard. Moreover, it is believed that giving non-state actors a voice in the rulemaking processes can carry the risk that "special interests will take advantage of open decision-making processes to distort policy outcomes."[459] As the Sutherland Report stresses, "there are continuing concerns about the legitimacy, representativity, accountability and politics of non-governmental organizations" and "serious imbalance in the capacities of non-governmental organizations from developed and developing countries."[460] At all times in the rulemaking processes, Members are called to make critical decisions that affect their citizens and are bindings, thus requiring implementation into their national law. They are subsequently held accountable by their constituents for their actions taken in the WTO. For these reasons, following the 'contractual conception' of the WTO, Member states are the only ones that should have and maintain the primary responsibility of balancing the interests of their various

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Order of the WTO – The Role of NGOs" in Wolfgang Benedek et al, eds, *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday* (New York: Peter Lang, 1999) 228 (explaining that representation of NGOs by state does not satisfy their interests in participation because their concerns are not satisfactorily taken care of on state level).

[457] Yves Bonzon, "Options for Public Participation in the WTO: Experience from Regional Trade Agreements" in Debra P Steger, ed, *Redesigning the World Trade Organization for the 21st Century* (Waterloo, ON: Wilfrid Laurier Press, 2009) 287 at 287.

[458] Sutherland Report, *supra* note 11 at para 210.

[459] Esty, "Good Governance at the WTO", *supra* note 80 at 526 [footnotes omitted].

[460] Sutherland Report, *supra* note 11 at para 209.

constituents when deciding about the policies they will adopt.[461] Hence, the factors of external transparency and public participation do not affect the delicate allocation of powers to states as it currently exists in the sphere of public international law due to the fact that these factors are compatible with WTO rulemaking and decision-making being restricted to Member states only. But at the same time, these factors bolster public accountability as they provide for opportunities for non-state actors to keep up with the work of the WTO through external transparency and to express their views and interests regarding WTO rulemaking activities through public participation.

Should the factors of external transparency and public participation, as Yves Bonzon suggested, be treated as indivisible? It is obvious that external transparency is a precondition for meaningful public participation. It would be impossible for the civil society to comment upon the activities of the WTO without sufficient information about its work. However, the opposite is not necessarily true. Active participation is not an absolute prerequisite for external transparency in the WTO, as long as there is a large extent of information available about the activities of the WTO. If there is a great amount of easily accessible information to the public, a 'dialectic interaction' between the WTO organs and the public is not going to be necessarily required to assure a high degree of external transparency. It is however correct to say that active public participation contributes positively to external transparency and vice versa. Therefore, for a normative standard of legitimacy for the WTO rulemaking processes, it can be argued that external transparency is an absolute prerequisite for public accountability and, to a lesser extent, public participation can be seen as a complement to external transparency.

How can the standards of external transparency and public participation take into account the intergovernmental nature of the WTO? Should the public have access to every single negotiating document, including official and unofficial documents? Should non-state actors be able to attend every single meeting either of a formal or an informal nature? Should they have a seat at the negotiations table? If so, who should be invited?

The standard of accountability should not be the same as the one of a government in relation to its constituents. Moreover, there may be limits to the degree to which the WTO should give the

[461] *Ibid* at para 210.

public access to its work and have non-state actors participate in it in order for Members to be able to effectively negotiate among themselves.[462] As for the standard of external transparency, the use of informal negotiating documents and informal meetings is a practice proven to be effective for forging consensus between Members.[463] Unofficial documents are regularly used by Members "to float ideas without wedding themselves to them, and to gauge the reaction of other Members without entrenching their own position."[464] Their unofficial nature signals that they are "still open to revision", allowing to "take snapshots of ongoing developments" without paralysing the negotiations.[465] Similarly, informal meetings allow Members to discuss ideas and proposals among themselves "openly and frankly"[466] without the need of coming out with "established positions."[467]

Contrary to the claims of some scholars[468], this practice of informality does not deliberately aim to keep some information secret from the public. Conversely, giving public access to unofficial documents and informal meetings would defeat the purpose of having them at the first place. Most Members believe that trade negotiations require confidentiality.[469] In this regard, Professor Stasavage's game-theoretic model showed that "the presence of an audience [in international negotiations] may make officials more reluctant to retreat from initially stated positions when

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[462] This view is in line with the perceived 'contractual nature' of the WTO, see Section 3.1.2; Sutherland Report, *supra* note 11 at para 206.
[463] See generally Nicolas Lamp, "The Receding Horizon of Informality in WTO Negotiations" (Paper delivered at the Decennial Conference of the Association of Social Anthropologists, Edinburgh, 19-22 June 2014) at 7-8 [on file with author] [Lamp, "The Receding Horizon of Informality"]. See also Statement by the representative of Switzerland in GATT 1947, Group of Negotiations on Goods, *Meeting of 25-26 June 1990,* GATT Doc MTN.GNG/NG14/18, online: WTO <https://docs.wto.org/gattdocs/q/m.htm> ("The reasons for presenting a non-paper rather than a formal submission were threefold: the paper was intended to be a discussion paper rather than a full-fledged proposal; the paper contained elements which had not been of major concern to Switzerland but which seemed to correspond to the general will of the Group; and the text was not yet at a stage of full maturity." at 3, para 10).
[464] Lamp,"The Receding Horizon of Informality", *ibid* at 8.
[465] *Ibid* at 8.
[466] WTO, NGTF, *Summary of the Meeting* (held on 25-26 July 2005), WTO Doc TN/TF/M/7 at para 269, online: WTO <http://docs.wto.org> [*NGTF Meeting of 25-26 July 2005*].
[467] WTO, PCTF, *Minutes of the Meeting* (held on 10 March 2014), WTO Doc WT/PCTF/M/2 at para 2.64, online: WTO <http://docs.wto.org> [*PCTF Meeting of 10 March 2014*].
[468] See e.g. Steve Charnovitz, "WTO Transparency Remains Poor", *IELP Blog* (28 October 2011), online: IELP Blog <http://worldtradelaw.typepad.com/ielpblog/2011/10/wto-transparency-remains-poor.html> (regarding the lack of transparency of the accession process).
[469] Sergey Ripinsky & Peter Van Den Bossche, *NGO Involvement in International Organizations: A Legal Analysis* (London: British Institute of International and Comparative Law, 2007) at 193 [Ripinsky & Van Den Bossche, *NGO Involvement*].

confronted with persuasive counter-arguments."[470] The same logic applies for the public distribution of unofficial documents, which would have the effect of embedding a Member's position by making it known to the public. Once a position is 'out there' in the public eye, it becomes more challenging for a Member to retreat from it.[471]

So what should be the standard of external transparency for the legitimacy of the rulemaking processes? Due to the fact that external transparency matters for the purpose of enabling non-state actors to observe and understand how the rules are created and evaluate whether the WTO and their own government are carrying out their mandate, the standard should be set in regard to the ability of non-state actors to have access to sufficient and timely information regarding the rulemaking processes carried on officially. It should include easily available information about how the rules are created from the time an issue is added on the WTO's agenda, including the official meetings' discussions and decisions taken as it relates to the issue, until its legal implementation.[472] Transparency can be achieved through public access to documents or opportunities for non-state actors to observe meetings, either directly or through the use of web broadcasts.[473]

As regards public participation, how far should the participatory rights of non-state actors extend in the WTO as a standard for legitimacy? To respond to this question, it is useful to refer to participatory rights generally granted to non-state actors in international organizations as benchmarks for evaluating the standard of public participation in the WTO. In some organizations, accredited non-state actors are granted the right to attend all, or most, meetings of the organization's bodies[474] and deliver oral statements, subject to the discretion of the meeting's

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[470] David Stasavage, "Open-Door or Closed-Door? Transparency in Domestic and International Bargaining" (2004) 58 International Organization 667 at 682-83.
[471] See e.g. Lamp, "The Receding Horizon of Informality", *supra* note 463 at 8.
[472] See e.g. William D Coleman & Tony Porter, "International Institutions, Globalization and Democracy: Assessing the Challenges" (2000) 14(3) Global Society 377 at 388; Albin, "Using Negotiation", *supra* note 89 at 764.
[473] Instead of granting a right to some non-state actors to observe WTO meetings, the Sutherland Report considered that it could be more appropriate for the WTO to use web broadcasts of certain meetings, see: Sutherland Report, *supra* note 11 at para 207. Sergey Ripinsky and Peter Van den Bossche qualify the opportunity for non-state actors to attend most meetings of an international organization as a "very basic right", see: Ripinsky & Van Den Bossche, *NGO Involvement, supra* note 469 at 214 (this practice can be found in the UN ECOSOC at 29; ILO at 71; UNEP at 124; UNCTAD at 56; WHO at 104; and WIPO at 89).
[474] Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 at 214-16 (This practice can be found in UNEP at 139; the UN ECONOC at 29; WHO at 103, 105 and 108; and UNCTAD at 55-57).

Chair or the meeting itself.[475] In other cases, they are entitled to communicate written statements, which are circulated and pre-read by the secretariats[476] or propose items for the agenda.[477] In general, these participatory rights apply to formal meetings of the bodies concerned, but they usually do not extend to informal and preparatory meetings of those bodies. International organizations generally only allow non-state actors to voice their interests with the possibility that their views might (at best) be taken into account for the adoption of a particular decision. However, with the exception of the International Labour Organization (ILO), they do not extend to negotiations with non-state actors or voting rights.[478] Thus, for the WTO rulemaking processes specifically, public participation should be evaluated in regard to the opportunities of non-state actors to have adequate channels to express their views with respect to the rulemaking activities of the WTO (i.e. make oral statements, circulate written statements, proposed agenda items, etc.).[479]

In summary, the fourth criterion against which the legitimacy of the WTO rulemaking processes is to be evaluated is *openness*. Openness should be measured principally in regard to external transparency as it is at the heart of the criterion and, to a lesser extent, opportunities for public participation provided for within the WTO framework. Both factors should be assessed in the two first stages of the rulemaking processes, i.e. the agenda-setting and the consensus-building processes.

4.1.4.2. Indicators of legitimacy and methodology

The criterion of openness will be assessed against the following two indicators: the first one assessing external transparency, and the second one, opportunities for public participation. Considering that openness is concerned principally with external transparency, the first indicator should have a predominant weight of 70 percent for the criterion of openness as a whole, whereas the second indicator should account for a lesser weight of 30 percent of the total weight:

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[475] See *ibid* (This practice can be found in the UN ECOSOC at 29; ILO at 71; UNEP at 124; UNCTAD at 56; WHO at 104; and WIPO at 89).
[476] See *ibid* (This is the case of the UN ECOSOC at 24-27, UNCTAD at 56; and UNEP at 123-24.)
[477] *Ibid* (This right only exists in the UN ECOSOC (for NGOs in the general consultative status) at 24 and 29; and in UNEP at 125).
[478] *Ibid* at 216.
[479] Koppell, *World Rule, supra* note 357 at 58; Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 at 214-16.

OPENNESS	Weight
Indicators:	
1. *Was there easily accessible and timely information for non-state actors regarding the rulemaking process for the specific subject-matter from the time the subject-matter was added on the WTO's agenda, including the meetings' discussions and decisions taken as it relates to the subject-matter, until its legal implementation? (Openness − External transparency)*	70%
2. *Were there adequate channels for non-state actors to make oral statements and circulate written communications upon the specific subject-matter? (Openness − Public participation)*	30%

4.1.4.2.1. *Openness − External transparency*

The first indicator of openness, *Openness − External transparency,* assesses the degree of external transparency of the rulemaking process, i.e. whether there was easily accessible information for non-state actors regarding the rulemaking process for the specific subject-matter at all stages of the process. Information can be obtained through (a) access to WTO documents; and (b) opportunities to observe WTO meetings.

(a) public access to WTO documents

The assessment of non-state actors' access to WTO documents will take into account the 1996 and 2002 *Procedures for the Circulation and Derestriction of WTO Documents* (*1996 and 2002 Procedures for Derestriction*)[480] which governed the accessibility of most WTO documents for all three case studies. Following these procedures, between 18 July 1996 and 14 May 2002, all the working documents related to the subject-matter of each case study have been derestricted upon the adoption of the report or of the decision pertaining to their subject matter (e.g. for the case of draft documents such as agendas and decisions) or considered for derestriction six months after the date of their circulation (e.g. for proposals as well as other working papers).[481]

[480] *Procedures for the Circulation and Derestriction of WTO Documents, Revision* (General Council Decision of 18 July 1996), WTO Doc WT/L/160/Rev.1, online: WTO <http://docs.wto.org> [*1996 Procedures for Derestriction*]; Procedures *for the Circulation and Derestriction of WTO Documents* (General Council Decision of 14 May 2002), WTO Doc WT/L/452, online: WTO <http://docs.wto.org> [*2002 Procedures for Derestriction*].

[481] *1996 Procedures for Derestriction*, *ibid*, Appendix, para (a). For a detailed description of the *1996 Procedures for Derestriction,* see: Marceau & Pedersen, "Is the WTO Open", *supra* note 354 at 30-32.

Since May 2002, such working documents have been derestricted upon circulation to Members.[482] However, in all those cases, any Member or WTO body have had, at the time it submitted a document, the option to circulate it as restricted.[483] This has been the case of some analyses prepared by the Secretariat, some non-papers or other restricted communications submitted by Members, draft negotiating texts, and proposals prepared by chairpersons (the so-called JOB documents). Upon request, any of these restricted documents has been eligible to be considered for derestriction.[484]

As for the Secretariat background papers and minutes of WTO meetings (including any related records, reports and notes), between July 1996 and May 2002, they were only derestricted and made available to the public on average after 8-9 months.[485] However, since May 2002, Secretariat background papers have been only restricted if the body in question so decided, which in such case have been made available to the public in average after 6-12 weeks upon circulation.[486] Moreover, all minutes from WTO meetings and related documents have been derestricted 45 days after date of circulation, which occurs usually within three weeks after a meeting of a WTO body.[487]

The assessment of non-state actors' access to WTO documents will also examine whether non-state actors were able to obtain information regarding the rulemaking processes from other sources than the official documents posted on the WTO website but still within the framework of the WTO. For instance, as a general practice, through its power conferred by the *Guidelines for Arrangements on Relations with Non-Governmental Organizations (Guidelines for Arrangements With NGOs)*[488], the Secretariat has organized briefing sessions for NGOs on meetings of the WTO bodies, which are usually attended by approximately 20 to 30 NGOs.

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[482] *2002 Procedures for Derestriction*, *ibid* at para 1.
[483] *1996 Procedures for Derestriction*, *supra* note 480 at para 2(a).
[484] *Ibid* at para 2(a); *2002 Procedures for Derestriction*, *supra* note 480 at para 2(a).
[485] The *1996 Procedures for Derestriction* provided that such documents would be "considered for derestriction six month after the date of their circulation", however in practice they would be effectively derestricted and made available to the public in average after 8-9 months, see: *1996 Procedures for Derestriction, supra* note 480, Appendix, paras (a) and (c); WTO, *Explanatory Note on Old and New Procedure,* online: WTO <http://www.wto.org/english/forums_e/ngo_e/derestr_explane_e.htm> [WTO, *Explanatory Note on Old and New Procedure*].
[486] WTO, *Explanatory Note on Old and New Procedure*, *ibid.*
[487] *2002 Procedures for Derestriction*, *supra* note 480 at para 2(c) and n 3.
[488] *Guidelines for Arrangements With NGOs, supra* note 354.

However, any sources of information obtained outside the framework of the WTO will be discarded due to the fact that they are unrelated to the functioning of the WTO as an organization, and thus irrelevant for the evaluation of its (own) legitimacy.

(b) opportunities for non-state actors to observe WTO meetings

The assessment of non-state actors' opportunities to observe WTO meetings (that addressed the specific subject-matter dealt within each case study) will take into account the following existing rules of procedure or established practices governing public participation in WTO meetings. With the exception of the plenary sessions of WTO Ministerial Conferences (where heads of governments and trade ministers "read out short prepared statements"[489]), it has been reported that all official WTO meetings are closed to non-state actors.[490] No provision of the *WTO Agreement* requires that the meetings of the councils and committees be kept confidential or held behind closed doors. However, in 1996 the General Council adopted the *Guidelines for Arrangements With NGOs*, which handed over the responsibility of engaging with civil society to the national level, it provided:

> As a result of extensive discussions, 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.[491]

Rule 37 of the *Rules of Procedure for Meetings of the General Council,* which has also been adopted by most WTO councils or committees for the conduct of their own meetings[492], also corroborates with the practice of confidentiality for WTO meetings. It provides that the meetings

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[489] Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 at 194. NGOs can register to take part of Ministerial Conferences, see: WTO, *NGOs and the WTO*, online: WTO <http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm>.

[490] Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 at 194-96; Steve Charnovitz, "Transparency and Participation in the World Trade Organization" (2004) 56 Rutgers LJ 927 at 939.

[491] *Guidelines for Arrangements With NGOs, supra* note 354.

[492] See e.g. *Rules of Procedure for Meetings of the Council for Trade in Goods*, *supra* note 210; *Rules of Procedure for Meetings of the Council for Trade in Services*, *supra* note 210; *Rules of Procedure for Meetings of the Council for TRIPS*, *supra* note 210.

of the General Council should "ordinarily be held in private."[493] However, it leaves the door open for some meetings to be open to non-state actors by providing that "[i]t may be decided that a particular meeting or meetings should be held in public."[494]

Overall, this assessment will focus on whether there was evidence to the effect that some non-state actors were able to observe the meetings of the councils or the committees dealing with the specific subject-matter addressed by each case study either officially or non-officially.

4.1.4.2.2. *Openness − Public participation*

The second indicator of openness*, Openness - Public participation,* assesses whether there were adequate channels for non-state actors to make oral statements and circulate written communications upon the specific subject-matter dealt within each case study. The analysis will focus on channels that were made available within the WTO framework exclusively. It will disregard any other means outside of the WTO through which non-state actors could have been involved in the work of the WTO. It will examine, among others, the arrangements that were made by the General Council through its power conferred by Article V:2 of the *WTO Agreement*[495] to consult and cooperate with NGOs and those made by the Secretariat pursuant to the *Guidelines for Arrangements With NGOs.*[496]

As a general practice, such arrangements on relations with NGOs have comprised the following. The Secretariat has organized a number of symposia, forums, workshops and seminars open to the participation of non-state actors and Members, where panellists and interested participants have discussed a broad range of WTO-related issues.[497] However, such forums generally have "not le[d] to any specific outcomes, such as civil society statements to WTO bodies."[498] Instead, they have served as a forum where participants can dialogue and exchange views.[499]

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[493] *Rules of Procedure for Meetings of the General Council*, *supra* note 209, Rule 37
[494] *Ibid.*
[495] *WTO Agreement, supra* note 1, Article V:2 (providing that the General Council "may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO".).
[496] *Guidelines for Arrangements With NGOs*, *supra* note 354.
[497] Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 at 196-98; Marceau & Pedersen, "Is the WTO Open", *supra* note 354 at 12-18.
[498] *Ibid* at 198.
[499] *Ibid* at 198.

Additionally, the Director-General has established an Informal NGO Advisory Body and an Informal Business Advisory Body, which remained in operation solely between 2003 and 2005.[500] These advisory bodies were composed respectively of ten high level representatives from NGOs considered influential and representative, as well as ten representatives from the business sector. These two bodies, which were expected to meet twice a year, were created to provide a platform for dialogue with the WTO Director-General and express the positions and concerns of civil society on international trade.[501] It has been reported that their meetings have not resulted in any specific outcomes, such as official meetings reports or NGO statements that would have been reported back to the WTO membership.[502]

Various forms of informal meetings have been also commonly held with NGOs. A practice has developed where, at the initiative of Geneva-based NGOs or upon the suggestion of the relevant chairperson (or in some exceptional cases the WTO Secretariat), NGOs and chairpersons of the relevant councils/committees exchange views and opinions with respect to ongoing negotiations. Due to their informal nature, the information about upcoming meetings has been rarely published[503] and no reports have been issued.[504] Moreover, on an *ad-hoc* and roughly weekly basis, informal meetings have taken place between NGOs and the Secretariat to discuss on-going negotiations or issues of interests to NGOs. In addition, three to four times a year, the WTO Secretariat has organized events where NGOs have been given the opportunity to present their studies or publications to interested WTO Members and observers. However, they have generated only "limited interest" among government officials.[505]

Due to the primary informal nature of most of these arrangements with NGOs, it is expected that there might be some gaps in the data collected with respect to NGOs' opportunities for participation in the rulemaking processes. Therefore, the score attributed in the case studies to the indicator *Openness - Public participation* should be taken with some reservations.

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[500] These two advisory bodies were terminated at the end of Director-General Panitchpakdi's term in office, see: Bonzon, *Public Participation, supra* note 88 at 233.
[501] *Ibid* at 233; Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 ("Although the WTO Director-General is not party to WTO negotiations, he is the Chairman of the Trade Negotiations Committee and thus serve as an intermediately between NGOs and the WTO membership." at 193).
[502] Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 at 193.
[503] It is shared within NGO networks informally, see: *ibid* at 199.
[504] *Ibid*; Marceau & Pedersen, "Is the WTO Open", *supra* note 354 at 19-20.
[505] Ripinsky & Van Den Bossche, *NGO Involvement*, *supra* note 469 at 199.

4.1.5. Summary

In summary, the legitimacy of the WTO rulemaking processes will be assessed against four criteria, each comprising specific indicators of legitimacy, which will consist in the 'qualitative constructs' of the *interval scale*: (1) legality (i.e. the correctness of the rule and procedure used); (2) effectiveness (including: whether the mandated goal was addressed by the final outcome; whether the negotiated policy was brought into effect; and the effectiveness of the process); (3) representativeness (encompassing: internal transparency and inclusiveness; representativity; and effective participation, as applied to WTO Members internally); and (4) openness (including: external transparency and public participation). Additionally, Members' normative values (i.e. procedural equality of Members, Member-driven rulemaking processes, preservation of nation-state sovereignty, and intergovernmental nature of the rulemaking processes) will act as benchmark to evaluate whether these legitimacy criteria and indicators can be *justified.*

The following sections present the weight that each criterion of legitimacy should account for the evaluation of the overall legitimacy of the WTO rulemaking processes (Section 4.2), how the scores will be attributed for each of the specific indicator and criterion of legitimacy (Section 4.3), and a description of the case studies, as well as the basis for selecting them, that will be used to assess the legitimacy of the WTO rulemaking processes (Section 4.4).

4.2. Overall Schematic: Allocation of Weight to the Criteria of Legitimacy

As explained at the outset of Section 3, the *interval scale* will allow evaluating the degree of legitimacy of the WTO rulemaking processes by the application of the four determined criteria of legitimacy (i.e. legality, effectiveness, representativeness and openness) to the three case studies. However, some criteria are more important than others for the legitimacy of the WTO rulemaking processes as a whole, and thus, need to be assigned a distinctive weight reflecting their own preponderance.

The most significant criterion for the legitimacy of the WTO rulemaking processes should be *representativeness* because it relates to the core of the WTO conceived as a 'contract'[506], which is

[506] See Section 3.1.2.

its Members acting as the principal subjects of the WTO.[507] Therefore, the criterion of representativeness as applied to WTO Members internally should be put first in terms of importance for the legitimacy of the rulemaking processes and account for 35 percent in the total weight of the rulemaking processes' legitimacy.

Effectiveness is another core criterion for the legitimacy *per se* of the rulemaking processes, which importance can be better understood *a contrario.* In fact, if the rulemaking processes are ineffective, that is, if they do not address the goals set out in the negotiating mandate and they do not produce results in a timely and effective manner in light of the policy objectives to be addressed, they will lose their relevancy. There is no point of justifying the existence of the rulemaking processes if they cannot achieve desired outcomes. Thus, the criterion of *effectiveness* should account for 25 percent in the total weight of the rulemaking processes' legitimacy.

For its part, the criterion of *legality* is a moderately important criterion for the legitimacy of the WTO rulemaking processes; however it is insufficient on its own. Indeed, the WTO is founded on the basis of a treaty (i.e. the *WTO Agreement*), therefore it is important for its legitimacy that the rulemaking processes respect the rules contained in its establishing treaty. However, even if some of the rules about rulemaking were not fully respected, the rulemaking processes could still be found to be somewhat legitimate if they scored highly in terms of representativeness and effectiveness. For that reason, the criterion of *legality* should be given a moderate weight of 20 percent for the legitimacy as a whole of the rulemaking processes.

Finally, *openness* is not a criterion that should be as important as representativeness, because it is not intrinsically related to the legitimacy of the WTO conceived as intergovernmental in nature following the contractual vision of the WTO. However, considering that openness is the only window for the public and non-state actors to scrutinize and be able to judge by themselves whether or not the WTO rulemaking processes are legitimate, the criterion of *openness* should nevertheless be given a moderately important weight of 20 percent for the legitimacy as a whole of the rulemaking processes.

[507] *WTO Agreement, supra* note 1, Article II:1.

The following section explains how the scores will be attributed for each indicator of the legitimacy criteria.

4.3. Attribution of Scores to the Indicators of Legitimacy

The performance of each case study will be evaluated in function of the rating standard of each legitimacy criterion's indicators. As explained at the outset of Section 4, the *interval scale* requires that each indicator of legitimacy be rated on a scale of 1 to 5. To allow for a more systematic attribution of scores, each rating will be assigned a precise standard, as described in Table 3.2 below.

Table 3.2: Rating Standards for the Indicators of Legitimacy

Rating	Rating Standard
5 Exceeds	*Performance exceeded the indicator's standards*
4 Meets	*Performance consistently met the indicator's standards*
3 Meets with some exceptions	*Performance did not consistently meet the indicator's standards*
2 Potential to meet	*Performance was consistently below the indicator's standards*
1 Not met	*Performance did not meet any of the indicator's standards*

If the case study in question fully meets the indicator's standards[508], it will be attributed a score of 4/5. Thus, 4/5 represents a perfect score for each indicator of legitimacy. In some cases, the case study may perform higher than the indicator's standards, which will result in the attribution of a score of 5/5. If, on the other hand, the case study meets the indicator's standards with some notable exceptions, it will be attributed a score of 3/5. If the case study does not even come close

[508] Described in Section 4.1 above.

to fulfilling part of the indicator's standards, it will score 1/5, but if it does meet a portion of the indicator's standards, it will be attributed a score of 2/5.

Some indicators may be attributed fragmented scores if they sit in between two different rating standards, to allow for a more accurate assessment if needed. As a general indication, these fragmented scores could be interpreted as follows: (4.5) *performance exceeded the indicator's standards on some occasions*; (3.5) *performance met the indicator's standards, with a few exceptions*; (2.5) *performance was most of the time below the indicator's standards*; (1.5) *performance was consistently below the indicator's standards and did not meet a majority of the indicator's standards.*

4.4. Selection of Case Studies: What Can they Tell about Legitimacy?

How can the *interval scale* be applied to the WTO rulemaking processes? In other words, what data can be used to evaluate the rulemaking processes? Contributions that have analyzed the WTO decision-making and rulemaking processes have generally focused on the negotiating processes of specific Ministerial Conferences.[509] However, this study does not target the negotiating processes *per se*; it is not interested in some negotiating processes, unless they actually led to the creation of rules or agreements (i.e. hence the designation 'rulemaking' processes).[510] Thus, the results of this study do not provide a complete picture of the legitimacy of the WTO rulemaking processes. It only examines the 'success stories'. This should be kept in mind when analyzing the results of the case studies analysis considering that the legitimacy of

[509] See e.g. Odell, "Chairing", *supra* note 9; Anders Ahnlid, "Improving the Effectiveness of Multilateral Trade Negotiations: A Practitioner's Perspective on the 2008 WTO Ministerial Meeting" (2012) 17(1) International Negotiation 65; Gerard Depayre, "An Innovative Approach to Multilateral Negotiations: The Shadow of Jan Woznowski" (2010) 44(4) J World Trade 809-12; Faizel Ismail, "An Assessment of the Doha Round July-December 2008 Collapse" (2009) 8(4) World Trade Review 579; Faizel Ismail, "The Role of the Chair in the WTO Negotiations from the Potsdam Collapse in June 2007 to July 2008" (2009) 43(6) J World Trade 1145; Jones, "Green Room", *supra* note 97; Amrita Narlikar, "The Ministerial Process and Power Dynamics in the WTO: Understanding Failure from Seattle to Cancun" (2004) 9(3) New Political Economy 413; Mike Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance* (Cambridge: Cambridge University Press, 2003); Jawara & Kwa, *Behind the Scenes*, *supra* note 97; Thuo James Gathii, "Process and Substance in WTO Reform" (2004) 56(885) Rutgers LJ 885; Peter Drahos, "When the Weak Bargain with the Strong: Negotiations in the World Trade Organization" (2003) 8(1) International Negotiation 79; Robert Wolfe, "Sprinting During a Marathon: Why the WTO Ministerial Failed in July 2008" (2010) 44(1) J World Trade 81; John Odell, ed, *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge: Cambridge University Press, 2006) at 41-172; Marcel Hanegraaff, Jan Beyers & Caelesta Braun, "Open the Door to More of the Same? The Development of Interest Group Representation at the WTO" (2011) 10(4) World Trade Review 447.

[510] See Chapter 1, Section 2.

the processes which led to the conclusion of actual rules or agreements could potentially score higher than it would have had for those processes which did not result in the adoption of any outcomes.[511]

Thus, the case studies analysis will aim to respond to these questions: In the cases where Members arrived at the conclusion of a new rule or agreement, were the rulemaking processes that were used legitimate? To what degree? The data used to respond to these questions will be the processes that led to the adoption of three rules or agreements: (i) the *TRIPS and Public Health Case*; (ii) the *Basic Telecoms Agreement*; and (iii) the *Agreement on Trade Facilitation.*

4.4.1. TRIPS and Public Health Case

The first case study will be the TRIPS and Public Health Case, according to which Members' negotiated policies were implemented following three different instruments: a Ministerial Declaration[512] (which is not provided for in the *WTO Agreement*), a collective waiver[513] under Article IX:3 of the *WTO Agreement*, and a proposed amendment of a provision of a Multilateral Trade Agreement (i.e. the *TRIPS Agreement*)[514] following Article X (the first amendment to be proposed since the establishment of the WTO). The adoption of these decisions, i.e. the *Declaration on TRIPS and Public Health,* the *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement*, arguably represented a significant achievement for the legitimacy of the WTO due to fact that they implemented policies as part of a wider national and international action to address severe public health problems and epidemics afflicting many developing and least-developed countries.[515] Moreover, they put into place a system that enables

[511] It can be hypothesized that one of the reasons why some negotiating processes did not lead to the creation of a rule or an agreement was because these processes were not perceived to be sufficiently legitimate by the Members concerned. In fact, the fairness of the processes has a positive impact on outcomes. For more information, see Section 2.3 above on the sociological perspective of legitimacy.
[512] *Declaration on the TRIPS Agreement and Public Health* (adopted by the Ministerial Conference on 14 November 2001), WTO Doc WT/MIN(01)/DEC/2, online: WTO <http://docs.wto.org> [*Declaration on TRIPS and Public Health*].
[513] *TRIPS and Public Health Waiver*, *supra* note 94.
[514] *Protocol Amending the TRIPS Agreement*, *supra* note 94.
[515] *Declaration on TRIPS and Public Health*, *supra* note 512 at paras 1-4.

a country that lacks capacity to produce medicines itself to obtain them from abroad under a compulsory licence at low cost.[516]

Although the *TRIPS Agreement* gave developing countries the flexibility to apply patents in ways that still enabled the protection of the health of their people, recent legal challenges by the pharmaceutical industry[517] and some Members under the DSU[518] had highlighted the lack of legal clarity on the interpretation and/or application of the relevant provisions of the *TRIPS Agreement*.[519] It was said that, due to lack of clarity of certain provisions of the *TRIPS Agreement*, developing countries seemed to be reluctant to take measures that they were entitled under this Agreement.[520] Additionally, it was being argued that, contrary to the principles and objectives of the *TRIPS Agreement*, the then current model of intellectual property rights protection was too heavily tilted in favour of right holders and against the public interests. As a recent upsurge of public feeling and even public outrage over AIDS medicines had shown, there was at the moment a crisis of public perception about the intellectual property system and about the role of the *TRIPS Agreement*, which was leading to a crisis of legitimacy for the *TRIPS Agreement*.[521]

Were the outcomes of the TRIPS and Public Health Case truly effective in achieving the issues noted and the mandated solution? Considering the high level of public interests at stake, did the WTO provide non-state actors with sufficient channels to express their views and opinions on the subject matters and sufficient external transparency for them to be able to follow the ongoing

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[516] See generally, *TRIPS and Public Health Waiver*, *supra* note 94; *Protocol Amending the TRIPS Agreement*, *supra* note 94.

[517] In 1997, there was a lawsuit brought by a Pharmaceutical Industry Association and 39 of its affiliate pharmaceutical companies against the Government of South Africa. The lawsuit was dropped because a coalition of NGOs brought public attention to the public health impact of the industry action, for additional details on the lawsuit, see: Frederick M Abbott, "The TRIPS-Legality of Measures Taken to Address Public Health Crises: A Synopsis" (2001) 7 Widener L Symp J 71; Frederick M Abbott, *WTO TRIPS Agreement and its Implications for Access to Medicines in Developing Countries*, Study Paper 2a, United Kingdom Commission on Intellectual Property Rights, 14 February 2002), online: SSRN <http://ssrn.com/abstract=1924420>; "Drug Companies Drop Case Against S. African Government", *BRIDGES* 5:15 (24 April 2001), online: ictsd.org: <http://www.ictsd.org/bridges-news/bridges/news/drug-companies-drop-case-against-s-african-government>.

[518] See e.g. Request for Consultations by the United States, *Brazil – Measures Affecting Patent Protection*, WT/DS199/1, G/L/385; IP/D/23, 8 June 2000, and Request for the Establishment of a Panel by the United States, *Brazil – Measures Affecting Patent Protection*, WT/DS199/39, January 2001.

[519] See WTO, Council for TRIPS, *Minutes of Meeting* (held from 2 to 5 April 2001), WTO Doc IP/C/M/30 para 20, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 2-5 April 2001*].

[520] *Ibid* at para 32.

[521] *Ibid* at paras 230-31.

work of the Council for TRIPS? Did the *WTO Agreement* provide sufficient flexibilities and adequate legal means of implementation for Members to achieve their objectives? Did the Members correctly follow the *WTO Agreement*'s rules and procedures? Did the results of the outcomes of the TRIPS and Public Health Case reflect a balance of the interests of the whole Membership? Were all categories and groupings of Members and the main set of interests expressed regarding the issues at stake fully represented throughout the rulemaking processes? This case study explores these questions.

4.4.2. Basic Telecoms Agreement

The second case study will be the *Basic Telecoms Agreement* that was implemented through an entry into Members' Schedules of Concessions, which is not specifically provided for in the *WTO Agreement.* Its adoption was a breakthrough for the liberalization and deregulation of the telecommunications services sector, which had been dominated by a 60-year tradition of telecommunications monopolies and closed markets. The *Basic Telecoms Agreement* gave way to market opening, deregulation, and competition. It was negotiated among 69 countries, both developed and developing, which accounted for over 90 percent of WTO Members' telecommunications revenues.[522] It arguably marked the beginnings of a new turning point for the WTO of expansion towards progressive regulation. The participating Members felt that the liberalization of basic telecommunications services would confer major economic benefits on industry as well as on consumers in this field. In addition, it was noted that it would have the effect of reinforcing the integrity of the *General Agreement on Trade in Services* (GATS) and its

[522] The range of services and technologies covered by the Basic Telecommunications Agreement extends from submarine cables to satellites, from wide-band networks to cellular phones, and from business intranets to fixed wireless for rural and underserved regions, see: WTO, 199 Press Releases, Press/67, "Ruggiero congratulates governments on landmark telecommunications agreement" (17 February 1997), online: WTO News <http://www.wto.org/english/news_e/pres97_e/pr67_e.htm> [Press/67, "Ruggiero congratulates governments"]; William J Drake & Eli M Noam, "The WTO Deal on Basic Telecommunications: Big Bang or Little Whimper?" (1997) 21(9-10) Telecommunications Policy 799 at 800 [Drake & Noam, "The WTO Deal"]; Laura B Sherman, "Introductory Note to WTO Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services)" (1997) 36 ILM 354 at 354 [Sherman, "Introductory Note"]; Markus Fredebeul-Krein & Andreas Freytag, "Telecommunications and WTO Discipline: An Assessment of the WTO Agreement on Telecommunication Services" (1997) 21(6) Telecommunications Policy 477 at 486 [Fredebeul-Krein & Freytag, "Telecommunications"]; Statement of Ambassador Charlene Barshefsky, "WTO Basic Telecom Agreement" (Testimony delivered before the House Commerce Committee, Subcommittee on Telecommunications, Trade & Consumer Protection, 19 March 1997) at 1, online: U.S. Department of State <http://www.state.gov/documents/organization/65881.pdf> [Statement of Ambassador Barshefsky of 19 March 1997].

agenda of progressive liberalization in different service sectors, in addition to providing a solid foundation for the success of multilateral negotiations in other service areas.[523]

Was it legally correct to implement an agreement through entries in Members' Schedules of Concessions? Was it more effective? Did the *WTO Agreement* provide adequate methods of implementation to accomplish the participants' objectives? What was the impact of the negotiation of a plurilateral agreement on the effectiveness and representativeness of the processes? Were the outcomes reflective of the interests of the whole Membership? Were the processes sufficiently transparent and did they provide sufficient channels for non-state actors (such as interested national and foreign operators, as well as consumers' associations) to express their views and opinions on the subject matters at issue? This case study responds to these questions.

4.4.3. Agreement on Trade Facilitation

Finally, the third case study will be the *Agreement on Trade Facilitation,* which was the first Multilateral Trade Agreement pursuant to Article X of the *WTO Agreement* to be adopted since the inception of the WTO in 1995 and one of the biggest reforms of WTO law.[524] Moreover, just the fact that 160 Members achieved consensus on the text of the *Agreement on Trade Facilitation* is to be commended on its own. Upon its entry into force the *Agreement on Trade Facilitation* will expedite and facilitate customs procedures through effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. Part of the deal involves assistance for developing and least-developed countries to update their infrastructure, train customs officials, or assistance for any other cost associated with implementing the agreement.[525] The WTO claims that the deal will generate between $400 billion and $1 trillion in global trade by reducing costs of trade by between 10 percent and 15

[523] WTO, GBT, *Report of the Meeting* (held on 15 February 1997)*,* WTO Doc S/GBT/M/9 at para 6, online: WTO <http://docs.wto.org> [*GBT Meeting of 15 February 1997*].
[524] See "Days 3,4 and 5: Round-the-clock Consultations Produce 'Bali Package'", *2013 News Items* (5-7 December 2013), online: WTO <http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm> ["Days 3, 4 and 5"].
[525] WTO, *Trade Facilitation,* online: WTO <http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm> [WTO, *Trade Facilitation*]; See "Days 3,4 and 5", *ibid.*

percent, increasing trade flows and revenue collection, creating a stable business environment and attracting foreign investment.[526]

Can the WTO successfully negotiate a multilateral trade agreement among 160 Members while providing a fully transparent and inclusive rulemaking processes? Can a multilateral trade agreement accommodate the various interests of these 160 Members? What contributes to or impedes the negotiations processes among such a large number of Members? Are Members willing to depart from the practice of decision-making by consensus? Are the rules and procedures contained in the *WTO Agreement* adequate to equip Members with sufficient flexibilities to accomplish their objectives and implement their negotiated policies? Can the WTO successfully reconcile Members' value of sovereignty with the increasing demands of non-state actors (such as the millions of exporters and importers affected by the trade facilitation procedures) to be consulted for the negotiation of an agreement affecting directly their interests? This case study addresses these questions.

5. CONCLUSION

This Chapter responded to the secondary research question of this thesis: *How the legitimacy of the rulemaking processes ought to be assessed?* Section 2 showed there was no uniform conception of legitimacy and that it could be understood according to three different perspectives: the legal perspective; the sociological perspective; and the normative perspective. It was argued that all perspectives were relevant to some extent for the conceptualization of legitimacy for the rulemaking processes and, therefore, it was appropriate to use a model of legitimacy based on a mix of perspectives as put forth by Beetham. Such model enables the evaluation of the rulemaking processes on the basis of four legitimacy criteria (legality, effectiveness, representativeness, and openness) predominantly derived from normative conceptions of legitimacy based on input and output. But also, it allows an assessment of whether the level of legality, effectiveness, representativeness, and openness of the WTO rulemaking processes can be *justified* in terms of Members' normative values about the WTO, which include procedural equality of Members, Member-driven rulemaking processes,

[526] WTO, *2013 News Items* (5-7 December 2013), online: WTO <http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm>.

preservation of nation-state sovereignty, and the intergovernmental nature of the rulemaking processes (Section 3).

Finally, Section 4 advanced that legitimacy is a concept that can only be assessed as a matter of degree. Therefore, its evaluation requires the conception of the *multidimensional interval scale* (represented in Table 3.1 above), which would allow the measurement of unmeasurable constructs that are the legitimacy criteria. As for the data used for the evaluation of the rulemaking processes, the assessment will be done on the basis of the processes that led to the adoption of the following rules or agreements: (i) the *TRIPS and Public Health Case*; (ii) the *Basic Telecoms Agreement*; and (iii) the *Agreement on Trade Facilitation*. The case studies analysis will be performed in Part IV of this thesis presented as follows.

PART IV

CASE STUDIES ANALYSIS

This part proceeds with the case studies analysis of this thesis. It aims to respond to the primary research question of this thesis: *In the cases where Members arrived at the conclusion of a new rule, agreement or amendment, were the rulemaking processes that were used legitimate? To what degree?*

To respond to this question, the processes leading to the adoption of three rules or agreements will be examined:

(i) the *TRIPS and Public Health Declaration, Waiver and Amendment* (Chapter 4);
(ii) the *Basic Telecoms Agreement* (Chapter 5); and
(iii) the *Agreement on Trade Facilitation* (Chapter 6).

For each of these three case studies, the assessment will be performed on the basis of four criteria of legitimacy: legality, effectiveness, representativeness, and openness.

Legality will evaluate:

(i) the correctness of the rule and procedure used for the implementation of the policy objective (*Legality − Correctness of rule and procedure*).

Effectiveness will assess:

(i) the final outcome's ability to address the mandated goal (*Effectiveness − Mandate*);
(ii) whether the policy objective has been brought into effect (*Effectiveness − Policy*); and
(iii) the ability of Members to reach consensus in a timely and effective manner (*Effectiveness − Process*).

Representativeness will analyze:

(i) the degree of internal transparency and inclusiveness of the rulemaking processes (*Representativeness − Internal transparency*);
(ii) the representativity of Members in the rulemaking processes (*Representativeness − Representativity*); and
(iii) Members' effective participation in the rulemaking processes, i.e. whether the mandate and final outcome represented a balanced set of interests that were expressed (*Representativeness − Outcome*).

Finally, openness will assess:

(i) the degree of external transparency of the rulemaking processes (*Openness − External transparency*); and
(ii) the opportunities for public participation provided for within the WTO's framework (*Openness − Public participation*).

The following chapters present the evaluation and the results of the three case studies analysis.

CHAPTER 4
CASE STUDY #1: TRIPS AND PUBLIC HEALTH

1. INTRODUCTION

The assessment of the TRIPS and Public Health Case is an example where Members renegotiated the results of the Uruguay Round in an attempt to arguably recalibrate the balance towards distributive justice.[527] Were the final outcomes of the TRIPS and Public Health Case truly effective in achieving their mandate? Or did the practice of negotiations based on reciprocal exchanges prevent the outcomes from effectively addressing the mandated problem?

In this case study Members made use of some legal instruments, such as a 'declaration' and a 'collective waiver', which are not expressly provided for in the *WTO Agreement*. Yet, are these methods of implementation legal? Have the rules and procedures contained in the *WTO rulemaking* processes proven to be sufficiently effective for Members to put into effect their negotiated policies in a timely manner in light of the issue that needed to be addressed? Did Members made use of all the flexibilities provided for by the rules and procedures contained in the *WTO Agreement*? Moreover, on some occasions, due to their difficulties of reaching consensus, Members referred to legally ambiguous means, such as a statement by the Chairman and a declaration, in order to transfer the responsibility to the dispute settlement organs to rule on what has been agreed upon. What is the impact of these practices from both a legality and an effectiveness standpoint?

The TRIPS and Public Health Case is a key example where Members negotiated on the basis of interests-based coalitions. How did it impact the effectiveness of the rulemaking processes? Were Members' interests sufficiently represented through the use of coalitions? In addition, this case study illustrates that the most decisive moments of the rulemaking processes were conducted within small groups. Did the use of these small groups ensure the overall representativity of the interests of the whole Membership? Were they nonetheless transparent and inclusive? What was the impact of the overall representativity of Members in the rulemaking

[527] See e.g. Gerhart, "Slow Transformations", *supra* note 346 at 1065-85.

processes on the content of the outcomes? Did the use of small groups in the negotiating processes nevertheless result in balanced outcomes reflecting the interests of the entire Membership?

The TRIPS and Public Health Case attracted a lot of public interests due to the fact that it had a direct influence on non-state actors. On the one hand, it had the potential to impact access to affordable medicines to millions of citizens afflicted by pandemics or living in countries subject to the occurrences of pandemics or other public health diseases. On the other hand, it exercised direct influence on the interests of patent owners for the drugs used to treat the concerned diseases. Considering these elements, were non-state actors provided with adequate channels to express their views and opinions on the TRIPS and Public Health Case throughout the rulemaking processes? Were the processes sufficiently transparent to allow them obtaining adequate information about the ongoing negotiations? This Chapter responds to these questions.

Before presenting the legitimacy assessment, the following section provides a description of the rulemaking processes followed in the TRIPS and Public Health Case.

2. DESCRIPTION OF THE RULEMAKING PROCESS

The rulemaking processes leading up to the adoption of the *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement* took place between the years 2001 and 2005. They encompass three stages: (1) the agenda-setting process leading up to the adoption of the *Declaration on TRIPS and Public Health*; (2) the consensus-building process, which comprised, in a first step, the adoption of the *TRIPS and Public Health Waiver,* and in a second step, the adoption of the *Protocol Amending the TRIPS* Agreement; and (3) the implementation process of these decisions.

2.1. Agenda-Setting Process: Adoption of the Declaration on TRIPS and Public Health

In a context where there was a grave situation of AIDS, tuberculosis and malaria pandemics in the continent of Africa, the African Group brought the issue concerning the relationship between

the *TRIPS Agreement* and access to affordable medicines in the WTO.[528] What was the problem hoping to be addressed? It was believed that Members with no or insufficient manufacturing capacities would not be able to take advantage of compulsory patent licences for addressing public health problems due to some limitations provided for by the *TRIPS Agreement.*

Members had generally recognized that compulsory patent licences are an essential tool for governments to carry out effective public health policies.[529] Compulsory patent licences consist of "licenses to another producer to make the patented product without the patent holder's consent."[530] The grant of compulsory licences for the production of generic pharmaceutical products is permitted by Article 31 of the *TRIPS Agreement,* upon the fulfilment of certain obligations of a substantive and procedural nature.[531] One of the conditions for the grant of compulsory licences that received the most attention during the TRIPS and Public Health Case is laid down in Article 31(f) of the *TRIPS Agreement*, which provides that licences should be issued "predominantly for the supply of the domestic market" of the Member granting them.[532] Accordingly, a Member with manufacturing capacity for a pharmaceutical product is authorized under Article 31(f) to issue a compulsory licence to produce generic medicines for its local manufacture and supply all of its country's internal needs.[533] However, this provision was viewed by Members as preventing a small Member, which has no production facilities of its

[528] It was reported that as many as 11 million people died every year of infectious diseases, the great majority of them women and children living in the third world. Out of these, AIDS claims an estimated 3 million lives, tuberculosis 2 million and malaria 1 million. Additionally, it was estimated that more than 17 million lives had then been lost due to HIV/AIDS in Sub-Saharan Africa alone, and that out of 36 million people infected with the HIV virus worldwide, more than 25 million lived in Sub-Saharan Africa, see WTO, Council for TRIPS, *Special Discussion on Intellectual Property and Access to Medicines* (held on Council for TRIPS meeting from 18 to 22 June 2001), WTO Doc IP/C/M/31 at 21 and 28, online: WTO <http://docs.wto.org> [*Special Discussion on IP and Medicines*].

[529] See e.g. *ibid* (statement of Zimbabwe, on the behalf of the African Group at 5; statement of the European Union at 8; statement of Brazil at 11; statement of Venezuela at 14; statement of Norway at 16; statement of India at 23; statement of Tanzania on behalf of the least-developed countries at 29; statement of Bolivia at 31; statement of the United States at 41; statement of Egypt at 42; statement of Japan at 48; statement of Hungary at 55-56; statement of Canada at 58; statement of New Zealand at 60; statement of Jamaica at 61; statement of Indonesia at 70; statement of Korea at 73; statement of Colombia at 73; and statement of Uruguay at 76).

[530] Frederick M Abbott, "The WTO Medicines Decision: The Political Economy of World Pharmaceutical Trade and the Protection of Public Health" (2005) 99 AJIL 317 at 319 [Abbott, "The WTO Medicines Decision"].

[531] *TRIPS Agreement, supra* note 233, Article 31, paras (a) to (l).

[532] *Ibid,* Article 31(f).

[533] See Abbott, "The WTO Medicines Decision", *supra* note 530 at 319 (Abbott argues that Article 31(f) could also allow a Member to authorize export of a "non-predominant" part of the production and to issue a licence for the importation of a product to meet all of its domestic needs).

own, from obtaining cheap generic medicines from a foreign generic producer under a compulsory licence.[534]

Members agreed to address the matter at the Doha Ministerial Conference in a separate *Declaration on TRIPS and Public Health* (or 'Declaration'), which was adopted on 14 November 2001.[535] The Declaration contained a series of interpretative provisions of the *TRIPS Agreement,* including the well-known paragraph 4, which provides that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health" and that the *TRIPS Agreement* "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[536] The Declaration also mandated the Council for TRIPS "to find an expeditious solution" to the difficulties that Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the *TRIPS Agreement*.[537]

2.2. Consensus-Building Process

Considering the need for an expeditious solution as mandated by paragraph 6 of the Declaration, Members agreed that a long-term waiver of Article 31(f) of the *TRIPS Agreement* would be used as a temporary arrangement (Section 2.2.1) pending the entry into fore of an amendment of Article 31 of the *TRIPS Agreement,* which would consist in a permanent solution providing the legal certainty required (Section 2.2.2).

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[534] See e.g. *Special Discussion on IP and Medicines*, *supra* note 528 (statement of Zimbabwe, on the behalf of the African Group at 5; statement of the European Union at 8; statement of Venezuela at 14; statement of Norway at 17; statement of Malaysia at 18; statement of India at 24; statement of Tanzania on behalf of the least-developed countries at 29; statement of Bolivia at 31; statement of Thailand at 32; statement of the United States ". . . if no patent for the drug has been granted in the licensee's country, no infringement would occur. If such protection does exist, however, and the compulsory licensee chooses to manufacture the drug in its country for export to the country that granted the compulsory licence, a problem is created" at 39; statement of Japan at 49-50; statement of Cuba at 51 and 53; statement of Hungary at 55-56; statement of Jamaica at 61; statement of Indonesia at 70; statement of Turkey at 72; and statement of Korea at 73).
[535] *Declaration on TRIPS and Public Health, supra* note 512.
[536] *Ibid* at para 4.
[537] *Ibid* at para 6.

2.2.1. Adoption of the TRIPS and Public Health Waiver

The first attempt to adopt a waiver decision based on a Chair's proposal ('the Motta text'[538]) was blocked by the United States in December 2002.[539] In order to bridge the differences between the United States and other Members, it was agreed that the Motta text would be adopted along with a Chairman's statement, outlining a number of 'shared understandings', that would be read prior to the adoption of the waiver decision. The *TRIPS and Public Health Waiver* (or 'Waiver Decision') was adopted "in light of the Chairman's Statement" by the General Council on 30 August 2003.[540] It waived the obligations set out in Article 31(f) and (h) of the *TRIPS Agreement* with respect to pharmaceutical products and established a system (hereinafter 'System') that enables a Member that lacks capacity to produce medicines itself to obtain it from another Member under a compulsory licence at low cost.[541] Moreover, the Waiver Decision instructed the Council for TRIPS to work on the preparation of an amendment which would replace the Waiver Decision on the understanding that the amendment would be based, where appropriate, on the Waiver Decision.[542]

2.2.2. Adoption of the Protocol Amending the TRIPS Agreement

Due to Members' difficulties to agree on the content of an amendment, the only agreement that could be reached was to transpose almost literally the form and the content of the Waiver Decision into the text of the amendment. Indeed, it was agreed that the content of the amendment would remain substantially the same as that of the Waiver Decision (i.e. 'the Motta text') and that an identical Chairman's statement would be read prior to the adoption of the proposal for amendment, just as it was done for the adoption of the *TRIPS and Public Health Waiver*.

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[538] Referring to Ambassador Eduardo Pérez Motta of Mexico, who chaired the TRIPS Council during its negotiation, see: Abbott, "The WTO Medicines Decision", *supra* note 530 at 326. The Motta text can be found in: WTO, Council for TRIPS, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Note from the Chairman,* WTO Doc JOB(02)/217 (16 December 2002), online : WTO <http://docs.wto.org> (unavailable to the public) [Motta text].

[539] WTO, Council for TRIPS, *Minutes of Meeting* (held on 25-27 and 29 November, and 20 December 2002), WTO Doc IP/C/M/38 at paras 33-34, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002*].

[540] WTO, General Council, *Minutes of Meeting* (held on 25, 26 and 30 August 2003), WTO Doc WT/GC/M/82 at paras 29-31, online: WTO <http://docs.wto.org> [*General Council Meeting of 25, 26 and 30 August 2003*].

[541] See generally *TRIPS and Public Health Waiver, supra* note 94.

[542] *Ibid* at para 11.

As a result, on 6 December 2005, the General Council adopted the *Protocol Amending the TRIPS Agreement,* in light of a quasi-identical Chairman's Statement.[543] The *Protocol Amending the TRIPS Agreement* (or 'the Protocol of Amendment') stipulates that, upon the entry into force of the Protocol, the *TRIPS Agreement* shall be amended by inserting Article 31*bis* after Article 31 and by inserting an Annex to the *TRIPS Agreement* after Article 73.[544]

2.3. Implementation

The *TRIPS and Public Health Waiver* took effect immediately upon adoption by the General Council. Indeed, a waiver does not require an implementation process, i.e. to be sent back to Members' capitals for acceptance and ratification.[545] This is why it was considered to be an expeditious solution.

As for the *Protocol Amending the TRIPS Agreement,* it provided that, pursing to Article X:3 of the *WTO Agreement,* the amendment would take effect for the Members that have accepted them upon acceptance by two-thirds of the Members (currently 107 Members[546]) and thereafter for each other Member upon acceptance by it. The General Council set a deadline of 1 December 2007 for the entry into force of the *Protocol Amending the TRIPS Agreement.*[547] However after the deadline was extended four times[548], more than seven years later, the Protocol of Amendment has still not received the required number of acceptances for its entry into force.[549]

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[543] WTO, General Council, Minutes of Meeting (held on 1, 2 and 6 December 2005), WTO Doc WT/GC/M/100 at paras 28-32, online: WTO <http://docs.wto.org> [*General Council Meeting of 1, 2 and 6 December 2005*].
[544] *Protocol Amending the TRIPS Agreement, supra* note 94 at 2 para 1.
[545] *WTO Agreement, supra* note 1, Article IX:1 and IX:3. For additional information, see Chapter 2, Section 3.4.
[546] See Chapter 2, Section 3.2.4.
[547] *Protocol Amending the TRIPS Agreement*, *supra* note 94 at 1 paras 2 and 3.
[548] The most recent decision of the General Council of 26 November 2013 extends the period for the acceptance by Members if the *Protocol Amending the TRIPS Agreement* until 31 December 2015, see: *Amendment of the TRIPS Agreement − Fourth Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement* (adopted by the General Council on 26 November 2013)*,*WTO Doc WT/L/899, online: WTO <http://docs.wto.org>.
[549] As of April 2015, 54 Members have accepted the *Protocol Amending the TRIPS Agreement.* The European Union (EU) has deposited an instrument of acceptance, but not the 28 individual EU Member States as required by Article X:7 of the *WTO Agreement*. For an up-to-date list of the Members who have accepted it see: WTO, *Members accepting amendment of the TRIPS Agreement,* online: WTO <http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm>. For the special case of EU's acceptance, see Kennedy, "When Will the Protocol", *supra* note 237 at 466-72.

3. LEGITIMACY ANALYSIS

The following sections proceed with a step-by-step evaluation of each criterion of legitimacy and its specific indicators as applied to the rulemaking processes that led to the adoption of the *Declaration on TRIPS and Public Health, the TRIPS and Public Health Waiver,* and *the Protocol Amending the TRIPS Agreement*: legality (Section 3.1); effectiveness (Section 3.2); representativeness (Section 3.3); and openness (Section 3.4).

3.1. Legality

The criterion of legality possesses only one indicator, which assesses the correctness of the rule and procedure used.

3.1.1. Legality − Correctness of rule and procedure

> *Legality's Indicator #1: Was the correct rulemaking rule or procedure followed for the implementation of the negotiated policy?*

Three different legal instruments were used to implement Members' negotiated policies in the TRIPS and Public Health Case: a declaration (i.e. the *Declaration on TRIPS and Public Health*); a collective waiver (i.e. the *TRIPS and Public Health Waiver*); and an amendment (i.e. the *Protocol Amending the TRIPS Agreement*). The following sections analyze the legal effect and status of each of these three instruments and assess whether they were the proper legal means to be used for the implementation of the policies (or rules) that they contained.

3.1.1.1. Legal effect and status of the Declaration

Nowhere in the *WTO Agreement* does it make mention of a 'declaration' as a legal instrument.[550] The *Declaration on TRIPS and Public Health* ('Declaration') can be most logically assimilated to a type of decision under Article IX:1 of the *WTO Agreement* considering that, akin to a decision, it was negotiated within Members in the Council for TRIPS and the Doha Ministerial Conference and was adopted by consensus of the Ministerial Conference.[551]

[550] See generally Chapter 2, Section 3.

[551] See WTO, Ministerial Conference, *Summary Record of the Ninth Meeting* (held on 14 November 2001), WTO Doc WT/MIN(01)/SR/9 at 1-4, online: WTO <http://docs.wto.org>; Frederick M Abbott, "The Doha Declaration on

However, some provisions of the Declaration seem to be reaching beyond what is legally permissible by a decision. The provisions of the Declaration comprise: (i) some interpretative language of the *TRIPS Agreement*[552]; (ii) some language containing a deferral of the obligations to comply for LDC Members with respect to some provisions of the *TRIPS Agreement*; and (iii) mandates for future negotiations and actions to be taken by the Council for TRIPS. What is the legal effect of these provisions with respect to the *TRIPS Agreement*?

3.1.1.1.1. *Interpretative language to the TRIPS Agreement*

Several provisions of the Declaration contain interpretative language of the *TRIPS Agreement*. Paragraph 4 of the Declaration states that Ministers "*agree* that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health" and that the *TRIPS Agreement* "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[553] In addition, paragraph 5 recognizes the existence of several flexibilities in the *TRIPS Agreement,* including that: (i) each provision of the TRIPS Agreement "shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles"; (ii) each Member "has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted"[554]; (iii) each Members "has the right to determine what constitutes a national emergency or other circumstances of extreme urgency"[555]; and (iv) each Member is "free to establish its own regime for [the exhaustion of intellectual property rights] without challenge."[556] What is the legal weight of this interpretative language? What would be its impact for the interpretation of the *TRIPS Agreement* in the case of a dispute before the dispute settlement organs?

Interpretations of the Multilateral Trade Agreements are explicitly permitted by Article IX:2 of the *WTO Agreement.* However, it does not appear that the Declaration was adopted pursuant to

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the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO" (2002) 5(2) J Int'l Econ L 469 at 490 [Abbott, "The Doha Declaration"]; Steve Charnovitz, "The Legal Status of the Doha Declarations" (2002) 5(1) J Int'l Econ L 207 at 208 [Charnovitz, "The Legal Status"].

[552] *Declaration on TRIPS and Public Health, supra* note 512 at para 2.

[553] *Ibid* at para 4 [emphasis added].

[554] *Ibid* at para 5(b).

[555] *Ibid* at para 5(c).

[556] *Ibid* at para 5(d).

Article IX:2 considering that there was no such mention in the text of the Declaration and also no mention of the intention of Members to formally and authoritatively interpret the *TRIPS Agreement.* Moreover, the adoption of the Declaration was not adopted on the basis of a recommendation for an interpretation by the Council for TRIPS, as provided by Article IX:2.[557]

Therefore, it can be concluded that the interpretative language contained in the Declaration does not have the effect of authoritatively interpreting the *TRIPS Agreement.*[558] At its best, the Declaration's interpretative language could be assimilated to a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions [i.e. those of the *TRIPS Agreement*]", specifically recognized by Article 31.3(a) of the *Vienna Convention on the Law of Treaties* (VCLT)[559] as a proper element for treaty interpretation.[560] This would be especially the case for paragraph 4 of the Declaration which explicitly uses the words "we agree", thus formulated in the form of an agreement.[561]

3.1.1.1.2. *Language containing a deferral of the obligations to comply*

Paragraph 7 of the Declaration states that Ministers "agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the *TRIPS Agreement* or to enforce rights provided under these Sections until 1 January 2016."[562] The language of this provision appears to be of a nature to defer the obligation to comply for LDC Members for an additional period of ten years than what

[557] Abbott, "The Doha Declaration", *supra* note 551 at 492; Charnovitz, "The Legal Status", *supra* note 551 at 210; Carlos M Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health* (Geneva: WHO, 2002) at 44, online: WHO <http://www.who.int/medicines/areas/policy/WHO_EDM_PAR_2002.3.pdf> [Correa, *Implications of the Doha Declaration*]. On the procedure for the adoption of interpretations, see Chapter 2, Section 3.3.

[558] But see Correa, *Implications of the Doha Declaration, ibid* (arguing that the Declaration has "the same *effect* as an authoritative interpretation." at 44).

[559] VCLT, *supra* note 110.

[560] *Ibid*, Article 31.3(a). See also *WTO Agreement, supra* note 1, Article IV:1 ("The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements . . . in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement."); Charnovitz, "The Legal Status", *supra* note 551 at 211; Carmen Otero García-Castrillón, "An Approach to the WTO Ministerial Declaration on the TRIPS Agreement and Public Health" (2002) 5(1) J Int'l Econ L 212 at 212 [García-Castrillón, "An Approach"]; Abbott, "The Doha Declaration", *supra* note 551 at 490.

[561] Abbott, "The Doha Declaration", *supra* note 551 at 491.

[562] *Declaration on TRIPS and Public Health, supra* note 512, para 7.

was originally provided for in the *TRIPS Agreement*, thus affecting the rights and obligation of Members between themselves.[563]

Legally, the transitional period accorded to LDC Members to comply with the provisions of the *TRIPS Agreement* could only be extended by means of a waiver pursuant to Article IX:3 of the *WTO Agreement* or an amendment following Article X. Indeed, Article 39 of the VCLT provides that if a treaty contains specific rules about amendment, the parties must follow the rules of that treaty.[564] Thus, the language containing a deferral of the obligations to comply should be considered as having no effect on Members' rights and obligations under the *TRIPS Agreement* due to the fact that a simple decision pursuant to Article IX:1 of the *WTO Agreement* cannot modify Members' rights and obligations.[565] The effect of this language is purely political, reflecting the political will and commitments of Ministers.[566]

3.1.1.1.3. *Mandates for future negotiations and actions*

Paragraphs 6 and 7 of the Declaration contained two separate mandates for future negotiations and actions to be taken by the Council for TRIPS. First, Ministers instructed the Council for TRIPS "to find an expeditious solution to [the difficulties of Members with insufficient or no manufacturing capacities in the pharmaceutical sector in making effective use of the compulsory licensing under the *TRIPS Agreement*] and report to the General Council before the end of 2002."[567] Second, Ministers instructed the Council for TRIPS "to take the necessary action to give effect to [the extension of the transitional period of LDC Members until 1 January 2016] pursuant to Article 66.1 of the *TRIPS Agreement.*"[568]

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[563] When the *TRIPS Agreement* entered into force on 1 January 1995, LDC Members were accorded a transition period of 11 years (until 1 January 1 2006) to apply the provisions of the agreement, other than the national treatment and MFN provisions (i.e. Articles 3-5 of the *TRIPS Agreement*), see *TRIPS Agreement, supra* note 233, Article 66.1, read in conjunction with Article 65.1; Frederick M Abbott, *Technical Note: The LDC TRIPS Transition Extension and the Question of Rollback,* ICTSD Programme on Innovation, Technology and Intellectual Property, Policy Brief No 15 (May 2013) at 1, n 1, online: ictsd.org <http://www.ictsd.org/downloads/2013/05/the-ldc-trips-transition-extension-and-the-question-of-rollback.pdf>.
[564] VCLT, *supra* note 110, Article 39.
[565] *WTO Agreement, supra* note 1, Article IX:1 and IV:1. See also Charnovitz, "The Legal Status", *supra* note 551 at 210.
[566] Paul Vandoren, "Médicaments sans Frontières? Clarification of the Relationship between TRIPS and Public Health resulting from the Doha Ministerial Declaration" (2002) 5(1) Journal of World Intellectual Property 5 at 8 and 10 [Vandoren, "Médicaments sans Frontières"].
[567] *Declaration on TRIPS and Public Health, supra* note 512, para 6.
[568] *Ibid* at para 7.

A mandate for future negotiations or for actions to be taken by the Council for TRIPS does not modify Members' rights and obligations. It is of the nature that can be taken by a simple decision by the Ministerial Conference following Article IX:1 of the *WTO Agreement.* Indeed, Article III:2 specifically states that the WTO may "provide a forum for further negotiations among its Members concerning their multilateral trade relations."[569] Moreover, Article IV:1 provides that the Ministerial Conference has the authority "to take decisions on all matters under any of the Multilateral Trade Agreements."[570] Therefore the mandates contained in paragraphs 6 and 7 of the Declaration should have the legal effect of a decision of the Ministerial Conference pursuant to Article IX:1.[571]

3.1.1.1.4. *Was a Declaration the correct legal instrument?*

In a nutshell, was the Declaration the correct legal instrument to implement the provisions that it contained (i.e. interpretative language of the *TRIPS Agreement,* a deferral of the obligations to comply for LDC Members, and mandates for future negotiations and actions to be taken by the Council for TRIPS)? For the reasons provided above, it was concluded that the Declaration, if assimilated to a type of decision taken under Article IX:1 of the *WTO Agreement,* was the correct legal instrument for adopting the mandate for future negotiations on the TRIPS and public health issue and for instructing the Council for TRIPS to take action pursuant to Article 66.1 of the *TRIPS Agreement.*

However, for the interpretative language to have legal effect on the *TRIPS Agreement,* it should have been adopted pursuant to an authoritative interpretation under Article IX:2 of the *WTO Agreement.* Due to the fact that it was instead incorporated into a declaration, the legal effect of the interpretative language is limited to the extent permissible by Article 31.3(a) of the VCLT, i.e. to be considered as a proper element, among others, for treaty interpretation. Moreover, for the provision containing a deferral of obligations for LDC Members to have legal effect, it should have been adopted pursuant to a waiver under Article IX:3 of the *WTO Agreement* or an amendment following Article X.

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[569] *WTO Agreement, supra* note 1, Article III:2.
[570] *Ibid*, Article IV:1.
[571] See Charnovitz, "The Legal Status", *supra* note 551 at 210.

In summary, the Declaration was the correct legal instrument uniquely for adopting the mandates for future negotiations and actions by the Council for TRIPS, but not for adopting interpretative language of the *TRIPS Agreement* or for deferring the obligations of LDC Members to comply with some provisions of the *TRIPS Agreement*.[571.1]

3.1.1.2. Legal effect and status of the Waiver Decision

3.1.1.2.1. *Was the correct procedure followed for the adoption of the Waiver Decision?*

The rules and procedures for the adoption of a waiver are contained in paragraphs 1, 3 and 4 of Article IX of the *WTO Agreement.*[572] There was no 'request for waiver' leading up to the adoption of the *TRIPS and Public Health Waiver* as required by Article IX:3(b), but a mandate set out in paragraph 6 of the *Declaration on TRIPS and Public Health* to find an "expeditious solution" to the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the *TRIPS Agreement*.[573] It can be logically concluded that the mandate by the Ministerial Conference amounted to the instruction (i.e. the request) from all Members to have the Council for TRIPS consider a waiver.

The Waiver Decision was adopted by consensus, as provided for by Article IX:1 of the *WTO Agreement* and the *Decision-Making Procedures Under Articles IX and XII.*[574] Indeed, the Council for TRIPS first approved a draft waiver decision by consensus[575] and forwarded it to the General Council, which on its turn, adopted the decision by consensus on 30 August 2003.[576] However, in the process leading up to the adoption of the Waiver Decision, the Council for TRIPS met on 20 December 2002 to consider the approval of a draft waiver decision; however it

[571.1] It should be noted that in *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* the Appellate Body concluded that "paragraph 5.2 of the *Doha Ministerial Decision* constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention", see Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/AB/R at para 268, adopted 4 April 2012, AB-2012-1. However, considering that the *WTO Agreement* contains some rules for authoritative interpretations and waivers, the WTO Members should have respected the *WTO Agreement's* own normative hierarchy as provided for in Article 40(1) VCLT.
[572] For a description of the rules and procedures for the adoption of waiver decisions, see Chapter 2, Section 3.4.
[573] *Declaration on TRIPS and Public Health, supra* note 512, para 6.
[574] *Decision-Making Procedures Under Articles IX and XII, supra* note 250.
[575] WTO, Council for TRIPS, *Minutes of Meeting* (held on 28 August 2003), WTO Doc IP/C/M/41at paras 2-3, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 28 August 2003*].
[576] *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at paras 30-31.

failed to adopt a decision on the waiver because the United States was unable to join the consensus on the draft waiver text.[577] Instead of proceeding to a vote on the draft waiver text, as permitted (but not required) by Article IX:1, the Council for TRIPS decided to resume its work on the search of a consensus on the mandate set out in paragraph 6 the *Declaration on TRIPS and Public Health.*[578]

As regards to the need of exceptional circumstances for justifying the Waiver Decision, following the terms of Article IX:4 of the *WTO Agreement,* the Waiver Decision makes an express reference to the Declaration*,* which recognizes "the gravity of the public health afflicting many developing and least-developed countries"[579] and the difficulties that "Members with insufficient or no manufacturing capacities in the pharmaceutical sector" could face "in making effective use of compulsory licensing under the TRIPS Agreement."[580]

In summary, the correct procedure was generally followed for the adoption of the Waiver Decision, with the exception of a small procedural deviation, i.e. the lack of a 'request for waiver', which was instead replaced by a mandate by the Ministerial Conference. This procedural deviation should not negatively affect the score of the indicator of legitimacy, considering that the mandate (instead of a request for waiver) was emitted by the highest governing body of the WTO (i.e. the Ministerial Conference).

3.1.1.2.2. *Was a Waiver Decision the correct legal instrument?*

The *TRIPS and Public Health Waiver* encompasses three different waivers. Contrary to the provisions of Article IX:3 of the *WTO Agreement,* which provides that a waiver should suspend an obligation imposed on only one specifically designated Member, all three waivers are collective: they are granted to any qualifying Member(s)*,* not just to one Member.[581] Indeed, all three waivers provide general conditions following which, if they are met by one or more

[577] *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002*, *supra* note 539 at paras 33-34.

[578] *Ibid* at paras 33 and 64.
[579] *Declaration on TRIPS and Public Health, supra* note 512 at para 1.
[580] *Ibid* at para 6.
[581] On collective waivers, see generally Chapter 2, Section 3.4.

Members, the waiver of the obligation in question is to be automatically granted to that or these Member(s).[582]

The first waiver suspends the obligations under Article 31(f) of the *TRIPS Agreement* (i.e. the obligation that the use of a compulsory licence be authorized predominantly for the supply of the domestic market of the Member authorizing such use) of *any Member* qualifying as an "exporting Member" with respect to the grant by it of a compulsory licence.[583] The Waiver Decision defines "exporting Member" as "a Member using the system set out in this Decision to produce pharmaceutical products for, and export them to, an eligible importing Member."[584]

The second waiver suspends the obligation of *any Member* qualifying as an "eligible importing Member" to pay adequate remuneration to the right holder pursuant to Article 31(h) of the *TRIPS Agreement,* if certain circumstances are met.[585] The Waiver Decision defines an "eligible importing Member" as "any least-developed country Member, and any other Member that has made a notification to the Council for TRIPS of its intention to use the system as an importer."[586]

Finally, the third waiver suspends the "domestic market" condition laid down in Article 31(f) of the *TRIPS Agreement* for *any developing or LDC Member party to a RTA*, which meets certain requirements provided for in paragraph 6(i) of the *TRIPS and Public Health Waiver,* "to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory licence in that Member to be exported to the markets of those other developing or least-developed country parties to the regional trade agreement that share the health problem in question."[587]

By providing general conditions following which the waivers will be granted, the legal effect of the *TRIPS and Public Health Waiver* extends beyond that envisioned for a waiver decision and

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[582] See e.g. Feichtner, *The Law and Politics of WTO Waivers*, *supra* note 154 at 125.
[583] *TRIPS and Public Health Waiver, supra* note 94, para 2.
[584] *Ibid* at para 1(c).
[585] If the compulsory licence is granted for the same products in the eligible importing Member than in the exporting Member, the obligation to pay adequate remuneration is waived in respect of those products for which remuneration in accordance with the first sentence of paragraph 3 is paid in the exporting Member, see: *ibid* at para 3.
[586] The waiver decision provides a list of some Members will not use the system set out in this Decision as importing Members and that some other Members have stated that they will not use the system unless in case of situations of national emergency or other circumstances of extreme urgency, see: *ibid* at para 1(b) and n 3.
[587] *Ibid* at para 6(i).

is more akin to that of an amendment. Indeed, the Waiver Decision has the effect of creating new general exceptions to the grant of compulsory licences, thus modifying the Members' rights and obligations between themselves.[588] Moreover, it is intended to be of a permanent nature considering that the grant of the waivers contained in the decision are not subject to annual review, as provided by Article IX:4 of the *WTO Agreement* (only the functioning of the System set out in the Waiver Decision is).[589] Additionally, it is provided that the Waiver Decision will remain into force for each Member until an amendment to the *TRIPS Agreement* replacing its provisions takes effect for that Member[590], in contravention of Article IX:4, which provides that the decision must state "the date on which the waiver shall terminate." For these reasons, the proper legal instrument to implement the provisions of the Waiver Decision would have been pursuant to an amendment under Article X of the *WTO Agreement.*

3.1.1.3. Legal effect and status of the Protocol of Amendment

Was the Protocol of Amendment adopted according to the correct rules and procedures?[591] The wording of Article X:1 of the *WTO Agreement* seems to imply that the General Council would consider a proposal for amendment for a period of maximum 90 days (unless otherwise agreed upon); however in the case of the *Protocol Amending the TRIPS Agreement,* the hard consensus-building work was performed within the Council for TRIPS, prior to the submission of the proposal for amendment to the General Council. No more work was left to be done within the General Council at this point.[592] Indeed, the General Council decided by consensus to submit the proposed amendment to the Members for acceptance pursuant to Article X:1 on the same day that it received it from the Council for TRIPS. This was well within the permitted 90-day time period to consider a proposed amendment.[593]

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[588] See also Feichtner, *The Law and Politics of WTO Waivers, supra* note 154 at 139-40.
[589] *TRIPS and Public Health Waiver, supra* note 94 at para 8.
[590] *Ibid* at para 11.
[591] For a description of the rules and procedures for amendments, see Chapter 2, Section 3.2.
[592] The proposal to amend the *TRIPS Agreement* was negotiated within the Council for TRIPS between September 2003 and December 2005, and finally submitted by the Council for TRIPS to the General Council for approval on 6 December 2005, see: WTO, Council for TRIPS, *Minutes of Meeting* (held on 25-26 and 28 October, 29 November and 6 December 2005), WTO Doc IP/C/M/49 at paras 214-15, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005*]; WTO, *General Council Meeting of 1, 2 and 6 December 2005, supra* note 543 at paras 22-24.
[593] WTO, *General Council Meeting of 1, 2 and 6 December 2005, supra* note 543 at paras 31-32.

Moreover, as provided for in Article X:3 of the *WTO Agreement,* Paragraph 4 of the *Protocol Amending the TRIPS Agreement* indicates that the proposed amendment is of a nature that would alter the rights and obligations of the Members and, as a result, will enter into force upon the acceptance by two thirds of the Members (currently 107 Members). Following the terms of Article X:3, the Protocol of Amendment has not entered into effect, having not yet received the required number of acceptances for its entry into force.[594]

Was an amendment the correct instrument to implement the provisions of the *Protocol Amending the TRIPS Agreement*? The text of the proposed amendment is quasi-identical to that of the *TRIPS and Public Health Waiver,* which should have been adopted pursuant to an amendment in the first place. Considering that the provisions of the Protocol of Amendment create new general exceptions to the grant of compulsory licences, which have the effect of modifying the Members' rights and obligations between themselves[595], and that it is of a permanent nature, it can be concluded that the use of an amendment was correct to implement the provisions of the Protocol of Amendment.

3.1.1.4. Attribution of a score: *Legality − Correctness of rule and procedure*

Legality − Correctness of rule and procedure evaluated the following standard: *Was the correct rulemaking rule or procedure followed for the implementation of the negotiated policy?* For the adoption of *Protocol Amending the TRIPS Agreement,* an amendment was the correct legal means as the objective was to create a permanent exception to the grant of compulsory licences, which affects Members' rights and obligations. Additionally, the analysis above has shown that the correct procedure was followed for its adoption.

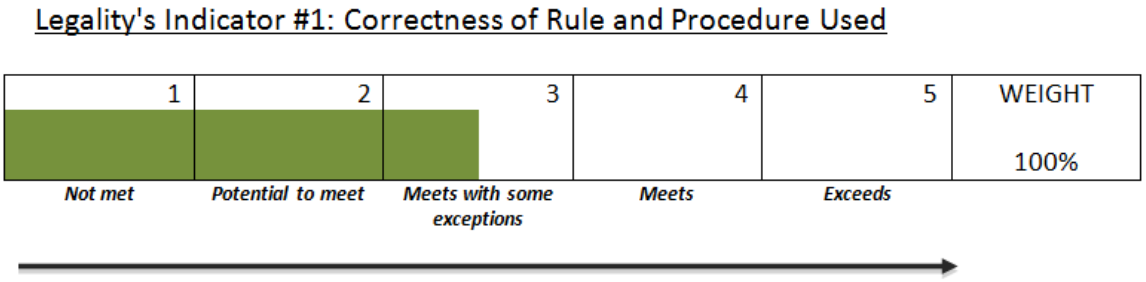
As regards the *TRIPS and Public Health Waiver,* it can be concluded that the correct procedure was followed for its adoption, however, its legal effect was to create a general and quasi-permanent exception for all qualifying Members, thus extending beyond the permissible scope of a waiver pursuant to Article IX:3 of the *WTO Agreement*. It should have instead been adopted by the means of an amendment under Article X.

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[594] See Section 3.1.1.2.2 above.
[595] *Protocol Amending the TRIPS Agreement, supra* note 94 at 1 para 3 and 2 para 4 (indicating that the proposed amendment is of a nature that would alter the rights and obligations of the Members).

As regards the *Declaration on TRIPS and Public Health,* the use of a decision was the correct legal means for the adoption of a mandate for future negotiations and actions by the Council for TRIPS. However, it was not appropriate for adopting the interpretative language of the *TRIPS Agreement,* as well as a deferral for LDC Members of the obligations to comply with some provisions of the *TRIPS Agreement.* The adoption of these provisions was *ultra vires* and should have been adopted pursuant to an authoritative interpretation under Article IX:2 of the *WTO Agreement,* for the former, and a waiver under Article IX:3 or an amendment following Article X, for the latter.

In summary, the adoption of the *Protocol Amending the TRIPS Agreement* should receive a perfect score for the indicator of legality. However, in both the cases of the adoption of the Declaration and the Waiver Decision, Members did not use the correct legal means to implement their provisions. This was not a simple deviation of a rule of procedure, but arguably the violation of substantive rules of the *WTO Agreement.* For these reasons, *Legality - Correctness of rule and procedure,* i.e. the first and only indicator of the criterion of legality, should be attributed a score of 2.5/5 (i.e. '*performance was most of the time below the indicator's standards*').



3.1.2. Overall performance of the criterion of legality

Considering that the criterion of legality is composed of only one indicator of legitimacy, its score (i.e. 2.5/5) corresponds to that of the criterion of legality as a whole. Thus it can be concluded that the performance of the TRIPS and Public Health Case *was most of the time below the standards* of the criterion of legality.

CASE STUDY #1: TRIPS AND PUBLIC HEALTH								
CRITERION	**Indicator**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
LEGALITY	Ind #1	100						2.5
	Rating	100						2.5/5
RATING STANDARD	*Performance was most of the time below the standards of the legitimacy criterion*							**2.5/5**

3.2. Effectiveness

The criterion of effectiveness is to be assessed on the basis of three indicators of legitimacy:

(i) whether the final outcome addressed the mandated goal (Section 3.2.1);
(ii) whether the negotiated policy was brought into effect (Section 3.2.2); and
(iii) whether Members were able to reach consensus in a timely and effective manner (Section 3.2.3).

Each indicator of legitimacy will be evaluated in light of the original mandate contained in paragraph 6 of the *Declaration on TRIPS and Public Health* of 14 November 2001, which instructed the Council for TRIPS to find a solution to the difficulties that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making use of compulsory licensing under the *TRIPS Agreement.*[596] The mandate also came with a specific timeline: it was explicitly provided that the solution had to be expeditious and the Council for TRIPS was instructed to report to the General Council before the end of 2002.[597]

The following sections proceed with the analysis of each of the three indicators of effectiveness.

[596] *Declaration on TRIPS and Public Health, supra* note 512, para 6.
[597] *Ibid.*

3.2.1. Effectiveness − Mandate

Effectiveness' Indicator #1: Did the final negotiated outcome address the goal as set out in the negotiating mandate?

As mandated by paragraph 6 of the *Declaration on TRIPS and Public Health,* both the *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement* established a System to authorize Members that have insufficient or no manufacturing capacities in the pharmaceutical sector for a product to issue a compulsory licence to enable the import of the generic version of the product in question from a foreign generic producer.[598] What were the conditions for the use of the System? Did it effectively solve the problem related to the difficulties of Members with insufficient manufacturing capacities to make use of compulsory licences? Was it made sufficiently expeditious and timely to address to the objective set out in paragraph 6 of the Declaration? The following sections answer these questions.

3.2.1.1. Description of final outcome: conditions for the use of the System

The *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement* have been criticized for linking cumbersome procedural conditions to the use of the System set out in the texts of the Waiver Decision and the amendment, which could affect its effectiveness.[599] The procedural conditions for the grant of compulsory licences is laid out in Article 31 of the *TRIPS Agreement*, which includes, *inter alia*, a failed attempt to obtain the authorization of the right holder on reasonable commercial terms and conditions and the payment of adequate compensation to the right holder.[600] However, the *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement* modified some of these requirements and added

[598] See generally *TRIPS and Public Health Waiver, supra* note 94; *Protocol Amending the TRIPS Agreement, supra* note 94.
[599] Cecilia Oh, "The New 'Deal' on TRIPS and Drugs: What Does it Mean for Access to Medicines", *Third World Network,* Briefing Paper 17 (October 2003), online: TWN: <http://www.twnside.org.sg/title/cancun4.doc> [Oh, "The New Deal"]; Catherine Saez, "Global Access To Medicines Not Improved By TRIPS Waiver, Some Say", *Intellectual Property Watch* (1 October 2008), online: IP Watch < http://www.ip-watch.org/2008/10/01/global-access-to-medicines-not-improved-by-trips-waiver-some-say/> [Saez, "Global Access to Medicines"]; "Members Strike Deal on TRIPS And Public Health; Civil Society Unimpressed", *BRIDGES* 9:42 (7 December 2005), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/members-strike-deal-on-trips-and-public-health-civil-society-unimpressed> ["Members Strike Deal"]; Joint NGO Statement on TRIPS and Public Health, "WTO Members Should Reject Bad Deal on Medicines", *Consumer Project Technology* (3 December 2005), online: cptech.org <www.cptech.org/ip/wto/p6/ngos12032005.html> [Joint NGO Statement on TRIPS and Public Health].
[600] *TRIPS Agreement, supra* note 233, Article 31(b) and (h).

additional procedures to be complied with when a Member that has insufficient or no manufacturing capacity for a pharmaceutical product (under patent protection in the country) wishes to import the product in question from a foreign generic producer. These additional procedures require that an eligible importing, other than a LDC Member (which are automatically eligible and exempted from the obligation to make a notification[601]):

1. Establishes that it has insufficient or no manufacturing capacity in either of the following ways: (i) by establishing that it has no manufacturing capacities in the pharmaceutical sector; or (ii) where the Member has some manufacturing capacity in this sector, then by establishing that it has (self)-examined this capacity and found that, excluding any capacity owned or controlled by the patent owner, it is currently insufficient for the purposes of meeting its needs. When it is established that such capacity has become sufficient to meet the Member's needs, the System must no longer apply.[602]
2. Notifies the Council for TRIPS of its intention to make use of the System. The notification should: (i) specify the names and expected quantities of the product(s) needed; (ii) confirm that the Member in question has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector; (iii) confirm the grant or the intention to grant a compulsory licence.[603]
3. Takes safeguards measures against trade diversion, which are to be reasonable within the means of the Member and proportionate to the Member's administrative capacities and to the risk of trade diversion.[604]

In addition to fulfilling these additional procedures, in order to make use of the System, the eligible importing country will also need to find a generic manufacturer that is willing and able to supply the pharmaceutical products required. If the pharmaceutical products in question are under patent protection in the country of the generic manufacturer, the government of this

[601] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b) and Annex; *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 1(a) and Appendix.
[602] *TRIPS and Public Health Waiver, supra* note 94, Annex; *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(a)(ii) and Appendix.
[603] *TRIPS and Public Health Waiver, supra* note 94 at para 2; *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(a).
[604] *TRIPS and Public Health Waiver, supra* note 94 at para 4; *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 3.

country will need to grant a compulsory licence, notify the Council for TRIPS of the grant of the licence and the conditions attached to it, which includes: the name and address of the generic producer, the product, the quantity, the importing countries, the duration of the licence, as well as the address of the website on which the information regarding the product has been posted.[605] In addition, the compulsory licence issued by the exporting Member will be subject to the following conditions: (i) it is only for the amount necessary to meet the needs of the eligible importing Member[606]; (ii) the products produced under the System shall be clearly identifiable through labelling or marketing (e.g. special packaging, colouring, shaping of the products themselves), provided that such distinction is feasible and does not have a significant impact on price[607]; and (iii) the generic producer is obliged, prior to shipment, to post on a website information on the quantities supplied to each importing country and the distinguishing features of the product.[608]

Moreover, the Chairman's Statements made prior to the adoption of the Waiver Decision and the Protocol of Amendment, placed on the record "several key understandings" of the Members regarding the Decision to be taken and the amendment to be submitted for acceptance and "the way in which [they] will be interpreted and implemented."[609] Such understandings include: (i) the recognition that the System will not be used for "industrial or commercial policy objectives"; and (ii) the mention that "it is the understanding of Members that in general special packaging and/or special colouring or shaping should not have a significant impact on the price of pharmaceuticals", contradicting the Waiver Decision and the text of the amendment, which impose this distinction in products only if "feasible" and which do not negate *prima facie* the probabilities of the impact on the price of the product.[610]

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[605] *TRIPS and Public Health Waiver, supra* note 94 at para 2(c); *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(c).
[606] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b)(i); *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(b)(i).
[607] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b)(ii); *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(b)(ii).
[608] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b)(iii); *Protocol Amending the TRIPS Agreement,* note 94, Annex at para 2(b)(iii).
[609] WTO, General Council, *Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 29; WTO, General Council, *Meeting of 1, 2 and 6 December 2005, supra* note 543 at para 29.
[610] The *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement* provides that suppliers should distinguish products through special packaging, colouring, shaping of the products themselves "provided that

3.2.1.2. Did the final outcome address the goal set out in paragraph 6 of the Declaration?

Various generic industry experts and public health activists expressed concerns with respect to the conditions attached to the use of the System, especially those imposed on the exporting countries and their generic producers, as well as the potential impact of the Chairman's Statement on the Waiver Decision and the amendment.[611] For a generic producer to agree to apply for a compulsory licence, it would need to be convinced that it will benefit it and be economically viable, considering all the above requirements and procedural hurdles. Notably, the generic producer would have to attempt to negotiate with the patent holder for a voluntary licence, and if unsuccessful, it would need to pay the compensation amount, apply for a compulsory licence and fulfill the conditions described above. If the generic producer decides to produce the pharmaceutical products, it appears from the text of the Waiver Decision and the amendment that the requirements would have to be fulfilled over again for each batch of products produced under the System, and for every country to which the products will be exported. In addition, there could also be other standards or conditions that would need to be fulfilled, such as product-registration and drug-safety requirements.[612] These cumbersome requirements could hence deter a generic manufacturer to produce medicines under the System because of all the costs and bureaucratic implications.[613]

According to some generic industry experts and some Members, for the System to be effective, it would need to have the effect of encouraging competition between generic manufacturers and enabling them to achieve economies of scale or cost efficiencies so that they can remain viable and be able to economically justify the use of the System.[614] This competitive setting would have

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such distinction is feasible and does not have a significant impact on price", see *TRIPS and Public Health Waiver, supra* note 94 at para 1(b)(ii); *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(b)(ii).

[611] Andrew D Mitchell & Tania Voon, "The TRIPS Waiver as a Recognition of Public Health Concerns in the WTO" in Thomas Pogge, Matthew Rimmer & Kim Rubenstein, eds, *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge: Cambridge University Press, 2010) 56 at 70-71 [Mitchell & Voon, "The TRIPS Waiver"]; Joint NGO Statement on TRIPS and Public Health, *supra* note 599; Oh, "The New Deal", *supra* note 599; Saez, "Global Access to Medicines", *supra* note 599; "Members Strike Deal", *supra* note 599.

[612] Oh, "The New Deal", *supra* note 599 at 3. See e.g. Government of Canada, *Report on the Statutory Review of Sections 21.01 to 21.19 of the Patent Act* (Ottawa: Industry Canada, 2007) at 33, online: Government of Canada Publications <http://www.camr-rcam.gc.ca/review-reviser/camr_rcam_report_rapport-eng.pdf> [Government of Canada, *Report on the Statutory Review*].

[613] Oh, "The New Deal", *supra* note 599 at 3; Saez, "Global Access to Medicines", *supra* note 599 at 3.

[614] This could be achieved by large production of medicines, which would depend upon large enough orders, see e.g. Oh, "The New Deal", *supra* note 599 at 3. See also: Abbott, "The WTO Medicines Decision", *supra* note 530 at

the effect of bringing down the price of generic medicines.[615] However, the following conditions of the Waiver Decision and the amendment, as well as some understandings laid out in the Chairman's Statement, could impede the effectiveness of the System. First, the requirement that the products produced under the System should be distinguished through special packaging, colouring or shaping[616] may prevent the production of large quantities of generic medicines.[617] Second, the mention in the Chairman's Statement that the System should not be used for "industrial or commercial policy objectives" create some uncertainties as to whether it could prevent the use of the System if it were to result in an expansion of the generic medicines industry or if the generic manufacturers were to make any profits.[618]

As for the conditions imposed on importing Members, it is unlikely that they could have a substantial impact on the effectiveness of the System *prima facie*. First, LDCs are automatically eligible to make use of the System as importers and they do not need to make a notification to the Council for TRIPS.[619] Therefore, their limited resources and technical capacities would not prevent them to make an effective use of the System. Second, other non LDC Members need to establish their insufficient or absence of manufacturing capacities in the pharmaceutical sector; however the requirement is a simple self-assessment process for transparency purposes.[620] In light of Members' discussions during their consultations, it would appear that the self-assessment

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346; Statement of Brazil in: WTO, Council for TRIPS, *Minutes of Meeting* (held on 26-27 October 2010), WTO Doc IP/C/M/64 at para 30, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 26-27 October 2010*]; Saez, "Global Access to Medicines", *supra* note 599 at 3; Commission on Intellectual Property Rights, Innovation and Public Health, *Public Health, Innovation and Intellectual Property Rights* (Geneva: World Health Organization, 2006), online: WHO.int <http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf?ua=1>; Government of Canada, *Report on the Statutory Review, supra* note 612.

[615] Oh, "The New Deal", *supra* note 599 at 3.

[616] This condition was rewritten in the Chairman's Statement by removing the mention that this requirement was conditional upon its feasibility and if it would not have a significant impact on price, see: *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 29; *General Council Meeting of 1, 2 and 6 December 2005, supra* note 543 at para 29.

[617] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b)(ii); *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(b)(ii). See Mitchell & Voon, "The TRIPS Waiver", *supra* note 611 at 71; Oh, "The New Deal", *supra* note 599 at 3.

[618] Oh, "The New Deal", *supra* note 599 at 3. But see Abbott, "The WTO Medicines Decision", *supra* note 530 (arguing that "'industrial or commercial policy objectives' [in the Chairman's Statement] do not refer to whether an export is undertaken y a private or public enterprise, or whether for profit or not for profit." at 346 and n 207).

[619] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b) and Annex; *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 1(a) and Appendix.

[620] *TRIPS and Public Health Waiver, supra* note 94, Annex; *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 2(a)(ii) and Appendix.

process "d[oes] not involve provision of a great deal of technical or other information but only to indicate briefly and concisely the methodology for determination of insufficient capacity and the conclusions that were drawn on the basis of the available data."[621] Third, as regards the adoption of safeguards measures against trade diversion, the text of the Waiver Decision and the amendment expressly state that they are to be reasonable within the means of the Member and proportionate to the Member's administrative capacities and to the risk of trade diversion.[622] Due to the fact that these safeguards measures are to be proportionate with a Member's means, it is unlikely that they would overburden the importing Member and consequently impede the effectiveness of the System.

Nonetheless, the experience with the use of the System laid out in the Waiver Decision suggests that impediments exist for both the importer and the exporter. Eleven years after the adoption of the *TRIPS and Public Health Waiver* in August 2003, only one drug has been manufactured and delivered under the decision.[623] With the assistance of the NGO Médecins Sans Frontières (MSF), Rwanda made a formal notification to the Council for TRIPS in July 2007 of its intent to import a fixed dose combination of three HIV medications (i.e. Apo-Triavir).[624] The Canadian generic manufacturer Apotex then sought a royal-free licence from four separate patent owners for use of nine patents, required under Canada's law regarding the implementation of the waiver procedure, and filed for a compulsory licence on 28 August 2007.[625] Apotex was granted a

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[621] Chakravarthi Raghavan, "Medicines Won't Be Cheaper Under TRIPS and Public Health Decision", *Third World Network* (31 August 2003) at 3, online: Third World Network <www.twnside.org.sg/title/5409b.htm>.
[622] *TRIPS and Public Health Waiver, supra* note 94 at para 4; *Protocol Amending the TRIPS Agreement, supra* note 94, Annex at para 3.
[623] As of April 2015, there has been only one notification to the Council for TRIPS under paragraph 2(a) of the *TRIPS an d Public Health Waiver,* by Rwanda, and another under paragraph 2(c) by Canada, see: WTO, Council for TRIPS, *Notification Under Paragraph 2(a) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (notification by Rwanda of 17 July 2007), WTO Doc IP/N/9/RWA/1, online: WTO <http://docs.wto.org> [*Notification by Rwanda of 17 July 2007*]; WTO, Council for TRIPS, *Notification Under Paragraph 2(c) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (notification by Canada of 4 October 2007), WTO Doc IP/N/10/CAN/1, online: WTO <http://docs.wto.org> [*Notification by Canada of 4 October 2007*]. See also, WTO, *Notifications by Importing WTO Members,* online: WTO <http://www.wto.org/english/tratop_e/trips_e/public_health_notif_import_e.htm>; *WTO, Notifications by Exporting WTO Members,* online: WTO <http://www.wto.org/english/tratop_e/trips_e/public_health_notif_export_e.htm>.
[624] *Notification by Rwanda of 17 July 2007, supra* note 623.
[625] Cynthia M Ho, *Complicated Compulsory Licenses: The Waiver/Article31bis 'Solution*, Loyola University Chicago School of Law Research Paper No 2011-032 (February 2, 2011) at 215, online: SSRN <http://ssrn.com/abstract=1922825> [Ho, *Complicated Compulsory Licenses*]. Canada made its official notification to the WTO on 8 October 2007, see: *Notification by Canada of 4 October 2007, supra* note 623.

compulsory licence shortly after its application was filed, however it was not ready to produce the medicines for shipment because it was still in the process of developing the active ingredients and Apotex had not yet received an official purchase request from Rwanda.[626] Late in the process Rwanda indicated its intention to hold a public tender[627] despite the fact that Apotex had said that it would be offering its products at cost.[628] This caused great uncertainty for Apotex, which had already invested resources in the development of active ingredients, because there was no guarantee that it would receive the bid.[629] Indeed, other competitors from India were also being contemplated.[630]

Apotex ended up winning the bid in May 2008. It has been reported that its final bid was significantly lower than the price it had originally considered making at no cost. Some have suggested that Apotex actually loss money on the deal in order to be competitive with other generic manufacturers.[631] Apotex began production and made the first shipment shortly after winning the bid. The second and final shipment was delivered one year later.[632] Rwanda manifested its interest for additional shipments; however no others were possible because the permitted quantity of drugs to be exported under Canadian law was exhausted.[633] In order for new medicines to be exported, Apotex would have needed to undergo the process again, which it was unwilling to do.[634]

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[626] Government of Canada, *Report on the Statutory Review, supra* note 612 at 22; Ho, *Complicated Compulsory Licenses, supra* note 625 at 216.
[627] Romeo St. Martin, "Rwanda will only accept Canadian generics if price is right", *Politics Watch* (26 September 2007), online: Politics Watch <http://www.politicswatch.com/drugs-september26-2007.htm>. See also Rwanda Ministry of Health (15 October 2007), online: <http://www.moh.gov.rw>.
[628] "Canada Issues Compulsory Licence For Hiv/Aids Drug Export To Rwanda, In First Test Of WTO Procedure", *BRIDGES* 11:32 (26 September 2007), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/canada-issues-compulsory-licence-for-hivaids-drug-export-to-rwanda-in>. See also Government of Canada, *Report on the Statutory Review, supra* note 612 at 34.
[629] Government of Canada, *Report on the Statutory Review, supra* note 612 at 34.
[630] *Ibid* at 33-34; Ho, *Complicated Compulsory Licenses, supra* note 625 at 216.
[631] In a meeting of the Council for TRIPS, the representative of Canada reported that Apotex had publically noted that the price of USD 0.39 per tablet would have enabled it to break even. However, as part of the Rwanda tendering process, Apotex reduced its price by half to USD 0.195 per table. The representative of Canada argued that it could be assumed that the sale at the lower price of USD 0.195 implied a loss in this transaction, see: Statement of the representative of Canada in *Council for TRIPS Meeting of 26-27 October 2010, supra* note 614 at para 116. See also Amir Attaran, "Why Canada's Access to Medicines Regime Can Never Succeed" (2010) 60 UNBLJ 150.
[632] Ho, *Complicated Compulsory Licenses, supra* note 625 at 216.
[633] *Patent Act,* RSC 1985, c P-4, s 21.05(2).
[634] Ho, *Complicated Compulsory Licenses, supra* note 625 at 216.

