# OPEN TRADE NEGOTIATIONS AS OPPOSED TO SECRET TRADE NEGOTIATIONS: FROM TRANSPARENCY TO PUBLIC PARTICIPATION

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## I. Introduction

In May 2012, a group of legal scholars wrote a letter to the then United States Trade Representative (USTR) Ambassador Ron Kirk criticising the lack of transparency in the Trans-Pacific Partnership (TPP) negotiating process.[1] In reply, then-Ambassador Kirk asserted that the TPP negotiating process is more transparent than any previously negotiated Free Trade Agreements (FTAs).[2] The TPP negotiations aim to establish a regional trade agreement amongst twelve Asia Pacific countries: Australia, Brunei, Chile, Malaysia, Peru, Singapore, the United States, Vietnam, New Zealand, Canada, Mexico and Japan.[3]

Leaked draft texts of the intellectual property, regulatory coherence and investment chapters of the TPP Agreement have resulted in a call for transparency.[4] InternetNZ, for example, was concerned that there would be significant costs if New Zealand agreed to the United States' demands for stronger intellectual property laws in the TPP Agreement, and that these high costs are impossible to evaluate because of the secrecy surrounding the negotiations.[5]

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1 Sean Flynn "Kirk Responds to TPP Transparency Demands" (10 May 2012) Infojustice.org <http://infojustice.org>.

2 The scholars disagreed with Ambassador Kirk's reference to bilateral free trade agreement negotiations as a comparison to the current Trans-Pacific Partnership (TPP) talks. They argued that the FTAs processes are indeed more secretive than the TPP. The USTR should make a comparison to far more open processes such as in the World Trade Organization [WTO] or World Intellectual Property Organization [WIPO]. See Flynn, above n 1.

3 As of November 2013, there were twelve countries negotiating the TPP Agreement. Japan, the newest TPP participant, was joined the negotiations in July 2013. See New Zealand Ministry of Foreign Affairs and Trade [MFAT] "Trans-Pacific Partnership (TPP) Negotiations" <www.mfat.govt.nz>.

4 Leaked texts of the TPP investment and regulatory coherence chapters are available at the Citizens Trade Campaign website <www.citizenstrade.org>. The intellectual property chapter is available at <www.keepthewebopen.com>.

5 InternetNZ "Position Paper on the Trans Pacific Partnership Agreement" (10 November 2011) <http://internetnz.net.nz>.

The governments involved in the TPP negotiations including New Zealand refuse to release the negotiating texts of the Agreement.[6] The reason is because trade and investment negotiations cover a wide range of complex and sensitive issues. It is therefore common practice that trade negotiating partners enter into a confidential arrangement.[7]

Similarly, in 2009 the Anti-Counterfeiting Trade Agreement (ACTA) negotiating partners[8] issued a joint statement as a response to requests for transparency stating that "it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation."[9] A European Union negotiator for the ACTA also asserted that he had never seen a treaty being negotiated in public; it is unfeasible.[10] In 2010, opponents of secretive negotiations on the ACTA submitted a document to New Zealand negotiators asking for full transparency and public scrutiny of the ACTA process in order to ensure no unintended consequences to the community as a result of the agreement.[11]

This article evaluates the notions of transparency and secrecy in the context of trade agreement negotiations. Transparency is generally characterised by open negotiation and access to information. While transparency and public participation are important elements for those who are concerned with good governance, democracy and public interest,[12] a secretive approach can be seen as necessary to provide the negotiators with an environment of confidence in order to reach successful outcomes.[13]

This article argues that simply arguing in favour of open negotiations on the one hand and closed negotiations on the other is misguided. The focus should not be on this division, but rather on how to achieve public participation in closed-door negotiations. This argument does not necessarily mean that this article is against transparency. People have the right to

6 Citizens Trade Campaign "'Bigger-than-NAFTA' Leesburg Trade Summit Attracts Controversy, Protest" (5 September 2012) <www.citizenstrade.org>; New Zealand Parliament "Order Paper and Questions: Questions for Oral Answer – 9. Trans-Pacific Partnership – Investor-State Dispute Provisions" (14 June 2012) <http://www.parliament.nz/en-nz/pb/business/qoa/50HansQ_20120614_00000009/9-trans-pacific-partnership%E2%80%94investor-state-dispute-provisions>.