The Canadian-Rwandan experience with the use of the System under the Waiver Decision generated pessimistic feedbacks from both the generic manufacturer and MSF officers that were involved in the process, as well as from some Members. The Canadian generic manufacturer Apotex publically stated that it would not be willing to go through the process again, being too cumbersome and non-profitable.[635] Some Members have expressed concerns that it took approximately three years for Apotex to supply the medicines to Rwanda, revealing some hurdles with respect to the lengthy process leading to the shipment.[636] The Canadian-Rwandan experience has also discouraged MSF from continuing to get involved in the application of the Waiver Decision.[637] Indeed, Former MSF Essential Medicines Campaign Canada coordinator, Rachel Kiddell-Monroe, qualified the process set out by the Waiver Decision as "unworkable."[638] She reported that: "Five years after the decision, 70 percent of patients needing antiretroviral therapy still do not have access to treatment, and no other country or company has tried to use the legislation either in Canada or in the other countries which have adopted legislation."[639] Additionally, the then policy and advocacy director of the MSF campaign for the access to essential medicines, Ellen 't Hoen, noted that ordering medicine through the Waiver Decision's System is "becoming extremely complicated as we have to persuade heads of states to notify the WTO." She added that "in principle it's easy", but that "in practice drug procurement and the ordering of medicine is incredibly difficult."[640]

Several Members have also expressed concerns regarding the fact that the System has been used only once.[641] However, others have contended that the very example of export of generic

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[635] Apotex, Press Release, "CAMR Federal Law Needs to be Fixed if Life-Saving Drugs for Children are to be Developed" (14 May 2009), online: Apotex <http://www.apotex.com/global/about/press/20090514.asp> ("We invested millions in the research and development of the product, legal costs in negotiating with the brand companies and made no profits in this process. We did it because it was the right thing to do," stated Jack Kay, President of Apotex. "But in its current form it's not workable for us and, it appears, it doesn't work easily for developing countries".).

[636] WTO, Council for TRIPS, *Minutes of Meeting* (held on 27-28 October and 6 November 2009), WTO Doc IP/C/M/61, online: <http://docs.wto.org> [*Council for TRIPS Meeting of 27-28 October and 6 November 2009*] (Statement by the representative of: India at para 113; and China at para 122).

[637] Saez, "Global Access to Medicines", *supra* note 599 at 2

[638] *Ibid* at 2

[639] *Ibid* at 4.

[640] *Ibid* at 4.

[641] These concerns have been expressed during the 2009-2014 annual reviews of the System, see: *Council for TRIPS Meeting of 27-28 October and 6 November 2009*, *supra* note 636 (Statement by the representative of: India at para 114; and Ecuador at para 116); *Council for TRIPS Meeting of 26-27 October 2010*, *supra* note 614 (Statement by the representatives of: Egypt at para 94; New Zealand at para 138; and Australia at para 296); WTO, Council for

medicines from Canada to Rwanda demonstrated that the System functions and can be used effectively.[642] Different reasons have been put forth for explaining the little use of the System. Some Members have argued that it could be attributed to other factors than the lack of effectiveness of the System, such as the increased access to pharmaceuticals by countries with insufficient pharmaceutical manufacturing capacity due to the improvement of the international environment for procurement of drugs.[643] Some commentators have reported a "general reluctance" of developing countries to identify a need for a product and make use of the System potentially due to some "intimidation tactics on the part of patent holding, innovative pharmaceutical companies or a fear of recrimination at the hands of the developed countries."[644] Another possible explanation for the little use of the System by developing and least-developed countries could be because they lack the resources to pay for needed medicines, even at the lowest available price.[645]

3.2.1.3. Attribution of a score: *Effectiveness − Mandate*

Overall, *Effectiveness − Mandate* evaluated the following standard: *Did the final negotiated outcome address the goal as set out in the negotiating mandate?* The demanding conditions imposed on the exporting countries and their generic producers, as well as the Canadian experience regarding the use of the System set out in the Waiver Decision suggest that the effectiveness of the System is hindered by many factors. It is difficult and cumbersome to put into use and practice, some provisions potentially limit the possibilities for market capacity and

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TRIPS, *Minutes of Meeting* (held on 10-11 October 2013), WTO Doc IP/C/M/74/Add.1, online: WTO <http://docs.wto.org> (Statement by the representative of: India at para 76; China at para 79; Switzerland at para 92; and the United States at para 95).

[642] *Council for TRIPS Meeting of 27-28 October and 6 November 2009*, *supra* note 636 (Statement by the representative of Mexico at para 111); *Council for TRIPS Meeting of 26-27 October 2010, supra* note 614 (Statement by the representative of: Indonesia at para 99; Canada at para 105; and New Zealand at para 138).

[643] *Council for TRIPS Meeting of 27-28 October and 6 November 2009*, *supra* note 636 (Statement by the representative of: United States at para 115; and Australia at para 120; *Council for TRIPS Meeting of 26-27 October 2010, supra* note 614 (Statement by the representative of: Canada at paras 81 and 136; Brazil at para 127; and the European Union at para 277).

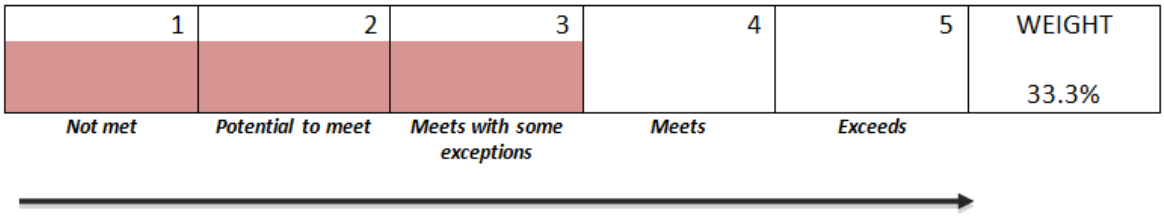
[644] North-South Institute, *Access to Medicines and Intellectual Property: An International Expert Consultation on Canada's Access to Medicines Regime, Global Developments and New Strategies* (Ottawa: North-South Institute, April 2007), online: North-South Institute <http://www.nsi-ins.ca/english/pdf/Agenda%20AccessToMeds.pdf> [North-South Institute, *Access to Medicines*]; Government of Canada, *Report on the Statutory Review, supra* note 612 at 32-33.

[645] Government of Canada, *Report on the Statutory Review, supra* note 612 at 33 (a third explanation may be "a continued lack of awareness in developing and least-developed countries about CAMR [Canada Access to Medicines Regime] and what is required of them to import products in compliance with the waiver" at 33); North-South Institute, *Access to Medicines, ibid.*

economy of scales and the System lacks of financial incentives for potential exporting generic manufacturers.

Therefore, considering that the System fails to fully and effectively address the objective stated in paragraph 6 of the *Declaration on TRIPS and Public Health,* the first indicator of effectiveness, *Effectiveness − Mandate*, should be attributed a score of 3/5 (i.e. '*performance did not consistently meet the indicator's standards*').

Effectiveness' Indicator #1: Mandated Goal Addressed by Final Outcome



3.2.2. Effectiveness − Policy

Effectiveness' Indicator #2: Did the rule/agreement or the negotiated policy come into effect?

Effectiveness − Policy assesses whether the commitments, negotiated policies and the System contained in the Declaration, the TRIPS and Public Health Waiver and the Protocol of Amendment are into force. Even though such policies have been adopted as part of these decisions, are they in effect as a matter of fact?

3.2.2.1. Are the commitments contained in the Declaration and the System into effect?

Regarding the commitments contained in the *Declaration on TRIPS and Public Health,* it has been reported that Members deliberately created a political declaration, which was not meant to be legally binding. However, there were some expectations that it would have a certain weight in the interpretation of the *TRIPS Agreement* by the panels and the Appellate Body when deciding over a dispute related to public health and access to medicines.[646] The interpretative effect of the Declaration will only be confirmed once a case on the issue of TRIPS and public health is

[646] John Odell S & Susan K Sell, "Reframing the Issue: the WTO Coalition on Intellectual Property and Health, 2001" in Odell, *supra* note 509 at 101 [Odell & Sell, "Reframing the Issue"].

brought in front of the dispute settlement organs; however it is probable that it will have some weight in the interpretation of the *TRIPS Agreement.*[647]

As for the entry into effect of the System set out in the *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement,* it should be noted that during the negotiations leading up to the adoption of the Waiver Decision*,* some delegations had stressed the importance of having a permanent solution to the problem, which would provide legal certainty; the waiver was only meant to be temporary as a way to expeditiously address the problem.[648] The *TRIPS and Public Health Waiver* decision was adopted on 30 August 2003[649] and came into effect at the same time pursuant to Article IX of the *WTO Agreement*. On the other hand, the *Protocol Amending the TRIPS Agreement* was adopted on 6 December 2005, however, following Article X:3 of the *WTO Agreement,* it has not come yet into effect because it has not received the required number of acceptances of two thirds of the Members for its entry into force.[650]

In practice, the fact that the Protocol of Amendment has not entered into force does not have a major impact on the outcome because the Waiver Decision provides that the Decision is to remain into force for each Member until an amendment of the *TRIPS Agreement* replacing its provisions takes effect for that Member.[651] Additionally, contrary to standard waivers granted for a period of more than one year, the *TRIPS and Public Health Waiver per se* is not subject to annual review, only the "functioning of the system" is.[652] As a result, even if the amendment never comes into force, the Waiver Decision will remain effective and into force indefinitely.

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[647] For a legal analysis of the Declaration, see Section 3.1.1.1 above.
[648] See e.g. WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration of the TRIPS Agreement and Public Health* (communication from the European Communities and their Member States dated 19 June 2002)*,* WTO Doc IP/C/W/352 at paras 6-7, online: WTO <http://docs.wto.org>; WTO, Council for TRIPS, *Paragraph 6 of the Ministerial Declaration on the TRIPS Agreement and Public Health* (communication by Brazil on behalf of Bolivia, Brazil, Cuba, China, Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, Sri Lanka, Thailand and Venezuela dated 21 June 2002)*,* WTO Doc IP/C/W/355 at para 15, online: WTO <http://docs.wto.org> [*Communication from Brazil et al dated 21 June 2002*].
[649] *TRIPS and Public Health Waiver, supra* note 94.
[650] See Section 2.3 above.
[651] *TRIPS and Public Health Waiver, supra* note 94 at para 11.
[652] *Declaration on TRIPS and Public Health, supra* note 512 at para 8 ("The Council for TRIPS shall review annually the functioning of the system set out in this Decision with a view to ensuring its effective operation and shall annually report on its operation to the General Council. This review shall be deemed to fulfil the review requirements of Article IX:4 of the WTO Agreement."); *WTO Agreement, supra* note 1, Article IX:4 (". . . Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial

The entry into effect of the Waiver Decision is, however, not sufficient to bringing the System into force: a number of Members need also to modify their legislation. As of April 2015, 12 Members (counting the EU and its 28 Members as one) have made changes to their domestic legislation in order to implement the System contained in the Waiver Decision to act exclusively as exporters, 2 Members, to act exclusively as importers, and three Members, to act as both.[653] However, some important potential exporting Members, such as the United States, have still not made the necessary legislative changes to implement the System to act as an exporter.[654]

3.2.2.2. Attribution of a score: *Effectiveness − Policy*

Overall, *Effectiveness − Policy* evaluated the following standard: *Did the negotiated policy come into effect?* The *Declaration on TRIPS and Public Health* has come into effect upon its adoption by the Ministerial Conference. However considering its ambiguous nature, it will be only possible to know whether its provisions will have a weight in the interpretation of the *TRIPS Agreement* once the dispute settlement organs rule on this matter. Nevertheless, it is expected that it will be attributed *some* weight.

As for the System set out in the *TRIPS and Public Health Waiver,* it also came into force on the day of its adoption. Due to the fact that the provisions of the Waiver Decision and those of the amendment are quasi-identical, the result is practically the same as if the *Protocol Amending the TRIPS Agreement* would have entered into force. Moreover, considering that 12 Members have made changes to their domestic legislation to act as exporters under the System, it can be evaluated that the System has come into effect and can be effectively used by potential importing Members (providing that no further domestic legislation changes are needed to do

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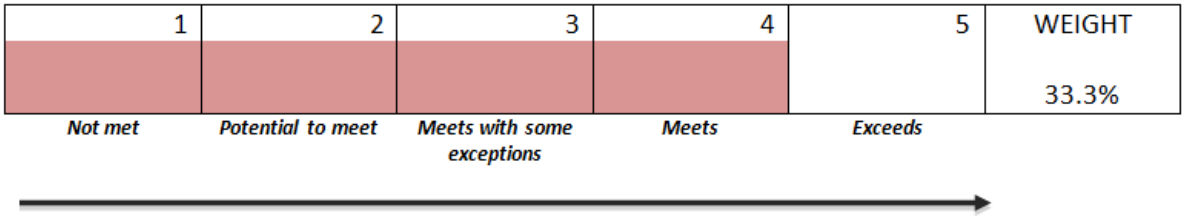
Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.").

[653] Those Members that have implemented the system to act exclusively as exporters are: Albania, Canada, China, Croatia, European Union (accounting for its 28 Members), India, Jordan, Norway, Oman, Switzerland, Chine Taipei, and Japan (which solely reported orally to the TRIPS Council on the domestic rules which constitute the basis for it to act as an exporting Member under the System). It should be noted that the United States has still not made legislative changes to implement the System to act as an exporter. Those Members that have implemented the system to act exclusively as importers are: the Philippines and Singapore. Those Members that have implemented the system to act both as exporters or importers are: Botswana, Hong Kong and Republic of Korea, see: WTO, *Members' Law Implementing the 'Paragraph 6' System,* online: WTO <http://www.wto.org/english/tratop_e/trips_e/par6laws_e.htm> [*Members' Law Implementing Paragraph 6 System*].

[654] *Ibid.*

so).Therefore, the second indicator of effectiveness, *Effectiveness − Policy,* should be attributed a score of 4/5 (i.e. '*performance consistently met the indicator's standards*').

Effectiveness' Indicator #2: Policy Objective Into Effect



3.2.3. Effectiveness − Process

> *Effectiveness' Indicator #3: Were Members able to reach consensus in a timely and effective manner in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate?*

Effectiveness − Process evaluates whether Members were able to reach consensus in a timely and effective manner. The effectiveness of the process is to be assessed in light of the subject-matter that needed to be addressed, which is in this case, the difficulties that Members with insufficient manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the *TRIPS Agreement*.[655]

The effectiveness of the process should also be evaluated in regard to the goal set out in the negotiating mandate. In this case, Ministers' instruction was for the Council for TRIPS to find a solution before the end of 2002.[656] The need for an expeditious solution was heightened by the fact that as of 1 January 2005, the ten-year transitional period under Article 65 of the *TRIPS Agreement,* which allowed some countries with generic manufacturing capacity to be exempted from providing full patent protection, would come to an end. India was a notable example among these countries that had successfully developed its generic drug industry predominantly because of this exemption.[657]

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[655] *Declaration on TRIPS and Public Health, supra* note 512 at para 6.
[656] *Ibid* at para 6.
[657] India benefitted from the advantage of the transitional period provided for in Article 65.4 of the *TRIPS Agreement* (allowing developing country Members that had not previously granted patent protection for pharmaceutical products a transitional period until 1 January 2005 to initiate the protection), along with the

Until the end of the transitional period on 1 January 2005, the "domestic market" restriction of Article 31(f) of the *TRIPS Agreement* for the grant of compulsory licences was unlikely to be problematic because countries with generic manufacturing capacity, such as India, benefiting from the transitional period were allowed to authorize the production and export of the generic product in question without issuing a compulsory licence. India had thus become an important exporter of generic medicines to countries with insufficient or no pharmaceutical capacities.[658] However, as of 1 January 2005, if a patent were to enter into force in the exporting country, the exporting country government would have to obtain a compulsory licence to allow the generic manufacturer to produce the drug and export it. In the case where a patent is also into force in the importing country on the product in question, another compulsory licence would be needed from the importing country. Nevertheless, considering that LDC Members had been exempted until 2016 to allow for drug protection, they were free to authorize the import of a generic product without issuing a compulsory licence until that date.[659]

The following examine the effectiveness of the negotiation processes to find an expeditious solution to the problem considering the imminent changing legal framework as of 1 January 2005 for the export of pharmaceutical products. It shows that the following factors have had an impact on the effectiveness of the processes: (i) the use of organized coalitions; (ii) the legal mechanism chosen to implement the solution; (iii) the use of the 'Chairman's Statement'; and (iv) the use or (non-use) of the *WTO Agreement's* flexibilities.

3.2.3.1. Negotiations on the basis of organized coalitions

The TRIPS and Public Health negotiations have been conducted on the basis of cohesive and organized coalitions from the very beginning until the very end. Prior to the adoption of the *Declaration on TRIPS and Public Health,* a very large group of developing countries representing together a total of 61 Members (comprising the African Group, Brazil, India and 17

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provisions of Article 70.8 and 70.9. For additional information, see: Abbott, "The WTO Medicines Decision", *supra* note 530 at 320-23.

[658] Abbott, "The WTO Medicines Decision", *supra* note 530 ("If a developing country in Africa, for example, wanted to grant a compulsory license to import a low-price generic version of an antiretroviral medicine (ARV) to treat HIV/AIDS, it could import the medicine from an Indian producer." at 320).

[659] See *Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members* (Council for TRIPS Decision of 19 November 2005),WTO Doc IP/C/40, online: WTO <http://docs.wto.org>; *Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products* (Council for TRIPS Decision of 27 June 2002), WTO Doc IP/C/25, online: WTO <http://docs.wto.org>.

others Latin American and Asian Members) unified their voice to claim, among other things, that nothing in the *TRIPS Agreement* should prevent Members from taking measures to protect public health.[660]

Two other groupings played an important role in the negotiations: a group representing the interests of the major pharmaceutical companies (i.e. Australia, Canada, Japan, Switzerland and the United States), and the European Communities (EC) and its then 15 Members, playing a mediator between the two other groups.[661] These three principal groupings slightly diluted for the negotiations of the Waiver Decision and the amendment, but the dynamic remained similar. The major grouping of developing countries expressed its interests into two separate groups: the African Group and a Group of 14 developing countries led by Brazil and India. The United States parted ways from its partners and voiced its interests individually, just like the European Communities continued to do.[662]

In the context where the interests were exceptionally disparate on the issue of intellectual property protection vs. access to cheap medicines, negotiating on the basis of organized coalitions was a very effective way to proceed. Part of the work has been conducted outside of the walls of the WTO where the coalitions crafted their unified positions.[663] All that remained to be done within the Council for TRIPS was to bridge the real divergences between the two different camps. The use of coalitions thus allowed the Council for TRIPS to focus on the major differences without wasting its time on the small divergences that could be easily bridged by Members within themselves.

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[660] WTO, Council for TRIPS and General Council, *Proposal by the African Group, Bangladesh, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Haiti, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela* (dated 19 September 2001), WTO Doc IP/C/W/312; WT/GC/W/450 at para 7, online: WTO <http://docs.wto.org> [*Proposed Declaration by the Group of Developing Countries*].

[661] See e.g. Vandoren, "Médicaments sans Frontières", *supra* note 566 ("Troughout the negotiations the EU worked with a view to reconciling the almost irreconcilable positions of the outer ends of the spectrum." at 12).

[662] See generally WTO, Council for TRIPS, *Proposals on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Thematic Compilation* (note by the Secretariat), WTO Doc IP/C/W/363, online: WTO <http://docs.wto.org> [*Thematic Compilation of Proposals on Paragraph 6*].

[663] See generally Odell & Sell, "Reframing the Issue", *supra* note 646.

3.2.3.2. Legal mechanism chosen to implement the solution

As regards to the legal mechanism that would be used to implement the solution, Members decided to use a waiver as a temporary and expeditious solution, which would be eventually replaced by an amendment as a permanent and more legally certain solution.[664]

While the waiver/amendment solution addressed both the needs of an expeditious and permanent solution, was it the most effective legal mechanism to implement the solution? An amendment alone would have not been a viable alternative considering the required cumbersome procedure of acceptance and ratification as provided for in Article X of the *WTO Agreement*. In that respect, it was advisable to use a waiver for expeditiousness due to the fact that waivers enter into force at the same time as their adoption by the General Council or the Ministerial Conference.[665] A dispute settlement moratorium, which had been considered by some Members[666], would have not offered the desired legal predictability considering that it is not a legal mechanism explicitly provided for in the *WTO Agreement* (or the DSU). However, the use of an authoritative interpretation of Article 30 of the *TRIPS Agreement* pursuant to Article IX:2 of the *WTO Agreement,* which had also been tabled a as potential option[667], would have been an optimized legal mechanism to implement the solution.[668]

Indeed, an authoritative interpretation of Article 30 of the *TRIPS Agreement* could have declared something to the effect that a Member may lawfully authorize the manufacture, on its territory, of a patented product, without authorization of the right holder when it is meant to supply another Member which has granted a licence for the import and sale of the product concerned in

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[664] *TRIPS and Public Health Waiver, supra* note 94 at para 11.
[665] *WTO Agreement, supra* note 1, Article IX:3.
[666] This option was notably proposed by the United States, see: WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (second Communication from the United States dated 25 June 2002), WTO Doc IP/C/W/358 at 6-7, online: WTO <http://docs.wto.org> [*Second Communication from the United States dated 25June 2002*].
[667] This idea was put forth by the United Arab Emirates and a Group of developing countries, see: WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration of the TRIPS Agreement and Public Health* (communication from the United Arab Emirates dated 21 June 2002), WTO Doc IP/C/W/354 at 2-3, online: WTO <http://docs.wto.org>.
[668] *TRIPS Agreement, supra* note 233, Article 30 (stating that "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.").

its territory in order to address a serious public health problem.[669] Like a waiver decision, an authoritative interpretation takes effect at the same time as its adoption by the General Council or the Ministerial Conference.[670] However, as compared to a waiver, it has the advantage of being a permanent solution. Thus, an authoritative interpretation of Article 30 of the *TRIPS Agreement* would have been a much more effective solution, avoiding the need to proceed in a two-steps process, which ended-up dragging out the negotiation process for two extra years once the *TRIPS and Public Health Waiver* was adopted.[671]

3.2.3.3. The use of a 'Statement by the Chairman'

Both the Waiver Decision and the Protocol of Amendment were adopted "in light of the Chairman's Statement", which was pronounced before their adoption.[672] The use of a Chairman's Statement prior to the adoption of a decision or an amendment is not provided for in the *WTO Agreement.* However, the statement was not made on the Chairman's own initiative; in both cases, Members (i.e. the Council for TRIPS) explicitly approved the text of the statement that

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[669] See e.g. a proposal submitted by the European Communities and their Member States: WTO, Council for TRIPS, *Concept Paper Relating to Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (communication from the European Communities and their Member States dated 1 March 2002), WTO Doc IP/C/W/339 at para 24, online: WTO <http://docs.wto.org>.

[670] *WTO Agreement, supra* note 1, Article IX:2.

[671] The *TRIPS and Public Health Waiver* was adopted on 30 August 2003, however the *Protocol Amending the TRIPS Agreement* was adopted more than two years after on 6 December 2005, see: *TRIPS and Public Health Waiver, supra* note 94; *Protocol Amending the TRIPS Agreement, supra* note 94. An authoritative interpretation of Article 30 of the *TRIPS Agreement* was not an acceptable option for the United States, which contended that allowing exceptions to patent rights to permit otherwise infringing acts to supply a patented pharmaceutical for purposes of export would "seriously prejudice the rights and obligations of Members under the TRIPS Agreement", see WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (communication from the United States dated 8 March 2002), WTO Doc IP/C/W/340 at 4, online: WTO <http://docs.wto.org> (The United States supported its view by saying that "Article 30 authorizes limited exceptions to patent rights, for such things as research exemptions, prior user rights, pre-expiration testing, so long as those exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties. The limited exceptions to patent rights authorized by Article 30 do not require a government decision in each case. Article 30 contains no requirements for notifying a patent owner of use, for establishing particular terms and conditions, for expiration if circumstances change, or for remuneration to the patent holder." at 4). See also *Second Communication from the United States dated 25June 2002*, *supra* note 666 at para 31.

[672] *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 30; *General Council Meeting of 1, 2 and 6 December 2005, supra* note 543 at para 31.

would be read by the Chairman before the adoption of the Waiver Decision and the Protocol of Amendment.[673]

The following shows that the Chairman's Statement had disadvantages that were inherent to its benefits. The use of the Chairman's Statement had the advantage of creating a 'constructive ambiguity', which permitted Members to bridge the gap between their positions and reach consensus (section 3.2.3.3.1). However, this 'constructive ambiguity' resulted in a lack of a clear consensus between Members and understanding of what they had specifically agreed upon, which hampered subsequent negotiations on the subject matter (section 3.2.3.3.2).

3.2.3.3.1. *The use of the Chairman's Statement as constructive ambiguity to build consensus*

The Chairman's Statement was used in the context where Members experienced tremendous difficulties in reaching a compromise on the solution mandated by paragraph 6 of the Declaration. The adoption of the Motta text, which appeared to be the bare minimum that several delegations were willing to accept, had been blocked by the United States.[674] In a way, the use of the Chairman's Statement was a means to accommodate some concerns of the United States (and others like-minded Members), without reopening the compromised text.

It appears that the delegations were well aware that the legal status of the Chairman's Statement and that its relevance for interpretation of the Motta text would be uncertain.[675] It is actually the

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[673] *Council for TRIPS Meeting of 28 August 2003, supra* note 575 at paras 2-3; *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at paras 214-15.

[674] See e.g. "TRIPS Council Back at 'Square One' on Medicines Issue", *BRIDGES* 7:4 (6 February 2003), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/trips-council-back-at-square-one-on-medicines-issue> ["TRIPS Council Back at Square One"]; "Last Minute Attempt to Save TRIPS & Health Discussions", *Bridges* 7:5 (12 February 2003), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/last-minute-attempt-to-save-trips-health-discussions-0> ["Last Minute Attempt"]; "No Compromise in Sight On TRIPS & Health", *BRIDGES* 7:6 (19 February 2003), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/no-compromise-in-sight-on-trips-health> ["No Compromise in Sight"]; WTO, Council for TRIPS, *Minutes of Meeting* (held on 1-2 December 2004), WTO Doc IP/C/M/46 at para 117, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 1-2 December 2004*].

[675] See Statement by the representative of Argentina in: *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at para 203 (stating that "it was apparent from the discussions over the last two years that there was no such unanimity among WTO Members [regarding the legal status of the Chairman's Statement], and that the majority of Members considered that the Chairman's Statement lacked sufficient legal value to form part of an amendment to the TRIPS Agreement" at para 203). See also "Last Minute Attempt", *ibid* (NGO Médecins Sans Frontières (MSF) strongly criticised the proposed statement, "urgently" calling on countries to reject the text". MSF further warned delegations to "be under no illusion" that the Chair's note would

very fact that the Chairman's Statement's legal status was dubious that facilitated consensus: it played the role of some sort of calculated "constructive ambiguity."[676]

There is little existing jurisprudence on the role of Chairman's Statements in both the GATT 1947 and the WTO, and there is no example which is akin to the one at issue.[677] Most likely, a panel or the Appellate Body would give meaning to the Chairman's Statement within the lines of Articles 31(2) or 32 of the *Vienna Convention on the Law of Treaties* (VCLT).[678] At its best, the Chairman's Statement could be considered as an "agreement" or "instrument" that was made by the parties in connection with the conclusion of the treaty following Article 31(2)(a) and (b) VCLT, which would provide an additional element of *context* within which to interpret the Waiver Decision or the *Amendment of the TRIPS Agreement*.

In the case where a panel or the Appellate Body would decide that the Chairman's Statement is not an agreement or an instrument falling within the meaning of Article 31(2)(a) and (b) of the VCLT, they could have recourse to the Chairman's Statement as a "supplementary means of interpretation"[679] pursuant to Article 32 of the VCLT. However, this would be subject to the following preliminary conditions: (i) the Waiver Decision/*Amendment of the TRIPS Agreement* has been interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; and (ii) the meaning has been left ambiguous, obscure or has led to a result which is manifestly absurd or unreasonable.[680]

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have no legal consequences. "The Chair would not be making the note if it had no legal effect", it stressed.); "TRIPS Council Remains Divided on Public Health Amendment", *BRIDGES* 9:36, online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/trips-council-remains-divided-on-public-health-amendment> ["TRIPS Council Remains Divided"].

[676] Henning M Grosse Ruse-Khan, "The Role of Chairman's Statements in the WTO" (2007) 41(3) J World Trade 475 at 491 [Ruse-Khan, "The Role of Chairman's Statements"] ("This ambiguity, however, plays a supportive role in the decision-making process. By allowing Members to retain their own understanding about the (legal) relevance of a chairman's statement and of its substance, it facilitates agreement among Members." at 491).

[677] For a comprehensive review of the jurisprudence on the role of Chairman's Statements, see *ibid* at 509-13.

[678] VCLT, *supra* note 110.

[679] Supplementary means of interpretation within the meaning of Article 32 VCLT include the preparatory work of the treaty and the circumstances of its conclusion, see *ibid*, Article 32.

[680] *Ibid*, Articles 31 and 32.

Due to their failure to achieve a clear and unambiguous consensus, Members left the unresolved issues in the hands of panels and the Appellate Body in the case of a potential dispute on the subject matter.

3.2.3.3.2. *Consequences of a lack of clear consensus resulting from the use of the Chairman's Statement*

The lack of a clear consensus on what had been agreed on 30 August 2003 (i.e. the Waiver/Chairman's Statement solution) encumbered the subsequent work on an amendment. Paragraph 11 of the Waiver Decision mandated the Council for TRIPS to work on an amendment, with the instruction that the amendment would be "based, where appropriate" on the Waiver Decision, with a view to its adoption within six months (i.e. the end of March 2004).[681] When the Council for TRIPS began its work on an amendment, a number of Members were of the opinion that the amendment should be "an essentially technical process" and that the amendment should represent faithfully what had been agreed in the Waiver Decision.[682] However, not too long after the work on the amendment had commenced, Members realized that they had different understandings as to what had been agreed in the Waiver Decision of 30 August 2003, especially with respect to the status of the Chairman's Statement.[683] The unresolved differences of 30 August 2003 remained irreconcilable. The lack of a clear consensus on what had been exactly agreed upon on 30 August 2003 dragged out the negotiation process on the text of an amendment for nearly an additional two years from the time limit that they had initially projected for reaching consensus.[684] Such impasse resulted in feelings of frustration and dissatisfaction from a number of Members.[685]

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[681] *TRIPS and Public Health Waiver, supra* note 94, at para 11.

[682] See the statements of the European Communities (EC) representative and also the statements from the representatives of Norway, Korea, Hungary, United States, Japan, and Switzerland: WTO, Council for TRIPS, *Minutes of Meeting* (held on 18 November 2003), WTO Doc IP/C/M/42 at paras 138 and 139-56, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 18 November 2003*].

[683] Some Members contended argued that both the text of the Decision and the Chairman's Statement were an integral part of the consensus that was reached on 30 August 2003, and therefore they should be both reflected in the amendment. Others believed that the content of the Chairman's Statement should not form part of the amendment, as it would give the Chairman's Statement a greater legal status in the amendment in relation to what it had in the Decision, see: WTO, Council for TRIPS, *Minutes of Meeting* (held on 8 March 2004), WTO Doc IP/C/M/43 at para 84, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 8 March 2004*].

[684] Members had projected they would be able to agree on the text of an amendment by the end of March 2004, but it took until the end of December 2005 to reach a consensus.

[685] See e.g. the statements of the representatives of Peru, Brazil, Nigeria, and Korea: WTO, Council for TRIPS, *Minutes of Meeting* (held on 4-5 June 2003), WTO Doc IP/C/M/40 at paras 41-42, 51 and 56, online: WTO

The only way that Members have been able to achieve consensus was by the faithful reproduction in the amendment of the 'constructive ambiguity' that had allowed all sides to join consensus on 30 August 2003 for the adoption of the Waiver Decision. Thus, Members recreated the adoption process that had been used for the Waiver Decision in a "carefully chosen choreography"[686], beginning with the lecture of the original Chairman's Statement, followed by the adoption of the Protocol of Amendment 'in light of the Chairman's Statement', and ending by statements made by some delegations.[687]

In summary, it can be evaluated that the use of the Chairman's Statement was a creative and effective way to achieve a compromised consensus in the context where an expeditious solution was needed and Members could not find any other ways to bridge the gaps between their divergent positions. It showed that Members preferred to agree on an ambiguous solution to the mandate provided in paragraph 6 of the *Declaration on TRIPS and Public Health* for both the Waiver Decision and the amendment over no solution at all.

3.2.3.4. The use (or non-use) of the WTO Agreement's flexibilities

When the United States blocked consensus on the adoption of the draft waiver decision of 16 December 2002 ('Motta text')[688], the Council for TRIPS could have decided to use the flexibilities of Article IX:1 of the *WTO Agreement* and proceed to a vote on the Motta text pursuant to Article IX:3.[689] Instead, the Council for TRIPS decided to resume its work on the

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<http://docs.wto.org> [*Council for TRIPS Meeting of 4-5 June 2003*] (The representative of Brazil said that :"his delegation fully shared the feelings of frustration expressed by other Members regarding the lack of progress in discussions on the establishment of a permanent and multilateral solution to the problems identified by paragraph 6 despite their active and constructive participation" at para 42); WTO, General Council, *Minutes of Meeting* (held on 27 and 29 July 2005), WTO Doc WT/GC/M/97 at para 3, online: WTO <http://docs.wto.org> (The delegation of Kenya on the behalf of the African Group said that his delegation was "deeply disappointed that nearly two years after the Decision of 30 August 2003, Members had not been able to conclude their work on the amendment to accommodate that Decision. The biggest problem Members were facing was the difference in interpretation on what shape the amendment should take. While some Members wished to amend the Decision, others wished to transpose the Decision as it stood. Paragraph 11 of the Decision said that the amendment would be based, where appropriate, on the Decision, but it did not mention transposition." at para 3). See also the statement of the representative of Cuba in: WTO, General Council, *Minutes of Meeting* (held on 19 October 2005), WTO Doc WT/GC/M/98 at para 30, online: WTO <http://docs.wto.org> [*General Council Meeting of 19 October 2005*].

[686] Ruse-Khan, "The Role of Chairman's Statements", *supra* note 676 at 485.

[687] Compare *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at paras 29-31 and *General Council Meeting of 1, 2 and 6 December 2005, supra* note 543 at paras 29-34.

[688] *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at paras 33-34.

[689] *WTO Agreement, supra* note 1, Article IX:3 (providing that waiver decisions shall be taken by a vote of three fourths of the Members).

search of a consensus on the matter despite the fact that the Ministerial Conference had explicitly mandated the Council for TRIPS to find an expeditious solution before the end of 2002.[690]

Considering the deep-rooted practice of decision-making by consensus[691], it is very unlikely that the Council for TRIPS would have even considered taking a vote on the Motta text. Additionally, the United States had major interests at stake in the TRIPS and public health negotiations, as being home to the largest concentration of pharmaceutical patent holders and generating the most revenue from this sector[692], and it was one of the greatest economic powers at the time the Motta text was considered. As a result, it would have been politically unviable to adopt the Motta text without the consent of the United States, but yet legally possible due to the fact that waiver decisions take effect and bind *all Members* upon their adoption.[693] Nonetheless, the 20 December 2002 meeting was a notable example of a case where Members did not use the flexibilities provided for in the *WTO Agreement* in order to overcome a stalemate in the case where an expeditious solution was explicitly needed.

3.2.3.5. Attribution of a score: *Effectiveness − Process*

Overall, *Effectiveness − Process* assessed the following standard: *Were Members able to reach consensus in a timely and effective manner in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate?* The negotiating mandate instructed the Council for TRIPS to find an expeditious solution to the problem prior to the end of 2002. However, the ten-year transitional period under Article 65 of the *TRIPS Agreement,* allowing some countries with generic manufacturing capacity to be exempted from providing full patent protection, was to terminate only at the end of 2004. Thus, it would be fair to say that the adoption of the *TRIPS and Public Health Waiver* on 30 August 2003 was timely in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate, even though it was adopted six months after the deadline agreed upon.

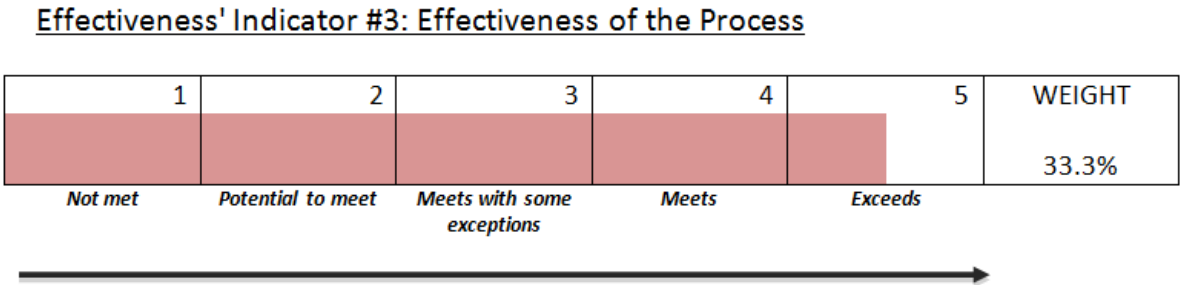
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[690] *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at para 33; *Declaration on TRIPS and Public Health, supra* note 512 at para 6.
[691] See Chapter 2, Section 3.1.2.
[692] Abbott, "The WTO Medicines Decision", *supra* note 530 at 324.
[693] *WTO Agreement, supra* note 1, Article IX:3.

Several factors highly contributed to the effectiveness of the rulemaking processes, such as the negotiations on the basis of organized coalitions, the use of a waiver decision as an expeditious solution pending the entry into force of an amendment, as well as the use of the Chairman's Statement, which was a crucial element for reaching a difficult consensus.

On the downside, the lack of a clear consensus on the Waiver/Chairman's Statement solution had the effect of dragging out the negotiation processes for the adoption of the amendment. However, considering that a System was already into effect through the Waiver Decision, it did not impair the effectiveness of the processes in bringing the mandate into force. Additionally, it can be considered that the processes would have been more effective if Members would have used the flexibilities contained in the *WTO Agreement,* such as having recourse to voting when a consensus on the Motta text was blocked by the United States. However, considering that the United States is one of the most major actors in international trade and home of the most major concentration of pharmaceutical patent holders, it would have been probably ill-advised to conclude an agreement without its consent. Indeed, the United States could have taken political retaliation measures against some Members for adopting the Waiver Decision despite its opposition, which could have had the effect of severely impeding the effectiveness of the System set out in the Waiver Decision. Thus, it can be evaluated that these two negative factors had only a marginal effect, if any, on the effectiveness of the rulemaking processes and, therefore, should not affect the indicator's legitimacy score.

Considering all these reasons, the third indicator of effectiveness, *Effectiveness – Process,* should be attributed a score of 4.5/5 (i.e. '*performance exceeded the indicator's standards on some occasions*').



3.2.4. Overall performance of the criterion of effectiveness

Overall, the criterion of effectiveness was evaluated on the basis of the following three indicators, which were all assessed separately and attributed a distinct score:

(i) whether the final outcome addressed the mandated goal (scored 3/5);
(ii) whether the negotiated policy was brought into effect (scored 4/5); and
(iii) whether Members were able to reach consensus in a timely and effective manner (scored 4.5/5).

Considering that all three indicators have an identical weight for the pondering of the criterion of effectiveness as a whole, the criterion of effectiveness received a rounded score of 4/5, representing an average of the scores of all three indicators of legitimacy. As a result, it can be concluded that the performance of the TRIPS and Public Health Case *consistently met the standards* of the criterion of effectiveness.

CASE STUDY #1: TRIPS AND PUBLIC HEALTH								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
EFFECTIVENESS	Ind #1	33.3						1
	Ind #2	33.3						1.33
	Ind #3	33.3						1.5
	Rating	100						3.8/5
RATING STANDARD	*Performance consistently met the standards of the legitimacy criterion*							**4/5**

3.3. Representativeness

The criterion of representativeness is to be assessed on the basis of three indicators of legitimacy:

(i) the internal transparency and inclusiveness of the rulemaking processes (Section 3.3.1);
(ii) the degree of representativity of Members in the rulemaking processes (Section 3.3.2);

(iii) the degree of effective participation of Members, i.e. whether the negotiating mandate and outcome represented a balanced set of interests that were expressed (Section 3.3.3).

The following sections proceed with the analysis of each of the three indicators of representativeness.

3.3.1. Representativeness − Internal transparency

> *Representativeness' Indicator #1: Was the rulemaking process open and transparent for all Members expected to be bound by the outcome at all stages of the process? Were the meetings announced in advance? Were they open to participation from all Members expected to be bound by the outcome? Were these Members given an opportunity to review and comment on draft texts?*

Representativeness − Internal transparency analyses the internal transparency and inclusiveness of the rulemaking processes, i.e. whether they were predictable and the meetings were announced in advance (section 3.3.1.1); whether they were transparent and open to participation from all Members (section 3.3.1.2), and whether Members were given an opportunity to review and comment on draft texts (section 3.3.1.3).

In the case of the TRIPS and Public Health Case, the 'Members expected to be bound by the outcome' are all those that were Members of the WTO at the time of negotiations (i.e. between 2001 and 2005 inclusively) due to the fact that, upon its adoption, the *TRIPS and Public Health Waiver* became binding on all Members.[694]

3.3.1.1. Was the rulemaking process predictable and the meetings announced in advance?

During the agenda-setting and the consensus-building processes, all formal meetings of the Council for TRIPS, as well as the agenda containing the subjects to be discussed, were announced at least ten days in advance by airgram, in conformity with Rules 2 and 3 of the *Rules*

[694] The *Amendment of the TRIPS Agreement* is only binding to those Members that have accepted and ratified it, following Article 10:3 of the *WTO Agreement, supra* note 1, and *Protocol Amending the TRIPS Agreement, supra* note 94, at 1 para 3 and 2 para 4. However, paragraph 11 of the *TRIPS and Public Health Waiver, supra* note 94, provided that the Waiver Decision (which contained the same provisions as the amendment) would remain into force for each Member until the *Amendment to the TRIPS Agreement* takes effect for that Member.

of Procedure for Meeting of the Council for TRIPS.[695] In addition, the Chair of the Council for TRIPS regularly consulted Members about the process and informed them about the next steps that would be taken[696], such as whether informal meetings or consultations would be held[697] and the role that other WTO bodies[698], as well as the Secretariat[699], would have in the processes.

[695] *Rules of Procedure for Meetings of the Council for TRIPS, supra* note 210. The agenda of the Council for TRIPS meetings can be found in WTO/AIR documents between 2001 and 2005 and can be accessed in the WTO online database, see: *WTO Documents Online, supra* note 432.

[696] See e.g. WTO, Council for TRIPS, *Minutes of Meeting* (held on 19 and 20 September 2001) at paras 148, WTO Doc IP/C/M/33, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 19 and 20 September 2001*] (indicating that a number of delegations were preparing proposals for language for the Doha Ministerial Conference); WTO, Council for TRIPS, *Minutes of Meeting* (held on 16 June 2004), WTO Doc IP/C/M/44 at para 70, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 16 June 2004*] (informing Members that there was general acceptance among delegations that the Council for TRIPS would need additional time until the end of March 2005 in order to complete its work on the amendment);WTO, Council for TRIPS, *Minutes of Meeting* (held on 21 September 2004), WTO Doc IP/C/M/45 at para 75, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 21 September 2004*] (stressing that the Council for TRIPS would need to work expeditiously and purposefully in order to meet the new timeframe); WTO, Council for TRIPS, *Minutes of Meeting* (held on 8-9 and 31 March 2005), WTO Doc IP/C/M/47 at para 181, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 8-9 and 31 March 2005*] (announcing that the meeting would be suspending to allow for continued consultations with a view to meeting the March 2005 target date).

[697] See e.g. *Council for TRIPS Meeting of 19 and 20 September 2001, ibid* at para 148 (announcing his intention to hold consultations and indicating that a number of delegations were preparing proposals for language for the Doha Ministerial Conference); WTO, Council for TRIPS, *Minutes of Meeting* (held on 27 and 28 November 2001), WTO Doc IP/C/M/34 at para 57, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 27 and 28 November 2001*] (indicating his intention to hold informal consultations early in 2002 on how the Council for TRIPS should organize its work in light of the mandate set out in paragraph 6 of the *Declaration on TRIPS and Public Health*); *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at para 32 (informing Members that he was holding consultations on the draft decision he had released and that he would revert back to the matter later in the course of the meeting; informing Members that he was not in a position to present a draft legal instrument and that he would continue his consultations with a view to circulating a draft to the to the Council for TRIPS in time for the 10-12 December meeting); *Council for TRIPS Meeting of 4-5 June 2003, supra* note 685 at para 65 (expressing his intention to remain in close contact with delegations with a view to resuming its consultations as soon as developments would show signs of renewed consultations being useful); *Council for TRIPS Meeting of 18 November 2003, supra* note 683 at para 135 (announcing his intention to hold informal consultations to find out how delegations wished to proceed on a certain issue before the Council for TRIPS' next meeting); *Council for TRIPS Meeting of 21 September 2004, supra* note 696 at paras 75-76 (informing Members that he would initiate consultations as soon as possible with a view to carrying forward the work in question expeditiously).

[698] See e.g. *Council for TRIPS Meeting of 19 and 20 September 2001, supra* note 696 at para 148 (announcing that he would consult with the Chair of the General Council and that the Chair of the General Council had indicated his intention to submit to Members a draft text for a Ministerial Declaration towards the end of the month).

[699] *Council for TRIPS Meeting of 19 and 20 September 2001, supra* note 696 at paras 243-44 (proposing that the Secretariat help in the drawing of a list of the elements to be included in a declaration on the issues that had been discussed under the agenda item in question).

3.3.1.2. Was the rulemaking process transparent and open to participation from all Members?

Throughout the agenda-setting and consensus-building processes, Members met alternately in formal and open-ended informal meetings open to the entire membership and in small group meetings. For the agenda-setting process leading up to the adoption of the *Declaration on TRIPS and Public Health*, it appears that most of the meetings that were held were open to the participation of the entire membership (formal and open-ended informal meetings).[700] During these meetings, Members discussed several issues of important matter, such as: the need to address the issue of TRIPS and access to medicines within the WTO[701]; their views on the flexibility to which Members are entitled under the *TRIPS Agreement* and the relationship between the *TRIPS Agreement* and affordable access to medicines[702]; how Members should proceed to address the problem and specific issues on which they should focused their discussions; and other more technical issues, such as meeting the objectives and principles enshrined in Article 7 and 8 of the *TRIPS Agreement,* the provisions relating to compulsory licensing and those relating to parallel imports.[703]

However, for the most decisive periods of the processes, the negotiations were mostly conducted in different formats of small groups meetings to help forge a consensus among Members. Members held two mini-ministerial meetings that dealt with the TRIPS and public health issue (of which at least one of them can be considered as a WTO meeting), which were only open to roughly 20 Members.[704] These mini-ministerial meetings were held to cover a wide range of

[700] From the evidence collected in this study, all the meetings that were held between April and the end of July 2001 were open to the whole membership. For the entire agenda-setting process spanning between April and November 2001, a total of three formal meetings of the Council for TRIPS dealing with the issue of TRIPS and public health were held in April, June and September, see: *Council for TRIPS Meeting of 2-5 April 2001, supra* note 519 at paras 229-52; *Special Discussion on IP and Medicines, supra* note 528; *Council for TRIPS Meeting of 19 and 20 September 2001, supra* note 696 at paras 14-248. In addition, three informal meetings were conducted in May, July and September, see: *Special Discussion on IP and Medicines, supra* note 528 at para 1 (open-ended meeting of 21 May 2001); *Council for TRIPS Meeting of 19 and 20 September 2001, supra* note 696 at para 244 (open-ended meeting of 25 July 2001); *Council for TRIPS Meeting of 19 and 20 September 2001, supra* note 696 at para 244 (open-ended meeting of 21 September 2001).

[701] *Special Discussion on IP and Medicines, supra* note 528 at 4.

[702] *Ibid* at para 1.

[703] *Council for TRIPS Meeting of 19 and 20 September 2001, supra* note 696 at paras 149-242.

[704] A first mini-ministerial meeting took place in Mexico on 31 August 2001 and, a second, in Singapore on 13-14 October 2001. These meetings were attended respectively by 17 and 22 Members out of 142 WTO Members at the time, see: Wolfe, "Informal Political Engagement", *supra* note 416, Appendix. The Mexico mini-ministerial was attended by key officials of the WTO Secretariat and the then Chair of the General Council, see: Jawara & Kwa,

issues to be addressed at the imminent Doha Ministerial Conference; however it appears that they did not lead to any significant outcomes with respect to the TRIPS and public health issue.[705] The Chair also conducted small group consultations with some of the delegations that had been most active in the debate on intellectual property and access to medicines to see whether Members could come up with a framework for capturing the progress in their work on this subject.[706] Finally, consensus on the text of the *Declaration on TRIPS and Public Health* was achieved in a small group meeting of eight Members and approved by a larger group of some 20 Members.[707]

As regards to the consensus-building process that led to the adoption of the *TRIPS and Public Health Waiver,* during the first year of negotiations, rich and comprehensive debates took place in formal and open-ended informal meetings regarding the different proposals that had been tabled for finding a solution to the problem laid out in paragraph 6 of the Declaration. These debates later focused on five specific subjects: scope and coverage; conditions; legal mechanisms; measures to facilitate production in countries with presently insufficient manufacturing capacity; and other proposals.[708] It appears that a total of seven formal meetings[709] and seven open-ended informal meetings[710] of the Council for TRIPS dealing with

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Behind the Scenes, supra note 97 at 58-65. However the Singapore mini-ministerial meeting was qualified as being "not a WTO meeting" by the then WTO Director-General, Mike Moore, see: Chidyausiku, "Effective Participation", *supra* note 417. These mini-ministerial meetings were held to cover a wide range of issues to be addressed at the imminent Doha Ministerial Conference; however it appears that they did not lead to significant outcomes with respect to the TRIPS and public health issue, see: Wolfe, "Informal Political Engagement", *supra* note 416, Appendix.

[705] Wolfe, "Informal Political Engagement", *supra* note 416, Appendix.

[706] *Council for TRIPS Meeting of 19 and 20 September 2001, supra* note 696 at para 148.

[707] See Abbott, "The Doha Declaration", *supra* note 551 at 486-88; Odell & Sell, "Reframing the Issue", *supra* note 646 at 105; Jawara & Kwa, *Behind the Scenes, supra* note 97 at 99-101; "Draft Declaration on TRIPS and Health Highlights Divisions in the WTO", *BRIDGES* 5:37 (30 October 2001), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/draft-declaration-on-trips-and-health-highlights-divisions-in-the-wto> ["Draft Declaration on TRIPS and Health Highlights Divisions"]; "Doha Turning to Single Undertaking", *BRIDGES,* Daily Update #3 (12 November 2001), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/bridges-daily-update-3-doha-turning-to-single-undertaking> ["Doha Turning to Single Undertaking"].

[708] See e.g. WTO, Council for TRIPS, *Minutes of Meeting* (held on 17-19 September 2002), WTO Doc IP/C/M/37 at para 2, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 17-19 September 2002*].

[709] *Council for TRIPS Meeting of 27 and 28 November 2001, supra* note 697 at para 57; WTO, Council for TRIPS, *Minutes of Meeting* (held on 5-7 March 2002), WTO Doc IP/C/M/35 at paras 63-138, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 5-7 March 2002*]; WTO, Council for TRIPS, *Minutes of Meeting* (held on 25-27 June 2002), WTO Doc IP/C/M/36 at paras 1-190, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 25-27 June 2002*]; *Council for TRIPS Meeting of 17-19 September 2002, ibid*; *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 paras 32-64; WTO,

the TRIPS and public health subject matter were held during the consensus-building process between November 2001 and August 2003 inclusively.

However, the most crucial moments of the processes, i.e. the processes leading up to the tabling of the draft waiver decision of 16 December 2002 (i.e. the 'Motta text') and the draft Chairman's Statement in August 2003, which both composed the final solution contained in the Waiver Decision, took place in small group settings between November 2002 and August 2003 inclusively. During this period, Members held two mini-ministerial meetings which addressed the TRIPS and public health issue. The first one was held in November 2002 and attended by 25 WTO Members, as well as the WTO Director-General.[711] It had an influential impact on the release of draft legal language by the Chair for a waiver decision.[712] The second took place in February 2003 and was attended by 22 WTO Members, in addition to the WTO Director-General and the Chair of the General Council. During this meeting, Members discussed a first potential concession offered by the United States on the scope of diseases if the solution were to be limited to Africa.[713] Additionally, during this period, the Chair held a series of consultations

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Council for TRIPS, *Minutes of Meeting* (held on 18-19 February 2003) at paras 57-107, WTO Doc IP/C/M/39 online: WTO <http://docs.wto.org>; *Council for TRIPS Meeting of 4-5 June 2003, supra* note 685 at paras 26-66; *Council for TRIPS Meeting of 28 August 2003, supra* note 575 at paras 1-2.

[710] *Council for TRIPS Meeting of 5-7 March 2002, ibid* at para 1(open-ended meeting of 15 February 2002); *Council for TRIPS Meeting of 25-27 June 2002*, *ibid* at para 189 (open-ended meeting of 24-25 July 2002); "Still No Movement in TRIPS Council on Health Or GIS", BRIDGES 6:32 (25 September 2002), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/still-no-movement-in-trips-council-on-health-or-gis> (open-ended informal meeting of 17 October 2002); "Inching Towards Compromise on Medicines After Sydney Mini-Ministerial", *BRIDGES* 6:40 (29 November 2002), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/inching-towards-compromise-on-medicines-after-sydney-mini-ministerial> ["Inching Towards Compromise"] (open-ended informal meeting of 18 November 2002); "TRIPS and Health Still Blocked As Deadline Nears", *BRIDGES* 6:42 (12 December 2002), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/trips-and-health-still-blocked-as-deadline-nears> (open-ended meeting of 8-9 December 2002) ["TRIPS and Health Still Blocked"]; "Informal TRIPS Council Reconvenes on Drugs Issue", *BRIDGES* 7:3 (29 January 2003), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/informal-trips-council-reconvenes-on-drugs-issue> (open-ended meeting of 28 January 2003); "TRIPS Council Back at Square One", *supra* note 674 (open-ended informal meeting of 5 February 2003).

[711] The ministerial meeting was held in Sydney on 14-15 November 2002, see: Wolfe, "Informal Political Engagement", *supra* note 416, Appendix; "Mini-Ministerial To Focus On Tough Doha Questions", *BRIDGES* 6:8 (7 November 2002), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/mini-ministerial-to-focus-on-tough-doha-questions> ["Mini-Ministerial To Focus on Tough Doha Questions"].

[712] "Inching Towards Compromise", *supra* note 710; "TRIPS Council: Still No Solution on Medicines In Sight", *BRIDGES* 6:41 (28 November 2002), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/trips-council-still-no-solution-on-medicines-in-sight> ["Still No Solution"].

[713] Wolfe, "Informal Political Engagement", *supra* note 416, Appendix; Abbott, "The WTO Medicines Decision", *supra* note 530 at 331. See also "No Compromise in Sight", *supra* note 674.

and small group meetings and regularly kept Members informed of their results.[714] These consultations and small group meetings resulted in the release of a first draft decision on 24 November[715] and, eventually, the tabling of the Motta text on 16 December 2002.[716] For its part, the text Chairman's Statement[717] was principally negotiated within a small group of five Members (the United States, South Africa, India, Kenya and Brazil) upon the initiative of the Chairman.[718]

Finally, during the processes that led up to the adoption of the *Protocol Amending the TRIPS Agreement,* it appears that nine formal meetings[719] and four open-ended informal meetings[720] of the Council for TRIPS would have been held between November 2003 and December 2005 inclusively. However, considering that there were significant differences among the delegations in regard to the substantive content and the legal form that the amendment should have[721], the consensus-building process was conducted for the most part in small groups and bilateral consultations, with the Chair first requesting and receiving Members' approval to this effect and

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[714] See e.g. *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at paras 22 and 33-34; "TRIPS and Health Still Blocked", *supra* note 710.
[715] "Inching Towards Compromise", *supra* note 710; "Still No Solution", *supra* note 712.
[716] Motta text, *supra* note 538; *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at paras 33-34; "WTO Members Still Battling Over TRIPS And Health", *BRIDGES* 6:43 (20 December 2002), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/issue-archive/wto-members-still-battling-over-trips-and-health>.
[717] WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (note from the Chairman)*,* WTO Doc JOB(03)/177 (27 August 2003), online: WTO <http://docs.wto.org> (unavailable to the public) [Chairman's Statement of 30 August 2003].
[718] Abbott, "The WTO Medicines Decision", *supra* note 530 at 307, n 71. See also *General Council Meeting of 25, 26 and 30 August 2003*, *supra* note 540 (At the General Council Meeting of 30 August 2003, the Chair of the Council for TRIPS said that he was "grateful to the Ambassadors of South Africa, India, Kenya, and Brazil, all of whom he had used as a sounding board in preparing the General Council Chairman's statement". at para 88).
[719] *Council for TRIPS Meeting of 18 November 2003, supra* note 683 at paras 134-58; *Council for TRIPS Meeting of 8 March 2004, supra* note 683 at 82-90; *Council for TRIPS Meeting of 16 June 2004, supra* note 696 at paras 68-129; *Council for TRIPS Meeting of 21 September 2004, supra* note 696 at 62-76; *Council for TRIPS Meeting of 1-2 December 2004, supra* note 674 at paras 21-51; *Council for TRIPS Meeting of 8-9 and 31 March 2005, supra* note 696 at paras 101-219; WTO, Council for TRIPS, *Minutes of Meeting* (held on 14-15 June 2005), WTO Doc IP/C/M/48 at paras 109-57, online: WTO <http://docs.wto.org> [*Council for TRIPS Meeting of 14-15 June 2005*]; *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at paras 174-210 and 211-85.
[720] *Council for TRIPS Meeting of 8 March 2004, supra* note 683 at para 83 (open-ended informal meeting of 4 March 2004); *Council for TRIPS Meeting of 1-2 December 2004, supra* note 674 at para 102 (open-ended informal meeting of 30 November 2004); *Council for TRIPS Meeting of 14-15 June 2005, supra* note 719 at paras 109-10 (open-ended informal meeting of 23 May 2005); *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at para 174 (open-ended informal meeting of 25 October 2005); "TRIPS Council Remains Divided", *supra* note 675 (open-ended informal meeting of 25 October 2005).
[721] *Council for TRIPS Meeting of 8 March 2004, supra* note 683 at paras 89-90.

keeping Members informed of their results.[722] Within the three months preceding the adoption of the Protocol of Amendment, the Chair held several separate meetings with the presence of only three delegations (the EC, the United States and a representative of the African Group).[723] He reported back to the Members about the process and the state of play of the ongoing trilateral consultations.[724] Upon their insistence, other Members joined these consultations in the week preceding the adoption of the Protocol of amendment.[725]

3.3.1.3. Were Members given an opportunity to review and comment on draft texts?

The draft Ministerial Declaration text, containing two different options in brackets, was drafted within a restricted group of Members upon the initiative of the Chairman[726] and eight countries were asked to draft compromise language on these two options. [727] The text was subsequently forwarded to a larger group of some 20 countries for further discussion and was finally adopted as is by the Ministerial Conference on 14 November 2001.[728]

Regarding the Waiver Decision, both the Motta text and the draft Chairman's Statement were negotiated within a restricted group of Members.[729] For the drafting of the Chairman's Statement, the Chair consulted with a group of five delegations, presented them the text of a proposed

[722] See e.g. *Council for TRIPS Meeting of 18 November 2003, supra* note 683 at para 135; *Council for TRIPS Meeting of 8 March 2004, ibid* at para 83 and 89-90; *Council for TRIPS Meeting of 16 June 2004, supra* note 696 at 70; *Council for TRIPS Meeting of 21 September 2004, supra* note 696 at paras 75-76; *Council for TRIPS Meeting of 8-9 and 31 March 2005, supra* note 696 at paras 102, 182-216 and 217-18; *Council for TRIPS Meeting of 14-15 June 2005, supra* note 719 at para 174; *General Council Meeting of 19 October 2005, supra* note 685 at para 29; *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at paras 174, 211 and 213.

[723] *General Council Meeting of 19 October 2005, supra* note 685 at para 29; *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at para 205.

[724] *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at para 174; *General Council Meeting of 19 October 2005, supra* note 685 at para 29.

[725] These Members included Brazil, India, Hong Kong and Israel, in addition to the African Group, the EC and the United States, see: "Members Strike Deal", *supra* note 599.

[726] See e.g. Abbott, "The Doha Declaration", *supra* note 551 at 486-88; "Draft Declaration on TRIPS and Health Highlights Divisions", *supra* note 707.

[727] Abbott, "The Doha Declaration", *supra* note 551 at 488; Jawara & Kwa, *Behind the Scenes, supra* note 97 at 99-101; Odell & Sell, "Reframing the Issue", *supra* note 646 at 105; "Doha Turning to Single Undertaking", *supra* note 707.

[728] "Doha Turning to Single Undertaking", *supra* note 707; Abbott, "The Doha Declaration", *supra* note 551 at 488; Jawara & Kwa, *Behind the Scenes, supra* note 97 at 99-101; Odell & Sell, "Reframing the Issue", *supra* note 646 at 105.

[729] For example a group of developing countries, including inter alia the African Group had agreed to work with the Director General in the preparation of a compromise text, see the Statement by the representative of Kenya on behalf of the African Group: *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at para 35.

Chairman's statement and modified it in accordance with the comments of these delegations.[730] All those discussions took place in confidentiality behind closed doors.[731] Once the text was revised and approved by the five delegations, the proposed Chairman's Statement was presented to all Members in an open-ended informal meeting of the Council for TRIPS at the level of Heads of Delegation plus one[732], as well as in another meeting attended by the five delegations and any other interested delegations, with the purpose of explaining and clarifying the statement and with the hope that the proposal would find favour with Members.[733] Little time was given to Members to approve the Chairman's Statement.[734]

Both the Motta text and the Chairman's Statement were approved by the Council for TRIPS and adopted by the General Council without any further modifications. Over a year after the adoption of the Waiver Decision, the African Group, voiced its concern that a footnote referring to the Chairman's Statement had been added in the official Waiver Decision (document WT/L/540) without the express consent of Members and was "puzzled as to how that footnote came to be added."[735] Indeed, it was pointed out that the Waiver Decision that had originally been agreed to in document IP/C/W/405 did not make any references to the Chairman's Statement.[736]

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[730] Abbott, "The WTO Medicines Decision", *supra* note 530 at 327, n 71. See also *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 (At the General Council Meeting of 30 August 2003, the Chair of the Council for TRIPS said that he was "grateful to the Ambassadors of South Africa, India, Kenya, and Brazil, all of whom he had used as a sounding board in preparing the General Council Chairman's statement." at para 88).
[731] Abbott, "The WTO Medicines Decision", *supra* note 530 at 327, n 71.
[732] *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 12 and Annex III. See also Abbott, "The WTO Medicines Decision", *supra* note 530 at 327, n 71 and 72.
[733] Abbott, "The WTO Medicines Decision", *supra* note 530 at 327, n 71 and 72.
[734] *Ibid.*
[735] *Council for TRIPS Meeting of 8-9 and 31 March 2005*, *supra* note 696 at para 187 ("Regarding the clarification sought by the representative of Rwanda on the asterisked note in document WT/L/540, a representative of the Secretariat clarified that this asterisked note was not part of the legal text of the Decision. Its purpose had been to provide factual information about the way the Decision had been adopted in the belief that this would be found helpful. If there were Members who did not find this information helpful in the text of the Decision as circulated, and maybe found it confusing, one course of action might be to re-issue the Decision without this note." at para 219). The official waiver decision was corrected as followed: The asterisked note at the bottom of page 1 should read as follows: "**Secretariat note for information purposes only and without prejudice to Members' legal rights and obligations:* This Decision was adopted by the General Council in the light of a statement read out by the Chairman, which can be found in JOB(03)/177. This statement will be reproduced in the minutes of the General Council to be issued as WT/GC/M/82.", see: *Implementation of Paragraph 6 of the Doha Declaration on TRIPS and Public Health − Corrigendum* (General Council Decision of 30 August 2003), WTO Doc WT/L/540/Corr.1, online: WTO <http://docs.wto.org>.
[736] *Council for TRIPS Meeting of 8-9 and 31 March 2005*, *supra* note 696 at para 193.

As regards to the Protocol of amendment, although the drafting of the amendment was quasi-identical to the text of the Waiver Decision, its drafting and negotiation principally took place in a restricted group of three delegations.[737] Only towards the very end of the consultation process were other interested Members eventually invited to join the restricted group.[738]

3.3.1.4. Members' criticisms regarding the rulemaking processes

Overall the consensus-building processes leading to the adoption of the Waiver Decision and the Protocol of Amendment received several criticisms regarding their lack of inclusiveness and transparency despite the repeatedly insistence of some Members that the processes be carried out in a transparent and inclusive manner.[739]

As regards the process used for the adoption of the Waiver Decision, several Members went out of their way to put their concerns on the record and these were not denied by other Members or the Chairman.[740] Indeed, some delegations expressed their discontent with the negotiation processes that took place in the weeks preceding the release of the Motta text and previous Chairman's draft texts, which, they stressed, should have been "more transparent" and "straight forward."[741] Additionally, it appears that some delegations had been more involved than others in helping the Director-General to finding a formulation that might bring the remaining Members

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[737] *General Council Meeting of 19 October 2005, supra* note 685 at para 29; *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at para 205; "TRIPS Council Remains Divided on Public Health Amendment", *supra* note 675.

[738] *Council for TRIPS Meeting of 25-26 and 28 October,29 November and 6 December 2005, supra* note 292 at para 212; "Members Strike Deal", *supra* note 599.

[739] See e.g. Statement by the representative of Indonesia in *Council for TRIPS Meeting of 4-5 June 2003, supra* note 685 at para 38; Statements by the representatives of Brazil, India and Argentina in "TRIPS Council Remains Divided", *supra* note 675; *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 (The Chair said that he was "very much aware" that this matter was "of great interest to all delegations" and that the further process of consultations "needed to be as transparent and inclusive as possible." at para 174. The representative of Argentina underlined one more time that "[c]onsidering the importance of this process for all WTO Members, informal consultations carried out by the Chairman needed to be organized with the greatest degree of transparency and inclusiveness." at para 181.); *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, ibid* (Several delegations manifested their interest to participate in the consultations, see: Statement by the representative of Nigeria on behalf of the African Group at para 179; India at para 180; Kenya at para 186; European Communities at para 188; and Switzerland at para 191; statement by the Chairman at para 206).

[740] See e.g. *General Council Meeting of 25, 26 and 30 August 2003*, *supra* note 540 at paras 17, 44, and 58-59).

[741] See e.g. Statement by the representative of Cuba: *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at para 58.

in the consensus.[742] Some delegations also indicated that they were not pleased with the short time frame in which they were asked to approve the Chairman's statement or with the lack of consultations during its preparation.[743] Both the Chair and some Members fully recognized that some delegations had felt that they had not been "as fully consulted as some others" and that the processes could have been more transparent.[744]

Regarding the process used for the adoption of the Protocol of Amendment, some representatives from the LDC Group, and the Philippines felt that "major developed country Members had made a number of promises to other Members in order to obtain their support for the [Waiver Decision of 30 August 2003] and the Chairman's Statement."[745] The representative of Zambia, speaking on behalf of the LDC Group said that his delegation had been informed that the Waiver Decision "was intended to be only an interim solution and that discussions towards finding a permanent solution in the form of an amendment to the TRIPS Agreement would continue."[746] The representative of Kenya said that the statement by the coordinator of the LDC Group, notably, was "indicative of the journey that had been covered so far since 2001."[747]

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[742] For example a group of developing countries, including inter alia the African Group had agreed to work with the Director General in the preparation of a compromise text, see the Statement by the representative of Kenya on behalf of the African Group: *ibid* at para 35.

[743] Abbott, "The WTO Medicines Decision", *supra* note 530 at 327, n 71 and 72.

[744] *General Council Meeting of 25, 26 and 30 August 2003*, *supra* note 540 at para 17 (At the General Council meeting of 30 August 2003, before the adoption of the Waiver Decision, the Chair of the Council for TRIPS said that he "was aware that some delegations had felt that they had not been as fully consulted as some others in the earlier phases of the consultations, and that this had left them with questions that needed clarification before they could join the consensus, with the need to consult fully their capitals." at para 17 However, he further stressed that "he believed that the consultation process that had taken place over the past 24 hours had enabled them to seek the clarifications they needed to fully join the consensus." at para 17. The representative of South Africa said that he "took some responsibility for some delegations not having being fully informed and briefed on the issues where further clarification had been needed" and that the WTO should "learn from this process and ensure that sometimes Members might need to go slower in order to go faster." at para 44. The representative of Uganda stressed that, although he recognized that success had been achieved and commended all who had been involved, he had "had initially misgiving about the secretive manner of the consultations." at para 58. The representative of Canada offered a more balance perspective on the process. While he recognized that a number of colleagues "had considered that the process could, and should, have been a little better", he believed that "things often worked in ebbs and flows in this organization − they got off track and then they got back on track." at para 59).

[745] Statement by the representative of Zambia on behalf of the LDC Group in *Council for TRIPS Meeting of 8-9 and 31 March 2005*, *supra* note 696 at para 193.

[746] *Council for TRIPS Meeting of 8-9 and 31 March 2005*, *supra* note 696 at para 193 (Similarly, the representative of Kenya stressed that "Africa respected the written and unwritten promises that had been made behind the scenes and that was why he had accepted the solution . . . [h]owever, those promises seemed to have evaporated as soon as the exercise to amend the TRIPS Agreement had begun, and they needed to be brought back to the table." at para 198. The representative of Philippines said that his delegation "had agreed to the Decision on the premise and in the belief in the word of the then Chair as well as certain key players in these negotiations that their concerns would be

Moreover, the representatives of Brazil, India and Argentina objected to the "central role" of the trilateral consultations (between the EC, the African Group and the United States) in the discussions on the TRIPS amendment, arguing that "they were neither representative nor transparent."[748] They further stressed that "all countries with an interest in the matter − including their own − should [have been] able to participate in a consultative process that involve[d] the Chair."[749] The representative of Brazil expressed concerns about "the disregard of procedures insofar as participation in informal consultations had been selected and partial, and not all interested parties and those who had declared themselves interested were included."[750] Indeed, despite its express request to be included in the Chairman's trilateral consultations, Brazil remained excluded from these consultations until the very end of the processes, where it and other Members interested in participating were finally invited to join the consultations.[751] In the same vein, the representative of India said that the process should have been "inclusive", involving all interested Members and no distinction should [have been] made between a set of most interested parties, another set of key Members and still another set of ordinary Members."[752] The representative of Brazil also contended that reference had been made to documents "that were unknown to his delegation, and which had not been officially circulated."

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addressed or could be rectified during the amendment process." Thus, he added that "Members had acquiesced with such an appeal for approval at that time, given the urgency for a need to establish a mechanism to address the problems of developing countries with no or insufficient manufacturing capacity in the pharmaceutical sector." at para 202. However, the representative of the United States contended that his delegation "was not familiar with promises that may have been made or broken or whether these were relevant, and expressed its concern over the presence of such allegations without further clarity." at para 210. But the representative of Kenya responded that while there were no records of the informal process that led to the Waiver Decision, "Members should not forget the degree of activity that had taken place behind the scenes in the few days before and right up to the meeting in which the Waiver Decision had been taken." He added that "the promises that had been made were not in Decision, but some Members had been told that all their concerns and problems could be addressed during the amendment process."Moreover, his delegations "had even prepared a statement which it had been prevailed upon by other Members not to issue." But [i]f Members were still doubting this background, he could produce this statement as proof and disclose the details of the topics behind the scenes and in capitals at the time of the Decision." at para 213).

[747] *Council for TRIPS Meeting of 8-9 and 31 March 2005, supra* note 696 at para 198.

[748] "TRIPS Council Remains Divided", *supra* note 675.

[749] Nonetheless, other Members, including Switzerland and Malaysia, expressed "their support for this trilateral process, and indicated that they were willing to contribute if and when the Chair deemed it necessary", see *ibid.*

[750] *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at para 181.

[751] *Ibid* at para 212; "Members Strike Deal", *supra* note 599.

[752] *Council for TRIPS Meeting of 25-26 and 28 October, 29 November and 6 December 2005, supra* note 292 at para 206.

These documents were "non-official" and "could not be referred to as a basis for the negotiation of an amendment to a formal WTO Agreement."[753]

3.3.1.5. Attribution of a score: *Representativeness − Internal transparency*

Overall, *Representativeness − Internal transparency* assessed the following standard: *Was the rulemaking process open and transparent for all Members expected to be bound by the outcome at all stages of the process? Were the meetings announced in advance? Were they open to participation from all Members expected to be bound by the outcome? Were these Members given an opportunity to review and comment on draft texts?* As regards to the process being predictable and the meetings announced in advance, for both the agenda-setting and the consensus-building processes, all of the formal meetings, as well as their agenda, were announced in advance by default procedure of the Council for TRIPS. In addition, the Chair regularly consulted Members about the process and informed them about the next steps that would be taken, including the holding of open-ended informal meetings, small group meetings and consultations.

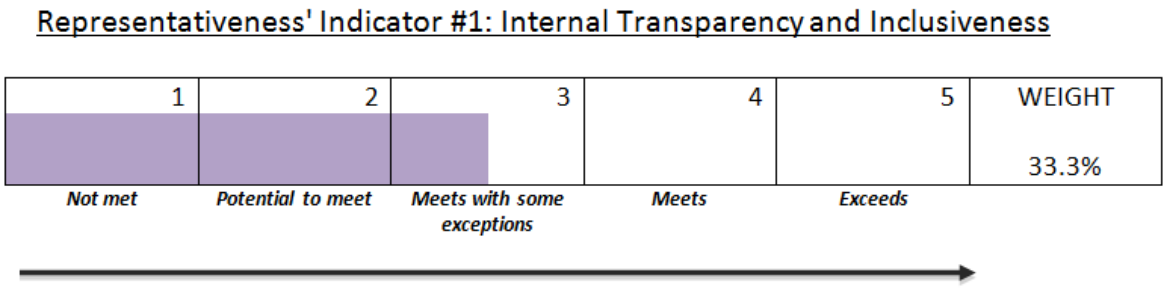
In general, a great portion of the rulemaking processes was held in formal and open-ended informal meetings open to all Members, which assured full transparency and inclusiveness. However, what seems to be evident from the data collected is that some Members were excluded from the negotiation processes in some of the most crucial moments, just before the release of the Motta text, the Chairman's Statement and the draft Protocol of Amendment despite the fact that they had explicitly stated their desire to be included.

All Members were given an opportunity to review and comment on draft texts of the Declaration, the Waiver Decision and the Protocol of amendment prior to their adoption. However, in all three cases the draft texts had been negotiated in advance within a small group and it appears that there was not much room for modification and input once they were circulated to a larger group or the entire membership. In addition, at least in one occasion (for the case of the text of the Chairman's Statement), Members felt they were given very little time

[753] *Ibid* at para 196 (The Chair clarified that the consultations "were not entirely under his auspices"; it was a "spontaneous process initiated by the delegation of the European Communities." at para 206. He added that "any agreement emerging from the consultations between some Members should be put to the entire membership" at para 209).

to approve the negotiated text. Some Members also expressed some concerns on how a footnote referring to the Chairman's Statement had been added in the official Waiver Decision after its adoption.

For the evaluation of *Representativeness − Internal transparency*, the most decisive moments which had the most impact on the final outcomes, but had some important shortcomings with respect to transparency and inclusiveness, should outweigh the remaining of the processes which was generally open to the entire membership and transparent. Thus, *Representativeness − Internal transparency,* i.e. the first indicator of representativeness, should be attributed a score of 2.5/5 (i.e. between '*performance did not consistently meet the indicator's standards*' and '*performance was consistently below the indicator's standards*').



3.3.2. Representativeness − Representativity

Representativeness' Indicator #2: Did a representative group of Members, representing a balanced set of interests, participate in the various meetings and submitted written communications at all stages of the process?

Representativeness − Representativity analyzes the degree of representativity of Members, classified by level of development (categories) and geopolitical groupings (groupings), in all stages of the rulemaking processes. The assessment is performed in three steps, the first two consisting of a quantitative analysis, and the third one, of a qualitative analysis:

1) The first step will evaluate the degree of 'direct participation' for each category/grouping of Members both by means of oral interventions and written communications at all stages of the rulemaking processes. For those categories/groupings of Members which obtained

a lower degree of 'direct participation' than the benchmark[754], their degree of 'direct representation' will also be evaluated to verify whether it offsets their weaker degree of 'direct participation' (section 3.3.2.1).

2) For only those categories/groupings of Members which had a lower degree of 'combined direct participation and direct representation' than the benchmark (determined in Step 1), their degree of 'balanced representation' at all stages of the rulemaking processes will be analyzed in the second step to verify whether it counterbalances their weaker degree of 'combined direct participation and direct representation' (section 3.3.2.2). The first and second steps together will constitute the quantitative analysis.
3) Finally, the third step will analyze whether there was a sufficient degree of 'balanced representation' following the qualitative analysis. It will assess whether there was a balanced set of interests represented in the most decisive moments of the rulemaking processes (section 3.3.2.3).

The assessment of the quantitative and qualitative analyses, broken down into these three steps is presented in the following sections.

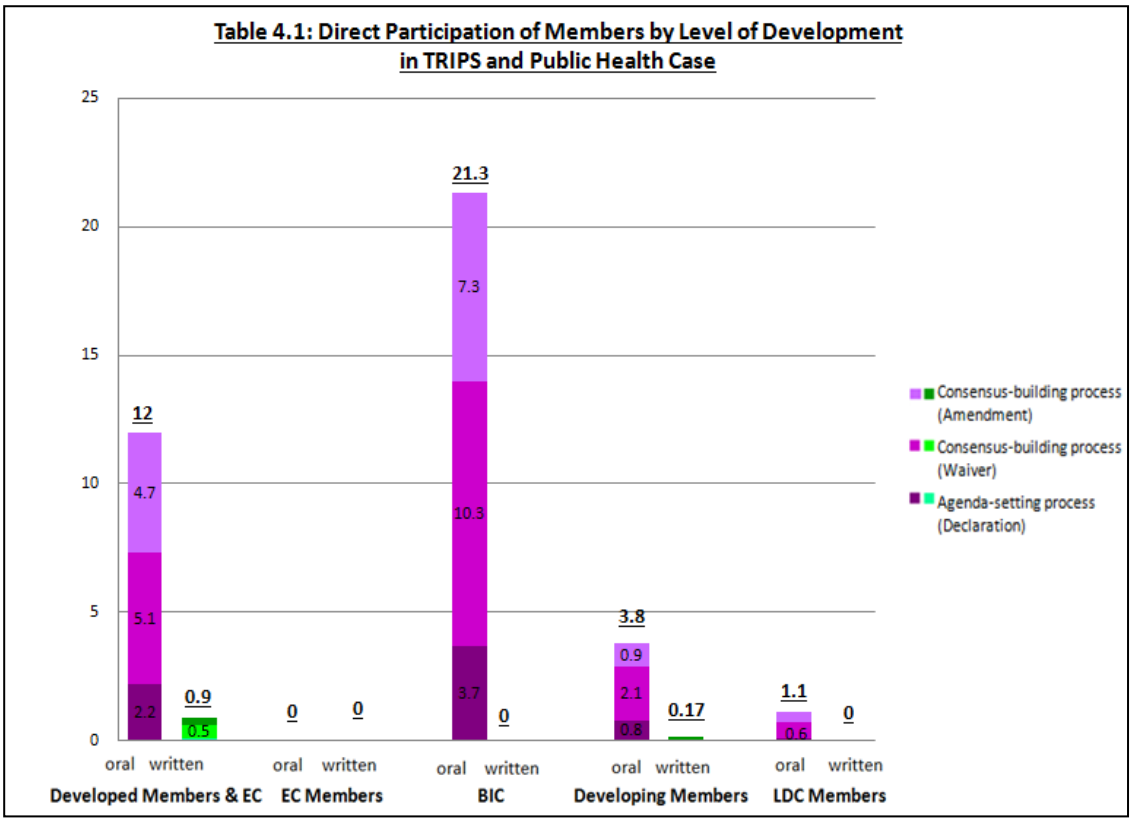
3.3.2.1. Step 1: To what degrees individual Members directly participated in the rulemaking processes or had their interests directly represented?

This section presents the results of the quantitative analysis performed under Step 1 regarding the degree of 'combined direct participation and direct representation' of individual Members classified by level of development (section 3.3.2.1.1) and by geopolitical groupings (section 3.3.2.1.2). It focuses both on the participation or representation by way of oral interventions ('oral') and written communications ('written'). The values presented in the tables represent an average of the total direct participation and total direct representation of each single Member forming each category of development and geopolitical grouping at all stages of the rulemaking processes.

[754] The benchmark is formed of the combined average of the degree of participation of the categories/groupings of Members that obtained a sufficient degree of participation (i.e. not under 40 percent lower than the category/grouping of Members that had the highest degree of participation) see: Chapter 3, Section 4.1.3.2.2 (e).

3.3.2.1.1. *Direct participation and direct representation of Members by level of development*

Table 4.1 below illustrates the degree of direct participation of Members classified by level of development (as listed on the horizontal axis) in the rulemaking processes by way of oral interventions and written communications during both the agenda-setting process (leading to the adoption of the Declaration) and the consensus-building process (that led to the adoption of the Waiver Decision and the Protocol of Amendment), as they are identified in the table's legend.



ORAL INTERVENTIONS: Table 4.1 shows that individual BIC Members are by far the category of Members that had the highest degree of direct participation by means of oral interventions (21.3). It also establishes the benchmark (i.e. 21.3) to evaluate the degree of direct participation by means of oral interventions of individual Members part of other categories.[755]

[755] The benchmark is formed of the combined average of the degrees of participation of the categories/groupings of Members that obtained a degree of participation not under 40 percent lower than the single category/grouping of Members that had the highest degree of participation. For additional information, see: Chapter 3, Section 4.1.3.2.2 (e).

The degree of direct participation of Developed Members & EC (12) was *moderately lower* (with a decrease of 44 percent) than the benchmark (21.3).

As for the degrees of direct participation of individual Developing Members (3.8) and LDC Members (1.1), they were *significantly lower* than the benchmark (21.3), representing respectively an 82 percent and a 95 percent decrease. For their part, individual EC Members did not obtain any values in 'direct participation'.

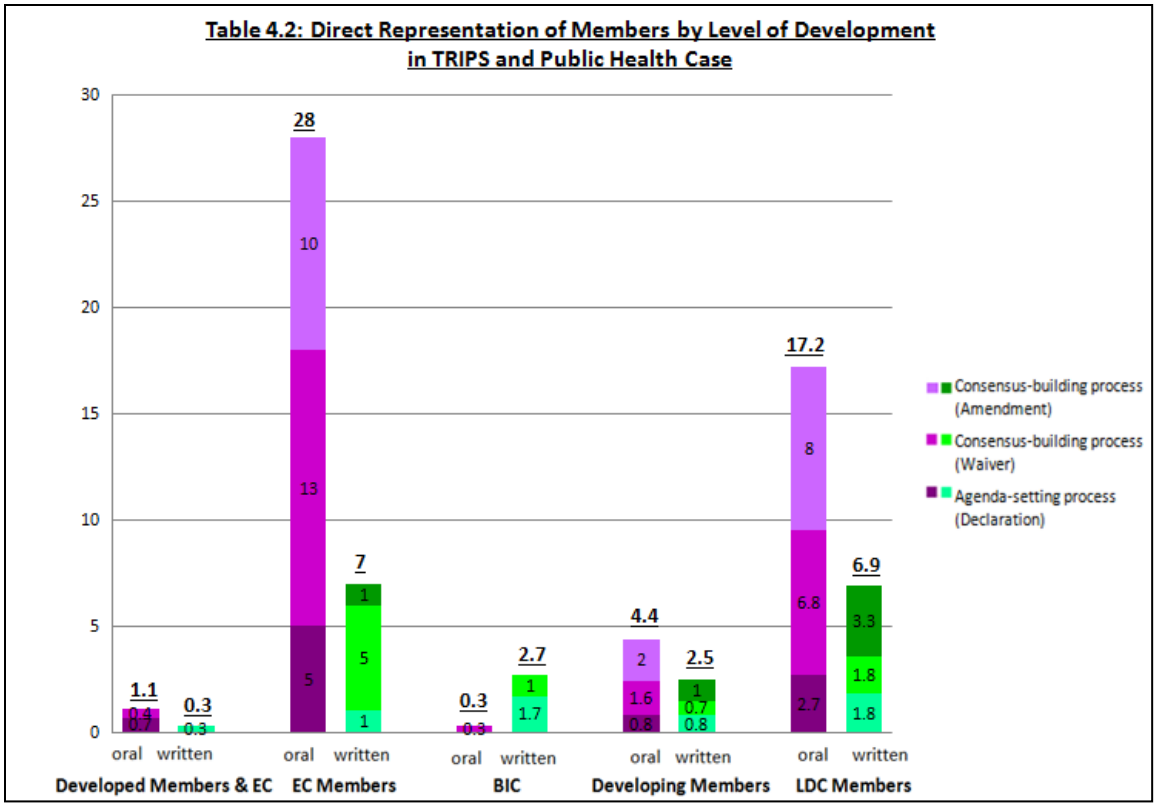
Can the weaker degree of 'direct participation' by means of oral interventions of these individual Members part of these above categories be offset by a sufficiently high degree of 'direct representation' to meet the benchmark?

Table 4.2 illustrates the degree of 'direct representation', i.e. the values regarding the extent to which individual Members part of the different categories had their interests directly represented by other Members on their behalf. As for the representation of Members' interests by way of oral interventions, the degree of direct representation of the interests of individual LDC Members (17.2) largely compensated for their poor degree of direct participation (1.1[756]). Indeed, combined together, the degree of 'direct participation and direct representation' of individual LDC Members (18.3[757]) achieved a similar level (with only a 14 percent decrease) than the benchmark (21.3), and thus a sufficient degree of 'combined direct participation and direct representation'.

Individual EC Members, which had no values of direct participation, had a degree of direct representation (28) that was 24 percent higher than the benchmark (21.3), thus completely overcompensating for their lack of direct participation.

[756] As shown in Table 4.1.
[757] Representing the sum of the degree of direct participation of individual LDC Members by means of oral interventions (1.1), as illustrated in Table 4.1, added to their degree of direct representation (17.2) indicated in Table 4.2.

As for individual Developed Members & EC, they only had a modest degree of direct representation (1.1), however it was sufficient to offset their moderately lower degree of direct participation (12[758]), amounting to a combined degree of 'direct participation and direct representation' of 13.1[759] (which represents a 38 percent decrease as compared to the benchmark (21.3)).



However, with respect to individual Developing Members, their combined degree of direct participation (3.8[760]) and direct representation (4.4), amounting to 8.2[761], remained *significantly lower* (i.e. 62 percent) than the benchmark (21.3).

[758] As illustrated in Table 4.1.
[759] Representing the sum of the degree of direct participation of individual Developed Members & EC by means of oral interventions (12), as illustrated in Table 4.1, added to their degree of direct representation (1.1) indicated in Table 4.2.
[760] As illustrated in Table 4.1
[761] Representing the sum of the degree of direct participation of individual Developing Members by means of oral interventions (3.8), as illustrated in Table 4.1, added to their degree of direct representation (4.4) indicated in Table 4.2.

WRITTEN COMMUNICATIONS: With respect to Members' direct participation by way of written communications, Table 4.1 highlights that only individual Developed Members & EC (0.9) and individual Developing Members (0.17) submitted individual written communications. The benchmark corresponds to the degree of direct participation by means of written communications by individual Developed Members & EC (i.e. 0.9), which was not met by individual Developing Members that obtained a degree of direct participation *significantly lower* (i.e. 81 percent) than it.

Can the weaker degrees of 'direct participation' by means of written communications of individual Members part of the above categories be compensated for by a sufficiently high degree of 'direct representation' to meet the benchmark?

The reading of Tables 4.1 and 4.2 jointly highlights the degrees of 'combined direct participation and direct representation' by means of written communications of individual Members part of the Developing Members (2.7[762]), the BIC (2.7[763]), the LDC Members (6.9[764]) and the EC Members (7[765]) categories fully offset their poor degrees of direct participation, representing an increase between 67 and 87 percent higher than the benchmark (0.9).

CATEGORIES OF MEMBERS WITH LOWER DEGREES OF 'COMBINED DIRECT PARTICIPATION AND DIRECT REPRESENTATION': Overall, individual Members part of the following category remained with a lower degree of 'combined direct participation and direct representation' than the established benchmarks:

- Developing Members: *significantly lower* for oral (8.2).

[762] Representing the sum of the degree of direct participation of individual Developing Members by means of written communications (0.17), as illustrated in Table 4.1, added to their degree of direct representation (2.5) indicated in Table 4.2.
[763] Representing the sum of the degree of direct participation of individual BIC Members by means of written communications (0), as illustrated in Table 4.1, added to their degree of direct representation (2.7) indicated in Table 4.2.
[764] Representing the sum of the degree of direct participation of individual LDC Members by means of written communications (0), as illustrated in Table 4.1, added to their degree of direct representation (6.9) indicated in Table 4.2.
[765] Representing the sum of the degree of direct participation of individual EC Members by means of written communications (0), as illustrated in Table 4.1, added to their degree of direct representation (7) indicated in Table 4.2.

In addition, it can be observed that all categories of Members either directly participated or were directly represented by means of oral interventions or written communications in both the agenda-setting and consensus-building processes, as illustrated in Tables 4.1 and 4.2. Moreover, it can be noted that in general individual Members submitted considerably more joint communications than individual communications.

3.3.2.1.2. *Direct participation and direct representation of Members by geopolitical groupings*

This section follows the same analysis as section 3.3.2.1.2 above, however it instead focuses on the 'direct participation and direct representation' of individual Members classified by geopolitical groupings. Tables 4.3 and 4.4 are presented in the same format as Tables 4.1 and 4.2 above, with the exception that the values studied are those of Members classified by geopolitical groupings as illustrated on the horizontal axis of these tables.

ORAL INTERVENTIONS: Table 4.3 shows that individual Members from the QUAD (23.5) and the BIC (21.3) groupings had the highest degrees of direct participation by means oral interventions. Together, they form the benchmark, averaging a degree of 22.4 combined together.[766]

The degree of direct participation by means of oral interventions of individual Members from the ASEAN grouping (9.5) was *moderately lower* (i.e. 58 percent) than the benchmark (22.4).

As for individual Members from the Other Developed Members (8.4), MERCOSUR (6.4), and the African Group (2.7) groupings, their degree of direct participation by means of oral interventions was *significantly lower* (respectively 62, 71 and 88 percent lower) than the benchmark. For their part, individual EC Members did not obtain any values in 'direct participation'.

[766] Representing the average between the sum of direct participation by means of oral interventions for both the QUAD Members (23.5) and the BIC Members (21.3) groupings.

Can the lower degree of 'direct participation' by means of oral interventions of these individual Members part of the above groupings be counterbalanced by a sufficiently high degree of 'direct representation' to meet the benchmark?

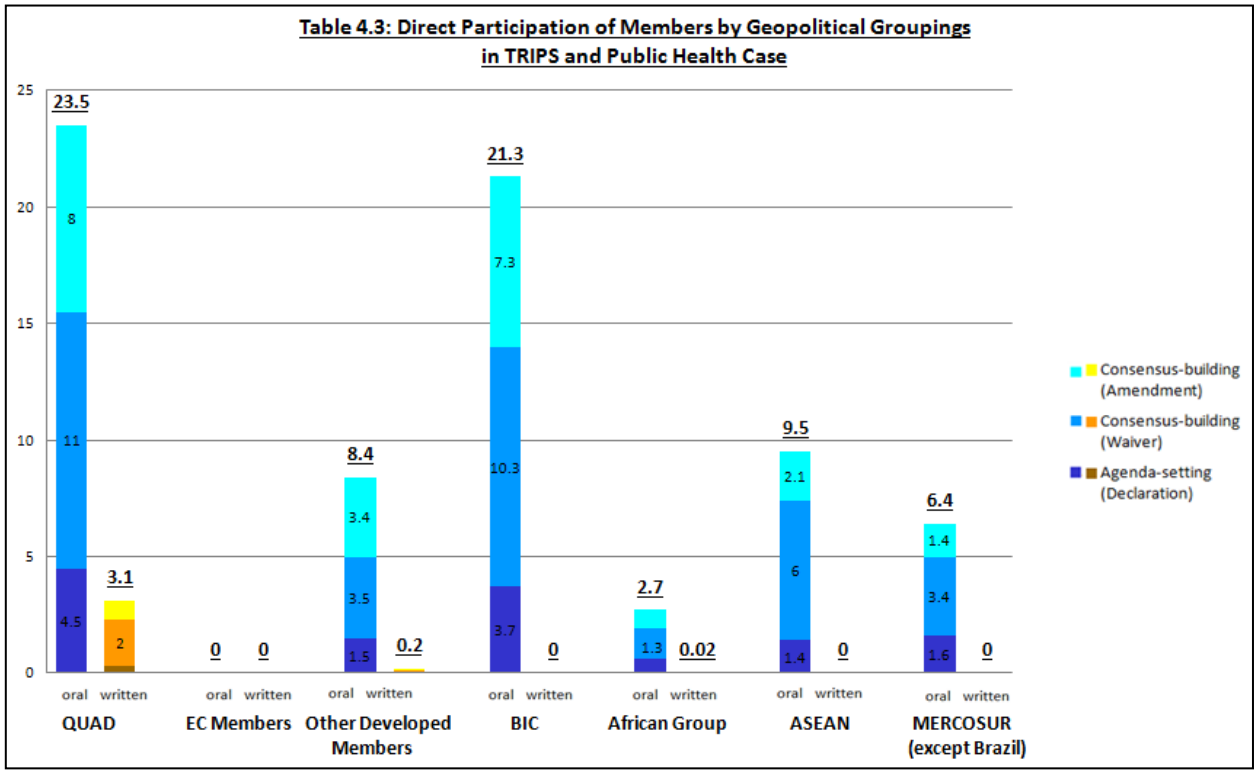


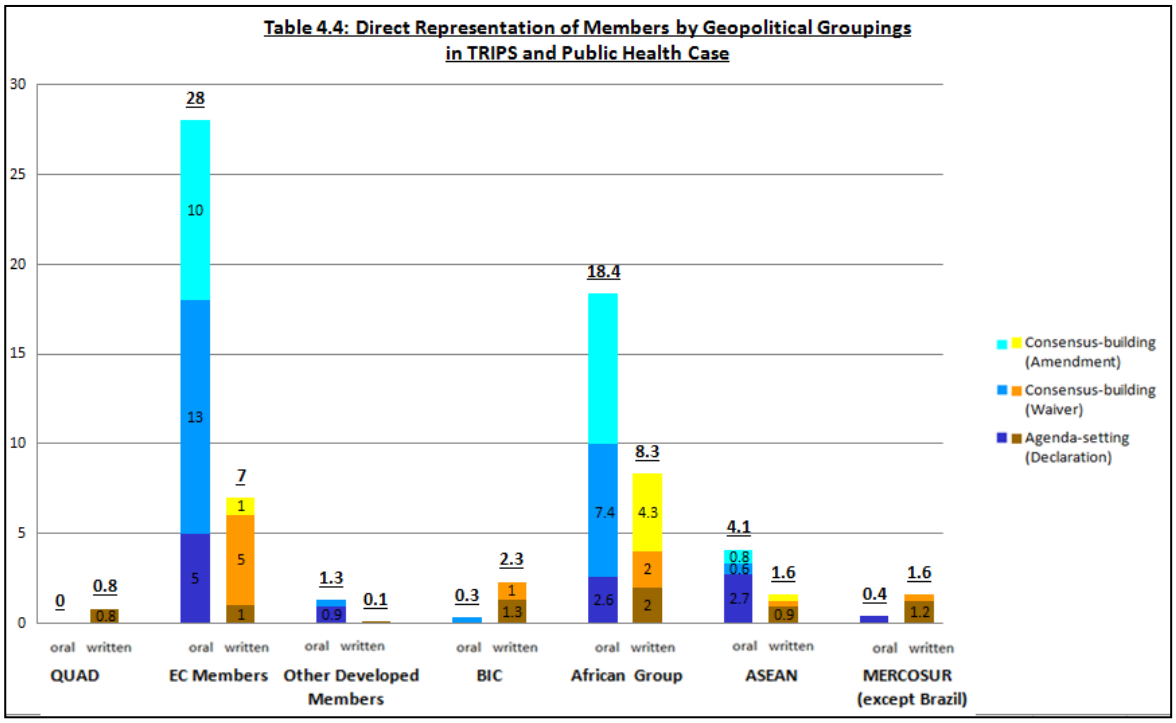
Table 4.4 indicates that the degree of direct representation of individual Members part of the EC Members (28), the African Group (18.4) and the ASEAN (4.1) groupings compensated for their lower degree of direct participation (respectively 0, 2.7 and 9.5[767]). Indeed, combined together, the degree of 'direct participation and direct representation' of individual Members part of the EC Members (28[768]), the African Group (21.1[769]) and the ASEAN (13.6[770]) groupings achieved

[767] As indicated in Table 4.3.
[768] Representing the sum of the degree of direct participation of individual EC Members by means of oral interventions (0), as illustrated in Table 4.3, added to their degree of direct representation (28) indicated in Table 4.4.
[769] Representing the sum of the degree of direct participation of individual African Group Members by means of oral interventions (2.7), as illustrated in Table 4.3, added to their degree of direct representation (18.4) indicated in Table 4.4.
[770] Representing the sum of the degree of direct participation of individual ASEAN Members by means of oral interventions (0.5), as illustrated in Table 4.3, added to their degree of direct representation (4.1) indicated in Table 4.4.

levels approaching the benchmark (22.4) (respectively 20 percent higher, 6 percent lower and 39 percent lower than the benchmark).

As for individual Members part of the Other Developed Members grouping, their combined degree of direct participation (8.4[771]) and direct representation (1.3) (amounting to 9.7) was insufficient to offset their poor degree of direct participation. It *remained moderately lower* (i.e. 57 percent) than the benchmark (22.4).

For their part, the combined degree of direct participation (6.4[772]) and direct representation (0.4) of individual MERCOSUR Members (amounting to 6.8) did not sufficiently compensate for their weak degree of direct participation. It *stayed significantly lower* (i.e. 70 percent) than the benchmark (22.4).



WRITTEN COMMUNICATIONS: With respect to participation by way of written communications, Table 4.3 shows that only individual Members part of the QUAD (3.1), the Other Developed Members (0.2), and the African Group (0.02) groupings directly participated by means of written communications. The value of direct participation of individual Members part of the QUAD

[771] As shown in Table 4.3.
[772] As shown in Table 4.3.

grouping should constitute the benchmark (i.e. 3.1). Both degrees of direct participation by means of written communications of individual Members part of the Other Developed Members (0.2) and the African Group (0.02) groupings are *significantly lower* (respectively 94 and 99 percent) than the benchmark (3.1).

Can the weaker degrees of 'direct participation' by means of written communications of individual Members part of the above groupings be compensated for by a sufficiently high degree of 'direct representation' to meet the benchmark?

The reading of Tables 4.3 and 4.4 jointly shows the degrees of 'combined direct participation and direct representation' by means of written communications of individual Members part of the EC Members (7[773]) and the African Group (8.3[774]) groupings fully offset their weaker degrees of direct participation, representing an increase between 56 and 63 percent higher than the benchmark (3.1). Individual Members part of the BIC grouping also counterbalanced their lack of direct participation with a sufficient degree of direct representation (2.3), which is only 26 percent lower than the benchmark.

Both individual Members part of the ASEAN and MERCOSUR groupings obtained a *moderately lower* degree of "combined direct participation and direct representation" by means of written communications (1.6 for both[775]) than the benchmark, representing a 48 percent decrease. However, as for individual Members part of the Other Developed Members grouping, their degree of 'combined direct participation and direct representation' (0.3[776]) remained *significantly lower* (90 percent) than the benchmark.

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[773] Representing the sum of the degree of direct participation of individual EC Members by means of written communications (0), as illustrated in Table 4.3, added to their degree of direct representation (7) indicated in Table 4.4.

[774] Representing the sum of the degree of direct participation of individual African Group Members by means of written communications (0.02), as illustrated in Table 4.3, added to their degree of direct representation (8.3) indicated in Table 4.4.

[775] Representing the sum of the degree of direct participation of both individual Members part of the ASEAN and MERCOSUR groupings by means of written communications (0), as illustrated in Table 4.3, added to their degree of direct representation (1.6) indicated in Table 4.4.

[776] Representing the sum of the degree of direct participation of individual Other Developed Members by means of written communications (0.2), as illustrated in Table 4.3, added to their degree of direct representation (0.1) indicated in Table 4.4.

GROUPINGS OF MEMBERS WITH LOWER DEGREES OF 'COMBINED DIRECT PARTICIPATION AND DIRECT REPRESENTATION': Overall, individual Members from the following groupings remained with a lower degree of 'combined direct participation and direct representation' than the established benchmarks:

- MERCOSUR: *significantly lower* for both oral (6.8) and *moderately* lower for written (1.6)
- Other Developed Members: *moderately lower* for oral (9.7) and *significantly lower* for written (0.3)
- ASEAN: *moderately lower* for written (1.6)

In addition, it can be observed that all categories of Members either directly participated or were directly represented by means of oral interventions or written communications in both the agenda-setting and the consensus-building processes, as illustrated in Tables 4.3 and 4.4. Moreover, it can be noted that in general individual Members part of the different groupings submitted more joint communications (i.e. direct representation) than individual communications (i.e. direct participation), with the exception of the QUAD grouping (0.8 vs. 3.1).

3.3.2.2. Step 2: Was an even-handed group of Members participating in the rulemaking processes?

Section 3.3.2.1 above performed the evaluation of the degree of representativity of Members under Step 1 of the indicator *Representativeness − Representativity*. It focused on the direct participation and direct representation of individual Members as part of different categories of level of development and geopolitical groupings, which are the two most optimum forms of participation. It did not take into consideration the number of Members composing each category, but instead look at the degrees of direct participation and direct representation in average for each Member composing each category or grouping. It concluded that the following categories/groupings of Members obtained insufficient degrees of 'combined direct participation and direct representation' as compared to the established benchmarks:

Categories	Groupings
• Developing Members: s*ignificantly lower* for oral (8.2)	• MERCOSUR: *significantly lower* for oral (6.8) and *moderately* lower for written (1.6) • Other Developed Members: *moderately lower* for oral (9.7) and *significantly lower* for written (0.3) • ASEAN: *moderately lower* for written (1.6)

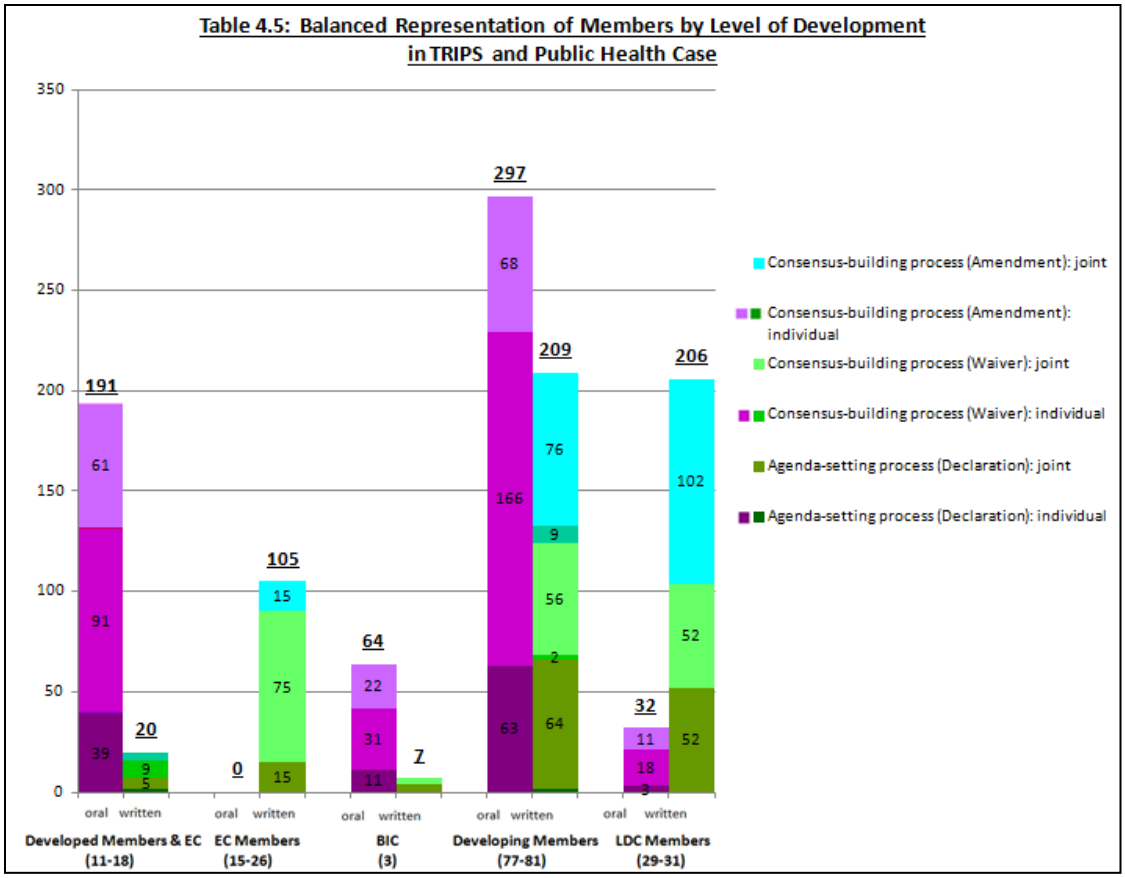
This section proceeds with Step 2 of the evaluation of the degree of representativity of Members under the indicator *Representativeness − Representativity*. It assesses whether those categories/groupings of Members which obtained an insufficient degree of 'combined direct participation and direct representation' had a sufficient degree of 'balanced representation' to counterbalance their poor performance in Step 1.

'Balanced representation' consists of the minimum standard under the quantitative analysis for meeting the standard of *Representativeness − Representativity*. It examines the degree of balanced representation of each category of Members by level of development (section 3.3.2.2.1) and geopolitical groupings (section 3.3.2.2.2), which is correlated to the number of Members composing each category and grouping, as indicated on the horizontal axis of Tables 4.5 and 4.6. Under this form of participation what matters is that an even-handed group of Members from the different categories or groupings participated in the rulemaking processes. It focuses exclusively on the categories and groupings which obtained an insufficient degree of ' combined direct participation and direct representation' pursuing to the analysis performed in Step 1.

3.3.2.2.1. *Balanced representation of Members by level of development*

The question examined under this section is whether the Developing Members category received a sufficiently high degree of 'balanced representation' by means of oral interventions to offset its poor performance.

Table 4.5 shows that the Developing Members category had a higher degree of balanced representation by means of oral interventions (297) than any other categories of Members at all stages of the rulemaking processes, followed by the Developed Members & EC category (191). The average of the combined values of these two categories together should constitute the benchmark (i.e. 244[777]). Without any further analysis, it can be concluded that the weak degree of 'combined direct participation and direct representation' of individual Developing Members



[777] Representing the average of the sum of the degree of balanced representation by means of oral interventions of the Developing Members category (297) and that of the Developed Members & EC category (191).

can be counterbalanced by the high degree of 'balanced representation' of the Developing Members category, which exceeds the benchmark by 18 percent.

The high degree of balanced representation of the Developing Members category can be explained by the large number of Members composing their category (between 77-81 Members[778]), which has the potential of giving the Members part of this category more balanced representation in the WTO overall than any other categories of Members.

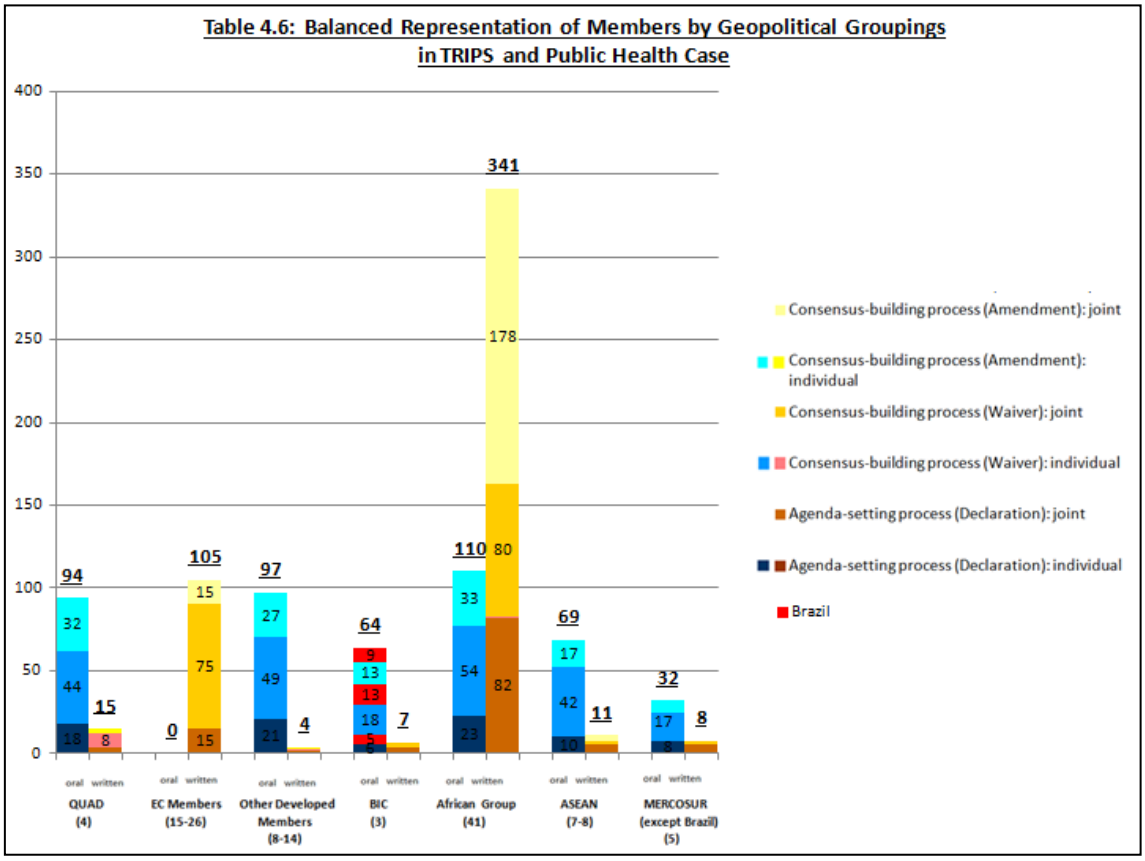
3.3.2.2.2. *Balanced representation of Members by geopolitical groupings*

Section 3.3.2.1.2 above demonstrated that individual Members part of the MERCOSUR[779] and Other Developed Members[780] groupings had an *insufficient* degree of 'combined direct participation and direct representation' both by means of oral interventions and written communications, and individual ASEAN Members had a *moderately lower* degree of 'combined direct participation and direct representation' by means of written communications only as compared to the benchmarks. This section aims to assess whether these groupings enjoyed a sufficiently high degree of balanced representation to palliate for their insufficient degree of 'combined direct participation and direct representation'?

ORAL INTERVENTIONS: Table 4.6 reveals that the African Group (110) obtained the highest degree of 'balanced representation' by means of oral interventions. Considering that the degrees of balanced representation of the Other Developed Members (97), the QUAD (94) and ASEAN (69) groupings were respectively only 15, 12 and 37 percent lower than that of the African Group (thus over 40 percent lower), all four groupings together should constitute the benchmark, i.e. averaging 93 for all four groupings combined. [781]

[778] Throughout the years 2001 to 2005 exclusively, where the rulemaking processes took place for the TRIPS and Public Health Case.
[779] Individual MERCOSUR Members' degree of 'combined direct participation and direct representation' was *significantly lower* for both oral interventions and *moderately* lower for written communications.
[780] Individual Other Developed Members' degree of 'combined direct participation and direct representation' was *moderately lower* for oral interventions and *significantly lower* for written communications.
[781] To understand how the benchmark is calculated, see *supra* note 754 and Chapter 3, Section 4.1.3.2.2 (e).

Did the MERCOSUR and Other Developed Members groupings meet the benchmark? The Other Developed Members grouping's degree of 'balanced representation' by means of oral interventions was fully compensated for its insufficient degree of 'combined direct participation and direct representation'. It received a score of 97, which is 4 percent higher than the benchmark (93).



As for the MERCOSUR grouping, the calculation of its degree of 'balanced representation' by means of oral interventions (32) should also take into account the degree of balanced representation of Brazil (27[782]), amounting to 59. Its newly combined score is only 37 percent lower than the benchmark and, therefore, sufficiently offset its insufficient degree of 'combined direct participation and direct representation'.

[782] Brazil is an official Member of MERCOSUR, but treated separately for the purpose of this thesis. For additional information, see Chapter 3, Section 4.1.3.2.2 (b). Brazil's score of 27 represents the total of its participation by means of oral interventions in the agenda-setting process (5), in the consensus-building process leading to the adoption of the Waiver (13), and in the consensus-building process leading to the adoption of the Amendment (9) as illustrated on Table 4.6.

WRITTEN COMMUNICATIONS: As for the degree of 'balanced representation' by means of written communications, Table 4.6 shows that the African Group received the highest degree (341) and should also constitute the benchmark considering that it is over 40 percent higher than any other results.

The degrees of 'balanced representation' by means of written of communications of the ASEAN (11), the MERCOSUR (8)[783], and the Other Developed Members (4) groupings were *significantly lower* than the benchmark, representing respectively a decrease of 97, 98 and 99 percent.

3.3.2.2.3. *Results of the quantitative analysis*

Step 1 and Step 2 above performed the quantitative analysis for the evaluation of the indicator *Representativeness − Representativity.* After the assessment of Step 2, it was concluded that all the categories of Members by level of development met the standard for the quantitative analysis.[784] However, the following three geopolitical groupings of Members did not meet the standard:

- MERCOSUR: its representativity was *moderately* lower than the benchmark for written communications;
- ASEAN: its representativity was *moderately lower* than the benchmark for written communications; and
- Other Developed Members: its representativity was *significantly lower* than the benchmark for written communications.

[783] MERCOSUR's degree of balanced represented by means of written interventions (8) also takes into account the degree of balanced representation of Brazil (0). However, considering that Brazil did not obtain any values in written interventions, MERCOSUR's performance remains unchanged.
[784] The methodology to evaluate the standard of the quantitative analysis is described in Chapter 3, Section 4.1.3.2.2 (e).

Categories/Groupings of Members	Interests regarding the TRIPS and Public Health Issue
Members home of major patent-holding pharmaceutical companies (United States, Switzerland, Germany, Great Britain and Japan)	*Representing the interests of major patent-holding pharmaceutical companies- earning substantial rents from the exploitation of pharmaceutical patents - promoting future research and development*[785]
Developing Members (including the African Group, LDC Members, and ASEAN[786])	*Demanding greater access to affordable medicines not under the control of patent holders*[787]
Developed Members not base of major pharmaceutical companies	*Supporting consumer interests over producer interests - substantial interest in access to lower-priced patented medicines - in the opinion that consumers benefit from pharmaceutical research development as well as from lower prices*[788]
BIC Members and some larger Developing Members (e.g. Argentina, Chinese Taipei, Jordan and Oman[789])	*Interest in competing in the development and introduction of new patented medicines or make profitable use of the System as exporters*[790]

The following section presents the methodology for Step 3, i.e. the qualitative analysis.

3.3.2.3. Step 3: Was a balanced set of interests represented in the most decisive moments of the rulemaking processes?

This section conducts the qualitative analysis for the indicator *Representativeness – Representativity*. It assesses whether the Members that participated in the most decisive moments of the rulemaking processes reflected a balanced set of Members' interests. For the TRIPS and public health issue, Members' interests could be classified into four sets:

[785] Abbott, "The WTO Medicines Decision", *supra* note 530 at 324.
[786] For instance, Singapore and the Philippines see: *Members' Law Implementing Paragraph 6 System, supra* note 653.
[787] Abbott, "The WTO Medicines Decision", *supra* note 530 at 323-24.
[788] *Ibid* at 324 and n 52.
[789] *Members' Law Implementing Paragraph 6 System, supra* note 653.
[790] Abbott, "The WTO Medicines Decision", *supra* note 530 at 323-24.

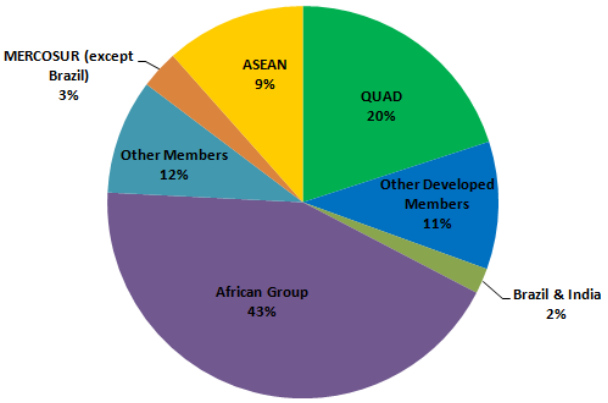
As for the unique case of the EC, it adopted a more central position, representing at the same time the interests of patent holders Members such as Germany and the United Kingdom, but also those of its developed Members, such as Norway and the Netherlands, that are not base of the major pharmaceutical companies and were instead in support of consumer interests and to providing a broader access to pharmaceutical products.[791]

The analysis of the most decisive moments is focused on the crucial meetings which had the most impact for the adoption of the *Declaration on TRIPS and Public Health,* the *TRIPS and Public Health Waiver,* and the *Protocol Amending the TRIPS Agreement.*

3.3.2.3.1. *Most decisive moments leading to the adoption of the Declaration*

During the agenda-setting process leading to the adoption of the *Declaration on TRIPS and Public Health,* two moments were particularly decisive in terms of their influence on the content of the final outcome. The first moment was the request from the African Group to devote a special session of the Council for TRIPS to address the issues relating to TRIPS, patents and access to medicines.[792] The African Group was able to put on the agenda for discussions a topic of utmost interest to it, which finally gave place to the adoption of a negotiating mandate on the issue. The African Group's proposal was supported by 59 Members[793], which amounted to a total of 96 Members including the African Group Members. Due to the impossibility of accurately classifying each of these 96 Members by sets of interests, Table 4.7 shows the overall representativity of these Members by geopolitical groupings. The grouping 'Other Members' included the delegations of Bulgaria, Colombia, Croatia, Cuba, Ecuador, Jamaica, Latvia, Mexico, Peru, Romania, and Sri Lanka.

Table 4.7: Members Supporting the African Group's Proposal by Geopolitical Groupings in TRIPS and Public Health Case

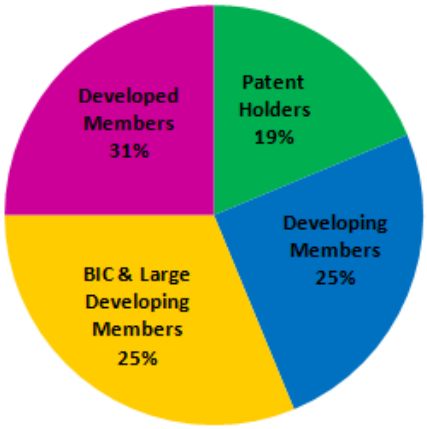


[791] Abbott, "The WTO Medicines Decision", *supra* note 530 at 324 and n 53-54, 333, 337-38.
[792] *Council for TRIPS Meeting of 2-5 April 2001, supra* note 519 at paras 229-31.
[793] For a list of Members supporting the African Group proposal, see: *Council for TRIPS Meeting of 2-5 April 2001, supra* note 519 at para 234.

The participation of these 96 Members represented all four sets of interests regarding the TRIPS and Public Health issue: (1) the interests of the major patent-holding pharmaceutical companies were represented by the United States, the EC (partially), Japan and Switzerland; (2) the interests of Developing Members demanding greater access to affordable medicines were represented by the participation of Members part of the African Group and ASEAN; (3) the interests of Developed Members not base of major pharmaceutical companies were represented by Members part of the Other Developed Members grouping and the EC (partially); and (4) the interests of BIC Members and some larger Developing Members were represented by Argentina, Brazil and India.

The second decisive moment leading to the adoption of the Declaration was the informal negotiations and consultations that took place in the last month preceding the Doha Ministerial Conference and those that were conducted within the informal framework of the Ministerial Conference. During this crucial time, some Members got to be more directly involved in the negotiation of the draft text of the *Declaration on TRIPS and Public Health.* Eight Members were asked to draft compromise language on the two options that were proposed in the Chairman's bracketed text.[794] These eight Members were: Brazil, Canada, the EC, India, Kenya, New Zealand, the United States and Zimbabwe.[795] They represented proportionally all four sets of interests for the TRIPS and public health issue, as

Table 4.8: Groups of Interests Involved in Drafting of *Declaration on TRIPS and Public Health*



[794] The Chairman's bracketed text contained two options, Option 1 mirroring the views of developing Members, and Option 2, those of the United States and other like-minded Members (i.e. Japan, Australia, Switzerland, Canada, and Korea), see: Ellen 't Hoen, "TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha" (2002) 3(1) Chicago J Int'l L 27 at 40 ['t Hoen, "TRIPS, Pharmaceutical, Patents"].See also "Draft Declaration on TRIPS and Health Highlights Divisions", *supra* note 707; Abbott, "The Doha Declaration", *supra* note 551 at 488.

[795] "Doha Turning to Single Undertaking", *supra* note 707. The small group of Members were able to agree on a compromise text, which was subsequently forwarded to a larger group of some 20-25 Members for further discussions, however the data collected does not provide information on who exactly these Members were, see: *ibid*; Odell & Sell, "Reframing the Issue", *supra* note 646 at 105.

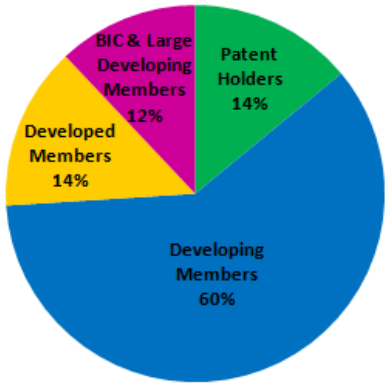
illustrated in Table 4.8. The United States and EC (for Germany and the United Kingdom) represented the interests of the Members home of the major patent-holding pharmaceutical companies. Zimbabwe and Kenya represented the interests of the Developing Members demanding greater access to affordable medicines. New Zealand and EC (for its developed Members others than Germany and the United Kingdom) represented the interests of Developed Members not base of major pharmaceutical companies. Finally, Brazil and India represented the interests of the BIC and some larger Developing Members.

In summary, it can be estimated that all four groups of interests were represented in the two most crucial moments leading to the adoption of the Declaration, i.e. (i) the inclusion of the TRIPS and public health issue on the Council for TRIPS' agenda and (ii) the drafting of the compromise text for the draft Declaration. As a result, it can be concluded that, overall, there was a sufficient degree of balanced representation in the most decisive moments leading to the adoption of the *Declaration on TRIPS and Public Health.*

3.3.2.3.2. *Most decisive moments leading to the adoption of the Waiver Decision*

Two periods were particularly decisive for the determination of the content of the *TRIPS and Public Health Waiver*. The first moment was the consultations that took place in mid-November and December 2002, which led to the tabling of the Motta text by the Chairman. Due to the highly informal and privy nature of some of the consultations that took place during this period of time, the data gathered is limited as to the details of every consultation that took place, the Members that were involved and the result in each case.[796] However, there is information on the attendance and the outcome of a mini-ministerial meeting that took place in Sydney on 14-15 November 2002 where 25 Members

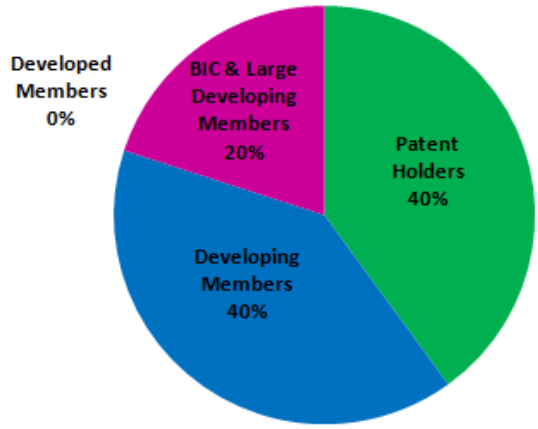
Table 4.9: Groups of Interests Involved in Most Decisive Meetings Leading to Tabling of Motta Text by Chairman



[796] Even some WTO Members themselves did not have this information, see Section 3.1 above.

discussed a Chairman's draft and agreed that it consisted of a "good basis to finalize an agreement."[797] These 25 Members were: (i) Japan, Switzerland and the United States, representing the interests of Members home of major patent-holding pharmaceutical companies; (ii) Colombia, Egypt, Hong Kong (China), Indonesia, Kenya, Korea, Lesotho, Malaysia, Mexico, Nigeria, Senegal, Singapore, South Africa, Thailand and Trinidad and Tobago, representing the interests of Developing Members demanding greater access to affordable medicines; (iii) Australia, Canada and New Zealand, representing the interests of Developed Members not base of major pharmaceutical companies; (iv) Brazil, China, India, representing the interests of the BIC and some larger Developing Members; and (v) the EC, representing both the interests of Members home of major patent-holding pharmaceutical companies and Developed Members not base of major pharmaceutical companies.[798] Hence, as illustrated in Table 4.9, together these 25 Members represented all four sets of interests regarding the TRIPS and Public Health issue.

Table 4.10: Groups of Interests Involved in Most Decisive Meetings Leading to Tabling of Chairman's Statement



The second determinative period of the consensus-building process for the adoption of the Waiver Decision was the negotiation of the Chairman's Statement, which principally took place during the month of August 2003. Evidence shows that the Chairman's Statement was negotiated within a restrictive group of five Members: Brazil and India (both representing the interests of the BIC and some larger Developing Members); Kenya and South Africa (both representing the interests of Developing Members demanding greater access to affordable medicines); and the United States (representing the interests of the Members

[797] Wolfe, "Informal Political Engagement", *supra* note 416, Appendix.
[798] See *ibid.*

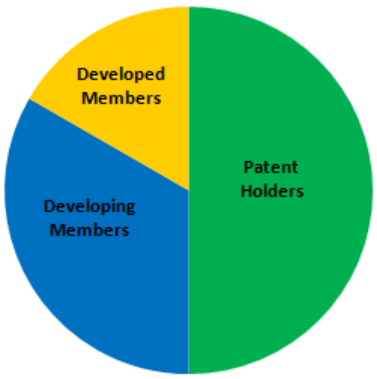
home of major patent-holding pharmaceutical companies).[799] As represented in Table 4.10, all four sets of interests were represented, with the exception of those of the Developed Members not base of major pharmaceutical companies.[800]

In summary, all four sets of interests were represented in the most decisive moments leading to the adoption of the Waiver Decision (i.e. the Sydney mini-ministerial which was crucial in the determination of the content of the Motta text and the negotiations of the Chairman's Statement), with the exception of those of the Developed Members not base of major pharmaceutical companies that were left unrepresented for the negotiation of the Chairman's Statement.

3.3.2.3.3. *Most decisive moments leading to the adoption of the Protocol of Amendment*

The most decisive moments leading to the adoption of the *Protocol Amending the TRIPS Agreement* took place during the months of October through December 2005, where the Chair would have held a series of trilateral consultations between the EC, the United States, and the African Group. It appears that these consultations would have been particularly determinative for the content of the Protocol of Amendment.[801] As illustrated in Table 4.11, these three delegations represented three of the four sets of interests regarding the TRIPS and public health issue: (1) the United States and the EC (partially) represented the interests of Members home of the major patent-holding pharmaceutical companies; (2) the African Group represented the interests of the Developing Members

Table 4.11: Groups of Interests Involved in Chairman's Trilateral Consultations Leading to Adoption of *Protocol Amending the TRIPS Agreement*

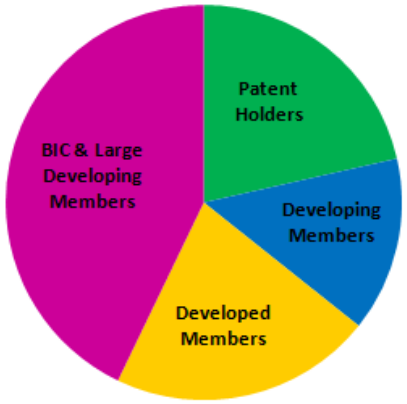


[799] *General Council Meeting of 25, 26 and 30 August 2003*, *supra* note 540 at para 88; "WTO Members Expected To Agree on Trips & Health Pre-Cancun", *BRIDGES* 7:29 (28 August 2003), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/wto-members-expected-to-agree-on-trips-health-pre-cancun>.
[800] Brazil and India represented the interests of the BIC Members and some larger Developing Members. Kenya and South African represented those of the Developing Members demanding greater access to affordable Medicines. Finally, the United States represented the interests of Members home of major patent-holding pharmaceutical companies.
[801] *General Council Meeting of 19 October 2005*, *supra* note 685 at para 29; "TRIPS Council Remains Divided", *supra* note 675.

demanding greater access to affordable medicines; and (3) the EC (partially) represented the interests of Developed Members not base of major pharmaceutical companies. However, the interests of the BIC and some larger Developing Members were left unrepresented.

In the week preceding the adoption of the Protocol of Amendment in early December 2005, additional Members, such as Brazil, India, Hong Kong, and Israel have also been included in the consultations after persistently objecting to the form of trilateral consultations.[802] As represented in Table 4.12, they extended the coverage to the fourth set of interests regarding the TRIPS and Public Health issue: those of the BIC and some larger Developing Members.

Table 4.12: Groups of Interests Involved in Decisive Meeting Leading to Adoption of *Protocol Amending the TRIPS Agreement*



In summary, the most decisive moments leading to the adoption of the Protocol of Amendment were the trilateral consultations and the consultations (opened to more Members) that followed them. All four sets of interests were represented with the exception of those of the BIC and some larger Developing Members during the trilateral consultations.

3.3.2.3.4. Results of the qualitative analysis

The assessment performed in Step 3 evaluated whether all four sets of interests were represented in a total of eight decisive moments covering the rulemaking processes leading to the adoption of the Declaration, the Waiver Decision and the Protocol of Amendment. The following conclusions were drawn:

1. There was a sufficient degree of balanced representation in the most decisive moments leading to the adoption of the *Declaration on TRIPS and Public Health*.
2. There was an insufficient degree of balanced representation during one of the most decisive moments leading to the adoption of the *TRIPS and Public Health Waiver* where

[802] "Members Strike Deal", *supra* note 599.

the interests of the Developed Members not base of major pharmaceutical companies were not represented.

3. There was an insufficient degree of balanced representation during one of the most decisive moments that led to the adoption of the *Protocol Amending the TRIPS Agreement* where the interests of the BIC and some larger Developing Members remained unrepresented.

As a result, it can be concluded that the degree of representativity of Members during the most decisive moments of the rulemaking processes met most of the time the standards of the qualitative analysis but with a few exceptions.

3.3.2.4. Attribution of a score: *Representativeness − Representativity*

Representativeness − Representativity assessed the following standard: *Did a representative group of Members, representing a balanced set of interests, participate in the various meetings and submitted written communications at all stages of the process*? The analysis for this indicator was conducted in three steps. Based on a quantitative analysis, Step 1 evaluated the degree of 'combined direct participation and direct representation' of Members classified by level of development and geopolitical groupings, as being the two greatest forms of participation. It concluded that individual Members from all the various categories and groupings obtained *sufficient* degrees of 'combined direct participation and direct representation' both by means of oral interventions and written communications, with the exceptions of: individual MERCOSUR Members and Other Developed Members (both with respect to oral interventions and written communications; individual Developing Members (with respect to oral interventions only); and individual ASEAN Members (with respect to written communications only).

Also based on a quantitative analysis, Step 2 examined whether those categories of Members which had an insufficient degree of 'combined direct participation and direct representation' had a sufficiently high degree of balanced representation to offset their poor performance. It concluded that the degree of balanced representation of the Developing Members category, the Other Developed Members grouping and the MERCOSUR grouping adequately compensated for their weak degree of 'combined direct participation and direct representation' by means of oral interventions. However, it did not make up for the Other Developed Members' *significantly*

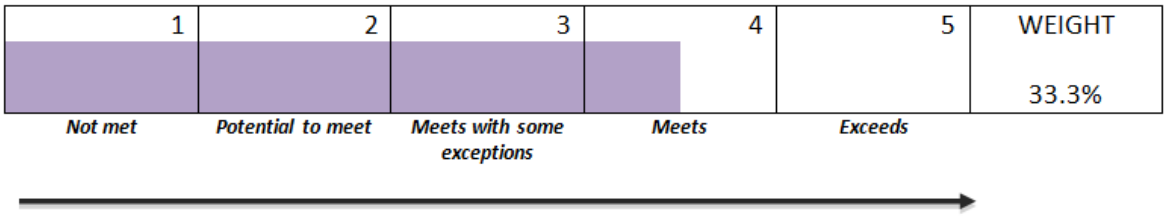
lower, and the MERCOSUR and ASEAN's *moderately lower,* degrees of 'combined direct participation and direct representation' by means of written communications.

Finally, Step 3 was based on a qualitative analysis and focused on the degree of representativity of a balanced set of interests (balanced representation) in the most decisive moments of the rulemaking processes. In total, for the eight most decisive moments that were examined, all four sets of interests regarding the TRIPS and public health issue were represented, with the exception of the interests of the Developed Members not base of major pharmaceutical companies for the negotiation of the Chairman's Statement specifically and the interests of the BIC and some larger Developing Members during the trilateral consultations that played an important role for the adoption of the Protocol of Amendment.

Overall, it can be considered that the performance of the TRIPS and Public Health Case in the quantitative and qualitative analyses did in general meet the standards of the indicator *Representativeness − Representativity*, but with a few exceptions: for the case of Members part of the MERCOSUR, the Other Developed Members and the ASEAN groupings, at one occasion each. In addition, two of the four sets of interests regarding the TRIPS and public health issue were unrepresented at one separate occasion each during the most decisive moments of the rulemaking processes: (i) the interests of Developed Members not base of major pharmaceutical companies; and (ii) those of the BIC and some larger Developing Members. These exceptions are relatively minor if considered among all the instances where the degree of representativity of Members actually met the standards of the quantitative and qualitative analyses. As a result, the second indicator of representativeness, *Representativeness − Representativity,* should be attributed a score of 3.5/5 (i.e. *performance met the indicator's standards, with a few exceptions*).[803]

[803] For the results of the quantitative analysis, the degree of representativity of Members was *sufficient* in 21 out of 24 occasions, which represents a score of 87.5 percent. As for the qualitative analysis, the degree of representativity of Members was *sufficient* in 22 out of 24 occasions, amounting to a score of 92.5 percent.
Together, the quantitative and qualitative analyses scored an average of 90 percent in terms of the number of occasions where the degree of representativity of Members and their interests was *sufficient*. Following the rating standard used in this thesis, the performance is attributed a score of 4/5 when it meets the indicator's standard. Thus, if 4/5 represents a degree of representativity met at 100 percent of the time, the score of 90 percent for the quantitative and qualitative analyses equals a rounded performance of 3.5/5 (i.e. 90/100 = 3.6/4).

Representativeness' Indicator #2: Representativity



3.3.3. Representativeness − Outcome

> *Representativeness' Indicator #3: Did the negotiating mandate and the final outcome represent a balanced set of interests that were expressed? Were Members free to accept or reject the results of a decision?*

Representativeness − Outcome analyses whether the negotiating mandate and the final outcomes contained in the *Declaration on TRIPS and Public Health* (section 3.3.3.1), the *TRIPS and Public Health Waiver* (section 3.3.3.2) and the *Protocol Amending the TRIPS Agreement* (section 3.3.3.3) represent a balanced set of interests that were expressed. It also assesses whether Members were free to accept or reject the results of these decisions (section 3.3.3.4).

3.3.3.1. Did the Declaration represent a balanced set of interests that were expressed?

During the agenda-setting process that led to the adoption of the *Declaration on TRIPS and Public Health*, three groups of Members played an important role and decided to voice their interests jointly:

(i) a very large group of developing countries representing together a total of 61 Members (comprising the African Group, Brazil, India and 17 others Latin American and Asian Members);

(ii) a group composed of major pharmaceuticals-producing Members (i.e. the United States, Switzerland, Japan, Australia and Canada); and

(iii) the European Communities, on the behalf of its then 15 Members, playing a mediator between the two other groups.[804]

[804] See e.g. Odell & Sell, "Reframing the Issue", *supra* note 646 at 98-104; Abbott, "The Doha Declaration", *supra* note 551 at 481-86; Vandoren, "Médicaments sans Frontières", *supra* note 566 ("Throughout the negotiations the EU worked with a view to reconciling the almost irreconcilable positions of the outer ends of the spectrum." at 12).

This section examines if both the mandate (in paragraph 6) and the commitments contained in the Declaration represent a balanced set of interests that were expressed by the three groups of Members. It proceeds with a paragraph-by-paragraph analysis of the text of the Declaration, presented into three clusters: the scope of the Declaration (section 3.3.3.1.1); interpretative provisions (section 3.3.3.1.2); and mandates for future negotiations (section 3.3.3.1.3).

3.3.3.1.1. *Scope of the Declaration*

A separate Declaration on the issue of TRIPS and public health was created, as requested by the group of developing countries upon the belief that it would attract more attention to the subject.[805] It was actually the deliberate intention of the group of developing countries to create a political declaration, which would not be legally binding.[806]

As for the scope of the Declaration, the United States like-minded group wanted to restrict it to health crises, such as that of HIV/AIDS and other pandemics[807] whereas the group of developing countries wished to extend it to public health in general. Although specific pandemics are mentioned in examples in paragraph 1 of the Declaration[808], both the title and paragraph 1 extend the scope of the Declaration to public health in general[809], as was specifically proposed by the group of developing countries.[810]

See also *Proposed Declaration by the Group of Developing Countries*, *supra* note 660; WTO, Council for TRIPS, *Preambular Language for Ministerial Declaration* (contribution from Australia, Canada, Japan, Switzerland and the United States dated 19 September 2001), WTO Doc IP/C/W/313, online: WTO <http://docs.wto.org> [*Proposed Declaration by the United States Like-minded Group*]; WTO, Council for TRIPS, *Communication from the European Communities and their Member States* (dated 11 June 2001), WTO Doc IP/C/W/280, online: WTO <http://docs.wto.org> [*EC's Views on TRIPS and Access to Medicines*].

[805] Odell & Sell, "Reframing the Issue", *supra* note 646 at 101.

[806] However, they were expecting that it would have a certain weight in the interpretation of the *TRIPS Agreement* by the panels and the Appellate Body when deciding over a dispute related to public health and access to medicines. The interpretative effect of the Declaration will only be confirmed upon a ruling on this matter by a panel or the Appellate Body. For an analysis of the legal effect of the Declaration, see Section 3.1.1.1 above. See also Odell & Sell, "Reframing the Issue", *supra* note 646 at 101.

[807] *Proposed Declaration by the United States Like-minded Group*, *supra* note 804; Abbott, "The Doha Declaration", *supra* note 551 at 485-86; 't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 at 42.

[808] *Declaration on TRIPS and Public Health, supra* note 512 ("*especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics*" at para 1).

[809] *Ibid* (*"We recognize the gravity of the public health problems afflicting developing countries" at para 1).*

[810] *Proposed Declaration by the Group of Developing Countries*, *supra* note 660; Abbott, "The Doha Declaration", *supra* note 551 at 485-86; 't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 at 42; Odell & Sell, "Reframing the Issue", *supra* note 646 at 102.

Paragraph 2 of the Declaration, which stated that the *TRIPS Agreement* needs to be "part of the wider national and international action to address these problems"[811], reflected partially the United States like-minded group position. The United States like-minded group had contended that the solution to access to medicines lies in efficient infrastructure for the distribution, delivery and monitoring of drug usage and education, increased research and development particularly targeted at the major communicable diseases of relevance for developing countries, mechanisms to finance drug purchases and affordable pharmaceuticals, and the implementation of effective and sustainable healthcare systems.[812] Thus, paragraph 2 of the Declaration implies that relaxing patent protections, on its own, will not completely eliminate the health problems in the developing countries.[813]

Paragraph 3 recognizes that "intellectual property protection is important for the development of new medicines", but also notes the "concerns about its effects on price."[814] These two propositions were explicitly acknowledged by all three groups of Members.[815]

3.3.3.1.2. *Interpretative provisions*

Paragraphs 4 and 5 of the Declaration include a series of interpretative provisions of the *TRIPS Agreement.* Paragraph 4 contains the most contentious proposition of the Declaration.[816] Its first sentence states that Ministers "agree that the TRIPS Agreement does and should not prevent

[811] *Declaration on TRIPS and Public Health, supra* note 512 at para 2.
[812] *Proposed Declaration by the United States Like-minded Group, supra* note 804 at 1, para 4; Odell & Sell, "Reframing the Issue", *supra* note 646 at 100; Abbott, "The Doha Declaration", *supra* note 551 at 481-82.
[813] Bryan Mercurio, "TRIPS, Patents, and Access to Life-Saving Drugs in the Developing World" (2004) 8 Marq Intell Prop L Rev 211 at 225 [Mercurio, "TRIPS, Patents"]; Abbott, "The Doha Declaration", *supra* note 551 at 491.
[814] *Declaration on TRIPS and Public Health, supra* note 512 at para 3. See also García-Castrillón, "An Approach", *supra* note 560 at 213.
[815] *Proposed Declaration by the United States Like-minded Group, supra* note 804 at para 4; Odell & Sell, "Reframing the Issue", *supra* note 646 at 100; Abbott, "The Doha Declaration", *supra* note 551 at 481-82; *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 1; García-Castrillón, "An Approach", *supra* note 560 at 213; *EC's Views on TRIPS and Access to Medicines, supra* note 804 at 7.
[816] The most contentious provisions of both the group of developing countries' and the United States like-minded group's proposals were included in two different options in a bracketed draft of 27 October 2001 tabled by the Chair of the General Council. Option 1 reflected the views of developing countries and stated that "[n]othing in the TRIPS Agreement shall prevent Members from taking measure to protect public health", while Option 2 favoured those of the large pharmaceutical-producing Members and affirmed "a Member's ability to use, to the full, the provisions in the TRIPS Agreement which provide flexibility to address public health crises such as HIV/AIDS and other pandemics, and that to that end, a Member is able to take measures necessary "to secure affordable access to medicines.", see: Draft Declaration of 27 October 2001, reproduced in: Abbott, "The Doha Declaration", *supra* note 551 at 488.

Members from taking measures to protect public health."[817] The incorporation of this statement in the Declaration, which was initially treated as "radical" by the United States like-minded group[818], was one of the most significant gains for the group of developing countries that had made their number one priority to obtain an agreement on this effect.[819] This proposition appears intended to establish recognition that sovereign governments, in the words of Professor Abbott, "have the right to establish and maintain public health systems without restriction by an agreement regulating international trade and intellectual property rights."[820]

The second sentence of paragraph 4 of the Declaration states "while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[821] This proposition represents a delicate balance between the positions of the United States liked-minded group and the EC, which contended that Members must uphold their original TRIPS commitments[822], and that of the group of developing countries, which stressed that Members can use, to the greatest extent possible, the flexibilities available in the provisions of the *TRIPS Agreement*.[823] Moreover, despite the original objection of some Members (such as Switzerland[824]), paragraph 4 recognize

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[817] *Declaration on TRIPS and Public Health, supra* note 512 at para 4.
[818] Abbott, "The Doha Declaration", *supra* note 551 at 484.
[819] *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 3, para 1 (the proposed text by the group of developing countries stated "[n]othing in the TRIPS Agreement shall prevent Members from taking measures to protect public health" at 3 para 1); Odell & Sell, "Reframing the Issue", *supra* note 646 at 101; Abbott, "The Doha Declaration", *supra* note 551 at 484; Interview of a Brazilian negotiator, reproduced in Jawara & Kwa, *Behind the Scenes, supra* note 97 (A Brazilian negotiator reported that a compromise between these two options was reached by the United States and Brazil at the Doha Ministerial Conference in 9-13 November 2001. He stated: "At the end of the day, a deal was brokered between the USA and Brazil . . . The USA fought it, but they realized there would be no round if they refused to budge, so they gave in . . . The EC tried to act as a mediator between us and the US, and claimed they were on our side. We, however, realized they were creating more obstacles than helping us, so we bypassed them and went face-to-face with the USA . . . The breakthrough was the first one at Doha and it sent a very good sign to developing country delegates." at 99-101). See also't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 at 40.
[820] Abbott, "The Doha Declaration", *supra* note 551 at 484; 't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 ("This text acknowledges the unmitigated right of countries to take measures to protect public health. Thus, if intellectual property rules should stand in the way of doing so (for example, in the case of high prices associated with patented medicines), countries are allowed to override the patent." at 40).
[821] *Declaration on TRIPS and Public Health, supra* note 512 at para 4.
[822] *Proposed Declaration by the United States Like-Minded Group, supra* note 804 at 1; *EC's Views on TRIPS and Access to Medicines, supra* note 804 at para 10.
[823] Vandoren, "Médicaments Sans Frontières", *supra* note 566 at 8.
[824] 't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 at 40.

the right of Members "to ensure access to medicines *for all*"[825], no matter their level of development.

Paragraph 5 of the Declaration recognizes other flexibilities contained in the *TRIPS Agreement* that favoured the interests of the group of developing countries. One of them is the recognition that "[e]ach Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted"[826], which was also explicitly supported by the EC.[827] Although this proposition is clear from the text of Article 31 of the *TRIPS Agreement,* the Pharmaceutical Research and Manufacturers of America (PhRMA), an association representing leading research-based pharmaceutical companies in the US, and others had attempted to put them in doubt. Thus, having a direct and unequivocal statement on this right created more legal certainty for Members wishing to make use of compulsory licences and for generic suppliers and purchasers.[828]

Additionally, paragraph 5(c) of the Declaration recognizes that each Member "has the right to determine what constitutes a national emergency or other circumstances of extreme emergency" and that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, "can represent a national emergency or other circumstances of extreme urgency."[829] This recognition, which was explicitly supported by the EC[830], was a significant gain for the group of developing countries because Article 31(b) of the *TRIPS Agreement* provides for fast-track procedures for the grant of compulsory licences in situations of national emergency or other circumstances of extreme urgency. Thus, the occurrences *per se* of an epidemic or a public health crisis were recognized as sufficient basis to make use of the fast track procedures for the grant of compulsory licences for pharmaceutical products.[831]

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[825] *Declaration on TRIPS and Public Health, supra* note 512 at para 4 [emphasis added]
[826] *Ibid* at para 5(b).
[827] *EC's Views on TRIPS and Access to Medicines, supra* note 804 at para 11.
[828] This statement reflected a demand made by the group of developing Members and the views of the EC on the issue of TRIPS and access to medicines, see: *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 3, para 3; *EC's Views on TRIPS and Access to Medicines* , *supra* note 804 at para 9. See also Vandoren, "Médicaments Sans Frontières", *supra* note 566 at 10; Abbott, "The Doha Declaration", *supra* note 551 at 493-94.
[829] *Declaration on TRIPS and Public Health, supra* note 512 at para 5(c).
[830] *EC's Views on TRIPS and Access to Medicines, supra* note 804 at paras 12 and 16.
[831] This recognition reflected a demand made by the group of developing countries, see: *Proposed Declaration by the Group of Developing Countries, supra* note 660 at para 4. See also 't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 at 40; Vandoren, "Médicaments Sans Frontières", *supra* note 566 at 9.

Finally, paragraph 5(d) of the Declaration recognizes that each Member is free to establish its own regime for exhaustion without there being a challenge in the dispute settlement system.[832] This statement represents "an unequivocal recognition of the right of each Member to permit parallel importation of medicines" (i.e. international exhaustion)[833], which favoured the position of the group of developing countries[834] in spite of the demands of the United States liked-minded group that Members be "encouraged" to take measures to prevent trade diversion to other markets of the pharmaceuticals originally provided to the poorest population.[835]

3.3.3.1.3. *Mandates for future negotiations*

The Declaration also contains mandates for future negotiations. Paragraph 6 of the Declaration recognizes that Members with insufficient or no manufacturing capacities could face difficulties in making effective use of compulsory licensing under the *TRIPS Agreement.*[836] This proposition was generally universally recognized among the different group of interests.[837] In response to this problem, the group of developing countries had requested that Article 30 of the *TRIPS Agreement* be recognized as allowing Members to authorize the production and export of medicines by persons other than holders of patents on those medicines to address public health needs in importing Members.[838] Furthermore, they demanded the recognition that a compulsory licence could be issued for the supply of the market of another Member in contraction with the provision of Article 31(f) of the *TRIPS Agreement.*[839] However, Ministers were not able to agree on this important issue for the group of developing countries. Instead, the group of developing countries gained a commitment (i.e. the mandate) that the Council for TRIPS would find an expeditious solution to this problem.[840]

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[832] *Declaration on TRIPS and Public Health, supra* note 512 ("subject to the MFN and national treatment provisions" at para 5(d)); Vandoren, "Médicaments Sans Frontières", *supra* note 566 at 9-10.
[833] Abbott, "The Doha Declaration", *supra* note 551 at 494; García-Castrillón, "An Approach", *supra* note 560 at 215.
[834] *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 3, paras 2 and 11.
[835] *Proposed Declaration by the United States Like-Minded Group, supra* note 804 at 2.
[836] *Declaration on TRIPS and Public Health, supra* note 512 at para 6.
[837] See e.g. *EC's Views on TRIPS and Access to Medicines, supra* note 804 at para 13.
[838] *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 3, para 9; García-Castrillón, "An Approach", *supra* note 560 at 217-18.
[839] *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 3, para 5; García-Castrillón, "An Approach", *supra* note 560 at 217-18.
[840] *Declaration on TRIPS and Public Health, supra* note 512 at para 6; Abbott, "The Doha Declaration", *supra* note 551 at 501; Mercurio, "TRIPS, Patents", *supra* note 813 at 227-28.

Finally, paragraph 7 of the Declaration provides a commitment to grant an extension of ten years to LDC Members of their obligation to provide pharmaceutical patent protection.[841] The group of developing countries had demanded that such an extension be granted for both developing and LDC Members (but for a period of five years).[842] However, it was granted exclusively to LDC Members. The United States like-minded group were in favour of granting such an extension to LDC Members with the hope that it would divide the group of the developing country Members.[843] However, they were not willing to extend the obligations to developing countries, considering that larger developing Members, such as India and China, had an interest in competing with the major pharmaceutical companies in the development and introduction of new patented medicines.[844] This extension allowed LDC Members until 2016 to import and produce generic medicines without providing patent protection.[845]

3.3.3.1.4. *Was a balanced set of interests represented in paragraph 6's mandate and the text of the Declaration?*

Overall, the group of developing countries obtained a great portion of what they originally sought[846]: an 'agreement' (i.e. Ministers 'agree') that the *TRIPS Agreement* does not and should not prevent Members from taking measures to protect public health; a recognition of Members' right to protect public health and promote access to medicines for all; a ten-year extension for LDC Members of their obligation to provide pharmaceutical patent protection; and broader interpretations of the *TRIPS Agreement* (although not authoritative and subject to the provisions of the VCLT) with respect to a number of issues, including compulsory licensing and parallel importation of patented products.

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[841] *Declaration on TRIPS and Public Health, supra* note 512 at para 7.
[842] *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 4, para 13.
[843] 't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 at 41-42.
[844] Abbott, "The WTO Medicines Decision", *supra* note 530 at 323-24.
[845] *Declaration on TRIPS and Public Health, supra* note 512 at para 7. The commitment contained in the Declaration did not create any legal obligations, for further information, see: Section 3.1.1.1. In addition, it is not clear whether LDC Members may be required to implement mailbox and exclusive rights provisions prior to the end of the transition deadline, see: 't Hoen, "TRIPS, Pharmaceutical, Patents", *supra* note 794 at 41-42; Abbott, "The Doha Declaration", *supra* note 551 at 502-04; García-Castrillón, "An Approach", *supra* note 560 (arguing that "the mailbox protection and exclusive commercialization rights . . . will be applicable during the new transition periods." at 216.).
[846] See generally *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 3-4, paras 1-14. See also Mercurio, "TRIPS, Patents", *supra* note 813 at 227-28; Abbott, "The WTO Medicines Decision", *supra* note 530 at 326.

As for the United States like-minded group, they granted more concessions than they initially sought. They did not want to extend the scope of the Declaration to public health in general, and sought to limit it to specific pandemics. They also wished to change the focus of access to medicines from patents protection to the strengthening of infrastructures[847] and to obtain a commitment from Members that they would take measures to prevent trade diversion of pharmaceutical products.[848] As for the EC, they were willing to explicitly recognize more flexibilities of the *TRIPS Agreement*; however they also sought to ensure strong commitments to the existing provisions of the *TRIPS Agreement.*[849]

As for the mandate for future negotiations concerning the problem of the use of compulsory licences by Members with insufficient manufacturing capacities (paragraph 6), it explicitly reflected a demand from the developing countries[850], which the EC and some Members part of the United States like-minded group were also willing to discuss.[851]

Thus, to the question as to whether there was a balanced set of interests represented in the mandate and the text of the Declaration, it can be evaluated that the balance titled more in favour of the group of developing countries and of the EC, to some extent.

3.3.3.2. Did the text of the Waiver Decision represent a balanced set of interests?

The coalitions slightly changed during the processes leading up to the adoption of the *TRIPS and Public Health Waiver.* Five players were primarily actively involved during the negotiations: (i) the African Group; (ii) the European Communities on the behalf of its Member States; (iii) a Group of 14 developing countries[852]; (iv) the United Arab Emirates; and (v) the United States. Some other Members also presented their views individually in some occasions, such as

[847] See e.g. *Proposed Declaration by the United States Like-minded Group supra* note 804 at 1.
[848] See e.g. *Ibid* at 2.
[849] See e.g. *EC's Views on TRIPS and Access to Medicines, supra* note 804 at paras 15 and 17.
[850] *Proposed Declaration by the Group of Developing Countries, supra* note 660 at 3, paras 5 and 10.
[851] *EC's Views on TRIPS and Access to Medicines, supra* note 804 at paras 8-12; See Statements by the United States and Japan in *Special Discussion on IP and Medicines, supra* note 528 at 38-39 and 50.
[852] Comprising the delegations of Bolivia, Brazil, Cuba, China, Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru, the Philippines, Sri Lanka, Thailand, and Venezuela, see: *Thematic Compilation of Proposals on Paragraph 6, supra* note 662.

Argentina, Brazil, Canada, Colombia, Czech Republic, Hungary, Japan, Malaysia, New Zealand, Norway, and Switzerland.[853]

This section examines whether the *TRIPS and Public Health Waiver* represents a balanced set of interests that were expressed by these five groups and by some other Members that voiced their views. The analysis is framed according to four clusters, which mattered the most during the negotiations: the legal mechanism used and the *TRIPS Agreement* article addressed to implement the solution (section 3.3.3.2.1); product coverage (section 3.3.3.2.2); the eligible Members (section 3.3.3.2.3); and the conditions (section 3.3.3.2.4).[854]

3.3.3.2.1. *Legal mechanism used and TRIPS Agreement article addressed*

During the negotiations leading to the adoption of the *TRIPS and Public Health Waiver*, the legal mechanism that would be used and the *TRIPS Agreement* article that would be addressed to implement the solution mandated by paragraph 6 of the Declaration (i.e. regarding the difficulties that Members with inadequate manufacturing capacities could face in making use of compulsory licensing under the *TRIPS Agreement*) was a contentious issue.[855] There were two main views considered: (i) the first was an interpretation of Article 30 of the *TRIPS Agreement,* supported by the Group of developing countries and the United Arab Emirates, whereas (ii) the second, was a waiver of Article 31(f) of the *TRIPS Agreement,* advocated by the United States, the EC, Canada, New Zealand and the African Group. [856]

Article 31 of the *TRIPS Agreement* is the basis for the use of compulsory licences under the *TRIPS Agreement* and provides for a list of procedures and conditions to be respected by a Member wishing to grant a compulsory licence.[857] It was advanced that the "domestic market" requirement provided for in paragraph (f) could be waived so as to allow the export of medicines

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[853] See e.g. *ibid.*
[854] For a compilation of all the proposals that were submitted, as well as the views presented, see: *Thematic Compilation of Proposals on Paragraph 6, supra* note 662.
[855] Abbott, "The WTO Medicines Decision", *supra* note 530 at 338.
[856] *Ibid*. The United States also proposed using a dispute settlement moratorium, which was not well received by some other Members desiring to create a *permanent* solution, see: *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 16-17. See also Paul Vandoren & Jean Charles Van Eeckhaute, "The WTO Decision on Paragraph 6 of the Doha Declaration on the Trips Agreement and Public Health: Making it Work" (2003) 6(6) Journal of World Intellectual Property 779 at 783 [Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6"].
[857] *TRIPS Agreement, supra* note 233, Article 31 paras (a) to (l).

produced under a compulsory licence in the territory of another Member.[858] As for the Article 30 approach, the Group of developing countries argued that Article 30[859] could be interpreted "so as to recogniz[e] the right of WTO to authorize third parties to make, sell and export patented public health related products without the consent of the patent holder to address public health needs in another country."[860] They believed that this approach would have the major advantage of avoiding burdensome procedures related to the grant of compulsory licences in the exporting Member. Moreover, it would avoid dependence by the country in need (i.e. the importing Member) on the grant of a compulsory licence in the exporting Member.[861]

From the standpoint of Members home of the major pharmaceutical patent holders (i.e. the United States, the EC, Japan, Switzerland, and others), an Article 31 approach had the advantage of providing better procedural safeguards and a greater degree of control over third-party activity. Indeed, they worried that the absence of any procedural requirements in the exporting country "would leave no means to distinguish between actions taken to meet the legitimate needs of importing countries and actions undertaken to profit at the expense of patent holder research."[862] Moreover, there was a concern that the absence of a patent in the importing Members could prevent payment of royalties.[863] As for the African Group, some scholars have argued that it may have advocated for an Article 31 approach for strategic reasons on the ground that the United States would "not, under any foreseeable circumstances, accept an Article 30 solution."[864]

Overall, the legal mechanism that was agreed upon in the Waiver Decision favoured the position of United States, the EC, Canada, New Zealand and the African Group. It consists in: (i) a waiver of Article 31(f), which is subject to certain obligations provided for by the Waiver Decision[865]; and (ii) a waiver of the condition of providing adequate remuneration to the patent

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[858] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 16-17.
[859] *TRIPS Agreement, supra* note 233, Article 30 (stating: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.").
[860] See *Communication from Brazil et al dated 21 June 2002, supra* 648 at para 8.
[861] *Ibid* at para 10. See also Abbott, "The WTO Medicines Decision", *supra* note 530 at 339.
[862] Abbott, "The WTO Medicines Decision", *supra* note 307 at 339.
[863] *Ibid.*
[864] Abbott, "The WTO Medicines Decision", *supra* note 530 at 440.
[865] *TRIPS and Public Health Waiver, supra* note 94 at paras 2 and 6(i).

holder under Article 31(h) for the importing Member when remuneration is paid by the exporting Member.[866]

3.3.3.2.2. *Product coverage under the Waiver Decision*

Product coverage was the most contentious issue. It was negotiated in terms of the scope of diseases that would be covered by the solution.[867] The United States and some other Members home of the major patent-holding pharmaceutical companies contended that the scope of diseases should be limited to the ones explicitly stated in the Declaration (i.e. "those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics").[868] They were concerned that revenues would be eroded as a result of a large number of patents being subject to compulsory licensing. Thus, they hoped to limit the solution to an enumerated list of diseases in order to restrict the number of patented technologies that would be subject to compulsory licensing for export.[869]

As for the African Group, the Group of developing countries, the United Arab Emirates, as well as Argentina, Colombia and Norway, they were of the view that the scope of diseases should not be limited by the ones enumerated in the Declaration.[870] Although their immediate and pressing concern was to address the HIV/AIDS pandemic, malaria, and tuberculosis, they contended that the solution "should broadly cover their present and future public health needs."[871] It was also recognized that the potential problem of access to affordable medicines "extended beyond a short list of enumerated diseases."[872] In their view, narrowing the scope of diseases to a short list amounted to "effectively redefine and limit the scope of public health problems reflected in the

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[866] *Ibid* at para 3.
[867] Abbott, "The WTO Medicines Decision", *supra* note 530 at 327.
[868] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 4; Abbott, "The WTO Medicines Decision", *supra* note 530 at 327-29.
[869] Abbott, "The WTO Medicines Decision", *supra* note 530 at para 329.
[870] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 4; Mercurio, "TRIPS, Patents", *supra* note 813 at 235.
[871] Abbott, "The WTO Medicines Decision", *supra* note 530 at 328.
[872] *Ibid.*

Doha Declaration."[873] Developing countries formulated and maintained a common and strong position on this issue.

In the end, the United States was not able to obtain the support of the EC to limit the scope of the diseases that would be covered and remained the only Member objecting on this issue.[874] As a result, it was finally agreed that "pharmaceutical product" would be defined in the Waiver Decision as referring to "any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the *public health problems as recognized in paragraph 1 of the Declaration*."[875] According to a number of commentators, it appears to be clear that this definition "does not limit the disease conditions that may be addressed under the Decision."[876]

3.3.3.2.3. *Eligible Members under the Waiver Decision*

The third disputed issue was the Members which would be eligible to act as importing Members under the System. The Group of developing countries, the African Group, and other developing countries in general formed a common position that the solution should not be limited to a particular category or class among them on the grounds that no Member is immune from public health problems, insulated from the need for affordable medicines or self-sufficient for

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[873] WTO, Council for TRIPS, *Paragraph 6 of the Ministerial Declaration on the TRIPS Agreement and Public Health* (communication from the African, Caribbean and Pacific Group of States (ACP) dated 23 May 2003), WTO Doc IP/C/W/401 at 2, online: WTO <http://docs.wto.org>; Mercurio, "TRIPS, Patents", *supra* note 813 at 235-36.

[874] Abbott, "The WTO Medicines Decision", *supra* note 530 (The United States legal arguments "were not adequately grounded in the Doha Declaration." In addition, its position "was hard to justify from a policy standpoint." The United Statements argument "that broad scope-of-disease coverage would undermine future research and development was ultimately not persuasive to the broad spectrum of WTO Members." at 332). The United States blocked the adoption of the a waiver decision (on the basis of the Motta text) for the precise reason that it could not agree on the scope of the diseases, see: *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002*, *supra* note 539 at para 34; Abbott, "The WTO Medicines Decision", *supra* note 530 at 329, n 88.

[875] *TRIPS and Public Health Waiver, supra* note 94 at para 1 [emphasis added].

[876] Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6", *supra* note 856 at 785; Abbott, "The WTO Medicines Decision", *supra* note 530 at 332; Carlos M Correa, *Implementation of the WTO General Council Decision on Paragraph 6 of the Doha Declaration on the Trips Agreement and Public Health*, Health Economics and Drugs Series No 016 (Geneva: WHO, April 2004) at 11, online: WHO <http://apps.who.int/medicinedocs/en/d/Js6159e/> [Correa, *Implementation of the General Council Decision*]. It can be noted that the implementation legislation of Canada, Norway, Netherland, as well as the EU regulation to implement the Waiver Decision, all do not limit the pharmaceutical products that may be supplied or a list of diseases that may be addressed, see generally: Abbott, *ibid* at 332-34.

producing the full range of medicines used in its health system.[877] They contended that the determination of eligibility should be based on the language of paragraph 6 of the Declaration (i.e. that a Member has insufficient or no manufacturing capacities in the pharmaceutical sector) and that this determination should be made on a case-by-case basis for each pharmaceutical needed. In addition, they proposed that each Member should be responsible for determining its own capacity.[878]

As for the United States, the EC, Switzerland and the United Arab Emirates, they had interests in limiting the prospective importing Members in order to generally restrict the potential use of the System. They were considering a reasonable method for defining the limitation.[879] The United States advanced that the beneficiary should be limited to those developing and LDC Members that are afflicted by the public health problems as defined in the Declaration. The EC and the United Arab Emirates contended that the beneficiary should be developing and LDC Members with no or insufficient manufacturing capacity to make use of compulsory licensing, whereas Switzerland argued that the high-income countries under the World Bank classification should not be able to make use of the solution.[880]

The final language used in the Waiver Decision automatically qualifies LDC Members as "eligible importing Members" and recognizes that they are automatically determined to lack sufficient manufacturing capacity for pharmaceutical products.[881] As for the remaining of the Members, their eligibility varies according to their level of development. First, along with the request of Switzerland, some 35 (mainly developed) Members either have wholly opted out of using the solution as importing countries[882], or have stated that they will only use it in situation

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[877] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 5; Abbott, "The WTO Medicines Decision", *supra* note 530 at 334.

[878] The common position of developing Members was reflected in WTO, Council for TRIPS, *Substantive and Procedural Elements of a Report to the General Council under Paragraph 6 of the Declaration on the TRIPS Agreement and Public Health* (non-Paper by South Africa), WTO Doc JOB(02)/156 (5 November 2002) at paras 6-8, online: WTO <http://docs.wto.org> (unavailable to the public), cited in *Inside U.S. Trade* (25 October 2002) [*Non-Paperby South Africa*].

[879] Abbott, "The WTO Medicines Decision", *supra* note 530 at 335.

[880] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 5.

[881] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b) and Annex.

[882] These Members are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States, see *TRIPS and Public Health Waiver, supra* note 94 at para 1(b), n 3.

of national emergency or circumstances of extreme urgency.[883] Second, the Waiver Decision qualifies any other Member for using the System on the condition that it has made a notification to the Council for TRIPS and has established that it has insufficient or no manufacturing capacities.[884] As demanded by developing countries, the Waiver Decision provides that each Member is responsible to assess its own manufacturing capacity and that such capacity should be determined for the product(s) in question.[885] However, for transparency purposes and to avoid controversy, the Chairman's Statement indicates that eligible importing Members must include information, under paragraph 2(a)(ii) of the Waiver Decision, on how it has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector.[886] The focus is on the methodology that it used and not on the facts supporting its assessment.[887]

Overall, as for the Members eligible to make use of the solution, developing countries successfully obtained no *a priori* exclusions, with the exception of those Members who have voluntarily elected to opt out as prospective importers under the System.[888] Moreover they got the benefit of establishing their own capacity on a product-by-product basis. As for the United States, the EC and Switzerland, they were able to obtain a great number of op-outs and limitations in order to prevent developed Members from using the System as importers. It appears that the EC would have been "principally concerned to protect prices in developed countries' markets from erosion by low-priced imports."[889] Thus, it was felt that the limitations regarding the eligible Members would "adequately prevent drugs produced under the system from entering Europe or other developed countries' markets."[890]

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[883] These Members are: Hong, Kong China, Israel, Korea, Kuwait, Macao China, Mexico, Qatar, Singapore, Chinese Taipei, Turkey, and the United Arab Emirates indicated that they would use the System as importers in situations of national emergency or other circumstances of extreme urgency, see: *TRIPS and Public Health Waiver, supra* note 94 at para 1(b); *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 29.
[884] *TRIPS and Public Health Waiver, supra* note 94 at para 1(b).
[885] *Ibid,* Annex.
[886] *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 29.
[887] Abbott, "The WTO Medicines Decision", *supra* note 530 at 336; Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6", *supra* note 856 at 785; Correa, *Implementation of the General Council Decision, supra* note 876 at 17-18.
[888] Abbott, "The WTO Medicines Decision", *supra* note 530 at 337.
[889] *Ibid.*
[890] *Ibid.*

3.3.3.2.4. *Conditions of the Waiver Decision*

The Waiver Decision provides some additional conditions, which reflect demands that have been made by different group of interests: (a) safeguards against trade diversion; (b) transparency provisions; and (c) exclusion of non-violation nullification or impairment actions.

(a) safeguards against trade diversion

The EC and the United States wished that all Members take all necessary regulatory and administrative measures to prevent the sale of the pharmaceutical products, produced at low price under the System for the Member in needs, to a second buyer in another Member.[891] The demand for such provisions against trade diversion also addressed concerns of potential importers under the System as they would ensure that the products manufactured would effectively reach those in need. [892] While Brazil contended that the burden of safeguards against trade diversion should be put on the patent owners under existing provisions of the *TRIPS Agreement,* the African Group offered a more balanced view and proposed that such safeguards should not be burdensome and they should be proportionate with the capacity of the importing Members.[893]

The safeguards provisions in the Waiver Decision balanced the concerns of both the EC and the United States, on one hand, and those of the African Group, on the other.[894] For the importing Members, paragraph 4 is worded carefully in order to ensure that they would not bear an unreasonable burden.[895] It stipulates that importing Members should take "reasonable measures within their means" and also "proportionate to their administrative capacities and to the risk of trade diversion" to prevent re-exportation of the products that have already been imported into their territories.[896] It further provides for the possibility of developed Members to provide, on request and on mutually agreed terms and conditions, "technical and financial cooperation" in order to facilitate the implementation of these safeguards.[897] Paragraph 5 does not add any new

[891] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 10; Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6", *supra* note 856 at 786.
[892] Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6", *supra* note 856 at 786.
[893] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 10.
[894] Mercurio, "TRIPS, Patents", *supra* note 813 at 244.
[895] Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6", *supra* note 856 at 787.
[896] *TRIPS and Public Health Waiver, supra* note 94 at para 4.
[897] *Ibid.*

commitments, but reiterates the legal obligations of all Members under the *TRIPS Agreement* to prevent trade diversion and provides that a Member can request the Council for TRIPS to review the measures taken by a Member in that regard if they are considered insufficient by another Member.[898]

Further safeguards against trade diversion apply to exporting Members. Paragraph 2(b)(i) stipulates that exporting Members should ensure that only the amount necessary to meet the needs of the eligible importing Member(s) may be manufactured under the compulsory licence and the entirety of the production shall be exported to that Member.[899] Furthermore, paragraph 2(b)(ii) and the Chairman's Statement provide that the pharmaceuticals and active ingredients produced under the compulsory licence shall be clearly identified as being produced under the System through specific labelling, packaging and/or special colouring/shaping of the products themselves.[900] The Chairman's Statement refers to some "Best practices" that Members and producers are encouraged to draw from in preventing diversion.[901]

(b) transparency provisions

The EC, the United States as well as Japan and Switzerland advocated for the need for measures to ensure full transparency of the process and to ensure that the patent holder(s) and other WTO members remain fully informed of the steps undertaken in view of granting the authorization.[902] In response to their request, paragraph 2 of the Waiver Decision provides for a series of information requirements that are requested from both the eligible importing Member and the exporting Member. The information requirements applicable to the eligible importing Member are: the names and expected quantities of the product(s) needed, confirmation of its eligibility and intention to grant a compulsory licence.[903] Those applicable to the exporting Member consist of: the conditions attached to the grant of the compulsory licences, the name and address of the licensee, the product(s) for which the licence has been granted, the quantity(ies) for which it has

[898] *Ibid* at para 5.
[899] *Ibid* at para 2(b)(i).
[900] *Ibid* at para 2(b)(ii); *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 29.
[901] *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at para 29.
[902] *Thematic Compilation of Proposals on Paragraph 6, supra* note 662 at 11; Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6", *supra* note 856 at 789.
[903] *TRIPS and Public Health Waiver, supra* note 94 at para 2 (a).

been granted, the country(ies) to which the product(s) is (are) to be supplied and the duration of the licence.[904]

(c) exclusion of non-violation nullification or impairment actions

Developing countries in general were concerned about the impact of non-violation causes of action, pursuant to Article XXIII 1(b) of the GATT 1994, which could be employed against a Member's measures or actions taken on the basis of the Waiver Decision.[905] Indeed, claims on the basis of Article XXIII 1(b) could have opened the door to allegations that the grant of a compulsory licence deprived patent holders of their expectations, thus causing uncertainties for Members making use of the System.[906] Paragraph 10 of the Waiver Decision closes the door to such concerns by stipulating that Members agree that they will not seek to challenge the conformity of another Member's measures or actions taken on the basis of the Waiver Decision on the grounds that they adversely affect the benefits they expected to receive based on a negotiated exchange of concessions, as provided by Article XXIII 1(b) of the GATT 1994.[907]

3.3.3.2.5. *Was a balanced set of interests represented in the text of the Waiver Decision?*

Overall, the Group of developing countries and the African Group made substantial gains with respect to some controversial issues of the Waiver Decision.[908] The obtained an extensive definition of pharmaceutical products, not limited to those needed to address specific diseases, and were granted *a priori* eligibility of all Members to use the System as importers, with the exception of those that voluntarily opted-out from this right. They were also able to ensure that prospective importers Members would be the ones responsible to assess their own manufacturing capacities with respect to each pharmaceutical product. In addition, they got the exclusion of non-violation nullification or impairment actions against measures taken on the basis of the Waiver Decision, providing more legal certainty for them.

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[904] *Ibid* at para 2 (b).
[905] *Proposed Declaration by the Group of Developing Countries, supra* note 660 at para 12.
[906] Frederick M Abbott, *Non-Violation Nullification or Impairment Causes of Action Under the TRIPS Agreement and the Fifth Ministerial Conference: A Warning and Reminder*, QUNO Occasional Paper No 11 (Geneva: Quaker United Nations Office (QUNO), July 2003) at 3, online: SSRN <http://ssrn.com/abstract=2364991>.
[907] *TRIPS and Public Health Waiver, supra* note 94, para 10.
[908] See e.g. Vandoren & Eeckhaute, "The WTO Decision on Paragraph 6", *supra* note 856 at 791.

As for the United States, the EC, Switzerland and other Members home of the major patent-holding pharmaceutical companies, while they made significant concessions on the scope of the diseases and the eligibility of prospective importing Members, they achieved important gains on conditions and safeguards. First, with the support of the African Group, they were able to get a compromise from the Group of developing countries to have the solution implemented pursuant to a waiver of Article 31 of the *TRIPS Agreement,* which already set a number of procedures and conditions for the grant of compulsory licences. Second, they got a great number of opt-outs and limitations to prevent developed Members from using the System as importers. Third, they were able to obtain a number of provisions about transparency and against trade diversion.

In summary, this analysis reveals that the adoption of the Waiver Decision consisted in a difficult compromise. The text addresses several demands from the developing countries, but at the same time, fills them with several safeguards and conditions requested by Members home of the major patent-holding pharmaceutical companies. From the general comments that have been expressed regarding the Waiver Decision, a majority of Members were of the view that it represented a fine balance of rights and obligations and it appears that it constituted the bare-minimum that most Members were willing to accept.[909]

3.3.3.3. Did the text of the Protocol of Amendment represent a balanced set of interests that were expressed?

During the consensus-building process leading up to the adoption of the *Protocol Amending the TRIPS Agreement,* the EC, the United States, Switzerland and Norway, generally supported by developed countries, contended that the amendment should be "an essentially technical process"[910] and that the discussions should "not re-open the discussion on the substantive elements."[911] Their suggestion was to add a footnote referring to the Chairman's Statement into

[909] See e.g. *Council for TRIPS Meeting of 16 June 2004, supra* note 696 at para 111; *Council for TRIPS Meeting of 1-2 December 2004, supra* note 674 at para 117; *Council for TRIPS Meeting of 8-9 and 31 March 2005, supra* note 696 at paras 121-125, 132, 136, 147, 149 and 176.
[910] See statement by the representative of the European Communities: WTO, Council for TRIPS, *Meeting of 18 November 2003, supra* note 683 at 138.
[911] See statement by the representative of Norway: WTO, Council for TRIPS, *Meeting of 18 November 2003, supra* note 683 at 143 (see also statements by the representatives of Korea at para 144; the United States at para 148; Switzerland at paras 155-56).

the text of the amendment.[912] For their part, developing countries contended that the Chairman's Statement should not be part of the amendment.[913] Additionally, they hoped to remove some of the conditions that were included in the Waiver Decision that applied to exporting Members and some of the safeguards measures that were originally provided for in the Waiver Decision.[914]

In the end, both the text of the *Protocol Amending the TRIPS Agreement,* as well as its adoption along with the Chairman's Statement, had the effect of making the Protocol of Amendment and its legal content quasi-identical to the Waiver Decision. Both developed and developing Members gained no more nor less than what they had originally obtained in the Waiver Decision. Some developing countries said that they were under the impression that the Waiver Decision was intended to be only an interim solution, that discussions towards finding a permanent solution in the form of an amendment would continue and that some of their concerns regarding the Waiver Decision would be addressed in the amendment.[915] Accordingly, they may have lost on the illusion of a promise (true or false) that the content of the amendment would be more favourable to them, but no more than that.

3.3.3.4. Were Members free to accept or reject the final outcomes?

The Declaration, the Waiver Decision and the Protocol of Amendment were all three adopted by consensus, which in theory gave a right to every Member to object to the adoption of these decisions.[916] For strategic and political reasons, only the most powerful Members in the WTO can afford to block the adoption of a decision on their own as the United States did for the

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[912] WTO, Council for TRIPS, *Meeting of 8 March 2004, supra* note 683 at para 86; Statement of the representative of Switzerland in Council for TRIPS, *Meeting of 1-2 December 2004, supra* note 674 at para 124. However, the EC was of the opinion that the footnote approach "was not the best solution to amend the TRIPS Agreement", see: "TRIPS Council Meeting Suspended in Effort to Meet Public Deadline", *BRIDGES* 9:9 (16 March 2005), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/trips-council-meeting-suspended-in-effort-to-meet-public-health-deadline>.

[913] See e.g. WTO, Council for TRIPS, *Meeting of 21 September 2004, supra* note 696 at 74.

[914] Compare WTO, Council for TRIPS, *Implementation of Paragraph 11 of the 30 August 2003 Decision* (communication from Nigeria on behalf of the African Group dated 29 November 2004), WTO Doc IP/C/W/437; IP/C/W/437/Rev.1, online: WTO <http://docs.wto.org> and *TRIPS and Public Health Waiver, supra* note 94.

[915] *Council for TRIPS Meeting of 8-9 and 31 March 2005*, *supra* note 696 at paras 198 and 210.

[916] *WTO Agreement, supra* note 1, Article IX:1 and X:1. *Declaration on TRIPS and Public Health, supra* note 512; *TRIPS and Public Health Waiver, supra* note 94; *General Council Meeting of 25, 26 and 30 August 2003, supra* note 540 at paras 30-32; *Protocol Amending the TRIPS Agreement, supra* note 94; *General Council Meeting of 1, 2 and 6 December 2005, supra* note 543 at paras 31-32.

adoption of the draft waiver decision (the Motta text) in December 2002.[917] However, by forming a strong unified position throughout the rulemaking processes in the TRIPS and Public Health Case, the developing countries showed that they could stand up for their demands and block an unwanted outcome, especially if they were opposed by no more than one of the major trading powers.[918] The Declaration and the Waiver Decision are concrete examples of their ability to impact outcomes. Even though the United States blocked the adoption of the Motta text, it ended up being adopted seven months later as the exact text of the *TRIPS and Public Health Waiver* (but accompanied by a Chairman's Statement) due to the developing countries acting together as a block and maintaining firmly their position.

To the question as to whether Members were free to accept or reject the results of the Declaration, the Waiver Decision and the Protocol of Amendment, it can be responded that, from a legal standpoint, nothing prevented them from blocking the adoption of these decisions. However, from a political perspective, with the exception of the largest Members, the ability of Members to block a consensus lied in their dedication to form coalitions and hold unified common positions, as it was successfully proven by developing Members in the TRIPS and Public Health Case.

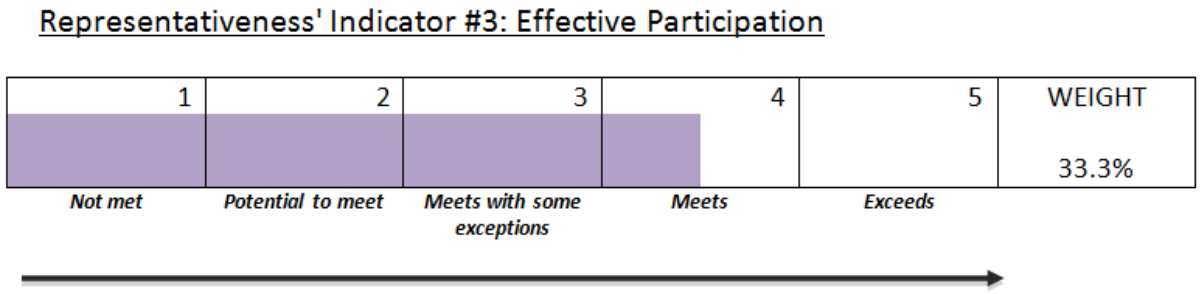
3.3.3.5. Attribution of a score: *Representativeness − Outcome*

Overall, *Representativeness − Outcome* assessed the following standard: *Did the negotiating mandate and the final outcome represent a balanced set of interests that were expressed? Were Members free to accept or reject the results of a decision?* The mandate for the TRIPS and Public Health Case was contained in paragraph 6 of the Declaration, and the Declaration, the Waiver Decision and the Protocol of Amendment had all three an impact on the final outcome for the TRIPS and Public Health Case. Did they represent a balance of interests that were expressed? From the analysis conducted in the precedent sections, it was concluded that the text of the Declaration tilted more in favour of the interests of the group of developing countries (and the EC to some extent) than that of the United States like-minded group. As for the Waiver Decision, it was determined that it represented a fairly balanced outcome between the interests

[917] *Council for TRIPS Meeting of 25-27 and 29 November, and 20 December 2002, supra* note 539 at para 34.
[918] Abbott, "The WTO Medicines Decision", *supra* note 530 at 344-45; Odell & Sell, "Reframing the Issue", *supra* note 646 at 85-87 and 98-104.

of the developing countries and those of the Members home of the major patent-holding pharmaceutical companies. As for the text of the Protocol of Amendment, considering that it was quasi-exactly the same as that of the Waiver Decision, it was evaluated that the status quo remained the same: Members gained no more nor less than what they had originally obtained in the Waiver Decision. Finally, to the question as to whether Members were free to accept the outcome of all these decisions, it was concluded that they had the legal right to object to the adoption of any of these decisions and had some political power to do so when acting together as a block.

As regards the attribution of the score for the indicator *Representativeness − Outcome,* it can be assessed that, in general, Members were free to accept or reject the results of all three decisions. Moreover, the texts of all three decisions represented a balanced set of interests that were expressed, with the exception of that of the Declaration, which favoured more the interests of the group of developing countries. For that reason, the third indicator of representativeness, *Representativeness − Outcome,* should be attributed a score of 3.5/5 (i.e. '*performance met the indicator's standards, with a few exceptions*').



3.3.4. Overall performance of the criterion of representativeness

Overall, the criterion of representativeness was evaluated on the basis of the following three indicators, which were all evaluated separately and attributed a distinct score:

(i) the degree of internal transparency and inclusiveness of the rulemaking processes (scored 2.5/5);
(ii) the degree of representativity of Members in the rulemaking processes (scored 3.5/5); and

(iii) the degree of effective participation of Members, i.e. whether the negotiating mandate and the final outcome represented a balanced set of interests that were expressed and whether Members were free to accept or reject the results of a decision (scored 3.5/5).

Due to the fact that all three indicators have an identical weight for the pondering of the criterion of representativeness as a whole, the criterion of representativeness scores 3/5, consisting of an average of the sums of the scores of all three indicators of legitimacy. As a result, it can be concluded that the performance of the TRIPS and Public Health Case *did not consistently meet the standards* of the criterion of representativeness.

CASE STUDY #1: TRIPS AND PUBLIC HEALTH								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
REPRESENTATIVENESS	Ind #1	33.3						0.83
	Ind #2	33.3						1.17
	Ind #3	33.3						1.17
	Rating	100						3.2/5
RATING STANDARD	*Performance did not consistently meet the standards of the legitimacy criterion*							**3/5**

3.4. Openness

The criterion of openness is to be evaluated on the basis of two indicators of legitimacy:

(i) the external transparency of the rulemaking processes (Section 3.4.1); and
(ii) opportunities for public participation that were made available within the WTO framework (Section 3.4.2).

It has been widely acknowledged that public health activist NGOs and representatives of the pharmaceutical industries played a major role and have had an important impact on the negotiation and adoption of the *Declaration on TRIPS and Public Health*, the TRIPS *and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement*. NGOs, such as Médecins Sans Frontières (MSF), Consumer Project on Technology (CPT), Oxfam, Third World Network

(TWN), and Treatment Action Campaign (TAC) made great public relations endeavours to successfully move the interests of the developing countries regarding people's access to affordable medicines in forums such as the WTO and the World Health Organization (WHO).[919]

These public health activist NGOs participated in and organized symposiums outside of the walls of the WTO to discuss the issue of intellectual property protection and access to essential medicines.[920] In addition, it has been reported that throughout the WTO negotiations on the subject matter, some NGOs have acted as unofficial government advisers; they helped developing countries to craft their positions, conducted research, and regularly commented on the work in progress within the Council for TRIPS.[921] On the other side of the spectrum, representatives of the pharmaceutical industry were also actively involved and regularly consulted by their national government during the negotiations on TRIPS and Public Health.[922]

The negotiations would have been much different without the contribution of the public health activist NGOs and the representatives of the pharmaceutical industries. However, their actual and formal implication within the infrastructure of the WTO *per se* has been more limited. The following analysis focuses only on the implication and transparency *vis-à-vis* non-state actors within the framework of the WTO. Although the involvement of non-state actors on the TRIPS and public health issue has been significant outside the walls of the WTO, it is disregarded in this section because it was achieved by other means than through the actual WTO framework.

The following sections proceed with the analysis of each of the two indicators of openness.

3.4.1. Openness − External transparency

> *Openness' Indicator #1: Was there easily accessible and timely information for non-state actors regarding the rulemaking process for the specific subject-matter from the time the subject-matter was added on the WTO's agenda, including the meetings'*

[919] See Abbott, "The Doha Declaration", *supra* note 551 at 478.
[920] See e.g. "Trips, Aids, Drugs and Developing Countries", *BRIDGES* 5:6 (20 February 2001), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/trips-aids-drugs-and-developing-countries>.
[921] See e.g. "NGOs Pursue New Avenues To Get Their Voice To The Table", *BRIDGES* 5:39 (15 November 2001), online ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/ngos-pursue-new-avenues-to-get-their-voice-to-the-table>.
[922] See e.g. "US Rumoured To Consider Change in Tactic on Trips & Health", *BRIDGES* 7:24 (3 July 2003), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/us-rumoured-to-consider-change-in-tactic-on-trips-health>.

discussions and decisions taken as it relates to the subject-matter, until its legal implementation?

Openness − External transparency assesses the degree of external transparency of the rulemaking processes, i.e. whether there was easily accessible information for non-state actors regarding the TRIPS and public health issue throughout the rulemaking processes. It also evaluates whether such information was made available to the public within a sufficient period of time to enable non-state actors to provide timely comments on the issues that imported them.

3.4.1.1. Was there easily accessible and timely information for non-state actors?

The accessibility of most WTO documents during the negotiations on the TRIPS and public health issue, which took place between the years 2001 and 2005, was governed by the *1996 and 2002 Procedures for Derestriction.*[923] This means that all the agendas, some Secretariat background notes and reports circulated after 14 May 2002[924] (half of them have been restricted), Members' communications and proposals circulated throughout the processes (except a few of them circulated as restricted), draft decisions and adopted decisions (i.e. Declaration, the Waiver Decision and the Protocol of Amendment) were made publically available upon circulation to Members. As, for the minutes of the Council for TRIPS meetings circulated to Members before 14 May 2002, they have been derestricted in average 8-9 months after circulation, and those circulated after this date, 6-12 weeks after circulation. This derestriction of a large amount of official WTO documents related to the TRIPS and Public Health issue allowed the public to obtain a considerable extent of information and have access to the primary data on how the negotiation processes took place for the adoption of the Declaration, the Waiver Decision and the Protocol of Amendment.

Minutes of the meetings were another great source of information for the TRIPS and public health negotiations, as they provided substantial information on the views of WTO Members and the most contentious issues. However, considering that the minutes of the Council for TRIPS meetings that took place during the consensus-building processes (leading to the adoption of the Waiver Decision and the Protocol of Amendment) were made publicly available only 6-12

[923] *1996 Procedures for Derestriction*, *supra* note 480; *2002 Procedures for Derestriction*, *supra* note 480.
[924] For examples: WTO, Council for TRIPS, *Available Information on Manufacturing Capacity for Medicine* (note by the Secretariat), WTO Doc IP/C/W/345 (24 May 2002), online: WTO <http://docs.wto.org>.

weeks after the date of circulation, it kept civil society a month and a half to three months behind the issues that were debated. This made it challenging for the public to be able to provide timely comments on the ongoing work, especially in the context where the Council for TRIPS was working on an expeditious solution, which needed to be adopted within a limited time span. For the case of the agenda-setting process leading to the adoption of the Declaration, which spanned over a period of 8 months (between April and November 2001), it was even less timely as the minutes of the Council for TRIPS meetings were not made available until the Declaration had already been adopted (i.e. 8-9 months after circulation).[925] In addition, no data gathered in this study showed evidence to the effect that some members of the public were able to observe official or informal meetings of the Council for TRIPS, which could have provided non-state actors more timely access to information.[926]

Some non-papers or other restricted communications submitted by Members[927], draft negotiating texts, and proposals prepared by chairmen (such as the Motta text and the Chairman's Statements[928]) have remained restricted to the public throughout the rulemaking processes, and some of them, even after. However, the strict confidentiality of these documents used as

[925] Prior to 14 May 2002, the *1996 Procedures for Derestriction of WTO Documents* applied, see: *1996 Procedures for Derestriction, supra* note 480.

[926] The only exceptions could have been in the cases where a representative of an NGO would have been conferred the role of an official representative of a delegation in the WTO, however there is no evidence to this effect within the data gathered.

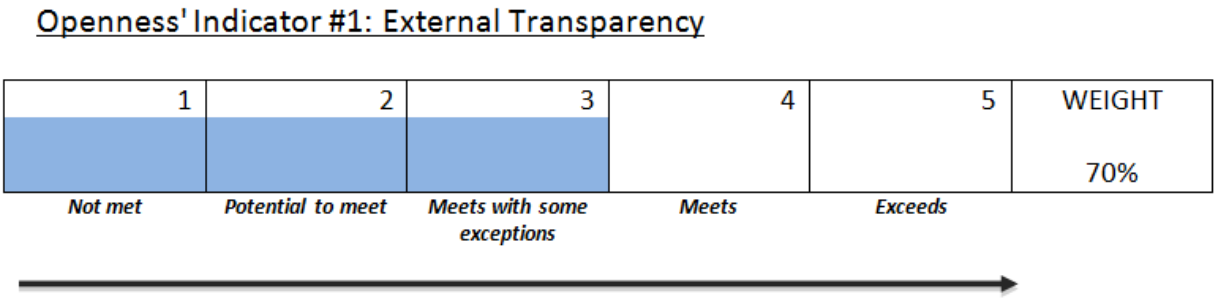
[927] See e.g. WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (non-Paper from Switzerland), WTO Doc JOB(02)/109 (13 September 2002), online: WTO <http://docs.wto.org> (unavailable to the public); *Non-Paperby South Africa, supra* note 878; WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Elements for a Compromise Solution* (non-paper by the European Communities and their Member States), WTO Doc JOB(02)/157 (7 November 2002), online: WTO <http://docs.wto.org> (unavailable to the public); WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (communication from the European Communities and their Member States), WTO Doc JOB(03)/9 (24 January 2003), online: WTO<http://docs.wto.org> (unavailable to the public); WTO, Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (communication from Japan), WTO Doc JOB(03)/19 (6 February 2003), online: WTO <http://docs.wto.org> (unavailable to the public).

[928] See e.g. Motta text, *supra* note 538; Chairman's Statement of 30 August 2003, *supra* note 717; WTO, Council for TRIPS, *Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (note from the Chairman), WTO Doc JOB(05)/319 (5 December 2005), online: WTO <http://docs.wto.org> (unavailable to the public); WTO, Council for TRIPS, *Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (note from the Chairman), WTO Doc JOB(05)/320 (5 December 2005), online: WTO <http://docs.wto.org> (unavailable to the public).

negotiating tools was crucial for the effectiveness of the negotiations within Members, and thus, offset the need for external transparency for legitimacy purposes.[929]

3.4.1.2. Attribution of a score: *Openness − External transparency*

Overall, *Openness − External transparency* assessed the following standard: *Was there easily accessible and timely information for non-state actors regarding the rulemaking process for the specific subject-matter from the time the subject-matter was added on the WTO's agenda, including the meetings' discussions and decisions taken as it relates to the subject-matter, until its legal implementation?* It can be evaluated that there was sufficient and easily accessible information for non-state actors regarding all stages of the rulemaking processes. However, the information, especially with respect to access to the minutes of the Council for TRIPS meetings, was not sufficiently timely to allow non-state actors to follow and comments on ongoing work. For these reasons, *Openness − External transparency,* i.e. the first indicator of openness, should be attributed a score of 3/5 (i.e. '*performance did not consistently meet the indicator's standards*').



3.4.2. Openness − Public participation

Openness' Indicator #2: Were there adequate channels for non-state actors to make oral statements and circulate written communications upon the specific subject-matter?

Openness − Public participation evaluates whether there were adequate channels made available within the WTO framework for non-state actors to express their views (either through oral

[929] See Chapter 3, Section 4.1.4.1.

statements or by the circulation of written communications) on the TRIPS and public health issue.