7 United States Trade Representative [USTR] "Fact Sheet: Transparency and Trans-Pacific Partnership" (June 2012) <www.ustr.gov>.

8 The Anti-Counterfeiting Trade Agreement [ACTA] is a plurilateral agreement focusing on the issues of pirated copyright and counterfeit trademark goods, as well as other intellectual property (IP)-protected goods. The participants in ACTA negotiations were Australia, Canada, the European Union, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States.

9 European Commission "The Anti-Counterfeiting Trade Agreement – Summary of Key Elements under Discussion" (6 November 2009) <http://trade.ec.europa.eu>.

10 Knowledge Ecology International "ACTA is Secret. How Transparent are Other Global Norm Setting Exercises?" (21 July 2009) <www.keionline.org>.

11 GoPetition "PublicACTA – The Wellington Declaration" (9 April 2010) <www.gopetition.com>.

12 Peter Yu "Six Secret (and Now Open) Fears of ACTA" (2011) 64 SMU L Rev 975 at 998.

13 Yu, above n 12, at 1004; *Electronic Frontier Foundation et al v Office of the United States Trade Representative* No 08-1599 (RMC) (DDC, 29 May 2009) at 13.

know what their governments are negotiating at the international level. Transparency provides the public with the opportunity to obtain authentic information in a timely manner. In principle, the public have a right of access to information. Governments may be exempted from disclosing information or documents concerning free trade agreement negotiations; they, however, often share the documents and information to the business entities with the purpose of enabling them to fulfil their role as the government's advisers. This sort of participation which is in favour of business entities is problematic. Free trade agreements have far-reaching implications on people's daily lives. Consequently, the public should have the right to participate in some way too.

This article consists of nine parts. Part II discusses the definition and significance of transparency to assure good governance. Part III considers the importance of secrecy from the trade negotiators' perspective. Part IV elaborates on the development of transparency in international trade law. Part V discusses the "confidential and open" nature of trade agreements and the successful campaign of anti-globalisation or anti-FTAs groups or activists. Part VI discusses the degree of secrecy in trade talks. Part VII observes the constitutional right of access to information and its exemptions. This part also discusses court decisions that have raised the question as to who the primary stakeholders to the trade talks are. Part VIII explores what public participation in trade negotiations might look like, and Part IX concludes.

## II. Transparency in Trade Negotiations: Definition and its Significance

The term "transparency" is used widely in many different contexts. In general terms, transparency is often referred to as "access to information"[14] or "acting in an open manner".[15] In the administrative law context, it refers to the procedures of administration that are governmental measures which must be published in a timely fashion, accessible to the public, and subject to judicial review.[16] In World Trade Organization (WTO) dispute settlement, transparency refers to public documents and open hearings.[17] In finance and economics, it is to ensure that "market participants have sufficient information

14 Forest Transparency "Transparency and the Right to Information" <http://www.foresttransparency.info/background/forest-transparency/32/transparency-and-the-right-to-information/>. See also International Institute for Sustainable Development [IISD] "Transparency and Accountability" <http://www.iisd.org/trade/policy/transparency.asp>.

15 United Nations Development Programme [UNDP] "Governance for Sustainable Human Development: A UNDP Policy Document – Glossary of Key Terms" <http://mirror.undp.org/magnet/policy/glossary.htm>.

16 Padideh Ala'i "The Multilateral Trading System and Transparency" in Alan S Alexandroff (ed) *Trends in World Trade: Essays in Honor of Sylvia Ostry* (Carolina Academic Press, Durham, North Carolina, 2007) at 106 as cited in Thomas O Sargentich "Teaching Administrative Law in the Twenty-First Century" (1992) 1 Widener J Pub L 147 at 157.