3.4.2.1. Were there adequate channels for non-state actors to express their views?

Pursuant the *Guidelines for Arrangements With NGOs*[930], the WTO Secretariat received and published on the WTO website approximately six position papers by NGOs, and roughly ten by business associations representing the pharmaceutical industry.[931] The impact of these communications and whether they have been actually consulted by Members is unclear, however. In addition, no data gathered in this study showed evidence to the effect that some members of the public were granted the opportunity to deliver oral statements or circulate written communications directly to the Council for TRIPS. However, a number of NGOs would have reportedly participated in certain portions of the informal Sydney mini-ministerial meeting (considered as a WTO meeting) that took place on 14-15 November 2002.[932] This mini-ministerial meeting was considered instrumental for the determination of the content of the Motta text.[933]

Additionally, the WTO organized a number of public events addressing the TRIPS and public health issue that were open to non-state actors. During the Fifty-third World Health Assembly in May 2000, the World Health Organization (WHO) and the WTO organized a joint briefing on trade and health.[934] Moreover, in April 2001, the WHO and the WTO organized a joint workshop on 'Different Pricing and Financing of Essential Drugs' in Høsbjør, Norway, which brought experts together to explore the complex questions relating to access to affordable essential medicines, while providing adequate incentives for research and development into new drugs.[935] Some 59 experts participated in the workshop, representing the views of academia, governments, manufacturers from both the research-based and the generic industry, health care

[930] *Guidelines for Arrangements With NGOs, supra* note 354.
[931] WTO, *NGO position papers received by the WTO Secretariat,* years 2001 to 2005, online: WTO <http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm> [WTO, *NGO position papers received*].
[932] "Mini-Ministerial To Focus On Tough Doha Questions", *supra* note 711.
[933] See Section 3.3.2.3.2 (b).
[934] See e.g. WTO, Council for TRIPS, *Technical Cooperation Activities: Information from Other Intergovernmental Organizations, Addendum* (communication from the World Health Organization dated 14 September 2001), WTO Doc IP/C/W/305/Add.3 at para 4, online: WTO <http://docs.wto.org>.
[935] *Ibid.*

groups, and NGOS. Moreover, some 21 officials from the WHO, the WTO, the Global Health Council and the Norwegian government also attended and spoke at the workshop.[936]

The WTO also held at its offices in Geneva a 'Symposium on Issues Confronting the World Trade System' on 6 and 7 July 2001, which included a work session on 'TRIPS and Access to Essential Medicines'. Some 48 experts attended the work session, from various backgrounds (academia, NGOs, industry, international organizations, etc.). The topics addressed were mostly related to the concerns of the pharmaceutical manufacturers, such as compulsory licences and their impact on drugs price, research and development, patent protection, and access issues as they relate to lack of adequate financing and infrastructure. A small portion of the work session was dedicated on the use of the flexibility measures in the *TRIPS Agreement* in order to facilitate access to affordable medicines.[937]

3.4.2.2. Attribution of a score: *Openness − Public Participation*

In general, the timing of these public events, which all took place prior to the adoption of the *Declaration on TRIPS and Public Health,* allowed non-state actors to potentially have an impact (or, at the minimum, express their opinions) on the shaping of the future agenda on TRIPS and access to medicines. Indeed, it gave an opportunity to Members to take into account the views of various non-state experts and other civil society actors before agreeing on a mandate and launching the negotiations. In addition, the Sydney mini-ministerial meeting, to which some NGOs were invited, played an important role for the determination of the Motta text, which formed the final content of the Waiver Decision and the Protocol of Amendment. Considering these elements, it can be evaluated that during the TRIPS and Public Health Case, non-state actors were offered adequate channels to express their views on the issue. As a result, the second

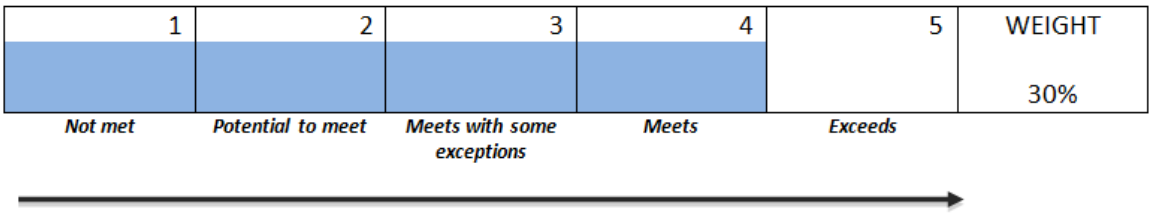
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[936] WHO & WTO, *Report of the Workshop on Differential Pricing & Financing of Essential Drugs: A WHO/WTO Secretariat Workshop* (Høsbjør, Norway, 8-11 April 2001), online: WHO <http://apps.who.int/medicinedocs/en/d/Jh2951e/#Jh2951e>. The joint WHO & WTO workshop received negative reactions by NGOs because it addressed only "a narrow range of issues" relating to: (i) the cost of medicines for the 'poor countries'; (ii) 'differential pricing' for different users and consumers and consumers and how to achieve it; and (iii) the issue of financing of medicines (for health care) in these countries, see: Chakravarthi Raghavan, "NGOs Disappointed With the Outcome of Essential Drugs Workshop", *Third World Network* (11 April 2001), online: TWN < http://www.twnside.org.sg/title/workshop.htm>.

[937] For a summary of the work session on TRIPS and Access to Essential Medicines, see: Institute for Sustainable Developments, "A Summary Report of the WTO Symposium on Issues Confronting the World Trading System", *Sustainable Developments* 55:1 (23 July 2001), online: iisd.ca <http://www.iisd.ca/download/pdf/sd/sdvol55num1.pdf>.

indicator of openness, *Openness − Public participation,* should be attributed a weight of 4/5 (i.e. '*performance consistently met the indicator's standards*').

Openness' Indicator #2: Public Participation



3.4.3. Overall performance of the criterion of openness

Overall the criterion of openness was assessed on the basis of the following two indicators, which were analyzed separately and attributed a distinct score:

(i) the degree of external transparency of the rulemaking processes (scored 3/5); and
(ii) the opportunities for public participation made available within the WTO framework (scored 4/5).

Considering that the first indicator accounts for 70 percent of the total weight of the criterion of openness, and the second indicator, 30 percent, the criterion of openness should be attributed a rounded score of 3.5/5, representing the sum of the weighted scores of each of its two indicators of legitimacy. As a result, it can be concluded that the performance of the TRIPS and Public Health Case *met the standards of the criterion of openness, with a few exceptions.*

CASE STUDY #1: TRIPS AND PUBLIC HEALTH								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
OPENNESS	Ind #1	70						2.1
	Ind #2	30						1.2
	Rating	100						3.3/5
RATING STANDARD	*Performance met the standards of the legitimacy criterion, with a few exceptions*							**3.5/5**

4. RESULTS AND CONCLUSION

The TRIPS and Public Health Case received an overall legitimacy score of 3.2/5, as illustrated in Table 4.13 below, which signifies that it *did not consistently meet the standards of the legitimacy criteria.* Table 4.14 presents the individual result of each of the separate indicators of legitimacy.

The criterion of effectiveness is the only one which standards were globally *met* by the TRIPS and Public Health Case, with a rounded score of 4/5. Overall, it was found that the use of a collective waiver was an effective legal method of implementation to bring the System agreed upon by Members into force due to the fact that it did not require acceptance and ratification. In addition, several factors contributed to the effectiveness of the consensus-building processes, such as negotiating on the basis of organized interests-based coalitions and using a Chairman's Statement as 'constructive ambiguity' for reaching consensus on difficult issues. On the downside, Members did not make use of all the flexibilities of the *WTO Agreement,* such as the fallback voting provisions when the United States blocked the adoption of the Motta text. However, the political viability of a vote in this case was weak due to the fact that the United Sates was one of the most major powers in the world economy and had high interests at stake in the TRIPS and Public Health Case considering that it was home of the most major patent holders pharmaceutical companies. Second, due to the fact that the interpretative provisions contained in Declaration were implemented pursuant to a simple decision instead of an authoritative interpretation, it is uncertain what weight panels and the Appellate Body will attribute to them when ruling on the subject matter of the TRIPS and Public Health Case. Third, the experience regarding the use of the System set out in the TRIPS and Public Health Case suggests that it may not be fully successful in addressing the mandated goal due to the fact that its conditions are cumbersome and that it lacks of financial incentives for potential exporting generic manufacturers.

Table 4.13: Legitimacy Score of the Rulemaking Processes Used in TRIPS and Public Health Case

CASE STUDY #1: TRIPS AND PUBLIC HEALTH											
CRITERIA	**Weight (%)**	**Indicators**	**Weight (%)**	**Interval Scale**					**Criteria Score (%)**	**WEIGHTED SCORE**
				1	**2**	**3**	**4**	**5**		
LEGALITY	20	Ind #1	100						2.5	**0.5**
		Rating	100						2.5/5	
EFFECTIVENESS	25	Ind #1	33.3						1	**0.95**
		Ind #2	33.3						1.33	
		Ind #3	33.3						1.5	
		Rating	100						3.8/5	
REPRESENTATIVENESS	35	Ind #1	33.3						0.83	**1.12**
		Ind #2	33.3						1.17	
		Ind #3	33.3						1.17	
		Rating	100						3.2/5	
OPENNESS	20	Ind #1	70						2.1	**0.66**
		Ind #2	30						1.2	
		Rating	100						3.3/5	
TOTAL / RATING	100									**3.2/5**
RATING STANDARD	*Performance did not consistently meet the standards of the legitimacy criteria*									

In second place, comes the criterion of openness with an approximate score of 3.5/5, which means that *its standards were generally met, but with a few exceptions*. Overall, the TRIPS and Public Health Case was successful in providing adequate channels for non-state actors to express their views on the subject matters in a sufficiently timely manner for them to have potentially an impact (or have the opportunity to express their opinions) on the shaping of the agenda on TRIPS and Public Health and the content of the final outcome. These channels included the holding of public events and a mini-ministerial meeting to which some NGOs were invited. However, as for the standard of external transparency, non-state actors did not have access to the minutes of the Council for TRIPS (a primary source of information) in a sufficiently timely manner to be able to follow and comment on the ongoing work of the Council for TRIPS.

As for the criterion of representativeness, it received a rounded score of 3/5, signifying that *its standards were not consistently met* by the TRIPS and Public Health Case. Its principal weaknesses concern its degree of internal transparency and inclusiveness. Indeed, the initial

negotiation of the draft texts of the Declaration, the Waiver Decision and the Protocol of amendment all took place in small restricted groups prior to be circulated to the entire membership for comments. This was done despite the expressed requests of some Members to be included in these meetings. As for the content of the final outcomes, it can be evaluated that overall they represented a balanced set of interests that were expressed, with the exception of the Declaration, which titled more in favour of the interests of the group of developing countries. Moreover, it can be estimated that all Members were free to accept or reject the results of all three decisions. As for the degree of representativity of the rulemaking processes both the quantitative and qualitative analyses demonstrated that all the categories and groupings of Members and all four sets of interests regarding the TRIPS and public health issue were adequately represented at all stages of the processes, with only a few minor exceptions.

Finally, the criterion of legality received the lowest score, i.e. 2/5, which is an indication that the TRIPS and Public Health Case was *most of the time below its standards*. Indeed, the TRIPS and Public Health Case made use of two legal instruments that are not specifically provided for in the *WTO Agreement.* First, Members chose to adopt interpretative provisions of the *TRIPS Agreement* pursuant to a Declaration. Second, they referred to a collective waiver (i.e. applicable to potentially the entire membership) to implement the System laid out in the TRIPS and Public Health Case.

Overall, the TRIPS and Public Health Case suggests that the different criteria of legitimacy may be subject to some trade-offs. It can be estimated that Members favoured effectiveness at the expense of the correctness of the rules and procedures followed, inclusiveness as well as internal and external transparency of the rulemaking processes. However, it did not negatively affect the degree of representativity of Members in the processes and the representativity of their interests in the final outcomes, as well as the channels offered for public participation.

On the flip side, the high degree of balance in the final outcomes in terms of the various interests expressed arguably affected the ability of the final outcome to address the mandated objective. Indeed, the mandate called for a certain degree of distributive justice in the outcomes, but the reciprocal nature of the negotiations produced a delicate balance of the various interests of the whole Membership. This, in turn, reduced the ability of the final outcome to address the mandate

which was by nature tilted in favour of the interests of the developing and least-developed Members.

Table 4.14: Performance of the Indicators of Legitimacy in TRIPS and Public Health Case

PERFORMANCE OF THE INDICATORS OF LEGITIMACY TRIPS AND PUBLIC HEALTH CASE				
POTENTIAL TO MEET	**MET WITH SOME EXCEPTIONS**		**MET**	
Most of the time below the standards	***Did not consistently meet the standards***	***Met the standards with a few exceptions***	***Met the standards***	***Exceeded the standards at some occasions***
(2.5/5)	**(3/5)**	**(3.5/5)**	**(4/5)**	**(4.5/5)**
• Correctness of the rule and procedure used • Internal transparency and inclusiveness	• Mandated goal addressed by final outcome • External transparency	• Representativity of Members in the processes • Effective participation (whether the final outcome represented a balanced set of interests)	• Negotiated policy brought into effect • Public participation	• Effectiveness of the process

CHAPTER 5
CASE STUDY #2: BASIC TELECOMS AGREEMENT

1. INTRODUCTION

The *Agreement on Basic Telecommunications Services*[938] (*Basic Telecoms Agreement*) was one of the first of a series of plurilateral sectorial agreements, which were the results of a built-in agenda in trade in services that was agreed upon at the end of the Uruguay Round. As part of a built-in agenda of the GATS, this agreement was concluded outside of an official round of multilateral trade negotiations and was therefore, by nature, not subject to the single undertaking. The examination of the Basic Telecoms Case allows the highlighting of a number of practices that were followed in relation to legitimacy. Was negotiating outside of a round of multilateral negotiations and the single undertaking, where only one area of trade was subject to negotiations, effective? Did negotiating on a basis of a critical mass of offers allow reaching satisfying outcomes in relation to Members' objectives? Did it impair the ability of the rulemaking processes to produce balanced outcomes for the entire Membership? The negotiations took place within a subset of Members. Yet, were the processes transparent, inclusive and representative of the whole Membership?

The results of the negotiations were implemented through legal means that are not expressly provided for in the *WTO Agreement.* What was the impact of these legal methods from a legality and effectiveness standpoint? Were these nonetheless legal? Were they more effective? Did the rules and procedures contained in the *WTO Agreement* equip the participants with the sufficient flexibilities to allow them meeting their end goals?

The results of the negotiations aimed at the progressive deregulation and liberalization of telecommunications markets and, as a result, were to have a considerable impact on the interests of national and foreign operators, as well as customers. What opportunities did the WTO provide for non-state actors to express their views and interests on the issue? Was there a sufficiently high degree of external transparency to allow non-state actors to follow the ongoing work of the

[938] *Basic Telecoms Agreement*, *supra* note 95.

Negotiating Group on Basic Telecommunications (NGBT) and, subsequently, the Group on Basic Telecommunications (GBT)? This Chapter addresses these questions.

The following section provides a description of the rulemaking processes that took place in the Basic Telecoms Case, followed by the assessment of their legitimacy.

2. DESCRIPTION OF THE RULEMAKING PROCESS

The rulemaking process leading up adoption of the *Basic Telecoms Agreement*[939] began during the Uruguay Round in 1989 and ended 15 February 1997. It encompassed three stages: (i) the agenda-setting process leading up to the adoption of the *Ministerial Decision on Negotiations on Basic Telecommunications*[940] and the *Annex on Negotiations on Basic Telecommunications*[941] by the GATT 1947 Trade Negotiations Committee, which provided the basis for Members to continue their negotiations on basic telecommunications within the WTO; (ii) the consensus-building process leading up to the adoption of the *Basic Telecoms Agreement*; and (iii) the implementation process for the *Basic Telecoms Agreement.*

2.1. Agenda-setting Process: Adoption of the Decision on Negotiations on Basic Telecommunications and the Annex on Negotiations on Basic Telecommunications

Informal discussions on trade in basic telecommunications began during the Uruguay Round in 1989. Considering that the United States was then the most advanced country in the area of telecommunications liberalization, it played a leadership role in these telecommunications discussions. United States telecoms companies were highly interested in penetrating foreign markets and investing abroad due to the fact that they were comparatively more advanced than foreign competitors. However, considering that a certain extent of foreign markets was dominated by legal monopolists, there was a risk that they would defeat the efforts of foreign

[939] *Ibid.*
[940] *Decision on Negotiations on Basic Telecommunications,* adopted by the Ministers at Marrakesh, 15 April 1994, reprinted in *The Results of the Uruguay Round, supra* note 213, 405 [*Ministerial Decision on Negotiations on Basic Telecommunications*].
[941] *Annex on Negotiations on Basic Telecommunications* in *The Results of the Uruguay Round, supra* note 213 at 319 [*Annex on Negotiations on Basic Telecommunications*].

telecoms services providers and potentially engage in anti-competitive practices.[942] As a result, the United States agreed to open its telecommunications market, the largest in the world, on the condition that its telecoms services providers would be granted reciprocal access to markets of similar size to the United States. This gave place to the 'critical mass' basis of negotiations: there would be a telecoms agreement only upon sufficiently large number of market access commitments from other delegations.[943]

By the end of the Uruguay Round, considering that participants felt that there was little likelihood of achieving high levels of commitments on basic telecommunications before the completion of the Round[944], it was agreed that the negotiations on basic telecommunications would extend beyond the conclusion of the Uruguay Round in the form of a built-in agenda.[945] As a framework for future negotiations, an informal group of interested participants mandated by the Group of Negotiations Services drafted a model schedule (also referred to as a "shopping list") which comprised a common understanding on the services and issues that would be subject to negotiations.[946]

The mandate for extended negotiations on basic telecommunications was contained in the *Ministerial Decision on Negotiations on Basic Telecommunications*[947] and the *Annex on Negotiations on Basic Telecommunications*[948]*,* which were adopted as part of the final results of

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[942] Marco Bronckers & Pierre Larouche, "A Review of the WTO Regime for Telecommunications Services" in Kern Alexander & Mads Andenas, eds, *The World Trade Organization and Trade in Services* (Boston: Brill, 2008) 319 at 321 [Bronckers & Larouche, "WTO Regime for Telecommunications"].
[943] *Ibid* at 321.
[944] WTO, Committee on Specific Commitments, *Additional Commitments Under Article XVIII of the GATS* (note by the Secretariat)*,* WTO Doc S/CSC/W/34 (16 July 2002) at para 9, online: WTO <http://docs.wto.org> [*Note on Article XVIII*].
[945] GATS, NGBT, *Negotiations on Basic Telecommunications, Revisions* (note by the Secretariat)*,* WTO Doc TS/NGBT/W/1/Rev.1 (10 June 1994) at para 2, online: WTO <http://docs.wto.org> [*Note by the Secretariat regarding Negotiations on Basic Telecoms*]; *Note on Article XVIII*, *supra* note 944.
[946] *Note on Article XVIII, supra* note 944 at para 9. The model schedule included the following issues: the separation of regulatory and operational functions; safeguards against anti-competitive practices; procedures or requirements related to licensing, the allotment of radio frequencies, numbering and identification codes, type approval and interconnection; pricing related measures, such as cost-oriented pricing; participation in the standards setting process; and rights of way for the construction of infrastructure, which most of these can be found in the Reference Paper as it exists today, see: *Note by the Secretariat regarding Negotiations on Basic Telecoms, ibid,* Model Schedule of Commitments on Basic Telecommunications at 6-7.
[947] *Ministerial Decision on Negotiations on Basic Telecommunications*, *supra* note 940.
[948] *Annex on Negotiations on Basic Telecommunications*, *supra* note 941.

the Uruguay Round.[949] The *Ministerial Decision on Negotiations on Basic Telecommunications* stated that Members could enter into the negotiations on a voluntary basis, with a view to the progressive liberalization of trade in basic telecommunications.[950] The Decision also contained a standstill commitment (which began on the date of the decision (i.e. 15 April 1994) until the end of the permitted period for negotiations on 30 April 1996 or the implementation date of the results of negotiations) following which participants were prohibited to apply any measure affecting trade in basic telecommunications in such a manner as would improve their negotiating position and leverage.[951] For its part, the *Annex on Negotiations on Basic Telecommunications* extended the time limit for filling exemptions to Article II of the GATS (i.e. MFN treatment) in the telecommunications sector that were not listed at the conclusion of the Uruguay Round until the implementation date of the results of the negotiations or 30 April 1996, should the negotiations not succeed.[952]

2.2. Consensus-building process: Adoption of the Basic Telecoms Agreement

Negotiations on basic telecommunications focused on market access commitments, as well as regulatory and pro-competitive disciplines. An informal group of participants (eventually known as the 'Group of 12'[953]) tackled the drafting of an informal text on the regulatory and pro-competitive issues, entitled 'Reference on Regulatory Principles in Basic Telecommunications Services' ('Reference Paper')[954], which were by far the most complex and controversial aspects of the negotiations. It was explained that the Reference Paper "had no legal status and was to be used as a guideline for the scheduling of additional commitments."[955] It was further advanced that "there would be no binding commitment arising from the paper *per se*; only that which was

[949] For additional information, see: *Note by the Secretariat regarding Negotiations on Basic Telecoms, supra* note 945 at para 5.
[950] *Ministerial Decision on Negotiations on Basic Telecommunications*, *supra* note 940 at para 1.
[951] *Ministerial Decision on Negotiations on Basic Telecommunications*, *supra* note 940 at para 7.
[952] This exemption did not apply to any specific commitment on basic telecommunications which was inscribed in a Member's services schedule, see: *Annex on Negotiations on Basic Telecommunications, supra* note 941 at paras 1-2.
[953] The Group of 12 ultimately included 16 participants (counting the EC singly) from both developed and developing countries and representing most geographic regions, see: *Note on Article XVIII*, *supra* note 944 at para 13.
[954] The text of the Reference Paper can be found in WTO, NGBT, *Reference Paper* (24 April 1996), online: WTO <https://www.wto.org/english/Tratop_e/serv_e/telecom_e/tel23_e.htm> [*Reference Paper*].
[955] WTO, NGBT, *Report of the Meeting* (held on 22 March 1996), WTO Doc S/NGBT/14 at para 5, online: WTO <http://docs.wto.org> [*NGBT Meeting of 22 March 1996*].

explicitly inscribed in the schedule of commitments would be of a legally binding nature."[956] Eventually throughout the negotiations, it became accepted that the disciplines of the Reference Paper would be negotiated as additional commitments, to be inscribed in the fourth column of the participants' schedules of commitments and lists of Article II exemptions (schedules) pursuant to Article XVIII of the GATS.[957]

Participants negotiated market access commitments on the basis of the submission of draft and revised offers inscribed in schedules.[958] By the end of the negotiating deadline of 30 April 1996, while substantial progress had been made in the submission of offers and that important obstacles had been addressed, participants were not able to reach an agreement due to the fact that a critical mass of offers had not been achieved.[959] Indeed, it was reported that the United States was unable to join an agreement because it was dissatisfied with the offers from India, as well as from the ASEAN and Latin-American countries, about continuing foreign ownership restrictions in some EC countries and Canada, and with the quality of the offers on the issues of international traffic and satellite services in general.[960]

In order to salvage the progress that had been made by then and preserve the economic value of the offers, the WTO Director-General presented a proposal following which the best offers then on the table would be maintained and, as they were, frozen until a period which would be set for reconsideration in the spring of 1997. As proposed, the NGBT forwarded to the Council for Trade and Services the list of participants' schedules together with the text of the *Fourth Protocol to the GATS* (or Fourth Protocol)[961] and the draft *Decision on Commitments in Basic*

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[956] *NGBT Meeting of 22 March 1996*, *ibid* at para 5.
[957] *Note on Article XVIII, supra* note 944 at para 16.
[958] WTO, Council for Trade in Services, *Report of the Meeting* (held on 30 April 1996), WTO Doc S/C/M/9 at para 4, online: WTO <http://docs.wto.org> [*NGBT Meeting of 30 April 1996*].
[959] WTO, NGBT, *Report of the Meeting* (held on 26 April 1996), WTO Doc S/NGBT/16 at para 4, online: WTO <http://docs.wto.org> [*NGBT Meeting of 26 April 1996*]. In a press release, the United States trade representative explained its refusal to conclude an agreement due to the fact that a critical mass of market access commitments had not been reached, see: Statement of Ambassador Barshefsky of 19 March 1997, *supra* note 522 (The Unites States trade representative stated: "Taken together, the offers in Geneva fall far short. As things stand today, over 40% of world telecom revenues and over 34% of global international traffic are not covered by acceptable offers. We will not enter an agreement on these terms.").
[960] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 486; Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942 at 322, n 15.
[961] *Fourth Protocol to the General Agreement on Trade in Services* (Council for Trade in Services Decision of 30 April 1996), WTO Doc S/L/20, online: WTO <http://docs.wto.org> [*Text of the Fourth Protocol to the GATS*].

Telecommunications[962]*,* which were adopted by the Council for Trade in Services on 30 April 1996.[963] The *Fourth Protocol to the GATS* provided that it would be open for acceptance by the Members concerned until 30 November 1997, and that it would enter into force on 1 January 1998, provided that it had been accepted by all Members concerned.[964]

The *Decision on Commitments in Basic Telecommunications* included a standstill clause, which prevented Members from the date of the Decision (i.e. 30 April 1996) until the date of entry into force of the *Fourth Protocol to the GATS* to not take measures that would be inconsistent with their undertakings resulting from the negotiations.[965] In addition, it provided that Members that had attached their schedule to the *Fourth Protocol to the GATS* would be given a period of 30 days, between 15 January and 15 February 1997, during which they would be authorized to supplement or modify such schedule or list of MFN exemptions.[966]

By the deadline of 15 February 1997, a substantial number of delegations had submitted revised offers, which included additional commitments in more sub-sectors, higher thresholds on foreign equity participation (in a number of offers which listed such limitations), and the incorporation of the Reference Paper on regulatory principles (in an increasing number of offers).[967] The United States noted a substantial improvement in the balance of commitments among Members and stated that the 'critical mass' necessary for the successful conclusion of the negotiations appeared achievable.[968] As a result, the GBT adopted a list of participants' schedules which, pursuing to paragraph 3 of the *Decision on Commitments in Basic Telecommunications*, would be attached to the *Fourth Protocol to the GATS* in replacement of those attached on 30 April

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[962] *Decision on Commitments in Basic Telecommunications* (Council for Trade in Services Decision of 30 April 1996)*,* WTO Doc S/L/19, online: WTO <http://docs.wto.org> [*Decision on Commitments in Basic Telecommunications*].
[963] *NGBT Meeting of 30 April 1996*, *supra* note 958 at para 6.
[964] *Text of the Fourth Protocol to the GATS*, *supra* note 961 at paras 2-3 (The Fourth Protocol further provided that in the case where the Protocol would not be accepted by all Members concerned, those Members which would have accepted it by that date could decide, prior to 1 January 1998, on its entry into force.).
[965] *Decision on Commitments in Basic Telecommunications, supra* note 962 at para 2.
[966] *Ibid* at para 3.
[967] WTO, Group on Basic Telecommunications, *Report of the Meeting* (held on 14 February 1997)*,* WTO Doc S/GBT/M/8 at para 2, online: WTO <http://docs.wto.org> [*GBT Meeting of 14 February 1997*]. See also Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942 ("At the end, 32 of the 34 offers that had been tabled in April 1996 were revised, and 21 new offers were submitted, bringing the to5tal number of schedules of commitments to 55, accounting for 69 countries (the fifteen countries of the EU being included in a single schedule).") at 323).
[968] *GBT Meeting of 14 February 1997*, *ibid* at para 3.

1996.[969] There were in total 55 schedules submitted, accounting for 69 countries (the 15 EC countries being included in a single schedule).[970] In addition, a majority (67 out of 69) of the participating governments included regulatory disciplines in their schedules, while 55 of them committed to the Reference Paper in whole or with a few modifications.[971]

2.3. Implementation

By the time-limit of 30 November 1997 for the acceptance and ratification of the *Fourth Protocol to the GATS*, 50 out 70 Members (including the EC as a whole and 12 of its Member States) had accepted it.[972] Considering that 20 Members had still not deposited their instrument of acceptance, pursuant to their power conferred in the third paragraph of the *Fourth Protocol to the GATS,* the Members that had accepted it decided that it would enter into force on 5 February 1998 (instead of on 1 January 1998 as originally envisioned).[973] In addition, the Council for Trade in Services by decision extended the time-limit for the acceptance of the Fourth Protocol until 31 July 1998.[974]

As provided, the *Basic Telecoms Agreement* (i.e. the *Fourth Protocol to the GATS*) entered into force on 5 February 1998 for 58 Members.[975] Six additional Members (for a total of 64 Members) accepted the Fourth Protocol before the extended deadline of 31 July 1998.[976] After

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[969] *GBT Meeting of 15 February 1997*, *supra* note 523 at para 9.
[970] For a list of the Members who attached a Schedule and List of MFN Exemption, see *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74.
[971] See Participants' schedules in *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74;Marco CEJ Bronckers & Pierre Larouche, "Telecommunications Services and the World Trade Organization" (1997) 31(5) J World Trade 5 at 22 [Bronckers & Larouche, "Telecommunications Services"].
[972] See WTO, Director-General, *Fourth Protocol to the General Agreement on Trade in Services Done at Geneva on 15 April 1997: Notification of Acceptances, Entry Into Force,* WTO Doc WT/Let/213 (30 January 1998), online: WTO <http://docs.wto.org> [*Status of Acceptance of the Fourth Protocol to the GATS*].
[973] WTO, Council for Trade in Services, *Report of the Meeting* (held on 26 January 1998), WTO Doc S/C/M/25 at paras 4-7, online: WTO <http://docs.wto.org> [*Council for Trade in Services Meeting of 26 January 1998*].
[974] *Decision on Acceptance of the Fourth Protocol to the General Agreement on Trade in Services* (Council for Trade in Services Decision of 19 December 1997), WTO Doc S/L/51, online: WTO <http://docs.wto.org>. This decision was taken upon the recommendation of the Members who had accepted the Fourth Protocol before the deadline of 30 November 1997, see: WTO, Council for Trade in Services, *Report of the Meeting* (held on 18 and 19 December 1997), WTO Doc S/C/M/23 at paras 2-3, online: WTO <http://docs.wto.org>.
[975] *Basic Telecoms Agreement, supra* note 95. Eight additional Members, including two EC Member States, accepted the Fourth Protocol before the date of its entry into force. For the list of Members for which the Fourth Protocol entered into force on 5 February 1998, see: *Status of Acceptance of the Fourth Protocol to the GATS*, *supra* note 972.
[976] WTO, Director-General, *Fourth Protocol to the GATS Done at Geneva on 15 April 1997* (notification of acceptance by Belgium of 26 May 1998), WTO Doc WT/Let/222, online: WTO <http://docs.wto.org>; WTO,

the closing of the acceptance period for the Fourth Protocol to the GATS, it was temporarily reopened, upon the individual request of four Members, in order to allow these Members to deposit their instruments of acceptance.[977] As of April 2015, 68 acceptances have been received and two Members, Brazil and Guatemala, have still not accepted the Fourth Protocol to the GATS.[978]

3. LEGITIMACY ANALYSIS

The following sections conduct the legitimacy analysis for the Basic Telecoms Case. They provide an assessment of each criterion of legitimacy and its specific indicators as applied to the rulemaking processes that led to the adoption of the *Basic Telecoms Agreement*: legality (Section 3.1); effectiveness (Section 3.2); representativeness (Section 3.3); and openness (Section 3.4).

Considering that the agenda-setting process leading to the adoption of the mandate for the basic telecommunications negotiations was conducted exclusively within the GATT 1947, it falls beyond the object of this study and, therefore, is not assessed in this Chapter. Instead, the analysis focuses exclusively on the consensus-building process, which took place within the WTO (and its Preparatory Committee) between 1994 and 1997.[979]

Director-General, *Fourth Protocol to the GATS Done at Geneva on 15 April 1997* (notification of acceptance by Poland on 29 July 1998, by Bolivia on 19 January 1998, and by Argentina on 31 July 1998), WTO Doc WT/Let/236, online: WTO <http://docs.wto.org>; WTO, Director-General, *Fourth Protocol to the GATS Done at Geneva on 15 April 1997* (notification of acceptance by Dominican Republic on 11 June 1998 and Chile on 16 June 1998), WTO Doc WT/Let/227, online: WTO <http://docs.wto.org>.

[977] These four Members are: Ghana (acceptance on 20 October 1998), see: *Second Decision on the Acceptance of the Fourth Protocol* (Council for Trade in Services Decision of 15 December 1998), WTO Doc S/L/62, online: WTO <http://docs.wto.org>; WTO, Director-General, *Fourth Protocol to the GATS Done at Geneva on 15 April 1997* (notification of acceptance by Ghana of 20 October 1998), WTO Doc WT/Let/277, online: WTO <http://docs.wto.org>; Dominica (acceptance on 27 June 2000), see: *Third Decision on the Acceptance of the Fourth Protocol* (Council for Trade in Services Decision of 26 May 2000), WTO Doc S/L/86, online: WTO <http://docs.wto.org>; WTO, Director-General, *Fourth Protocol to the GATS Done at Geneva on 15 April 1997* (notification of acceptance by Dominica of 27 June 2000), WTO Doc WT/Let/346, online: WTO <http://docs.wto.org>; Papua New Guinea (acceptance on 11 April 2002), see: *Fourth Decision on the Acceptance of the Fourth Protocol* (Council for Trade in Services Decision of 11 June 2002), WTO Doc S/L/104, online: WTO <http://docs.wto.org>; WTO, Director-General, *Fourth Protocol to the GATS Done at Geneva on 15 April 1997* (notification of acceptance by Papua New Guinea of 20 June 2002), WTO Doc WT/Let/422, online: WTO <http://docs.wto.org>; and the Philippines (acceptance on 25 April 2006), see: *Fifth Decision on the Acceptance of the Fourth Protocol* (Council for Trade in Services Decision of 11 April 2006), WTO Doc S/L/251, online: WTO <http://docs.wto.org>; WTO, Director-General, *Fourth Protocol to the GATS Done at Geneva on 15 April 1997* (notification of acceptance by the Philippines of 5 May 2006), WTO Doc WT/Let/538, online: WTO <http://docs.wto.org>.

[978] See *supra* notes 975-977 and accompanying text.

[979] Negotiations began in 1994 in the NGBT, see: *NGBT Meeting of 6 May 1994, supra* note 415.

3.1. Legality

The criterion of legality is to be evaluated against only one indicator of legitimacy, which assesses the correctness of the rule and procedure used to implement the *Basic Telecoms Agreement*.

3.1.1. Legality − Correctness of rule and procedure

> *Legality's Indicator #1: Was the correct rulemaking rule or procedure followed for the implementation of the negotiated policy?*

The *Basic Telecoms Agreement* contained two major components: (i) some tariff commitments in the basic telecommunications sector (as attached to the *Fourth Protocol to the GATS*); and (ii) some regulatory principles with respect to basic telecommunications (as included in the Reference Paper). The tariff commitments and the regulatory principles were both bound into each individual Member's Schedule of Commitments and List of Article II Exemptions (services schedule) that participated in the *Basic Telecoms Agreement.*

The following sections analyze the legal effect and status of the *Fourth Protocol to the GATS* and the Reference Paper and assess whether they were the proper legal instruments to be used for the implementation of the policies (or rules) that they contained.

3.1.1.1. Legal effect and status of the Fourth Protocol to the GATS

The *Fourth Protocol to the GATS* had the effect of modifying or supplementing the services schedule of each participating Member with the outcomes of the negotiations on basic telecommunications.[980] As a general rule, Members' services schedules can only be modified pursuant to the procedure provided for in Article XXI of the GATS.[981] However, the legal basis for the negotiations on basic telecommunications that led to the adoption of the *Fourth Protocol to the GATS* can be found in the *Ministerial Decision on Negotiations on Basic Telecommunications*[982] and the *Annex on Negotiations on Basic Telecommunications*[983]*,* which

[980] *Text of the Fourth Protocol to the GATS, supra* note 961 at para 1.
[981] Members' services schedules form an integral part of the GATS, see: GATS, *supra* note 229, Article XX:3. See also WTO, Committee on Specific Commitments, *Incorporation of Commitments Resulting from Current Services Negotiations into Members' GATS Schedules* (note by the Secretariat)*,* WTO Doc S/CSC/W/33 (3 June 202) at 1 para 2, online: WTO <http://docs.wto.org> [*Note on Incorporation of Commitments*].
[982] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940.

were attached to the GATS as part of the Uruguay Round results and contained a built-in agenda for further liberalisation in basic telecommunications services.[984]

The *Ministerial Decision on Negotiations on Basic Telecommunications* provided that Members could enter into the negotiations on a voluntary basis, with a view to the progressive liberalization of trade in basic telecommunications.[985] It included a standstill commitment, which began on the date of the decision (i.e. 15 April 1994) until the implementation date of the results of negotiations, according to which participants would not seek to improve their negotiating position or leverage by the introduction of new measures.[986] Additionally, the *Annex on Negotiations on Basic Telecommunications* extended the time limit for filling exemptions to Article II of the GATS (i.e. MFN treatment) in the telecommunications sector until the end of the telecommunications negotiations.[987] The *Ministerial Decision on Negotiations on Basic Telecommunications* explicitly provided that any commitments resulting from the negotiations should be inscribed in Members' services schedules attached to the GATS.[988]

The results of the basis telecommunications negotiations were implemented pursuant to the *Fourth Protocol of the GATS* to which was attached a list of 55 services schedules (accounting for 70 Members)[989] that supplemented or modified the services schedule of each participating Member upon the entry into force of the Protocol in question.[990] The *Fourth Protocol to the GATS* was actually modeled after some types of protocols that were used during the GATT 1947 for making changes to schedules in rounds of multilateral trade negotiations and which included clauses designed to ensure reciprocity.[991] Indeed, the *Fourth Protocol to the GATS* stipulated

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[983] *Annex on Negotiations on Basic Telecommunications, supra* note 941.
[984] Mary E Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Leiden, Netherlands: Nijhoff, 2006) at 222 [Footer, *An Institutional and Normative Analysis*]; WTO, Committee on Trade in Financial Services, *Issues Concerning the Adoption of a Protocol to Conclude the Financial Services Negotiations* (note by the Secretariat), WTO Doc S/FIN/W/11 (1 May 1997) at 1, online: WTO <http://docs.wto.org>.
[985] *Ministerial Decision on Negotiations on Basic Telecommunications*, *supra* note 940 at para 1.
[986] *Ibid* at para 7.
[987] *Annex on Negotiations on Basic Telecommunications, supra* note 941.
[988] *Ministerial Decision on Negotiations on Basic Telecommunications*, *supra* note 940 at para 6.
[989] The 15 EC countries are included in a single schedule. For a list of the Members who attached a Schedule and List of MFN Exemption, see *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74.
[990] *Text of the Fourth Protocol to the GATS, supra* note 961 at para 1.
[991] Such protocols provided that the schedules annexed to it would enter into force on a specific date for those contracting parties that had accepted it, and for the contracting parties that had accepted it subsequently, on the date of their acceptance. See Hunter Nottage & Thomas Sebastian, "Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law" (2006) 9(4) J Int'l Econ L 989 at 996-97

that it would enter into force on a certain date (i.e. on 1 January 1998) provided that it had been accepted by all Members concerned. However, if a month prior to the date envisioned for its entry into fore (i.e. 1 December 1997), the Protocol had not been accepted by all Members that had attached their services schedules to it, those Members which had accepted it by that date could decide on its entry into force.[992] These provisions ensured that the results of the negotiations would be incorporated in the schedules of all key participants.[993]

The use of separate protocols to supplement or modify Members' obligations under schedules, such as was used for the implementation of the *Fourth Protocol to the GATS,* is not specifically regulated in the *WTO Agreement*, neither was it under the GATT 1947. [994] In addition, its use was also not specifically provided for in either the *Decision on Negotiations on Basic Telecommunications* or the *Annex on Negotiations on Basic Telecommunications,* which contained no mention regarding the method for implementing the results of the negotiations on basic telecommunications, with the exception that they should be inscribed in Members' services schedules.

The exact legal nature of the *Fourth Protocol to the GATS* (and other similar protocols used during the GATT 1947 and the WTO) has posed an intriguing legal problem for some

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[Nottage & Sebastian, "Giving Legal Effect"]; *Note on Incorporation of Commitments, supra* note 981 at paras 3-5; Footer, *An Institutional and Normative Analysis*, *supra* note 984 at 232. For a description of the processes used for GATT Tariff Negotiations, see Jackson, Davey & Sykes, *Legal Problems*, *supra* note 104 at 376-77. The following protocols were based on this model: *Annecy Protocol of Terms of Accession to the General Agreement on Tariffs and Trade,* Denmark, the Dominican Republic, Finland, Greece, Haiti, Italy, Liberia, Nicaragua, Sweden, United States, and Uruguay,10 October 1949,62 UNTS 121, 64 Stat B139, TIAS 2100 (entered into force 1 January 1950); *Torquay Protocol, supra* note 140; *Sixth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade,* Australia, Austria, Belgium, Canada, Chile, Cuba, Denmark, Dominican Republic, Finland, France, Germany, Haiti, Italy, Japan, Luxembourg, Netherlands, Norway, Peru, Sweden, Turkey, the United Kingdom, Northern Ireland, and the United States, 23 May 1956, 244-46 UNTS, 7 UST 1085, TIAS 3591 (entered into force 30 June 1956); *Protocol to the General Agreement on Tariffs and Trade Embodying Results of the 1960-61 Tariff Conference*, 16 July 1962, 440 UNTS 1 (entered into force 15 August 1962); *Geneva Protocol to the General Agreement on Tariffs and Trade,* 30 June 1979, 1194 UNTS 152, BISD 26S/3 (entered into force 1 January 1980); GATT 1994, *supra* note 262.

[992] *Text of the Fourth Protocol to the GATS, supra* note 961 at para 3. The latter case happened and it was decided that the Protocol would enter into force on 5 February 1998, see: *Council for Trade in Services Meeting of 26 January 1998, supra* note 973 at paras 4-7. The *Fourth Protocol to the GATS* was adopted by 70 Members and ratified by 68 Members. It entered into force on 5 February 1998 for 58 Members, which all had ratified and accepted it, see: *Status of Acceptance of the Fourth Protocol to the GATS*, *supra* note 972. As of April 2015, ten more acceptances have been received (for a total of 68 acceptances), see: *supra* notes 975-977 and accompanying text. Two Members, Brazil and Guatemala, have still not accepted the Fourth Protocol to the GATS.

[993] Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 996.

[994] Footer, *An Institutional and Normative Analysis*, *supra* note 984 at 221; *Ibid* at 996-97.

scholars.[995] What type of instrument exactly is the *Fourth Protocol to the GATS*? Considering that the *Fourth Protocol to the GATS* entered into force by means of acceptance and ratification, it leaves out the possibility that it would consist of any type of decisions under Article IX of the *WTO Agreement* that take effect immediately upon adoption by consensus or by vote of the Members and that are not subject to acceptance and ratification. Thus, the only possibility that is left is that it was an amendment or a plurilateral agreement pursuant to Article X of the *WTO Agreement,* which require acceptance and ratification.[996]

Can the *Fourth Protocol to the GATS* be considered to be an amendment? The answer is most likely not, due to the fact that the procedures for amendment under Article X have not been followed.[997] Article X:1 provides that a proposal to amend the provisions of one of the Multilateral Trade Agreements in Annex 1 (which includes the GATS) must be approved by the Ministerial Conference (or the General Council[998]) before being submitted to the Members for acceptance. However, in the case of the *Fourth Protocol to the GATS,* the text of the protocol and the services schedules attached to it was adopted by the Council for Trade in Services (as well as the GBT), not by the General Council or the Ministerial Conference.[999] In addition Article X provides for different amendment procedures depending upon the specific provisions subject to amendment. In the case of the *Fourth Protocol to the GATS,* the modifications concerned Members' services schedules[1000], which according to Article XX:3 of the GATS are annexed to the GATS. Following Article X:5 of the *WTO Agreement,* amendments to the GATS annexes shall take effect upon acceptance by two thirds of the Members. In contrast, paragraph 3 of the *Fourth Protocol to the GATS* specifies that the Protocol would enter into force upon acceptance by "all Members concerned", or in the case where it would not be accepted by all Members concerned upon a certain date, it would be up to the Members that have accepted it to

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[995] See e.g. Footer, *An Institutional and Normative Analysis*, *supra* note 984 at 221-33; Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 996-97.
[996] *WTO Agreement, supra* note 1, Article X:7. For additional information on the legal methods of implementation under the WTO, see Chapter 2, Section 3.
[997] See Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 997.
[998] *WTO Agreement, supra* note 1, IV:2 (providing that the General Council shall carry the function of the Ministerial Conference in the intervals between the meetings of the Ministerial Conference).
[999] *Decision on Commitments in Basic Telecommunications, supra* note 962 at para 1; *Text of the Fourth Protocol to the GATS, supra* note 961; WTO, GBT, *Report of the Group on Basic Telecommunications,* WTO Doc S/GBT/4 (15 February 1997) at para 9, online: WTO < http://docs.wto.org > [*Report of the GBT of 15 February 1997*].
[1000] *Text of the Fourth Protocol to the GATS*, *supra* note 961 at para 1 (providing that Members' services schedules would be supplemented or modified upon the entry into force of the Protocol).

"decide . . . on its entry into force."[1001] Therefore, considering that the procedures followed for the implementation of the *Fourth Protocol to the GATS* did not comply with the requirements for amendments under Article X, it can be concluded that the *Fourth Protocol to the GATS* was not an amendment.[1002]

Alternatively, can the *Fourth Protocol to the GATS* be considered to be a Plurilateral Trade Agreement following Article X:9 of the *WTO Agreement*? At first glance, the *Fourth Protocol to the GATS* would appear to fit with the conditions of plurilateral trade agreement.[1003] Indeed, just like a Plurilateral Trade Agreement, it was negotiated within and ratified by a restricted group of Members (i.e. the participants in the NGBT and GBT that attached their schedules to the *Fourth Protocol to the GATS*). However, in contrast with the requirement of Article X:9 of the *WTO Agreement,* the participating Members did not request the Ministerial Conference (or the General Council) to add the *Fourth Protocol to the GATS* to Annex 4 of the *WTO Agreement.* For that reason, the possibility of the *Fourth Protocol to the GATS* to be considered as a Plurilateral Trade Agreement should be discarded.

Now, if the *Fourth Protocol to the GATS* is not a type of decision under Article IX, nor an amendment or a Plurilateral Trade Agreement pursuant to Article X of the *WTO Agreement,* what type of instrument is it? Some commentators who examined this issue concluded that it should be qualified as a self-standing treaty regarding the amendment or modification of the *WTO Agreement* in lines with Article 39 of the VCLT.[1004] Does it fit with the description of a self-standing treaty under the VCLT? It should be found that it does. In accordance with Articles 9 and 16 of the VCLT, the text of the *Fourth Protocol to the GATS* was adopted by the Council for Trade in Services and the GBT[1005], it was accepted and ratified by 68 Members through its deposit with the Director-General of the WTO[1006], and the Protocol was also registered in accordance with the provisions of Article 102 of the Charter of the United Nations.[1007]

[1001] *Ibid* at para 3.
[1002] See Nottage & Sebastian, "Giving Legal Effect", *supra* note 991.
[1003] For a description of the rules and procedures for Plurilateral Trade Agreements, see Chapter 2, Section 3.5.
[1004] See Footer, *An Institutional and Normative Analysis*, *supra* note 984 at 221; *Ibid* at 996-97.
[1005] *Decision on Commitments in Basic Telecommunications, supra* note 962 at para 1; *Text of the Fourth Protocol to the GATS, supra* note 961; *Report of the GBT of 15 February 1997,* supra note 999 at para 9.
[1006] *Text of the Fourth Protocol to the GATS, supra* note 961 at para 4. The *Fourth Protocol to the GATS* was adopted by 70 Members and ratified by 68 Members. It entered into force on 5 February 1998 for 58 Members,

Could the participating Members that attached their schedules to the *Fourth Protocol to the GATS* legally supplement or modify their services schedules that are annexed to the GATS on the basis of a self-standing treaty under the VCLT? Considering that only some and not all Members attached their schedules to the *Fourth Protocol to the GATS,* and therefore, participated in the agreement, Article 41 of the VCLT should apply, which specifically deals with agreements to modify multilateral treaties (i.e. the *WTO Agreement*) between certain of the parties only. Article 41 of the VCLT provides that two or more parties to a multilateral treaty (i.e. the *WTO Agreement*) may conclude an agreement to modify the treaty as between themselves alone under two circumstances. The first circumstance stated in Article 41(a) is in the case where the possibility of such a modification is provided for by the treaty.[1008] In the case of the *Fourth Protocol to the GATS*, it could be argued that the possibility for Members to supplement or modify schedules is insufficiently regulated in the *WTO Agreement.*[1009] Therefore, Article 41(a) of the VCLT would not apply considering that the possibility of such a modification is not explicitly provided for by the *WTO Agreement.*[1010] The second circumstance according to which a multilateral treaty can be modified by some parties between themselves, provided for in Article 41(b) of the VCLT, is when "the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution and purpose of the treaty as a whole."[1011] The supplementation and modification of the participating Members' services schedules did not affect the "enjoyment" of the non-participating Members' rights under the

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which all had ratified and accepted it, see: *Status of Acceptance of the Fourth Protocol to the GATS*, *supra* note 972. As of April 2015, ten more acceptances have been received (for a total of 68 acceptances), see: *supra* notes 975-977 and accompanying text. Two Members, Brazil and Guatemala, have still not accepted the Fourth Protocol to the GATS.

[1007] VCLT, *supra* note 110, Article 39; *Text of the Fourth Protocol to the GATS, supra* note 961 at para 5. In the context of the use of protocols for the incorporation of commitments resulting from negotiations into Members' GATS schedules, the WTO Secretariat defined the term 'protocol' as being "used to describe a legally binding international agreement that is less comprehensive than a 'treaty' or 'convention'", but that is "often used to supplement obligations in a treaty", see: *Note on Incorporation of Commitments, supra* note 981 at para 1, n 1. In public international law, the term 'protocol' "is used to refer not only to amending treaties but also to self-standing treaties", see: Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 996; Antony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 221 and 333.

[1008] VCLT, *supra* note 110, Article 41(a).

[1009] See *WTO Agreement, supra* note 1, Articles IX and X.

[1010] This was also argued by Professor Footer, see Footer, *An Institutional and Normative Analysis*, *supra* note 984 at 232-33.

[1011] VCLT, *supra* note 110, Article 41(b).

GATS. In contrast, as a result of the entry into force of the *Fourth Protocol to the GATS,* non-participating Members were able to benefit from additional concessions in the sector of basic telecommunications from their counterparts on a MFN basis without providing any reciprocal commitments in exchange.[1012] In addition, as provided for by Article 41(b)(ii) of the VCLT, the supplementation and modification of the participating Members' schedules did not impair in any way the effective execution and purpose of the treaty as a whole.[1013] As a result, it should be assumed that the participating Members could legally modify and supplement their services schedules on the basis of a self-standing treaty following the terms of Article 41 of the VCLT.[1014]

In summary, as to the legal status and effect of the *Fourth Protocol to the GATS,* it was found that the legal basis for the negotiations on basic telecommunications that led to the adoption of the *Fourth Protocol to the GATS* derived from the *Ministerial Decision on Negotiations on Basic Telecommunications*[1015] and the *Annex on Negotiations on Basic Telecommunications*[1016] which were attached to the GATS. Considering that these instruments did not specify a legal means to implement the results of the negotiations (other than the fact that they had to be inscribed in the participating Members' services schedules[1017]) and that the *WTO Agreement* does not specifically provide for the possibility to supplement or modify schedules, the participating Members to the *Fourth Protocol to the GATS* could legally use a self-standing treaty following the terms of Articles 39 and 41 of the VCLT to implement the results of their negotiations on basic telecommunications.

[1012] GATS, *supra* note 229, Article II. See also Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 33-35.
[1013] See GATS, *supra* note 229, preamble (providing that Members wish "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners. . ." and desire "the early achievement of progressively higher levels of liberalization of trade in services. . . ").
[1014] See e.g. Panel Report, *Japan − Measures Affecting Consumer Photographic Film and Paper,* WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179 (suggesting that Article XXVIII*bis* of the GATT, which concerned further tariff negotiations, provides the legal authority for Members to modify schedules through protocols as it "provides a legal basis for Members to reduce and bind tariffs on a mutually advantageous (i.e. multilateral) basis" at para 10.69). See also Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 997.
[1015] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940.
[1016] *Annex on Negotiations on Basic Telecommunications, supra* note 941.
[1017] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940 at para 6.

3.1.1.2. Legal effect and status of the Reference Paper

For its part, the Reference Paper contains provisions concerning the regulatory framework for the basic telecommunications services. It includes regulatory principles on competitive safeguards, commitments related to interconnection rights, universal service obligations, public availability of licensing criteria, commitments for independent regulators, and allocation of scarce resources.[1018] It was implemented through its inscription in some Members' services schedule, under the fourth column 'Additional Commitments.'[1019] A majority of Members incorporated the Reference Paper by inserting a comment in the fourth column of their services schedule to the effect that the Members "undertake the obligations contained in the reference paper attached hereto" in addition to including the text of the Reference Paper as an attachment to the schedule.[1020]

What is the legal status and effect of the Reference Paper? The Reference Paper has no legal status; it can be characterized as a policy document that served as a guideline for the scheduling of Members' individual regulatory commitments.[1021] There was no binding commitment arising from the Reference Paper *per se*. It became binding through its inscription in Members' schedules.[1022]

[1018] *Reference Paper, supra* note 954.

[1019] Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 1013. See the comments that were made at the formal meeting of the NGBT of 22 March 1996: *NGBT Meeting of 22 March 1996*, *supra* note 955 at para 5. Additional commitments can be made in Members' services schedules pursuant to GATS, *supra* note 229, Article XVIII.

[1020] See e.g. WTO, Trade in Services, *United States of America – Schedule of Specific Commitments, Supplement 3,* WTO Doc GATS/SC/90/Suppl.2 (11 April 1997) at 2, online: WTO <http://docs.wto.org>; WTO, Trade in Services, *European Communities and their Member States – Schedule of Specific Commitments, Supplement 3,* WTO Doc GATS/SC/31/Suppl.3 (11 April 1997) at 2, online: WTO <http://docs.wto.org>. See also *Note on Article XVIII, supra* note 944 at para 17; *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74.

[1021] See e.g. *NGBT Meeting of 22 March 1996*, *supra* note 955 at para 5; Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942 at 331; Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 1013.

[1022] The Reference Paper has been interpreted at one occasion by a panel in the *Mexico − Measures Affecting Telecommunications Services* case, which found that Mexico's Reference Paper (which is identical to the guideline as found in *Reference Paper, supra* note 954) was binding and that Mexico had failed to comply with its commitments under Sections 1.1 and 2.2(b) of its Reference Paper, see: Panel Report, *Mexico − Measures Affecting Telecommunications Services,* WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1579 [*Mexico − Telecoms*]. Mexico's services schedule, which was attached to the *Fourth Protocol to the GATS,* is reproduced in: WTO, GBT, *Draft Schedule on Basic Telecommunications Services, Revision* (communication from Mexico), WTO Doc S/GBT/W/1/Add.16/Rev.2 (14 February 1997), online: WTO <http://docs.wto.org> [*Mexico's Telecoms Schedule*].

Could the regulatory provisions contained in the Reference Paper be legally implemented through their inscriptions in Members' schedules under 'Additional Commitments'? Article XVIII of the GATS is the only provision that deals with the scheduling of additional commitments, it states:

> Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.[1023]

It is clear from the text of Article XVIII that Members are authorized to negotiate additional commitments and bind them in their schedules. However, Article XVIII does not specify a discipline applicable to the additional commitments that can be scheduled pursuant to it. It provides little assistance overall in understanding the scope of permissible additional commitments and, more specifically for the case at issue, whether permissible additional commitments may include regulatory principles as contained in the Reference Paper.[1024]

In order to shed some light on whether additional commitments under Article XVIII may include regulatory provisions, the following will analyze whether panels' or Appellate Body's decisions have clarified the issue (section 3.1.1.2.1) and interpret Article XVIII in light of Articles 31 and 32 of the VCLT (section 3.1.1.2.2).

3.1.1.2.1. *Panels' and Appellate Body's interpretation of Article XVIII*

To date, two disputes have been based on allegations of violations of 'additional commitments' under the GATS: *Mexico − Measures Affecting Telecommunications Services* (*Mexico − Telecoms*)[1025] and *United States − Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US − Gambling*).[1026]

[1023] GATS, *supra* note 229, Article XVIII.
[1024] For an excellent and comprehensive analysis of Article XVIII of the GATS, see: J Bradley Bigos, "Contemplating GATS Article XVIII on Additional Commitments" (2008) 42(4) J World Trade 723 [Bigos, "Contemplating GATS Article XVIII].
[1025] *Mexico − Telecoms, supra* note 1022.
[1026] Panel Report, *US − Gambling,* WT/DS285/R, as modified by Appellate Body Report, WT/DS285/AB/R, adopted 20 April 2005 [*US − Gambling*].

In the *Mexico − Telecoms* case, the United States alleged that Mexico had violated, *inter alia,* its commitments under the Reference Paper (attached in Mexico's services schedule[1027]) by adopting measures affecting telecommunications services. It appears that the practice of incorporating the Reference Paper in a Member's schedule remained undisputed. The Panel plainly confirmed the validity of Mexico's additional commitments contained in the Reference Paper, without undertaking an extensive analysis.[1028] In addition, there were no allegations (even from Mexico) that the disciplines in the Reference Paper exceeded the scope of Article XVIII or were inadequately implemented. In summary, the Panel's decision did not clarify the scope of the additional commitments permitted under Article XVIII; however it also did not question the validity of the implementation of these commitments in Mexico's schedule, under 'Additional Commitments'.[1029]

The *US − Gambling* dispute did not directly deal with Article XVIII of the GATS, but the Appellate Body stipulated that the *1993 Scheduling Guidelines*[1030] should constitute "supplementary means of interpretation for Article XVIII, including the preparatory work of the treaty and the circumstances of its conclusion", following the terms of Article 32 of the VCLT.[1031]

Considering that the dispute settlement organs have not proceeded with a full interpretation of Article XVIII in light of Articles 31 and 32 of the VCLT[1032], the following section will undertake such an interpretation in order to clarify whether Members can lawfully schedule regulatory commitments, such as those contained in the Reference Paper, under the 'Additional Commitments' column of their schedules.

[1027] See *Mexico's Telecoms Schedule, supra* note 1022.
[1028] *Mexico − Telecoms, supra* note 1022 at para 7.95.
[1029] See Bigos, "Contemplating GATS Article XVIII", *supra* note 1024 at 740-42.
[1030] GATT 1947, Group of Negotiations on Services, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note,* GATT 1947 Doc MTN.GNS/W/164 (3 September 1993), online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm> [*1993 Scheduling Guidelines*].
[1031] Appellate Body Report, *US − Gambling, supra* note 1026 at para 196.
[1032] Article 3.2 of the DSU provides that the WTO agreements should be clarified "in accordance with customary rules of interpretation of public international law", *see* DSU, *supra* note 241, Article 3.2. The Appellate Body has ruled that those rules are found in Articles 31 and 32 of the VCLT, see*:* Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R at 17-22, adopted 20 May 1996, DSR 1996:I, 3 (finding that Article 31 of the VCLT had attained the status of customary international law); *Japan − Taxes on Alcoholic Beverages, supra* note 349 (finding that Article 32 of the VCLT had attained the status of customary international law). For information on the Appellate Body's analytical methodology for interpreting the WTO agreements, see generally Jackson, Davey & Sykes, *Legal Problems, supra* note 104 at 306-26.

3.1.1.2.2. *Interpretation of Article XVIII in light of Articles 31 and 32 VCLT*

The first step of treaty interpretation is contained in Article 31(1) of the VCLT, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[1033] The Appellate Body has clarified that an interpretation pursuant to Article 31(1) should be "a holistic exercise that should not be mechanically subdivided into rigid components."[1034] In other words, there should not be "a sequence of separate tests to be applied in a hierarchical order" for each of the three elements to be considered for interpretation (i.e. the ordinary meaning of the terms of the treaty, its object and its purpose).[1035]

Article 32 of the VCLT provides the possibility to have recourse to "supplementary means of interpretation" in order to either "confirm the meaning resulting from the application of article 31" or to determine the meaning when such an interpretation "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."[1036] The supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion.[1037]

(a) ordinary meaning, object and purpose

What can be understood from the ordinary meaning of the terms of Article XVIII of the GATS? The text of Article XVIII of the GATS provides:

> Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI [related to market access] or XVII [related to national treatment], *including those regarding qualifications, standards or licensing matters*. Such commitments shall be inscribed in a Member's Schedule.[1038]

[1033] VCLT, *supra* note 110, Article 31(1).
[1034] Appellate Body Report, *European Communities − Customs Classification of Frozen Boneless Chicken Cuts,* WT/DS269/AB/R; WT/DS286/AB/R at para 176, adopted 27 September 2005.
[1035] Panel Report, *United States − Sections 301–310 of the Trade Act 1974,* WT/DS152/R at para 7.22, adopted 27 January 2000, DSR 2000:II, 815. See also See Bigos, "Contemplating GATS Article XVIII", *supra* note 1024 at 748.
[1036] VCLT, *supra* note 110, Article 32 VCLT.
[1037] *Ibid,* Article 32 VCLT.
[1038] GATS, *supra* note 229, Article XVIII [emphasis added].

What is clear from the text of the article is that Members are authorized to negotiate additional commitments. 'Commitment' is defined as "[t]he action of committing oneself or another to a course of action."[1039] As interpreted in the context of Article XVIII of the GATS, 'commitment' refers to the ability of Members to make promises or to undertake positive obligations.[1040] It is expressly specified that such commitments should *not* be *subject to scheduling* under market access (Article XVI) or national treatment (Article XVII) and should be *inscribed in a Member's Schedule.* This should be interpreted as meaning that additional commitments under Article XVIII should "relate to commitments that do not belong, or should not be scheduled, in other columns of a Member's Schedule"[1041], i.e. either under the "Limitations on market access" column (Article XVI) or the "Limitations on national treatment" column (Article XVII).[1042] In addition, Article XVIII stipulates that the additional commitments may concern "qualifications", "standards" or "licensing matters", but the use of the word "including" indicates that the list is not exhaustive and that other measures may be inscribed as additional commitments.[1043]

Following the general language used in Article XVIII, what does it say about the other measures that could be inscribed as additional commitments? As a starting point, "measure" is defined in the GATS as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form"[1044] which, according to Article XVIII, has to be *affecting trade in services*. As for the meaning of the word "affecting", in the context of an interpretation of Article I:1 of the GATS (which provides "[t]his Agreement applies to measures by Members affecting trade in services"[1045]), the Appellate Body has interpreted it broadly:

> In our view, the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a

[1039] *New Shorter Oxford English Dictionary on Historical Principles,* 5th ed, *sub verbo* "commitment".
[1040] See e.g. Bigos, "Contemplating GATS Article XVIII, *supra* note 1024 at 751.
[1041] *Ibid*; Joost Pauwelyn, "Rien ne Va Plus?: Distinguishing Domestic Regulation from Market Access in GATT and GATS" (2005) 4(2) World Trade Review 131 at 152 [Pauwelyn, "Rien ne Va Plus"]; Panagiotis Delimatsis, "Don't Gamble with GATS −The Interaction Between Articles VI, XVI, XVII and XVIII GATS in the Light of the US−Gambling Case" (2006) 40(6) J World Trade 1059 at 1075 [Delimatsis, "Don't Gamble with GATS"].
[1042] For an example of a GATS schedule, see e.g. *Mexico's Telecoms Schedule, supra* note 1022 at 2.
[1043] GATS, *supra* note 229, Article XVIII. See Rachel Frid, "The Telecommunications Pact Under the GATS − Another Step Towards the Rule of Law" (1997) 24(2) LIEI 67 at 81, n 54 [Frid, "The Telecoms Pact"]; Bigos, "Contemplating GATS Article XVIII, *supra* note 1024 at 751.
[1044] GATS, *supra* note 229, Article XXVIII(a).
[1045] *Ibid*, Article I:1.

> measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels[1046] that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing.' . . . For these reasons, we uphold the Panel's finding that there is no legal basis for an a priori exclusion of measures within the EC banana import licensing regime from the scope of the GATS."[1047]

In short, from a textual interpretation of Article XVIII, it can be inferred that Members may (i) negotiate additional commitments, (ii) which consist of promises or positive obligations, (iii) that do not concern the types of measures referred to in Articles XVI and XVII. Such measures can be (iv) in the form of a law regulation, rule, procedure, decision, administrative action, or any other form. They may (v) concern, not exclusively, qualifications, standards or licensing matters, but they can also (vi) go beyond this scope, as long as they (vii) have an impact on trade in services, interpreted broadly. Therefore, *a priori*, a textual analysis of Article XVIII suggests that the scope of the provision would be sufficiently broad to possibly open the door to the inclusion of regulatory measures affecting trade in services.

Can an analysis of the object and context of the GATS provide more clarity about the scope of commitments permissible under Article XVIII? The object and purpose of the GATS can be found in its preamble, which states that Members wish "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization. . . ."[1048] It can be deduced from this statement that the object and purpose of the GATS is to "expand trade in services and progressively liberalize restrictions thereon."[1049] In *US − Gambling,* the Panel noted "[i]n designing the structure of the GATS, it appears that the drafters aimed at liberalizing such restrictions through the provisions of Part III of the Agreement, which is comprised of Article

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[1046] In the GATT 1947 case *Italian Discrimination Against Imported Agricultural Machinery,* the Panel interpreted the word "affecting" in Article III:4 of the GATT 1947 as follows: "The selection of the word "affecting" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition. . .", see: GATT 1947 Panel Report, *Italian discrimination Against Imported Agricultural Machinery,* L/833 at para 12, 15 July 1958, online: WTO <http://www.wto.org/english/docs_e/gattdocs_e.htm>.

[1047] Appellate Body Report, *European Communities −Regime for the Importation, Sale and Distribution of Bananas,* WTO/DS27/AB/R at para 220, adopted 25 September 1997, DSR 1997:II, 589.

[1048] GATS, *supra* note 229, preamble.

[1049] Bigos, "Contemplating GATS Article XVIII, *supra* note 1024 at 758.

XVI ("Market Access"), Article XVII ("National Treatment") and Article XVIII ("Additional Commitments")."[1050] Following this interpretation, it could be safe to say that Article XVIII is "intended to further the object and purpose of promoting, and liberalizing restrictions on, trade in services."[1051] In such case, it would then appear compatible that Article XVIII authorizes the scheduling of additional commitments with respect to measures regarding regulatory principles.

In summary, following an interpretation pursuant to Article 31 of the VCLT, it can be presupposed *a priori* that the scheduling of regulatory principles fall within the scope of Article XVIII. Nevertheless, in this context, it seems particularly useful to have recourse to supplementary means of interpretation under Article 32 of the VCLT to confirm or clarify the meaning resulting from the application of Article 31.

(b) supplementary means of interpretation

As mentioned in section 3.1.1.2.1 above, the Appellate Body noted that the *1993 Scheduling Guidelines*[1052] should be considered as supplementary means of interpretation under Article 32 of the VCLT.[1053] In addition, in a similar manner, the *Guidelines for the Scheduling of Specific Commitments Under the GATS (2001 Scheduling Guidelines)*[1054], as well as the Secretariat's Note on *Additional Commitments Under Article XVIII of the GATS (Note on Article XVIII)*[1055] could also be categorized as supplementary means of interpretation.[1056]

The *1993 and 2001 Scheduling Guidelines* explain that additional commitments under Article XVIII of the GATS "include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with Article VI."[1057] Moreover, they stipulate that additional commitments are to

[1050] Panel Report, *US − Gambling, supra* note 1026 at para 6.310.
[1051] Bigos, "Contemplating GATS Article XVIII, *supra* note 1024 at 758-60 (for a thorough analysis of the object and purpose of the GATS in light of Article XVIII).
[1052] *1993 Scheduling Guidelines, supra* note 1030.
[1053] Appellate Body Report, *US − Gambling, supra* note 1026 at para 196.
[1054] WTO, Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under the GATS* (adopted on 23 March 2001), WTO Doc S/L/92, online: WTO <http://docs.wto.org> [*2001 Scheduling Guidelines*].
[1055] *Note on Article XVIII, supra* note 944.
[1056] VCLT, *supra* note 110, Article 32 (providing that "supplementary means of interpretation" include the preparatory work of the treaty and the circumstances of its conclusion). See also Bigos, "Contemplating GATS Article XVIII, *supra* note 1024 at 761; Delimatsis, "Don't Gamble with GATS", *supra* note 1041 at 1075 and n 71.
[1057] *1993 Scheduling Guidelines, supra* note 1030 at para 12; *2001 Scheduling Guidelines, supra* note 1054 at para 19.

be "expressed in the form of undertakings, not limitations."[1058] The *2001 Scheduling Guidelines* also specify that "[s]ince schedules, including footnotes, headnotes and attachments, are a record of legal commitments, nothing should appear in them which a Member does not intend to be legally binding."[1059] This confirms the textual interpretation of Article XVIII to the effect that the permissible additional commitments can extend beyond the scope of qualifications, technical standards, licensing requirements or procedures.[1060] Moreover, they should not be limitative and instead be in the form of binding positive obligations or undertakings.

As for the *Note on Article XVIII,* it provided the context in which Article XVIII was drafted:

> In drafting Part III of the GATS, the aim was to capture all types of trade restrictions and establish a mechanism for scheduling specific commitments on them. In Articles XVI and XVII, specific commitments are defined in a way that allows the identification of trade restrictions (in other words limitations). Therefore, if a Member undertakes a full market access or a national treatment commitment, it must not apply any measure which would be inconsistent with the provisions of those articles. Nonetheless, the drafters realized that there may be other types of restrictions which would not be captured by the disciplines of Articles XVI and XVII. . . . It was considered that such measures would mainly, but not exclusively, relate to qualifications, standards and licencing matters. At the same time, it was not possible to arrive at a clear definition of the restrictive nature of such measures so that disciplines similar to those of Articles XVI and XVII could be established. It was therefore considered best to simply provide a legal framework for Members to negotiate and schedule specific commitments which they would define, on a case-by-case basis, in relation to any measures which do not fall within the scope of Article XVI or XVII. That framework was provided in Article XVIII. . .[1061]

This explanation of the drafting history of Part III of the GATS indicates that it was intentional to leave the scope of Article XVIII broad and to not attach a specific discipline to it.[1062] Indeed, the intention was to provide a legal framework, which would be sufficiently broad to allow

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[1058] *Ibid.*
[1059] *2001 Scheduling Guidelines, supra* note 1054 at para 3.
[1060] Delimatsis, "Don't Gamble with GATS", *supra* note 1041 at 1075.
[1061] *Note on Article XVIII, supra* note 944 at para 3.
[1062] Bigos, "Contemplating GATS Article XVIII, *supra* note 1024 at 737 and 762 ("[A]s the *Note on Article XVIII* stated that Part III on the GATS was intended to cover all restrictions on trade, the language 'measures affecting trade in services' in Article XVIII is very broad, if not limitless." at 737).

Members to negotiate and schedule specific commitments, which they would define among themselves, on a case-by-case basis.[1063]

In summary, from an interpretation of Article XVIII of the GATS pursuant to Articles 31 and 32 of the VCLT, it appears that Members can lawfully schedule binding regulatory measures under the "Additional Commitments" section of their services schedule, as long as they do not consist of limitations or concern the types of measures referred to in Articles XVI (market access) and XVII (national treatment) and providing that they have an impact on trade in services.[1064]

3.1.1.2.3. *Could the Reference Paper's regulatory provisions be legally implemented in Members' schedules?*

To the question as to whether the regulatory provisions contained in the Reference Paper were legally implemented through their inscription in Members' services schedules under 'Additional Commitments', it would appear that they were. First, in the *Mexico − Telecoms,* the validity of the implementation of the Reference Paper's commitments in Mexico's schedule was not put into question by either the Panel or the defendant (i.e. Mexico); instead, it was taken for granted.[1065]

Second, from an interpretation of Article XVIII of the GATS in light of Articles 31 and 32 of the VCLT, it was concluded that the scheduling of regulatory measures is permissible within the scope of Article XVIII, so long as: (i) they do not consist of limitations; (ii) they do not consist

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[1063] Delimatsis, "Don't Gamble with GATS", *supra* note 1041 at 1075.
[1064] *Ibid* ("Article XVIII can also be considered as a *passage obligé* for those Members, that, instead of waiting for the development of disciplines under Article VI, would like to undertake liberalization commitments, unilaterally or commitments that are the outcome of bilateral/plurilateral negotiations." at 1075); Pauwelyn, "Rien ne Va plus", *supra* note 1041 ("[D]omestic regulations addressing the quality of a service or its supplier . . . are addressed predominantly in Articles VI, XVII and XVIII of the GATS." at 136 "Comparable with the SPS and TBT agreements for trade in goods, Articles VI and XVIII of GATS add further discipline for domestic service regulations, in particularly those that are *not* discriminatory." at 137 [emphasis in the original]); Peter C Evans, "Strengthening WTO Member Commitments in Energy Services: Problems and Prospects" in Aaditya Mattoo & Pierre Sauvé, eds, *Domestic Regulation and Service Trade Liberalization* (Washington, DC: World Bank, 2003) 167 ("GATS Article XVIII provides a means for countries to negotiate additional commitments not covered by the basic GATS framework. The provision grew from the recognition that MFN, market access, and national treatment disciplines were not necessarily sufficient to ensure the full benefits of trade liberalization." at 177); Rudolf Adlung, "Services Negotiations in the Doha Round: Lost in Flexibility?" (2006) 9(4) J Int'l Econ L 865 ("Article XIII expressly exempts government purchases of services from the application of Articles II (MFN), XVI (Market Access), and XVII (National Treatment) but not from Article XVIII. Could the latter thus serve as a vehicle for the adoption of procurement-related disciplines? It is difficult to see how [the] non-applicability [of Articles II and XVI] to procurement transactions . . . could change their scope and their relationship with Article XVIII." at 890, n 54); Bigos, "Contemplating GATS Article XVIII", *supra* note 1024 at 762.
[1065] See *Mexico − Telecoms, supra* note 1022 at para 7.95.

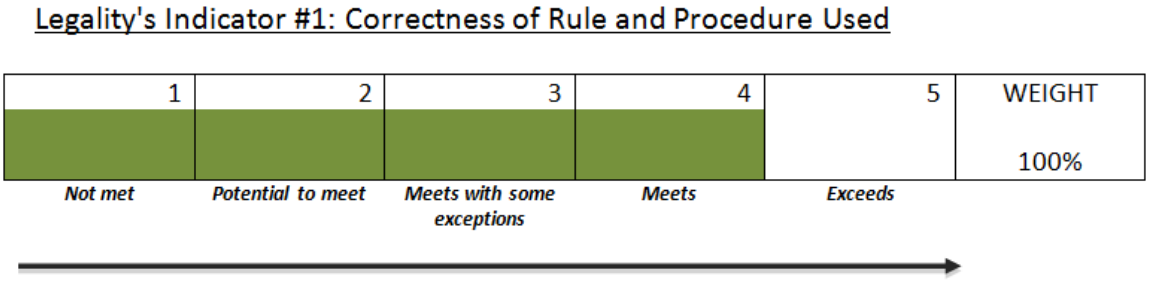
of measures referred to in Articles XVI (market access) and XVII (national treatment); and (iii) they have an impact on trade in services.

These conditions are consistent with the provisions of the Reference Paper, which do not fall within the scope of Articles XVI and XVII. In addition, they have an impact on telecommunications services and do not consist of limitations, but instead take the form of positive undertakings. Indeed, Section 1 of the Reference Paper provides that appropriate measures should be taken to prevent anti-competitive practices in telecommunications services. Section 2 stipulates that interconnection should be provided under pro-competitive and transparent terms. Section 4 provides that the licensing criteria and the terms and conditions of individual licences should be made publicly available. Finally, Sections 3, 5 and 6 require that the universal service obligation, the regulatory body and the procedures for the allocation and use of scare resources should be administered, *inter alia,* in a transparent, objective and non-discriminatory manner. As a result, it can be concluded that the Reference Paper's regulatory provisions were lawfully implemented through their scheduling in Members' services schedules, under the 'Additional Commitments' column.

3.1.1.3. Attribution of a score: *Legality − Correctness of rule and procedure*

Legality − Correctness of rule and procedure evaluated the following standard: *Was the correct rulemaking rule or procedure followed for the creation of the specific rule or agreement?* The *Basic Telecoms Agreement* was composed of two main documents: (i) the *Fourth Protocol to the GATS*, a self-standing treaty to which was attached some Members' schedules which aimed to supplement or modify their existing services schedules; and (ii) the Reference Paper, which consisted of a guideline for scheduling Members' individual regulatory commitments. It was concluded that it was legally correct to supplement or modify some Members' schedules pursuant to the *Fourth Protocol to the GATS* due to the fact that its legal basis derived from the *Ministerial Decision on Negotiations on Basic Telecommunications* and the *Annex on Negotiations on Basic Telecommunications,* and that the *WTO Agreement* does not specifically provide for the possibility to supplement or modify schedules. In addition, it was found that it was correct to implement the regulatory provisions contained in the Reference Paper pursuant to their inscription in each Member' services schedule, under 'Additional Commitments',

considering that they fall under the scope of Article XVIII of the GATS. As a result, *Legality − Correctness of rule and procedure,* i.e. the first and only indicator of legality, should be attributed a score of 4/5 (i.e. '*performance consistently met the indicator's standards*').



3.1.2. Overall performance of the criterion of legality

The criterion of legality is composed of only one indicator of legitimacy. Therefore, the score of the latter (i.e. 4/5) corresponds to that of the criterion of legality as a whole. As a result, it can be concluded that the performance of the Basic Telecoms Case *consistently met the standards* of the criterion of legality.

CASE STUDY #2: BASIC TELECOMS AGREEMENT									
CRITERION	**Indicator**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
LEGALITY	Ind #1	100						4
	Rating	100						4/5
RATING STANDARD	*Performance consistently met the standards of the legitimacy criterion*							**4/5**

3.2. Effectiveness

The criterion of effectiveness is to be evaluated on the basis of three indicators of legitimacy:

(i) whether the final outcome addressed the mandated goal (Section 3.2.1);

(ii) whether the negotiated policy was brought into effect (Section 3.2.2); and

(iii) whether Members were able to reach consensus in a timely and effective manner (Section 3.2.3).

Each indicator of legitimacy will be evaluated in light of the original mandate contained in the *Ministerial Decision on Negotiations on Basic Telecommunications*, which provided that Members could enter into negotiations on a voluntary basis starting on 16 May 1994 until 30 April 1996, with a view to the progressive liberalization of trade in basic telecommunications.[1066] The date for the entry into force of the commitments resulting from the negotiations was left flexible and to be decided by the participating Members.[1067] In addition, although the negotiation of additional commitments on regulatory principles was not specifically provided for in the *Ministerial Decision on Negotiation on Basic Telecommunications* (but nonetheless implicitly permitted), the model schedule, that was drafted by an informal group of interested participants in the negotiations on basic telecommunications at the end of the Uruguay Round, comprised a number of regulatory issues that represented a "common understanding" of the scope of issues that would be subject to negotiations.[1068] The regulatory issues contained in the draft schedule will therefore also be considered as being an integral part of the mandate for negotiations on basic telecommunications.

The following sections proceed with the analysis of each of the three indicators of effectiveness.

3.2.1. Effectiveness − Mandate

Effectiveness' Indicator #1: Did the final negotiated outcome address the goal as set out in the negotiating mandate?

Effectiveness − Mandate analyzes whether the *Basic Telecoms Agreement* contributed to the progressive liberalization of trade in basic telecommunications, as mandated in the *Ministerial*

[1066] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940 at paras 1-2 and 7.
[1067] *Ibid* at para 5.
[1068] *Note on Article XVIII, supra* note 944 at paras 9-10; *Note by the Secretariat regarding Negotiations on Basic Telecoms, supra* note 945, Model Schedule of Commitments on Basic Telecommunications at 6-7 (These issues included: (i) safeguards against anti-competitive practices; (ii) procedures or requirements related to licensing, allotment of radio frequencies, numbering and identification codes, type of approval, and interconnection; (iii) pricing related measures; (iv) participation in the standards-setting process; and (v) rights of way for the construction of infrastructure).

Decision on Negotiations on Basic Telecommunications[1069] and whether it included the key issues that had been inscribed in the model schedule at the end of the Uruguay Round.[1070]

3.2.1.1. Did the Basic Telecoms Agreement address the goal set out in the Ministerial Decision on Negotiations on Basic Telecommunications and the regulatory issues included in the model schedule?

The *Basic Telecoms Agreement* was negotiated among 70 Members (representing 69 countries), both developed and developing, which, it was reported, accounted for over 90 percent of WTO Members' telecommunications revenues.[1071] Part of the deal comprised commitments on market access (section 3.2.1.1.1) and on pro-competitive regulatory principles (section 3.2.1.1.2). The following analyzes whether these commitments addressed the mandated objectives.

3.2.1.1.1. *Market access and national treatment commitments*

At the end of the Uruguay Round a number of countries had made some commitments in the value-added telecommunications services sector[1072]; however it represented only "a minor proportion" of the market.[1073] No agreement was reached on basic telecommunications (as defined as "the relay of voice or data from sender to receiver"[1074]) despite the fact that it

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[1069] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940 at paras 1-2.
[1070] *Note by the Secretariat regarding Negotiations on Basic Telecoms, supra* note 945*,* Model Schedule of Commitments on Basic Telecommunications at 6-7.
[1071] The range of services and technologies covered by the Basic Telecommunications Agreement extends from submarine cables to satellites, from wide-band networks to cellular phones, and from business intranets to fixed wireless for rural and underserved regions, see: Press/67, "Ruggiero congratulates governments", *supra* note 522; Drake & Noam, "The WTO Deal", *supra* note 522 at 800; Sherman, "Introductory Note", *supra* note 522 at 354; Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 486; Statement of Ambassador Barshefsky of 19 March 1997, *supra* note 522. But see Drake & Noam, "The WTO Deal", *supra* note 522 at 812-13 (arguing that the scope of the agreement "is being exaggerated.").
[1072] Value-added telecommunications services consist of "telecommunications for which suppliers 'add value' to the customer's information by enhancing its form or content or by providing for its storage and retrieval." They include: online data processing, online database storage and retrieval, electronic data interchange, email and voice mail, see: WTO, *Coverage of Basic Telecommunications and Value-Added Services,* online: WTO <http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_coverage_e.htm> [WTO, *Coverage of Basic Telecoms*].
[1073] Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 18-19.
[1074] Basic telecommunications encompass all communication services, both public and private "that involve end-to-end transmission of customer supplier information" and are provided through cross-border supply and through the establishment of foreign firms or commercial presence, including the ability to own and operate independent network infrastructure, see: WTO, *Coverage of Basic Telecoms, supra* note 1072 (Basic communications include: (a) voice telephone services; (b) packet-switched data transmission services; (c) circuit-switched data transmission services; (d) telex services; (e) telegraph services; (f) facsimile services; (g) private leased circuit services; (h) electronic mail; (i) voice mail; (j) online information and database retrieval; (k) electronic data interchange; (l) enhanced facsimile services (including store & forward, store & retrieve); (m) code and protocol conversion; (n)

accounted for the majority of the overall telecommunications market, especially with respect to the 'public voice telephony' subsector.[1075] As a result of the conclusion of the *Basic Telecoms Agreement,* the landscape of the commitments in telecommunications services sector dramatically switched.[1076] Indeed, 55 schedules of specific commitments (accounting for 69 governments[1077]) were attached to the *Fourth Protocol to the GATS*.[1078] The extent of the market access commitments that were made has been qualified as "significant."[1079]

With respect to market access, overall the *Basic Telecoms Agreement* authorizes foreign companies to provide local, long distance and international service, including all voice and data service, through any means of network technology. However, cross-border supply of telecommunications is not permitted. Foreign suppliers are given the possibility to build their own facilities to compete with established operators and also to re-sell existing network capacity (through private leased circuits).[1080] Table 5.1 shows the commitments that were made, distinguished into three separate subsectors: voice telephony services, other services, and value-added telecommunications services.

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online information and/or date processes (including transaction processing); (o) other (e.g. analog/ digital/ cellular/ mobile telephone services, mobile data services, paging, personal communication services, satellite-based mobile services (including telephony, data, paging and/or PCS), fixed satellite services, VSAT services, gateway earth station services, teleconferencing, video transport, trunked radio system services). Such classification of telecommunications services is used by Members for the purpose of scheduling commitments, see: Drake & Noam, "The WTO Deal", *supra* note 522 at 801-02; WTO, *Coverage of Basic Telecoms, supra* note 1072.

[1075] Public voice telephony can refer to "the commercial provision for the public or the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point", see: EC, *Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services,* [1990] OJ, L192; Pierre Larouche, *Competition Law and Regulation in European Telecommunications* (New York: Bloomsbury Publishing, 2000) at 10.

[1076] Lee Tuthill, "The GATS and New Rules for Regulators" (1997) 21(9-10) Telecommunications Policy 783 [Tuthill, "The GATS"] (the results of the basic telecommunications negotiations "illustrate the dramatic scope of regime changes." at 783).

[1077] The EC and its Member States presented a single schedule.

[1078] WTO, *Highlights of the Basic Telecommunication Commitments and Exemptions,* online: WTO <http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_highlights_commit_exempt_e.htm#country> [*Basic Telecoms Highlights*]. The schedules that were attached to the *Fourth Protocol to the GATS* can be found in *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74.

[1079] Drake & Noam, "The WTO Deal", *supra* note 522 ("[M]any governments ended up offering 'roll back' concessions that commit them to go further than their existing domestic liberalization programs, albeit for developing countries often on a phased in basis." at 803). See also Tuthill, "The GATS", *supra* note 1076 at 783.

[1080] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 487.

Which Members made commitments and to what degrees? Most industrialized countries[1081] undertook commitments to provide market access via all the relevant modes of supply in the voice telephony[1082] and other services sectors, as detailed above. However, certain important players on the telecommunications market retained some limitations on equity ownership (especially in traditional national carriers), such as Canada, France, Israel, Japan and Korea. Other less affluent countries like Spain, Greece and Portugal delayed the implementation of their commitments.[1083]

Table 5.1: Commitments by Subsectors in the *Basic Telecoms Agreement*

Voice Telephony Services (Commitments in 49 schedules, for 63 governments)	Other Services	Value-added Telecommunications Services
• International voice services Commitments in 45 schedules (for 59 governments) • National long-distance services Commitments in 41 schedules (for 55 governments) • Local services Commitments in 44 schedules (for 58 governments) • Resale of public voice telephone Commitments in 30 schedules (for 44 governments)	• Data transmission Commitments in 51 schedules (for 65 governments) • Cellular/mobile telephone Commitments in 48 schedules (for 62 governments) • Leased circuit services Commitments in 42 schedules (for 56 governments) • Other types of mobile services (personal communication services, mobile data, paging) Commitments in 48 schedules (for 62 governments • Mobile satellite services or transport capacity Commitments in 39 schedules (for 53 governments) • Fixed satellite services or transport capacity Commitments in 38 schedules (for 52 governments)	• Value-added telecommunications services (e.g. e-mail, online data processing or database retrieval) Commitments in 10 schedules (10 governments)
*The data regarding Members' commitments by subsector is taken from informal tabulations prepared by the WTO Secretariat, which does not provide authoritative and complete information on commitments in the telecommunications services, see: <http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_highlights_commit_exempt_e.htm#country>.		

[1081] Referring to Members of the OECD, with the exception of Estonia, Slovenia, Switzerland and Turkey. For a list of the OECD Members, see: OECD, *Members and Partners,* online: OECD <http://www.oecd.org/about/membersandpartners/#d.en.194378>.
[1082] With the exception of the resale of public voice telephone for some Members.
[1083] Drake & Noam, "The WTO Deal", *supra* note 522 at 804; *Basic Telecoms Highlights, supra* note 1078.

It has been noted that the most "notable commitments" came from the then "newly industrialized countries", Chile and Mexico, which liberalized to the furthest extent by committing to full competition, with the exception of local telephony in Chile and some equity limits in Mexico.[1084] Other countries, such as Brazil, India, Indonesia, Malaysia, South Africa, Thailand and Turkey did not liberalized to the same extent as their counterparts. Their commitments were "carefully circumscribed" and, in some cases, "very limited", having the effect of opening certain market segments while reserving some or all of voice telephony for companies that had already been granted exclusive rights.[1085]

As for the then emerging markets of Eastern Europe, such as Bulgaria, Czech Republic, Hungary, Poland, Slovak Republic and Romania, they also made "notable but limited commitments" and delayed further or complete liberalization to sometime in the period 2000-2004.[1086] Unexpectedly, some of the largest leaps forward were made by lower-income developing countries. El Salvador liberalized more than its most industrialized counterparts and undertook to provide full competition immediately. Other small developing countries offered "the usual liberalization of specific markets"; however they promised to open themselves to full or near full competition later: Peru in 1999, Venezuela in 2000, Bolivia in 2001, Morocco in 2001, Mauritius in 2004, Grenada in 2006, Côte d'Ivoire in 2007, Trinidad and Tobago in 2010, and Jamaica in 2013.[1087]

In addition, the commitments extended to the services provided through the establishment of foreign firms or commercial presence, including the ability to acquire shares in domestic telecommunications operators, which consisted of one of the key commitments demanded by the United States for obtaining a critical mass of market access.[1088] A total of 56 governments (i.e. 42 out of the 55 schedules attached to the *Fourth Protocol to the GATS*) made commitments to permit foreign ownership or control of all telecommunications services and facilities. The United States Trade Representative estimated that these 56 governments then accounted for 97 percent

[1084] Drake & Noam, "The WTO Deal", *supra* note 522 at 804.
[1085] *Ibid* ("In some such cases, promises were often made to review the situation after the year 2000 or the passage of new national laws." at 804).
[1086] *Ibid* at 804.
[1087] *Ibid* at 805.
[1088] Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 22; Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 487.

of the total basic telecommunications services revenue of WTO Members.[1089] However, that being said, certain significant WTO Members, including important players on the telecommunications market, have retained a number of limitations on foreign investment, including: a foreign investment limit or no commitment at all[1090]; foreign investment limits on certain services[1091]; and limits on foreign participation in the local incumbent telecommunications operator.[1092]

What can be said about the quality of the outcomes of the *Basic Telecoms Agreement*? On the one hand, some could argue that the various limitations and phase-in periods as described above adversely impacted the outcome of the agreement, which did not immediately result "in a harmonized and rigorous level of liberalization across all participating countries."[1093] Indeed, a large number of commitments on public voice telephone services (approximately 40 percent, i.e. for 26 out of the 62 governments) were phased-in beyond the date of the entry into force of the *Fourth Protocol to the GATS* on 1 January 1998.[1094] On the other hand, it should be highlighted that the three largest players in the telecommunications sector, i.e. the United States, the EC and Japan which, it was reported, accounted between them for nearly 75 percent of world telecoms revenues, completely opened their market to domestic and foreign competition immediately upon the entry into force of the agreement in 1998.[1095]

Overall, it should be concluded that the commitments bound in the schedules attached to the *Fourth Protocol to the GATS* contributed to the "progressive liberalization of trade in basic telecommunications" as mandated by the *Ministerial Decision on Negotiations on Basic*

[1089] Statement of Ambassador Barshefsky of 19 March 1997, *supra* note 522.
[1090] This was notably the case of India, South Africa, Turkey and many Asian countries, such as Malaysia, the Philippines and Thailand, see: Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 22.
[1091] This was the case of important players in the telecommunications market, such as Brazil, Canada, France, Israel, Mexico and Portugal, see: *ibid* at 22.
[1092] This was notably the case of Australia, Japan and New Zealand. Moreover, considering that the privatization of State-owned enterprises falls outside of the scope of the GATS, the *Fourth Protocol to the GATS* did not contain any commitments with respect to the privatization of State-owned telecommunications operator. This has the effect of limiting the impact of commitments to open markets to foreign investment due to the fact that the local telecommunications operator may "remain untouchable for foreign investors as long as the State does not decide to privatize it.", see: *ibid* at 22; Frid, "The Telecoms Pact", *supra* note 1043 at 79-80.
[1093] Drake & Noam, "The WTO Deal", *supra* note 522 at 805 and 812-17 (providing a critique of the outcomes).
[1094] *Basic Telecoms Highlights*, *supra* note 1078; Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 21 ("for instance: Spain (December 1998), Ireland, Portugal, Argentina and Singapore (2000), as well as Greece 2003").
[1095] Frid, "The Telecoms Pact", *supra* note 1043 at 89; Drake & Noam, "The WTO Deal", *supra* note 522 at 812.

Telecommunications.[1096] The mandated goal did not specify any specific degree of liberalization in trade in basic telecommunications services. However a considerable number of Members (i.e. 70 Members), accounting for over 90 percent of world telecoms revenues made market access and national treatment commitments, which extended to all WTO Members on a MFN basis.[1097] In addition, it was reported that the achievement was "warmly welcomed by consumers and suppliers of basic telecommunications services."[1098] As a result, it can be found that the market access outcomes of the *Basic Telecoms Agreement* even surpassed the scope envisioned in the original mandate for negotiations.[1099] What about the regulatory commitments, did they achieve the mandated scope in the model schedule?

3.2.1.1.2. *Additional commitments on regulatory principles*

The model schedule comprised a number of regulatory issues, which represented a common understanding of the scope of the issues that would be subject to negotiations. These issues included: (a) safeguards against anti-competitive practices; (b) procedures or requirements related to licensing, allotment of radio frequencies, numbering and identification codes, type of approval, and interconnection; (c) pricing related measures; (d) participation in the standards-

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[1096] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940 at paras 1-2.
[1097] GATS, *supra* note 229, Article II. Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 33-35.
[1098] This was reported by United States Trade Representative Laura B Sherman, who was the chief lawyer for the United States during the basic telecommunications negotiations, see: Sherman, "Introductory Note", *supra* note 522 at 354, citing Anne Swarson & Paul Blustein, "Trade Group Reaches Phone Pact", *Washington Post* (16 February 1997) A33.
[1099] One of the most major critiques of the *Basic Telecoms Agreement* is that it does not eliminate the accounting rate system. Although such a commitment was not specifically instructed in the mandate for negotiations, it corresponded to a demand by the United States, see Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 11 (defining the problem of accounting rates as follows: the national telecommunications operators (TOs) of the countries "alone collects a fee from the caller (collection rate between the two TOs, an 'accounting rate' is agreed. For each minute of international traffic, the TO of the originating country will then owe a fraction of the accounting rate (usually half, called the 'settlement rate,) to the TO of the terminating country, in order to compensate the latter for the completion of the international call. . . . [A] central weakness of the current system is that accounting rates bear no relationship to either custom prices (collection rate) or underlying costs." at 10). See also Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 ("One problem still unresolved is given by the fact that the [*Basic Telecoms Agreement*] does not eliminate the accounting rate system. It neither replaces the accounting rate payments by a sender − keeps all approach or call termination fees, nor requires member states to reduce accounting rates slowly toward actual cost. Yet, 52 WTO members will not only allow for re-sale of leased lines, but also for infrastructure-based international competition. Thus, countries will be able to land their own lines in a foreign country, and avoid paying settlement rates. The promotion of competition will bring down the accounting rates at costs. Telecoms operators will be able to bypass the international accounting rate payments by using their own facilities in foreign markets to take their telecom traffic off the accounting rate system. However, this will take some years." at 489.); Frid, "The Telecoms Pact", *supra* note 1043 at 87-88.

setting process; and (e) rights of way for the construction of infrastructure.[1100] The following analyzes whether the scope of additional commitments that were made on regulatory principles correspond to that which was envisioned in the model schedule and whether they contributed overall to the progressive liberalization of trade in basic telecommunications as mandated by the *Ministerial Decision on Negotiations on Basic Telecommunications*.

(a) safeguards against anti-competitive practices

Sections 1 and 2 of the Reference Paper provide safeguards against anti-competitive practices, as was included in the model schedule, which scope goes beyond that of Article VIII of the GATS that applies strictly to monopolies. Indeed, Sections 1 and 2 extend more broadly to "major suppliers" that are defined as suppliers that have "the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market."[1101]

Members that attached the Reference Paper to their schedules are obligated to regulate major suppliers in two situations: (i) if they unilaterally try to obstruct competition on the market (Section 1 of the Reference Paper); and (ii) if they attempt to prevent entry competition (Section 2).[1102] Section 1 provides that WTO governments should take "appropriate measures" to prevent major suppliers from engaging in "anti-competitive practices."[1103] It spells out in examples three specific practices that can be referred as being anti-competitive: (i) engaging in anti-competitive cross-subsidization (i.e. "the use of profits derived from one area of operations in order to finance another area (presumably loss-making)"[1104]); (ii) using information obtained from competitors with anti-competitive results; and (iii) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially

[1100] *Note by the Secretariat regarding Negotiations on Basic Telecoms, supra* note 945*,* Model Schedule of Commitments on Basic Telecommunications at 6-7.
[1101] *Reference Paper, supra* note 954, Definitions, "major supplier".
[1102] *Ibid,* Sections 1 and 2. See also Olga Batura, "The WTO Legal Framework for Telecommunications Services and Challenges of the Information Age" in Christoph Herrmann, Markus Krajewski & Jörg Philipp Terhechte, eds, *European Yearbook of International Economic Law 2014* (Berlin: Springer, 2013) 201 at 222 [Batura, "The WTO Legal Framework for Telecommunications"].
[1103] *Reference Paper, supra* note 954, Section1.1.
[1104] Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 27.

relevant information which are necessary for them to provide services.[1105] Some commentators have criticized these provisions for not being sufficiently detailed.[1106] For instance, for cross-subsidization provisions to be truly effective, major suppliers would need to create separate subsidiaries with independent administration and accounting operations − details concerning which the Reference paper remains silent.[1107] Moreover, to effectively ensure that major suppliers do not use information obtained from competitors with anti-competitive purposes, the Reference Paper should have stipulated the requirement to take "structural measures such as the legal separation of business divisions operating in different markets."[1108] As for the obligation to provide technical information about essential facilities and commercially relevant information, this provision goes beyond the scope of general competition law, but is particularly useful in the telecommunications sector due to the dependence of new providers upon former monopolists' infrastructures: "[a]s long as competitors remain dependent on the technical infrastructure (an essential facility) of the former monopolist to offer their services, they need to know certain things about this infrastructure and about the plans the incumbent has with this infrastructure."[1109]

Due to the fact that new telecommunications providers do not own a universal network, their entry in competition in the basic telecommunications sector depends upon interconnecting their network with those of different providers (especially major suppliers) in order to allow "a direct

[1105] *Reference Paper, supra* note 954, Section 1.2.
[1106] Batura, "The WTO Legal Framework for Telecommunications", *supra* note 1102 at 224.
[1107] See Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 489-90; Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 27 ("In order to be able to monitor whether any cross-subsidization occurs, one of the first regulatory elements required is that major supplier in question implement an appropriate accounting system, with regular reporting and disclosure requirements. Given the size and service portfolios of large telecommunications companies, it is otherwise almost impossible to prove that cross-subsidization has occurred. Yet the [Reference Paper] is silent on this issue, which leads one to doubt the effectiveness of a general commitment to prevent cross-subsidization without more." at 27 [footnotes omitted]); Frid, "The Telecoms Pact", *supra* note 1043 at 85.
[1108] Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 27-28 ("In the course of supplying leased lines to its data communications competitor, a [telecommunications operator] would likely to obtain information from the competitor which is often precise enough to identify the customers of the competitor or to guess the intentions of a competitor. If that information is relayed to the data communications division of the TO, it can be used for anti-competitive purposes." at 27).
[1109] Marco CEJ Bronckers, "The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?" in Bronckers & Quick, *supra* note 102, 371 at 377 [Bronckers, "The WTO Reference Paper"]; Frid, "The Telecoms Pact", *supra* note 1043 at 85.

contact between a provider and customer of another provider." [1110] As a result, Section 2 imposes an obligation on governments to ensure that major suppliers cooperate with foreign providers of telecommunications upon request and open their public network to them under non-discriminatory and reasonable terms.[1111] However, it has been noted that the Reference Paper could have included a provision to force "local exchange carriers to offer to other telecommunications carriers the same terms and conditions as those offered under existing interconnection agreements", as provided for in the U.S. Telecommunications Act of 1996.[1112]

(b) non-discrimination and transparency of procedures and requirements

The Reference Paper includes several provisions concerning the non-discrimination and transparency of procedures and requirements going beyond the scope of Articles II and III of the GATS (about transparency) and Articles 4 and 5 of the *Annex on Telecommunications*[1113] with respect to the following issues that were included in the model schedule: licensing, allotment of radio frequencies, numbering and identification codes, interconnection and rights of way for the construction of infrastructure. These provisions are key to ensure fair and equitable terms for foreign providers' entry in competition.[1114] Sections 2.3 and 2.4 provide that the procedures applicable for interconnection should be made publicly available and that major suppliers must make publicly available their interconnection agreements or reference interconnection offers.

Section 4 stipulates that where a licence is required, the licensing criteria, including the period of time normally required to reach a decision concerning an application for a licence and the terms and conditions of individual licences, should be made publically available. However, it fails to provide additional regulations that could prevent licensing from becoming a substantial barrier to cross-border trade, such as: prohibition of restrictions on the number of licences granted by

[1110] Batura, "The WTO Legal Framework for Telecommunications", *supra* note 1102 at 222; *Reference Paper, supra* note 954, Section 2.1. See also Bronckers, "The WTO Reference Paper", *supra* note 1109 ("As new entrants will not be able (at least not in the foreseeable future) to build such extensive networks on their own, access to the existing public network makes it possible for new suppliers to offer competing services." at 378); Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 481.
[1111] *Reference Paper, supra* note 954, Section 2.2. See also, Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 481.
[1112] Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 29, citing *Telecommunications Act of 1996*, 45 USC §252(1) (1996).
[1113] *Annex on Telecommunications,* reprinted in *The Results of the Uruguay Round, supra* note 13, 314.
[1114] See e.g. Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 481.

national regulators[1115], defining the situations in which a licence can be required, circumscribing the terms and conditions which should or should not be found in a licence, mutual recognition of licences, etc.[1116]

Finally, Section 6 provides that any procedures for the allocation and use of scarce resources, which include the allotment of radio frequencies, the numbering and identification codes and rights of way for the construction of infrastructure, must be carried out in an objective, timely, transparent and non-discriminatory manner. Moreover, the current state of allocated frequency bands must be made publicly available.[1117] However, one critique of this provision is the fact that it does not prescribe "rules on actual policies" for allocating these resources.[1118]

(c) pricing related measures

With respect to issue of pricing as provided for in the model schedule, Sections 2.2 (b) and (c) stipulate that interconnection prices should be "cost oriented". This provision is essential to prevent major suppliers from charging "prohibitive interconnection rates" to their competitors, which could severely impede their entry into competition.[1119] However, there is no definition of cost-orientation and no further details are provided regarding this measure which leaves the meaning of this provision unclear. This has actually been the object of some criticisms in the literature due to the fact that governments use different methods for allocation of costs of interconnection, which may in certain cases be higher than the actual economic cost of interconnection.[1120] The ambiguity of this provision has also been the focus of the *Mexico – Telecoms* case, where the Panel applied a restrictive interpretation of these provisions and

[1115] See *ibid* (Restricting the number of licences granted by naional regulators "can be used by governments to impede market entry of foreign firms." at 490).
[1116] Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 30 ("the GATS only contains a mere encouragement to mutual recognition of licences and a non-discrimination obligation" at 30); Batura, "The WTO Legal Framework for Telecommunications", *supra* note 1102 at 226.
[1117] *Reference Paper, supra* note 954, Section 6.
[1118] See Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 ("For example, firms and households do not have the right to retain their familiar telephone number automatically when changing to another telecom service provider. However, number portability is essential for meaningful competition, since businesses but also consumers face high costs when changing the number." at 490 [footnotes omitted]); Batura, "The WTO Legal Framework for Telecommunications", *supra* note 1102 at 226.
[1119] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 481.
[1120] Markus Fredebeul-Krein & Andreas Freytag, "The Case for a More Binding WTO Agreement on Regulatory Principles in Telecommunication Markets" (1999) 23(9) Telecommunications Policy 625 at 629; Frid, "The Telecoms Pact", *supra* note 1043 at 86-87.

concluded that the term "cost-oriented" should mean "the costs incurred in supplying the service" as determined by "long term incremental cost methodologies."[1121]

(d) omitted provisions from the model schedule: participation in the standards-setting process

Although the Reference Paper contains several provisions regarding the transparency of procedures and requirements related to the entry in competition, it does not provide a specific clause with respect to the participation in the standards-setting process as was inscribed in the model schedule.[1122] However, in the model schedule a footnote indicated that "[f]urther discussion is required to determine whether these measures [i.e. the participation in the standards-setting process] would need to be addressed in the context of the negotiations; if so, whether they are adequately covered by other provisions of the Agreement or whether they need to be addressed as additional commitments."[1123] This footnote should be interpreted as an indication that not all participants in the basic telecommunications negotiations shared the view that this measure should be addressed in the Reference Paper or that it should even fall under the scope of Article XVIII of the GATS (i.e. 'Additional Commitments').[1124] Therefore, it should be considered that a provision on 'participation in the standards-setting process' was not formally part of the mandate on regulatory commitments contained in the model schedule.

(e) additional provisions not contained in the model schedule: enforcement and universal service

The Reference Paper goes beyond the scope of the model schedule and provides for additional provisions with respect to enforcement and universal service which were not included in the model schedule. Indeed, Section 2.5 of the Reference Paper creates an obligation for governments to take the necessary measures so that a supplier (i.e. a private party) can bring disputes with the major suppliers regarding interconnection before an independent domestic body. Such regulatory may be a court; a tribunal or a regulatory body that is separate from, and

[1121] *Mexico − Telecoms, supra* note 1022 at para 7.177.
[1122] *Note by the Secretariat regarding Negotiations on Basic Telecoms, supra* note 945, Model Schedule of Commitments on Basic Telecommunications at 7.
[1123] *Note by the Secretariat regarding Negotiations on Basic Telecoms, supra* note 945, Model Schedule of Commitments on Basic Telecommunications at 7, n g.
[1124] See e.g. Mireille Cossy, "Energy Services under the General Agreement on Trade in Services" in Julia Selivanova, ed, *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (The Netherlands: Kluwer Law International, 2011) 149 at 165.

not accountable to, any supplier of basic telecommunications services and uses procedures and makes decisions impartial with respect to all market participants.[1125] However, the Reference Paper fails to indicate if the terms "resolv[ing] disputes" mean that the outcome (i.e. a decision or an agreement) can be imposed on the parties or not.[1126]

Section 5 concerns independent regulators and defines what they are. A provision regarding independent regulators is of "crucial significance for the prevention of anti-competitive behaviour", especially considering the fact that most Members do not have autonomous regulators.[1127] However, Section 5 does not unequivocally impose an obligation to establish an independent regulatory body for telecommunications markets. Moreover, it does not specify the circumstances according to which recourse to an independent authority will be open (except in the case of interconnection disputes).[1128]

In addition, Section 3 provides that any Member has the right to define the kind of universal service[1129] it wishes to maintain. However, governments have the obligation to administer such provisions in a "transparent, non-discriminatory and competitively neutral manner" and "not

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[1125] *Reference Paper, supra* note 954, Sections 2.5 and 5; Bronckers, "The WTO Reference Paper", *supra* note 1109 at 379 ("There is a significant omission, however. The Reference Paper does not specify that this independent agency, or another domestic court or tribunal, should also have jurisdiction to hear complaints about anticompetitive practices of the 'major suppliers'" at 379) [footnotes omitted].

[1126] See Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 29-30.

[1127] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 ("Time will tell whether the newly established regulatory bodies will gain sufficient competencies to ensure fair competition" at 490); Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 31 "There is provision in the Reference Paper that provides that when the telecommunications operator (TO) "is State-owned or controlled, the regulatory authority should also be structurally separated from the government departments in charge of exercising the ownership and control functions over the TO. Indeed, when the local TO is State-owned but autonomous, two sometimes distinct sets of interests can potentially conflict with the regulatory authority: the interests of the TO itself as a business; and the interests of the government as the owner of the TO. Even if the regulatory authority is independent from the TO as a business, it can still conflict with the government as owner, for instance when privatization is taking place." at 31); Frid, "The Telecoms Pact", *supra* note 1043 at 82.

[1128] Frid, "The Telecoms Pact", *supra* note 1043 ("The Reference Paper is silent regarding the circumstances in which a recourse to an independent body will be available. Nonetheless, from the reference in [Section 2.5 of the Reference Paper] for dispute settlement, it is reasonable to expect that other disputes or telecoms services can be brought before the independent regulatory body." at 82); Batura, "The WTO Legal Framework for Telecommunications", *supra* note 1102 at 226; Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 31.

[1129] Universal service can be defined as "The concept that every individual within a country should have basic telephone service available at an affordable price. The concept varies, among countries, from having a telephone in every home and business in the wealthier countries to most inhabitants' being within a certain distance or time away from a public telephone in developing countries.", see: WTO, *Telecommunications Services: Glossary of Terms,* online: WTO <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel12_e.htm>.

more burdensome than necessary for the kind of universal service defined by the Member."[1130] Some commentators have contended that this provision consisted in the "main shortcoming of the regulatory framework", for the following reasons: (i) it does not prevent Members "to define rather strict universal service conditions"; (ii) there are no provisions "on the number of services that operators are required to offer" and "on the prices they have to charge for the services"; and (iii) it does not specify "the number of operators which have to offer universal services."[1131] Therefore, it is argued that national regulators will be able to indirectly deter foreign providers from market entry "by requiring them to provide several universal services at very low prices."[1132]

(f) contribution to the progressive liberalization of trade in basic telecommunications

Did the provisions contained in the Reference Paper contribute to the progressive liberalization of trade in basic telecommunications as mandated in the *Ministerial Decision on Negotiations on Basic Telecommunications*? Prior to the negotiation of the *Basic Telecoms Agreement,* the telecommunications sector in most countries in the world was operating under a legal monopoly regime according to which one or a few operators were granted the exclusive right to provide telecommunications services.[1133] Even after liberalization occurs, it is common that the former monopoly operator retains market advantages (i.e. network already in place, strong customer base, etc.). Hence, the introduction of the anti-competitive safeguards, as well as the non-discrimination and transparency provisions that are included in the Reference Paper ensure that the former monopoly does not use its advantages to the detriment of new entrants on the telecommunications markets. Such provisions allow the market access and foreign investment commitments to be truly effective as they enable market entry for alternative providers.[1134] They go beyond the scope of the pro-competition provisions of the GATS, such as Article VIII on monopolies and exclusive service providers, Article IX on business practices, and Article XV on

[1130] *Reference Paper, supra* note 954, Section 3.
[1131] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 490; Batura, "The WTO Legal Framework for Telecommunications", *supra* note 1102 at 224.
[1132] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 490.
[1133] Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 23; Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 478; Sherman, "Introductory Note", *supra* note 522 at 357.
[1134] Frid, "The Telecoms Pact", *supra* note 1043 at 79; Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 23; Sherman, "Introductory Note", *supra* note 522 at 357.

subsidies.[1135] However, some have criticized the commitments concerning regulatory policies and processes for being "far not detailed enough to achieve market access."[1136] Others are concerned with the fact that "there is no restriction against a legal as a natural monopoly *per se*."[1137] Nevertheless, it should be noted that the *Mexico − Telecoms* case demonstrated that the obligations contained in the Reference Paper as they are can "bite".[1138]

Did the provisions contained in the Reference Paper address the issues listed in the model schedule? Almost all the issues that were listed in the model schedule were included in the Reference Paper, with the exception of 'participation in the standards-setting process'. However, due to the fact that this issue was subject to a footnote in the model schedule indicating that further discussion would be required to determine whether this measure would need to be addressed in the context of the negotiations, the non-inclusion of such provision should not be interpreted negatively as a failure of the Reference Paper to fulfill its mandate's objectives. In addition, it should be noted that the provisions of the Reference Paper went beyond the envisioned scope as they extended to enforcement and universal service.[1139]

As for the adoption of the principles contained in the Reference Paper, an overwhelming majority of participating governments (67 out of 69) scheduled additional commitments concerning regulatory principles to be applied in the telecommunications sector derived from the Reference Paper.[1140] Only two governments did not make any additional regulatory commitments: Ecuador and Tunisia.[1141] A total of 55 governments committed to the Reference Paper in whole or with a few modifications. Some governments (i.e. Bolivia, India, Malaysia, Morocco, Pakistan, the Philippines, Turkey and Venezuela) adopted only some (i.e. not all) of the principles contained in the Reference Paper, while others phased-in their commitments at a later point in time (this was the case of Bangladesh, Brazil, and Mauritius conditional upon the

[1135] Batura, "The WTO Legal Framework for Telecommunications", *supra* note 1102 at 221; Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 1013, n 96.
[1136] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 at 491.
[1137] Drake & Noam, "The WTO Deal", *supra* note 522 at 817.
[1138] Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942 at 374; *Mexico − Telecoms, supra* note 1022.
[1139] *Reference Paper, supra* note 954, Sections 2.5 and 5.
[1140] See Participants' schedules in *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74.
[1141] See *ibid*; Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 22.

entry into force of pending legislations, as well as Thailand upon the entry into force of all new communication acts in 2006).[1142]

Even though the scope of the regulatory provisions could have been further detailed to effectively enable market access and full competition, the degree of liberalization sought in the negotiating mandate was not as onerous as its critiques suggest. The mandate simply instructed participants to achieve "the progressive liberalization" of trade in basic telecommunications.[1143] Moreover, the model schedule did not specify the scope of the regulatory commitments, but only listed the issues which should be covered by the Reference Paper.[1144] Considering the modest scope of the negotiating mandate, it can be found that the provisions contained in the Reference Paper, as well as their adoption by an overwhelming majority of governments contributed (at least to the mandated degree) to the progressive liberalization of trade in basic telecommunications and addressed the undisputed issues listed in the model schedule and even went beyond its envisioned scope.

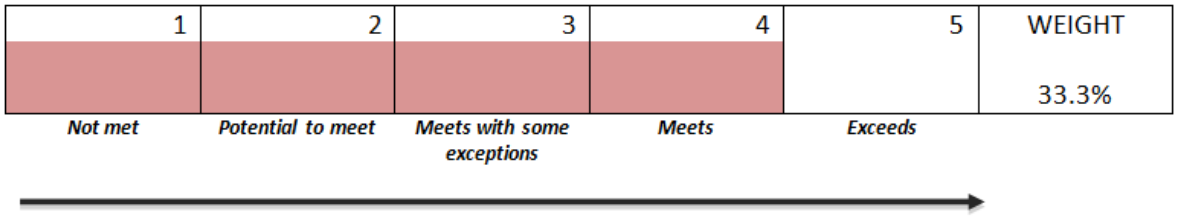
3.2.1.2. Attribution of a score: *Effectiveness − Mandate*

Overall, *Effectiveness − Mandate* evaluated the following standard: *Did the negotiated outcome address the goal as set out in the negotiating mandate?* As it was argued in the previous section, it can be estimated that the *Basic Telecoms Agreement* achieved to the fullest extent the objective conferred by its *modest* negotiating mandate, i.e. the "progressive liberalization" of trade in basic telecommunications, as well as the inclusion of commitments on pro-competition and regulatory issues that were listed in the model schedule.[1145] Indeed, a considerable amount of 69 governments (over 50 percent, i.e. 70 out of the 132 WTO Members at the end of 1997[1146]) accounting for over 90 percent of world telecoms revenues made market access and national treatment commitments and 67 scheduled additional commitments concerning regulatory

[1142] See Participants' schedules in *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74; Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 22.
[1143] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940 at para 1.
[1144] *Note by the Secretariat regarding Negotiations on Basic Telecoms, supra* note 945, Model Schedule of Commitments on Basic Telecommunications at 6-7.
[1145] Fredebeul-Krein & Freytag, "Telecommunications", *supra* note 522 (The *Basic Telecoms Agreement* "is a major step in the direction of liberalising national telecommunication markets. The international provision of telecom services will be significantly facilitated once the agreement enters into force. The guidelines on the issues of market access and investment will enable foreign firms to enter domestic markets." at 491).
[1146] See Appendix 2.

principles to be applied in the telecommunications sector derived from the Reference Paper (with 55 of them committing to the Reference Paper in whole or with a few modifications, covering all undisputed issues listed in the model schedule).[1147] Even though both the market access and the regulatory principle commitments were found to contain limitations, considering the modest negotiating mandate, it can be concluded that the final outcome adequately addressed the goal set out in the negotiating mandate, as required by *Effectiveness − Mandate*. For these reasons, *Effectiveness − Mandate*, i.e. the first indicator of effectiveness, should be attributed a score of 4/5 (i.e. '*performance consistently met the indicator's standards*').

Effectiveness' Indicator #1: Mandated Goal Addressed by Final Outcome



3.2.2. Effectiveness − Policy

Effectiveness' Indicator #2: Did the rule/agreement or the negotiated policy come into effect?

Effectiveness − Policy assesses whether the commitments contained in the *Basic Telecoms Agreement* have come into effect.

3.2.2.1. Did the commitments contained in the Basic Telecoms Agreement come into effect?

The *Fourth Protocol to the GATS* originally stipulated that the *Basic Telecoms Agreement* would enter into force on 1 January 1998, provided that it had been accepted by all 70 participating Members.[1148] However, it also included the possibility that it could enter into force on a later date if it had not received acceptance by all participating Members. Those Members that had accepted the *Basic Telecoms Agreement* by the deadline took advantage of this flexibility and

[1147] See Participants' schedules in *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74.
[1148] *Text of the Fourth Protocol to the GATS, supra* note 961 at para 3.

decided that it would enter into force on 5 February 1998.[1149] As agreed, the *Basic Telecoms Agreement* entered into force on 5 February 1998 for 58 Members.[1150] By 2006, ten more Members had deposited their document of acceptance, for a total of 68 Members.[1151] As of April 2015, two Members, Brazil and Guatemala, have still not accepted the *Basic Telecoms Agreement*; however as with other non-participants to the Agreement, they get to take advantage on an MFN basis of the benefits conferred by the decision.[1152] Also, it should be noted that a large quantity of commitments (i.e. approximately 40 percent or for 26 out of the 62 governments committing on public voice telephone services and for 4 governments committing on regulatory principles) were phased-in beyond the date of the entry into force of the *Basic Telecoms Agreement,* sometimes between 1998 and 2013.[1153]

3.2.2.2. Attribution of a score: *Effectiveness − Policy*

Overall, *Effectiveness − Policy* assessed the following standard: *Did the rule/agreement or the negotiated policy come into effect?* The *Basic Telecoms Agreement* entered into force only approximately one month later than originally envisioned, which is not significant enough to be treated as affecting the effectiveness of the implementation process. What should be highlighted, however, is that solely one month later than the originally expected date for the entry into force of the *Basic Telecoms Agreement,* more than 80 percent of the participating Members (58 out of 70 Members) had ratified the Agreement. Approximately 8 years later, the Agreement was

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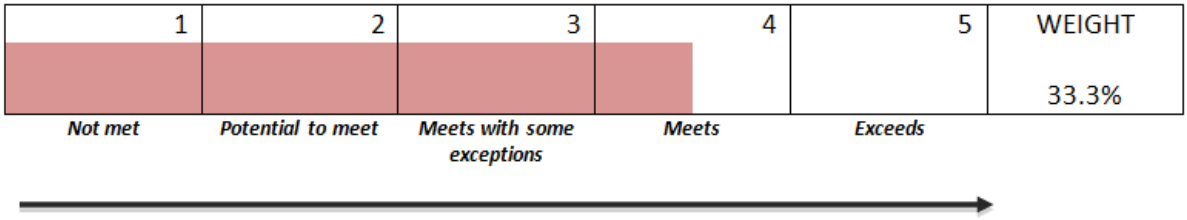
[1149] *Council for Trade in Services Meeting of 26 January 1998, supra* note 973 at 3-5.
For a list of the acceptances received, see *Status of Acceptance of the Fourth Protocol to the GATS, supra* note 972.
[1150] *Basic Telecoms Agreement, supra* note 95. For the list of Members for which the *Basic Telecoms Agreement* entered into force on 5 February 1998, see: *Status of Acceptance of the Fourth Protocol to the GATS*, *supra* note 972.
[1151] See *supra* notes 975-977 and accompanying text.
[1152] GATS, *supra* note 229, Article II. See also Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 33-35. It should be noted that since the 1994-97 negotiations on basic telecommunications negotiations, commitments on basic telecommunications have been made by new Members, upon accession to the WTO, or unilaterally at any time. It was reported on the WTO website, that a total of 99 Members have made commitments on basic telecommunications services and 82 Members have committed to the regulatory principles contained in the Reference Paper, see: WTO, *Telecommunications Services,* online :WTO <http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm>; WTO, *Telecommunications Commitments and Exemptions,* online: WTO <http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm> (for a list of all current telecommunications commitments and exemptions).
[1153] *Basic Telecoms Highlights, supra* note 1078; See Participants' schedules in *Basic Telecoms Agreement*, *supra* note 95, Attachment at 373-74.

ratified by a total of 68 participating Members (97 percent). However, more than 17 years later after the entry into force of the Agreement, 2 participating Members have still not ratified it.

The fact that some commitments were phased-in beyond the date of the entry into force of the *Basic Telecoms Agreement* should not be interpreted as delaying the entry into force of the Agreement since these phased-in commitments were an integral part of the Agreement and were in line with the negotiating mandate which provided for the "progressive liberalization" of trade in basic telecommunications.

Considering these elements, it should be found that the performance of the Basic Telecoms Case met the standards of the indicator *Effectiveness − Policy* with a few exceptions. As a result, *Effectiveness − Policy,* the second indicator of effectiveness, should be attributed a score of 3.5/5 (*i.e.* '*performance met the indicator's standards, with a few exceptions*').

Effectiveness' Indicator #2: Policy Objective Into Effect



3.2.3. Effectiveness − Process

> *Effectiveness' Indicator #3: Were Members able to reach consensus in a timely and effective manner in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate?*

Effectiveness − Policy evaluates whether Members were able to reach consensus on the commitments contained in the *Basic Telecoms Agreement* in a timely and effective manner. The following sections will show that five factors had a significant impact on the effectiveness of the consensus-building process leading up to the adoption of the *Basic Telecoms Agreement*: negotiations outside of a round of multilateral trade negotiations (section 3.2.3.1); negotiations on the basis of a critical mass of offers (section 3.2.3.2); effectiveness of the legal method of implementation chosen (section 3.2.3.3); proposal to preserve the results achieved along the way (section 3.2.3.4); and leadership by the major trading partners (section 3.2.3.5).

3.2.3.1. Negotiations outside of a round of multilateral trade negotiations

The mandate for negotiations on basic telecommunications was contained in a 'built-in-agenda' adopted as part of the results of the Uruguay Round in order to improve the levels of liberalization in the basic telecommunications services sector.[1154] It provided the explicit mandate for interested Members to negotiate on basic telecommunications outside of a round of multilateral trade negotiations.

It has been reported that the "sectoral approach" to negotiations was successful for the case of basic telecommunications due to the fact that it allowed negotiators to "focus their attention on one set of talks", to "study the issues in depth" and to "consult with each other with business and political interests at home."[1155] Moreover, due to the fact that the negotiations concerned only one sector, it enabled the Secretariat to provide greater technical assistance to developing countries. Indeed, it has been reported that the Secretariat drafted offers for many developing countries to put forward in the negotiations on basic telecommunications.[1156]

3.2.3.2. Negotiations on the basis of a critical mass of offers

For the case of the negotiations on basic telecommunications, it was agreed that the negotiations would be entered on "a voluntary basis" only.[1157] In parallel, the United States, which was the most advanced country in the area of telecommunications, had made clear that it would only open its market on the basis of a 'critical mass' of offers, i.e. if its telephone operators were granted reciprocal access to markets of similar size to the U.S. and if other Members would implement regulatory legislation that would protect its market from potential anti-competitive practices.[1158]

Negotiating on the basis of a critical mass of offers bolstered the effectiveness of the consensus-building process because only those Members interested, and which had something to gain from the negotiations, participated. In total some 78 Members (out of approximately 132 Members at

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[1154] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940; Footer, *An Institutional and Normative Analysis*, *supra* note 984 at 222.
[1155] Frid, "The Telecoms Pact", *supra* note 1043 at 90.
[1156] *Ibid.*
[1157] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940 at para 1.
[1158] Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942 at 319-21.

the time[1159]) participated in the processes.[1160] Moreover, by having only the interested parties at the table, the discussions were more focused and participants were able to maintain audacious offers of commitments on the table, especially with respect to regulatory issues.

Alternatively, having the entire membership involved in the negotiations could have had some potential drawbacks, such as resulting in weaker disciplines. Indeed, it would have been challenging to reach consensus on commitments and regulatory principles acceptable to all. Members that were not yet planning to open their markets and which did not have interests in regulatory disciplines might have been reluctant to assent on the inclusion of strong provisions.[1161] In addition, there could have been a risk that some Members, that saw little potential gains in the negotiations, threatened to block a consensus or hampered the consensus-building processes in the hope of making some gains in a cross-sector.

3.2.3.3. Effectiveness of the legal method of implementation chosen

There were two challenges related to the negotiations and implementation of the *Basic Telecoms Agreement.* First, Members had to find a way to implement the regulatory principles that were contained in the Reference Paper.[1162] Second, Members needed insurance that there would be reciprocity if they added commitments to their services schedules.

As regards the implementation of the Reference Paper, the participating Members in the NGBT felt they did not have the authority or mandate to amend the GATS, considering that the entire membership was not participating in the discussions. In addition, due to the fact that they were negotiating outside of the context of a full trade round, they felt they were not in a position to put forth a proposal for an annex to the GATS (i.e. an amendment to a Multilateral Trade Agreement (the GATS) pursuant to Article X of the *WTO Agreement*) to form part of a final package (i.e. the single undertaking). As a result, it became eventually accepted that the disciplines of the

[1159] See Appendix 2.
[1160] But only 70 Members attached their schedule of commitments to the Fourth Protocol at the end.
[1161] See e.g. *Note on Article XVIII, supra* note 944 at para 15. See also *NGBT Meeting of 6 May 1994, supra* note 415 (A comment was made by a delegation to these effect that these negotiations "were viewed as a process that should lead to major changes in regimes, i.e., the provision of basic telecommunications on a competitive basis. As this represented for many a radical departure from current regimes it was inevitable that there would be a finite number of participants. Nevertheless, it would be beneficial for countries that could not make radical changes to participate as observers in order to understand what this would entail." at para 5).
[1162] *Note on Article XVIII, supra* note 944 at paras 15-17.

Reference Paper would be negotiated as additional commitments under Article XVIII of the GATS, to be included in the fourth column of their schedules.[1163] This innovative method allowed participating Members to accept the agreement through entries in schedules, thus creating an *ad hoc* plurilateral agreement within the interested parties only.[1164] Another effective and straight-forward option would have been to agree on the addition of a Plurilateral Trade Agreement under Annex 4 of the *WTO Agreement* pursuing to Article X:9 of the *WTO Agreement.* However, the addition of a Plurilateral Trade Agreement would have necessitated the approval of the Ministerial Conference (or the General Council), i.e. the entire membership and not just the participating Members.[1165]

The advantage of implementing the Reference Paper through entries in schedules was that it could be done by Members on an individual basis, without a consensus decision of the Ministerial Conference. Moreover, each participating Member was able to retain exceptions and commit only on the disciplines that it was in a position to accept. In addition, this innovative method of legal implementation provided the comfortable assurance to participating Members that they would be able to effectively withdraw from the provisions of the Reference Paper (through renegotiation) by following the procedures for the modification of schedules laid out in Article XXI of the GATS in the case where circumstances or policy preferences were to change.[1166] This flexible context might have given the extra push needed for some delegations to join the plurilateral deal.

However, on the flip side, it carried the disadvantage that the commitments could be withdrawn, thus creating some legal uncertainty regarding the future of the regulatory commitments on basic telecommunications. Moreover, the effect of the implementation of the Reference Paper principles through entries in schedules was that they remained "a patchwork of individual commitments" instead of "a modicum of uniformity, and predictability in their interpretation and

[1163] *Ibid* at para 16.
[1164] Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 1012-14.
[1165] *WTO Agreement, supra* note 1, Article X:9.
[1166] Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 1014; GATS, *supra* note 229, Article XXI.

enforcement" as it would have been the case if they would have been implemented pursuant to a Plurilateral Trade Agreement under Article X:9 of the *WTO Agreement.*[1167]

The second challenge that Members faced during the negotiations of the *Basic Telecoms Agreement* was the need for insurance that there would be reciprocity from other Members if they added commitments to their services schedules. For that reason, the use of a separate protocol to supplement and modify Members' commitments under their schedules allowed Members to devise an implementation mechanism designed to ensure reciprocity. Indeed, the *Fourth Protocol to the GATS* stipulated that it would enter into force on 1 January 1998 provided it had been accepted by all Members concerned. However, if by 1 December 1997 the Protocol had not been accepted by all Members concerned those Members which had accepted it could decide on its entry into force.[1168] This clause gave the insurance that the results of negotiations would be incorporated in the schedules of key participants through acceptance before the entry into force of the *Basic Telecoms Agreement.*[1169]

Another advantage of this type of provision in contrast with a Multilateral Trade Agreement is that there was no specific required number of acceptances for the entry into force of the agreement. Members that had accepted it were free to decide within themselves whether they felt there were a sufficient amount of acceptances to be worth their while to bring the agreement into effect. Participating Members actually made use of this provision. On the date of the deadline, only 50 out of 70 Members had accepted the *Fourth Protocol to the GATS,* hence the Members that had accepted it decided to extend the time-limit for the entry into force for one additional month until they were satisfied with the number of acceptances and had been reassured that more acceptances would follow soon. [1170] It should be noted, however, that nothing would prevent participating Members to include such a provision in a protocol incorporating a Plurilateral Trade Agreement under Annex 4 of the *WTO Agreement.*[1171]

[1167] Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942 at 374; Frid, "The Telecoms Pact", *supra* note 1043 at 92.
[1168] *Basic Telecoms Agreement, supra* note 95, para 3.
[1169] On that point, see Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 996.
[1170] *Council for Trade in Services Meeting of 26 January 1998, supra* note 973 at 3-5.
[1171] See e.g. *Protocol Amending the GPA, supra* note 278, preamble and para 3 (illustrating different provisions that may be included in a protocol of amendment).

Overall the two most effective legal mechanisms for implementing the *Basic Telecoms Agreement* were through a Plurilateral Trade Agreement to be added under Annex 4 of the *WTO Agreement* or pursuant to entries in schedules according to Articles XVI through XVIII of the GATS. The advantage of the Plurilateral Trade Agreement would have been that it would have created more legal certainty and predictability in their interpretation and enforcement due to uniformity. However, the drawback is that it would have necessitated the approval of the Ministerial Conference or the General Council, and not just the participating Members. As for its implementation through entries in schedules, the disadvantage is that the commitments can be easily withdrawn[1172], but on the flip side, it may have provided the flexibility needed for Members to pick and choose the commitments that they could concede to allow a greater number of Members to commit on controversial pro-competitive and regulatory principles.[1173]

3.2.3.4. Proposal to preserve the results achieved along the way

The *Ministerial Decision on Negotiations on Basic Telecommunications*[1174] and the *Annex on Negotiations on Basic Telecommunications*[1175] provided a favorable legal framework for the conduct of negotiations on basic telecommunications until 30 April 1996. They contained a standstill commitment which prohibited Members to apply any measures affecting trade in basic telecommunications and authorized Members to list, at the conclusion of the negotiations, any measures inconsistent with MFN treatment obligations for basic telecommunications or MFN exemptions that were not already listed in their schedules at the end of the Uruguay Round.

By the negotiation deadline of 30 April 1996, Members (especially the United States) did not feel that the offers on the table were sufficient to reach an agreement. Participants agreed to continue their efforts to improve offers, however there were some concerns that some delegations may reconsider and withdraw commitments relating to international services, and by doing so, posed a serious threat to concluding the negotiations.[1176]

[1172] It should be noted that Members parties to a Plurilateral Trade Agreement would also have the option of unilaterally withdrawing from this agreement, see e.g. GPA, *supra* note 278, Article 10 (providing for the possibility of parties to unilaterally withdrawn from the Plurilateral Trade Agreement).
[1173] See e.g. Frid, "The Telecoms Pact", *supra* note 1043 at 91.
[1174] *Ministerial Decision on Negotiations on Basic Telecommunications, supra* note 940.
[1175] *Annex on Negotiations on Basic Telecommunications, supra* note 941.
[1176] *NGBT Meeting of 26 April 1996, supra* note 959 at para 4.

In response to these concerns, the Chair proposed to freeze the best offers that were then on the table until a period of reconsideration in the next year.[1177] Thus, the effect of both the 1994 *Ministerial Decision on Negotiations on Basic Telecommunications* and the *Annex on Negotiations on Basic Telecommunications,* were extended in substance to 15 February 1997, by the *Decision on Commitments in Basic Telecommunications.*[1178] The Chair's proposal accomplished three objectives: (i) it preserved the results that had been made so far, even if these could not be finalized at this time; (ii) it preserved the economic value of the negotiation by maintaining the implementation date of 1 January 1998; and (iii) it provided flexibility within that time frame by allowing a period of one month during which it would be possible to re-examine the position and to supplement or modify the draft schedules as they then stood, which resulted in improvements on the offers as they were on 30 April 1996.[1179] The efforts of the Chair to salvage the results accomplished until then in the negotiations were commended by the NGBT, which expressed its appreciation for the Chair's leadership.[1180]

3.2.3.5. Leadership by the major trading partners

On several occasions, during critical stages of the negotiations, participants made an "urgent appeal" to major trading partners to assume a leadership role.[1181] On 17 April 1996, a week before the first negotiation deadline of 30 April 1996, participants called upon the major trading partners to table substantive and meaningful commitments in order to provide impetus in the final phase of the negotiation process.[1182] Similarly, on 10 February 1997, less than a week prior to the final deadline of 15 February 1997, several delegations urged the major trading partners to improve the quality of their offers[1183] These data suggest that the major trading partners could have played a better leadership role, which would have likely bolster the effectiveness of the consensus-building process.

[1177] *NGBT Meeting of 30 April 1996, supra* note 958 at paras 2 and 6.
[1178] *Decision on Commitments in Basic Telecommunications, supra* note 962 at para 2.
[1179] *NGBT Meeting of 30 April 1996*, *supra* note 958 at para 2; *GBT Meeting of 14 February 1997, supra* note 967; *GBT Meeting of 15 February 1997, supra* note 523.
[1180] *NGBT Meeting of 30 April 1996, supra* note 958 at para 6.
[1181] WTO, NGBT, *Report of the Meeting* (held on 17 April 1996), WTO Doc TS/NGBT/15 at para 3, online: WTO <http://docs.wto.org> [*NGBT Meeting of 17 April 1996*].
[1182] *Ibid* at para 3.
[1183] WTO, GBT, *Report of the Meeting* (held on 10 February 1997)*,* WTO Doc S/GBT/M/7 at para 3, online: WTO <http://docs.wto.org> [*GBT Meeting of 10 February 1997*].

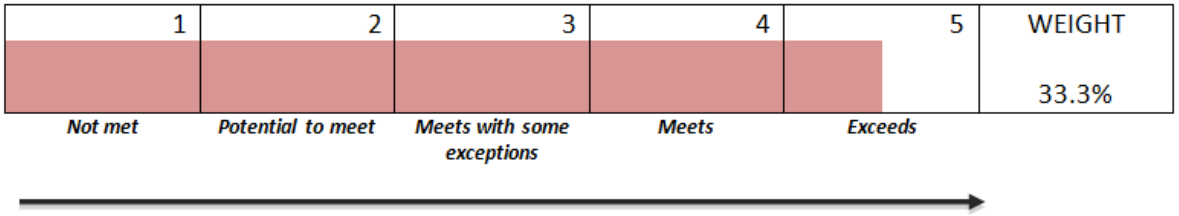
3.2.3.6. Attribution of a score: *Effectiveness − Process*

Overall, *Effectiveness − Process* assessed the following standard: *Were Members able to reach consensus in a timely and effective manner in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate?* The negotiating mandate provided for the progressive liberalization of trade in basic telecommunications and authorized Members to enter into negotiations on a voluntary basis between 16 May 1994 and 30 April 1996. However, it did not provide a specific timeline for the entry into force of the results of the commitments.

It was found that several factors highly contributed to the effectiveness of the consensus-building process, such as the fact that the negotiations took place outside of a round of multilateral trade negotiations, that the negotiations were made on the basis of a critical mass of offers (in contrast with the participation of the full membership), the choice of the legal method of implementation by means of entries in schedules which enabled participating Members to pick and choose their commitments, as well as the solution proposed by the Chair to salvage the results accomplished during the negotiations at the expiration of the original period set for the negotiations (i.e. 30 April 1996). On the downside, the major trading partners could have shown more leadership to stimulate wider and deeper commitments and improve the effectiveness of the consensus-building process.

Nevertheless, overall the positive factors largely outweigh the lack of leadership of the major trading partners and it should be found that the effectiveness of the consensus-building process used in the Basic Telecoms Case exceeded to some extent the standards of *Effectiveness − Process*. Indeed, the effectiveness of the rulemaking processes was exemplary due to creative ways that were found and used throughout the rulemaking processes to provide flexibilities with respect to individual Members' scope of commitments, preserve the results achieved along the way, and implement the final outcome. Therefore, *Effectiveness − Process*, i.e. the third indicator of effectiveness, should be attributed a score of 4.5/5 (i.e. '*performance exceeded the indicator's standards on some occasions*').

Effectiveness' Indicator #3: Effectiveness of the Process



3.2.4. Overall performance of the criterion of effectiveness

Overall the criterion of effectiveness was evaluated on the basis of the following three indicators, which were all assessed separately and attributed a distinct score:

(i) whether the final outcome addressed the mandated goal (scored 4/5);
(ii) whether the negotiated policy was brought into effect (scored 3.5/5); and
(iii) whether Members were able to reach consensus in a timely and effective manner (scored 4.5/5).

Considering that all three indicators have an identical weight for the pondering of the criterion of effectiveness as a whole, the criterion of effectiveness received a rounded score of 4/5, representing an average of the scores of all three indicators of legitimacy. As a result, it can be concluded that the performance of the Basic Telecoms Case *consistently met the standards* of the criterion of effectiveness.

CASE STUDY #2: BASIC TELECOMS AGREEMENT								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
EFFECTIVENESS	Ind #1	33.3						1.33
	Ind #2	33.3						1.17
	Ind #3	33.3						1.5
	Rating	100						4/5
RATING STANDARD	*Performance consistently met the standards of the legitimacy criterion*							**4/5**

3.3. Representativeness

The criterion of representativeness is to be assessed on the basis of three indicators of legitimacy:

(i) the internal transparency and inclusiveness of the rulemaking processes (Section 3.3.1);
(ii) the degree of representativity of Members in the rulemaking processes (Section 3.3.2);
(iii) the degree of effective participation of Members, i.e. whether the negotiating mandate and outcome represented a balanced set of interests that were expressed (Section 3.3.3).

The following sections proceed with the analysis of each of the three indicators of representativeness.

3.3.1. Representativeness − Internal transparency

> *Representativeness' Indicator #1: Was the rulemaking process open and transparent for all Members expected to be bound by the outcome at all stages of the process? Were the meetings announced in advance? Were they open to participation from all Members expected to be bound by the outcome? Were these Members given an opportunity to review and comment on draft texts?*

Representativeness − Internal transparency analyses the internal transparency and inclusiveness of the rulemaking processes, i.e. whether they were predictable and the meetings were announced in advance (section 3.3.1.1); whether they were transparent and open to participation from all Members (section 3.3.1.2), and whether Members were given an opportunity to review and comment on draft texts (section 3.3.1.3).

In the case of the Basic Telecoms Case, the 'Members expected to be bound by the outcome' are all those Members that manifested their interests to participate in the negotiations on basic telecommunications.[1184]

3.3.1.1. Were the rulemaking processes predictable and the meetings announced in advance?

As a general procedure, all formal meetings of the NGBT/GBT, as well as the agenda containing the subjects to be discussed, were announced at least ten days in advance by airgram as provided

[1184] See e.g. *NGBT Meeting of 6 May 1994, supra* note 415 at paras 3-4.

for by Rules 2 and 3 of the *Rules of Procedure for Meetings of the Council for Trade in Services.*[1185] In addition, the Chair regularly kept participants and observers informed of the process and the next steps that would be taken. Participants would generally explicitly agree on the future work that would be conducted by the NGBT[1186], such as the creation of an informal group (i.e. the 'Group of 12') to discuss issues related to regulatory principles, which eventually formed part of the Reference Paper.[1187]

[1185] *Rules of Procedure for Meetings of the Council for Trade in Services, supra* note 210. The document number containing the agenda for each of the NGBT and GBT meetings is usually cited in the first paragraph of each of the report of the meetings. The NBGT was established before the adoption of the *Rules of Procedure for Meetings of the Council for Trade in Services* but nevertheless followed the procedures contained in Rules 2 and 3.

[1186] See e.g. WTO, NGBT, *Report of the Meeting* (held on 11 July 1994), WTO Doc TS/NGBT/2 at para 8, online: WTO <http://docs.wto.org>; WTO, NGBT, *Report of the Meeting* (held on 24-26 October 1994), WTO Doc TS/NGBT/3 at paras 8 and 11, online: WTO <http://docs.wto.org> [*NGBT Meeting of 24-26 October 1994*]; WTO, NGBT, *Report of the Meeting* (held on 12-13 December 1994), WTO Doc TS/NGBT/4 at 2, online: WTO <http://docs.wto.org> [*NGBT Meeting of 12-13 December 1994*]; WTO, NGBT, *Report of the Meeting* (held on 27-28 February 1995), WTO Doc TS/NGBT/5 at para 11, online: WTO <http://docs.wto.org> [*NGBT Meeting of 27-28 February 1995*]; WTO, NGBT, *Report of the Meeting* (held on 26 April 1995), WTO Doc TS/NGBT/6 at para 11, online: WTO <http://docs.wto.org> [*NGBT Meeting of 26 April 1995*]; WTO, NGBT, *Report of the Meeting* (held on 12-13 July1995), WTO Doc TS/NGBT/7 at paras 5-6, online: WTO <http://docs.wto.org> [*NGBT Meeting of 12-13 July 1995*]; WTO, NGBT, *Report of the Meeting* (held on 20 September 1995), WTO Doc TS/NGBT/8 at paras 7-9, online: WTO <http://docs.wto.org> [*NGBT Meeting of 20 September 1995*]; WTO, NGBT, *Report of the Meeting* (held on 6 October 1995), WTO Doc TS/NGBT/9 at para 22, online: WTO <http://docs.wto.org> [*NGBT Meeting of 6 October 1995*]; WTO, NGBT, *Report of the Meeting* (held on 17 November 1995), WTO Doc TS/NGBT/10 at para 8, online: WTO <http://docs.wto.org> [*NGBT Meeting of 17 November 1995*]; WTO, NGBT, *Report of the Meeting* (held on15 December 1995), WTO Doc TS/NGBT/11 at para 7, online: WTO <http://docs.wto.org> [*NGBT Meeting of 15 December 1995*]; WTO, NGBT, *Report of the Meeting* (held on 26 January1996), WTO Doc TS/NGBT/12 at para 8, online: WTO <http://docs.wto.org> [*NGBT Meeting of 26 January 1996*]; WTO, NGBT, *Report of the Meeting* (held on 28 February 1996), WTO Doc TS/NGBT/13 at paras 5 and 7, online: WTO <http://docs.wto.org> [*NGTB Meeting of 28 February 1996*]; *NGBT Meeting of 22 March 1996, supra* note 955 at para 7; *NGBT Meeting of 17 April 1996, supra* note 1181 at para 5; *NGBT Meeting of 26 April 1996, supra* note 959 at para 7; WTO, GBT, *Report of the Meeting* (held on 19 July 1996), WTO Doc S/GBT/M/1 at paras 5-6, online: WTO <http://docs.wto.org> [*GBT Meeting of 19 July 1996*]; WTO, GBT, *Report of the Meeting* (held on 20 September 1996), WTO Doc S/GBT/M/2 at para 9, online: WTO <http://docs.wto.org> [*GBT Meeting of 20 September 1996*]; WTO, GBT, *Report of the Meeting* (held on 18 October 1996), WTO Doc S/GBT/M/3 at para 6, online: WTO <http://docs.wto.org> [*GBT Meeting of 18 October 1996*]; WTO, GBT, *Report of the Meeting* (held on 14 November 1996), WTO Doc S/GBT/M/4 at para 7, online: WTO <http://docs.wto.org> [*GBT Meeting of 14 November 1996*]; WTO, GBT, *Report of the Meeting* (held on 15 January 1997), WTO Doc S/GBT/M/5 at para 5, online: WTO <http://docs.wto.org> [*GBT Meeting of 15 January 1997*]; WTO, GBT, *Report of the Meeting* (held on 31 January 1997), WTO Doc S/GBT/M/6 at para 6, online: WTO <http://docs.wto.org> [*GBT Meeting of 31 January 1997*]; *GBT Meeting of 10 February 1997, supra* note 1183 at paras 6-7; *GBT Meeting of 14 February 1997, supra* note 967 at para 5.

[1187] *NGTB Meeting of 26 January 1996, ibid* at para 6; *Note on Article XVIII, supra* note 944 at para 13; *NGTB Meeting of 28 February 1996, ibid* at para 5.

3.3.1.2. Was the rulemaking process transparent and open to participation from all Members?

The meetings of the NGBT (between May 1994 and April 1996) were conducted only within a limited group of Members composed of the delegations that had announced their intention to participate. However, the widest participation of Members was encouraged in these negotiations.[1188] In addition, the NGBT adopted an open door policy regarding other delegations that would wish to participate as observers. Yet, it was decided that observers would only be allowed to speak during the meetings of the NGBT upon invitation, with the exceptions of some specific cases, and they would not be allowed to participate in arriving at any decisions of the NGBT.[1189] As for the meetings of the GBT (between July 1996 and February 1997), they were open to the whole membership.[1190]

The majority of the work of the NGBT/GBT was conducted in informal rounds of bilateral consultations between participants, which began to be held in February 1995. From the evidence of the data collected, it appears that every meeting of the NGBT/GBT was accompanied by a week of bilateral negotiating sessions.[1191] To ensure the transparency of the process, which was principally conducted in bilateral settings, the participants, as well as the observers optionally, were invited to respond to a questionnaire aimed to explore each government's regulatory environment regarding the supply of basic telecommunications networks and services, which

[1188] *NGBT Meeting of 6 May 1994, supra* note 415 at para 3.
[1189] The observers would be given the unconditional right to speak with respect to the commitments that were exchanged that would have implications for the framework on the *Annex on Negotiations on Basic Telecommunications*, see: *NGBT Meeting of 6 May 1994, supra* note 415 at paras 34.
[1190] *GBT Meeting of 19 July 1996, supra* note 1186 at para 3.
[1191] WTO, NGBT, *Statement by Mr. W. Lavorel, Deputy Director-General Reporting on the Status of the Negotiations* (presented at the High-Level Meeting of 6 October 1995), WTO Doc S/NGBT/W/15, online: WTO <http://docs.wto.org> (The Deputy Director-General reported at a High-Level Meeting of the NGBT of 6 October 1995 that bilateral negotiating sessions had begun in February, and every meeting since then had been accompanied by a week of bilateral meetings.). It appears, from the data collected, that the same format was kept for the subsequent work in the remaining months of 1995 through 15 February 1997, see e.g. *NGBT Meeting of 6 May 1994, supra* note 415 at 12; *NGBT Meeting of 27-28 February 1995, supra* note 1186 at para 11; *NGBT Meeting of 12-13 July 1995, supra* note 1186 at para 5; *NGBT Meeting of 20 September 1995, supra* note 1186 at para 8; *NGBT Meeting of 17 November 1995, supra* note 1186 at para 8; *NGBT Meeting of 15 December 1995, supra* note 1186 at para 7; *NGTB Meeting of 26 January 1996, supra* note 1186 at para 8; *NGTB Meeting of 28 February 1996, supra* note 1186 at para 5; *GBT Meeting of 20 September 1996, supra* note 1186 at para 3; *GBT Meeting of 18 October 1996, supra* note 1186 at para 2; *GBT Meeting of 14 November 1996, supra* note 1186 at para 2; *GBT Meeting of 15 January 1997, supra* note 1186 at para 2; *GBT Meeting of 31 January 1997, supra* note 1186 at para 3.

were made available to all Members.[1192] The formal and informal meetings of the NGBT/GBT (open to all participants and observers for the NGBT and to all Members for the case of the GBT) were used to provide an opportunity to participants to explain their responses to the questionnaire and present their offers, discuss proposals (including the reference paper that had been prepared conjointly by the Members of the QUAD[1193]), comment on the bilateral consultations that had been held, express their views on some specifically requested issues and for the Group of 12 to report back the results of its work on regulatory issues.[1194]

3.3.1.3. Were Members given an opportunity to review and comment on draft texts?

The *Basic Telecoms Agreement* comprised three parts: the different schedules of each participating Members comprising their individual commitments, the Reference Paper which was used as a drafting guideline for regulatory principles, as well as the *Fourth Protocol to the GATS* which was the instrument used to implement the full agreement.

First, as for the schedules of commitments, even though the negotiations of commitments were conducted on a bilateral basis, throughout the process all participants' draft (and final) offers of commitments were submitted in writing and made accessible to all Members for review and

[1192] The questionnaire can be found in: GATS, NGBT, *Questionnaire on Basic Telecommunications Services – Note by the Secretariat,* WTO Doc TS/NGBT/W/3, online: WTO <http://docs.wto.org> [*Questionnaire on Basic Telecoms*].

[1193] *Note on Article XVIII, supra* note 944 at para 13; *GBT Meeting of 14 November 1996, supra* note 1186 at paras 2 and 4.

[1194] *NGBT Meeting of 28 February 1996, supra* note 1186 at para 5 (The NGBT agreed that the Group of 12 would report back on the results of its discussions in the formal NGBT meetings). For all the other matters that were discussed in formal and informal meetings, see e.g. *NGBT Meeting of 24-26 October 1994, supra* note 1186 at para 5; *NGBT Meeting of 12-13 December 1994, supra* note 1186 at 1; *NGBT Meeting of 27-28 February 1995, supra* note 1186 at paras 3 and 10; *NGBT Meeting of 26 April 1995, supra* note 1186 at paras 3 and 9; *NGBT Meeting of 12-13 July 1995, supra* note 1186 at paras 3, 5 and 7; *NGBT Meeting of 20 September 1995, supra* note 1186 at paras 3-4; *NGBT Meeting of 6 October 1995, supra* note 1186 at para 3; *NGBT Meeting of 17 November 1995, supra* note 1186 at paras 4-5 and 7; *NGBT Meeting of 15 December 1995, supra* note 1186 at paras 4-6; *NGBT Meeting of 26 January 1996, supra* note 1186 at paras 4, 6 and 7; *NGBT Meeting of 28 February 1996, supra* note 1186 at paras 2-7; *NGBT Meeting of 22 March 1996, supra* note 955 at paras 2-6; *NGBT Meeting of 17 April 1996, supra* note 1181 at paras 2-3; *NGBT Meeting of 26 April 1996, supra* note 959 at paras 3-5; *GBT Meeting of 19 July 1996, supra* note 1186 at paras 5-6; *GBT Meeting of 20 September 1996, supra* note 1186 at paras 2-4; *GBT Meeting of 18 October 1996, supra* note 1186 at paras 2-4 and 7; *GBT Meeting of 14 November 1996, supra* note 1186 at paras 2-4; *GBT Meeting of 15 January 1997, supra* note 1186 at paras 2-4; *GBT Meeting of 31 January 1997, supra* note 1186 at paras 2-4; *GBT Meeting of 10 February 1997, supra* note 1183 at para 3; *GBT Meeting of 14 February 1997, supra* note 967 at paras 25; *GBT Meeting of 15 February 1997, supra* note 523 at paras 2-3 and 5.

comments.[1195] In addition, the last GBT informal meeting (held in mid-February 1997) was held to allow all Members (but especially the participants) to discuss and evaluate the offers that would be presented before the deadline of 15 February 1997.[1196]

Second, upon explicit approval by the NGBT, the drafting of the Reference Paper was performed within a restrictive group of 16 Members (i.e. the Group of 12) composed of a representative cross-section of the NGBT full participants and open to the participation of any participant that had submitted an offer.[1197] Moreover, the Group of 12 reported back the results of its discussions contained in a non-paper to all participants in the NGBT meetings for comments and it eventually included some of the drafting suggestions that it had received from the participants.[1198] According to the data collected, there has not been any concern voiced by Members with respect to the lacks of transparency or inclusiveness of the processes.

Third, as for the drafting of the *Fourth Protocol to the GATS* and the Decision by the Council for Trade in Services to adopt the Protocol, it was discussed during an informal meeting of 15 April 1996 which was open to all participants and observers.[1199]

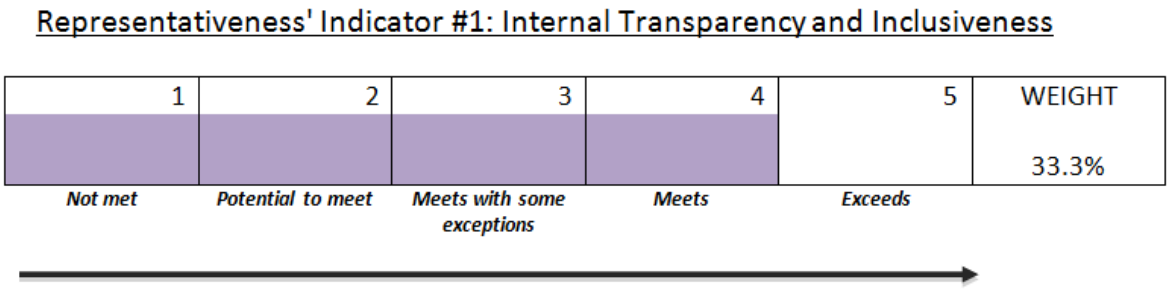
3.3.1.4. Attribution of a score: *Representativeness − Internal transparency*

Overall, *Representativeness − Internal transparency* assessed the following standard: *Was the rulemaking process open and transparent for all Members expected to be bound by the outcome at all stages of the process? Were the meetings announced in advance? Were they open to participation from all Members expected to be bound by the outcome? Were these Members given an opportunity to review and comment on draft texts?* As for the process being predictable and the meetings announced in advance, all the formal meetings of the NGBT/GBT, as well as their agenda, were announced in advance. In addition, the Chair regularly kept participants and observers informed of the process to be carried out and the NGBT/GBT would explicitly agree on future work to be conducted. The majority of the consensus-building process was conducted

[1195] *NGBT Meeting of 24-26 October 1994, supra* note 1186 at para 11; *NGBT Meeting of 26 April 1995, supra* note 1186 at para 12.
[1196] *GBT Meeting of 10 February 1997, supra* note 1183 at para 7.
[1197] *NGBT Meeting of 26 January 1996, supra* note 1186 at para 6; *Note on Article XVIII, supra* note 944 at para 13; *NGBT Meeting of 28 February 1996, supra* note 1186 at para 5.
[1198] See *NGBT Meeting of 28 February 1996, supra* note 1186 at para 5; *Note on Article XVIII*, *supra* note 944 at para 14. See also *NGBT Meeting of 26 January 1996, supra* note 1186 at para 6.
[1199] *NGBT Meeting of 22 March 1996, supra* note 955 at paras 7.

in bilateral settings, however the results of these discussions were reported back in the meetings open to all participants and observers, which provided an opportunity for participants to discuss and exchange views on the issues discussed bilaterally. Finally, all participants (and observers) were given an opportunity to review and comment on draft (and final) offers of commitments, as well as the draft *Fourth Protocol to the GATS* and the Decision adopting it. As for the Reference Paper, it was drafted within a restricted group (the Group of 12); however this was accomplished with the explicit consent of all participants and was open to the participation of any participants that had submitted an offer. Moreover, the Group of 12 kept the NGBT informed of the results of its discussions.

In general even though a large part of the process was conducted bilaterally, it can be found that the process was sufficiently open, transparent and inclusive to meet the standards of *Representativeness − Internal transparency.* Therefore, *Representativeness − Internal transparency,* i.e. the first indicator of representativeness, should be attributed a score of 4/5 (i.e. '*performance consistently met the indicator's standards*').



3.3.2. Representativeness − Representativity

> *Representativeness' Indicator #2: Did a representative group of Members, representing a balanced set of interests, participate in the various meetings and submitted written communications at all stages of the process?*

Representativeness − Representativity analyzes the degree of representativity of Members, classified by level of development (categories) and geopolitical groupings (groupings), in all stages of the rulemaking processes. Due to the unique nature of the *Basic Telecoms Agreement,* where participation was voluntarily and optional for each Member, the methodology for

evaluating the degree of representativity in the rulemaking processes will be adapted accordingly. The assessment will therefore be performed according to the following three steps, the first two consisting of a quantitative analysis, and the third one, of a qualitative analysis:

1) The first step will remain the same as described in the methodology section in Chapter 3.[1200] It will evaluate the degree of 'direct participation' for each category/grouping of Members both by means of oral interventions and written communications at all stages of the rulemaking processes. For those categories/groupings of Members which got a lower degree of 'direct participation' than the benchmark[1201], their degree of 'direct representation' is also evaluated to verify whether it offsets their weaker degree of 'direct participation' (section 3.3.2.1).

2) However, the second step will be adjusted according to the specificities of the Basic Telecoms Case. Due to the fact that the outcomes of the negotiations were to be inscribed in each Member's schedule on a case by case basis, the only forms of participation that were impactful for Members' degree of representativity were 'direct participation' and 'direct representation' (assessed under Step 1). In general, it did not serve any purpose for a Member to have its interests indirectly represented through 'balanced representation' (as evaluated under the quantitative analysis) considering that this form of participation is too indirect to have a substantial impact on each Member's commitments to be bound in its schedule.

   Instead, the second step will evaluate whether a representative group of Members from all categories and groupings participated in the *Basic Telecoms Agreement.* Considering that the categories/groupings of Members are uneven in terms of the number of Members composing each of them, the focus will be on the percentage of Members from each category/grouping that participated in the processes. The values will be evaluated with respect to the same benchmark formula[1202] as Step 1 (section 3.3.2.2).

3) Finally, the third step will also remain unchanged. It will analyze whether there was a sufficient degree of 'balanced representation' following the qualitative analysis.

[1200] Chapter 3, Section 4.1.3.2.2. (2).
[1201] The benchmark is formed of the combined average of the degree of participation of the categories/groupings of Members that obtained a sufficient degree of participation (i.e. not under 40 percent lower than the category/grouping of Members that had the highest degree of participation) see: Chapter 3, Section 4.1.3.2.2 (e).
[1202] *Ibid* and accompanying text.

Exceptionally, under the qualitative analysis, 'balanced representation' provides a good indication of the degree of representativity of Members because it focuses exclusively on the most decisive moments of the rulemaking processes (such as the drafting of the Reference Paper and the decision to adopt or not the *Basic Telecoms Agreement*) and assesses whether all categories/groupings were represented (section 3.3.2.3).

The assessment of the quantitative and qualitative analyses, broken down into these three steps is presented in the following sections.

3.3.2.1. Step 1: To what degrees individual Members directly participated in the rulemaking processes or had their interests directly represented?

This section presents the results of the quantitative analysis performed under Step 1 regarding the degree of 'combined direct participation and direct representation' (consisting of the two most optimum forms of participation) of individual Members classified by level of development (section 3.3.2.1.1) and by geopolitical groupings (section 3.3.2.1.2), with a focus on the participation or representation by way of oral interventions ('oral') and written communications ('written').

It focuses exclusively on the degree of 'combined direct participation and direct representation' of only those Members that were participants in the basic telecoms negotiations.[1203] The written communications are divided into three categories: (i) general communications that were submitted by Members ('communications'); (ii) responses to questionnaires, which were required to be answered by all participants ('questionnaires'); and (iii) draft and final offers that were presented by participants ('offers').

For the purpose of evaluating the participation by means of written communications, the type of documents that matters the most is 'offers'. Indeed, a high number of submitted offers can be interpreted as signifying that the participant in question was participating actively in the processes of bilateral consultations and negotiations. Due to the fact that the largest portion of

[1203] A total of 93 Members (including the EC and its 15 Members) participated in the consensus-building processes leading up to the adoption of the *Basic Telecoms Agreement.* However only 70 Members adopted the *Basic Telecoms Agreement* (i.e. attached their schedules to the *Fourth Protocol to the GATS*), see *Basic Telecoms Agreement, supra* note 95, Attachment at 373-74.

the consensus-building process was conducted by means of bilateral consultations and that these consultations were held in private and off-records, the amount of offers submitted is one of the best available pieces of evidence to provide some indications as to what might have happened behind closed doors.

The second type of documents that indicate substantial participation is 'communications', which represent a contribution in substance to the debate. In fact, communications are generally used for presenting proposals or other important factual information to other Members regarding the substance of the negotiations. As for 'questionnaires', they were required to be responded by each participant. They were used to explore each government's regulatory environment regarding the supply of basic telecommunications networks and services and aimed to facilitate an exchange of information with reference to a common format. However, they did not intend to reflect any participant's position with respect to negotiations or on the final content of schedules of commitments.[1204] Therefore, they should be accorded the least amount of weight for evaluating the degree of participation by means of written communications.

3.3.2.1.1. *Direct participation and direct representation of Members by level of development*

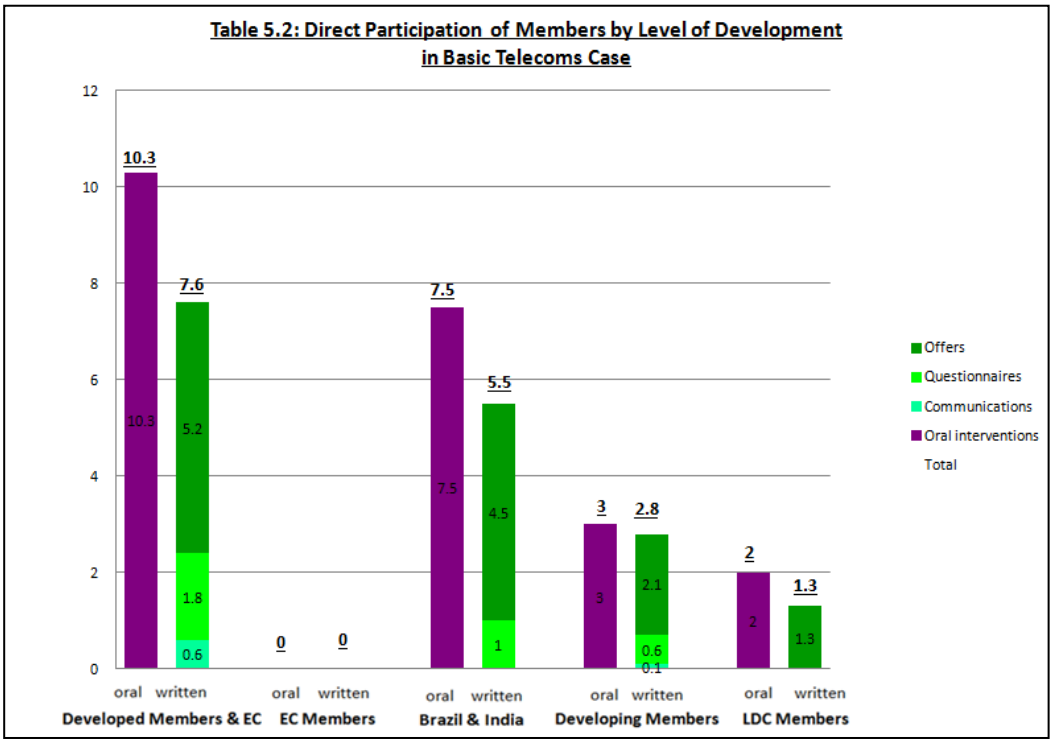
Table 5.2 below shows the degree of direct participation of Members classified by level of development (as indicated on the horizontal axis) in the rulemaking processes by way of oral interventions and written communications (distinguishing between communications, questionnaires and offers as they appeared in the table's legend) during the consensus-building process leading to the adoption of the *Basic Telecoms Agreement.*

ORAL INTERVENTIONS: Following the values represented in Table 5.2, the benchmark[1205] consists of 8.9, which is calculated from the average of the degrees of direct participation by means of oral interventions of individual Members part of the Developed Members & EC (10.3) and Brazil & India (7.5) categories. Individual Members from both these categories obtained a

[1204] The questionnaire can be found in: *Questionnaire on Basic Telecoms, supra* note 1192.
[1205] The benchmark is formed of the combined average of the degrees of participation of the categories/groupings of Members that obtained a degree of participation not under 40 percent lower than the single category/grouping of Members that had the highest degree of participation. For additional information, see: Chapter 3, Section 4.1.3.2.2 (e).

sufficient degree of direct participation considering that their scores were respectively 14 percent higher and 16 percent lower than the benchmark (8.9).

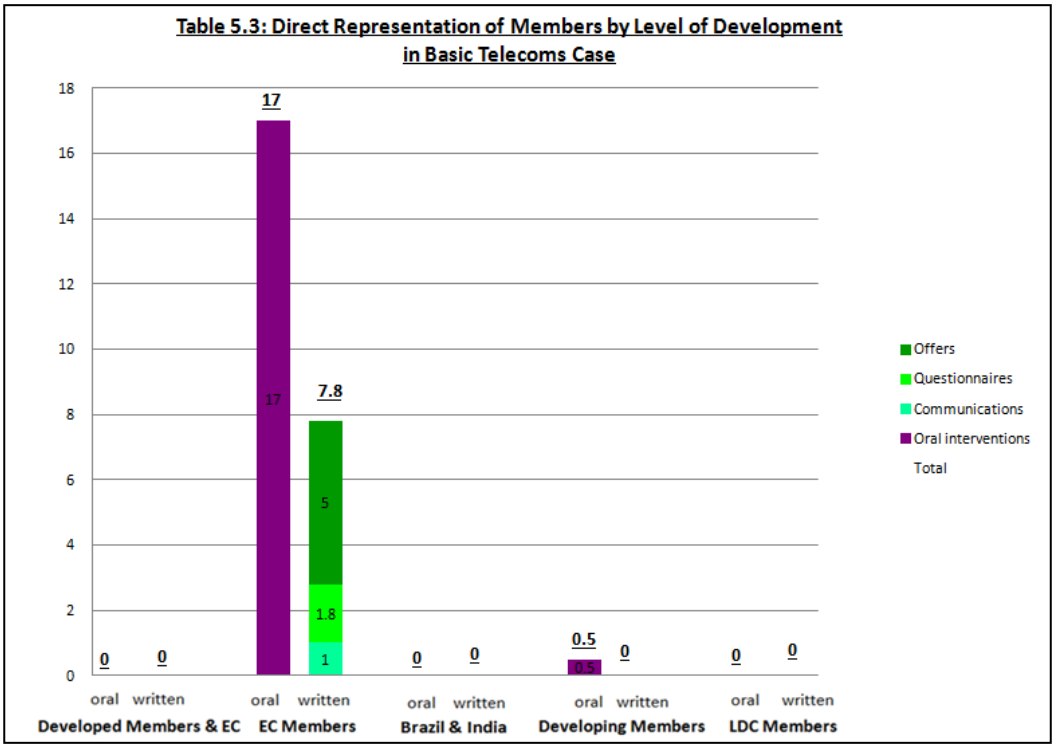
As for the degrees of direct participation of individual LDC Members (2) and Developing Members (3), they were *significantly lower* than the benchmark (8.9), scoring respectively 78 percent and 66 percent lower than the benchmark (8.9). For their part, individual EC Members did not obtain any values in 'direct participation'.



Can the significantly lower degrees of 'direct participation' by means of oral interventions of these individual Members part of the above categories be offset by a sufficiently high degree of 'direct representation' to meet the benchmark?

Table 5.3 highlights the degree of 'direct representation', i.e. the values regarding the categories of Members which interests were directly represented by other Members on their behalf. It shows that only individual Members part of the EC Members (17) and Developing Members categories (0.5) had their interests directly represented. Considering that individual LDC Members did not have their interests indirectly represented, their combined score of direct participation (2) and direct representation (0) remains unchanged, i.e. *significantly lower* (78

percent) than the benchmark (8.9). As for individual Developing Members, their combined degree of 'direct participation and direct representation' (3.5[1206]) also stayed *significantly lower* (i.e. 61 percent) than the benchmark. With respect to individual EC Members, which had zero values of direct participation, their degree of direct representation (17) significantly overcompensates for their lack of direct participation, scoring 48 percent higher than the benchmark (8.9).



WRITTEN COMMUNICATIONS: The following table combined the values of Tables 5.2 and 5.3 and evaluates the degree of 'combined direct participation and direct representation' for each category of Members in relation to the benchmark for each three types of document as they appear on the tables' legend: offers, communications and questionnaires. Only individual EC Members were directly represented for participation by means of written communications. As for the other categories, they only had values for 'direct participation' as shown on Tables 5.2 and 5.3 and above.

[1206] Representing the sum of the degree of direct participation of individual Developing Members by means of oral interventions (3), as illustrated in Table 5.2, added to their degree of direct representation (0.5) indicated in Table 5.3.

Table 5.4 illustrates the various results represented in Tables 5.2 and 5.3 separated by types of documents. It shows that individual Members part of the Developed Members & EC and the EC Members categories had a *sufficient* degree of 'combined direct participation and direct representation' by means of written communications. As for individual LDC Members, it is also clear from the table that they had a *significantly lower* degree of 'combined direct participation and direct representation' than the benchmark.

Table 5.4: Degree of Combined Direct Participation and Direct Representation by Means of Written Communications of Members by Level of Development

Categories/Types of documents	Total written communications combined	Offers	Communications	Questionnaires
Benchmark	(6.6)[1]	(4.9)[2]	(0.6)[3]	(1.8)[4]
Developed Members & EC (Direct Participation)	*Sufficient* (7.6) (13 percent higher)	*Sufficient* (5.2) (6 percent higher)	*Sufficient* (0.6) (benchmark)	*Sufficient* (1.8) (benchmark)
Brazil & India (Direct Participation)	*Sufficient* (5.5) (17 percent lower)	*Sufficient* (4.5) (8 percent lower)	*Significantly lower* (0) (N/A)	*Moderately lower* (1) (44 percent lower)
Developing Members (Direct Participation)	*Moderately lower* (2.8) (58 percent lower)	*Moderately lower* (0.1) (56 percent lower)	*Significantly lower* (0.1) (83 percent lower)	*Significantly lower* (0.6) (69 percent lower)
LDCs (Direct Participation)	*Significantly lower* (1.3) (80 percent lower)	*Significantly lower* (1.3) (74 percent lower)	*Significantly lower* (0) (N/A)	*Significantly lower* (0) (N/A)
EC Members (Direct Representation)	*Sufficient* (7.8) (15 percent higher)	*Sufficient* (5) (2 percent higher)	*Sufficient* (1) (40 percent higher)	*Sufficient* (1.8) (equals to benchmark)

[1] Representing the average degree of direct participation by means of oral interventions of the Developed Members & EC (7.6) and the Brazil & India (5.5) categories as shown in Tables 5.2 and 5.3.
[2] Representing the average degree of direct participation by means of offers of the Developed Members & EC (5.2) and the Brazil & India (4.5) categories as shown in Tables 5.2 and 5.3.
[3] Representing degree of direct participation by means of communications of the Developed Members & EC (0.6) category as shown in Tables 5.2 and 5.3.
[4] Representing degree of direct participation by means of questionnaires of the Developed Members & EC (1.8) category as shown in Tables 5.2 and 5.3.

With respect to individual Members from the Brazil & India and the Developing Members categories, their scores vary from one type of document to another. It should be found that the

degree of direct participation by means of written communications was *sufficient* for individual Members part of the Brazil & India category due to the fact that their score was *sufficient* for the most important type of communications (i.e. 'offers') and also for all three types of document combined. Similarly, it should be determined that the degree of direct participation by means of written communications was *moderately lower* than the benchmark considering that their score was *moderately lower* for 'offers' and also for all three types of document combined.

CATEGORIES OF MEMBERS WITH LOWER DEGREES OF 'COMBINED DIRECT PARTICIPATION AND DIRECT REPRESENTATION': Overall, individual Members from the following categories were attributed a lower degree of 'combined direct participation and direct representation' than the established benchmarks:

- LDC Members: *significantly lower* for both oral (2) and written (1.3)
- Developing Members: *moderately lower* for both oral (3.5) and written (2.8)

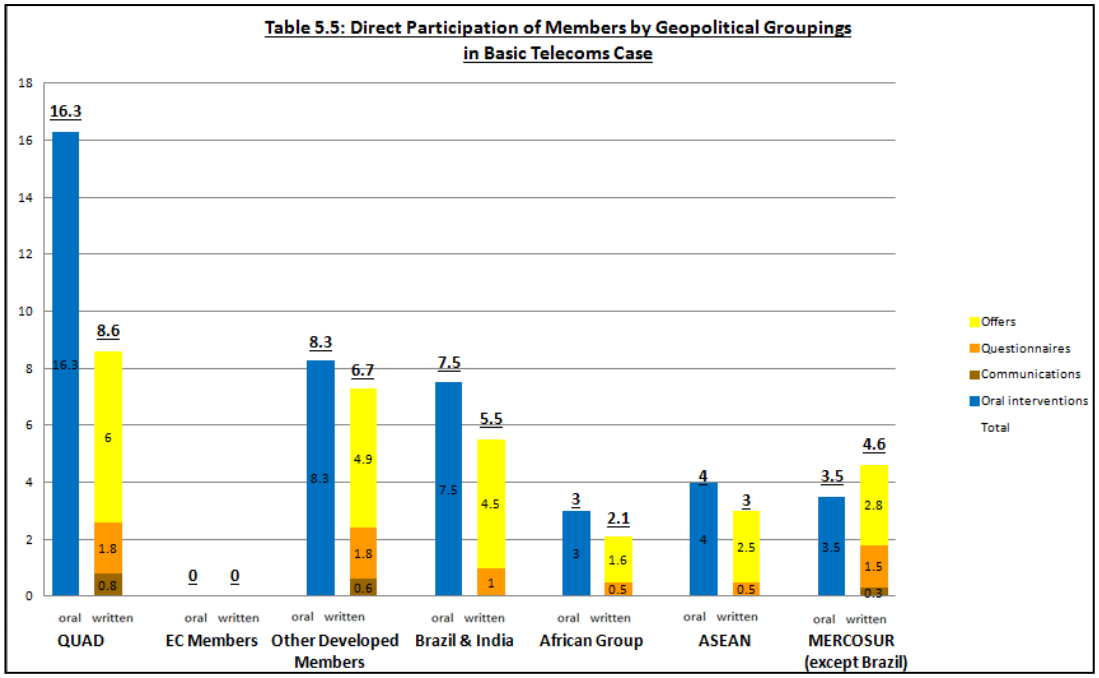
3.3.2.1.2. *Direct participation and direct representation of Members by geopolitical groupings*

This section follows the same analysis as section 3.3.2.1.1 above, however it instead focuses on 'direct participation and direct representation' of individual Members classified by geopolitical groupings. Tables 5.5 and 5.6 are also presented in the same format as Tables 5.2 and 5.3 above, with the exception that the values examined are those of Members classified by geopolitical groupings as illustrated on the horizontal axis of these tables.

ORAL INTERVENTIONS: Table 5.5 shows that individual Members part of the QUAD (16.3) grouping had the highest degree of direct participation by means of oral interventions, which also shall constitute the benchmark (16.3). Individual Members part of the Other Developed Members (8.3) and the Brazil & India (7.5) groupings obtained a degree of direct participation by means of oral interventions *moderately lower* (i.e. respectively 49 percent and 54 percent lower) than the benchmark (16.3).

As for individual Members part of the ASEAN (4), MERCOSUR (3.5) and the African Group (3) groupings, their degree of direct participation by means of oral interventions was

significantly lower (respectively 76, 79 and 82 percent lower) than the benchmark (16.3). For their part, individual EC Members did not obtain any values in 'direct participation'.



Can the lower degree of 'direct participation' by means of oral interventions of these individual Members part of the above groupings be offset by a sufficiently high degree of 'direct representation' to meet the benchmark?

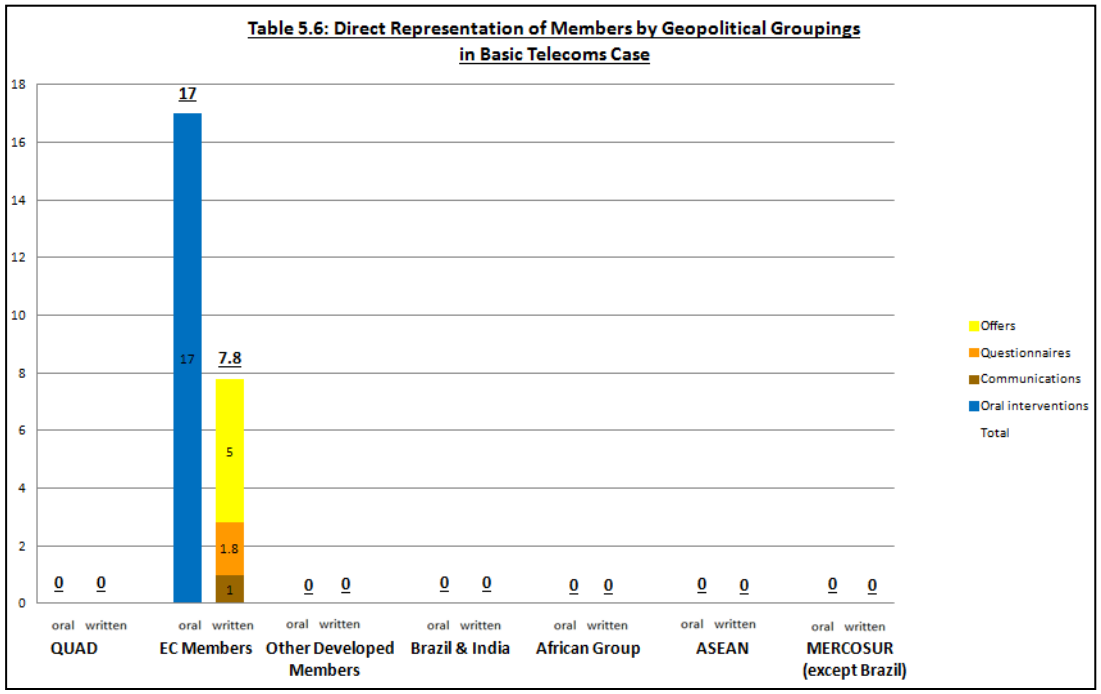


Table 5.6 indicates that individual Members part of the EC Members grouping was the only grouping which was directly represented in the processes. They obtained a degree of direct representation by means of oral interventions of 17, which was 4 percent higher than the benchmark (16.3). As a result, the degree of 'combined direct participation and direct representation' of individual EC Members (17) completely compensates for their lack of direct participation.

WRITTEN COMMUNICATIONS: Table 5.7 below consolidates the values of Tables 5.5 and 5.6 and assesses the degree of 'combined direct participation and direct representation' for each grouping of Members in relation to the benchmark for each three types of document included in the tables' legend. Only individual EC Members were directly represented for participation by means of written communications. As for the other groupings, they only had values for 'direct participation'.

Table 5.7 shows that individual Members part of the QUAD, the Other Developed Members, and the EC Members groupings had a *sufficient* degree of 'combined direct participation and direct representation' by means of written communications. As for individual Members from the African Group, Table 5.7 illustrates that they had unequivocally a *significantly lower* degree of 'combined direct participation and direct representation' than the benchmark.

The scores of individual Members from the Brazil & India, the ASEAN and the MERCOSUR groupings vary from one type of document to another. It should be found that the degree of direct participation by means of written communications was *sufficient* for individual Members part of the Brazil & India grouping considering that their score was *sufficient* for the most important type of communications (i.e. 'offers') and also for all three types of document combined.

As for individual Members part of the ASEAN grouping, due to the fact that they consistently scored *significantly lower* than the benchmarks for all three types of document examined separately, it should be considered that their degree of 'combined direct participation and direct representation' by means of written communications was *significantly lower* than the benchmark.

Table 5.7: Degree of Combined Direct Participation and Direct Representation by Means of Written Communications of Members by Geopolitical Groupings

Groupings/Types of documents	Total written communications combined	Offers	Communications	Questionnaires
Benchmark	(6.9)[1]	(5.1)[2]	(0.7)[3]	(1.7)[4]
QUAD (Direct Participation)	*Sufficient* (8.6) (20 percent higher)	*Sufficient* (6) (15 percent higher)	*Sufficient* (0.8) (13 percent higher)	*Sufficient* (1.8) (6 percent higher)
Other Developed Members (Direct Participation)	*Sufficient* (6.7) (3 percent lower)	*Sufficient* (4.9) (4 percent lower)	*Sufficient* (0.6) (14 percent lower)	*Sufficient* (1.8) (6 percent higher)
Brazil & India (Direct Participation)	*Sufficient* (5.5) (20 percent lower)	*Sufficient* (4.5) (12 percent lower)	*Significantly lower* (0) (N/A)	*Moderately lower* (1) (41 percent lower)
African Group (Direct Participation)	*Significantly lower* (2.1) (70 percent lower)	*Significantly lower* (1.6) (69 percent lower)	*Significantly lower* (0) (N/A)	*Significantly lower* (0.5) (71 percent lower)
ASEAN (Direct Participation)	*Moderately lower* (3) (57 percent lower)	*Significantly lower* (2.5) (64 percent lower)	*Significantly lower* (0) (N/A)	*Significantly lower* (0.5) (71 percent lower)
MERCOSUR (Direct Participation)	*Sufficient* (4.6) (33 percent lower)	*Moderately lower* (2.8) (45 percent lower)	*Moderately lower* (0.3) (57 percent lower)	*Sufficient* (1.5) (12 percent lower)
EC Members (Direct Representation)	*Sufficient* (7.8) (12 percent higher)	*Sufficient* (5) (2 percent lower)	*Sufficient* (1) (30 percent higher)	*Sufficient* (1.8) (6 percent higher)

[1] Representing the average degree of direct participation by means of oral interventions of the QUAD (8.6), the Other Developed Members (6.7) and the Brazil & India (5.5) groupings as shown in Tables 5.5 and 5.6.
[2] Representing the average degree of direct participation by means of offers of the QUAD (6), the Other Developed Members (4.9) and the Brazil & India (4.5) groupings as shown in Tables 5.5 and 5.6.
[3] Representing the average degree of direct participation by means of communications of the QUAD (0.8) and the Other Developed Members (0.6) groupings as shown in Tables 5.5 and 5.6.
[4] Representing the average degree of direct participation by means of questionnaires of the QUAD (1.8), the Other Developed Members (1.8) and the MERCOSUR groupings as shown in Tables 5.5 and 5.6.

Finally, individual Members part of the MERCOSUR grouping scored *moderately lower* than the benchmarks for the two most important types of document (i.e. offers and communications).

Therefore, it should be found that their degree of 'combined direct participation and direct representation' by means of written communications was *moderately lower* than the benchmark.

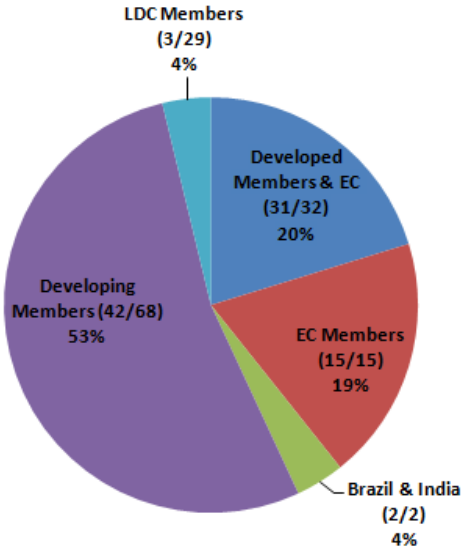
GROUPINGS OF MEMBERS WITH LOWER DEGREES OF 'COMBINED DIRECT PARTICIPATION AND DIRECT REPRESENTATION': Overall, individual Members from the following groupings were attributed a lower degree of 'combined direct participation and direct representation' than the established benchmarks:

- African Group: *significantly lower* for both oral (3) and written (2.1)
- ASEAN: *significantly lower* for both oral (4) and written (3)
- MERCOSUR: *significantly lower* for oral (3.5) and *moderately lower* for written (4.6)
- Brazil & India: *moderately lower* for oral (7.5)
- Other Developed Members: *moderately lower* for oral (8.3)

3.3.2.2. Step 2: Was a representative group of Members participating in the rulemaking processes?

As for Step 2 of the analysis of the indicator *Representativeness − Representativity*, it can be found that a total of 93 Members (including the EC and its 15 Members) participated in the consensus-building process leading up to the adoption of the *Basic Telecoms Agreement.*[1207] Table 5.8 illustrates the degree of representation by level of development of these 78 participants. It shows that a majority of 53 percent of the participants were Developing Members (which is also the most numerous category by level of development in the WTO) and 20 percent were Developed Members. The EC Members, on their own,

TABLE 5.8: Representation of Members by Level of Development in Basic Telecoms Case



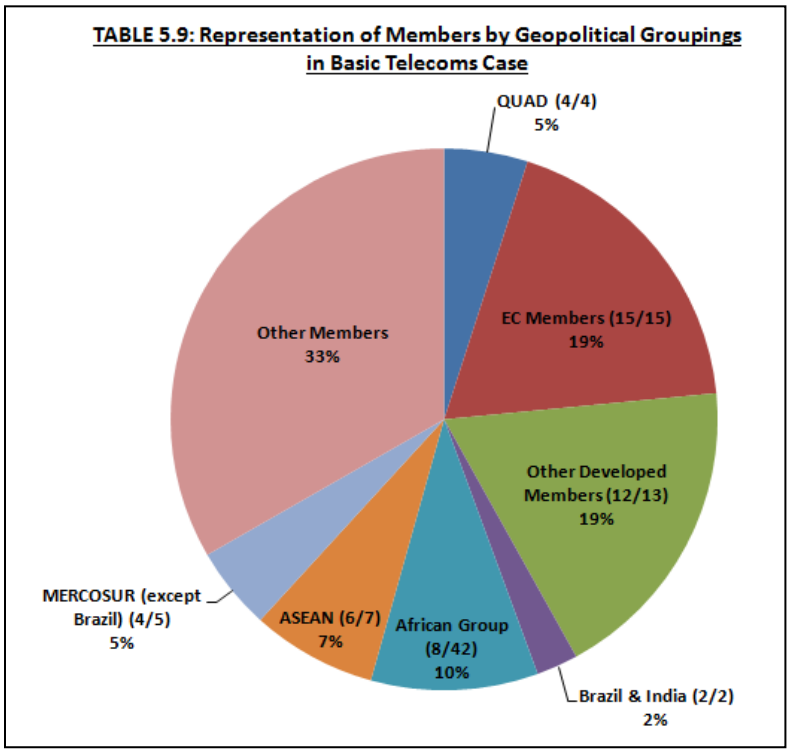
[1207] However only 70 Members adopted the *Basic Telecoms Agreement* (i.e. attached their schedules to the *Fourth Protocol to the GATS*), see *Basic Telecoms Agreement, supra* note 95, Attachment at 373-74.

represented 19 percent of the total of amount of participants. Four percent of the participants were LDC Members, and Brazil & India represented another 4 percent of the total participants.

However, the most important figures are the number of Members composing each category that participated in the processes. All Members composing the Brazil & India (2/2 Members) and the EC Members (15/15 Members) categories at the time participated. As for the Developed Members & EC category only one Member out of the 32 Members composing the category (31/32 Members) did not take part in the negotiations, amounting to 97 percent of participation for this category. However, the most notable case is the participation of Developing Members, where a total of 42 out of the 68 Members composing the category (i.e. 62 percent) joined the discussions.[1208] For their part, only three out of 29 LDC Members (i.e. 10 percent) participated in the processes.[1209]

The benchmark shall be 89.8, established by the average of the representation of the Brazil & India (100), the EC Members (100), the Developed Members & EC (97) and the Developing Members categories (62).[1210] The Developed Members & EC, the Brazil & India, the EC Members and categories obtained a *sufficient* degree of representation, scoring between 7 and 10 percent higher than the benchmark (89.8). The Developing Members category's score also falls within the benchmark, consisting of 31 percent lower than the benchmark (89.8). The LDC Members category (10) is the only category which did not meet the benchmark, with a score *significantly lower* (i.e. 89 percent lower) than the benchmark (89.8).

[1208] However only 35 Developing Members adopted the *Basic Telecoms Agreement* (i.e. attached their schedules to the *Fourth Protocol to the GATS*), see *ibid*, Attachment at 373-74.
[1209] However only 2 LDC Members adopted the *Basic Telecoms Agreement* (i.e. attached their schedules to the *Fourth Protocol to the GATS*), see *ibid*, Attachment at 373-74.
[1210] The benchmark is formed of the combined average of the degrees of participation of the categories/groupings of Members that obtained a degree of participation not under 40 percent lower than the single category/grouping of Members that had the highest degree of participation. For additional information, see: Chapter 3, Section 4.1.3.2.2 (e).



Using the same data and built on the same format, Table 5.9 illustrates the degree of geopolitical representation of all the participants during the basic telecommunications negotiations. In this case, 33 percent of the participants were 'Other Members' (i.e. not affiliated to a specific geopolitical group in this thesis). Following these 'Other Members', the most represented geopolitical group was 'Other Developed Members', representing 19 percent of the total participants. The EC Members, on their own, represented 19 percent of the participants, followed by Members respectively part of the African Group (10 percent), ASEAN (7 percent), MERCOSUR (5 percent), the QUAD (5 percent), and finally, Brazil & India (2 percent).

As for the number of Members composing each grouping that participated in the processes, all Members part of the QUAD (4/4 Members), the EC Members (15/15 Members), and the Brazil & India (2/2 Members) groupings joined the negotiations. A total of 12 out of the 13 Members composing the Other Developed Members grouping (i.e.92 percent) took part in the discussions. Impressively, less developed Members also participated to a high level, such as Members part of the ASEAN grouping, where 6 out of the 7 Members (i.e. 86 percent) participated, and those part of the MERCOSUR grouping, where 4 out of 5 Members (i.e. 80 percent) took part in the

processes.[1211] As for Members part of the African Group, 8 out of the 42 Members composing this group (i.e. 19 percent) participated.[1212]

The benchmark consists of 93, which is established by the average of the representation of the QUAD (100), the EC Members (100), the Brazil & India (100), the Other Developed Members (92), the ASEAN (86) and the MERCOSUR (80) groupings. It can be found that the QUAD, the EC Members, and the Brazil & India groupings obtained a *sufficient* degree of representation, scoring 7 percent higher than the benchmark (93) for all three groupings. The Other Developed Members (92), the ASEAN (86) and the MERCOSUR (80) groupings also met the benchmark, scoring respectively 1, 8 and 13 percent lower than the benchmark (93). However, the African Group (19) grouping scored *significantly lower* (i.e. 80 percent) than the benchmark (93).

In summary, with respect to the quantitative analysis conducted under Step 2, only the LDC Members category (10) and the African Group (19) grouping did not meet the benchmarks, but obtained a *significantly lower* score.

3.3.2.3. Step 3: Was a representative group of Members participating in the most decisive moments of the rulemaking processes?

Step 3 of the analysis for the indicator *Representativeness − Representativity* analyzes whether all categories/groupings of Members were represented in the most decisive moments of the rulemaking processes. In general, it can be found that there were three crucial moments in the negotiations. The first one was the drafting of the Reference Paper. The first informal discussions with respect to the principles that the Reference Paper would contain were conducted initially between the United States and the EC bilaterally, or among the QUAD Members. However, after a while, the QUAD Members realized that, for the success of the consultations, they would need to expand their discussions to a larger and most representative group of all involved Members. Therefore, from the beginning of 1996 onwards, upon the explicit request and consent from the participants of the NGBT, negotiations on the Reference Paper were held within a group of 16 participants from both developed and developing countries

[1211] However only 3 MERCOSUR Members adopted the *Basic Telecoms Agreement* (i.e. attached their schedules to the *Fourth Protocol to the GATS*), see *Basic Telecoms Agreement, supra* note 95, Attachment at 373-74.
[1212] However only 6 African Group Members adopted the *Basic Telecoms Agreement* (i.e. attached their schedules to the *Fourth Protocol to the GATS*), see *ibid.*

and representing most geographic regions. The data gathered does not provide indication as to which Members exactly were involved in this group.[1213] However, considering that the group was considered to be representative of the NGTB participants, it should consequently be found to be sufficiently representative for the purpose of this assessment under Step 3.

The second decisive moment was the decision at the expiry of the first time-limit for the negotiations on basic telecommunications services (i.e. on 30 April 1996) to not conclude an agreement.[1214] It appears that the United States alone would have been responsible of this decision on the basis that a critical mass of market access commitments would have not been reached.[1215] Similarly, the third most crucial moment, was the decision of the GBT on 15 February 1997 to conclude an agreement on basic telecommunications services, which once again, would have been largely impacted by the United States' view that a critical mass of offers had been reached to a sufficiently acceptable degree to conclude an agreement.[1216] Therefore, during these two crucial moments, only the interests of the QUAD grouping (mainly those of the United States, the EC (including the EC Members) and Japan, which together, it was reported, accounted for nearly 75 percent of world telecoms revenues[1217]) were represented, and to some extent, those of the Developed Members category.

3.3.2.4. Attribution of a score: *Representativeness − Representativity*

Representativeness − Representativity assessed the following standard: *Did a representative group of Members participate in the various meetings and submitted written communications at all stages of the process*? The analysis was performed in three steps. Based on a quantitative analysis, Step 1 evaluated the degree of 'combined direct participation and direct representation' of Members classified by level of development and geopolitical groupings, as being the two greatest forms of participation. It concluded that individual Members from all the various categories and groupings obtained *sufficient* degrees of 'combined direct participation and direct

[1213] See *Note on Article XVIII, supra* note 944 at para 13. See also *NGBT Meeting of 26 January 1996, supra* note 1186 at para 6; *NGBT Meeting of 28 February 1996, supra* note 1186 at para 5.
[1214] See generally *NGBT Meeting of 26 April 1996, supra* note 959; *NGBT Meeting of 30 April 1996*, *supra* note 958.
[1215] *NGBT Meeting of 30 April 1996*, *supra* note 958 at para 4; Statement of Ambassador Barshefsky of 19 March 1997, *supra* note 522.
[1216] *GBT Meeting of 14 February 1997, supra* note 967 at para 3; *NGBT Meeting of 26 April 1996*, *supra* note 959 at para 4; *GBT Meeting of 15 February 1997, supra* note 523.
[1217] Frid, "The Telecoms Pact", *supra* note 1043 at 89; Drake & Noam, "The WTO Deal", *supra* note 522 at 812.

representation' both by means of oral interventions and written communications, with the exceptions of: individual Members part of the LDC Members and the Developing Members categories (both with respect to oral interventions and written communications) and individual Members from the African Group, the ASEAN, and the MERCOSUR groupings (all three with respect to oral interventions and written communications), as well as the Brazil & India and the Other Developed Members groupings (both with respect to oral interventions only).

Also based on a quantitative analysis, Step 2 evaluated whether a representative group of Members from all categories and groupings (by percentage) participated in the *Basic Telecoms Agreement.* It was found that all categories or groupings of Members were sufficiently represented in the basic telecommunications negotiations, with the exception of the LDC Members category and the African Group grouping.

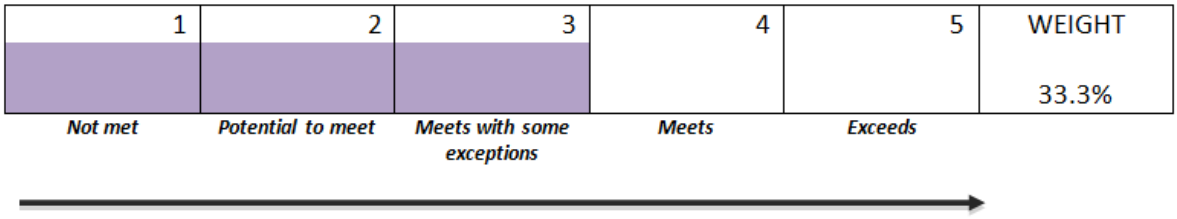
Finally, Step 3 was based on a qualitative analysis and focused on the degree of balanced representation by level of development and geopolitical groupings in the most decisive moments of the rulemaking processes. In total, for the three most decisive moments that were examined, all the categories/groupings of Members were represented during the negotiations of the principles to be contained in the Reference Paper. However, for the two last crucial moments (i.e. the decision to adopt and to not adopt the *Basic Telecoms Agreement*), only the QUAD grouping (including the EC Members) was represented, and to some extent the Developed Members category.