17 Centre of International Environmental Law [CIEL] *Transparency and Public Participation in WTO Dispute Settlement* (CIEL, 2009).

to identify risks and to distinguish one firm's, or one country's, circumstances from another's."[18] Since the term "transparency" is used extensively, there is no generally acceptable definition of it.[19]

There is also no exact definition of transparency in the multilateral trading system. The WTO glossary provides a broad definition: the "degree to which trade policies and practices, and the process by which they are established, are open and predictable."[20] Ostry describes the word "transparency" as "the most opaque in the trade policy lexicon".[21] Although Ostry does not define transparency, she identifies that generally it "includes access to information as well as the nature of participation in the policy-making process."[22]

Since the term transparency is rarely defined with precision, it is important in this article to draw some tentative conceptual boundaries. The notion of transparency discussed here refers to information that governments make available to the public with regard to its trade negotiations activities. In terms of its directionality, it is the channelling of information from government to the public, and vice versa.[23] It also refers to an external type of transparency. In the WTO context, for example, external transparency refers to public and citizens' access to the WTO's work and activities, including the negotiations.[24] Overall, the term transparency involves access to information, and the degree of public participation in the trade negotiations.[25]

Even though the meaning, degree, scope, and content of transparency are unclear, it is considered, either implicitly or explicitly, as a key element in nearly all concepts of good governance.[26] The United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), for instance, identifies eight characteristics of good governance. They are namely: participation, consensus oriented, accountability, transparency, responsiveness, effectiveness

18 International Monetary Fund [IMF] *Report of Working Group on Transparency and Accountability* (IMF, Washington DC, 1998) at v.

19 Ann Florini (ed) *The Right to Know: Transparency for an Open World* (Columbia University Press, New York, 2007) at 4-5.

20 WTO "Glossary Term – Transparency" <www.wto.org>.

21 Sylvia Ostry "External Transparency: The Policy Process at the National Level of the Two-Level Game" in Mike Moore (ed) *Doha and Beyond: The future of the Multilateral Trading System* (9th ed, Cambridge University Press, Cambridge, 2004) at 94. Her assertion is that "its genesis is obscure, its definition-captured in Article X of the 1947 GATT-imprecise, and the extent and nature of its implementation is unknown."

22 At 94.

23 Jonathan Fox "The Uncertain Relationship between Transparency and Accountability" (2007) 17 Development in Practice 663 at 665.

24 Maria Perez-Esteve *WTO Rules and Practices for Transparency and Engagement within Civil Society Organizations* (Working Paper, Draft Prepared for the IISD-Entwined Workshop Civil Society and WTO Accountability, Geneva, 9 May 2011) at 2. The author explains two dimensions of transparency in the WTO: internal and external transparency.

25 See Ostry, above n 21.

26 Friedl Weiss and Silke Steiner "Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison" (2007) 30 Fordham Int'l L J 1545 at 1552.

and efficiency, equity and inclusiveness, and rule of law.[27] Similarly, the elements of good governance provided by the Organisation for Economic Cooperation and Development (OECD) are accountability, transparency, effectiveness, efficiency, responsiveness and rule of law.[28]

So, transparency is of interest as an element of good governance. Openness, in terms of improved transparency generates accountability,[29] although one does not necessarily lead to another.[30] Openness, in terms of better access to decision-making bodies is a prerequisite for active participation.[31] Transparency, accountability, and public participation underpin democracy.[32] For democratic societies, a secretive approach is deemed to undermine the legitimacy of trade negotiations and the laws being created.[33] Thus, transparency and public participation are significant to enhance the credibility of trade negotiation processes. Greater credibility generates a greater degree of compliance.