Overall, it can be considered that the performance of the Basic Telecoms Case during the quantitative and qualitative analyses was consistently below the standards of the indicator *Representativeness − Representativity* (amounting to a score of 2.5/5[1218]), with the exception of the Developed Members and EC Members categories, as well as the QUAD grouping, which degrees of representativity were consistently *sufficient.* However, due to the fully voluntarily nature of the negotiations, which outcomes extended on a MFN basis to the whole membership,

[1218] For the first step's results, the degree of representativity of Members was *sufficient* in 12 out of 24 occasions, which represents a score of 50 percent. For the second step, the degree of representativity of Members was *sufficient* in 10 out of 12 occasions (representing a score of 83 percent). Finally, as for the third step, it was *sufficient* only in 20 out of 36 occasions (representing a score of 56 percent). Combined together, all three steps scored an average of 63 percent. Following the rating standard used in this thesis, the performance is attributed a score of 4/5 when it meets the indicator's standard. Thus, if 4/5 represents a degree of representativity met at 100 percent of the time, the score of 63 percent for all three steps combined equals approximately a performance of 2.5/5 (i.e. 63/100 = 2.5/5).

the standard of representativity should not be set as high as for multilateral agreements which outcomes are binding on the entire membership. Indeed, at the end of the negotiations, each Member could decide to join the *Basic Telecoms Agreement* or not, and at the same time, be assured to benefit from the advantages conferred by the agreement on a MFN basis. Moreover, when assessing the substantial impact of the United States on the outcome of the agreement, the results of the analysis should be tempered by the fact that the United States' market in basic telecommunications services was then the largest of the world, of a similar size than the additional market access that was gained at the conclusion of the *Basic Telecoms Agreement.*[1219] Therefore, the United States was by far the single participant that had the largest amount of vested interests and ran the highest risk of losing the most. Thus, considering these unique specificities of the Basic Telecoms Case, the standard of the second indicator of representativeness, *Representativeness − Representativity,* should be lessen and the Basic Telecoms Case should be attributed an additional 0.5 point, for a total of 3/5 (i.e. *performance did not consistently meet the indicator's standards*').

Representativeness' Indicator #2: Representativity



3.3.3. Representativeness − Outcome

> *Representativeness' Indicator #3: Did the negotiating mandate and the final outcome represent a balanced set of interests that were expressed? Were Members free to accept or reject the results of a decision?*

Representativeness − Outcome analyses whether the final outcomes contained in the *Basic Telecoms Agreement* represent a balanced set of interests that were expressed. It also assesses whether Members were free to accept or reject the results of this agreement.

[1219] See Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942 at 321.

3.3.3.1. Did the Basic Telecoms Agreement represent a balanced set of interests that were expressed and were Members free to accept it?

The acceptance of the *Basic Telecoms Agreement* was made on a pure voluntary basis. Each Member was free to participate or not in the negotiations and subsequently also free to decide to attach a schedule of commitments at the conclusion of the agreement. Moreover, each participant got to control the precise commitments that it would include in its schedule, including the decision to attach or not the Reference Paper or to annex it but with some modifications.[1220]

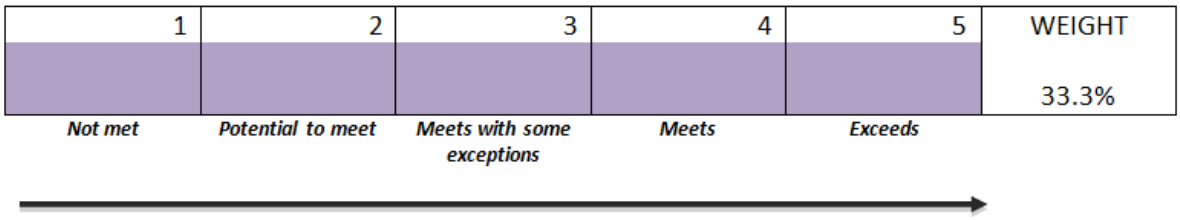
Indeed, out of the approximately 132 WTO Members at the end of 1997[1221], 78 participated in the basic telecommunications negotiations and 70 Members made market access and national treatment commitments.[1222] In addition, 56 out of the 70 participating Members committed to the Reference Paper in whole or with a few modifications and 12 additional Members included regulatory disciplines of their own drafting in their schedules.[1223]

3.3.3.2. Attribution of a score: *Representativeness − Outcome*

Overall, *Representativeness − Outcome* assessed the following standard: *Did the final outcome represent a balanced set of interests that were expressed? Were Members free to accept or reject the results of a decision?* Due to the highly consensual nature of the negotiations and the *Basic Telecoms Agreement* itself, it would be fair to say that the final outcomes represented to a very high degree a balanced set of interests that were expressed. Considering that not all Members participated in the negotiations or scheduled commitments and that each participant got to pick and choose the commitments it would be bound to, it can be concluded that Members were completely free to accept or reject the results of the *Basic Telecoms Agreement.* Taking into account the exceptional consensual nature of the *Basic Telecoms Agreement,* it should be found that it exceeded the standards of *Representativeness − Outcome.* Therefore, *Representativeness − Outcome,* i.e. the third indicator of representativeness, should be attributed a score of 5/5 (i.e. '*performance exceeded the indicator's standards*').

[1220] See e.g. *Note on Article XVIII, supra* note 944 at para 17.
[1221] See Appendix 2.
[1222] See *Basic Telecoms Agreement, supra* note 95, Attachment at 373-74 (55 schedules were attached, with the EC accounting for its 15 Members).
[1223] *Ibid*; Bronckers & Larouche, "Telecommunications Services", *supra* note 971 at 21.

Representativeness' Indicator #3: Effective Participation



3.3.4. Overall performance of the criterion of representativeness

Overall, the criterion of representativeness was evaluated on the basis of the following three indicators, which were all evaluated separately and attributed a distinct score:

(i) the degree of internal transparency and inclusiveness of the rulemaking processes (scored 4/5);
(ii) the degree of representativity of Members in the rulemaking processes (scored 3/5); and
(iii) the degree of effective participation of Members, i.e. whether the negotiating mandate and the final outcome represent a balanced set of interests that were expressed and whether Members were free to accept or reject the results of a decision (scored 5/5).

Due to the fact that all three indicators have an identical weight for the pondering of the criterion of representativeness as a whole, the criterion of representativeness scores 4/5, consisting of an average of the sums of the scores of all three indicators of legitimacy. As a result, it can be concluded that the performance of the Basic Telecoms Case *consistently met the standards* of the criterion of representativeness.

CASE STUDY #2: BASIC TELECOMS AGREEMENT								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
REPRESENTATIVENESS	Ind #1	33.3						1.33
	Ind #2	33.3						1
	Ind #3	33.3						1.67
	Rating	100						4/5
RATING STANDARD	*Performance consistently met the standards of the legitimacy criterion*							**4/5**

3.4. Openness

The criterion of openness is to be evaluated on the basis of two indicators of legitimacy:

(i) the external transparency of the rulemaking processes (Section 3.4.1); and
(ii) opportunities for public participation that were made available within the WTO framework (Section 3.4.2).

The following sections proceed with the analysis of each of the two indicators of openness.

3.4.1. Openness − External transparency

> *Openness' Indicator #1: Was there easily accessible and timely information for non-state actors regarding the rulemaking process for the specific subject-matter from the time the subject-matter was added on the WTO's agenda, including the meetings' discussions and decisions taken as it relates to the subject-matter, until its legal implementation?*

Openness − External transparency assesses the degree of external transparency of the rulemaking processes, i.e. whether there was easily accessible information for non-state actors regarding the negotiations on basic telecommunications throughout the rulemaking processes. It also analyzes whether such information was made available to the public within a sufficient

period of time to enable non-state actors to provide timely comments on the issues that mattered to them.

3.4.1.1. Was there easily accessible and timely information for non-state actors?

The accessibility of most WTO documents related to the basic telecommunications negotiations was governed by the *1996 Procedures Derestriction,* which were more restrictive than their successor (i.e. the *2002 Procedures for Derestriction*).[1224] According to the *1996 Procedures for Derestriction,* all the draft documents such as agendas and decisions or other reports concerning the basic telecommunications negotiations have been derestricted upon their adoption.[1225] However, Members' proposals, the background notes by the Secretariat, as well as the minutes of the NGTB or the GTB meetings were considered for derestriction six months after the date of their circulation to Member, which would make them available to the public in practice in average after 8-9 months[1226], unless they would be subject to a decision on derestriction by the NGTB or the GTB.[1227]

From the evidence collected, the NGBT/GBT would have decided on the derestriction of a specific set of documents of the group at only two occasions. The first decision on derestriction by the NGTB was made at its meeting of 27-28 February 1995, where it was agreed that the questionnaire on basic telecommunications[1228] would be derestricted, along with the responses to it contained in the Addenda to that document, prior to the expiry of the period of six months after the date of their circulation, however on the assurance that these documents contained only "factual informal and did not contain the negotiating positions of any participants."[1229] The second decision was taken at the GBT meeting of 19 July 1996 where the group agreed on the

[1224] *1996 Procedures for Derestriction, supra* note 480; *2002 Procedures for Derestriction*, *supra* note 480.
[1225] *1996 Procedures for Derestriction, supra* note 480, Appendix, para (a).
[1226] WTO, *Explanatory Note on Old and New Procedure, supra* note 485.
[1227] *1996 Procedures for Derestriction, supra* note 480, Appendix, paras (a) and (c).
[1228] *Questionnaire on Basic Telecoms*, *supra* note 1192.
[1229] *NGBT Meeting of 27-28 February 1995, supra* note 1186 at para 12. The representative of the EC expressed some concerns that this decision would create a precedent for the derestriction of future documents and, therefore, stated that it would agree to the derestriction of these documents only on the understanding that each decision in relation to derestriction would have to be taken on a case-by-case basis and on its own merits. The position expressed by the EC regarding its concerns on the creation of a precedent for the derestriction of future documents shows some evidence of a culture of secrecy that prevailed in the WTO, at least in its earlier years.

Chair's proposal to derestrict the draft schedules to be attached to the *Fourth Protocol to the GATS* on 30 August 1996.[1230]

The two set of documents that were derestricted contained important information concerning the basic telecommunications discussions and outcomes. With the exception of some confidential documents that would have reflected the negotiating positions of the participants, these two sets of documents were probably the most informative for outsiders to the negotiation processes, such as non-state actors. Indeed the questionnaires provided information regarding each government's regulatory environment regarding the supply of basic telecommunications.[1231] As for the draft schedules, they supplied information regarding the type of market access and regulatory commitments that the participants intended to make. In addition, they were derestricted well before the conclusion of the agreement, which could have provided meaningful opportunities to non-state actors to comment on the ongoing negotiations.

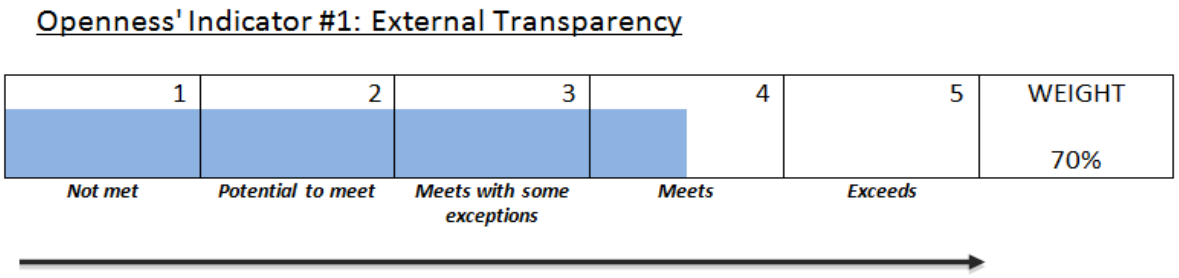
As a complement to these two sets of documents, non-state actors were able to access to the minutes of the meetings of the NGBT/GBT as well as Members' proposals, which were also great sources to gain substantial information on the issues pertaining to the basic telecommunications negotiations. However, they were made available only 8-9 months after circulation, which kept non-state actors nearly a year behind the issues that were addressed.

3.4.1.2. Attribution of a score: *Openness − External transparency*

Overall, *Openness − External transparency* assessed the following standard: *Was there easily accessible and timely information for non-state actors regarding the rulemaking process for the specific subject-matter from the time the subject-matter was added on the WTO's agenda, including the meetings' discussions and decisions taken as it relates to the subject-matter, until its legal implementation?* In general, most documents such as the minutes of the meetings of the NGBT/GBT, as well as Members' proposals or other working papers were not made available in a sufficiently timely manner to provide meaningful opportunities to non-state actors to be fully informed and comment on ongoing negotiations. However, this was mitigated by the fact that they got prompt access to two sets of documents (the questionnaires and the draft schedules)

[1230] *GBT Meeting of 19 July 1996, supra* note 1186 at para 7.
[1231] *Questionnaire on Basic Telecoms*, *supra* note 1192 at 1.

which can be considered as some of the most informative sources of information regarding the basic telecommunications negotiations. For those reasons, it should be found overall that the processes were transparent to the public, however with some exceptions. As a result, *Openness − External transparency,* i.e. the first indicator of openness, should be attributed a score of 3.5/5 (i.e. '*performance consistently met the indicator's standards*, *with a few exceptions*).



3.4.2. Openness − Public participation

> *Openness' Indicator #2: Were there adequate channels for non-state actors to make oral statements and circulate written communications upon the specific subject-matter?*

Openness − Public participation evaluates whether there were adequate channels made available within the WTO framework for non-state actors to express their views (either through oral statements or by the circulation of written communications) on the basic telecommunications negotiations.

3.4.2.1. Were there adequate channels for non-state actors to express their views?

From the data collected, there is no evidence that the WTO Secretariat would have organized public forums, workshops or other settings, which would have allowed non-state actors to express their views or discuss the issues related to basic telecommunications services. Moreover, there is no evidence that there were adequate and official channels for non-state actors to circulate written communications. Indeed, the WTO Secretariat only began to post the position papers that were submitted by non-state actors on and after 1998, which was after the conclusion of the negotiations on basic telecommunications that took place between 1994 and 1997.[1232]

[1232] See WTO, *NGO position papers received, supra* note 931.

The private telecoms industries most certainly played an important role behind the scenes and in informal settings in the building of a consensus on the *Basic Telecoms Agreement*[1233]; however these consultations were made outside of the official framework of the WTO and are therefore not considered for the evaluation of *Openness − Public participation*.

3.4.2.2. Attribution of a score: *Openness − Public participation*

Openness − Public participation assessed the following standard: *Were there adequate channels for non-state actors to make oral statements and circulate written communications upon the specific subject-matter?* Considering the fact that there is no evidence from the data collected that non-state actors would have been provided with any opportunities to express their views under the framework of the WTO, *Openness − Public participation,* i.e. the second indicator of openness, should be attributed a score of 1/5 (i.e. '*performance did not meet any of the indicator's standards*').

Openness' Indicator #2: Public Participation

1	2	3	4	5	WEIGHT
					30%
Not met	*Potential to meet*	*Meets with some exceptions*	*Meets*	*Exceeds*	

3.4.3. Overall performance of the criterion of openness

Overall the criterion, of openness was assessed on the basis of the following two indicators, which were analyzed separately and attributed a distinct score:

(i) the degree of external transparency of the rulemaking processes (scored 3.5/5); and
(ii) the opportunities for public participation made available within the WTO framework (scored 1/5).

Considering that the first indicator accounts for 70 percent of the total weight of the criterion of openness, and the second indicator, 30 percent, the criterion of openness should be attributed a rounded score of 3/5, representing the sum of the weighted scores of each of its two indicators of

[1233] Bronckers & Larouche, "WTO Regime for Telecommunications", *supra* note 942.

legitimacy. As a result, it can be concluded that the performance of the Basic Telecoms Case *did not consistently meet the standards of the criterion of openness*.

CASE STUDY #2: BASIC TELECOMS AGREEMENT								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
OPENNESS	Ind #1	70						2.5
	Ind #2	30						0.3
	Rating	100						2.8/5
RATING STANDARD	*Performance did not consistently meet the indicator's standards*							**3/5**

4. RESULTS AND CONCLUSION

The Basic Telecoms Case received an overall legitimacy score of 3.8/5, as illustrated in Table 5.10 below, which indicates that it *consistently met the standards of the legitimacy criteria*. Table 5.11 presents the individual result of each of the separate indicators of legitimacy.

Most notably, the Basic Telecoms Case *consistently met the standards* of all three criteria of legality, effectiveness and representativeness, with a rounded score of 4/5. Overall, for the criterion of legality, the Basic Telecoms Case was an excellent example of a case where Members did not follow the rules and procedures contained in the *WTO Agreement* for implementing their negotiated policy, but it was nevertheless found to be legally correct. Indeed, the participants accepted an agreement ('the Reference Paper') through entries in schedules pursuant to Article XVIII of the GATS and they used a self-standing treaty to implement the results of the negotiations. These legal means of implementation were also effective as they allowed the participants to: pick and choose their commitments; implement a plurilateral agreement without the approval of the entire Membership (i.e. the decision of the General Council or the Ministerial Conference); ensure reciprocity; and, in the case where not all Members would ratify the agreement by the set deadline, as it has shown to be the case, allow Members that had accepted the agreement to decide upon its entry into force.

Other practices contributed to the effectiveness of the rulemaking processes. First, the fact that the participants negotiated outside of a round of multilateral trade negotiations enabled them to concentrate all their efforts and resources (especially important for the smaller Members) on one subject matter: basic telecommunications. Moreover, it did not condition the conclusion of an agreement on basic telecommunications with other outcomes. In addition, negotiating on a critical mass basis was proven to be an effective method for achieving the expected outcomes. Indeed, while only interested Members were at the table, their presence resulted in representation in the *Basic Telecoms Agreement* of over 90 percent of WTO Members' telecommunications revenue, including an extensive amount of regulatory commitments. The Basic Telecoms Case also showed that the leadership by the Chair in proposing a solution to preserve the results achieved in the negotiations contributed to the effectiveness of the processes. On the downside, the major trading partners could have shown more leadership during the negotiations, which would have provided the necessary impetus to participants to improve their

Table 5.10: Legitimacy Score of the Rulemaking Processes Used in Basic Telecoms Case

CASE STUDY #2: BASIC TELECOMS AGREEMENT											
CRITERIA	**Weight (%)**	**Indicators**	**Weight (%)**	**Interval Scale**					**Criteria Score (%)**	**WEIGHTED SCORE**
				1	**2**	**3**	**4**	**5**		
LEGALITY	20	Ind #1	100						4	**0.8**
		Rating	100						4/5	
EFFECTIVENESS	25	Ind #1	33.3						1.33	**1**
		Ind #2	33.3						1.17	
		Ind #3	33.3						1.5	
		Rating	100						4/5	
REPRESENTATIVENESS	35	Ind #1	33.3						1.33	**1.4**
		Ind #2	33.3						1	
		Ind #3	33.3						1.67	
		Rating	100						4/5	
OPENNESS	20	Ind #1	70						2.5	**0.56**
		Ind #2	30						0.3	
		Rating	100						2.8/5	
TOTAL / RATING	100									**3.8/5**
RATING STANDARD	*Performance consistently met the standards of the legitimacy criteria*									

offers of commitments.

Regarding the overall degree of representativeness of the rulemaking processes, despite the fact that the negotiations were predominantly conducted in bilateral settings, the processes turned out to be sufficiently transparent as the participants often reported the results of their negotiations to all the participants and they submitted an update of their draft offers on a regular basis. In addition, due to the fact that each Member was free to participate or not in the process and could decide upon the extent of its own commitments, the outcome of the *Basic Telecoms Agreement* was highly reflective of a balanced set of interests expressed by Members. Moreover, there were no losers in the negotiations since the results were extended on a MFN basis to the entire Membership. On the downside, as for the overall representativity of the Members participating in the process, the quantitative and qualitative analyses showed that Members from the different categories and groupings composed of developing and least-developed countries[1234] were underrepresented as compared to their most developed counterparts. However, the negative impact of this fact was mitigated by the fully voluntary and MFN nature of the negotiations.

As for the criterion of openness, it received a rounded score of 3/5, indicating that its *standards were not consistently met* by the Basic Telecoms Case. Regarding the external transparency of the processes, non-state actors were not able to have sufficiently timely access to most documents, such as the minutes of the meetings of the NGBT/GBT, as well as Members' proposals or other working documents. However, they got prompt access to two of the most useful sources of information (i.e. the questionnaires and the draft schedules) regarding the basic telecommunications negotiations. As for the opportunities for public participation, the data collected indicates that no such channels would have been provided for non-state actors to express their views and opinions on the subject matter of the negotiations.

[1234] The following categories and groupings were underrepresented: BIC, Developing Members, LDC Members, the African Group, ASEAN, and MERCOSUR. However, the Other Developed Members & EC grouping was also insufficiently represented as compared to the QUAD grouping, the Developed Members and the EC Members categories.

Table 5.11: Performance of the Indicators of Legitimacy in Basic Telecoms Case

PERFORMANCE OF THE INDICATORS OF LEGITIMACY BASLIC TELECOMS CASE					
NOT MET	**MET WITH SOME EXCEPTIONS**		**MET**		
Did not meet any of the standards	***Did not consistently meet the standards***	***Met the standards with a few exceptions***	***Met the standards***	***Exceeded the standards at some occasions***	***Exceeded the standards***
1/5	**3/5**	**3.5/5**	**4/5**	**4.5/5**	**5/5**
• Public participation	• Representativity of Members in the processes	• Negotiated policy brought into effect • External transparency	• Correctness of the rule and procedure used • Mandated goal addressed by final outcome • Internal transparency and inclusiveness	• Effectiveness of the process	• Effective participation (whether the final outcome represented a balanced set of interests)

Overall, the Basic Telecoms Case highlighted the benefits of concluding a plurilateral agreement outside of a round of multilateral trade negotiations based on a critical mass of offers, extending on a MFN basis, where participants were free to decide upon the extent of their commitments. This made it possible to meet the standards of all three criteria of legality, effectiveness and representativeness without any trade-offs. It shows that representativeness does not always come at the expense of effectiveness. As for the criterion of openness, its lower score is not related to the plurilateral nature and other characteristics of the rulemaking processes *per se*, but predominantly linked to the rules, guidelines and practices regarding external transparency and public participation that existed in the first few years of the WTO.

CHAPTER 6
CASE STUDY #3: AGREEMENT ON TRADE FACILITATION

1. INTRODUCTION

The *Agreement on Trade Facilitation* is the first Multilateral Trade Agreement to be concluded since the establishment of the WTO in 1995. The WTO showed that it could achieve consensus following a decade of negotiations. To arrive at the conclusion of this Agreement, Members employed new rulemaking practices and maintained some of their older ones. Did it prove once again that the membership is flexible? What do these practices tell about the legitimacy of the rulemaking processes?

Can a multilateral trade agreement signed by 160 Members accommodate the various interests of the entire Membership? The *Agreement on Trade Facilitation* included a series of 'best endeavours' commitments. In addition, it was based on an unprecedented *à la carte* approach, which allowed every developing and LDC Members to determine for themselves the date of implementation of each of the provisions of the Agreement.[1235] Moreover, it introduced a novel concept regarding special and differential treatment: the requirement to undertake a commitment to be conditional upon the existence of implementation capacity.[1236] Can the WTO effectively move towards variable geometry and away from binding commitments?

The Trade Facilitation Case also provides the unique opportunity to reflect upon a question which has been lingering for a long time: is it possible to carry out fully inclusive and transparent processes conducive to consensus among more or less 160 Members? Does at some point the use of small groups become necessary to forge a consensus?

[1235] *Protocol Amending the WTO Agreement, supra* note 96, Annex, Article 14.

[1236] *Ibid,* Article 13; Neufeld, Nora, *The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement,* WTO Economic Research and Statistic Division, Staff Working Paper ERSD-2014-06 (7 April 2014) at 8, online: WTO <https://www.wto.org/english/res_e/reser_e/ersd201406_e.pdf> [Neufeld, *The Long and Winding Road*]; Bernard Hoekman, *The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage?* CEPR Discussion Paper No DP10212 (October 2014) at 1, online: SSRN <http://ssrn.com/abstract=2512740> [Hoekman, "The Bali Trade Facilitation Agreement"].

The Trade Facilitation Case also raises the issue of the effectiveness of the rules and procedures contained in the *WTO Agreement.* Are they sufficiently flexible? Were Members willing to depart from the principle of consensus decision-making in order to facilitate the achievement of an agreement? Although it is too soon to judge, what are the prospects regarding the effectiveness of the implementation process?

The issue of trade facilitation directly concerned the interests of millions of exporters and importers as the results of the negotiations were to directly impact the procedures, practices and formalities used during the movements of goods. It also indirectly affected the interests of consumers as the facilitation of trade procedures were believed to have an effect on the prices of goods. Considering these elements, was the WTO able to provide non-state actors with sufficient channels to express their views and opinions regarding the issues at stake and a sufficient degree of external transparency to follow the ongoing work of the Council for Trade in Goods and the Negotiating Group on Trade Facilitation? Was the WTO able to reconcile Members' normative value of sovereignty with the demands of non-state actors to be increasingly consulted in the negotiation of international trade rules and agreements that directly concern their interests? This Chapter provides responses to these questions.

The following section provides a description of the rulemaking processes that took place in the Trade Facilitation Case, followed by the assessment of their legitimacy.

2. DESCRIPTION OF THE RULEMAKING PROCESS

The rulemaking processes leading to the adoption of the text of the *Agreement on Trade Facilitation* spanned over a period of seventeen years between 1996 and 2014. Two stages can be distinguished: the agenda-setting processes which gave rise to the adoption of the *Doha Work Programme* on 1 August 2004 that contained the mandate for the launch of negotiations on trade facilitation (Section 2.1); and the consensus-building process which led to the adoption of the *Agreement on Trade Facilitation* by the General Council on 27 November 2014 (Section 2.2).

2.1. Agenda-Setting Process: Adoption of the Doha Work Programme

Shortly after the conclusion of the Uruguay Round, some Members began to put some thoughts on the content of the next round, which they hoped would include trade facilitation.[1237] Trade facilitation can be defined as the "simplification and harmonization of international trade procedures, with trade procedures being the activities, practices and formalities involved in collecting, presenting, communications and processing data required for the movement of goods in international trade."[1238] Basically, it has the objective of lowering transaction costs and increasing timeliness of transit.[1239]

The proposal to add the subject matter on the WTO agenda was first brought up by the European Communities in November 1996. It was argued that the costs of complying with official requirements for the importation, exportation and transit of goods was significant to the business community and the consumers, as they could often exceed the tariff duties by a considerable extent.[1240] Hence, at the first WTO Ministerial Conference held in Singapore in December 1996, Ministers agreed to include trade facilitation in the broader WTO agenda. Paragraph 21 of the *Singapore Ministerial Declaration* stated that Ministers directed "the Council for Trade in Goods to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area."[1241]

What were the main obstacles to trade identified during the exploratory work? Traders and trade officials singled out five categories of concerns: (i) excessive documentation requirements; (ii) lack of automation and insignificant use of information-technology; (iii) lack of transparency,

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[1237] International Trade Centre, *WTO Trade Facilitation Agreement: A Business Guide for Developing Countries* (Geneva: ITC, 2013) at 1, online: ITC <http://www.intracen.org/wto-trade-facilitation-agreement-business-guide-for-developing-countries>.
[1238] *Ibid*.
[1239] *Ibid.*
[1240] WTO, Council for Trade in Goods, *Minutes of the Meeting* (held on 1, 4, 5 and 6 November 1996), WTO Doc G/C/M/15 at para 5.1, online: WTO <http://docs.wto.org> [*Council for Trade in Goods Meeting of 1, 4, 5 an 6 November 1996*].
The proposal by the European Communities can be found in: WTO, Council for Trade in Goods, *WTO Ministerial Conference − Elements of a WTO Programme on Trade Facilitation* (communication by the European Communities of 1 November 1996), WTO Doc G/C/W/67, online: WTO <http://docs.wto.org>.
[1241] *Singapore Ministerial Declaration* (adopted on 13 December 1996), WTO Doc WT/MIN(96)/DEC at para 21, online: WTO <http://docs.wto.org>.

unclear and unspecified import and export requirements; (iv) inadequate procedures, especially a lack of audit-based controls and risk-assessment techniques; and (v) lack of modernization of, and cooperation among customs and other government agencies, which thwarts efforts to deal effectively with increased trade flows.[1242] Moreover, by assessing Members' national experiences regarding the movement of goods across barriers, some found a correlation between these experiences and WTO principles and observed that the description of these experiences showed that problems faced by traders were "identical in practically every country regardless of their level of development."[1243] Moreover, the national experiences illustrated the positive impacts of modernization and automation of customs procedures in terms of gains for traders and the government through reduction in transaction cost, better deployment of officers and better targeting of scarce resources to more risk-prone goods.[1244] Yet, a large number of developing countries (including India, Brazil, Philippines, Indonesia and Kenya) remained opposed to bringing new disciplines of trade facilitation in the WTO and believed that such issues would be better addressed by the World Customs Organization.[1245]

After more than four years of exploratory and analytical work on the subject matter, many delegations considered the topic of trade facilitation to be "ripe for negotiations" in the WTO and, therefore, it was proposed to include trade facilitation in the Doha Development Agenda.[1246] The General Council adopted the *Doha Work Programme* on 1 August 2004 and decided by

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[1242] WTO, Council for Trade in Goods, *Statement by H.E. Mr. R. Saborío Soto, Chairman of the Council for Trade in Goods, Under Item I (Trade Facilitation),* WTO Doc G/L/226 (1998), online: WTO <http://docs.wto.org> [*Statement by H.E. Mr. R. Saborío Soto*]; WTO, Council for Trade in Goods, *Checklist of Issues Raised During the WTO Trade Facilitation Symposium* (note by the Secretariat)*,* WTO Doc G/C/W/113 (1998), online: WTO <http://docs.wto.org> [*Checklist of Issues*]; WTO, Council for Trade in Goods, *WTO Trade Facilitation Symposium 9-10 March 1998: Report by the Secretariat,* WTO Doc G/C/W/115 (1998), online: WTO <http://docs.wto.org> [*WTO Trade Facilitation Symposium*].

[1243] WTO, *Overview of Trade Facilitation Work in 2001,* online: WTO <http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview2000_e.htm> [WTO, *Overview of Trade Facilitation Work in 2001*].

[1244] Shashank Priya, *Trade Facilitation: A Brief Negotiating History,* eSS Working Paper/International Trade (March 2007) at 1, online: IDEAS <https://ideas.repec.org/p/ess/wpaper/id919.html> [Priya, *Trade Facilitation Negotiating History*].

[1245] *Ibid* at 2.

[1246] Ministers adopted the *Doha Ministerial Declaration* of 14 November 2001, which moved the issue of trade facilitation to the next level by providing that the work programme on trade facilitation would involve clarification and improvement of relevant aspects of GATT 1994 articles on the freedom of transit for goods from other Member states (Articles V), trade-related fees and formalities (Article VIII), and transparency in the regulation and administration of trade regulation (Article X), as well as the identification of the trade facilitation needs and priorities of Members, in particular developing and least-developed countries, see: *Doha Ministerial Declaration*, *supra* note 10 at para 27. See also WTO, *Overview of Trade Facilitation Work in 2001, supra* note 1243.

"explicit consensus" to launch negotiations on trade facilitation.[1247] Annex D of the *Doha Work Programme* included modalities for future negotiations, which comprised the creation of a Negotiating Group on Trade Facilitation (NGTF)[1248] that was mandated to clarify and improve Articles V, VIII and X of the GATT 1994 and enhance technical assistance and support for capacity building in this area.[1249] Additionally, it provided unprecedented terms to the effect that developing or LDC Members would not be required to implement new commitments unless they receive the technical assistance necessary to do so.[1250]

2.2. Consensus-Building Process: Adoption of the Agreement on Trade Facilitation

Trade facilitation negotiations spanned between November 2004 and December 2013. During the years 2004 to 2009, Members submitted over 60 written contributions sponsored by more than 100 delegations on the issue of trade facilitation.[1251] In December 2009, work on trade facilitation made a significant step forward when Members agreed to circulate a draft consolidated text.[1252] It allowed the remaining negotiations to be made from a single text-based document.[1253] Finally, after more than seventeen years of preparation and nine years of negotiations, the Ministerial Conference adopted the text of the *Agreement on Trade Facilitation* in 7 December 2013[1254], along with other Decisions forming the 'Bali Package'.[1255] The

[1247] *Doha Work Programme* (General Council Decision of 1 August 2004), WTO Doc WT/L/579 at para 1(g), online: WTO <http://docs.wto.org> [*Doha Work Programme*]. See also Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 4-5.
[1248] The NGTF was established by the Trade Negotiations Committee on 12 October 2004, see: WTO, Trade Negotiations Committee, *Minutes of Meeting* (held on 12 October 2004), WTO Doc TN/C/M/14 at paras 1-5, online: WTO <http://docs.wto.org>.
[1249] *Doha Work Programme, supra* note 1247, Annex D, paras 1 and 10.
[1250] *Ibid,* Annex D, para 6.
[1251] Compilation of Members' Proposals were contained in WTO Doc TN/TF/W/43/Rev.2 and subsequent revisions, see: WTO, NGTF, *WTO Negotiations on Trade Facilitation − Compilation of Members' Proposals, Revision,* WTO Doc TN/TF/W/43/Rev.2 & Rev, online: WTO <http://docs.wto.org> [*Compilation of Members' Proposals and Subsequent Revisions*].
[1252] WTO, NGTF, *Draft Consolidated Negotiated Text,* WTO TN/TF/W/165 (2009), online: WTO <http://docs.wto.org> [*Draft Consolidated Negotiated Text of 14 December 2009*].
[1253] WTO, NGTF, *Report by the Chairman, Ambassador Sperisen-Yurt, to the Trade Negotiations Committee for the TNC Stocktaking Exercise,* WTO Doc TN/TF/7 (22 March 2010), online: WTO <http://docs.wto.org>.
[1254] *Agreement on Trade Facilitation* (Ministerial Decision of 7 December 2013), WTO Doc WT/MIN(13)/36, WT/L/911, online: WTO <http://docs.wto.org> [*Ministerial Decision Adopting the Text of the Agreement on Trade Facilitation*].
[1255] The 'Bali Package' was incorporated in the Bali Ministerial Declaration, see: *Bali Ministerial Declaration* (adopted by the Ministerial Conference on 7 December 2013), WTO Doc WT/MIN(13)/DEC, online: WTO <http://docs.wto.org> [*Bali Ministerial Declaration*].

Ministerial Decision established a Preparatory Committee on Trade Facilitation (PCTF) to conduct a legal review for rectifications of a purely formal character and draw up the protocol of amendment with the aim that it would be adopted no later than 31 July 2014.[1256]

The PCTF formally adopted the legally reviewed text of the *Agreement on Trade Facilitation* on 10 July 2014; however the delegation of India blocked the adoption of the protocol of amendment.[1257] It indicated that it would not be able to join consensus on the adoption of the protocol unless it saw its concerns on food security addressed. It stressed that the Bali outcomes "were negotiated as a package and [had to] be concluded as such."[1258] The United States and India reached an agreement on these key Bali Ministerial issues on November 2014[1259] and, as a result, the General Council moved forward with the adoption of the *Protocol Amending the WTO Agreement* to insert the *Agreement on Trade Facilitation* into Annex 1A on 27 November 2014.[1260] As of April 2015, no Member has yet deposited their instrument of acceptance with the Director-General.

3. LEGITIMACY ANALYSIS

The following sections proceed with a step-by-step evaluation of each criterion of legitimacy and its specific indicators as applied in the rulemaking processes that led to the adoption of the *Agreement on Trade Facilitation*: legality (Section 3.1); effectiveness (Section 3.2); representativeness (Section 3.3); and openness (Section 3.4).

[1256] *Ministerial Decision Adopting the Text of the Agreement on Trade Facilitation, supra* note 1254 at paras 1-3.
[1257] WTO, PCTF, *Minutes of the Meeting* (held on 10 July 2014), WTO Doc WT/PCTF/M/7 at paras 2.3-2.4 and 3.2, online: WTO <http://docs.wto.org>.
[1258] Ministry of Commerce & Industry of India, Press Releases, "Meeting of the General Council WTO Geneva 24-25 July 2014" (25 July 2014), online: Press Information Bureau Government of India <http://pib.nic.in/newsite/mbErel.aspx?relid=107533> [*India's Refusal to Join Consensus*]; "WTO Members Weigh Options as India Pushes Food Security Link on Trade Facilitation Deal", *BRIDGES Africa* (25 July 2014), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/wto-members-weigh-options-as-india-pushes-food-security-link-on-trade>.
[1259] "Azevêdo Applauds India-US Agreement on Key Bali Issues", *2014 New Items* (13 November 2014), online: WTO < http://www.wto.org/english/news_e/news14_e/dgra_13nov14_e.htm> ["Azevêdo Applauds India-US Agreement"].
[1260] *Protocol Amending the WTO Agreement*, *supra* note 96.

3.1. Legality

The criterion of legality possesses only one indicator, which assesses the correctness of the rule and procedure used.

3.1.1. Legality − Correctness of rule and procedure

Legality's Indicator #1: Was the correct rulemaking rule or procedure followed for the implementation of the negotiated policy?

Two different legal instruments were used to implement Members' negotiated policies in the Trade Facilitation Case: a decision (i.e. Paragraph g of the *Doha Work Programme,* containing the mandate for negotiations on trade facilitation) (section 3.1.1.1); and an amendment (i.e. the *Protocol Amending the WTO Agreement,* inserting the *Agreement on Trade Facilitation* under Annex 1A) (section 3.1.1.2).

3.1.1.1. Legal effect and status of paragraph g of the *Doha Work Programme*

The *Doha Work Programme* expressly states that it is a decision adopted by the General Council on 1 August 2004.[1261] Its Paragraph g instructed Members "to commence negotiations on the basis of the modalities set out in Annex D."[1262] The modalities of the negotiations provided for in Annex D included, *inter alia,* the specific provisions of the GATT 1994 that should be clarified, specific modalities regarding special and differential treatment for developing and LDC Members, as well as support and technical assistance, involvement of relevant international organizations and consideration of their work, and other general modalities that were contained in the work programme adopted by the *Doha Ministerial Declaration* of 14 November 2001.[1263]

Due to the fact that the mandate for future negotiations on trade facilitation, as well as its modalities included in Annex D, did not modify Members' rights and obligations, these provisions are of the nature that can be taken by a simple decision by the General Council under Article IX:1 of the *WTO Agreement*. This interpretation is further confirmed by Article III:2 of the *WTO Agreement* which explicitly stipulates that the WTO may "provide a forum for further

[1261] *Doha Work Programme, supra* note 1247.
[1262] *Ibid* at para g.
[1263] See generally, *Doha Work Programme, supra* note 1247, Annex D.

negotiations among its Members concerning their multilateral trade relations"[1264] and by Article IV:1 which provides that the Ministerial Conference (or the General Council in the interim[1265]) has the authority "to take decisions on all matter under any of the Multilateral Trade Agreements."[1266]

For the adoption of a decision, Article IX:1 of the *WTO Agreement* requires that it should be taken by consensus.[1267] Paragraph g of the *Doha Work Programme* specifically certified that the General Council had decided "by explicit consensus" to commence negotiations on trade facilitation.[1268] Considering that Article IX:1 of the *WTO Agreement* does not provide further details on how Members are supposed to reach consensus, it can be concluded that it was legally correct to adopt the negotiating mandate by means of a decision and that its adoption complied with the requirements set out in Article IX:1 of the *WTO Agreement.*

3.1.1.2. Legal effect and status of the *Agreement on Trade Facilitation*

The *Agreement on Trade Facilitation* contains a series of obligations which modify the rights and obligations of Members.[1269] Indeed, the *Protocol Amending the WTO Agreement* specifically states that it shall enter into force "in accordance with paragraph 3 of Article X of the WTO Agreement"[1270], which provides a special majority for the entry into force of amendments "of a

[1264] *WTO Agreement, supra* note 1, Article III:2.
[1265] *Ibid* Article IV:2 (providing that "[i]n the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council.").
[1266] *Ibid*, Article IV:1.
[1267] *Ibid*, Article X:1.
[1268] *Doha Work Programme, supra* note 1247 at para g.
[1269] These include obligations: to publish regulations on trade procedures, taxes, fees, etc. (Article 1); to provide opportunities to comment on proposed new regulations relating to, *inter alia,* movement, release, clearance of goods (Article 2); to provide traders with advance rulings on a timely basis when requested to do so regarding tariff classification and origin criteria (Article 3); provide the right to either administrative and/or judicial review of decisions on a non-discriminatory basis on customs issues (Article 4); follow certain procedures when implementing enhanced sanitary or phytosanitary border controls (Article 5); to publish fees and charges, that they be cost based and to follow certain procedures for the imposition of penalties (Article 6); to adopt or follow certain procedures with respect to pre-arrival processing, separation of release of goods from final determination of payment liability, post-clearance audits, facilitation measure for 'authorized operators', expedited release of air cargo shipments, release of perishable goods (Article 7), to allow goods intended for import to be moved within its territory under customs control from a customs office of entry to another customs in its territory from where the goods would be released or cleared (Article 9); to follow certain formalities connect with importation, exportation and transit (Article 10); and to not impose non-transport-related fees or to seek voluntary restraints (Article 11), see *Protocol Amending the WTO Agreement, supra* note 96, Annex.
[1270] *Ibid* at 2, para 4.

nature that would alter the rights and obligations of the Members."[1271] Therefore, it was the correct procedure to implement it pursuant to an amendment of Annex 1A (containing the Multilateral Agreements on Trade in Goods) of the *WTO Agreement* under Article X:3.

Was the *Agreement on Trade Facilitation* adopted according to the correct rules and procedures?[1272] The first step for the amendment procedure is the submission of a proposal for amendment to the Ministerial Conference (or the General Council) either by a Member or one of the three specialized Councils.[1273] For the case of the *Agreement on Trade Facilitation,* there was no proposal for amendment *per se* by either a Member or one of the Councils. The final phase of the negotiations on trade facilitation was completed during the Bali Ministerial Conference[1274], which led to the adoption of the text of the *Agreement on Trade Facilitation* by the Ministerial Conference on 7 December 2013.[1275] The Ministerial Decision containing the text of the *Agreement on Trade Facilitation* was essentially an agreement in substance and principles as regards the content of an agreement on trade facilitation: it provided that it was subject to legal review for rectifications of a purely formal character that do not affect the substance of the agreement and needed to be formally annexed to a protocol of amendment.[1276]

The text of the *Agreement on Trade Facilitation* was adopted once again after legal review by the PCTF on 10 July 2014, which became the official version of the agreement as attached to the *Protocol Amending the WTO Agreement* adopted on 27 November 2014.[1277] The adoption of the finally reviewed text by the PCTF most likely could not be considered as a proposal for amendment according to the terms of Article X:1 of the *WTO Agreement* due to the fact that it was not submitted by a Member or one of the three specialized Councils.

Following the second step of the amendment procedure under Article X:1 of the *WTO Agreement*, the Ministerial Conference (or the General Council) is to be given a period of 90 days to try to reach consensus on the proposal for amendment. The Ministerial Conference can decide to extend this period of time to reach consensus, which it did not do. At the expiration of

[1271] *WTO Agreement, supra* note 1, Article X:3.
[1272] For a description of the rules and procedures for amendments, see Chapter 2, Section 3.2.
[1273] *Ibid,* Article X:1.
[1274] Neufeld, *The Long and Winding Road, supra* note 1236 at 11.
[1275] *Ministerial Decision Adopting the Text of the Agreement on Trade Facilitation*, *supra* note 1254.
[1276] *Ibid* at paras 1-3.
[1277] *Protocol Amending the WTO Agreement, supra* note 96.

the 90-day period, Article X:1 expressly stipulates that "if consensus is not reached . . . within the established period, the Ministerial Conference *shall* decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance."[1278] After the adoption of the legally reviewed text of the Agreement, the PCTF and the Ministerial Conference (or the General Council) did not move forward with the drafting and adoption of a protocol of amendment for implementing the *Agreement on Trade Facilitation* due to the refusal of India to join consensus.[1279] However, following the terms of Article X:1, at the expiration of the 90-day period (i.e. by approximately 10 October 2014), the General Council should have proceeded by a vote by two-thirds majority of Members on whether to submit the proposal for amendment to Members for acceptance.

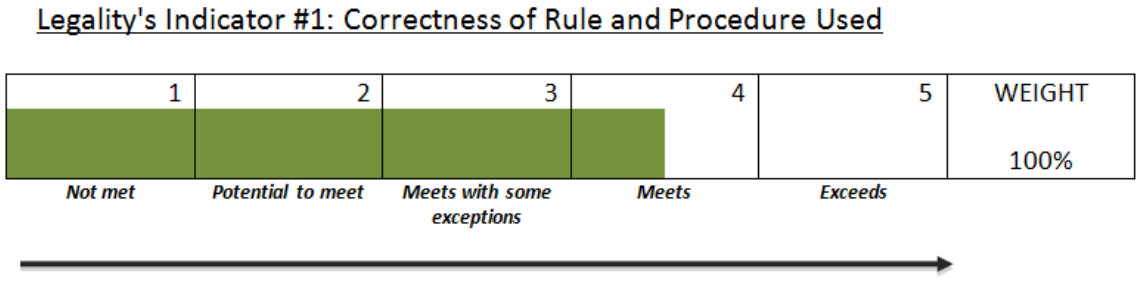
This was not done. Instead, Members decided to continue their efforts to reach consensus, which was finally achieved on 13 November 2014[1280] and was followed by the adoption by consensus of the General Council of a decision to submit the *Protocol Amending the WTO Agreement* containing the text of the *Agreement on Trade Facilitation* to the Members for acceptance.[1281] As provided for Article X:1, the decision also stated that the amendment was of a nature that would alter the rights and obligations of the Members, and therefore would take effect for the Members that have accepted it upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.[1282]

3.1.1.3. Attribution of a score: *Legality − Correctness of rule and procedure*

Legality − Correctness of rule and procedure evaluated the following standard: *Was the correct rulemaking rule or procedure followed for the implementation of the negotiated policy?* It was found that a decision pursuant to Article IX:1 of the *WTO Agreement* (i.e. Paragraph g of the *Doha Work Programme*) was the correct instrument and its procedure was correctly followed for implementing the negotiating mandate. As for the *Agreement on Trade Facilitation,* it was correct to implement it pursuant to an amendment of Annex 1A of the *WTO Agreement* as provided for by Article X:1 and 3. However, the procedure was not properly followed: there was

[1278] *WTO Agreement, supra* note 1, Article X:1 [emphasis added].
[1279] *India's Refusal to Join Consensus, supra* note 1258.
[1280] "Azevêdo Applauds India-US Agreement", *supra* note 1259.
[1281] *Protocol Amending the WTO Agreement, supra* note 96 at 1.
[1282] *Ibid* at 1 para 3.

no official submission of a proposal for amendment, and more importantly, after the expiration of the 90-day time period for consensus-building, the General Council did not proceed with a vote, as required by Article X:1, to decide whether to submit the proposed amendment to the Members for acceptance. For these reasons, *Legality − Correctness of rule and procedure,* i.e. the first and only indicator of the criterion of legitimacy, should be attributed a score of 3.5/5 (i.e. '*performance met the indicator's standards, with a few exceptions*').



3.1.2. Overall performance of the criterion of legality

Considering that the criterion of legality is composed of only one indicator of legitimacy, its score (i.e. 3.5/5) corresponds to that of the criterion of legality as a whole. Thus it can be concluded that the performance of the Trade Facilitation Case *met the standards of the criterion of legality, with a few exceptions.*

CASE STUDY #3: AGREEMENT ON TRADE FACILITATION								
CRITERION	**Indicator**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
LEGALITY	Ind #1	100						3.5
	Rating	100						3.5/5
RATING STANDARD	*Performance met the standards of the legitimacy criterion, with some exceptions*							**3.5/5**

3.2. Effectiveness

The criterion of effectiveness is evaluated on the basis of three indicators of legitimacy:

(i) whether the final outcome addressed the mandated goal (Section 3.2.1);
(ii) whether the negotiated policy was brought into effect (Section 3.2.2); and
(iii) whether Members were able to reach consensus in a timely and effective manner (Section 3.2.3).

Each indicator of legitimacy will be evaluated in light of the original mandate contained in paragraph g of the *Doha Work Programme* of 1 August 2004, which provided for the launch of negotiations on trade facilitation on the basis of very detailed modalities contained in its Annex D.[1283]

The following sections proceed with the analysis of each the three indicators of effectiveness.

3.2.1. Effectiveness − Mandate

Effectiveness' Indicator #1: Did the final negotiated outcome address the goal as set out in the negotiating mandate?

Effectiveness − Mandate assesses whether the *Agreement on Trade Facilitation* addressed the specific modalities provided for in Annex D the *Doha Work Programme.*[1284] Those modalities included, inter alia:

(i) the clarification and improvement of relevant aspects of Articles V (Freedom of Transit), VIII (Fees and Formalities connected with Importation and Exportation) and X (Publication and Administration of Trade Regulations) of the GATT 1994 with the view to further expediting the movement, release and clearance of goods, including goods in transit[1285];

[1283] *Doha Work Programme, supra* note 1247 at para g and Annex D.
[1284] *Ibid* at para g.
[1285] *Ibid* Annex D at para 1.

(ii) provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues[1286];

(iii) the principle of special and differential treatment for LDCs and developing countries, including the provision that those Members would not be obliged to undertake investments in infrastructure projects beyond their means[1287];

(iv) the provision that LDC Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities[1288] ;

(v) technical assistance and support for capacity-building to help LDCs and developing countries implement the commitments resulting from the outcome of the negotiations, with the understanding that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or LDC Member continues to lack the necessary capacity, implementation will not be required.[1289]

No specific time frame and deadline were provided for the conduct of these negotiations on trade facilitation.

It has been observed that the *Agreement on Trade Facilitation* contains a mix of binding obligations and good practices that should be applied insofar as possible (referred to as best endeavours type commitments).[1290] Best endeavours type commitments will be attributed a lesser weight than binding provisions in terms of their ability to address the mandated goals. Each objective contained in the negotiations modalities of Annex D is evaluated separately in the following sections.

3.2.1.1. Improvement Article V of the GATT 1994 (Freedom of Transit)

The *Agreement on Trade Facilitation* incorporates a few provisions that improve relevant aspects regarding the freedom of transit of goods as it existed under the GATT 1994. Article 9 includes binding provisions dealing with the movement of goods under customs control intended

[1286] *Ibid.*
[1287] *Ibid,* Annex D at para 2.
[1288] *Ibid,* Annex D at para 3.
[1289] *Ibid,* Annex D at paras 1 and 6.
[1290] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 (the best endeavours provisions are "measured by the use of the word 'should'." at 21).

for import and Article 11 provides for a series of binding commitments directly related to the freedom of transit of goods (e.g. the elimination or simplification of unnecessary regulations or formalities, the removal of fees and voluntary restraints, as well as MFN treatment with respect to the transit of goods).

3.2.1.2. Improvement of Article VIII of the GATT 1994 (Fees and Formalities connected with Importation and Exportation)

As regard to the fees and formalities connected with importation and exportation, Article 10 provides for a series of binding and best endeavours commitments that aim to minimize the incidence and complexity of import, export, and transit formalities and to decrease and simplify import, export and transit documentation requirements. Article 6 includes binding obligations to limit the level of fees and charges and requires the publication of information as it relates to these fees and charges imposed on or in connection with importation and exportation. Finally, Article 7 has the objective of simplifying the processes related to the release and clearance of goods largely through the imposition of a majority of binding obligations as well as a few best endeavours commitments.

3.2.1.3. Improvement of Article X of the GATT 1994 (Publication and Administration of Trade Regulations)

Articles 1 to 5 are general provisions concerned with the transparency and procedural fairness of the importation, exportation and transit processes. Article 1 provides binding obligations regarding the publication and availability of information, in a non-discriminatory and easily accessible manner, related to: (i) the procedures for importation, exportation and transit; (ii) applied rates of duties; (iii) fees and charges; (iv) rules for the classification or valuation of products for customs purposes; (v) laws, regulations and administrative rulings; (vi) import export or transit restrictions or prohibitions; (vii) penalty provisions; (viii) appeal procedures; (ix) agreements or parts thereof with any country relating to importation, exportation or transit; and (x) procedures relating to the administration of tariff quotas.

Article 2 provides a mix of binding and best endeavours commitments for Members to provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application

related to movement, release and clearance of goods, including goods in transit. Article 5 includes binding provisions related to other measures to enhance impartiality, non-discrimination and transparency, such as they relate to: (i) notifications for enhanced controls or inspections; (ii) the detention of goods, and (iii) test procedures.

Article 3 contains a binding obligation to provide traders with advance rulings on a timely basis when requested to do so regarding tariff classification and origin criteria and a best endeavours commitment to offer advance rulings for the criteria used to determine valuation, exemptions, and quotas, including tariff quotas. Finally, Article 4 includes a binding commitment on the right to either administrative and/or judicial review of decisions on a non-discriminatory manner on customs issues and a best endeavours commitment to offer such review for decisions of border management agencies.

3.2.1.4. Provisions for effective cooperation between customs

Articles 8 and 12 include best endeavours commitments with respect to border agency cooperation (as it relates to the alignment of working days and hours, the procedures and formalities, common facilities, joint controls and the establishment of one stop border or post control), as well as customs cooperation (as regard to compliance obligations, the exchange of information, verification procedures of an import or export declaration, etc.).

3.2.1.5. Special and differential treatment for LDCs and developing countries

Section II of the *Agreement on Trade Facilitation* incorporates a series of provisions on special and differential treatment for developing and LDC Members. It distinguishes between three categories of provisions that a developing country or a LDC Member designates for implementation: 'Category A' upon entry into force of the agreement, or in the case of a LDC Member, within one year after its entry into force; 'Category B' on a date after a transitional period of time following the entry into force of the agreement; and 'Category' on a date after a transitional period of time following the entry into force of this agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building.

3.2.1.6. LDCs' mandatory commitments proportionate with their means and capabilities

Article 13(3), to be read in conjunction with the three categories of provisions for special and differential treatment in Article 14, responds to the objective that LDCs' mandatory commitments remain proportionate with their means and capabilities. It provides that LDC Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

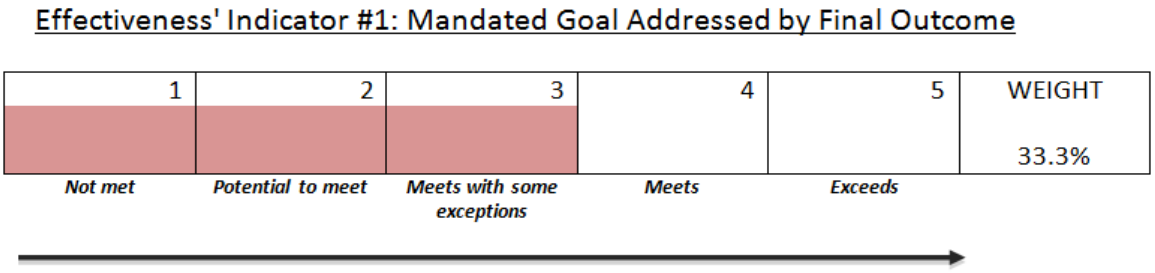
3.2.1.7. Technical assistance and support for capacity-building to LDCs and developing countries

Article 13(2) includes a best endeavours commitment to provide assistance and support for capacity building to help developing country and LDC Members implement the provisions of the Agreement, in accordance with their nature and scope. In addition, it provides that the extent and timing of implementing the provisions of the Agreement should be related to the implementation capacities of developing country and LDC Members. Furthermore, it specifically stipulates that where a developing country or LDC Member continues to lack the necessary capacity, implementation of the provision(s) concerned (those in Category C) will not be required until implementation capacity has been acquired.

3.2.1.8. Attribution of a score: *Effectiveness − Mandate*

Overall, *Effectiveness − Mandate* assessed the following standard: *Did the Agreement on Trade Facilitation address the goals provided for in Annex D of the Doha Work Programme?* It was found that each of the objectives contained in Annex D were dealt with in the *Agreement on Trade Facilitation.* However, some of these objectives were addressed by no more than best endeavours commitments, such as the effective cooperation between customs, as well as technical assistance and support for capacity-building to LDCs and developing countries. Additionally, other mandated goals were addressed by a mix of binding and best endeavours commitments, such as the improvement of Article XVIII of the GATT 1994 related to fees and formalities and Article X regarding the publication and administration of trade regulations.

Considering that the *Agreement on Trade Facilitation* did not provide binding provisions for all of the mandated objectives contained in Annex D of the *Doha Work Programme*[1291], *Effectiveness − Mandate,* i.e. the first indicator of effectiveness, should be attributed a score of 3/5 (i.e. '*performance did not consistently meet the indicator's standards*').



3.2.2. Effectiveness − Policy

Effectiveness' Indicator #2: Did the rule/agreement or the negotiated policy come into effect?

Effectiveness − Policy assesses whether the *Agreement on Trade Facilitation* has been brought into effect. As of April 2015, no Member has yet deposited its instrument of acceptance with the Director-General. But it is still too early to adequately assess whether the agreement or the negotiated policies have been brought into effect. For this reason, the indicator *Effectiveness − Policy* is discarded for the analysis of the criterion of effectiveness and the other indicators are to be prorated accordingly.

Yet, at this stage of the process, some comments regarding the entry into effect of the *Agreement on Trade Facilitation* can be me made. First, the nature of the Agreement could hinder the effective implementation of its provisions. Indeed, Article 14 allows all LDC and developing Members (including major emerging economies) to determine for themselves when they will implement each provisions of the Agreement, which leaves the date of the full entry into force of the Agreement uncertain, as well as the overall level of reduction of global trade costs.[1292]

[1291] See also Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 12-16 (also sharing this view).
[1292] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 ("[H]ow much a different the [*Agreement on Trade* Facilitation] will make in lowering global trade costs will depend importantly on what the emerging economies decide to do in terms of implementation of the various. . . provisions, i.e. which they will implement immediately and which will be left for later, and how long the self-determined implementation periods will be for

Second, due to the fact that several provisions of the Agreement are merely 'best endeavours' commitments with conditional language such as "to the extent practicable" or "to the extent possible", it is unclear whether such provisions will be fully implemented by Members, especially taking into account that they will not be fully enforceable under the DSU. Nevertheless, the panels and the Appellate Body could still rule on whether implementation by a Member has become "practicable" and "possible".[1293] Some have even suggested that, in practice, the enforceability of these best endeavours norms may work "more effectively than binding norms would do to lower trade costs for traders over time insofar as the [*Agreement on Trade Facilitation*] provides a focal point for domestic stakeholders to hold governments accountable for better trade facilitation outcomes."[1294] Yet, if the developed Members do not fulfil their 'best endeavours' commitments to provide technical assistance and capacity building support, this could serious impede the ability of developing and LDC Members to effectively implement their commitments.[1295]

Third, Article 18 of the *Agreement on Trade Facilitation* establishes a mechanism of experts to assess whether and why a Member is unable to implement its commitments according to the timeframe. It provides that Members shall have recourse to such mechanism prior to the institution of dispute settlement procedures under the DSU. Only time will be able to tell about the effectiveness of this mechanism.

Moreover, it is interesting to note that the Ministerial Decision of 7 December 2013 adopting the text of the *Agreement on Trade Facilitation* originally stipulated that the protocol of amendment would be open for acceptance until 31 July 2015.[1296] However, the stipulation of any time limit for the acceptance of the protocol of amendment has been removed in the final General Council

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the latter category. From a systemic perspective the positive impact of the [*Agreement on Trade Facilitation*] would be enhanced if the BRICS and other advanced developing economies were to implement all provisions under Categories A and B, and commit to short implementation periods."). Developing and LDC Members' notifications of category A commitments under the *Agreement on Trade Facilitation* can be access in WTO, *Trade Facilitation, supra* note 525 (under Preparatory Committee on Trade Facilitation - Technical and Administrative Information - General - Notifications).

[1293] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 21.

[1294] *Ibid.*

[1295] See generally Joseph Michael, Finger, "The WTO Trade Facilitation Agreement: Form without Substance Again?" (2014) 48(6) J World Trade 1279 at 1281 [Finger, "The WTO Trade Facilitation Agreement"]; *Ibid* at 22.

[1296] *Ministerial Decision Adopting the Text of the Agreement on Trade Facilitation, supra* note 1254 at para 3.

Decision submitting the proposed amendment to the Members for acceptance[1297] and in the *Protocol Amending the WTO Agreement.*[1298] It appears that Members have taken into account the difficult experiences with the acceptance and ratification process under the GATT 1947 and the WTO[1299] and have decided not to provide unrealistic timing expectations for the receipt of instruments of ratification and acceptance. Have they given up on the effectiveness of the implementation and ratification procedures to bring into force a negotiated policy within reasonable and expected timeframes?

3.2.3. Effectiveness − Process

> *Effectiveness' Indicator #3: Were Members able to reach consensus in a timely and effective manner in light of the subject-matter that needed to be addressed and the goal set out in the negotiating mandate?*

Effectiveness − Process evaluates whether Members were able to reach consensus on the *Agreement on Trade Facilitation* in a timely and effective manner. The *Doha Work Programme* did not mandate a specific time frame for concluding the negotiations on trade facilitation, however it should be noted that that they spanned over a decade (i.e. between 2004 and July 2014) which constitutes a very lengthy period of time, especially considering that, it was reported, the "contours" of the Agreement "were pretty clear already in 2008."[1300]

Nevertheless, the duration of the negotiations process does not provide on its own a full picture of their effectiveness. Indeed, several factors have had a substantial impact (either positive or negative) on the effectiveness of the consensus-building process leading up to the adoption of the *Agreement on Trade Facilitation*: negotiations within a large number of Members and use of coalitions (section 3.2.3.1); the lack of capacity of smaller Members (section 3.2.3.2); cooperation with relevant organizations and experts (section 3.2.3.3); the use of open-ended

[1297] *Protocol Amending the WTO Agreement*, *supra* note 96 at 1 para 2.
[1298] *Ibid* at 2 para 3.
[1299] For the difficulties with the ratification process during the GATT 1947, see Chapter 2, Section 2.2.2.3. For more information on the ratification process for the only other amendment under the WTO, see Chapter 4, Section 2.3.
[1300] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 16-17 (reporting that "the basic principle of linkage between implementation by developing countries and assistance from developed nations had already been established in the 2004 negotiation modalities." at 17). In February 2008, Members refined and revised their proposals in order to create a '*compilation plus'* document, see WTO, NGTF, *Summary Minutes of the Meeting* (held from 18-22 February 2008), WTO Doc TN/TF/M/23 at para 10, online: WTO <http://docs.wto.org> [*NGTF Meeting of 18-22 February 2008*].

informal sessions within formal meetings (section 3.2.3.4); appointment of several facilitators and 'Friends of the Chair' (section 3.2.3.5); the conclusion of an 'early agreement' within the single undertaking (section 3.2.3.6); an *à la carte* approach, with 'best endeavours' commitments (section 3.2.3.7); the deviation from the application of the rules of the *WTO Agreement* (section 3.2.3.8); and leadership by the major powers (section 3.2.3.9).

3.2.3.1. Negotiating within a large number of Members and Use of Coalitions

During the negotiations on trade facilitation a large number of Members participated actively in the discussions. Negotiating within a large number of Members can be cumbersome. However, what contributed significantly to the effectiveness of the negotiation processes and mitigated some of the cumbersome effects of negotiating within more or less 160 Members was the use of coalitions to form common positions.[1301] In fact, during the Trade Facilitation Case, Members with common interests negotiated their positions within themselves beforehand and presented a consolidated position in WTO meetings. As a result, a good portion of the negotiations was completed outside of the WTO meetings, in which coalitions' representative "brief[ed] the other [M]embers, took stock of the emerging situation and evolved common position in light of new proposals and development."[1302] This enabled Members to focus on the deeper divergences during meetings. Several coalitions were active during the trade facilitation negotiations: the African, Caribbean, and Pacific Group of States (ACP), the African Group, the Arab Group, ASEAN, the Colorado Group, the Core Group of Developing Countries on Trade Facilitation (Core Group), the Group of Landlocked Developing Countries (LLDCs), and the Least-Developed Country Group (LDC Group). Additionally, as usual, all of the EC Members expressed their interests with a single unified voice.

Members also consolidated their views for the presentation of written submissions. A total of 220 communications were submitted between August 2004 and December 2013, however 129 of these were presented jointly by more than one Member. Indeed, Members began to routinely

[1301] See e.g. GAO (United States Government Accountability Office), *World Trade Organization: Global Trade Talks Back on Track, but Considerable Work Needed to Fulfill Ambitious Objectives,* Report to the Chairman, Committee on Finance, U.S. Senate, and to the Chairman, Committee on Ways and Means, House of Representatives, No GAO-05-538 (31 May 2005) at 21, online: GAO <http://www.gao.gov/products/GAO-05-538>. [GAO, *Global Trade Talks*].
[1302] Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 5.

consolidate their views within themselves for the submission of proposals based on common interests, and even sometimes outside of the natural alliances or organized coalitions.[1303] Thus, the use of joint proposals enabled the *Agreement on Trade Facilitation* to be formed on the basis of the views of some 126 Members, however, expressed in a comparatively small number of 39 individual and consolidated proposals.[1304]

3.2.3.2. Lack of capacities of smaller Members

One of the principal obstacles to the effectiveness of the negotiations on trade facilitation was the lack of capacity of smaller Members to fully participate in the negotiation processes. Indeed, upon the request of small delegations during the discussions regarding the modalities of negotiations to be adopted, the NGTF agreed that it would schedule meetings in sequence and not in parallel considering the thin representation of the smaller delegations.[1305] The result of this was that the progress of the negotiations could only go as fast as the capacities of the smaller Members, thus impeding the overall effectiveness of the negotiations.

[1303] The majority of submissions were submitted by 2 and up to 19 Members, see e.g. WTO, NGTF, *Communication From Armenia, Chile, China, Dominican Republic, Ecuador, The European Communities, Georgia, Guatemala, Honduras, Japan, Kyrgyz Republic, Mexico, Moldova, Nicaragua, Pakistan, Paraguay, Sri Lanka, Switzerland And Uruguay* (dated 19 July 2006), WTO Doc TN/TF/W/137; WTO Doc TN/TF/W/137/Add.1 (24 July 2006) ; WTO Doc TN/TF/W/137/Add.2 (19 December 2006) ; WTO Doc TN/TF/W/137/Add.3 (11 January 2007) ; WTO Doc TN/TF/W/137/Add.4 (24 July 2007) , online: WTO <http://docs.wto.org>. Some proposals were issue by north south alliances, such as a proposal by Uganda and the United States to prohibit the requirement of consular transactions, including consularization-related fees and charges, in connection with the important of goods, see: WTO, NGTF, *Communication From Uganda And The United States* (dated 18 March 2005), WTO Doc TN/TF/W/22, online: WTO <http://docs.wto.org> [*Communication from Uganda and the United States Dated 18 March 2005*]. Rwanda, Paraguay and Switzerland (all three landlocked countries, but in different continents and at different levels of development) represented their interests jointly in the area of transit, see: WTO, NGTF, *Communication From Paraguay, Rwanda And Switzerland* (dated 29 April 2005), WTO Doc TN/TF/W/39, online: WTO <http://docs.wto.org> [*Communication from Paraguay, Rwanda and Switzerland Dated 29 April 2005*]. India and the United States proposed the establishment of a multilateral mechanism for the exchange and handling of information, see: WTO, NGTF, *Communication From India And The United States* (dated 22 July 2005), WTO Doc TN/TF/W/57, online: WTO <http://docs.wto.org> [*Communication from India and the United States Dated 22 July 2005*].

[1304] According to a compilation of Members' Textual Proposals for the negotiations on trade facilitation prepared by the WTO Secretariat in 2009, see: WTO, NGTF, *WTO Negotiations on Trade Facilitation − Compilation of Members' Textual Proposals, Revision,* WTO Doc TN/TF/W/43/Rev.19 (30 June 2009), online: WTO <http://docs.wto.org> [*Compilation of Members' Textual Proposal of 30 June 2009*].

[1305] See e.g. WTO, NGTF, *Minutes of the Meeting* (held on 15 November 2004), WTO Doc TN/TF/M/1 at para 35, online: WTO <http://docs.wto.org> (see the statements by the representatives of Tanzania at para 12; China at para 29; Sri Lanka at para 48; Antigua and Barbuda at para 49 and Trinidad and Tobago at para 50. The same format was also maintained for processes regarding the legal review of the text of the *Agreement on Trade Facilitation* within the PCTF, see: *PCTF Meeting of 10 March 2014*, *supra* note 467 at para 2.63.

Nevertheless, the supply of funding, as well as a capacity-building program, mitigated some of the adverse ramifications regarding the lack of capacity of smaller Members for the effectiveness of the consensus-building process. Indeed, on several occasions, for the negotiations on special and differential treatment provisions for developing country and LDC Members, as well as for the legal review of the text of the *Agreement on Trade Facilitation*, some of the most developed Members provided funding for the participation of capital-based experts from African and LDC countries.[1306] Moreover, a capacity building program was put into place to help developing and LDC Members to conduct a national assessment to identify their needs and priorities in the area of trade facilitation, thus allowing them to fully participate in and benefit from the negotiations.[1307]

3.2.3.3. Cooperation with relevant intergovernmental organizations and experts

Trade facilitation was considered to be a technical area during the negotiations which, it was reported, required "much learning" by trade officials who were not necessarily aware of the impact of trade facilitation for income growth and economic development, what constitutes good practices, and the types of disciplines that could benefit all Members.[1308] Relevant international organizations and experts would have undertaken "a very substantial effort . . . to provide information and educate not just negotiations but stakeholders more generally."[1309] This cooperation had a valuable impact in helping to convince all Members of the value of trade

[1306] Such support has been provided by several delegations, such as the European Union, Norway, Sweden, and the United Kingdom's Department of International Development, see: WTO, NGTF, *Summary Minutes of the Meeting* (held from 1-3 December 2008), WTO Doc TN/TF/M/27 at para 6, online: WTO <http://docs.wto.org> [*NGTF Meeting of 1-3 December 2008*]; WTO, NGTF, *Minutes of the Meeting* (held from 9-11 November 2011), WTO Doc TN/TF/M/44 at para 1, online: WTO <http://docs.wto.org> [*NGTF Meeting of 9-11 November 2011*]; WTO, NGTF, *Minutes of the Meeting* (held from 9-13 July 2012), WTO Doc TN/TF/M/47 at para 2, online: WTO <http://docs.wto.org> [*NGTF Meeting of 9-13 July 2012*]; WTO, NGTF, *Minutes of the Meeting* (held from 3-6 December 2012), WTO Doc TN/TF/M/49 at para 1, online: WTO <http://docs.wto.org> [*NGTF Meeting of 3-6 December 2012*]; WTO, NGTF, *Minutes of the Meeting* (held from 21-24 May 2013), WTO Doc TN/TF/M/51 at para 1.1, online: WTO <http://docs.wto.org> [*NGTF Meeting of 21-24 May 2013*]; WTO, NGTF, *Minutes of the Meeting* (held from 15-19 July 2013), WTO Doc TN/TF/M/52 at para 1.1, online: WTO <http://docs.wto.org> [*NGTF Meeting of 15-19 July 2013*]; WTO, PCTF, *Minutes of the Meeting* (held from 26-28 May 2014), WTO Doc WT/PCTF/M/5 at para 1.1, online: WTO <http://docs.wto.org> [*PCTF Meeting of 26-28 May 2014*].

[1307] WTO, NGTF, *Report by the Chairman of the Negotiating Group,* WTO Doc TN/TF/6 (18 July 2008), online: WTO <http://docs.wto.org> [*Report by the Chairman of the NGTF of 18 July 2008*]. See also, *Doha Work Programme, supra* note 1247, Annex D, para 5.

[1308] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 17 and 25.

[1309] *Ibid* at 17.

facilitation and of the overall effectiveness of the negotiations, which were allegedly able to proceed "relatively smoothly without major fundamental substantive difference."[1310]

More specifically, during the agenda-setting process prior to the launch of the negotiations on trade facilitation, the WTO held a Symposium during which speakers from private enterprises and industry groups gave an overview of the main areas where traders faced obstacles when moving goods across borders and speakers from intergovernmental organizations[1311] reported on the experiences in their work on trade facilitation.[1312] This Symposium contributed to moving the negotiations from the state of explanatory work to the phase of analytical work on trade facilitation. The WTO Secretariat also organized a Workshop on Technical Assistance and Capacity Building on Trade Facilitation where all relevant parties (donors, recipients, international organizations and representatives of the private sector) could exchange views on the role of technical assistance and capacity building in the facilitation of trade.[1313]

After the launch of the negotiations on trade facilitation, Members continued to request the assistance of relevant international organizations (IMF, OECD, UNCTAD, World Customs Organization and the World Bank) in their work[1314] and representatives of these organizations continued to regularly attend formal meetings of the NGTF on an *ad hoc* basis.[1315]

[1310] *Ibid* at 17 (contrasting with the negotiations on intellectual property rights in the Uruguay Round).
[1311] Speakers from the following intergovernmental organizations made presentations: IFM, International Trade Centre (ITC), UNCTAD, UN/ECE, World Bank and World Customs Organization.
[1312] *Statement by H.E. Mr. R. Saborío Soto, supra* note 1242.
[1313] Panellists comprised representatives from intergovernmental organizations (i.e. IFM, Inter-American Development Bank, UNCTAD, World Bank and World Customs Union) as well as experts from the private sector (i.e. CrossStreetTrade, Gateway Services Ltd, International Chamber of Commerce, International Express Carriers Conference and NTT Communications Corporation), see: WTO, *WTO Workshop on Technical Assistance and Capacity Building in Trade Facilitation* (10-11 May 2001), online: WTO <http://www.wto.org/english/tratop_e/tradfa_e/tradfac_workshop_may01_e.htm> [*WTO Workshop on Technical Assistance and Capacity Building*]. But see Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 (The many seminars and workshops arguably were less effective in changing attitudes towards the trade facilitation *negotiations* than they were in increasing understanding of the salience of the subject from a national development perspective. The technical assistance seminars and workshops delivered by development organizations tended to focus on what constitutes good practice as opposed to understanding where joint action was needed to lower trade costs." at 17, n 20).
[1314] See e.g. *Doha Work Programme, supra* note 1247, Annex D at para 8; WTO, NGTF, *Minutes of the Meeting* (held from 11-15 March 2013), WTO Doc TN/TF/M/50 at paras 1.1-1.3, online: WTO <http://docs.wto.org> [*NGTF Meeting of 11-15 March 2013*].
[1315] See generally: WTO, NGTF, *NGTF: Report by the Chairman to the Trade Negotiations Committee,* WTO Doc TN/TF/2 (15 July 2005), online: WTO <http://docs.wto.org>; WTO, NGTF, *Report to the Trade Negotiations Committee,* WTO Doc TN/TF/3 (21 November 2005), online: WTO <http://docs.wto.org>; *Doha Work*

The assistance of intergovernmental organizations and experts was valuable because it allowed Members to tap into their expertise to effectively identify and address the issues related to trade facilitation. However, on the downside, it was reported that the extensive length of the negotiations entailed "regular turnover of negotiators, implying a need for repeated learning on the part of a new set of officials to get up to speed on the substance of the many technical issues that were on the table."[1316]

3.2.3.4. Use of open-ended informal sessions within formal meetings

During the consensus-building process, the Chair of the NGTF proposed to conduct the formal meetings of the NGTF in an open-ended, informal setting in order to allow Members to discuss the proposals among themselves openly and frankly and to make as much progress as possible in covering all elements of the substance of the mandate.[1317] During these informal and non-plenary sessions, Members were free to engage among themselves in bilateral, plurilateral and confessional-style discussions, with the Chair also making himself available for anybody wishing to meet with him.[1318] Members would subsequently be called upon to report on the outcome of these consultations.[1319]

The advantage of an informal approach, by contrast to holding formal meetings with records of the discussions, was that Members were not compelled to come out with established positions and to read from pre-prepared statements. Instead, delegations were able to respond flexibly to proposals from the floor, which allowed an acceleration of progress in the work.[1320] At the same, this way of proceeding avoided the drawbacks of using informal small group meetings, which had been sources of heavy criticisms from those excluded and could potentially lead to their distrust or refusal to join a consensus. Thus, the use of open-ended informal sessions within formal meetings provided an open and transparent framework within which Members were also

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Programme: Ministerial Declaration (adopted on 18 December 2005), WTO Doc WT/MIN(05)/DEC, Annex E, online: WTO <http://docs.wto.org>; WTO, NGTF, *Report by the Chairman of the Negotiating Group on the State of Play in the Negotiations,* WTO Doc TN/TF/4 (27 July 2006), online: WTO <http://docs.wto.org>; WTO, NGTF, *Report by the Chairman of the Negotiating Group,* WTO Doc TN/TF/5 (25 July 2007), online: WTO <http://docs.wto.org>; *Report by the Chairman of the NGTF of 18 July 2008, supra* note 1307.

[1316] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 17.

[1317] *NGTF Meeting of 25-26 July 2005*, *supra* note 466 at para 269.

[1318] WTO, NGTF, *Summary Minutes of the Meeting* (held on 5-6 October 2005), WTO Doc TN/TF/M/9 at para 172, online: WTO <http://docs.wto.org>.

[1319] See e.g. *NGTF Meeting of 18-22 February 2008, supra* note 1300 at paras 3-4.

[1320] See e.g. *PCTF Meeting of 10 March 2014, supra* note 467 at para 2.64.

able to benefit from the informality of the setting in order to hold frank discussions within themselves.

3.2.3.5. Appointment of several facilitators and 'Friends of the Chair'

The active participation of a large group of Members resulted, in turn, in the submission of a large number of proposals. Consequently, when the Draft Consolidated Negotiating Text was first released in December 2009, it contained approximately 1700 square brackets reflecting the many areas of disagreement[1321], which increased to approximately 2200 brackets after the NGTF's first review of the text.[1322]

To accelerate the review procedure, the Chair appointed several facilitators (up to 14 at some point during the processes), consisting of technical experts from various delegations, who conducted parallel negotiations on specifically mandated sections of the draft text. This resulted in a noticeable intensification of work so that only one third of the brackets (i.e. about 700) remained in the beginning of 2013, although this still left some of the most contentious issues, such as customs cooperation and special and differential treatment outstanding.[1323]

Moreover, the Chair appointed four Friends of the Chair to deal with the outstanding issues and assigned each of them a segment of the draft text.[1324] A few days before the Bali Ministerial Conference of December 2013, there remained only around 70 brackets, where contentious issues such as special and differential treatment for developing countries (S&D) and customs cooperation had been resolved.[1325]

[1321] *Draft Consolidated Negotiated Text of 14 December 2009, supra* note 1252.
[1322] Neufeld, *The Long and Winding Road, supra* note 1236 at 10-11. See e.g. WTO, NGTF, *Draft Consolidated Negotiating Text,* WTO Doc TN/TF/W/165/Rev.4 (23 August 2010), online: WTO <http://docs.wto.org>.
[1323] Neufeld, *The Long and Winding Road, supra* note 1236 at 10-11; Mena Hassan, *A WTO Agreement on Trade Facilitation: Can it Really Facilitate Trade?* (PhD Thesis, University of St Gallen, 2014) at 51, online: University of St Gallen <http://verdi.unisg.ch/www/edis.nsf/SysLkpByIdentifier/4279/$FILE/dis4279.pdf> [Hassan, *A WTO Agreement on Trade Facilitation*]. See e.g. WTO, NGTF, *Draft Consolidated Negotiating Text,* WTO Doc TN/TF/W/165/Rev.14 (17 December 2012), online: WTO <http://docs.wto.org>.
[1324] Neufeld, *The Long and Winding Road, supra* note 1236 at 10 (These four segments consisted of: (i) transparency component and customs cooperation; (ii) fees and formalities and transit; (iii) formalities connected with importation and exportation; and (iv) special and differential treatment).
[1325] See the draft agreement on trade facilitation of 25 November 2013: Trade Negotiations Committee, *Trade facilitation - Room W Text- 25 November 2013,* WTO Doc JOB/TNC/35 (25 November 2013), online: WTO <http://docs.wto.org> (unavailable to the public), cited in Neufeld, *The Long and Winding Road, supra* note 1236 at 11, n 48.

The appointment of several facilitators and Friends of the Chair enabled the elimination of approximately 2100 areas of disagreement (i.e. bracket squares), including some of the most difficult issues, in four years of negotiations. Nevertheless, considering the fact that the framework of the Agreement was already delineated in 2008[1326] and that the basic linkage of implementation by developing countries and assistance by developed Members had already been agreed upon in the 2004 negotiation modalities, some have considered that it took "a very long time" to achieve consensus despite the fact it constituted "good performance compared to the other areas of the [Doha Development Agenda]."[1327]

3.2.3.6. Leadership by the major powers

It has been reported that leadership by the major powers played an essential role for the effectiveness of the negotiations. Indeed, the achievement of consensus on the *Doha Work Programme* in July 2004 would have been conditional upon the leadership and cooperation that were demonstrated by the United States and the EC.[1328] Moreover, when the General Council decided to suspend the Doha Round negotiations in July 2006[1329], the importance of trade facilitation in the Doha negotiations was reemphasized by both the Trade Minister of India and the EU Trade Commissioner. In a joint article, they stated: "If the multilateral trading system is the engine room of the global economy, trade-facilitation rules are the oil in the machine . . . There are no losers from trade facilitation reform, only winners."[1330] They called upon Members to renew their commitment to producing a first draft agreement by the end of July 2006.[1331]

3.2.3.7. Early agreement within the single undertaking

The trade facilitation issue was an integral part of the Doha Development Agenda[1332], which stipulated that the "conduct, conclusion and entry into force of the outcome of the negotiations

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[1326] In February 2008, Members refined and revised their proposals in order to create a '*compilation plus'* document, see *NGTF Meeting of 18-22 February 2008, supra* note 1300 at para 10.
[1327] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 16.
[1328] Gao, *Global Trade Talks, supra* note 1301 at 22.
[1329] WTO, General Council, *Minutes of Meeting* (held on 27-28 July 2006), WTO Doc WT/GC/M/103 at paras 1-53, online: WTO <http://docs.wto.org>.
[1330] Kamal Nath & Peter Mandelson, "Doha Round: It's Not Only What We Trade, But How", Editorial, *International Herald Tribune* (5 July 2006), online: The New York Times <http://www.nytimes.com/2006/07/05/opinion/05iht-edmandel.2121163.html?_r=0>.
[1331] *Ibid.*
[1332] *Doha Ministerial Declaration, supra* note 10 at para 27.

shall be treated as parts of a single undertaking." [1333] However, for the case of agreements that might be reached at an early stage, it provided for the possibility that they may be implemented "on a provisional or a definitive basis."[1334] Members made use of this flexibility at the Bali Ministerial Conference where they reached an agreement on principles on the text of the *Agreement on Trade Facilitation* and relaxed the rigid application of the single undertaking by concluding a deal on a subset of agenda items.[1335] This resulted in a major accomplishment for the WTO: the conclusion of the first multilateral agreement since its establishment in 1995.

However, some scholars have criticized the fact that the trade facilitation issue was subject even to *some* linkage dynamics (i.e. the 'Bali package'[1336]).[1337] It is argued that trade facilitation "predominantly benefits firms and consumers in the country that takes measures to lower costs" and, therefore, due to its "win-win" nature, the fact that some Members had to "pay" (i.e. make concessions in other areas like agriculture) to complete a deal on trade facilitation was an ineffective way to negotiate.[1338] Indeed, it has been reported that throughout the negotiations, good progress under a "constructive atmosphere" was being made on trade facilitation due to its less controversial nature.[1339] Some have explained the deadlock to be partly due to "a desire on the parts of some countries" to extract a "payment" (i.e. to pursue issue linkage) for an agreement on trade facilitation.[1340] It is also the "linkage incentives" nature of negotiations that led India's refusal to join consensus on the adoption of a protocol for the *Agreement on Trade Facilitation* due to the fact that it sought to see progress on another area of the negotiations (i.e. on food security).[1341]

[1333] *Ibid* at para 47.
[1334] *Ibid* at para 47.
[1335] See *Bali Ministerial Declaration, supra* note 1255. The single undertaking was perceived as a 'mantra' by WTO Members to the effect that "nothing is agreed until everything is agreed", see: Jackson, "Mantras", *supra* note 49 at para 72.
[1336] WTO, Bali Package and November 2014 decisions, online: WTO <https://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm>.
[1337] Neufeld, *The Long and Winding Road, supra* note 1236 at 5-6; Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 25.
[1338] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 25.
[1339] *Ibid* at 17; Neufeld, *The Long and Winding Road, supra* note 1236 at 5-6; Hassan, *A WTO Agreement on Trade Facilitation, supra* note 1323 at 46.
[1340] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 17; Neufeld, *The Long and Winding Road, supra* note 1236 at 5-6
[1341] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 17; *India's Refusal to Join Consensus, supra* note 1258.

3.2.3.8. À la carte approach, with 'best endeavours' commitments

Since the establishment of the WTO, it has been proven difficult to conclude multilateral agreements arguably due, at least in part, to the large number of Members that have different level of economic development and pursue different objectives at the WTO.[1342] To facilitate the achievement of consensus on the *Agreement on Trade Facilitation,* creativity was employed to address the difficulties inherent to multilateral negotiations and take into account the difference in implementation capacity across Members. Indeed, the Agreement provided for "an individual, country-by-country and measure-by-measure approach", instead of a "one-size-fits-all" model.[1343] The structure of the Agreement made it possible for developing and LDC Members to determine for themselves when they will implement each provision.[1344] Moreover, certain contentious provisions of the *Agreement on Trade Facilitation* moved away from binding enforceable commitments towards 'best endeavours language'.[1345] This was notably the case for the technical assistance provisions, which did not create binding obligations for the developed Members.[1346] This *à la carte* approach combined with 'best endeavours' commitments enabled the conclusion of an agreement that was acceptable to all Members.[1347]

3.2.3.9. Deviation from the rules of the WTO Agreement

In July 2014, the adoption of a protocol for the *Agreement on Trade Facilitation* was blocked by India.[1348] Due to the fact that consensus was not achieved by October 2014 and that the General Council did not extend the time period for reaching consensus, following the terms of Article X:1 of the *WTO Agreement,* the General Council was required to decide by a two-thirds majority of the Members whether to submit the *Agreement on Trade Facilitation* to the Members for

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[1342] Steger, "The House", *supra* note 9 at 8.
[1343] Neufeld, *The Long and Winding Road, supra* note 1236 at 11.
[1344] *Protocol Amending the WTO Agreement, supra* note 96, Annex, Article 14.
[1345] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 2.
[1346] Finger, "The WTO Trade Facilitation Agreement", *supra* note 1295 at 1281; Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 6.
[1347] "Members approaching last petrol station before Bali − Lamy" (3 June 2013) online: WTO 2013 News Items <https://www.wto.org/english/news_e/news13_e/tnc_infstat_03jun13_e.htm> ["Members approaching last petrol station"] (On June 2003, the Director-General called Members to remove "less conflictual brackets." He state: "In my view, there are three ways of removing brackets: agreement on substance; agreement to disagree and papering over disagreement with ambiguous or with best endeavours language.").
Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 17.
[1348] *India's Refusal to Join Consensus, supra* note 1258.

acceptance.[1349] The General Council did not proceed with voting and instead pursued its efforts to reach consensus. Proceeding with voting could have allowed Members to resolve the impasse and go on with the adoption of the protocol for the implementation of the *Agreement on Trade Facilitation* (provided a two-thirds majority would have been achieved). However, if voting would have been carried out, it is possible that a number of developing and LDC Members with major interests in agriculture would have sided with India and voted against the adoption of such protocol. Considering that developing and LDC Members represent altogether an overwhelming majority of nearly 75 percent of the entire membership, it would have been ill advised to proceed with voting for effectiveness purposes.

Additionally, taking into account the WTO deep-rooted practice of decision-making by consensus[1350] and the fact that India is now considered to be a major power in the WTO[1351], it is unlikely that Members would have even considered taking a vote on the adoption of the protocol of amendment without the support of India, as it could have jeopardized the whole balance of the negotiations and future negotiations.

3.2.3.10. Attribution of a score: *Effectiveness − Process*

Overall, *Effectiveness − Process* assessed the following standard: *Were Members able to reach consensus in a timely and effective manner in light of the subject-matter the needed to be addressed and the goal set out in the negotiating mandate?* Although it took approximately eight years for Members to adopt a mandate on trade facilitation, and more importantly, about ten years for the more or less 160 Members to reach consensus on the *Agreement on Trade Facilitation,* yet it was found that the actual consensus-building process that was used was for the most part effective.

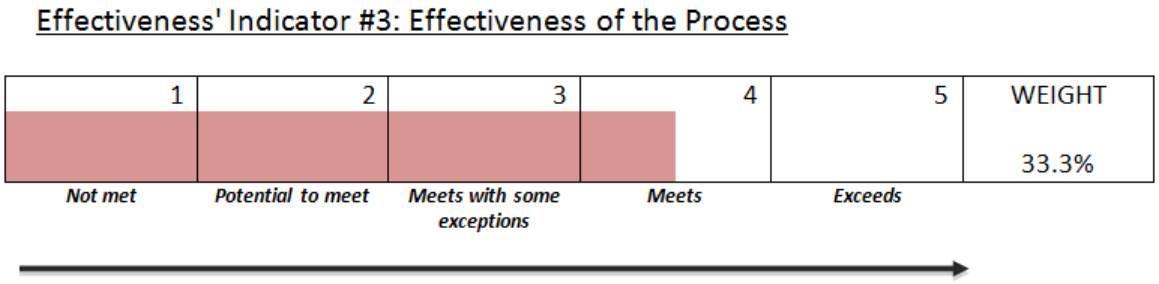
Several factors highly contributed to the effectiveness of the rulemaking processes, such as the use of coalitions, cooperation with relevant organizations and experts, the use of open-ended informal sessions within formal meetings, the appointment of several facilitators and Friends of

[1349] *WTO Agreement, supra* note 1, Article X:1 ("If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference *shall* decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance." [emphasis added]).
[1350] See e.g. Jackson, "Mantras", *supra* note 49 at 71 (qualifying consensus as being considered as "sacred" by WTO Members).
[1351] See generally Narlikar, "New Powers", *supra* note 3 at 718-20.

the Chair, leadership by the major powers, the conclusion of an 'early agreement' within the single undertaking, the adoption of a multilateral agreement comprising an *à la carte* approach, with 'best endeavours' commitments, and the avoidance of the voting provision for deciding on whether to submit the Agreement to the Members for acceptance despite the fact that it was required under Article X:1 of the *WTO Agreement.*

On the downside, only a few factors were responsible for hindering the effectiveness of the negotiations, such as the lack of capacity of the smaller Members and the decision to pursue issue linkage for an agreement on trade facilitation, which could have been a stand-alone agreement due to the fact that it was considered to be beneficial for all Members.

Overall, the factors that had a positive impact on the effectiveness of the rulemaking processes offset the few unfavorable ones. As a result, *Effectiveness − Process,* i.e. the third indicator of effectiveness, should be attributed a score of 3.5/5 (i.e. '*performance met the indicator's standards*, *with a few exceptions*').



3.2.4. Overall performance of the criterion of effectiveness

Regarding the overall performance of the criterion of effectiveness, it should be recalled that the indicator *Effectiveness − Policy* (regarding whether the policy objectives have been brought into effect) had to be discarded for the evaluation of the criterion of effectiveness due to the fact that it is still too early in time to assess it. As a result, the criterion of effectiveness should be evaluated on the basis of the two remaining indicators:

(i) whether the final outcome addressed the mandated goal (scored 3/5);
(ii) whether Members were able to reach consensus in a timely and effective manner (scored 3.5/5).

Considering that all three indicators had an identical weight for the pondering of the criterion of effectiveness as a whole, the weight of the two remaining indicators should be prorated to 50 percent each, which results in a rounded score of 3.5/5 for the criterion of effectiveness. As a result, it can be concluded that the performance of the Trade Facilitation Case *met the standards of the criterion of effectiveness, with a few exceptions.*

CASE STUDY #3: AGREEMENT ON TRADE FACILITATION								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
EFFECTIVENESS	Ind #1	50						1.5
	Ind #2	N/A						N/A
	Ind #3	50						1.75
	Rating	100						3.3/5
RATING STANDARD	*Performance met the standards of the legitimacy criterion, with a few exceptions*							**3.5/5**

3.3. Representativeness

The criterion of representativeness is to be evaluated on the basis of three indicators of legitimacy:

(i) the internal transparency and inclusiveness of the rulemaking processes (Section 3.3.1);
(ii) the degree of representativity of Members in the rulemaking processes (Section 3.3.2); and
(iii) the degree of effective participation of Members, i.e. whether the negotiating mandate and outcome represented a balanced set of interests that were expressed (Section 3.3.3).

The following sections proceed with the analysis of each of the three indicators of representativeness.

3.3.1. Representativeness − Internal transparency

> *Representativeness' Indicator #1: Was the rulemaking process open and transparent for all Members expected to be bound by the outcome at all stages of the process? Were the meetings announced in advance? Were they open to participation from all Members expected to be bound by the outcome? Were these Members given an opportunity to review and comment on draft texts?*

Representativeness − Internal transparency assesses the internal transparency and inclusiveness of the rulemaking processes, i.e. whether they were predictable and the meetings were announced in advance (section 3.3.1.1); whether they were transparent and open to participation from all Members (section 3.3.1.2), and whether Members were given an opportunity to review and comment on draft texts (section 3.3.1.3).

In the case of the Trade Facilitation Case, the 'Members expected to be bound by the outcome' are all those that were Members of the WTO at the time of negotiations (i.e. between 1996 and 2014 inclusively) due to the fact that the *Agreement on Trade Facilitation* is a multilateral agreement, which will eventually bind all Members (upon their ratification and acceptance).[1352]

3.3.1.1. Were the rulemaking processes predictable and the meetings announced in advance?

During the agenda-setting and the consensus-building processes, all formal meetings of the Council for Trade in Goods, the Negotiation Group of Trade Facilitation (NGTF) and those of the Preparatory Committee on Trade Facilitation (PCTF), as well as the agenda containing the subjects to be discussed, were announced at least ten days in advance by airgram, in conformity with Rules 2 and 3 of the *Rules of Procedure for Meeting of the Council for Trade in Goods.*[1353] During a two-year period, between July 1998 and November 2000, the Council for Trade in Goods held regular informal meetings and agreed on a schedule for the holding of these

[1352] The *Amendment of the TRIPS Agreement* is only binding to those Members that have accepted and ratified it, following Article 10:3 of the *WTO Agreement, supra* note 1, and paragraph 3 of the *Protocol Amending the TRIPS Agreement, supra* note 94. However, paragraph 11 of the *TRIPS and Public Health Waiver, supra* note 94, provided that the Waiver Decision (which contained the same provisions as the amendment) would remain into force for each Member until the *Amendment to the TRIPS Agreement* takes effect for that Member.

[1353] *Rules of Procedure for Meetings of the Council for Trade in Goods, supra* note 210. The proposed and adopted agenda of the Council for Trade in Goods, the NGTF and the PCTF can be found in G/C/W/ and WTO/AIR documents between 1996 and 2014 and can be access in the WTO online database, see: *WTO Documents Online, supra* note 432.

meetings, which made it easier for delegations (especially the smaller ones) to plan on attending these meetings.[1354]

3.3.1.2. Was the rulemaking process transparent and open to participation from all Members?

Throughout the agenda-setting and consensus building processes, Members met predominantly in formal and informal meetings open to the entire membership.[1355] Exceptionally, during the agenda-setting process, two rounds of informal consultations were held by the Chair before and after the Doha Ministerial Conference of November 2001 in order to, respectively, get a better understanding of the positions of Members on trade facilitation and on how to structure the work programme on trade facilitation for the year 2002.[1356] For the series of informal meetings that were held between July 1998 and November 2000, the Secretariat provided Members with a factual summary of these informal meetings.[1357]

In addition, a year after the official launch of the negotiations on trade facilitation in 2004, special measures were taken, which ensured full transparency and openness of the processes. The NGTF held its formal meetings in an open-ended, informal setting, which allowed Members to discuss proposals among themselves openly and frankly.[1358] Almost right after the conclusion of the meeting, an "on-screen summary of discussions" would be made available and could be sent to capitals to provide them with a record of what had been discussed. Additionally, a period was reserved in all of these meetings to be held in formal mode in order to allow delegations to make any statements they wish formally for the record. Some of the formal meetings also

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[1354] WTO, Council for Trade in Goods, *Trade Facilitation − Status Report by the Council for Trade in Goods,* WTO Doc G/L/333 (18 October 1999) at para 7, online: WTO <http://docs.wto.org> [*Status Report of 18 October 1999*] See also WTO, Council for Trade in Goods, *Minutes of the Meeting* (held on 5 April and 18 May 2000), WTO Doc G/C/M/43 at para 12.2, online: WTO <http://docs.wto.org>; WTO, Council for Trade in Goods, *Minutes of the Meeting* (held on 15 November 2000 and 14 March 2001), WTO Doc G/C/M/46, Section V, online: WTO <http://docs.wto.org>.

[1355] See e.g. *Status Report of 18 October 1999, ibid* at para 7, online: WTO <http://docs.wto.org>; WTO, *Report (2000) of the Council for Trade in Goods,* WTO Doc G/L/419, online: WTO <http://docs.wto.org>; WTO, *Report (2002) of the Council for Trade in Goods,* WTO Doc G/L/595, online: WTO <http://docs.wto.org>; WTO, Council for Trade in Goods, *Update to the 2002 Report of the Council for Trade in Goods,* WTO Doc G/L/637, online: WTO <http://docs.wto.org>; WTO, *Report (2003) of the Council for Trade in Goods,* WTO Doc G/L/665, online: WTO <http://docs.wto.org>. [*Report 2003 of the Council for Trade in Goods*].

[1356] WTO, *Overview of Trade Facilitation Work in 2001, supra* note 1243; WTO, Council for Trade in Goods, *Minutes of the Meeting* (held on 22 and 27 March 2002), WTO Doc G/C/M/59 at para 5.1, online: WTO <http://docs.wto.org>.

[1357] *Status Report of 18 October 1999, supra* note 1354 at para 7.