One may ask why the notion of transparency should be applied in trade negotiations involving non-democratic countries. This article does not claim that transparency, or for that matter any other democratic values, should be the benchmark in trade talks. Governments are by no means alike.[34] Interestingly, regardless of the form of government (democracy or non-democracy, absolute or constitutional monarchy or republic), most states prefer to conduct trade negotiations behind closed doors. Additionally, when individuals are potentially affected by governments' decisions in trade negotiations, they seek to participate or have input into the decision-making at the level where the decision is made.[35] The issue therefore is not whether non-democratic countries should be bound by democratic principles in the context of trade negotiations. Instead, the challenge is how to meet the desire of citizens for greater participation while recognising the prerogative role of governments in conducting negotiations. This article argues that a transparent

27 United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) "What is Good Governance?" <www.unescap.org/pdd/prs/projectactivities/ongoing/gg/governance.pdf>.

28 Organisation for Economic Co-operation and Development (OECD) "Policy Framework for Investment User's Toolkit – Chapter 10. Public Governance" <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf > at 2.

29 Beate Kohler-Koch "The Commission White Paper and the Improvement of European Governance" in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (Jean Monnet Working Paper No 6/01, 2001).

30 Fox, above n 23, at 665.

31 Kohler-Koch, above n 29.

32 European Commission *European Governance: A White Paper* (European Commission, Brussels, 25 July 2001).

33 David S Levine "Transparency Soup: The ACTA Negotiating Process and 'Black Box' Lawmaking" (2011) 26(3) Am U Int'l L Rev 811 at 828.

34 For that reason, this article does not focus on the representative role of parliament in a democratic system. Instead, it looks directly at the relationship between government and the public and transparency as a way to strengthen their relationship.

35 Steve Charnovitz "Opening the WTO to Nongovernmental Interests" (2000) 24 Fordham Int'l L J 173 at 204.

process can accommodate citizens' wish for greater participation while still recognising governments' prerogative role. It is argued that transparency ultimately strengthens the relationship between government and its citizens.

## III. Secrecy in Trade Negotiations: Why it is Crucial for Trade Negotiators

François de Callières, a special envoy of Louis XIV, wrote that "secrecy is the very soul of diplomacy".[36] Historically, diplomats and international negotiators have embraced secrecy and discretion. Successive generations of diplomats and negotiators around the world have become accustomed to carrying out negotiations in a closed manner.[37] In responding to arguments that secrecy negates democracy and other fundamental rights, Whyte argues that the "justification of popular control does not presuppose the publication of diplomatic negotiations."[38] He adds that "it is just as necessary that the people should not meddle with the actual process of diplomacy, but ... should confidently leave such transactions undisturbed in the hands of the expert."[39] De Magalhães also notes that people should not confuse the concepts of secret foreign policy and secret diplomacy/negotiation.[40] In his view, a secret foreign policy refers to an agreement, understanding or arrangement between governments that is kept secret from the public.[41] By citing Jules Cambon, he highlights that diplomacy or negotiations are secret by nature, without this meaning that the right of people to know what their governments have committed to is infringed.[42] De Magalhães concludes that the concept of a secret diplomacy as opposed to an open diplomacy is fatuous.

From the perspective of diplomats and negotiators, secrecy is a negotiation strategy that has been established for centuries. In other words, it is a norm. Maintaining secrecy for negotiators is seen to benefit the process of negotiation. The negotiations run more smoothly and efficiently, because they are shielded from external pressures such as opposition from NGOs or civil society groups.[43] A secretive strategy creates an environment of confidence for

36 François de Callières with introduction by A F Whyte *The Practice of Diplomacy* (Constable and Company, London, 1919) at 142.

37 Julio A Lacarte "Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective" (2004) 7(3) JIEL 683.

38 De Callières, above n 36, at xi.

39 At xii.

40 According to De Magalhães, President Wilson's statement "open covenants openly arrive at" bears most responsibilities for this misunderstanding. See José Calvet de Magalhães (translated by Bernanrdo Futscher Pereira) *The Pure Concept of Diplomacy* (Greenwood Publishing Group, New York, 1988) at 69.