[1358] *PCTF Meeting of 10 March 2014, supra* note 467 at paras 2.64-2.65.

included an informal and non-plenary session which replaced the long tradition of holding consultations or small group meetings in between the formal meetings that had in the past been frequently criticized for their lack of openness and transparency. This allowed Members to engage among themselves in bilateral, plurilateral and confessional-style discussions, with the Chair making himself available for anybody wishing to meeting with him. Moreover, at the end of the informal session, Members were called upon to report on the outcome of those consultations for transparency purposes.[1359] Similar formats of meetings were carried out by the PCTF.[1360]

[1359] See e.g. *NGTF Meeting of 25-26 July 2005, supra* note 466 at para 269; WTO, NGTF, *Summary Minutes of the Meeting* (held on 19-20 September 2005), WTO Doc TN/TF/M/8 at para 2, online: WTO <http://docs.wto.org>; *NGTF Meeting of 5-6 October 2005, supra* note 1318 at paras 1 and 172; WTO, NGTF, *Summary Minutes of the Meeting* (held on 24-25 October 2005), WTO Doc TN/TF/M/10 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held on 5-7 April 2006), WTO Doc TN/TF/M/13 at para 6, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held on 6-7 June 2006), WTO Doc TN/TF/M/14 at para 5, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held on 24-26 July 2006), WTO Doc TN/TF/M/15 at para 6, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held on 12-13 March 2007), WTO Doc TN/TF/M/16 at para 5, online: WTO <http://docs.wto.org> [*NGTF Meeting of 12-13 March 2007*]; WTO, NGTF, *Summary Minutes of the Meeting* (held on 30 April and 1 May 2007), WTO Doc TN/TF/M/17 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held on 7-8 June 2007), WTO Doc TN/TF/M/18 at paras 4-5, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held on 16-20 July 2007), WTO Doc TN/TF/M/19 at para 64, online: WTO <http://docs.wto.org> [*NGTF Meeting of 16-20 July 2007*]; WTO, NGTF, *Summary Minutes of the Meeting* (held on 1-3 October 2007), WTO Doc TN/TF/M/20 at para 4, online: WTO <http://docs.wto.org> [*NGTF Meeting of 1-3 October 2007*]; WTO, NGTF, *Summary Minutes of the Meeting* (held on 5-9 November 2007), WTO Doc TN/TF/M/21 at paras 3-4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held from 10-14 December 2007), WTO Doc TN/TF/M/22 at para 3, online: WTO <http://docs.wto.org>; *NGTF Meeting of 18-22 February 2008, supra* note 1300 at paras 3-4; WTO, NGTF, *Summary Minutes of the Meeting* (held from 26-30 May 2008), WTO Doc TN/TF/M/24 at para 6, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held from 14-18 July 2008), WTO Doc TN/TF/M/25 at para 5, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held from 13-17 October 2008), WTO Doc TN/TF/M/26 at paras 3 and 5, online: WTO <http://docs.wto.org>; *NGTF Meeting of 1-3 December 2008 , supra* note 1306 at paras 4-5; WTO, NGTF, *Summary Minutes of the Meeting* (held from 23-27 February 2009), WTO Doc TN/TF/M/28 at paras 4-5, online: WTO <http://docs.wto.org> [*NGTF Meeting of 23-27 February 2009*]; WTO, NGTF, *Minutes of the Meeting* (held from 27 April to 1 May 2009), WTO Doc TN/TF/M/29 at paras 3-4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 29 June to 3 July 2009), WTO Doc TN/TF/M/30 at para 5, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 31 May to 4 June 2010), WTO Doc TN/TF/M/35 at para 2, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 12-16 July 2010), WTO Doc TN/TF/M/36 at para 2, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 4-8 October 2010), WTO Doc TN/TF/M/37 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 29 November to 3 December 2010), WTO Doc TN/TF/M/38 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 14 to 18 February 2011), WTO Doc TN/TF/M/39 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 4 to 8 April 2011), WTO Doc TN/TF/M/40 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 6 to 10 June 2011), WTO Doc TN/TF/M/41 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 11-15 July 2011), WTO Doc TN/TF/M/42 at para 5, online: WTO <http://docs.wto.org> [*NGTB Meeting from 11-15 July 2011*]; WTO, NGTF, *Minutes of the Meeting* (held from 26 to 30 September 2011), WTO

Special efforts have also been undertaken by the 'Friends of the Chair' to promote a series of discussions in an open-ended and transparent context where every delegation could take ownership of any outcome and where it was clear to all what progress had been made and what progress remained to be made.[1361] Moreover, by September 2013, in the last months prior to the adoption of the text of the *Agreement on Trade Facilitation* at the Bali Ministerial Conference, it was reported that the Director-General Roberto Azevêdo personally chaired a series of negotiating sessions in a variety of configurations that were conducted in an inclusive overall setting. Apparently, he made a point to not leave out any delegation from the consensus-building processes and did not hold meetings behind closed doors. When presenting the draft Ministerial text to the Trade Negotiations Committee, Director-General Roberto Azevêdo stated: "I had often heard that truly productive meetings could only happen with a small number of delegations, behind closed doors. I never accepted that. I always felt that all delegations had to take part in the decision-making process…."[1362]

3.3.1.3. Were Members given an opportunity to review and comment on draft texts?

For the drafting of negotiating mandate and modalities, an informal negotiating group of some 19 Members was formed by the Deputy Director-General acting as the facilitator, which led the Deputy Director-General together with the General Council Chair to issue a draft for a Doha Work Programme.[1363] Although the text was based on the consultations that had been conducted by the Deputy Director-General, it explicitly stipulated that "it [did] not represent

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Doc TN/TF/M/43 at para 4, online: WTO <http://docs.wto.org>; *NGTF Meeting of 9-11 November 2011, supra* note 1306 at paras 4-5; WTO, NGTF, *Minutes of the Meeting* (held on 31 January 2012), WTO Doc TN/TF/M/45 at para 4, online: WTO <http://docs.wto.org>; WTO, NGTF, *Minutes of the Meeting* (held from 16-19 April 2012), WTO Doc TN/TF/M/46 at para 4, online: WTO <http://docs.wto.org>; *NGTF Meeting of 9-13 July 2012, supra* note 1306 at paras 4, 8 and 9; WTO, NGTF, *Minutes of the Meeting* (held from 8-12 October 2012), WTO Doc TN/TF/M/48 at paras 3, 7 and 8, online: WTO <http://docs.wto.org>; *NGTF Meeting of 3-6 December 2012, supra* note 1306 at paras 4, 8 and 9; *NGTF Meeting of 11-15 March 2013, supra* note 1314 at para 2.1; *NGTF Meeting of 21-24 May 2013, supra* note 1306 at para 2.1; *NGTF Meeting of 15-19 July 2013, supra* note 1306 at para 2.1; WTO, NGTF, *Minutes of the Meeting* (held from 15-16 October 2013), WTO Doc TN/TF/M/53 at para 1.9, online: WTO <http://docs.wto.org>. See also Hassan, *A WTO Agreement on Trade Facilitation, supra* note 1323 at 51.

[1360] *PCTF Meeting of 10 March 2014, supra* note 467 at paras 2.64-2.65.

[1361] *NGTF Meeting of 23-27 February 2009, supra* note 1359 at para 8.

[1362] WTO, General Council, *Report by the Chairman of the Trade Negotiations Committee, 26 November 2013,* WTO Doc JOB/GC/59, online: WTO <http://docs.wto.org> (unavailable to the public), cited in Neufeld, *The Long and Winding Road, supra* note 1236 at 11, n 46 [*Report by the Chairman of 26 November 2013*].

[1363] Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 5; Shashank Priya, *Trade Facilitation in WTO and Beyond,* Discussion Paper No 4 (New Delhi, Centre for WTO Studies, 2010) at 7, online: Centre for WTO Studies <http://wtocentre.iift.ac.in/discussion_papers/04.pdf> [Priya, *Trade Facilitation in WTO and Beyond*].

agreement."[1364] The authors stated ". . .we are aiming to take the action necessary at this stage, at the level of the General Council, in order to ensure the continued progress of the negotiations and the work programme as a whole."[1365] It appears that Members were provided with full opportunities to review and comment on the draft texts and, upon the request of several delegations, changes were actually made to the text.[1366] Moreover, the mandate expressly stipulated that it was adopted by "explicit consensus", which indicates a consensus-driven negotiation process.[1367]

For the drafting of the text of the *Agreement on Trade Facilitation,* special efforts were made to ensure that the process would be as open and transparent as possible. Indeed, from June 2005 onwards, the NGTF began to work on the basis of a compilation document prepared by the Secretariat containing all the proposals made by Members regarding the issue of clarification and improvement of GATT 1994 Articles V, VIII and X.[1368] In February 2008, upon the recommendation the Chair of the NGTF, Members refined and revised their proposals in order to create a '*compilation plus'* document.[1369] Finally, from December 2009 onwards, the NGTF began to negotiate on the basis of a 'Draft Consolidated Negotiating Text'[1370] which, it was made clear, was not a "chair's text"[1371], but a text containing in brackets the areas where there was lack of consensus, indicating all of the positions that Members had put forward, even those that were contradictory.[1372]

[1364] WTO, General Council, *Doha Work Programme - Draft General Council Decision of* [...] July 2004, WTO Doc JOB(04)/96 at 1, online: WTO <http://docs.wto.org> (unavailable to the public), cited in Neufeld, *The Long and Winding Road, supra* note 1236 at 6 and n 21.
[1365] *Ibid.*
[1366] Neufeld, *The Long and Winding Road, supra* note 1236 at 6-8; Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 5-8; Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 7-9.
[1367] *Doha Work Programme, supra* note 1247 at para g.
[1368] WTO, NGTF, *Clarification and Improvement of GATT Articles V, VIII and X Proposals Made by WTO Members − Compilation by the Secretariat,* WTO Doc TN/TF/W/43 & Rev, online: WTO <http://docs.wto.org>.
[1369] *NGTF Meeting of 18-22 February 2008, supra* note 1300 at para 10.
[1370] WTO, NGTF, *Draft Consolidated Negotiating Text,* WTO Doc TN/TF/W/165 & Rev, online: WTO <http://docs.wto.org> [*Draft Consolidated Negotiating Text and Subsequent Revisions*].
[1371] A Chair text was a term used to describe "a document that presents a single, unified view of how members should find consensus in the negotiations", see: "New 'Consolidated Text' on Trade Facilitation Expected Soon", *BRIDGES* 13:40 (18 November 2009), online: ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/new-%E2%80%98consolidated-text%E2%80%99-on-trade-facilitation-expected-soon>.
[1372] See *ibid.* See also WTO, NGTF, *Minutes of the Meeting* (held from 9-13 November 2009), WTO Doc TN/TF/M/32 at para 6, online: WTO <http://docs.wto.org>.

For the reviewing of the Draft Consolidated Negotiated Text, the Chair followed special informal procedures to ensure that all views would be taken into account and that the consensus-based process would be respected. He indicated that he would draw Members' attention to areas he considered to merit consideration by the NGTF, proposing for certain brackets to be eliminated or for their contents to be removed from the main text. However, he stressed that in light of the consensus based nature of work, any opposition to such action, and be it only from one delegation, would preserve the text in its current form. In other words, a single opposing view by one delegation would suffice to prevent a modification of the text.[1373] Overall, it appears that all Members were able to keep full control regarding the content of the text of the *Agreement on Trade Facilitation* throughout the negotiations processes.

3.3.1.4. Members' criticisms regarding the rulemaking processes

From the evidence of the data collected, it appears that at only one occasion during the agenda-setting and consensus-building processes would there have been complaints with respect to the lack of transparency or inclusiveness of the process. Indeed, such concerns were expressed by the representatives of the Russian Federation and Canada at the PCTF meeting of 26-28 May 2014, who had just discovered "a substantial discrepancy in the language of footnote 23 [of the text as adopted on 7 December 2014] compared to the language that had been previously agreed upon within the Room E process in Geneva before the Bali Ministerial Conference."[1374] Russia and Canada requested that the Members revert to the original language in footnote 23 that was negotiated before the Bali Ministerial Meeting, which was not possible due to the fact that time had passed for seeking changes to the text.[1375] The representative of Canada expressed his concerns "that a change had been made at Bali and had not been communicated to those delegations that had expressed a strong interest in the issue."[1376] He felt that "they had limited recourse at that point in time because the change in the footnote had not been identified to them

[1373] WTO, NGTF, *Minutes of the Meeting* (held from 8-12 March 2010), WTO Doc TN/TF/M/34 at paras 8-9, online: WTO <http://docs.wto.org> [*NGTF Meeting of 8-12 March 2010*].
[1374] *PCTF Meeting of 26-28 May 2014, supra* note 1306 (The representative of the Russian Federation reported that: "On the morning of 25 November 2013, Members had agreed on the following language of the footnote: "Such as GATT Article V:7, Ad note to GATT Article VIII, third sentence of GATT Article X:1". However, during the verification they found that the footnote now read as follows: "This includes Articles V:7 and X:1 of the GATT 1994 and the Ad note to Article VIII of the GATT 1994" at para 4.1).
[1375] *Ibid* at para 4.3.
[1376] *Ibid* at para 4.4.

previously."[1377] This was the only irregularity noted regarding the lack of transparency (and inclusiveness) of the processes.

3.3.1.5. Attribution of a score: *Representativeness − Internal transparency*

Overall, *Representativeness − Internal transparency* assessed the following standard: *Was the rulemaking process open and transparent for all Members expected to be bound by the outcome at all stages of the process? Were the meetings announced in advance? Were they open to the participation from all Members expected to be bound by the outcome? Were these Members given an opportunity to review and comment on draft texts?* Regarding the process being predictable and the meetings announced in advance, for both the agenda-setting and the consensus-building processes, all of the formal (and most informal meetings) were announced in advance.

Throughout the agenda-setting process and specifically during the consensus-building process, special efforts successfully ensured the highest degrees of transparency and inclusiveness through the conduct of formal meetings in an open-ended, informal setting, which provided the necessary context for real negotiations to be carried out effectively. In addition, from the evidence contained in the data collected, the processes would have been considered by Members to be transparent and inclusive. Indeed, for the preparation of the 2007 NGTF Report, the NGTF agreed to report that the negotiations on trade facilitation had been conducted in a "transparent and inclusive manner" on all aspects of the negotiating mandate and were based on Members' contributions.[1378] At many occasions, the Chairpersons of the NGTF also referred to the negotiation processes within the NGTF as being based on three pillars: "Member-driven", "inclusiveness" and "transparency."[1379]

Members were provided with full opportunities to review and comment on the draft negotiating mandate and modalities (contained in paragraph g and Annex D of the *Doha Work Programme*).

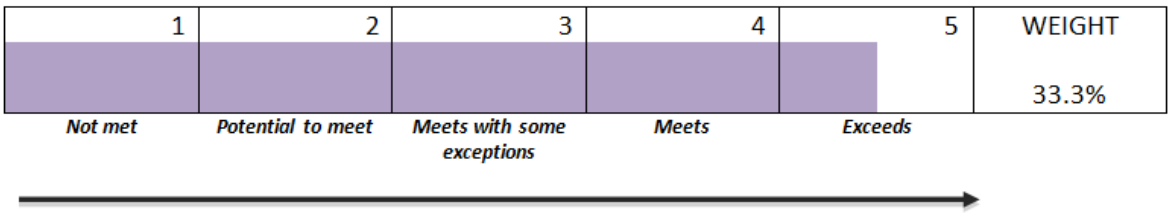
[1377] *Ibid.*
[1378] *NGTF Meeting of 16-20 July 2007, supra* note 1359 at para 6.
[1379] See e.g. *NGTF Meeting from 11-15 July 2011, supra* note 1359 at para 3; WTO, PCTF, *Minutes of the Meeting* (held on 31 January 2014), WTO Doc WT/PCTF/M/1 at para 1.11, online: WTO <http://docs.wto.org>; WTO, NGTF, *Summary Minutes of the Meeting* (held on 15-16 February 2006), WTO Doc TN/TF/M/12 at para 3, online: WTO <http://docs.wto.org>; *NGTF Meeting of 12-13 March 2007, supra* note 1359 at para 3; *NGTF Meeting of 1-3 October 2007, supra* note 1359 at para 47.

Although the Director-General and the General Council Chair proposed a draft text, they made it clear that Members were not bound by it; that its only purpose was to stimulate progress in the negotiations, and that Members were welcomed to propose changes to it.

As for the opportunity of Members to review and comment on draft texts of the *Agreement on Trade Facilitation,* throughout the process negotiations were conducted on the basis of a single bracketed text, where Members retained full control over its content. There were no Chair's texts or other draft texts prepared in small group meetings. In addition, Members were allowed to object to the removal of any bracketed areas of the text. With the exception of the concerns expressed by the Russian Federation and Canada regarding the modification of a footnote of the Agreement, it appears that Members have been generally satisfied with the transparency and inclusiveness of the processes.

Overall, it can be concluded that the degree of transparency and inclusiveness of the processes were exceptionally high, despite a small setback regarding the modification of a footnote of the text. As a result, *Representativeness − Internal transparency,* i.e. the first indicator of representativeness, should be attributed a score of 4.5/5 (i.e. '*performance exceeded the indicator's standards on some occasions*').

Representativeness' Indicator #1: Internal Transparency and Inclusiveness



3.3.2. Representativeness − Representativity

Representativeness' Indicator #2: Did a representative group of Members, representing a balanced set of interests, participate in the various meetings and submitted written communications at all stages of the process?

Representativeness − Representativity assesses the degree of representativity of Members, classified by level of development (categories) and geopolitical groupings (groupings), in all

stages of the rulemaking processes. The assessment will be performed in three steps, the first two consisting of a quantitative analysis, and the third one, of a qualitative analysis:

1) The first step will evaluate the degree of 'direct participation' for each category/grouping of Members both by means of oral interventions and written communications at all stages of the rulemaking processes. For those categories/groupings of Members which obtained a lower degree of 'direct participation' than the benchmark[1380], their degree of 'direct representation' will also be evaluated to verify whether it offsets their weaker degree of 'direct participation' (section 3.3.2.1).
2) For only those categories/groupings of Members which had a lower degree of 'combined direct participation and direct representation' than the benchmark (determined in Step 1), their degree of 'balanced representation' at all stages of the rulemaking processes will be analyzed in the second step to verify whether it counterbalances their weaker degree of 'combined direct participation and direct representation' (section 3.3.2.2). Step 1 and Step 2 together will constitute the quantitative analysis.
3) Finally, the third step will analyze whether there was a sufficient degree of 'balanced representation' following the qualitative analysis. It will assess whether there was a balanced set of interests represented in the most decisive moments of the rulemaking processes (section 3.3.2.3).

The assessment of the quantitative and qualitative analyses, broken down into these three steps is presented in the following sections.

3.3.2.1. Step 1: To what degrees individual Members directly participated in the rulemaking processes or had their interests directly represented?

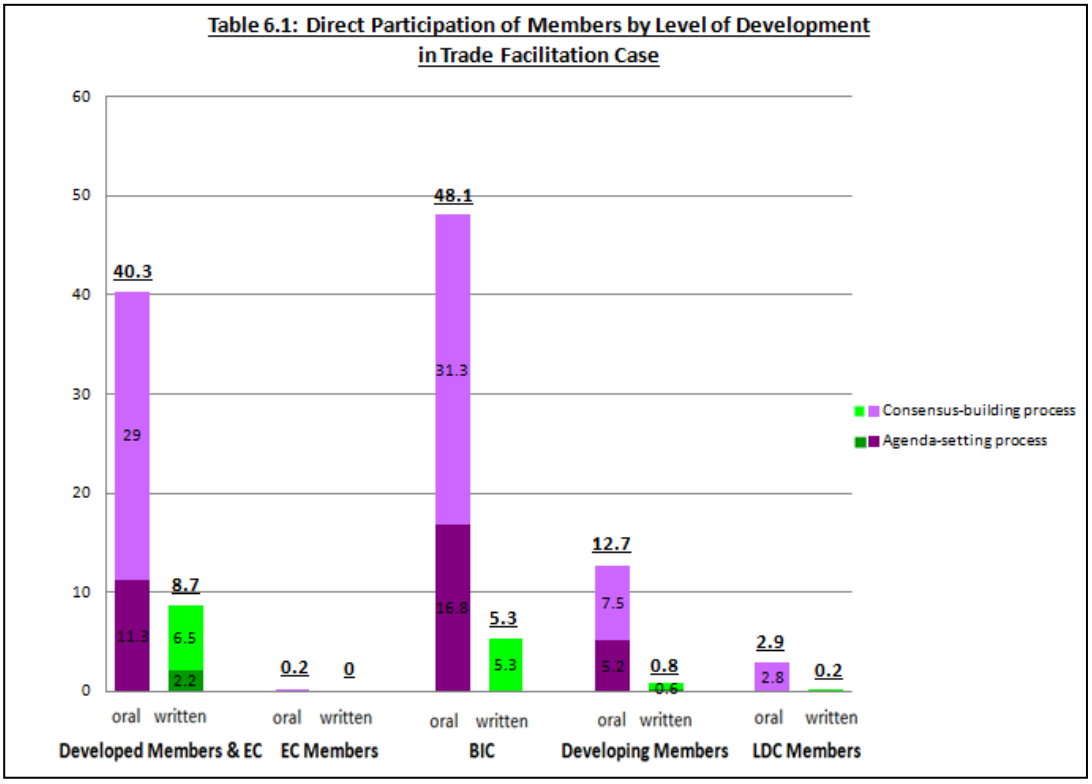
This section presents the results of the quantitative analysis Step 1 regarding the degree of 'combined direct participation and direction representation' of individual Members classified by level of development (section 3.3.2.1.1) and geopolitical groupings (section 3.3.2.1.2). Both types of participation by means of oral interventions ('oral') and written communications ('written') are assessed. The values appearing in the tables consist of an average of the total direct

[1380] The benchmark is formed of the combined average of the degree of participation of the categories/groupings of Members that obtained a sufficient degree of participation (i.e. not under 40 percent lower than the category/grouping of Members that had the highest degree of participation) see: Chapter 3, Section 4.1.3.2.2 (e).

participation and total direction representation of each single Member forming each category of development or geopolitical grouping at all stages of the rulemaking processes.

3.3.2.1.1. *Direct participation and direct representation of Members by level of development*

Table 6.1 below shows the degree of direct participation of Members classified by level of development (as they appear on the horizontal axis) in the rulemaking processes by means of oral interventions and written communications during both the agenda-setting process (leading to the adoption of paragraph g and the Annex D modalities of the *Doha Work Programme*) and the consensus-building process (that led to the adoption of the *Agreement on Trade Facilitation*), as they are listed on the table's legend.



ORAL INTERVENTIONS: According to Table 6.1's values, the benchmark[1381] for direct participation by means of oral interventions is 44.2, which is calculated from the average of the

[1381] The benchmark is formed of the combined average of the degree of participation of the categories/groupings of Members that obtained a sufficient degree of participation (i.e. not under 40 percent lower than the category/grouping of Members that had the highest degree of participation) see: Chapter 3, Section 4.1.3.2.2 (e).

degrees of direct participation by means of oral interventions of individual Members part of the BIC (48.1) and Developed Members & EC (40.3) categories. Individual Members from both these categories obtained a *sufficient* degree of direct participation considering that their score are respectively 8 percent higher and 9 percent lower than the benchmark (44.2).

As for the degrees of direct participation of individual Members part of the remaining categories, they all were *significantly lower* than the benchmark: individual Members part of the EC Members (0.2), the LDC Members (2.9) and the Developing Members (12.7) categories scored respectively 99.6 percent, 93 percent, and 71 percent lower than the benchmark (44.2).

Can the weaker performance in terms of 'direct participation' by means of oral interventions of these individual Members part of the above categories be compensated for by a sufficiently high degree of 'direct representation' to meet the benchmark?

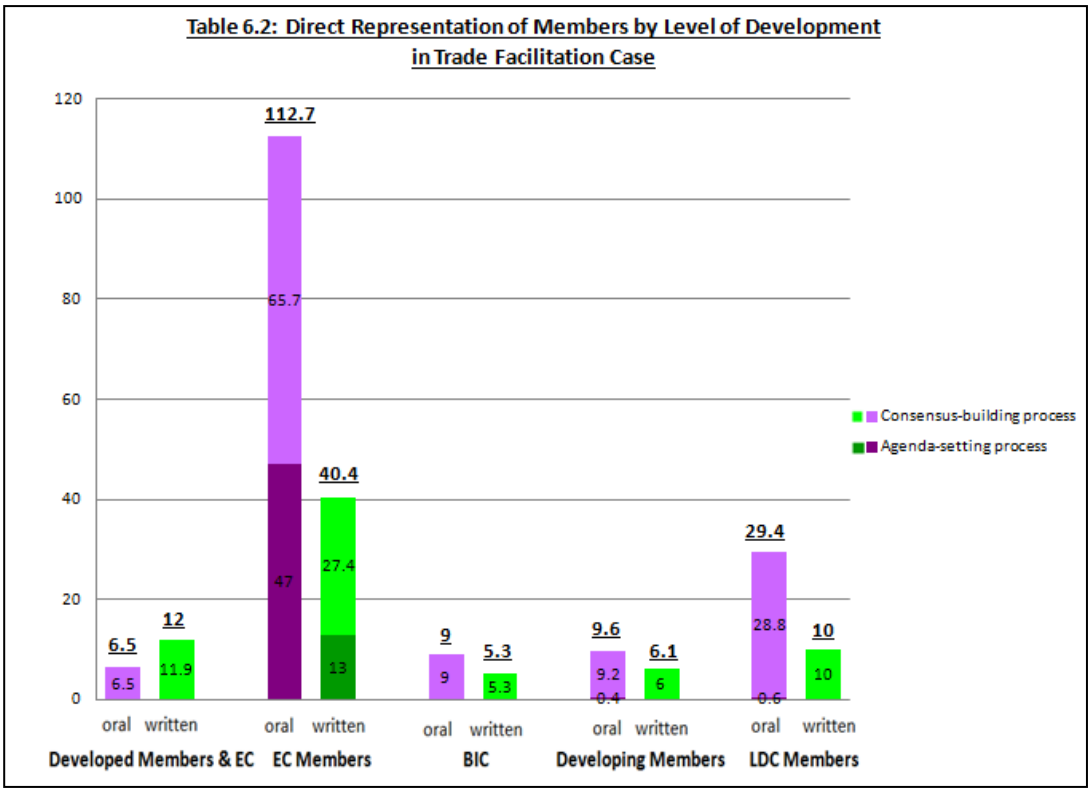
Table 6.2 below illustrates the degree of 'direct representation', i.e. values regarding the extent to which the interests of individual Members part of the different categories were directly represented by other Members on their behalf. It shows that the degree of direct representation by means of oral interventions of the interests of individual Members part of the EC Members (112.7) and the LDC Members (29.4) categories sufficiently offset their weaker degrees of direct participation. Indeed, the degree of 'combined direct participation and direct representation' of individual EC Members (112.9[1382]) and LDC Members (32.3[1383]) met the benchmark (44.2), i.e. respectively 61 percent higher and 27 percent lower than it.

However, the degree of direct representation of individual Developing Members (9.6) was not sufficient to counterbalance their weaker performance of direct participation (12.7[1384]). Indeed,

[1382] Representing the sum of the degree of direct participation of individual EC Members by means of oral interventions (0.2), as illustrated in Table 6.1, added to their degree of direct representation (112.7) indicated in Table 6.2.
[1383] Representing the sum of the degree of direct participation of individual LDC Members by means of oral interventions (2.9), as illustrated in Table 6.1, added to their degree of direct representation (29.4) indicated in Table 6.2.
[1384] As shown in Table 6.1.

their degree of 'combined direct participation and direct representation' (22.3[1385]) remained *moderately lower* (50 percent lower) than the benchmark (44.2).

WRITTEN COMMUNICATIONS: With respect to Members' direct participation by way of written communications, following the values represented in Table 6.1, the benchmark should be 7, which is established from the average of the degrees of direct participation by way of written communications of individual Members part of the Developed Members & EC (8.7) and the BIC (5.3) categories. Individual Members from both these categories achieved a *sufficient* degree of direct participation due to the fact that their scores were respectively 20 percent higher and 24 percent lower than the benchmark (7).



However, the degrees of direct participation by means of written communications of individual Members part of the LDC Members (0.2) and the Developing Members (0.8) categories scored *significantly lower* (respectively 97 and 89 percent lower) than the benchmark (7). As for

[1385] Representing the sum of the degree of direct participation of individual Developing Members by means of oral interventions (12.7), as illustrated in Table 6.1, added to their degree of direct representation (22.3) indicated in Table 6.2.

individual EC Members, they did not obtain any values of direct participation by way of written communications.

Can the weak degree (or lack) of 'direct participation' by means of written communications of individual Members part of these above categories be offset by a sufficiently high degree of 'direct representation' to meet the benchmark?

The reading of Tables 6.1 and 6.2 jointly highlights that the degrees of 'combined direct participation and direct representation' by means of written communications of individual Members from all the categories that scored below than the benchmark sufficiently compensated for their poor direct participation's performance. Indeed, individual Members part of the EC Members (40.4[1386]), the LDC Members (10.2[1387]) and the Developing Members (6.9[1388]) scored respectively 83 percent higher, 31 percent higher and 1 percent lower than the benchmark (7) in terms of 'combined direct participation and direct representation'.

***CATEGORIES OF MEMBERS WITH LOWER DEGREES OF 'COMBINED DIRECT PARTICIPATION AND DIRECT REPRESENTATION'*:** Overall, individual Members from the following category remained with a lower degree of 'combined direct participation and direct representation' than the established benchmarks:

- Developing Members: *significantly lower* for oral (22.3).

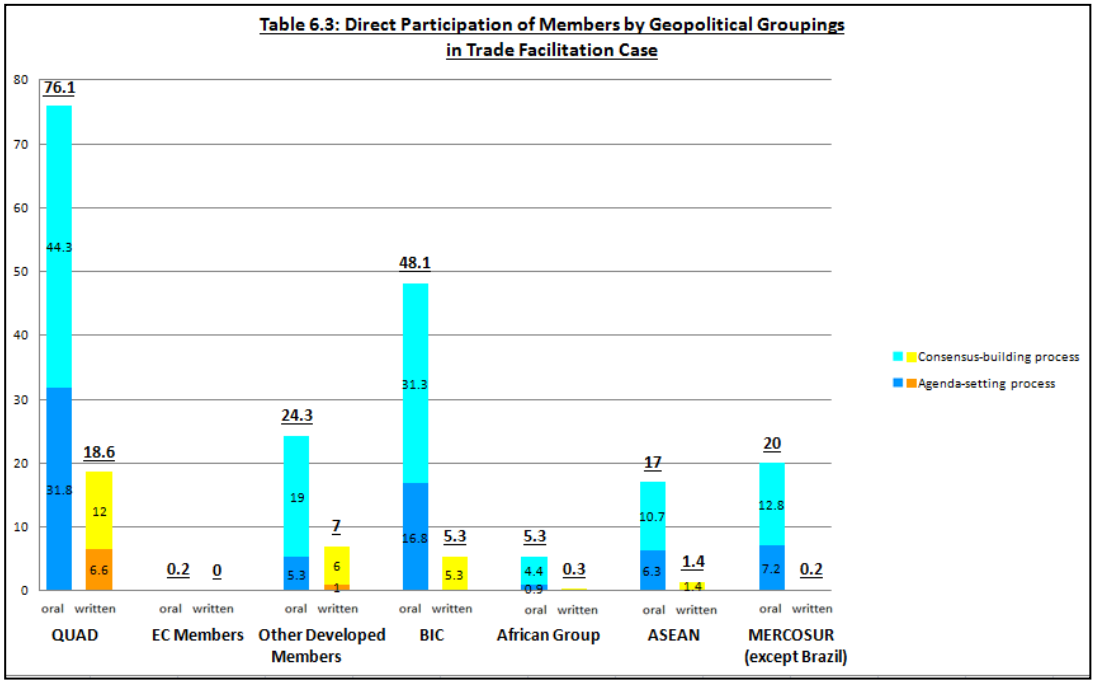
In addition, despite the fact that individual LDC Members obtained a sufficient degree of 'combined direct participation and direct representation' following the above analysis, it should be noted that their performance during the agenda-setting process exclusively in 'combined direct participation and direct representation' by means of oral interventions (0.7[1389]) was

[1386] Representing the sum of the degree of direct participation of individual EC Members by means of written communications (0), as illustrated in Table 6.1, added to their degree of direct representation (40.4) indicated in Table 6.2.
[1387] Representing the sum of the degree of direct participation of individual LDC Members by means of written communications (0.2), as illustrated in Table 6.1, added to their degree of direct representation (10) indicated in Table 6.2.
[1388] Representing the sum of the degree of direct participation of individual Developing Members by means of written communications (0.8), as illustrated in Table 6.1, added to their degree of direct representation (6.1) indicated in Table 6.2.
[1389] Representing the sum of the degree of direct participation of individual Developing Members by means of oral interventions in the agenda-setting process (0.1), as illustrated in Table 6.1 added to their degree of direct representation in the agenda-setting process (0.6) indicated in Table 6.2.

marginal, i.e. approximately one eight of the average degree of direct participation of their other counterparts, as shown in Tables 6.1 and 6.2.[1390] These tables also illustrate that not every category of Members participated by means of oral communications during the agenda-setting process; however due to the fact that it was generalized among the different categories, it should not be considered as affecting the degree of representativity of any Member.

3.3.2.1.2 *Direct participation and direct representation of Members by geopolitical groupings*

This section follows the same analysis as section 3.3.2.1.1 above, however it instead focuses on the direct participation and direct representation of individual Members classified by geopolitical groupings, as illustrated in the horizontal axis of Tables 6.3 and 6.4 below.



ORAL INTERVENTIONS: Following the values represented in Table 6.3, the benchmark consists of 62.1, which is calculated from the average of the degrees of direct participation by means of oral interventions of individual Members part of the QUAD (76.1) and BIC (48.1) groupings.

[1390] The degree of combined direct participation (0.1) and direct representation (0.6) by means of oral interventions in the agenda-setting process of individual LDC Members (amounting to 0.7) represents approximately one eight of the average degree of direct participation by means of oral interventions in the agenda-setting process of individual Members part of the Developed Members & EC (11.3), BIC (16.8) and Developing Members (5.2) categories (amounting to 5.6), see Tables 6.1 and 6.2.

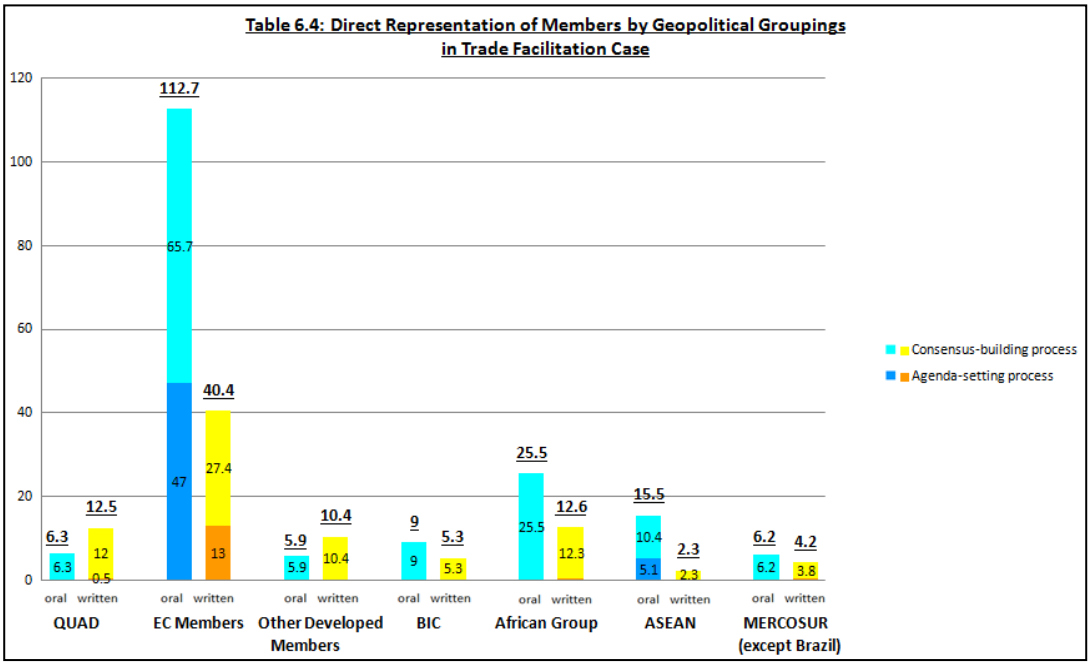
Individual Members from both these groupings obtained a *sufficient* degree of direct participation due to the fact that their scores were respectively 18 percent higher and 23 percent lower than the benchmark (62.1).

However, individual Members part of the EC Members (0.2), African Group (5.2), ASEAN (17), MERCOSUR (20), and the Other Developed Members (24.3) groupings all performed *significantly lower* (respectively 99.7 percent, 92 percent, 73 percent, 68 percent and 61 percent lower) than the benchmark.

Can the weaker performance in 'direct participation' by means of oral interventions of these individual Members part of the above groupings be offset by a sufficiently high degree of 'direct representation' to achieve the benchmark?

Table 6.4 illustrates that only individual EC Members obtained a sufficiently high degree of direct representation (112.7) to compensate for their poor degree of direct participation (0.2[1391]) by means of oral interventions. Indeed, their 'combined degree of direct participation and direct representation' (112.9) is 55 percent higher than the benchmark (62.1).

Table 6.4: Direct Representation of Members by Geopolitical Groupings in Trade Facilitation Case



[1391] As shown in Table 6.3.

The reading of Tables 6.3 and 6.4 jointly shows that the degrees of 'combined direct participation and direct representation' of individual Members part of the ASEAN (32.5[1392]), African Group (25.5[1393]), Other Developed Members (30.2[1394]) and the MERCOSUR (26.2[1395]) groupings were *moderately lower* (i.e. respectively 48 percent, 50 percent, 51 percent and 58 percent lower) than the benchmark (62.1).

WRITTEN COMMUNICATIONS: With respect to participation by way of written communications, the benchmark should be 18.6, which corresponds to the degree of direct participation by means of written communications of individual QUAD Members, as illustrated in Table 6.3.

None of the individual Members from the remaining groupings met the benchmark. Individual Members from the MERCOSUR (0.2), the African Group (0.3), ASEAN (1.4), BIC (5.3) and the Other Developed Members (7) groupings all performed *significantly lower* (respectively 99 percent, 98 percent, 93 percent, 72 percent and 62 percent lower) than the benchmark for direct participation by way of written communications (62.1). As for individual EC Members, they did not obtain any values in direct participation by means of written communications.

Can the insufficient (or lacking) degrees of 'direct participation' by way of written communications of individual Members part of the above groupings be compensated for by a sufficiently high degree of 'direct representation' to meet the benchmark?

The degrees of 'combined direct participation and direct representation' by means of written communications of individual Members part of the EC Members (40.4[1396]), Other Developed

[1392] Representing the sum of the degree of direct participation of individual ASEAN Members by means of oral interventions (17), as illustrated in Table 6.3, added to their degree of direct representation (15.5) indicated in Table 6.4.
[1393] Representing the sum of the degree of direct participation of individual African Group Members by means of oral interventions (5.3), as illustrated in Table 6.3, added to their degree of direct representation (25.5) indicated in Table 6.4.
[1394] Representing the sum of the degree of direct participation of individual Other Developed Members by means of oral interventions (24.3), as illustrated in Table 6.3, added to their degree of direct representation (5.9) indicated in Table 6.4.
[1395] Representing the sum of the degree of direct participation of individual MERCOSUR Members by means of oral interventions (20), as illustrated in Table 6.3, added to their degree of direct representation (6.2) indicated in Table 6.4.
[1396] Representing the sum of the degree of direct participation of individual EC Members by means of written communications (0), as illustrated in Table 6.3, added to their degree of direct representation (40.4) indicated in Table 6.4.

Members (17.4[1397]) and African Group (12.9[1398]) groupings, as highlighted by Tables 6.3 and 6.4 read jointly, sufficiently offset their poor performance in direct participation due to the fact that they were respectively 54 percent higher, 7 percent lower and 31 percent lower than the benchmark (18.6).

As for individual Members part of the BIC grouping, Tables 6.3 and 6.4 show that their degree of 'combined direct participation and direct representation' by means of written communications (10.6[1399]) improved their overall degree of participation/representation, however not to a sufficient degree. Their performance remained moderately lower (i.e. 43 percent lower) than the benchmark (18.6). However, the degree of 'combined direct participation and direct representation' of individual Members part of the ASEAN (3.7[1400]) and MERCOSUR (4.4[1401]) groupings remained *significantly lower* (respectively 80 and 76 percent lower) than the benchmark (18.6).

GROUPINGS OF MEMBERS WITH LOWER DEGREES OF 'COMBINED DIRECT PARTICIPATION AND DIRECT REPRESENTATION': Overall, individual Members part of the following groupings remained with a lower degree of 'combined direct participation and direct representation' than the set benchmarks:

- MERCOSUR: *moderately lower* for oral (26.2) and *significantly lower* for written (4.4)
- ASEAN: *moderately lower* for oral (32.5) and *significantly lower* for written (3.7)
- Other Developed Members: *moderately lower* for oral (30.2)
- African Group: *moderately lower* for oral (30.8)

[1397] Representing the sum of the degree of direct participation of individual Other Developed Members by means of written communications (7), as illustrated in Table 6.3, added to their degree of direct representation (10.4) indicated in Table 6.4.
[1398] Representing the sum of the degree of direct participation of individual African Group Members by means of written communications (0.3), as illustrated in Table 6.3, added to their degree of direct representation (12.6) indicated in Table 6.4.
[1399] Representing the sum of the degree of direct participation of individual BIC by means of written communications (5.3), as illustrated in Table 6.3, added to their degree of direct representation (5.3) indicated in Table 6.4.
[1400] Representing the sum of the degree of direct participation of individual ASEAN by means of written communications (1.4), as illustrated in Table 6.3, added to their degree of direct representation (2.3) indicated in Table 6.4.
[1401] Representing the sum of the degree of direct participation of individual MERCOSUR by means of written communications (0.2), as illustrated in Table 6.3, added to their degree of direct representation (4.2) indicated in Table 6.4.

- BIC: *moderately lower* for written (10.6)

Moreover, the performance of individual African Group Members in combined 'direct participation and direct representation' by means of oral interventions (0.9[1402]) was negligible, i.e. approximately 7 percent of the average degree of direct participation of their other counterparts, as shown in Tables 6.3 and 6.4.[1403] Due to the fact the majority of individual Members part of the different groupings did not submit written communications during the agenda-setting process, it should not be considered as affecting the degree of representativity of any Member.

3.3.2.2. Step 2: Was an even-handed group of Members participating in the rulemaking processes?

Step 1 evaluated the direct participation and direct representation, i.e. the two greatest forms of participation, of individual Members part of the different categories and groupings. It concluded that the following categories/groupings of Members obtained insufficient degrees of 'combined direct participation and direct representation' as compared to the established benchmarks:

Categories

- Developing Members: s*ignificantly lower* for oral (22.3)

Groupings

- MERCOSUR: *moderately lower* for oral (26.2) and *significantly* lower for written (4.4)
- ASEAN: *moderately lower* for oral (32.5) and *significantly lower* for written (3.7)
- Other Developed Members: *moderately lower* for oral (30.2)
- African Group: *moderately lower* for oral (30.8)

[1402] Representing the sum of the degree of direct participation of individual African Group Members by means of oral interventions in the agenda-setting process (0.9), as illustrated in Table 6.3 added to their degree of direct representation in the agenda-setting process (0) indicated in Table 6.4.

[1403] The degree of combined direct participation (0.9) and direct representation (0) by means of oral interventions in the agenda-setting process of individual African Group Members (amounting to 0.9) represents approximately 7 percent of the average degree of direct participation by means of oral interventions in the agenda-setting process of individual Members part of the QUAD (31.8), Other Developed Members (5.3), BIC (16.8), ASEAN (6.3) and MERCOSUR (7.2) groupings (amounting to13.5), see Tables 6.3 and 6.4.

- BIC: *moderately lower* for written (10.6)

This section proceeds with Step 2 of the evaluation of the degree of representativity of Members under the indicator *Representativeness − Representativity*. It evaluates whether those categories/groupings of Members which were attributed an insufficient degree of 'combined direct participation and direct representation' had a sufficient degree of 'balanced representation' to counterbalance their insufficient performance in Step 1.

'Balanced representation' consists of the minimum standard under the qualitative analysis for meeting the indicator *Representativeness − Representativity*. It evaluates whether an even-handed group of Members from the different categories (section 3.3.2.2.1) and geopolitical groupings (section 3.3.2.2.2) participated in the rulemaking process. Hence, it is directly correlated to the number of Members composing each category and groupings, as indicated on the horizontal axis of Tables 6.5 and 6.6. It focuses exclusively on the categories and groupings that were attributed an insufficient degree of 'combined direct participation and direct representation' according to the evaluation performed in Step 1.

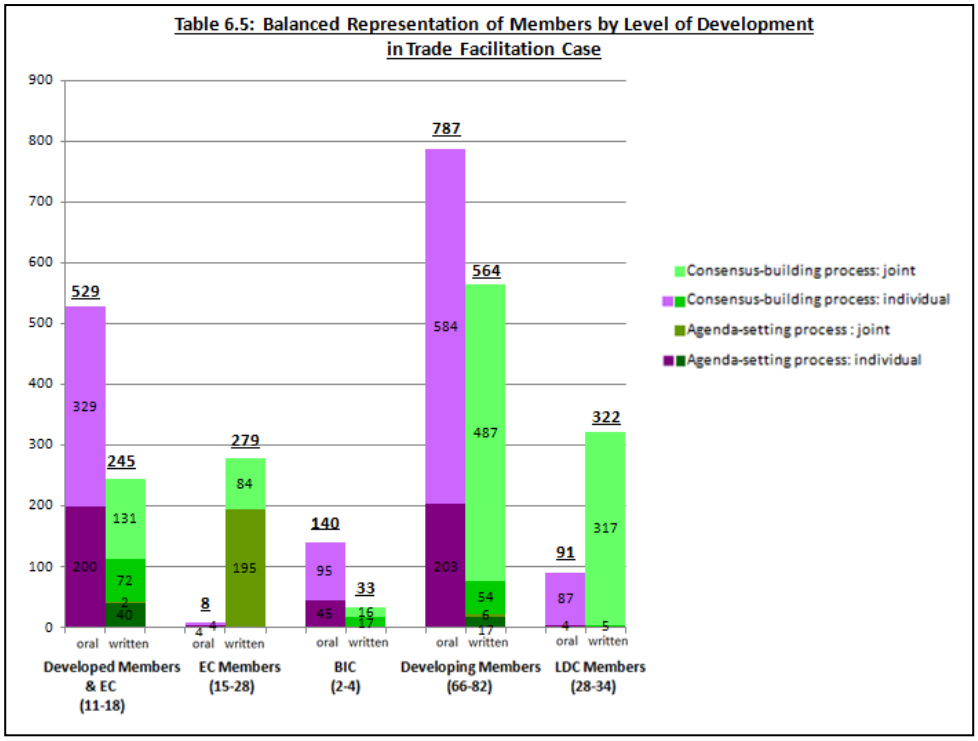
3.3.2.2.1. *Balanced representation of Members by level of development*

This section assesses whether the Developing Members category obtained a sufficiently high degree of 'balanced representation' by means of oral interventions.

Following the values presented in Table 6.5 the benchmark consists of 658, which corresponds to the average of the degrees of balanced representation by means of oral interventions of the Developing Members (787) and the Developed Members & EC (529) categories. These values illustrate that the excessively high degree of balanced representation of the Developing Members (787) category overly compensates for their weak degree of 'combined direct participation and direct representation' due to the fact that it exceeds the benchmark (658) by 16 percent.

Additionally, Step 1 had found that individual LDC Members had a marginal degree of 'combined direct participation and direct representation' by means of oral interventions in the agenda-setting process exclusively. Can this weak performance be offset by its degree of balanced representation? No. Table 6.5 shows that the participation of the LDC Members

category by means of oral interventions remained marginal, accounting for solely 0.9 percent[1404] of all participation in the agenda-setting process.



3.3.2.2.2. *Balanced representation of Members by geopolitical groupings*

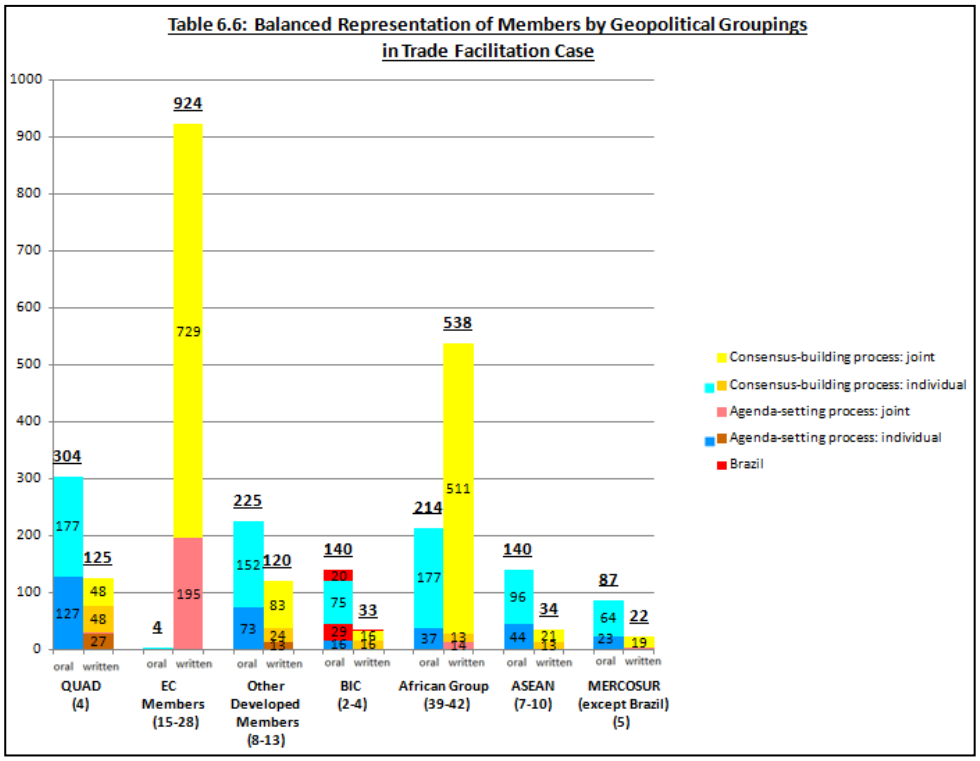
This section evaluates whether the degree of 'balanced representation' was sufficiently high for the MERCOSUR and ASEAN groupings (for both oral interventions and written communications), the Other Developed Members and the African Group groupings (for oral interventions only) and the BIC grouping (for written interventions only) to offset their poor performance in 'combined direct participation and direct representation'.

ORAL INTERVENTIONS: According to the values of Table 6.6 the benchmark should consist of 247.7, which is calculated from the average of the degrees of balanced representation by means of oral interventions of the QUAD (304), the Other Developed Members (225) and the African Group (214) groupings. Considering that the degrees of balanced representation by way of oral

[1404] The LDC Members category's degree of balanced representation by means of oral interventions (4) in the agenda-setting process represents approximately 0.9 percent of the average degree of balanced representation by means of oral interventions in the agenda-setting process of the Developed Members & EC (200), BIC (45) and Developing Members (203) categories (amounting to 448), see Table 6.5.

interventions of the Other Developed Members (225) and the African Group (214) groupings were only respectively 9 and 14 percent lower than the benchmark (247.7), it should be considered that they sufficiently offset their weak performance in 'combined direct participation and direct representation'.

As for the MERCOSUR grouping, the calculation of its degree of balanced representation by means of oral interventions (87) should also take into account the degree of balanced representation of Brazil (49)[1405], amounting to 136. Yet, it is still insufficient to completely compensate for its weak performance in 'combined direct participation and direct representation' due to the fact that it results in a score that is *moderately lower* (i.e. 45 percent lower) than the benchmark (247.7). The degree of balanced representation by means of oral intervention of the ASEAN grouping (140) also did not offset its poor degree of 'direct participation and direct representation' considering that it is *moderately lower* (i.e. 44 percent lower) than the benchmark (247.7)



[1405] Brazil is an official Member of MERCOSUR, but treated separately for the purpose of this thesis. For additional information, see Chapter 3, Section 4.1.3.2.2 (b).

WRITTEN COMMUNICATIONS: For the degree of 'balanced representation' by means of written communications, the benchmark should consist of 122.5 according to the values presented on Table 6.6, which represent the average of the degree of balanced representation of the QUAD (125) and the Other Developed Members (120) groupings.

The calculation of the degree of balanced representation by means of written communications of MERCOSUR (22) should also take into account that of Brazil (1)[1406], thus amounting to 23, which is still *significantly lower* (i.e. 81 percent lower) than the benchmark (122.5). For their part, the BIC (33) and the ASEAN (34) groupings scored *significantly lower* (i.e. respectively 73 and 72 percent) than the benchmark (122.5) in terms of balanced representation by means of written communications. As a result, none of these groupings were able to offset their poor degree of 'combined direct participation and direct representation'.

Additionally, it was found in Step 1 that the performance of individual African Group Members in 'combined direct participation and direct representation' by means of oral interventions was negligible. Can the degree of balanced representation of the African Group grouping in the agenda-setting process compensate for its poor performance? Following Table 6.6, the African Group grouping obtained a degree of balanced representation by means of oral interventions of 37 in the agenda-setting process, which sufficiently offsets its poor degree of 'direct participation and direct representation' in the agenda-setting process considering that it accounts for a reasonable amount of 11 percent[1407] of all participation values (of all groupings) by means of oral interventions in the agenda-setting process.

3.3.2.2.3. *Results of the quantitative analysis*

Step 1 and Step 2 above conducted the quantitative analysis for the assessment of the indicator *Representativeness − Representativity*. Following the evaluation under Step 2, it was found that all the categories of Members met the standard for the quantitative analysis.[1408] Yet, it should be

[1406] *Ibid.*
[1407] The African Group grouping's degree of balanced representation by means of oral interventions (37) in the agenda-setting process represents approximately 11 percent of the average degree of balanced representation by means of oral interventions in the agenda-setting process of the QUAD (127), Other Developed Members (73), the BIC (45), ASEAN (44) and MERCOSUR (23) (amounting to 349), see Table 6.6.
[1408] The methodology to evaluate the standard of the quantitative analysis is described in Chapter 3, Section 4.1.3.2.2 (c).

noted that the LDC Members category participated/was represented to a marginal degree in the agenda-setting process.

For their part, the following three geopolitical groupings did not meet the standards:

- MERCOSUR: its representativity was *moderately lower* than the benchmarks for oral interventions, and *significantly lower* for written communications;
- ASEAN: its representativity was *moderately lower* than the benchmarks for oral interventions, and *significantly lower* for written communications; and
- BIC: its representativity was *moderately lower* than the benchmark for written communications.

As for the African Group grouping, which participation/representation by means of oral interventions in the agenda-setting process was found to be negligible, it was evaluated that its degree of balanced participation in the agenda-setting process compensated adequately for its poor performance.

The following section presents the methodology for Step 3, i.e. the qualitative analysis.

3.3.2.3. Step 3: Was a balanced set of interests represented in the most decisive moments of the rulemaking processes?

This section performs the qualitative analysis for the indicator *Representativeness – Representativity*. It assesses whether the Members that participated in the most decisive moments of the rulemaking processes reflected a balanced set of Members' interests.

For the trade facilitation issue, Members' interests could be distinguished into these three groups:

Group	Position	Members
Colorado Group	Favourable to trade facilitation negotiations	Australia, Canada, Chile, Colombia, Costa Rica, EC, Hong Kong, Hungary, Japan, Korea, Morocco, New Zealand, Norway, Paraguay, Singapore, Switzerland, and the United States

Group	Position	Members
Moderate Group	Moderate for negotiations on trade facilitation	Chinese Taipei, Croatia, El Salvador, Iceland, Israel, Nicaragua, Pakistan, Peru, Sri Lanka, Turkey, and Uruguay
Core Group of Developing Countries	Unfavourable to trade facilitation negotiations	Bangladesh, Botswana, China*, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Namibia, Nepal, Nigeria, the Philippines, Rwanda. Tanzania, Trinidad and Tobago, Uganda, Venezuela, Zambia, and Zimbabwe. *China left the Core Group at the end of 2003[1409]

Both the Colorado and the Core Groups were actual negotiating coalitions that were formed by the Members composing them to represent their interests jointly.[1410] As for the Moderate Group, it was not an actual coalition, but this classification reflects the negotiating position of a certain number of Members regarding the trade facilitation issue. The Moderate Group was mostly involved in the agenda-setting process exclusively and, therefore, will not be considered for the assessment of the consensus-building process.[1411]

3.3.2.3.1. *Most decisive moments leading to the adoption of the Annex D negotiations modalities of the Doha Work Programme*

During the agenda-setting process, there were three decisive moments that had a substantial impact on the adoption of the negotiating mandate and modalities. The first was the proposal by the EC to include trade facilitation in the broader WTO agenda.[1412] The EC proposal was

[1409] Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 3, n 2; Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 36, n 12.
[1410] Japan Ministry of Finance, Customs and Tariff Bureau, "Approaches for Trade Facilitation Initiatives in WTO and WCO" (February 2005) at 10, online: Japan Ministry of Finance <https://www.mof.go.jp/english/customs_tariff/wto/b01e.pdf> [Japan Ministry of Finance, "Approaches for Trade Facilitation"]; Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 3, n 2 and 3; GAO, *Global Trade Talks, supra* note 1301, Appendix VI, n k and n l; Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 36, n 12 and 13; UNECE, *Trade Facilitation Implementation Guide: Context of TF Negotiations,* n 1*,* online: UNECE <http://tfig.unece.org/contents/Context-of-TF-negotiations.html>; Hassan, *A WTO Agreement on Trade Facilitation, supra* note 1323 at 47, n 45 and 59.
[1411] Japan Ministry of Finance, "Approaches for Trade Facilitation", *ibid* at 10; Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 36, n 14.
[1412] *Council for Trade in Goods Meeting of 1, 4, 5 and 6 November 1996, supra* note 1240 at para 5.1.

expressly supported by the delegations of Australia, Canada, Colombia, Czech Republic, Egypt, Hong Kong, Iceland, Japan, Morocco, Norway, Peru, Slovak Republic and Switzerland.[1413] Table 6.7 illustrates that all the different groups of interests supported the EC's proposal. More specifically, it was supported by a total of 65 percent of Colorado Members, 14 percent of Moderate Members and another 14 percent of other Members (i.e. Czech Republic and Slovak Republic), and by one Core Group Member (i.e. Egypt), representing 7 percent of the group of supporters. The second most decisive moment was the drafting of the negotiations modalities to be contained in Annex D of the Doha Work Programme, which was mostly finalized during long meetings of an informal negotiating group formed by the facilitator. This group was composed of the following delegations: Brazil, Canada, China, Costa Rica, EC, India, Japan, Malaysia, Philippines, Singapore, Tanzania, Trinidad and Tobago and the United States.[1414]

TABLE 6.7: Groups of Interests Supporting EC's Proposal in Trade Facilitation Case

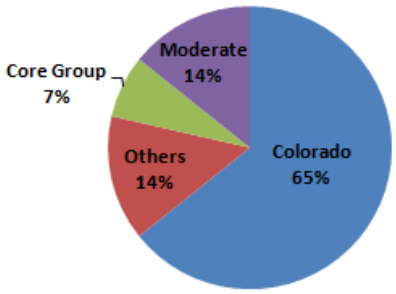
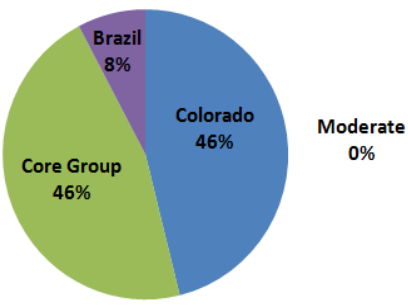


TABLE 6.8: Groups of Interests Involved in Drafting of Annex D of *Doha Work Programme* in Trade Facilitation Case

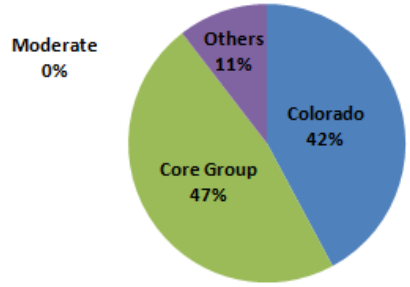


As illustrated in Table 6.8, this group was evenly balanced between Members from the Colorado and the Core Groups (each representing 46 percent of the participants). Brazil also participated in the drafting group, accounting on its own for 8 percent of the participants. However, no Members represented the position of the Moderate Group. At a later stage of the negotiations, the following six additional Members were invited to join the drafting: Bangladesh, Chile, Jamaica, Zimbabwe, Morocco, and Georgia. This brought up the representation of the Core

[1413] *Ibid* at para 5.2; WTO, Council for Trade in Goods, *Minutes of the Meeting* (held on 29 November 1996), WTO Doc G/C/M/16 at paras 2.2-2.9, online: WTO <http://docs.wto.org>.
[1414] Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 5; *Priya, Trade Facilitation in WTO and Beyond, supra* note 1363 at 7.

Group by 5 percent as compared to the Colorado Group. However there remained no Member representing the Moderate Group as shown on Table 6.9.

TABLE 6.9: Groups of Interests Later Inducted in Drafting of Annex D of *Doha Work Programme* in Trade Facilitation Case

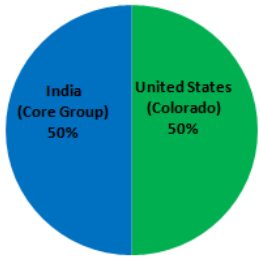


Also, as for the interests of the LDC Members which have been found to be only marginally represented during the agenda-setting process following the quantitative analysis, the results of the qualitative analysis lead to conclude that they were nevertheless sufficiently represented through the active involvement of the Core Group.[1415]

3.3.2.3.2. *Most decisive moments leading to the adoption of the Agreement on Trade Facilitation*

The data collected indicates that throughout the consensus-building process, the negotiations were conducted multilaterally with the active involvement of a large group of WTO Members. However, four moments were particularly influential for the adoption of the *Agreement on Trade Facilitation.* The first moment consists of the last four months (between September and December 2013) of crucial negotiations preceding the Bali Ministerial Conference, which were conducted under the leadership of the Director-General Roberto Azevêdo. It was reported that the intensive negotiations were successfully carried out with the exceptional involvement of the entire membership.[1416] Therefore, it can be assumed that they also were representative of both the Colorado and the Core groups of interests.

TABLE 6.10: Groups of Interests Involved in Decisive Moments Regarding the Adoption of the 'Bali Package' in Trade Facilitation Case

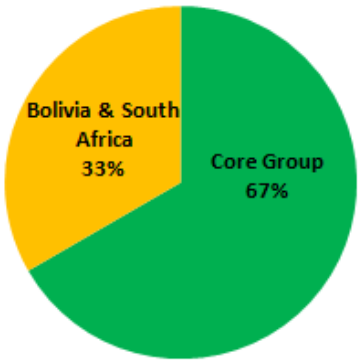


The second moment concerns the adoption of the 'Bali Package'[1417] which comprised the

[1415] In general, during the negotiations on trade facilitation, LDC Members supported the Core Group position, see: Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 36.
[1416] *Report by the Chairman of 26 November 2013, supra* note 1362.
[1417] The 'Bali package' was incorporated in the Bali Ministerial Declaration, see: *Bali Ministerial Declaration*, *supra* note 1255.

Ministerial Decision adopting the text of the *Agreement Trade Facilitation.* According to the data gathered, the final negotiations leading up to the adoption of the 'Bali Package' would have been conducted between India, which made its acceptance of the Bali Package conditional to the inclusion of a peace clause blocking WTO litigation related to subsidies programs for food security, and the United States, which finally gave in to the demand of India in the last hours of the negotiations.[1418] As represented on Table 6.10, this deal between the United States and India was concluded between representatives of both the Colorado and the Core Groups.

TABLE 6.11: Groups of Interests Involved in Crucial Moments Related to Adoption of Protocol of Amendment in Trade Facilitation Case



The third most decisive moment was the announcement by the delegation of India on 25 July 2014 that it would not join consensus on the adoption of a protocol of amendment for the *Agreement on Trade Facilitation* unless it saw its concerns on food security addressed.[1419] It was reported that its position was backed by the delegations of Bolivia, Cuba, South Africa, Venezuela and Zimbabwe.[1420] Thus, the objection to the adoption of the protocol of amendment was supported exclusively by Members representing the interests of the Core Group in addition to Bolivia and South Africa, as illustrated in Table 6.11. No supporting Members represented the interests of the Colorado Group.

[1418] Robert Howse, "How India & the US Broke the WTO Impasse-Without Either Making Any Concessions", *IELP Blog* (15 November 2014), online: worldtradelaw.net <http://worldtradelaw.typepad.com/ielpblog/2014/11/how-india-the-us-broke-the-wto-impasse-without-either-making-any-concessions.html>.

[1419] *India's Refusal to Join Consensus, supra* note 1258. The issue of food security, along with the adoption of the text of the *Agreement on Trade Facilitation,* was another essential component of the 'Bali package' of 7 December 2013, where Ministers agreed "to negotiate on an agreement for a permanent solution for the issue of public stockholding for food security purposes for adoption by the 11th Ministerial Conference", see: *Public Stockholding for Food Security Purposes* (Ministerial Decision of 7 December 2013), WTO Doc WT/MIN(13)/38, online: WTO <http://docs.wto.org>.

[1420] "WTO Trade Facilitation Deal in Limbo as Deadline Passes Without Resolution", *WTO BIORES* (4 August 2014) at 2, ictsd.org <http://www.ictsd.org/bridges-news/bridges/news/wto-trade-facilitation-deal-in-limbo-as-deadline-passes-without-resolution>.

Finally, the fourth most crucial moment was the declaration by India and the United States, on 13 November 2014, that they had reached an agreement on the key Bali Ministerial Declaration issues and that, as a result, India would be able to join the consensus on the adoption of a protocol of amendment for the *Agreement on Trade Facilitation.*[1421] This agreement on the outcome of the *Agreement on Trade Facilitation* and the other Bali issues reflects the new power dynamics in the WTO, as illustrated in Table 6.10, involving a large emerging developing power in the WTO, India (representing the Core Group), and an established developed power, the United States (representing the Colorado Group).[1422]

3.3.2.3.3. *Results of the qualitative analysis*

The assessment of Step 3 of the indicator *Representativeness − Representativity* evaluated whether a balanced set of interests was represented in the most decisive moments of both the agenda-setting and the consensus building processes. The following conclusions were drawn:

1. During all three decisive moments leading to the adoption of the Annex D negotiations modalities, the interests of both the Colorado and the Core Groups were represented. However, those of the Moderate Group were only represented in the proposal to add the issue of trade facilitation on the WTO's agenda.
2. In all four most crucial moments that led to the adoption of the *Agreement on Trade Facilitation*, the interests of the Core Group were represented. As for the interests of the Colorado Group, they were reflected in all moments, with the exception of the decision by India to block the adoption of the protocol of amendment in July 2014.

As a result, it can be concluded that the degree of 'balanced representation' of the different sets of interests during the most decisive moments of the rulemaking processes mostly met the standards of the qualitative analysis, but with some exceptions.

3.3.2.4. Attribution of a score: *Representativeness − Representativity*

Representativeness − Representativity assessed the following standard: *Did a representative group of Members, representing a balanced set of interests, participate in the various meetings*

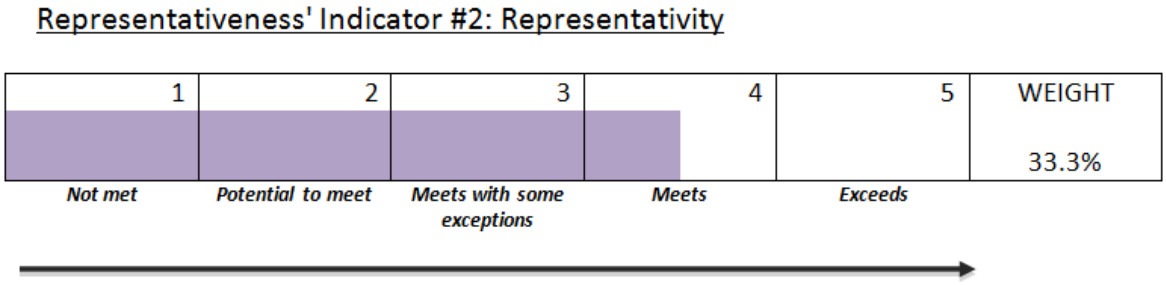
[1421] "Azevêdo Applauds India-US Agreement", *supra* note 1259.
[1422] See e.g. Narlikar, "New Powers", *supra* note 3.

and submitted written communications at all stages of the process? The analysis was performed in three steps. Based on a quantitative analysis, Step 1 evaluated the degree of 'combined direct participation and direct representation' of Members classified by level of development and geopolitical groupings, as being the two optimum forms of participation. It concluded that individual Members from all the various categories and groupings enjoyed *sufficient* degrees of 'combined direct participation and direct representation' both by means of oral interventions and written communications, with the exception of: individual MERCOSUR and ASEAN Members (both with respect to oral interventions and written communications); individual Other Developed Members, Developing Members and African Group Members (with respect to oral interventions only); and individual BIC Members (with respect to written communications only).

Also based on a quantitative analysis, Step 2 assessed whether those categories of Members which had an insufficient degree of 'combined direct participation and direct representation' obtained a sufficiently high degree of balanced representation to offset their poor performance. It was found that the degree of balanced representation of the Developing Members, the Other Developed Members and the African Group categories/groupings adequately compensated for their weak degree of 'combined direct participation and direct representation' by means of oral interventions. However, it did not make up for the MERCOSUR's and ASEAN's *moderately lower* degrees of 'combined direct participation and direct representation' by means of oral interventions, and *significantly lower* degrees by way of written communications. Moreover, the degree of balanced participation of the BIC grouping did not satisfactorily counterbalance its *moderately lower* degree of 'combined direct participation and direct representation' by means of written communications.

Finally, Step 3 was based on a qualitative analysis and focused on the degree of 'balanced representation' of the different sets of interests in the most decisive moments regarding the Trade Facilitation Case. In total, for the three most decisive moments of the agenda-setting process that were studied, all three groups of interests regarding the trade facilitation issue were represented, with the exception of those of the Moderate Group at two occasions. As for the consensus-building process, both groups of interests were represented in all four crucial moments, with the exception of the Colorado Group at one occasion.

Overall, it can be considered that the performance of the Trade Facilitation Case in the quantitative and qualitative analyses did in general meet the standards of the indicator *Representativeness − Representativity*, but with a few exceptions: for the case of Members part of the ASEAN and MERCOSUR groupings at two occasions, and the BIC grouping at one occasion. In addition, the interests of the Colorado Group were unrepresented at one occasion, and those of the Moderate Group at two occasions. As a result, *Representativeness − Representativity*, i.e. the second indicator of representativeness, should be attributed a score of 3.5/5 (i.e. '*performance met the indicator's standards, with a few exceptions*').[1423]



3.3.3. Representativeness − Outcome

> *Representativeness' Indicator #3: Did the negotiating mandate and the final outcome represent a balanced set of interests that were expressed? Were Members free to accept or reject the results of a decision?*

Representativeness − Outcome analyses whether the negotiating mandate and the final outcomes contained in the negotiations modalities of Annex D of the *Doha Work Programme* (section 3.3.3.1) and the text of the *Agreement on Trade Facilitation* (section 3.3.3.2) represent a balanced set of interests that were expressed. It also assesses whether Members were free to accept or reject the results of these decisions (section 3.3.3.3).

[1423] For the results of the quantitative analysis, the degree of representativity of Members was *sufficient* in 19 out of 24 occasions, which represents a score of 3.2/4 (the score is calculate on /4 due to the fact that the rating standard used in this thesis attributes a score of 4/5 when it meets the indicator's standards and above 4/5 when it exceeds − thus /4 represents /100). As for the qualitative analysis, the degree of representativity of Members' interests was *sufficient* in 7 out of the 9 occasions (3.1/4) in the agenda-process and in 7 out of the 8 occasions (3.5/4) in the consensus-building process, amounting to a rounded score of 3.3/4 for both stages. Together, the quantitative and qualitative analyses scored an average of 3.3/4 in terms of the number of occasions where the degree of representativity of Members or their interests was *sufficient*.

For the negotiations on trade facilitation, Members' interests could be distinguished primarily into two groups: the Colorado and the Core Groups which interests were at both opposing ends of the trade facilitation issue. However, the Moderate Group and the Group of Landlocked Developing Countries developed some of their own positions to some extent. First Members from the Colorado Group, representing predominantly the interests of developed Members, were pushing for the launch of negotiations and conclusion of an agreement on trade facilitation. As for the Core Group, composed of a majority of developing countries including some LDC Members, they were initially skeptical about the need for trade facilitation. Though, later in the process by the time the negotiations on trade facilitation had begun, most Members broadly recognized the benefits of trade facilitation.[1424]

Members retained divergent views regarding the legal form that the outcome would take. Members from the Colorado Group sought the establishment of binding norms, whereas Members from the Core Group called for alternative approaches, such as the development of non-binding guidelines.[1425] The latter were reluctant to take on legal obligations that might increase their exposure to WTO disputes while they lack the resources to modernize customs procedures. They were concerned over the cost of implementing some of the proposals and contended that training customs officials and putting in place appropriate technical infrastructure would require significant technical assistance and capacity building.[1426] Members from the Colorado Group were in favour of providing the necessary technical assistance and capacity

[1424] *Report 2003 of the Council for Trade in Goods, supra* note 1355 at 6.
[1425] *Ibid* at 7; Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 11; Neufeld, *The Long and Winding Road, supra* note 1236 at 3; Japan Ministry of Finance, "Approaches for Trade Facilitation", *supra* note 1410 at 10; Gunnela Becker, "Trade Facilitation in the WTO: Priorities for Sub-Saharan Africa", online: ILEAP <http://www.ileap-jeicp.org/downloads/Presentation%20-%20Trade%20Facilitation%20in%20the%20WTO_Priorities%20for%20sub-Saharan%20Africa%20-%20BECKER.pdf> [Becker, "Trade Facilitation"]; "Trade Facilitation Discussions Continue: Members Consider New Proposals", *BRIDGES* 9:11 (6 April 2005), online: ictsd.org < http://www.ictsd.org/bridges-news/bridges/news/trade-facilitation-discussions-continue-members-consider-new-proposals> ["Trade Facilitation Discussions Continue"]; Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 7.
[1426] *Report 2003 of the Council for Trade in Goods*, *supra* note 1355; Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 11; Priya, *Trade Facilitation in WTO And Beyond, supra* note 1363 at 5; "Trade Facilitation Discussions Continue", *ibid.*

building.[1427] However, they did not want to be confronted with open-ended financial commitments nor provide 'blank checks' for technical assistance.[1428]

A third group of Members, the Group of Landlocked Developing Countries, also consolidated its interests after the launch of the negotiations. The geographical situation of these countries causes them to be highly vulnerable to transit costs and delays.[1429] As a result, they favoured trade facilitation negotiations and demanded commitments on the simplification of transit formalities, the use of international standards, as well as advance notification and pre-consultations.[1430] As for Members from the Moderate Group, although they were sensitive to developing country concerns over implementation, in general, they largely supported negotiations on trade facilitation.[1431] It should be noted that after the official launch of the negotiations on trade facilitation on August 2004, negotiations on the basis of these coalitions slowly waned.[1432]

The following sections assessed whether the negotiating mandate and the final outcome represented a balanced set of interests that were expressed.

3.3.3.1. Did the negotiating mandate represent a balanced set of interests that were expressed?

The negotiating mandate, laid out in paragraph g and Annex of the *Doha Work Programme,* provided a fair balance between the interests of both developing and developed Members.[1433] First, the *Doha Work Programme* officially launched negotiations on trade facilitation as sought by the Colorado Group, the Group of Landlocked Developing Countries and, to some extent, the Moderate Group, and provided that the negotiations should aim "to clarify and improve relevant

[1427] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 11; Becker, "Trade Facilitation", *supra* note 1425.
[1428] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 18; Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 6-7.
[1429] UN-OHRLLS, *About the Landlocked Developing Countries (LLDCs)*, online: UN-OHRLLS <http://unohrlls.org/about-lldcs/>.
[1430] Becker, "Trade Facilitation", *supra* note 1425.
[1431] Japan Ministry of Finance, "Approaches for Trade Facilitation", *supra* note 1410 at 10; Priya, Trade *Facilitation in WTO and Beyond, supra* note 1363 at 36; Law Offices of Stewart and Stewart, *Trade Facilitation: The Doha Negotiations After Six Years − Progress Report at the end of 2007,* Briefing Paper on Multilateral Trade Negotiations (January 2008) at 3, online: primerus <http://www.primerus.com/files/tfstatus.pdf>.
[1432] Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 36-37; Hassan, *A WTO Agreement on Trade Facilitation, supra* note 1323 at 48.
[1433] Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 8.

aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit."[1434]

However, the *Doha Work Programme* also reflected the concerns voiced by the Core Group.[1435] In terms of technical assistance, paragraph 6 provided that that it was "recognized that negotiations could lead to certain commitments whose implementation would require support for infrastructure development on the part for some Members", which was a key demand of the Core Group. However, the language used aimed to confine such aid to "limited cases" and developed Members committed only "to make every effort to ensure support and assistance" that would only be "directly related to the nature and scope of the commitments in order to allow implementation."[1436] Furthermore, as sought by the Colorado Group, the *Doha Work Programme* stipulated that it was understood that "the commitments by developed countries to provide such support are not open-ended."[1437] In exchange for limitations on the provisions of technical assistance, the Core Group had proposed that the provision of financial and technical assistance and capacity building, including support for infrastructure development should be "an *a priori* condition for developing and least developed countries to implement the results of the negotiations."[1438] Although the Annex D modalities did not go as far as suggested by the Core Group, for the case of infrastructure development, paragraph 6 stated: "It is understood . . . that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required."[1439]

Regarding the concern of the Core Group to be increasingly exposed to dispute settlement due to additional binding commitments, paragraph 3 stated that LDC Members would "only be required to undertake commitments to the extent consistent with their individual development, financial

[1434] *Doha Work Programme, supra* note 1247, Annex D, para 1. Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 8.
[1435] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 11; Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 5; Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 8.
[1436] *Doha Work Programme, supra* note 1247, Annex D, para 6. See also Neufeld, *The Long and Winding Road, supra* note 1236 at 8.
[1437] *Doha Work Programme, supra* note 1247, Annex D, para 6. See also Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 6-7.
[1438] Core Group, *Contribution to Improve Annex D* as cited in Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 5; Neufeld, *The Long and Winding Road, supra* note 1236 at 8, n 26.
[1439] *Doha Work Programme, supra* note 1247, Annex D, para 6.

and trade needs or their administrative and institutional capabilities."[1440] For developing (and also LCD) Members, paragraph 2 provided for the application of broad principles of special and differential treatment (S&D) that would extend beyond the granting of traditional transition periods for implementing commitments.[1441] Paragraph 2 stipulated that the extent and timing of entering in commitments would be "related to the implementation capacities of developing and least-developed Members." It was further agreed that "those Members would not be obliged to undertake investments infrastructure projects beyond their means." [1442] Hence, these provisions introduced a novel concept regarding S&D treatment: "a conditional link between existence of implementation capacity and a requirement to undertake a commitment."[1443] The new focus was on the individual situation of every country instead of a one-size-fits-all approach.

3.3.3.2. Did the text of the Agreement on Trade Facilitation represent a balanced set of interests that were expressed?

The *Agreement on Trade Facilitation* also provided a delicate balance between the different views that were expressed. For the Colorado Members that sought binding disciplines, Section I of the *Agreement on Trade Facilitation* contains a good portion of binding obligations that will be required to be implemented by all developed countries on the date of its entry into force.[1444] Additionally, developing or LDC Members will also be required to implement the provisions that they designate for implementation upon entry into force of the Agreement, or in the case of LDC Members within one year after its entry into force ('Category A' obligations).[1445]

As for the Core Group's concerns to be overexposed to dispute settlement, several of the most contentious provisions consist only of 'best endeavours commitments' with conditional language such as "to the extent practicable" or "to the extent possible".[1446] Such best endeavours

[1440] *Ibid,* Annex D, para 3.
[1441] Priya, *Trade Facilitation Negotiating History, supra* note 1244 at 8.
[1442] *Doha Work Programme, supra* note 1247, Annex D, para 2.
[1443] Neufeld, *The Long and Winding Road, supra* note 1236 at 8.
[1444] *Protocol Amending the WTO Agreement, supra* note 96, Annex, Section I and Article24(1). See generally Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 12-14 (analyzing which provisions of the *Agreement on Trade Facilitation* are subject to binding vs best endeavours commitments).
[1445] *Protocol Amending the WTO Agreement, supra* note 96, Annex, Article 24(2).
[1446] See Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 12-14; "Members approaching last petrol station", *supra* note 1347.

commitments won't be subject to full enforceability by the DSU, or at the most, only to the extent as to whether implementation had become "practice" or "possible".[1447]

In addition, each developing country or LDC Member is responsible to self-designate the provisions that it will implement: upon entry of the Agreement or, for the case of LDCs, within one year after entry into force ('Category A'); on a date after a transitional period of time following the entry into force of the Agreement ('Category B'); or on a date after a transitional period of time following the entry into force of the Agreement and requiring the acquisition of implementation capacity through the provision of assistance for capacity building ('Category C').[1448] There are no limits regarding the length of implementation periods that can be notified.

Furthermore, Article 18 provides that if a Member self-assesses that it continue to be lacking capacity to implement a provision after transition periods have expired, the Trade Facilitation Committee is called to establish an Expert Group composed of five independent trade facilitation professionals that will examine the situation and make recommendations.[1449] No dispute settlement procedure may be intended until the recommendation of the Expert Group has been considered by the Trade Facilitation Committee.[1450] In addition, Article 20 grants grace periods before recourse to the DSU may be had made: first, Category A provisions cannot be contested before a period of two years after the entry into force of the Agreement (for developing countries) and six years (for LDCs); and second, LDCs (but not developing countries) are attributed a grace period of eight years following the implementation of their Category B and C provisions.

As for technical assistance, Article 13 provides a best endeavours commitment (considering the use of the term "should"[1451]) to provide assistance and support for capacity building to help developing country and LDC Members implement the provisions of the Agreement, which "may take the form of technical, financial, or any other mutually agreed form of assistance

[1447] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 21.
[1448] *Protocol Amending the WTO Agreement, supra* note 96, Annex, Article 14.
[1449] *Ibid*, Article 18 (1) to (4).
[1450] *Ibid* Article 18 (5).
[1451] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 21.

provided."[1452] As sought by the Colorado Group, nowhere in the Agreement is there a binding (enforceable) commitment on any Member to provide assistance.[1453]

In exchange, the Agreement reincorporates the provisions contained in Annex D that link implementation capacity and requirement to undertake a commitment. Article 13 stipulates that: (i) where a developing or a LDC Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired[1454]; and (ii) LDC Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.[1455]

As for the specific requests by the Group of Landlocked Developing Countries, Articles 10 and 11 provide for a series of measures to minimize transit formalities and documentation requirements, including a best endeavours commitment to make use of international standards[1456] and a binding commitment to allow and provide for advance filling and processing of transit documentation and data prior to the arrival of goods.[1457]

Overall, the text of the *Agreement on Trade Facilitation* was based on some 39 individual and joint proposals, representing the views of some 126 Members.[1458] Table 6.12 below presents the results of a comparison between the texts of the provisions as found in the *Agreement on Trade Facilitation* and the text of the proposals that were submitted by Members and included in the compilation by the WTO Secretariat.[1459] It aims to show the input that various Members classified by groups of interests had regarding the content each of the provision of the Agreement. It reveals that the Colorado Group contributed in all the provisions of Section I of the Agreement, with the exception of Article 5 (regarding Other Measures to Enhance Impartiality, Non-discrimination and Transparency). As for the Core Group, the Moderate Group and the Group of Landlocked Developing Countries, they contributed for approximately two

[1452] *Protocol Amending the WTO Agreement, supra* note 96, Annex, Article 13(2), n 16.
[1453] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 16.
[1454] *Protocol Amending the WTO Agreement, supra* note 96, Annex, Article 13(2).
[1455] *Ibid*, Article 13(2).
[1456] *Ibid*, Article 10(3).
[1457] *Ibid*, Article 11(9).
[1458] According to a compilation of Members' Textual Proposals for the negotiations on trade facilitation prepared by the WTO Secretariat in 2009, see: *Compilation of Members' Textual Proposal of 30 June 2009, supra* note 1304.
[1459] *Compilation of Members' Textual Proposal of 30 June 2009, supra* note 1304.

thirds of Section I provisions. For their part, Sections II and III were based on the inputs from all four groups of interests. Presumptively, the text of the provisions of the *Agreement on Trade Facilitation* incorporated a fair balance of all the views of the different groups of interests.

Table 6.12: Views Represented by Groups of Interests in Text of *Agreement on Trade Facilitation*

SECTION I				
ARTICLE 1: Publication and Availability of Information	COLORADO	CORE	MODERATE	LANDLOCKED
ARTICLE 2: Opportunity to Comment, Information Before Entry Into Force and Consultations	COLORADO	LANDLOCKED	MODERATE	
ARTICLE 3: Advance Rulings	COORADO	MODERATE		
ARTICLE 4: Procedures for Appeal or Review	COLORADO	LANDLOCKED		
ARTICLE 5: Other Measures to Enhance Impartiality, Non-Discrimination and Transparency	CORE			
ARTICLE 6: Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation and Penalties	COLORADO			
ARTICLE 7: Release and Clearance of Goods	COLORADO	CORE	MODERATE	LANDLOCKED
ARTICLE 8: Border Agency Cooperation	COLORADO			
ARTICLE 9: Movement of Goods Intended for Import Under Customs Control	COLORADO			
ARTICLE 10: Formalities Connected with Importation, Exportation and Transit	COLORADO	CORE	MODERATE	LANDLOCKED
ARTICLE 11: Freedom of Transit	COLORADO	CORE	MODERATE	LANDLOCKED
ARTICLE 12: Customs Cooperation	COLORADO	CORE	MODERATE	LANDLOCKED
SECTION II: Special and Differential Treatment Provisions for Developing and LDC Members	COLORADO	CORE	MODERATE	LANDLOCKED
SECTION III: Institutional Arrangements and Final Provisions	COLORADO	CORE	MODERATE	LANDLOCKED

3.3.3.3. Were Members free to accept or reject the results of the negotiating mandate and the Agreement on Trade Facilitation?

Both the modalities contained in Annex D of the *Doha Work Programme* and the *Agreement on Trade Facilitation* were adopted by consensus, which in theory gave a right to every Member to object to the adoption of these decisions.[1460] Following a practice that dates back to the time of the GATT 1947, only the most powerful Members use their veto to block the adoption of a decision. In that regard, the Trade Facilitation Case was significant because it showed that a large emerging developing power, such as India, had sufficient political influence to block on its own the adoption of the protocol for the *Agreement on Trade Facilitation.*[1461]

In addition, it can be noted that the coalitions-based negotiation process used during the Trade Facilitation Case moved negotiators away from the power-based dynamic. Indeed, Members effectively negotiate through the formation of traditional geopolitical-based coalitions, but also by coalitions based on common interests across Members from different level of development or geopolitical grouping.[1462] Moreover, for the reviewing of the Draft Consolidated Negotiated Text (containing the draft agreement on trade facilitation), the Chair made it clear that a single opposing view by one delegation would be sufficient to prevent a modification of the text.[1463] As a result, it appears that the process followed for the trade facilitation negotiations made it possible for all Members to use their veto, at least, during the drafting of the text of the Agreement.

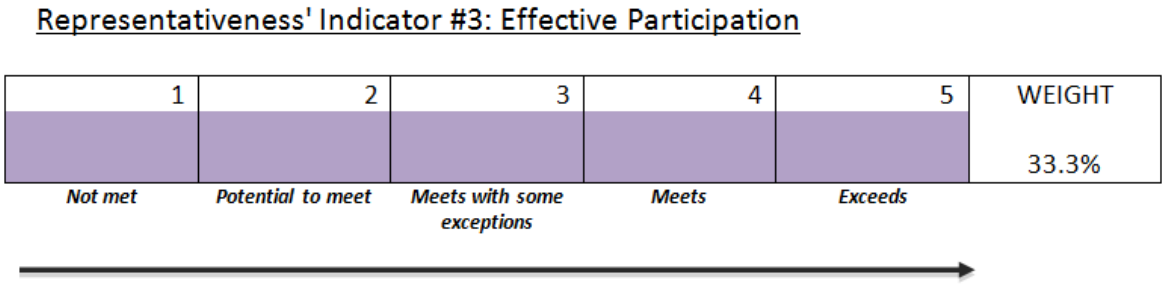
3.3.3.4. Attribution of a score: *Representativeness − Outcome*

Overall, *Representativeness − Outcome* assessed the following standard: *Did the negotiating*

[1460] *Doha Work Programme, supra* note 1247 at para g (noting the "explicit consensus"); *Protocol Amending the WTO Agreement, supra* note 96 at 1 (noting the "consensus").
[1461] *India's Refusal to Join Consensus*, *supra* note 1258.
[1462] There have been several North-South alliances for the submission of proposals, see e.g.: Proposal by Paraguay, Rwanda and Switzerland on transit, see: *Communication from Paraguay, Rwanda and Switzerland Dated 29 April 2005, supra* note 1303; Proposal by India and the United States for the establishment of a multilateral mechanism for the exchange and handling of information, see: *Communication From India and the United States Dated 22 July 2005, supra* note 1303; Proposal by Uganda and the United States on consularization of documents: Proposal by Paraguay, Rwanda and Switzerland on transit, see: *Communication from Uganda and the United States Dated 18 March 2005*, *supra* note 1303. See also Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 17; Hassan, *A WTO Agreement on Trade Facilitation, supra* note 1323 at 48.
[1463] *NGTF Meeting of 8-12 March 2010, supra* note 1373 at paras 8-9.

mandate and the Agreement on Trade Facilitation represent a balanced set of interests that were expressed? Were Members free to accept or reject the results of a decision? From the analysis conducted in the precedent sections, it was concluded that both the Annex D negotiations modalities and the *Agreement on Trade Facilitation* represent a fair balance between all the views of the different groups of interests. The achievement of consensus was difficult because Members wanted different things (primarily binding rules vs. non-binding provisions). Both the mandate and the Agreement were successfully able to address a wide range of interests due to its *à la carte* design. Finally, to the question as to whether Members were free to accept the outcome of these decisions, it was concluded that throughout the rulemaking processes the procedures used and the negotiations climate made it possible for Members to use their veto, at least, for the drafting of the Agreement.

As regards the attribution of the score for *Representativeness − Outcome*, considering the exceptional degree of representativity of Members' interests in the text of the mandate and the Agreement, *Representativeness − Outcome,* i.e. the third indicator of representativeness, should be attributed a score of 5/5 (i.e. '*performance exceeded the indicator's standards*').



3.3.4. Overall performance of the criterion of representativeness

Overall, the criterion of representativeness was evaluated on the basis of the following three indicators, which were all evaluated separately and attributed a distinct score:

(i) the degree of internal transparency and inclusiveness of the rulemaking processes (scored 4.5/5);

(ii) the degree of representativity of Members in the rulemaking processes (scored 3.5/5); and

(iii) the degree of effective participation of Members, i.e. whether the negotiating mandate and the final outcome represent a balanced set of interests that were expressed and whether Members were free to accept or reject the results of a decision (scored 5/5).

Due to the fact that all three indicators have an identical weight for the pondering of the criterion of representativeness as a whole, the criterion of representativeness scores 4.5/5, consisting of an average of the sums of the scores of all three indicators of legitimacy. As a result, it can be concluded that the performance of the Trade Facilitation Case *exceeded the standards of the criterion of representativeness on some occasions.*

CASE STUDY #3: AGREEMENT ON TRADE FACILITATION								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
REPRESENTATIVENESS	Ind #1	33.3						1.5
	Ind #2	33.3						1.17
	Ind #3	33.3						1.67
	Rating	100						4.3/5
RATING STANDARD	*Performance exceeded the standards of the legitimacy criterion at some occasions*							**4.5/5**

3.4. Openness

The criterion of openness is to be evaluated on the basis of two indicators of legitimacy:

(i) the external transparency of the rulemaking processes (Section 3.4.1); and

(ii) opportunities for public participation that were made available within the WTO framework (Section 3.4.2).

This section focuses exclusively on the implication and transparency *vis-à-vis* non-state actors within the framework of the WTO. It disregards any other channel through which the public could have had access to information regarding the rulemaking processes or could have been able to make comments on the ongoing work and express its views.

3.4.1. Openness − External transparency

> *Openness' Indicator #1: Was there easily accessible and timely information for non-state actors regarding the rulemaking process for the specific subject-matter from the time the subject-matter was added on the WTO's agenda, including the meetings' discussions and decisions taken as it relates to the subject-matter, until its legal implementation?*

Openness − External transparency analyzes the degree of external transparency of the rulemaking processes, i.e. whether there was easily accessible information for non-state actors regarding the trade facilitation negotiations throughout the rulemaking processes. It also evaluates whether such information was made available to the public within a sufficient period of time to enable non-state actors to provide timely comments on the issues that imported them.

3.4.1.1. Was there easily accessible and timely information for non-state actors?

The negotiations on trade facilitation took place between the years 1996 and 2014. Prior to 14 May 2002, the derestriction of all working documents, such as Members' proposals, the Secretariat background papers and minutes of the Council for Trade in Goods meetings was governed by the *1996 Procedures for Derestriction* and, as a result, these documents were made available to the public in average 8-9 months after the date of their circulation to Members' delegations.[1464] The draft decisions were usually made publically available upon their adoption.

However, from 14 May 2002 onwards, such documents became automatically derestricted upon their circulation to Members.[1465] This, however, is with the exception of the minutes of the

[1464] *1996 Procedures for Derestriction, supra* note 480, Appendix, paras (a) and (c); WTO, *Explanatory Note on Old and New Procedure, supra* note 485.
[1465] *2002 Procedures for Derestriction, supra* note 480 at para 1 and n 1.

Council for Trade in Goods, the NGTF and the PCTF meetings, which were made available to the public in average after 6-12 weeks upon circulation.[1466]

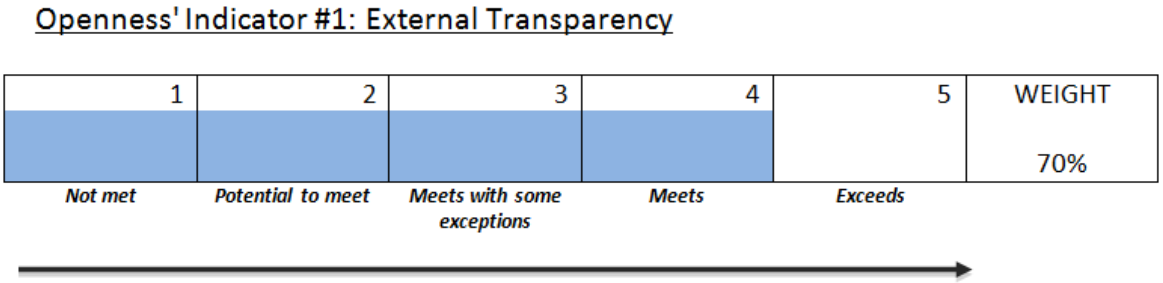
Regarding the external transparency of the agenda-setting process, the WTO Trade Facilitation Symposium held in March 1998 was an important event for the determination of the content of the negotiating mandate on trade facilitation. The public was able to access to a checklist of issues prepared by the WTO Secretariat[1467], summarizing concrete suggestions made at the Symposium, as well as a longer factual of the event[1468] containing full copies or transcripts of the presentations made and the ensuing discussions, which provided easily accessible information about the content of the discussions. It enabled non-state actors to take cognizance of the issues related to trade facilitation well before the adoption of the mandate for negotiations, thus providing them with a genuine opportunity to be able to express their interests on the subject matter before the launch of the negotiations.

As for the external transparency of the consensus-building process, the most significant documents for non-state actors to obtain information on the trade facilitation negotiations were probably the 'Compilation of Members' Textual Proposals'[1469] on trade facilitation prepared by the WTO Secretariat as well as the 'Draft Consolidated Negotiating Text'[1470] on trade facilitation. The Secretariat prepared and made available 19 revisions of the Compilation of Members' Textual Proposals between 2005 and 2009, which consisted in a unified consolidated document containing all Members' proposals that had been submitted until then, organized in a unified format. This consolidated document allowed the public to have easy access, in a comprehensive and intelligible format, to all the proposals that were being submitted by Members. Additionally, between 2009 and 2013, the Secretariat prepared 18 revisions of the 'Draft Consolidated Negotiating Text', containing in brackets the areas of divergences between Members. Considering that these documents were made available to the public only 6-12 weeks after their date of circulation, they made it easy for non-state actors to stay in the loop with the on-going progress of negotiations on trade facilitation and be in a position to provide timely comments.

[1466] *Ibid* at para 2(c); WTO, *Explanatory Note on Old and New Procedure, supra* note 485.
[1467] *Checklist of Issues, supra* note 1242.
[1468] *WTO Trade Facilitation Symposium, supra* note 1242.
[1469] *Compilation of Members' Proposals and Subsequent Revisions*, *supra* note 1251.
[1470] *Draft Consolidated Negotiating Text and Subsequent Revisions*, *supra* note 1370.

3.4.1.2. Attribution of a score: *Openness − External transparency*

Overall, based on the standards of *Openness − External transparency*, it can be evaluated that non-state actors were able to obtain easily accessible information at all stages of the rulemaking processes on a sufficiently timely basis to enable them to provide comments on the issues that imported them. As a result, *Openness − External transparency,* i.e. the first indicator of openness, should be attributed a score of 4/5 (i.e. '*performance consistently met the indicator's standards*').



3.4.2. Openness − Public participation

Openness' Indicator #2: Were there adequate channels for non-state actors to make oral statements and circulate written communications upon the specific subject-matter?

Openness − Public participation evaluates whether there were adequate channels made available within the WTO framework for non-state actors to express their views on the trade facilitation issue.

3.4.2.1. Were there adequate channels for non-state actors to express their views?

As regards the existence of channels for non-state actors to circulate written communications, between the years 1998 and 2014, the WTO Secretariat received approximately 43 position papers from non-state actors, through the power conferred by Article V:2 of the *WTO*

Agreement[1471], and posted them on the WTO website.[1472] Thirty-five of these position papers were submitted by business associations and eight of them were received by various NGOs.[1473]

The WTO also organized some public events to discuss trade facilitation issues that were open to non-state actors for participation. The first event was the WTO Trade Facilitation Symposium of March 1998, which aimed to helping identify the main areas where traders faced obstacles when moving goods across borders and putting WTO Members in a position to move from the stage of exploratory work to the phase of analytical work on trade facilitation.[1474] During the Symposium, 27 speakers from private enterprises and industry groups gave an overview of a number of obstacles that traders face in the importation, exportation and transit of goods. The Symposium was attended by some 350 delegates from around 75 Members and more than 20 observers as well as representatives from intergovernmental organizations.[1475] Many delegations included high-ranking capital based experts on customs and commercial affairs, as well as interested private sector representatives.[1476]

The WTO Secretariat held a Workshop on Technical Assistance and Capacity Building on Trade Facilitation in 2001 with the objective of providing a forum for an exchange of views among all relevant parties (donors, recipients, international organizations and representatives of the private sector) on the role of technical assistance and capacity building in the facilitation of trade. During the Workshop, 24 speakers shared their experiences with the provision of technical assistance, took stock of past and present programmes, analyzed the needs of recipients and assessed the expertise of the various providers of technical assistance. Panellists comprised representatives from intergovernmental organizations[1477], donors[1478] and recipient Members[1479], as well as representatives from the private sector.[1480]

[1471] *WTO Agreement, supra* note 1, Article V:2 (providing that the General Council "may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO".).
[1472] WTO, *NGO position papers received, supra* note 931, years 1998 to 2014.
[1473] *Ibid.*
[1474] WTO, Council for Trade in Goods, *Minutes of the Meeting* (held on 4 February and 4 March 1998) at para 1.2, WTO Doc G/C/M/30, online: WTO <http://docs.wto.org>.
[1475] There were speakers from the following intergovernmental organizations: IMF, ITC, UNCTAD, UN/ECE, World Bank, World Customs Organization.
[1476] *Statement by H.E. Mr. R. Saborío Soto, supra* note 1242.
[1477] I.e. IMF, Inter-American Development Bank, UNCTAD, World Bank and World Customs Union.
[1478] I.e. Canada, European Communities, Japan, Netherlands and the United States.

Moreover, shortly after the launch of negotiations on trade facilitation in July 2005, the WTO Secretariat circulated, as an official WTO document, a Trade Facilitation Negotiations Support Guide, on behalf of the World Bank prepared for the WTO, to assist developing and least-developed Members to effectively participate in the WTO trade facilitation negotiations. The Guide encouraged Members to put into place effective mechanisms for seeking relevant input from the business community and various other stakeholders, consolidating that input and communicating it to negotiators in a timely manner.[1481] It was later reported that the different proposals put forth by Members showed that "substantial inputs ha[d] been provided by national stakeholders connected with international trade."[1482] This indicates that the national consultations process must have been effective.

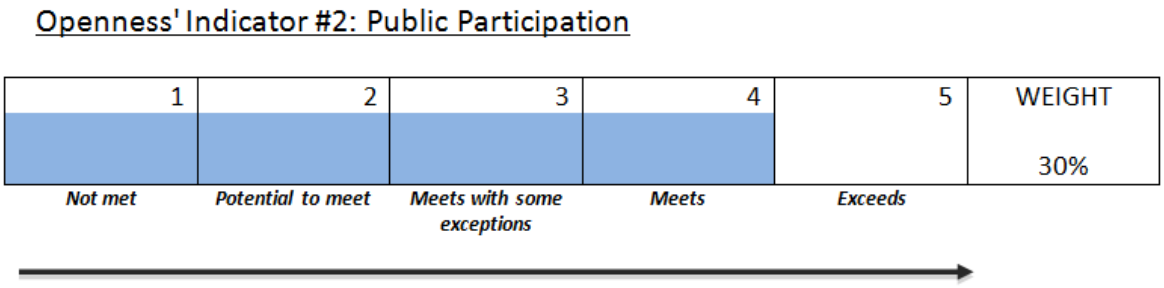
Finally, another Symposium was held in July 2012 with the objective of discussing practical experience of implementing trade facilitation reforms, including their costs and benefits. During the Symposium three representatives from the private sectors[1483] spoke about the importance of trade facilitation. Fourteen representatives of WTO Members and three representatives of intergovernmental organizations[1484] shared their experience with respect to the best practices for trade facilitation.[1485]

3.4.2.2. Attribution of a score: *Openness − Public participation*

Overall, the WTO made available various channels at the very different stages of the rulemaking processes in order to receive input from non-state actors. First, the holding of the first Symposium and Workshop took place prior to the adoption of the *Doha Work Programme* containing the negotiating mandate, which allowed non-state actors to have a potential impact on the shaping of the future agenda on trade facilitation.

[1479] I.e. Bangladesh, Bolivia, Costa Rica, Jordan, Philippines, Senegal and Turkey.
[1480] I.e. CrossStreetTrade, Gateway Services Ltd, International Chamber of Commerce, International Express Carriers Conference and NTT Communications Corporation, see: *WTO Workshop on Technical Assistance and Capacity Building, supra* note 1313.
[1481] WTO, NGTF, *WTO Trade Facilitation Negotiations Support Guide,* WTO Doc TN/TF/W/51 (6 July 2005), online: WTO <http://docs.wto.org> [*WTO Trade Facilitation Negotiations Support Guide*].
[1482] Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 11.
[1483] I.e. eBay Inc., COMESA Business Council and IMPERIAL Logistics Africa Division.
[1484] I.e. World Customs Organization, OECD, and Trademark Southern Africa.
[1485] WTO, *Practical Experience of Implementing Trade Facilitation Reforms, Including Their Costs and Benefits* (WTO Symposium held on 10-11 July 2012), online: WTO <http://www.wto.org/english/tratop_e/tradfa_e/case_studies_e/symp_agendajul12_e.htm>.

These events provided an opportunity to Members to take into account the views of various non-state experts before agreeing on a mandate and launching the negotiations. After the launch of the negotiations on trade facilitation, the WTO provided a negotiations support guide, which actively encouraged Members to put into place mechanisms to consult with the business communities and other stakeholders, which appears to have been effective.[1486] Finally, towards the end of the rulemaking processes, the WTO held a Symposium to discuss implementation issues. Considering that non-state actors have had appreciable opportunities to provide inputs at all stages of the rulemaking processes, *Openness − Public participation,* i.e. the second indicator of openness, should be attributed a score of 4/5 (i.e. '*performance consistently met the indicator's standards*').



3.4.3. Overall performance of the criterion of openness

Overall the criterion of openness was assessed on the basis of the following two indicators, which were analyzed separately and attributed a distinct score:

(i) the degree of external transparency of the rulemaking processes (scored 4/5); and
(ii) the opportunities for public participation made available within the WTO framework (scored 4/5).

Considering that both indicators received equal scores, it should also represent that of the criterion of openness as a whole, i.e. 4/5. As a result, it can be concluded that the performance of the Trade Facilitation Case *consistently met the standards of the criterion of openness.*

[1486] Priya, *Trade Facilitation in WTO and Beyond, supra* note 1363 at 11.

CASE STUDY #3: AGREEMENT ON TRADE FACILITATION								
CRITERION	**Indicators**	**Weight (%)**	**Interval Scale**					**Criterion Score (%)**
			1	**2**	**3**	**4**	**5**	
OPENNESS	Ind #1	70						2.8
	Ind #2	30						1.2
	Rating	100						4/5
RATING STANDARD	*Performance consistently met the indicator's standards*							**4/5**

4. RESULTS AND CONCLUSION

The Trade Facilitation Case received an overall legitimacy score of 3.8/5, as illustrated in Table 6.13 below, which signifies that it *consistently met the standards of the legitimacy criteria.* Table 6.14 presents the individual result of each of the separate indicators of legitimacy.

Table 6.13: Legitimacy Score of the Rulemaking Processes Used in Trade Facilitation Case

CASE STUDY #3: AGREEMENT ON TRADE FACILITATION											
CRITERIA	**Weight (%)**	**Indicators**	**Weight (%)**	**Interval Scale**					**Criteria Score (%)**	**WEIGHTED SCORE**
				1	**2**	**3**	**4**	**5**		
LEGALITY	20	Ind #1	100						3.5	**0.7**
		Rating	100						3.5/5	
EFFECTIVENESS	25	Ind #1	50						1.5	**0.83**
		Ind #2	N/A						N/A	
		Ind #3	50						1.75	
		Rating	100						3.3/5	
REPRESENTATIVENESS	35	Ind #1	33.3						1.5	**1.5**
		Ind #2	33.3						1.17	
		Ind #3	33.3						1.67	
		Rating	100						4.3/5	
OPENNESS	20	Ind #1	70						2.8	**0.8**
		Ind #2	30						1.2	
		Rating	100						4/5	
TOTAL / RATING	100									**3.8/5**
RATING STANDARD	*Performance consistently met the standards of the legitimacy criteria*									

As for the performance of the legitimacy criteria, the criterion of representativeness obtained the highest score (4.5/5), which indicates that its performance actually *exceeded the indicators' standards on some occasions.* Indeed, the Trade Facilitation Case acted as a prime example that consensus could be achieved within more or less 160 Members while following a fully transparent and inclusive negotiation process in which all Members could take part. Throughout the rulemaking process, the chairs conducted open-ended informal sessions within formal meetings to provide the informality needed to conduce to real negotiations, while remaining inclusive of the entire Membership. In addition, the Members participating in the rulemaking processes represented overall a fair balance of the various interests at play and of the different categories and groupings of Members, but with a few minor exceptions. Moreover, the Trade Facilitation Case showed that Members were able to arrive at consensus and produce an outcome representing a balanced set of interests even if they wanted different things (binding rules vs. non-binding provisions). In fact, the *à la carte* design of the *Agreement on Trade Facilitation*

allowed developing and LDC Members to decide when they would implement each provision of the Agreement. On the flip side, the richer Members only made 'best endeavours' commitments to provide technical assistance and financial aid. But yet, the *Agreement on Trade Facilitation* introduced a novel concept regarding S&D treatment according to which the requirement to undertake a commitment would be conditional upon the existence of implementation capacity. Will these non-binding commitments result in the expected outcomes?

The criterion of openness also *consistently met the indicators' standards* (scoring 4/4). Indeed, throughout the Trade Facilitation Case, non-state actors were able to obtain easily accessible and timely information on the rulemaking processes. Moreover, the WTO held a number of public symposiums, which provided opportunities for non-state actors to express their views and opinions at key stages of the negotiations. However, what should be highlighted is the fact that the WTO actually assisted Members in fulfilling their role of consulting with the business communities and other stakeholders at home. Indeed, Members generally hold the view that consulting with non-state actors and balancing their various interests should remain the primary responsibility of Members at the national level.[1487] What was novel about the Trade Facilitation Case is that the WTO fully endorsed this vision by providing some tools to Members for fulfilling their responsibility.

For their part, both the criteria of legality and effectiveness received a rounded score of 3.5/5, which is an indication that they *met the indicators' standards, with a few exceptions.* As for the criterion of legality, Members chose the correct legal method of implementation for the *Agreement on Trade Facilitation,* which was the amendment procedure contained in Article X of the *WTO Agreement.* However, there were some irregularities regarding the procedures followed. Most noteworthy, Members did not proceed to a vote when India blocked the adoption of the protocol of amendment, which was required to be pursued upon by Article X:1. This confirms that Members continue to see consensus as the golden rule of the organization at all costs, even at the expense of legality and effectiveness. Additionally, it suggests that voting may

[1487] See Chapter 3, Sections 3.1.2 and 4.1.4.1.

not be a politically viable option in the WTO, even when consensus is blocked by a developing country (although a large and emerging power[1488]) like India.

As for the effectiveness of the rulemaking processes, although the Trade Facilitation Case can be applauded as one of the major successes of the WTO, and despite the fact that its mandate did not set a rigid timeframe for the conclusion of the negotiations, it should be noted that it took eight years for Members to agree upon the inclusion of trade facilitation on the WTO agenda and the negotiations processes spanned for over a decade before the protocol of amendment was adopted. This is a very large amount of time! Indeed, the Trade Facilitation Case showed that the subject matter of trade facilitation was not a contentious issue for negotiations. In fact, not too long after the official launch of the negotiations, most Members recognized its win-win character. However, developing Members successfully attempted to link trade facilitation with other issues of higher interests to them (such as agriculture) in order to make developed Members 'pay' for the conclusion of a deal. Arguably, this had arguably the unfortunate effect of dragging the trade facilitation negotiations out until a full package (i.e. the Bali Package) could be satisfactorily adopted.

However, the linkage dynamic should not be blamed on its own for the extending amount of time the negotiations process took. Indeed, trade facilitation was also considered to be a very technical issue. As a result, it took time for the negotiators to educate themselves about the different issues at play, which made the negotiations especially onerous for the smaller delegations. On that matter, the assistance of relevant intergovernmental organizations and experts was tremendously helpful. In addition, the leadership of important actors (such as India, the United States, the Director-General, the chairs of the NGTF, as well as the various facilitators and Friends of the Chair) played an important role throughout the negotiations processes. Moreover, the decision to conclude an early agreement within the single undertaking allowed Members to proceed to the early implementation of the *Agreement on Trade Facilitation* without being compelled to wait until the conclusion of the Doha Development Round, which might take a few more years.

[1488] See generally Narlikar, "New Powers", *supra* note 3 at 718-20.

As for the effectiveness of the implementation process, only time will tell whether the non-binding commitments contained in the Agreement are fully effective for producing the expected outcomes. Additionally, the *Agreement on Trade Facilitation* establishes a mechanism of experts to assess whether and why a Member is unable to implement its commitments according to the timeframe. It further provides that Members shall have recourse to such mechanism prior to the institution of dispute settlement procedures under the DSU. What will be the effectiveness of this mechanism? The future will tell.

Table 6.14: Performance of the Indicators of Legitimacy in Trade Facilitation Case

PERFORMANCE OF THE INDICATORS OF LEGITIMACY TRADE FACILITATION CASE				
MET WITH SOME EXCEPTIONS		**MET**		**EXCEEDED**
Did not consistently meet the standards	***Met the standards with a few exceptions***	***Met the standards***	***Exceeded the standards at some occasions***	***Exceeded the standards***
3/5	**3.5/5**	**4/5**	**4.5/5**	**5/5**
• Mandated goal addressed by final outcome	• Correctness of the rule and procedure used • Effectiveness of the process • Representativity of Members in the processes	• External transparency • Public participation	• Internal transparency and inclusiveness	• Effective participation (whether the final outcome represented a balanced set of interests)

In sum, the Trade Facilitation Case proved that it was possible to negotiate a multilateral agreement among 160 Members. It showed Members' absolute commitment to consensus decision-making, even if consensus came at the expense of legality and effectiveness. At the same time, for consensus to be achieved and for meeting the different needs and interests of the entire Membership, the Trade Facilitation Case illustrated that it was necessary to 'change the rules of the game'. This included an absolute commitment to the standards of inclusiveness, openness and internal transparency. Moreover, the Trade Facilitation Case suggested that to accommodate a greater range of interests, it could be necessary to negotiate outside of the single

undertaking and to move away from binding obligations and towards variable geometry. Additionally, it showed that the WTO was able to fully meet the standards of external transparency and public participation while also respecting Members' normative value of sovereignty. The WTO could reconcile these two opposing values by extending its focus to assist Members to fulfil their responsibility to consult with stakeholders at home.

PART V

FINAL ANALYSIS AND CONCLUSION

CHAPTER 7
FINAL ANALYSIS AND CONCLUSION: WHERE TO GO FROM HERE?

1. INTRODUCTION

Over the last decade, political leaders, practitioners, and scholars have singled out the rulemaking processes for being the 'weak link' of the WTO. While several commentators have put forth proposals for their reform, only a few have examined their legitimacy or evaluated their performance in a comprehensive manner.[1489] This thesis put forward the position that the legitimacy of the WTO depends upon one's own conception regarding the nature of the WTO. Is the WTO perceived as a simple trade agreement aimed at trade liberalization where its obligations are bilateral in nature akin to a contract? Or should it be conceptualized as a community or a constitution, following which its mandate extends to obligations owned to the collectivity, such as economic regulation and possibly distributive justice?

This thesis evaluated the legitimacy of the rulemaking processes from the standpoint of the WTO Members, which arguably share the former vision of the WTO. Hence, the assessment conducted in this thesis constitutes a minimal benchmark for the legitimacy of the WTO rulemaking processes. It was performed on the basis of the concepts of input and output legitimacy from which were derived four criteria of legitimacy: legality, effectiveness, representativeness, and openness. The results of this thesis show that the rulemaking processes perform rather well and that their degree of legitimacy may actually be superior than what the conclusions of the Sutherland and the Warwick Reports and some other commentators have suggested.[1490] Nevertheless, the case studies analysis also demonstrated that there is room for improvement.

[1489] See notably two major studies that have focused on the future of the WTO: Sutherland Report, *supra* note 11; Warwick Report, *supra* note 3. For additional information, see Chapter 1, Sections 1 and 3.
[1490] See Chapter 1, Section 1.

2. FINAL RESULTS REGARDING THE LEGITIMACY OF THE WTO RULEMAKING PROCESSES

This thesis focused on the research question: *Are the WTO rulemaking processes legitimate? To what degree?* It found that the most effective way to evaluate the legitimacy of the WTO rulemaking processes was through case studies analyses which would provide an indication of the overall legitimacy performance of the rulemaking processes based on a spectrum and broken down into four criteria of legitimacy (i.e. legality, effectiveness, representativeness, and openness) and specific indicators.[1491]

When assessing the results of this case studies analysis, one has to take into consideration that this study focused exclusively on the rulemaking processes that actually led to a positive outcome. It did not evaluate negotiations on subject-matters that were never concluded or that ended in an impasse. In cases like these, it would be expected that the criterion of *effectiveness* would score much lower than the results of this study, and perhaps, it could also be the case for that of *representativeness* based on the hypothesis that Members would have not felt sufficiently included in the process to agree to join consensus on the final outcome. Therefore, it should be noted that the results of this study do not provide a complete picture of the legitimacy of the WTO rulemaking processes: it only assesses the success stories. In the cases where Members reached consensus on a policy (to amend or create a rule or an agreement through implementation), were the rulemaking processes that were used legitimate? To what degree? These are the answers that this case studies analysis provided.

Overall, the results of all three case studies combined (reproduced in Table 7.1 below) reveal that the WTO rulemaking processes obtained a total score of 3.6/5, indicating that they *met the standards of the legitimacy criteria, with some exceptions.* The TRIPS and Public Health Case scored the lowest, with 3.2/5, and *did not consistently meet the standards of the legitimacy criteria.* The Trade Facilitation Case, which scored 4/5, is the only case that actually *met the standards*. The Basic Telecoms Case, which scored 3.6/5, *met* them*, with some exceptions.*

[1491] See Chapter 3, Section 4.

Table 7.1: Legitimacy Score of the WTO Rulemaking Processes

LEGITIMACY SCORE OF THE WTO RULEMAKING PROCESSES								
CRITERIA	**Weight (%)**	**Indicators**	**Weight (%)**	**CASE STUDIES**				**CRITERIA WEIGHTED SCORE (%)**
				#1	**#2**	**#3**	**AVG**	
LEGALITY	20	Ind #1	100	2.5	4	3.5	3.3/5	**0.66**
		Rating	100	2.5/5	4/5	3.5/5	**3.3/5**	
EFFECTIVENESS	25	Ind #1	33.3	3	4	3	3.3/5	**0.93**
		Ind #2	33.3	4	3.5	N/A	3.8/5	
		Ind #3	33.3	4.5	4.5	3.5	4.2/5	
		Rating	100	3.8/5	4/5	3.3/5	**3.7/5**	
REPRESENTATIVENESS	35	Ind #1	33.3	2.5	4	4.5	3.7/5	**1.33**
		Ind #2	33.3	3.5	3	3.5	3.3/5	
		Ind #3	33.3	3.5	5	5	4.5/5	
		Rating	100	3.2/5	4/5	4.3/5	**3.8/5**	
OPENNESS	20	Ind #1	70	3	3.5	4	3.5/5	**0.68**
		Ind #2	30	4	1	4	3/5	
		Rating	100	3.3/5	2.8/5	4/5	**3.4/5**	
TOTAL / RATING	100			**3.2/5**	**3.6/5**	**4/5**		**3.6/5**
RATING STANDARD	*Performance met the standards of the legitimacy criteria, with some exceptions*							

Table 7.1 also shows the overall score from all case studies combined for each specific legitimacy criterion. It reveals that the criterion of representativeness (3.8/5) is the only one that actually *met the legitimacy standards*. As for the criteria of legality, (3.3/5), effectiveness (3.7/5) and openness (3.4/5), it was found they all *met the legitimacy standards, but with some exceptions.*

Table 7.2 highlights the details of the legitimacy performance of the WTO rulemaking processes by illustrating the performance of each of the specific indicator of legitimacy. Overall, what can be said about the legitimacy performance of the WTO rulemaking processes? What are the best and worst practices for legitimacy? What are the strengths and weaknesses of the rulemaking processes?

Table 7.2: Overall Performance of the Indicators of Legitimacy

PERFORMANCE OF THE INDICATORS OF LEGITIMACY			
MET WITH SOME EXCEPTIONS		**MET**	
Did not consistently meet the standards	***Met the standards with a few exceptions***	***Met the standards***	***Exceeded the standards at some occasions***
3/5	**3.5/5**	**4/5**	**4.5/5**
• Public participation	• Correctness of the rule and procedure used • Mandated goal addressed by final outcome • Internal transparency and inclusiveness • Representativity of Members in the processes • External transparency	• Negotiated policy brought into effect • Effectiveness of the process	• Effective participation (whether the final outcome represented a balanced set of interests)

3. BEST AND WORST PRACTICES FOR THE WTO RULEMAKING PROCESSES

The case studies analysis provided some findings regarding some areas of strengths and weaknesses of the legitimacy of the WTO rulemaking processes. The following sections highlight some of these best and worst practices adjudged for each criterion of legitimacy: legality (Section 3.1), effectiveness (Section 3.2), representativeness (Section 3.3), and openness (Section 3.4).

3.1. Legality and Effectiveness of Different Methods of Implementation

3.1.1. Consensus as the 'golden rule' and use of 'constructive ambiguity' or 'best endeavours ' language

Although it may take many years, sometimes a decade[1492], to achieve consensus on the content of an amendment, a rule or an agreement, Members have shown that they were not willing to depart from this golden rule, even when fallback to voting is permitted. Two examples of this stand out from the case studies analysis. First, during the negotiations of the *TRIPS and Public Health Waiver* where consensus on a draft waiver decision was blocked by the United States, Article IX:1 of the *WTO Agreement* provided for the possibility to have recourse to voting. However, Members preferred continuing their efforts to reach consensus.[1493] Second, during the negotiation of the *Agreement on Trade Facilitation,* after the expiration of 90 days following India's refusal to join consensus on the adoption of a protocol of amendment, Article X:1 of the *WTO Agreement* actually obligated Members to proceed by a vote on whether to submit the proposed amendment to the Members for acceptance. This procedure was not followed and, instead, Members continued their attempts to achieve consensus.[1494]

Yet, although the use of consensus remains "sacred" in the WTO[1495], to facilitate its achievement, Members have developed several practices of 'constructive ambiguity'. The case studies analysis highlighted three notable examples of such practices. The first example concerns the interpretative language that was used in the *Declaration on TRIPS and Public Health.* It was apparently Members' intention to not create binding obligations, but to agree on a text that could be assimilated to a "subsequent agreement between the parties regarding the interpretation of the treaty" as recognized by Article 31.3(a) of the VCLT.[1496]

Second, during the negotiations leading to the adoption of the System contained in the *TRIPS and Public Health Waiver* and the *Protocol Amending the TRIPS Agreement,* Members reached an impasse and were unable to agree on a compromise text. The only solution that was found to

[1492] This was notably the case of the negotiations on trade facilitation, after the adoption of the negotiating mandate, they spanned from 2004 until 2014, see Chapter 6, Section 2.2.
[1493] See Chapter 4, Section 3:1.1.2.
[1494] See Chapter 6, Section 3.1.1.2.
[1495] Jackson, "Mantras", *supra* note 49 at 71.
[1496] See Chapter 4, Section 3.2.2.1.

reach consensus was to make use of a Chairman's Statement that would be read prior to the adoption of both these decisions. Members were well aware that the Chairman's Statement was not binding *per se*, but that it was likely that it would be given some interpretative weight by the DSU organs within the lines of Article 31(2) or 32 of the VCLT in the event of a dispute regarding the System laid out in both these instruments.[1497]

Third, during the negotiations regarding the text of the *Agreement on Trade Facilitation,* Members encountered some difficulties to agree on a few bracketed contentious areas. Consensus was partly enabled through the use of best endeavours language in several provisions of the Agreement with conditional language such as "to the extent practicable" or "to the extent possible". It is uncertain the extent to which the best endeavours commitments will be enforced by the DSU organs, but one certain thing is that they do not constitute fully enforceable binding provisions and they may be at best enforceable to the extent that implementation was "practicable" or “possible" for the Member in question.[1498]

The great advantage of using 'constructive ambiguity' or 'best endeavours' language in these three cases was that it enabled Members to achieve consensus on contentious areas and subject matters that might have not been possible to agree upon otherwise. However, the downside of these practices is that it created legal uncertainty as to what exactly was agreed upon and may, as a result, lead to some unforeseen drawbacks for traders and governments.

3.1.2. The difficulties of the amendment procedure and alternatives to it

The experience from the GATT 1947 and the WTO rulemaking practices has shown that the main difficulty regarding the rulemaking rules and procedures concerns the amendment procedure which requires acceptance and ratification by Members that can take more than a decade before the required majority for entry into force be received by the Director-General.[1499]

[1497] See Chapter 4, Section 3.2.3.1.
[1498] See Chapter 6, Section 3.2.3.
[1499] For the difficulties of the amendment procedure during the GATT 1947, see Chapter 2, Section 2.2.2.3. The case studies analysis showed that similar difficulties to those encountered during the GATT 1947 with the amendment procedure have also been experienced under the WTO. Indeed, the *Protocol Amending the TRIPS Agreement, supra* note 94, which was adopted in December 2005, has still not yet entered into force as of April 2015 (ten years later), see Chapter 4, Section 2.3. As for the *Basic Telecoms Agreement, supra* note 95, although it has entered into force rapidly in February 1998, two participants have still not accepted it, see Chapter 5, Section 2.3. Moreover, it is interesting to note that, for the first time in history, no time limit has been provided for the

Throughout the history of the GATT 1947 and the WTO, Members have used creativity and ingenuity to avoid at all costs the amendment procedure. For example, during the GATT 1947, the CONTRACTING PARTIES developed a practice of 'collective waivers', which allowed the waiving of a provision for all contracting parties instead of only "a contracting party" as stipulated in Article XXV:5 of the GATT 1947.[1500] The effect of a collective waiver was, in some cases, tantamount to an amendment.[1501] Considering the wide usage and positive history associated with collective waivers during the GATT 1947, it is difficult to understand why the option for a collective waiver was not included in Article IX:3 of the *WTO Agreement.* Indeed, under the WTO, despite the fact that the text of the *WTO Agreement* does not specifically authorize[1502] the use of a collective waiver, it has been referred to on several occasions.[1503] The most notable case is probably the *TRIPS and Public Health Waiver,* which was purposely designed to have the effect of an amendment.[1504]

Other implementation methods have been used to circumvent the difficulties related to the amendment's implementation procedure, such as the adoption of an agreement through entries in Members' schedules.[1505] This was notably the case of the Reference Paper, as part of the *Basic*

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acceptance of the *Protocol Amending the WTO Agreement*, *supra* note 96, to incorporate the *Agreement on Trade Facilitation* under Annex 1A, see *Protocol Amending the WTO Agreement supra* note 96 at 1 para 2 and 2 para 3. It might be an indication that Members are aware that ratification and acceptance may take more time than envisioned, See Chapter 6, Section 3.2.2.

[1500] See Chapter 2, Section 2.2.3.

[1501] See Chapter 2, Section 2.2.3.4.

[1502] See Chapter 2, Section 3.4.

[1503] This was notably the case of *Article 70.9 TRIPS Agreement Waiver,* see *Least-Developed Country Members – obligations Under Article 70.9 of the TRIPS Agreement With Respect to Pharmaceutical Products* (General Council Decision of 8 July 2002), WTO Doc WT/L/478, online: WTO <http://docs.wto.org>; a series of Harmonized System waivers; the *Kimberley Waiver,* see: *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds* (General Council Decision of 15 May 2003), WTO Doc WT/L/518, online: WTO <http://docsonline.wto.org>; the *Preferential Tariff Treatment for LDCs Waiver,* see *Preferential Tariff Treatment for Least-Developed Countries* (Decision on waiver adopted 15 June 1999), WTO Doc WT/L/304, online: WTO <http://docs.wto.org>; and the *TRIPS and Public Health Waiver, supra* note 94. For additional information, see: Feichtner, *The Law and Politics of WTO Waivers, supra* note 154 at 124-57.

[1504] See Chapter 4, Section 3.1.1.2.

[1505] This was the case of the *Basic Telecoms Agreement, supra* note 95, where participants annexed the Reference Paper in their schedules (or incorporated the principles contained in it), see Chapter 5, Section 3.1. Other plurilaterally negotiated improvements have been implemented pursuant to the *Procedures for Modification and Rectification of Schedules of Tariff Concessions,* GATT 1947 CP Decision L/4962 (26 March 1980), 36th Sess, 27th Supp BISD (1981) 25. This was the notably the case of information technology products, see: *Agreement on Trade in Information Technology Products*, Implementation of the Ministerial Declaration on Trade in Information Technology Products, 13 December 1996, [1997] OJ L 155/3, WTO Doc WT/MIN(96)/16 (entered into force 1 July 1997), online: WTO <http://docs.wto.org>; pharmaceutical products, see: WTO Committee on Market Access, *Trade in Pharmaceutical Products,* WTO Doc G/MA/W/10 (11 October 1996); G/MA/W/18 (13 November 1998);

Telecoms Agreement. To ensure reciprocity, for the entry into force of the *Basic Telecoms Agreement,* Members drafted a protocol (i.e. the Fourth Protocol to the GATS, consisting of a self-standing treaty following the terms of Article 41 of the VCLT[1506]), which provided that if not all Members had accepted the Fourth Protocol at a certain determined date, the Members that had accepted it could decide on its entry into force.[1507] Such a provision acted as policy insurance that there would be a sufficient and acceptable amount of commitments before its entry into force. But also, by not providing a required minimum of acceptances for its entry into force (such as is the case for amendments[1508]), the Fourth Protocol ensured that its entry into effect would not be unduly delayed by the difficulties of some Members to accept and ratify the protocol.

An even more straight forward implementation method for plurilateral agreements (than through entry in schedules) would be pursuant to a Plurilateral Trade Agreement under Article X:9 of the *WTO Agreement.* Nothing would prevent the Members parties to such agreement from inserting a reciprocity clause (such as the one provided for in the Fourth Protocol to the GATS) in the protocol of amendment for the plurilateral trade agreement in question in order to allow the parties that have accepted the plurilateral agreement by a certain date to decide upon its entry into force. To date, this has, however, never been done.[1509]

It is surprising that, considering the difficulties of the amendment procedure and the substantive efforts by the GATT 1947 CONTRACTING PARTIES and WTO Members to find other implementation alternatives, Members have never made use of authoritative interpretations

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G/MA/W/85 (19 March 2007); G/MA/W/102 (2 August 2010), online: WTO <http://docs.wto.org>; and trade in distilled products between the United States and the EC, see: WTO, Committee on Market Access, *Rectifications and Modifications of Schedules − Schedule XX − United States,* WTO Doc G/MA/TAR/RS/18 (16 April 1997), online: WTO <http://docs.wto.org>; WTO Director-General, *Certification of Modifications to Schedule XX − United States* (dated 16 July 1997)*,* WTO Doc WT/Let/182, online: WTO <http://docs.wto.org>; WTO, Committee on Market Access, *Rectifications and Modifications of Schedules − Schedule CXL − European Communities,* WTO Doc G/MA/TAR/RS/30 (13 May 1997), online: WTO <http://docs.wto.org>; WTO, Director-General, *Certification of Modifications to Schedule LXXX − European Communities* (dated 13 August 1997)*,* WTO Doc WT/Let/178, online: WTO <http://docs.wto.org>. For additional information, see: Nottage & Sebastian, "Giving Legal Effect"*, supra* note 991 at 1000-01.

[1506] See Chapter 5, Section 3.1.1.1.

[1507] *Text of the Fourth Protocol to the GATS, supra* note 961 at para 3.

[1508] *WTO Agreement, supra* note 1, Article X. See also Chapter 2, Section 3.2.4.

[1509] For additional information see Chapter 5, Section 3.2.3.3 and Chapter 2, Section 3.5.

pursuant to Article IX:2 of the *WTO Agreement.*[1510] This flexibility did not exist in the GATT 1947 and was probably added in the *WTO Agreement* to respond to a specific need that the drafters had identified back during the Uruguay Round negotiations. Indeed, an interpretation takes effect simply upon a vote by a three-fourths majority of the Members (or potentially by consensus[1511]). No procedure of acceptance and ratification, necessitating approval on the domestic level, is required. Although IX:2 specifically provides that interpretations should not be used in lieu of an amendment or have the effect of one, there are certainly some cases that could benefit (or could have had benefited) from this procedure. One of them concerns the provisions contained in the *Declaration on TRIPS and Public Health* which comprised interpretative language regarding the *TRIPS Agreement.*[1512] Another is for the implementation of the System under the *TRIPS and Public Health Waiver* that authorized the grant of compulsory licences predominantly for the export of patented medicines. In that case, Members sought to reach a permanent and expeditious solution, which could have been implemented pursuant to an interpretation of Article 30 of the *TRIPS Agreement.* Instead, Members have preferred to implement the System pursuant to a collective waiver − a non-permanent instrument comprising some legal uncertainties that emanated from an invention of the GATT 1947 CONTRACTING PARTIES and that is not explicitly permitted in the *WTO Agreement.*[1513]

Following the consensus-based rulemaking practices pursued by Members, there are no serious legal implications within the WTO framework to use other means of implementation as an informal replacement of the amendment procedure. The reason for this is the fact that the text of any rule or amendment to be implemented is, in practice, always first adopted by consensus of the Members.[1514] Therefore, no matter the method of implementation, Members are always

[1510] See e.g. Ehlermann & Ehring, "The Authoritative Interpretation", *supra* note 114 at 813-18; Nottage & Sebastian, "Giving Legal Effect", *supra* note 991 at 1002-03. See also Chapter 2, Sections 2 and 3.3.
[1511] See Chapter 2, Section 3.3.
[1512] See Chapter 4, Section 3.1.1.1.
[1513] However, it should be noted that there were serious policy reasons behind the decision to use a collective waiver of Article 31 (f) of the *TRIPS Agreement,* instead of an interpretation of Article 30. For additional information, see Chapter 4, Section 3.3.3.2.1 and Chapter 2, Sections 2.2.3 and 3.4.
[1514] See e.g. *Declaration on TRIPS and Public Health*, *supra* note 512; *TRIPS and Public Health Waiver, supra* note 94; *Protocol Amending the TRIPS Agreement, supra* note 94; *Protocol Amending the WTO Agreement, supra* note 96. The only exception is for the *Reference Paper*, *supra* note 954, which Members were free to incorporate in full or partially (or not at all) in their schedules. On the WTO consensus-based decision-making practice, see Chapter 2, Section 3.1.

provided with a veto to block the adoption of such rule or amendment, if needed.[1515] Yet, if Members were to avail themselves of the voting procedures, the use of alternate means of implementation (in lieu of the amendment procedure) would seriously affect the delicate 'constitutional balance' that is provided for in the *WTO Agreement* due to the fact that the new rule, agreement or amendment could enter into force for *all Members* simply upon a simple vote by majority (or special majority) of the Members.[1516]

A good example of this is the *TRIPS and Public Health Waiver,* which adoption was initially blocked by the United States in December 2002. If Members were to have proceeded for its adoption by voting, the System contained in it would have immediately entered into force for all Members including the United States (provided that a majority of three fourths of the Members would have voted in favour of its adoption − which, not to mention, corresponds roughly to the amount of developing and LDC Members in the WTO).[1517] By contrast, under the amendment procedure of Article X:3 of the *WTO Agreement,* an amendment of a nature that would alter the rights and obligations of the Members is to take effect only for those Members which have accepted it. Such provision is designed to protect Members' sovereignty. However, such provision does not exist for waivers (for instance) due to the fact that it was not envisioned that Members would use collective waivers to have the practical effect of an amendment.

3.1.3. Plurilateral and *à la carte* approaches

The case studies analysis demonstrated that one effective tool for achieving consensus was through the use of variable geometries or *à la carte* approaches. First, the *Basic Telecoms Agreement,* a plurilateral agreement, enabled each participant to schedule the market access commitments and national treatment exemptions of its choice and each participant was free to adopt the Reference Paper as a whole, partially or not at all.[1518] The compelling aspect of the basic telecoms deal was that it was based on a 'critical mass approach', where it was agreed that an agreement would be reached once a critical mass of offers would be on the table.[1519] Moreover, the nature of implementation through entry in schedules *per se* allows Members to

[1515] *WTO Agreement, supra* note 1, Article IX:1, n 1.
[1516] See generally *WTO Agreement, supra* note 1, Article IX.
[1517] For an unofficial list of developing and LDC Members in the WTO, see: Appendix 3.
[1518] See Chapter 5, Section 3.2.3.3.
[1519] See Chapter 5, Section 3.2.3.2.

remove commitments under certain conditions in the future if it becomes necessary. [1520] As a result, it provided a flexible context in which Members could agree to schedule commitments with the insurance that they could be removed at a later time.

Another example of an *à la carte* approach to negotiations was the *Agreement on Trade Facilitation.* In that case, Members achieved what had never been done before: a Multilateral Trade Agreement (the first to be adopted since the establishment of the WTO) based on an individual, country-by-country and measure-by-measure implementation approach for developing and LDC Members.[1521] It proved the pessimists regarding the viability of the multilateral negotiating machinery of the WTO wrong.[1522] Like the GATT 1947, the WTO has shown its ability to use ingenuity and creativity and reinvent itself to face new challenges coming its way.[1523] It demonstrated that "new rule-making needs need not be confined to preferential trade agreements."[1524]

[1520] GATS, *supra* note 229, Article XXI.

[1521] See Chapter 6, Section 3.2.3.8. For a reflection on the future avenues of special and differential treatment in the WTO, see generally Bernard Hoekman, Constantine Michalopoulos & L Alan Winters, *More Favorable and Differential Treatment of Developing Countries: Toward a New Approach in the World Trade Organization*, World Bank Policy Research Working Paper No 3107 (1 August 2003), online: World Bank <http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/08/30/000094946_03082104020550/Rendered/PDF/multi0page.pdf>; Donald McRae, "Developing Countries and 'The Future of the WTO'" (2005) 8(3) J Int'l Econ L 603.

[1522] On the eve of the Bali Ministerial Conference there were fears that a failure to conclude new agreements would "kills off the Doha round of trade talks and casts the WTO into obsolescence", see: Tom Miles & Randy Fabi, "Bali talks to decide fate of the WTO", *Thomson Reuters* (1 December 2013), online: Global Post <http://www.globalpost.com/dispatch/news/thomson-reuters/131201/bali-talks-decide-fate-wto>. But see Steger, "The House", *supra* note 9 ("The Uruguay Round negotiators built the WTO Members a house: the WTO, in which they can administer the existing agreements, observe the practices of others, discuss relevant matters, negotiate new agreements and changes to existing agreements, resolve disputes, and cooperate with other international organizations. That house will continue to stand, whether or not a particular negotiation is successful or a particular dispute is resolved. The Members, like any family, will have their agreements and disagreements, some years or even decades may be better than others depending upon the state of the world economy, political relations and events in Members' regional locales. For certain periods of time, some family members may not be on good terms with other family members, but may reconcile later and do good things together. The important thing is that the house was built – it stands and is available for the Members to come home to when they want to participate in their multilateral family. Like children or family members, they can also come home to seek the advice and counsel of their wise elders in resolving their disputes" at 5); Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 24.

[1523] See e.g. Steger, "A New Constitution", *supra* note 102 at 138. For an analysis of the possibilities of variable geometry within the WTO and its critiques, see generally: Craig VanGrasstek & Pierre Sauvé, "The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?" (2006) 9(4) J Int'l Econ L 837; Robert Wolfe, "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor" (2009) 12(4) J Int'l Econ L 835; Catherine Mann & Xuepeng Liu, "The Information Technology Agreement: Sui Generis or Model Stepping Stone" in Richard Baldwin and Patrick Low, eds, *Multilateralising Regionalism: Challenges for the*

Yet, it should be noted that no plurilateral agreements have been adopted pursuant to Article X:9 of the *WTO Agreement*.[1525] One drawback for this procedure might be the fact that consensus is required by the Ministerial Conference for a Plurilateral Trade Agreement to be added under Annex 4.[1526]

3.2. Effectiveness of the Rulemaking Process

3.2.1. Increasing use of coalitions

Since the GATT 1947, the continuously increasing number of contracting parties and, subsequently, WTO Members has changed the negotiating dynamic of the multilateral trading system.[1527] In its first decades, the GATT 1947 had been referred to as a "club" where some trade ministers from the richest nations, with fairly similar level of economic development and interests, would control the agenda and make deals on trade liberalization.[1528] However, the growing number of Members, with a majority of them consisting of developing Members, changed the dynamic of the trade negotiations. By the beginning of the 1970s, a few years after the establishment of UNCTAD and the Group of 77, developing Members began to act as a bloc and by the strength of their number were able to make significant gains in the multilateral trading system.[1529] Like developing Members, developed Members also began to unite their

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Global Trading System (Cambridge: Cambridge University Press, 2009) 182; Miguel Rodriguez Mendoza & Marie Wilke, "Revisiting the Single Undertaking: Towards a More Balanced Approach to WTO Negotiations" in Carolyn Deere-Birkbeck, ed, *Making Global Trade Governance Work For Development* (Cambridge: Cambridge University Press, 2011) 486 at 487-99; Andrew Cornford, *Variable Geometry for the WTO: Concept and Precedents*, UNCTAD Discussion Paper No 171 (May 2004) at 7-12, online: UNCTAD <http://www.unctad.org/en/docs/osgdp20045_en.pdf>. See also Chapter 2, Section 2.3.

[1524] Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 at 24.

[1525] See also Chapter 2, Section 3.5.

[1526] *WTO Agreement, supra* note 1, Article X:9. See Sutherland Report, *supra* note 11 ("the consensus rule makes it difficult to add new agreements to [Annex 4]" at para 292).

[1527] See Appendices 1 and 2, for a list of the GATT contracting parties and WTO Members across the years and Chapter 2 Section 2.3. For a typology and critique of the use of coalitions in the GATT 1947 through the first decade of the WTO, see: Amrita Narlikar, *International Trade and Developing Countries: Coalitions in the GATT and WTO* (London: Routledge, 2003) [Narlikar, *Coalitions in the GATT and WTO*]; Sonia E Rolland, "Developing Country Coalitions at the WTO: In Search of Legal Support" (2007) 48(2) Harv Int'l LJ 483 at 485-505 [Rolland, "Developing Country Coalitions"]; Vicente Paolo B Yu III, "Enhancing Developing Country Participation in Global Trade Governance Through South-South Coalitions in the WTO" in Deere-Birkbeck, *supra* note 1523, 507 [Yu III, "Enhancing Developing Country"].

[1528] Keohane & Nye, "The Club Model", *supra* note 82 at 222-23; Joost Pauwelyn, "The Transformation of World Trade" (2005) 104 Mich L Rev 1 at 9-22.

[1529] These included notably: *Protocol Introducing Part IV on Trade and Development, supra* note 132; Enabling Clause, *supra* note 173; *1971 GSP Waiver*, *supra* note 151; Preferences *Among Developing Countries Waiver, supra* note 151. For additional information see Chapter 2, Section 2.

voice into negotiating coalitions. Most notably, the United States, the EC, Japan and Canada formed the QUAD, which was actively involved during the Uruguay Round negotiations leading to the establishment of the WTO, as well as in the first decade of the WTO.[1530]

The TRIPS and Public Health Case, spanning 2001 through 2005, showed that by unifying their views to form a common single negotiating position, developing and LDC Members could take advantage of the policy space between the United States and the EC and make gains in some areas of utmost interests to them despite the fact that they had been initially opposed by (or highly resisted by) the largest power, i.e. the United States.[1531] This North-South divide was also evident during the agenda-setting process of the Trade Facilitation Case (between 1996 and 2004), where the negotiations were dominated quasi-exclusively by the Core Group, formed of a majority of developing Members, and the Colorado Group, representing the interests of developed Members. The negotiations resulted in a fair compromise between both opposing positions.

However, the Trade Facilitation Case's consensus-building process (spanning 2004 through 2014), broke the old negotiation patterns. It demonstrated that Members were capable of going passed the natural alliances and developing common positions based on interests and crossing over Members with different level of economic development or geopolitical affiliation.[1532] From a club model of negotiations, to the building of alliances based on economic development, the experience of the Trade Facilitation Case's last decade could suggest that the WTO is evolving towards a process of rational argument-based negotiations, i.e. moving away from distributive positions-based negotiations and towards interests-based negotiations. Yet, it should be noted that the Trade Facilitation Case was unique in its kind due to the fact that facilitation was believed to be truly mutually beneficial for all Members and, thus, was win-win by nature.[1533]

[1530] Steger, "A New Constitution", *supra* note 102 at 143-46. For a description of the coalitions present in the Uruguay Round negotiations and an analysis of their effectiveness, see generally Colleen Hamilton & John Whalley, "Coalitions in the Uruguay Round" (1989) 125(3) Review of World Economics 547 [Hamilton & Whalley, "Coalitions in the Uruguay Round"].

[1531] Abbott, "The WTO Medicines Decision", *supra* note 530 at 343; Odell & Sell, "Reframing the Issue", *supra* note 646 at 98-104. See also Chapter 4, Section 3.2.3.1.

[1532] See Chapter 6, Section 3.2.3.1.

[1533] See Chapter 6, Section 3:2.3.7. For an excellent analysis of the conditions necessary to enhance the role of communicative power in the WTO rulemaking processes, see: Nicolas Lamp, "Democracy in the WTO: The Limits

Overall, it can be argued that the increasing use of coalitions both for the verbalization of interests by means of oral interventions in WTO meetings or through joint communications has boosted the effectiveness of the rulemaking processes. To what extent are coalitions (or other forms of direct representation) used in the WTO? The following tables show the percentage of direct representation vs. all participation combined of Members by level of development (Table 7.3) and geopolitical groupings (Table 7.4) for both participation by means of oral interventions ('oral') and written communications ('written'). They are based on the data collected for all three case studies combined. Therefore, the years 1994-1999 represent exclusively the data associated with the Basic Telecoms Case, whereas the years 2005-2014 represent mostly those of the Trade Facilitation Case.[1534] As for the years 2000-2004, they are based on a mix of both the values of the TRIPS and Public Health and the Trade Facilitation Cases. For the purpose of this analysis the values associated with the years 2010-2014 should be discarded due to the fact that they are incomplete. Indeed, during this period, Members were intensively working on the drafting of the text of the *Agreement on Trade Facilitation* and there were very little public records of these discussions. Hence, the data gathered does not amount to a fair 'sample' of the overall participation of Members during this period.

Table 7.3: Percentage of Direct Representation / All Participation Combined for Members by Level of Development

Percentage of Direct Representation / All Participation Combined for Members by Level of Development								
	Developed Members & EC		BIC		Developing Members		LDCs	
	Oral	*Written*	*Oral*	*Written*	*Oral*	*Written*	*Oral*	*Written*
1994-1999	0%	0%	0%	0%	20%	0%	13%	0%
2000-2004	13%	14%	1%	100%	33%	88%	90%	100%
2005-2009	22%	75%	24%	58%	58%	91%	91%	99%

of the Legitimacy Debate" in Jana Hertwig et al, eds, *Global Risks – Constructing World Order through Law, Politics and Economics* (New York: Peter Lang GmbH, 2010) 143.

[1534] Some data in the year 2005 is associated with the TRIPS and Public Health Case.

Table 7.4: Percentage of Direct Representation / All Participation Combined for Members by Geopolitical Groupings

Percentage of Direct Representation / All Participation Combined for Members by Geopolitical Groupings										
	QUAD		Other Developed Members		African Group		ASEAN		MERCOSUR	
	Oral	*Written*	*Oral*	*Written*	*Oral*	*Written*	*Oral*	*Written*	*Oral*	*Written*
1994-1999	0%	0%	0%	0%	0%	0%	53%	0%	0%	0%
2000-2004	0%	15%	10%	12%	75%	99.8%	25%	100%	4%	100%
2005-2009	12%	60%	24%	88%	87%	99%	49%	28%	37%	95%

While there are a few irregular exceptions, Tables 7.3 and 7.4 above reveal a general trend towards a progressive increase in overall percentage of direct representation for all categories and groupings of Members throughout the years 1994 and 2009. Most noteworthy is the fact that even the larger nations, which had acted predominantly by means of direct participation in the first decade[1535], have been increasingly 'directly represented' in the processes, even by means of oral interventions in the WTO meetings, despite the fact that they possess sufficient resources and technical expertise to represent themselves directly. For instance, between the years 2005-2009, 12 percent of all participation by means of oral interventions of individual QUAD Members was done through 'direct representation'; for individual Developed Members & EC, 22 percent; and for individual BIC Members, 24 percent. During these years, the large nations also participated to high degrees by means of joint communications: for individual QUAD Members, 60 percent; for Developed Members & EC, 75 percent; and for BIC Members, 58 percent. Expectedly, considering their lack of resources and technical expertise, the participation of smaller nations have been predominantly through direct representation, amounting in certain cases to nearly 100 percent of their participation (see e.g. individual LDCs and African Group Members).

[1535] With the unique exception of EC/EU Members that are quasi-exclusively represented by their constituent, the EC/EU, see Chapter 3, Section 4.1.3.2.2.

The use of coalitions (or of the 'direct representation' form of participation) allows Members to pre-negotiate their positions and clarify some issues outside of the formal rulemaking processes. As a result, it arguably reduces the burden on the multilateral processes and enables the focus of these processes to be on the deeper divergences between Members.[1536]

3.2.2. Lack of capacities of small Members and technical support

The drawback of the greater practices of inclusiveness in the last decade of the WTO is that the rulemaking processes and negotiations progress can only go as fast as the capacities of the smaller Members.[1537] To palliate for the smaller Members' lack of capacities, the following practices have been followed during the Trade Facilitation Case. First, the WTO (and sometimes some of the most developed Members or other international organizations) has supplied funding and capacity-building assistance to allow small developing and LDC Members to effectively participate in the negotiations processes.[1538] Second, cooperation with relevant international organizations and experts have been key to provide knowledge to trade officials regarding trade facilitation (a rather technical area requiring specific expertise and knowledge) and its potential benefits for income growth and economic development.[1539]

3.2.3. Leadership from major players and the WTO Secretariat

In both the Basic Telecoms and the Trade Facilitation Cases the leadership (or lack of leadership) from the major players have impacted the effectiveness of the rulemaking processes. On several occasions during the Basic Telecoms negotiations processes, delegations called upon their major trading partners to show leadership and table substantive and meaningful offers in order to provide impetus in the final phase of the negotiation process that had not been done

[1536] See Chapter 4, Section 3.2.3.1 and Chapter 6, Section 3.2.3.1. See generally Narlikar, *Coalitions in the GATT and WTO, supra* note 1527 at 10-33; Hamilton & Whalley, "Coalitions in the Uruguay Round", *supra* note 1530.
[1537] See e.g. Chapter 6, Section 3.2.3.2. See Constantine Michalopoulos, "Developing Countries' Participation in the World Trade Organization", World Bank Policy Research Working Paper No 1906 (2008), online: SSRN <http://ssrn.com/abstract=620518> (advancing that a large group of primarily smaller and lower income developing countries (accounting for more than 50 percent of total WTO developing country membership) is incapable of participating effectively in the WTO); Yu III, "Enhancing Developing Country", *supra* note 1527.
[1538] Chapter 6, Section 3.2.3.2. For a critique of technical assistance and capacity-building in the WTO, see: Gregory Shaffer, "Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?" in Petersmann & Harrison, *supra* note 64, 245.
[1539] Chapter 6, Section 3.2.3.3.

consistently throughout the processes.[1540] By contrast, during the Trade Facilitation Case, at the suspension of the Doha Round negotiations in July 2006, the trade Minister of India and the EU Trade Commissioner jointly reemphasized the importance of trade facilitation in the Doha negotiations, which was highly symbolic due to the fact that they then represented two opposing positions and interests in the negotiations (i.e. as respectively part of the Core and the Colorado Groups).[1541]

To ensure the full effectiveness of the processes, leadership needs also to come from the WTO Secretariat (although some practices have been found controversial in the past). One example of this was a proposal by the Chair of the Negotiating Group on Basic Telecommunications at the expiry of the period provided for negotiations of a legal mechanism to preserve the offers that had been tabled by then and enabled the continuation of negotiations.[1542] Another example concerns the Trade Facilitation Case and consisted of the appointment of several facilitators (up to 14) and Friends of the Chairs, which were all technical experts in the subject of trade facilitation and mandated to tackle effectively some specific sections of the draft text during parallel negotiations.[1543] Other officers have played important leadership role during the trade facilitation negotiations, such as the chairs of the Negotiating Group on Trade Facilitation and the Preparatory Committee on Trade Facilitation, as well as Director-General Roberto Azevêdo upon his appointment in September 2003, to commit to the best practices of inclusiveness and Members-driven processes.[1544]

3.2.4. Negotiating outside the single undertaking

Only a handful of agreements or amendments have been adopted since the establishment of the WTO in 1995. Some have criticized the single undertaking (the principle according to which "nothing is agreed until everything is agreed"[1545]) for being a factor that have impeded the

[1540] Chapter 5, Section 3.2.3.5.
[1541] See Chapter 6, Section 3.2.3.6.
[1542] See Chapter 5, Section 3.2.3.4. For an analysis of the role of the Chair in WTO negotiations, see: Odell, "Chairing", *supra* note 9; Jonas Tallberg, "The Power of the Chair: Formal Leadership in International Cooperation" (2010) 54(1) International Studies Quarterly 241 at 253-55.
[1543] See Chapter 6, Section 3.2.3.5.
[1544] See Chapter 6, Section 3.3.1.2.
[1545] WTO, *Negotiations, supra* note 23.

effectiveness of the negotiations processes.[1546] To date, all the agreements and amendments that have been adopted have been concluded outside of the single undertaking. The TRIPS and Public Health and the Basic Telecoms Cases are two examples of this.

As for the *Agreement on Trade Facilitation,* which was an integral part of the Doha Development Agenda, the Ministerial Conference decided to take advantage of a flexibility included in it, which authorized the early conclusion of agreements and their implementation on a definitive basis.[1547] Yet, it was decided to link several issues together and create a smaller package (i.e. the Bali Package), which was itself subject to the single undertaking. Due to the arguably win-win nature of the *Agreement on Trade Facilitation,* some have argued that it should have been a stand-alone agreement, which would have therefore also prevented India to block the adoption of its protocol of amendment on the basis that it did not see sufficient progress in other areas of the Bali Packages (i.e. on food securities).[1548] The consequence of this is that the action of India may "induce other countries to pursue similar tactics in the future" and even the prospects of such behaviour may have "a chilling effect on the willingness of governments to engage in efforts to negotiate stand-alone compacts."[1549]

3.2.5. Consensus at all costs − even at the expense of the effectiveness of the policy?

The TRIPS and Public Health Case concerned a sensitive subject matter for a large number of delegations, which found themselves at both ends of the spectrum on the issue: those countries

[1546] For critiques of the singe undertaking, see Will Martin & Patrick Messerlin, "Why Is It So Difficult? Trade Liberalization under the Doha Agenda" (2007) 23(3) Oxford Review of Economic Policy 347 at 357. See also Philip I Levy, "Do We Need an Undertaker for the Single Undertaking? Angles of Variable Geometry" in Simon J Evenett & Bernard M Hoekman, eds, *Economic Development and Multilateral Trade Cooperation* (London and Washington: Palgrave Macmillan; World Bank, 2005) 417; Warwick Report, *supra* note 3 at 13; Robert Z Lawrence, "International Organisations: The Challenge of Aligning Mission, Means and Legitimacy" (2008) 31(11) World Economy 1455 at 1455-70.

[1547] *Doha Ministerial Declaration, supra* note 10 at para 47.

[1548] See Chapter 6, Section 3.2.3.7. Hoekman, "The Bali Trade Facilitation Agreement", *supra* note 1236 ("The TFA experience is particularly pertinent in this regard because the subject it addresses does not lend itself well to issue linkage dynamics. Trade facilitation predominantly benefits firms and consumers in the country that takes measures to lower trade costs. In contrast to tariffs or subsidies that benefit domestic industries and that can shift the terms of trade in a nation's favor, a neglect of trade facilitation simply raises costs for all industries, domestic as well as foreign. The absence of terms of trade effects should imply that the "linkage value" associated with withholding agreement on trade facilitation is limited—nobody should be willing to "pay" much (i.e., make concessions in other areas like agriculture) to get a deal done" at 25-26). For a critique of the 'issue-linkage' negotiations dynamic from an economic perspective, see: Carlo Perroni Paola Conconi, "Issue Linkage and Issue Tie-in In Multilateral Negotiations" (2002) 57(2) Journal of International Economics 423.

[1549] *Ibid* at 26.

subject to pandemics seeking greater access to affordable medicines and those Members home of the major patent-holding pharmaceutical companies. The strenuousness of the negotiations resulted in a difficult crafted compromise, representing a delicate balance between the interests of all Members. However, the compromised aspects of the outcome led to a 'compromised solution': the establishment of a System authorizing the grant of compulsory licences predominantly for the export of patented medicines filled with procedural safeguards (to protect the interests of patent-holding pharmaceutical companies). Hence, it resulted in the creation of a cumbersome process that both developing countries and generic pharmaceutical companies are reluctant to use.[1550] Such example showed that it is not sufficient to have a compromise agreement: the policy agreed upon needs to be feasible and effective.

Thoughts should be put on whether the negotiated policy will work in practice. A solution to this could be the appointment of a neutral experts committee to reflect on the effectiveness of the agreed upon policy (to become a rule), especially in cases where the issues concerned are technical and complex.

3.3. Representativeness of Members in the Rulemaking Processes

3.3.1. Internal transparency and inclusiveness of the processes

In the first decade of the WTO, some Members, mainly developing and least-developed countries, have criticized the rulemaking processes for their use of practices deficient in internal transparency and inclusiveness, such as the conduct of small group meetings behind closed doors.[1551] Examples of such practices can be found in the case studies examined in this thesis,

[1550] See Chapter 4, Section 3.2.1.

[1551] Before the talks were brought to an end at the Seattle Ministerial Conference, the African, Latin American and Caribbean Members issued separate public statements protesting against the lack of transparency in the proceedings of the Ministerial Conference and the establishment of a group of limited and reserved participation by some Members, which intended to define the scope and extent of the future negotiating round for all Members. They stated that, under these circumstances, they would not be able to join the consensus required to meet the objectives of the Ministerial Conference, see e.g. Chakravarthi Raghavan, "Grulac, Africans Protest Non-Transparency, Threaten Walkout", *Third World Network* (1999), online: Third World Network <http://www.twnside.org.sg/title/grulac-cn.htm>. Even the then WTO Director-General, as well as the representatives of Members that were regularly invited in the small group meetings (also referred to as 'green rooms'), which were used to build consensus among the key players, recognized that there was a need to create better decision-making processes that would be more inclusive and transparent, see Richard Blackhurst, "Reforming WTO Decision Making: Lessons from Singapore and Seattle" in Klaus Deutsch & Bernhard Speyer, eds, *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century* (London: Routledge, 2001) 295 at 295-99 [Blackhurst, "Reforming"] (for a review of comments by countries excluded from the small group meetings

such as the negotiation of the Motta text (i.e. the draft waiver decision) in the TRIPS and Public Health Case, as well as the Chairman's Statement[1552] and, to some extent, the trade facilitation negotiations modalities contained in Annex D of the *Doha Work Programme*[1553] and the Reference Paper on regulatory principles with respect to basic telecommunications[1554], which were all principally conducted in small group settings. Despite the fact that these three examples included the participation of a group of Members that represented a somewhat fair balance of the interests of the entire Membership, some of them have been criticized for their lack of inclusiveness.[1555]

It is common practice to use small group settings in international organizations, and some commentators have suggested that they are necessary to achieve consensus within more or less 161 Members in the WTO.[1556] Hence, beyond any expectations, the experience from the Trade Facilitation Case has proven that it was possible to reach consensus on a Multilateral Trade Agreement without conducting meetings behind closed doors not open to the participation of the entire Membership.[1557] The success of the Trade Facilitation Case was due to its carefully designed procedures.[1558] Indeed, the conduct of trade facilitation negotiations took place

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expressed in the popular press); Keohane & Nye, "The Club Model", *supra* note 82 at 224; Elizabeth Smythe, "Democracy, Development, and the WTO's Legitimacy Challenge: Assessing the Doha Round" in Donna Lee & Rorden Wilkinson, eds, *The WTO After Hong Kong: Progress in, and Prospects for, the Doha Development Agenda* (New York: Routledge, 2007) 205 at 211-15 [Smythe, "WTO's Legitimacy Challenge"].

[1552] See Chapter 4, Section 3.3.1.

[1553] See Chapter 6, Section 3:3.1.

[1554] See Chapter 5, Section 3:3.1.

[1555] This was the case for the negotiations and drafting of the Motta text, as well as the Chairman's Statement, see Chapter 4, Section 3.3.1. According to the data gathered there were no critiques of the inclusiveness and transparency regarding the negotiation and drafting of the Annex D modalities of the *Doha Work Programme,* see Chapter 6, Section 3.3.1, and the *Reference Paper*, see Chapter 5, Section 3.3.1).

[1556] For e.g. in 1999, the then WTO Director-General Michael Moore wrote in a column in the New Zealand Herald newspaper that consensus-building is "impossible in a room with 135 ministers", see AFP via News EDGE (5 January 2000), cited in Blackhurst, "Reforming", *supra* note 1551 at 297-98.

[1557] Neufeld, *The Long and Winding Road, supra* note 1236 ("Soon after taking up his responsibilities in September 2013, the WTO's new Director-General offered his services as well. He personally chaired a series of negotiating sessions in a variety of configurations – and an inclusive overall setting. His skilful handling of complex situations and the unflinching commitment to keep everybody involved unblocked many controversies." at 11). See also Statement by Director-General Roberto Azevêdo in *Report by the Chairman of 26 November 2013, supra* note 1362.

[1558] Neufeld, *The Long and Winding Road, supra* note 1236 ("New ground was also broken in the way the negotiations were conducted. Going against conventional wisdom, the Trade Facilitation negotiations were predominately carried out in an open-ended, inclusive setting – and this despite an increase in WTO Membership, even during the course of the decade-long discussions. Novel philosophies were also applied to the way the negotiations were lead. Delegations remained in the driving seat throughout the entire process. Work was carried

predominantly in open-ended informal sessions held within the formal meetings, which allowed Members to discuss proposals among themselves openly and frankly. The informal and non-plenary sessions also provided opportunities for Members to engage among themselves in bilateral, plurilateral and confessional-style discussions, with the Chairperson being available to meet with anybody wishing to do so.[1559]

As for the drafting of the *Agreement on Trade Facilitation,* commendably, no 'Chair's text' was ever issued. Delegations remained in the driver's seat throughout the entire process. Negotiations were first conducted on the basis of a compilation document prepared by the Secretariat containing all the proposals made by Members and, subsequently, they were done on the basis of a 'Draft Consolidated Negotiating Text', which contained in brackets the areas where there was lack of consensus.[1560] This overly inclusive and transparent process received positive feedbacks from the Membership in general and, most certainly, had an impact on the ability of Members to reach consensus on the first ever multilateral agreement to be concluded in the WTO.

3.3.2. Representativity of Members in the processes

An innovative aspect of this thesis was the conduct of a quantitative analysis assessing the degree of participation of Members (classified by level of development and geopolitical groupings) in the formal rulemaking processes for all three cases studies spanning from 1994 through 2014, both by means of oral interventions and written communications.[1561] As a result of the quantitative analysis for all three case studies, what trends in participation can be observed?

In terms of direct participation and direct representation by means of oral interventions, Table 7.5 (representing the participation of Members by level of development) and Table 7.6 (by geopolitical groupings) below show that consistently throughout the rulemaking processes the

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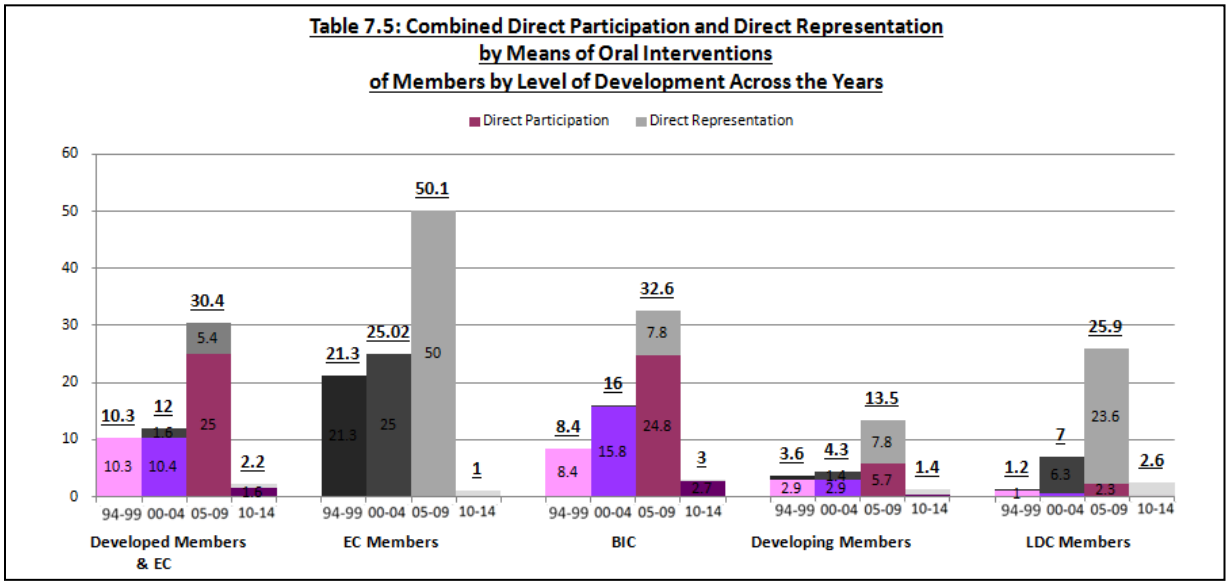
out in a bottom-up, Member–driven manner with the Chair functioning primarily as a facilitator, there to broker a compromise based on delegations' wishes." at 11-12).

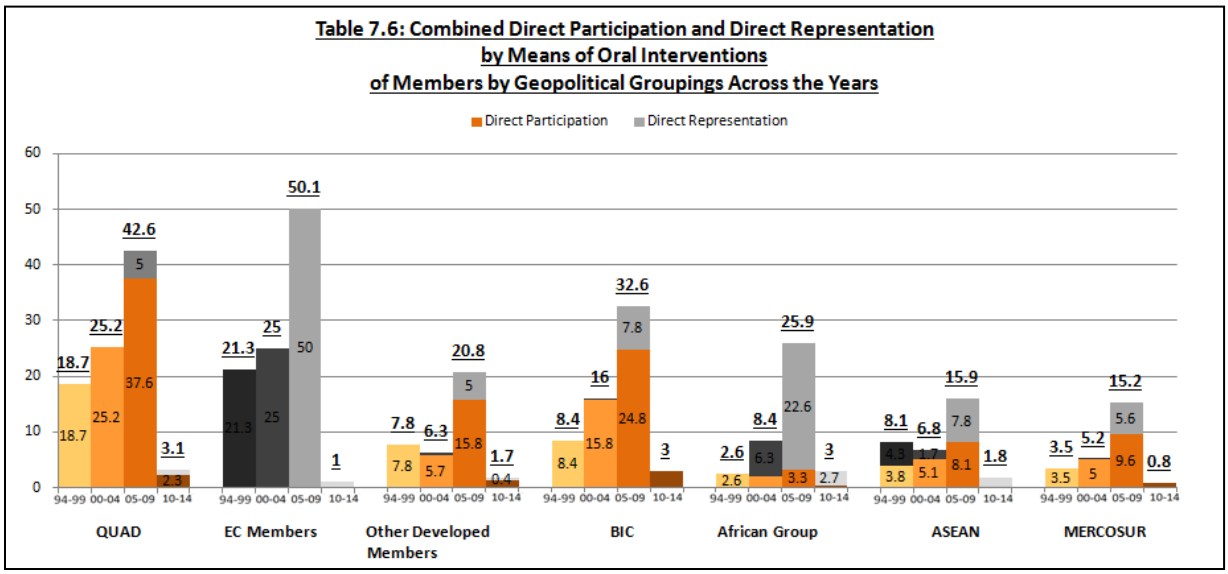
[1559] See Chapter 6, Section 3.3.1.2.

[1560] See Chapter 6, Section 3.3.1.3.

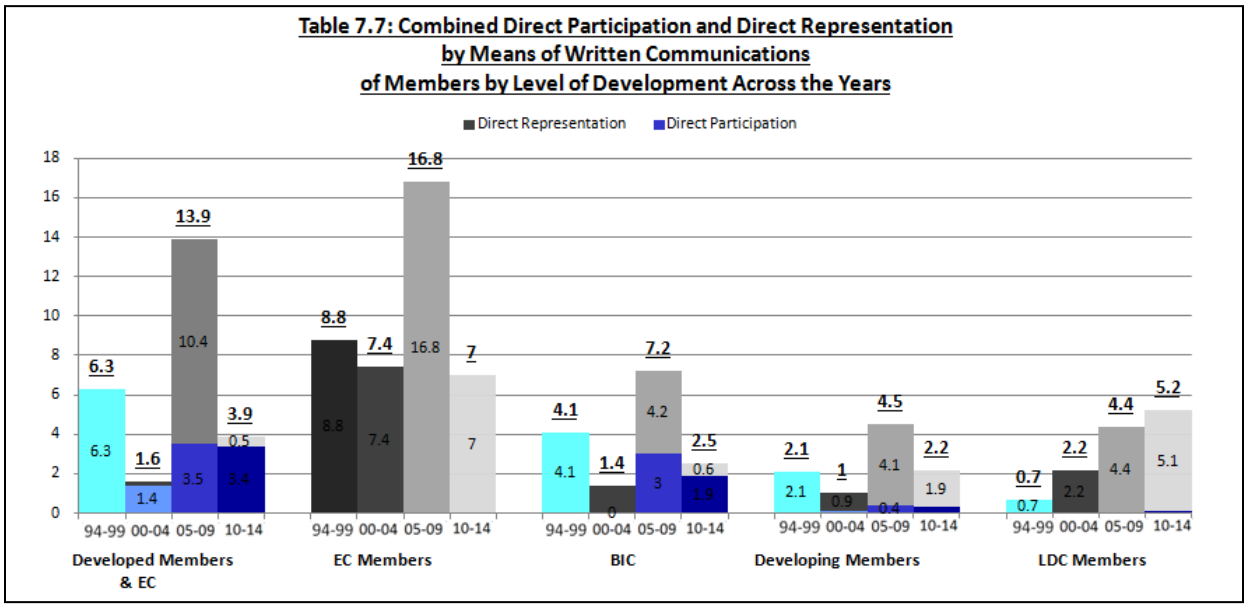
[1561] It resulted in roughly eleven thousands (approximately 11 191) separate data entries regarding the participation of Members, which was then presented according to two different classifications: by level of development and by geopolitical groupings. These classifications enable the attribution of meaning to the data collected and can be readily referred to in future studies. A similar analysis has been conducted in 2006 − from which the methodology used in this thesis for the data collection has been largely drawn upon − but with respect to the participation of developing countries in the WTO, see: Nordström, *Participation of Developing Countries, supra* note 431 and Chapter 2, Section 4.1.3.2.2 (c).

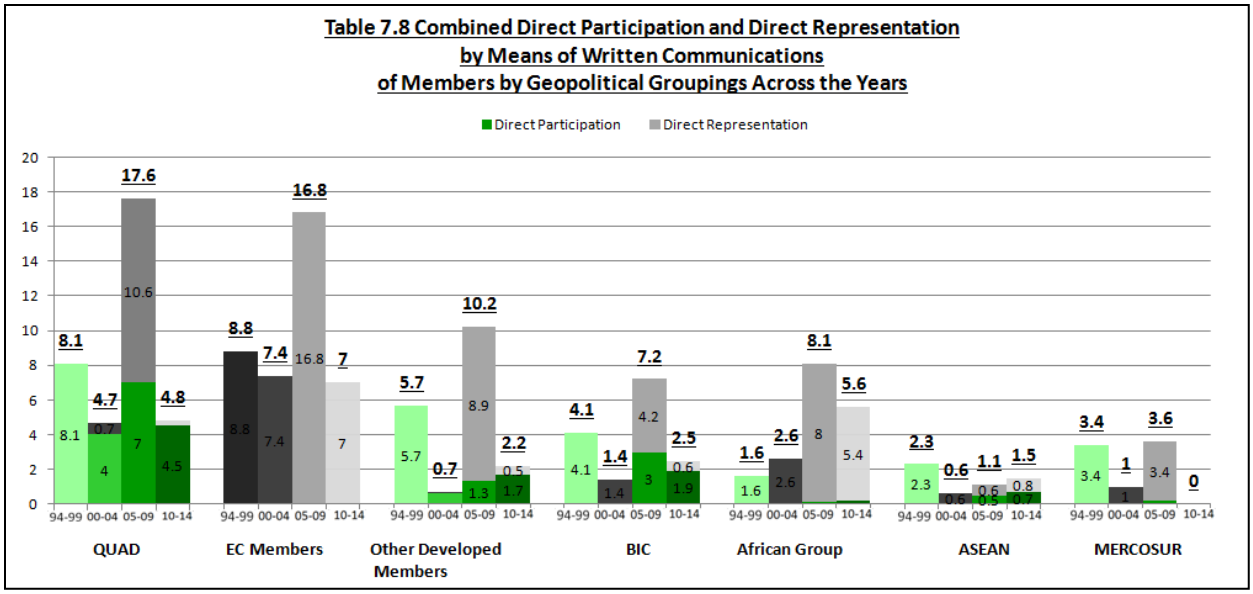
largest Members (i.e. individual Members from the Developed Members & EC, the, QUAD, Other Developed Members and the BIC) 'directly participated' by means of oral interventions considerably more than their counterparts. This is most likely directly related to Members' capacities (financial, technical and in human resources). However, what should be highlighted is the positive impact of 'direct representation' (represented in the different shades of grey in the histograms) for Members' overall representativity in the processes. Indeed, due to their high degree of 'direct representation', the poorest Members (i.e. individual Members part of the LDCs category and the African Group grouping) were able to achieved similar degrees of 'combined direct participation and direct representation' than their most developed counterparts, especially in the later decade of the WTO. It also indicates that individual Members from the Developing Members category, as well as the ASEAN and MERCOSUR groupings would have an interest in making even greater use of coalitions to increase their overall degree of representativity.





With respect to participation by means of written communications, Tables 7.7 and 7.8 below show that in the last decade, Members in general have submitted a substantially greater number of joint communications than individual written communications, with the exception of the larger Members (i.e. the QUAD, the Developed Members & EC and the BIC) which continued to submit a large number of individual communications. Overall, these tables reveal that joint communications are an effective tool to boost the overall representativity of all Members in the processes. They allow most categories/groupings of Members to have a fairly balanced degree of representativity.





The developing countries' practices of informal coalitions-building in the WTO could serve as a model to formalize some forms of 'direct representation' at the WTO[1562] and even also from the participation of EC/EU Members, which interests have been consistently directly represented to high degrees by their constituent, the EC/EU, as highlighted in all the tables. Although their political situation renders their situation unique, they show the value of a mechanism of permanent direct representation (through an official coalition) in the WTO even for developed Members.

3.4. Openness of the rulemaking processes *vis-à-vis* the public

3.4.1. External transparency

The case studies analysis underlined that since May 2002, the WTO website has been a key tool to promote high degrees of transparency, making most official WTO documents publically

[1562] See e.g. Steger, "The Future of the WTO", *supra* note 57 ("[C]oalitions of developing countries are currently used as a means of managing multilateral trade negotiations and building consensus, increasing transparency and inclusiveness in decision making. The valuable practice and experience of these informal groups should be taken into account in developing more formalized mechanisms for rule making and decision making in the WTO." at 813).

available between 6 and 12 weeks upon their circulation to Members[1563] and providing a user friendly database to find information on current negotiations.[1564]

Contrary to some other international organizations[1565], the WTO has made an institutional choice to not invite non-state actors (or NGOs[1566]) in the meetings of the councils and committees.[1567] However, this decision has not substantially affected the degree of external transparency of the WTO rulemaking processes considering that non-state actors can have access to the transcripts of most meetings of the WTO Councils and Committees after 6 to 12 weeks upon their circulation.[1568] Such transcripts, which are often very detailed, compensate for the non-ability of non-state actors to attend the Councils' and Committees' meetings. Moreover, they enable an even greater number of non-state actors (not just those able to travel or invited to the Geneva offices) to have access to the information discussed during those meetings. However, in the cases of the negotiation of policies requiring to be adopted expeditiously, such as was the situation of the TRIPS and Public Health Case, it could be beneficial to make these transcripts available even more promptly after the conclusion of the meetings to enable non-state actors to provide more timely comments.[1569]

[1563] *2002 Procedures for Derestriction, supra* note 480; WTO, *Explanatory Note on Old and New Procedure, supra* note 485.
[1564] *WTO Documents Online, supra* note 432. See e.g. Steve Charnovitz, "The WTO and Cosmopolitics" (2004) 7(3) J Int'l Econ L 675 at 676-78.
[1565] Ripinksy & Van Den Bossche, *NGO Involvement, supra* note 469.
[1566] Public attendance to Ministerial Conference Sessions in the WTO is exclusively limited to NGOs, see e.g.: WTO, Ministerial Conference, *Registration and Attendance of Non-Governmental Organizations at the Ninth Session of the Ministerial Conference,* online: WTO <https://meetings.wto.org/.../mc9_NGOregistrationProcedure_E.docx>.
[1567] See *Guidelines for Arrangements With NGOs, supra* note 354.
[1568] *2002 Procedures for Derestriction, supra* note 480; WTO, *Explanatory Note on Old and New Procedure, supra* note 485. See generally: *WTO Documents Online, supra* note 432.
[1569] See e.g. Chapter 4, Section 3.4.1.

3.4.2. Channels for public participation

The case studies analysis noted that the WTO does not have permanent and official channels to enable effective public participation. Although NGO positions papers are published on the WTO website, no indication is provided as to whether they are consulted by Members or the Secretariat. It seems to be a one way stream of communication. This practice could benefit from some improvements in light of the practices used in other international organizations where accredited non-state actors' written statements are circulated and pre-read by the secretariats.[1570]

The case studies analysis also concluded that some of the best practices for public participation used in the WTO include the holding of public symposiums, workshops or briefings attended by a diversity of actors (representatives of industries, WTO Members, NGOs, academia and other international organizations) at all stages of the processes.[1571] But more importantly, it was found that such public events should take place in the agenda-setting process in order to provide an opportunity to non-state actors to share their concerns regarding a specific subject matter prior to the official launch of negotiations on that issue.[1572]

It has been reported that the Secretariat from time to time makes other arrangements to consult with and provide information to NGOs, including various forms of informal meetings.[1573] However, due to the primary informal nature of most of these arrangements, it should be noted that it is expected that there might be some gaps in the data collected and reported in the case studies analysis with respect to NGOs' public participation.

Finally, the case studies analysis highlighted a novel approach regarding the involvement of non-state actors that have been followed during the Trade Facilitation Case where the WTO has circulated a guide to help national governments consult with non-state actors.[1574] This approach is in line with the *Guidelines for Arrangements With NGOs*, which conferred the primary

[1570] Ripinksy & Van Den Bossche, *NGO Involvement, supra* note 469 at 24 and 29. See also Chapter 3, Section 4.1.4.1.
[1571] Such practices were followed in both the TRIPS and Public Health Case, see Chapter 4, Section 3.4.2, and in the Trade Facilitation Case, see Chapter 6, Section 3.4.2.
[1572] This was notably the case in the Trade Facilitation Case, see Chapter 6, Section 3.4.2.
[1573] See Chapter 3, Section 4.1.4.2.2.
[1574] *WTO Trade Facilitation Negotiations Support Guide*, *supra* note 1481. See Chapter 6, Section 3.4.2.

responsibility to consult with non-state actors to Members at the national level.[1575] While such an approach has the effect of leaving the task to consult with non-state actors to national governments, the WTO fulfilled its part of the solution in the Trade Facilitation Case by providing support to Members for undertaking such consultations. Such avenues should be explored further as they are fully consistent with the vision of the WTO regarding the involvement of non-state actors and with Members' shared normative value of sovereignty; but provide support and assistance to Members which are unaware of (or have not developed) best practices to consult with their national constituents.[1576]

4. CONCLUSION: WHERE TO GO FROM HERE?

The assessment of the legitimacy of the rulemaking processes, as well as the conclusions reached in this Chapter, aim to provide a framework for considering future potential reforms of the WTO rulemaking processes. Over the years, the rulemaking processes have gained in internal transparency and inclusiveness. Members from different levels of development got to participate at more equalitarian levels in the processes, but the processes arguably lost in efficiency in terms of the time needed to reach consensus.[1577] How to improve the effectiveness of the rulemaking processes while maintaining their legitimacy?

Future reforms of the WTO rulemaking processes are dependent upon Members' vision of the mandate of the WTO.[1578] If the objective of the WTO is purely trade liberalization, then what should matter for legitimacy are mainly the legality, efficiency and inclusiveness of the processes as reflected by Members' shared normative values.[1579] However, if it is found that its mandate extends to trade regulation, or even further, to distributive justice and equality, then the involvement and consultation with non-state actors would increase in importance[1580], as well as the extent to which the outcomes of the rulemaking processes (such as the rules and agreements)

[1575] *Guidelines for Arrangements With NGOs*, *supra* note 354. See also Chapter 3, Section 4.1.4.2.2.
[1576] *WTO Trade Facilitation Negotiations Support Guide, supra* note 1481 at 7.
[1577] See Chapter 6, Section 3:2 and 3.3 and Tables 7.5, 7.6, 7.7 and 7.8.
[1578] Steger, "The Future of the WTO", *supra* note 57 at 805; Steger, "The House", *supra* note 9 at 8; Smythe, "WTO's Legitimacy Challenge", *supra* note 1551 at 216-18.
[1579] See Chapter 3, Section 3.1.2. On this vision of the WTO, see generally Shaffer & Trachtman, "Interpretation and Institutional Choice", *supra* note 340.
[1580] See e.g. Cho, "Beyond Rationality", *supra* note 340 at 343 (defining the WTO as a "community" and arguing that due to the "the increasing integration of the global market" the main actors of the WTO extend to various individual economic players.).

are fair and consist of an equitable distribution of wealth.[1581] Any attempt to reform the rulemaking processes of the WTO may oblige deeper reflections upon its mandate.

[1581] Thomas Cottier, "Trade and Human Rights: A Relationship to Discover" (2002) 5(1) J Int'l Econ L 111 (Cottier argues that the long-term legitimacy of the multilateral trading system relies on democracy and the advancement of human rights and therefore a better balance with human rights concerns should be provided: "Legitimacy is mainly drawn from economic theory and experience (comparative advantage) and remains essentially utilitarian, that is, looking at benefits for a majority without conceptualizing trade regulation in terms of individual rights. It has a powerful record of bringing about welfare and growth and a high level of implementation, supported by powerful economic interests." at115); Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1997) at 22-24; Gerhart, "Slow Transformations", *supra* note 346 at 1093-95.

APPENDICES

APPENDIX 1

Number of GATT 1947 Contracting Parties Across the Years

Year of Accession	Number	Contracting parties
1948	18	Australia; Belgium; Brazil; Canada; Cuba; France; India; Luxembourg; Myanmar; Netherlands; New Zealand; Norway; Pakistan; South Africa; Sri Lanka; United Kingdom; United States; Zimbabwe
1949	19	Chile
1950	28	Denmark; Dominican Republic; Finland; Greece; Haiti; Indonesia; Italy; Nicaragua; Sweden
1951	32	Austria; Germany; Peru; Turkey
1953	33	Uruguay
1955	34	Japan
1957	36	Ghana; Malaysia
1960	37	Nigeria
1961	39	Sierra Leone; Tanzania
1962	43	Israel; Portugal; Trinidad and Tobago; Uganda
1963	59	Benin; Burkina Faso; Cameroon; Central African Republic; Chad; Congo; Côte d'Ivoire; Cyprus; Gabon; Jamaica; Kuwait; Madagascar; Mauritania; Niger; Senegal; Spain
1964	63	Kenya; Malawi; Malta Togo
1965	65	Burundi ;Gambia
1966	68	Guyana; Rwanda; Switzerland
1967	73	Argentina; Barbados; Ireland; Korea; Poland
1968	74	Iceland
1970	76	Egypt; Mauritius
1971	77	Romania
1972	78	Bangladesh
1973	80	Hungary; Singapore
1978	81	Suriname
1979	82	Philippines
1981	83	Colombia
1982	85	Thailand; Zambia
1983	87	Belize; Maldives
1986	89	Hong Kong, Mexico
1987	92	Antigua and Barbuda; Botswana; Morocco
1988	93	Lesotho
1990	97	Bolivia; Costa Rica; Tunisia; Venezuela
1991	100	El Salvador; Guatemala; Macao
1992	102	Mozambique; Namibia
1993	112	Bahrain; Brunei Darussalam; Czech Republic; Dominica; Fiji; Mali; Saint Lucia; Saint Vincent & the Grenadines; Slovak Republic; Swaziland
1994	126	Angola; Djibouti; Grenada; Guinea; Guinea-Bissau; Honduras; Liechtenstein; Papua New Guinea; Paraguay; Qatar; Saint Kitts and Nevis; Slovenia; Solomon Islands; United Arab Emirates

Reference: WTO, *Members and Observers,* online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

APPENDIX 2

Number of WTO Members Across the Years

Year of Accession	Number	Members
1995	112	Antigua and Barbuda; Argentina; Australia; Austria; Bahrain; Bangladesh; Barbados; Belgium; Belize; Bolivia; Botswana; Brazil; Brunei Darussalam; Burkina Faso; Burundi; Cameroon; Canada; Central African Republic; Chile; Colombia; Costa Rica; Côte d'Ivoire; Cuba; Cyprus; Czech Republic; Denmark; Djibouti; Dominica; Dominican Republic; Egypt; El Salvador; European Union; Finland; France; Gabon; Germany; Ghana; Greece; Guatemala; Guinea; Guinea-Bissau; Guyana; Honduras; Hong Kong; Hungary; Iceland; India; Indonesia; Ireland; Israel; Italy; Jamaica; Japan; Kenya; Korea; Kuwait; Lesotho; Liechtenstein; Luxembourg; Macao; Madagascar; Malawi; Malaysia; Maldives; Mali; Malta; Mauritania; Mauritius; Mexico; Morocco; Mozambique; Myanmar; Namibia; Netherlands; New Zealand; Nicaragua; Nigeria; Norway; Pakistan; Paraguay; Peru; Philippines; Poland; Portugal; Romania; Saint Lucia; Saint Vincent and the Grenadines; Senegal; Sierra Leone; Singapore; Slovak Republic; Slovenia; South Africa; Spain; Sri Lanka; Suriname; Swaziland; Sweden; Switzerland; Tanzania; Thailand; Togo; Trinidad and Tobago; Tunisia; Turkey; Uganda; United Kingdom; United States; Uruguay; Venezuela; Zambia; Zimbabwe
1996	128	Angola; Benin; Bulgaria; Chad; Ecuador; Fiji; Gambia; Grenada; Haiti; Niger; Papua New Guinea; Qatar; Rwanda; Saint Kits and Nevis; Solomon Islands; United Arab Emirates
1997	132	Congo; Democratic Republic of the Congo; Mongolia; Panama
1998	133	Kyrgyz Republic
1999	135	Estonia; Latvia
2000	140	Albania; Croatia; Georgia; Jordan; Oman
2001	143	China; Lithuania; Moldova
2002	144	Chinese Taipei
2003	146	Armenia; Macedonia
2004	148	Cambodia; Nepal
2005	149	Saudia Arabia
2007	151	Tonga; Viet Nam
2008	153	Cabo Verde; Ukraine
2012	157	Montenegro; Russian Federation; Samoa; Vanuatu
2013	159	Laos; Tajikistan
2014	160	Yemen

Reference: WTO, *Members and Observers,* online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

APPENDIX 3

Classification of Members by Level of Development

	Developed Members	Year of Accession
1.	Australia	1995
2.	Canada	1995
3.	Chile	1995
4.	EC/EU	1995
5.	Iceland	1995
6.	Israel	1995
7.	Japan	1995
8.	New Zealand	1995
9.	Norway	1995
10.	Switzerland	1995
11.	Turkey	1995
12.	United States	1995

	BRIC Members	Year of Accession
1.	Brazil	1995
2.	China	2001
3.	India	1995
4.	Russian Federation	2012

	EC Members	Year of Accession	
		WTO	EC/EU
1.	Austria	1995	1995
2.	Belgium	1995	1952
3.	Bulgaria[1]	1996	2007
4.	Croatia[2]	2000	2013
5.	Cyprus[3]	1995	2004
6.	Czech Republic[4]	1995	2004
7.	Denmark	1995	1973
8.	Estonia[5]	1999	2004
9.	Finland	1995	1995
10.	France	1995	1952
11.	Germany	1995	1952
12.	Greece	1995	1981
13.	Hungary[6]	1995	2004
14.	Ireland	1995	1973
15.	Italy	1995	1952
16.	Latvia[7]	1999	2004
17.	Lithuania[8]	2001	2004
18.	Luxembourg	1995	1952
19.	Malta[9]	1995	2004
20.	Netherlands	1995	1952
21.	Poland[10]	1995	2004
22.	Portugal	1995	1986
23.	Romania[11]	1995	2007
24.	Slovak Republic[12]	1995	2004
25.	Slovenia[13]	1995	2004
26.	Spain	1995	1986
27.	Sweden	1995	1995
28.	United Kingdom	1995	1973

[1] Part of the 'Developing Members' category before 2007.
[2] Part of the 'Developing Members' category before 2013.
[3] Part of the 'Developing Members' category before 2004
[4] Part of the 'Developed Members' category before 2004.
[5] *Ibid.* [6] *Ibid.*
[7] Part of the 'Developing Members' category before 2004.
[8] *Ibid.* [9] *Ibid.*
[10] Part of the 'Developed Members' category before 2004.
[11] Part of the 'Developing Members' category before 2007.
[12] Part of the 'Developing Members' category before 2007.
[13] *Ibid.*

	Developing Members	Year of Accession		Developing Members	Year of Accession
1.	Albania	2000	43.	Mauritius	1995
2.	Antigua & Barbuda	1995	44.	Mexico	1995
3.	Argentina	1995	45.	Moldova	2001
4.	Armenia	2003	46.	Mongolia	1997
5.	Bahrain	1995	47.	Montenegro	2012
6.	Barbados	1995	48.	Morocco	1995
7.	Belize	1995	49.	Namibia	1995
8.	Bolivia	1995	50.	Nicaragua	1995
9.	Botswana	1995	51.	Nigeria	1995
10.	Brunei Darussalam	1995	52.	Oman	2000
11.	Cabo Verde	2008	53.	Pakistan	1995
12.	Cameroon	1995	54.	Panama	1997
13.	Colombia	1995	55.	Papua New Guinea	1996
14.	Costa Rica	1995	56.	Paraguay	1995
15.	Côte d'Ivoire	1995	57.	Peru	1995
16.	Cuba	1995	58.	Philippines	1995
17.	Democratic Republic of the Congo	1997	59.	Qatar	1996
18.	Dominica	1995	60.	Saint Kitts and Nevis	1996
19.	Dominican Republic	1995	61.	Saint Lucia	1995
20.	Ecuador	1996	62.	Saint Vincent & the Grenadines	1995
21.	Egypt	1995	63.	Samoa	2012
22.	El Salvador	1995	64.	Saudi Arabia	2005
23.	Fiji	1996	65.	Singapore	1995
24.	Gabon	1995	66.	South Africa	1995
25.	Georgia	2000	67.	Sri Lanka	1995
26.	Ghana	1995	68.	Suriname	1995
27.	Grenada	1995	69.	Swaziland	1995
28.	Guatemala	1995	70.	Chinese Taipei	2002
29.	Guyana	1995	71.	Tajikistan	2013
30.	Honduras	1995	72.	Thailand	1995
31.	Hong Kong	1995	73.	The former Yugoslav Republic of Macedonia	2003
32.	Indonesia	1995	74.	Tonga	2007
33.	Jamaica	1995	75.	Trinidad and Tobago	1995
34.	Jordan	2000	76.	Tunisia	1995
35.	Kenya	1995	77.	Ukraine	2008
36.	Korea	1995	78.	United Arab Emirates	1996
37.	Kuwait	1995	79.	Uruguay	1995
38.	Kyrgyz Republic	1998	80.	Venezuela	1995
39.	Liechtenstein	1995	81.	Viet Nam	2007
40.	Macao	1995	82.	Zimbabwe	1995
41.	Malaysia	1995			
42.	Maldives	1995			

	LDC Members	Year of Accession
1.	Angola	1996
2.	Bangladesh	1995
3.	Benin	1996
4.	Burkina Faso	1995
5.	Burundi	1995
6.	Cambodia	2004
7.	Central African Republic	1995
8.	Chad	1996
9.	Congo	1997
10.	Djibouti	1995
11.	Gambia	1996
12.	Guinea	1995
13.	Guinea-Bissau	1995
14.	Haiti	1996
15.	Laos	2013
16.	Lesotho	1995
17.	Madagascar	1995
18.	Malawi	1995
19.	Mali	1995
20.	Mauritania	1995
21.	Mozambique	1995
22.	Myanmar	1995
23.	Nepal	2004
24.	Niger	1996
25.	Rwanda	1996
26.	Senegal	1995
27.	Sierra Leone	1995
28.	Solomon Islands	1996
29.	Tanzania	1995
30.	Togo	1995
31.	Uganda	1995
32.	Vanuatu	2012
33.	Yemen	2014
34.	Zambia	1995

Reference: WTO, *Members and Observers,* online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

APPENDIX 4

Classification of Members by Geopolitical Groupings

	QUAD Members	Year of Accession
1.	Canada	1995
2.	EC/EU	1995
3.	Japan	1995
4.	United States	1995

	Other Developed Members	Year of Accession
1.	Australia	1995
2.	Chile	1995
3.	Iceland	1995
4.	Israel	1995
5.	New Zealand	1995
6.	Norway	1995
7.	Switzerland	1995
8.	Turkey	1995

	BRIC Members	Year of Accession
1.	Brazil	1995
2.	China	2001
3.	India	1995
4.	Russian Federation	2012

	EC Members	Year of Accession	
		WTO	EC/EU
1.	Austria	1995	1995
2.	Belgium	1995	1952
3.	Bulgaria	1996	2007
4.	Croatia	2000	2013
5.	Cyprus	1995	2004
6.	Czech Republic*	1995	2004
7.	Denmark	1995	1973
8.	Estonia*	1999	2004
9.	Finland	1995	1995
10.	France	1995	1952
11.	Germany	1995	1952
12.	Greece	1995	1981
13.	Hungary*	1995	2004
14.	Ireland	1995	1973
15.	Italy	1995	1952
16.	Latvia	1999	2004
17.	Lithuania	2001	2004
18.	Luxembourg	1995	1952
19.	Malta	1995	2004
20.	Netherlands	1995	1952
21.	Poland*	1995	2004
22.	Portugal	1995	1986
23.	Romania	1995	2007
24.	Slovak Republic	1995	2004
25.	Slovenia	1995	2004
26.	Spain	1995	1986
27.	Sweden	1995	1995
28.	United Kingdom	1995	1973

*Part of the 'Other Developed Members' grouping before 2004.

	African Group	Year of Accession
1.	Angola	1996
2.	Benin	1996
3.	Bostwana	1995
4.	Burkina Faso	1995
5.	Burundi	1995
6.	Cameroon	1995
7.	Cabo Verde	2008
8.	Central African	1995
9.	Chad	1996
10.	Congo	1997
11.	Côte d'Ivoire	1995
12.	Democratic Republic of the Congo	1997
13.	Djibouti	1995
14.	Egypt	1995
15.	Gabon	1995
16.	Gambia	1996
17.	Ghana	1995
18.	Guinea	1995
19.	Guinea Bissau	1995
20.	Kenya	1995
21.	Lesotho	1995
22.	Madagascar	1995
23.	Malawi	1995
24.	Mali	1995
25.	Mauritania	1995
26.	Mauritius	1995
27.	Morocco	1995
28	Mozambique	1995
29.	Namibia	1995
30.	Niger	1996
31.	Nigeria	1995
32.	Rwanda	1996
33.	Senegal	1995
34.	Sierra Leone	1995
35.	South Africa	1995
36.	Swaziland	1995
37.	Tanzania	1995
38.	Togo	1995
39.	Tunisia	1995
40.	Uganda	1995
41.	Zambia	1995
42.	Zimbabwe	1995

	ASEAN	Year of Accession
1.	Brunei Darussalam	1995
2.	Cambodia	2004
3.	Indonesia	1995
4.	Laos	2013
5.	Malaysia	1995
6.	Myanmar	1995
7.	Philippines	1995
8.	Singapore	1995
9.	Thailand	1995
10.	Viet Nam	2007

	MERCOSUR	Year of Accession
1.	Argentina	1995
2.	Bolivia	1995
3.	Paraguay	1995
4.	Uruguay	1995
5.	Venezuela	1995

* Brazil is also an official Member of this coalition, but treated separately (in the BRIC grouping) in this thesis

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