41 At 69. De Magalhães provides that a secret foreign policy has long been rejected by a democratic society.

42 At 70.

43 Yu, above n 12, at 1005; Lavine, above n 33, at 828. Stanford McCoy, the Assistant United States Trade Representative, provided that in his experience, "of paramount importance to a successful negotiation is an environment in which negotiating partners can exchange ideas,

negotiators. Charnovitz provides an interesting illustration when discussing the issues of NGOs' involvement in the WTO negotiations. He notes that it would be a difficult moment, for example, when the United States delegations state that the United States thinks X and NGOs that join the meeting rebut the statement by arguing that public opinion in the United States supports Y.[44] Additionally, other negotiating parties might be reluctant to allow what they put on the table to be disclosed to the public. For example, Singapore and South Korea were concerned about the criticism that might emerge at home concerning their negotiating positions; thus they do not support the release of the draft text of ACTA.[45] Hence, the secrecy approach is one way to promote an amicable long-term negotiating relationship between negotiating partners.[46]

## IV. The Development of Transparency in International Trade Law

According to the former WTO Director-General, Pascal Lamy, transparency is one of the main pillars of the multilateral trading system.[47] Likewise, a decade before, Ostry noted that transparency is one of the basic rules governing the post-war trading system.[48] There are two types of transparency in the WTO: internal and external transparency.[49] Article X (Publication and Administration of Trade Regulations) of the General Agreement on Tariffs and Trade (GATT) manifests the principle of internal transparency.[50] Article X imposes obligations on contracting parties to

draft texts, draft comments on texts, and other negotiating records, with the understanding that these exchanges will be held in confidence." For Stanford McCoy's statement, see *Electronic Frontier Foundation et al v Office of the United States Trade Representative*, above n 13, at 13.

44 Charnovitz, above n 35, at 202.

45 Michael Geist "New ACTA, Leak: US, Korea, Singapore, Denmark Do Not Support Transparency" (25 February 2010) <www.michaelgeist.ca>.

46 Yu, above n 12, at 1006. As Stanford McCoy recalled: "successful negotiations are grounded in trust among the negotiators, and any breach of that trust can lead to a situation in which negotiation partners are more likely to adopt and maintain rigid negotiation positions". For Stanford McCoy's statement, see *Electronic Frontier Foundation et al v Office of the United States Trade Representative*, above n 13, at 13.

47 Pascal Lamy, WTO Director-General "Monitoring and Surveillance: The Rising Agenda of the WTO" (a speech to the Georgetown University Law Centre, Washington DC, 22 October 2007).

48 Sylvia Ostry "China and the WTO: The Transparency Issue" (1998) 3 UCLA J Int'l L & For Aff 1 at 1.

49 Perez-Esteve, above n 24, at 4-8. As elaborated by Perez-Esteve, internal transparency refers to the practices for transparency between the Members, such as publication obligations, notifications to the WTO, and regular reviews on each individual Member's trade policy. External transparency refers to the practices of keeping the public informed of WTO's work and activities.

50 Article X of the General Agreement on Tariffs and Trade [GATT] 55 UNTS 194 was partially based on the 1923 International Custom Convention known as the International Convention relating to the Simplification of Customs Formalities 30 LNTS 371 (opened for signature 3 November 1923, entered into force 27 November 1924), and on the United States proposals

promptly publish laws, regulations, judicial decisions and administrative rulings affecting trade. The important role of Article X is to promote "good governance" amongst WTO members.[51] The Appellate Body in the *US – Cotton Underwear* dispute recognised that Article X embodies the principle of transparency and procedural due process.[52] Article X has inspired the drafting of "internal transparency" provisions in many of the Uruguay Round Agreements.[53]

The WTO has adopted a different approach with regard to its external transparency (transparency and public participation in its negotiation activities). Providing access to information and public participation became a major issue in the WTO following huge public protests and demonstrations during the Seattle Ministerial Conference Meeting. Prior to the WTO era, the GATT negotiations were frequently conducted in a secret and non-transparent manner. Closedness was the rule.[54] Yet, the activities were rarely criticised, because there was no mass or popular culture that politically engaged with the work pursued by the governments in the GATT.[55] GATT was for decades secluded from the public eye, but at the same time functioned

in 1947. The 1923 International Custom Convention can be considered as the foundation stone for transparency rules in the multilateral trading system. Moreover, the proposals proposed by the United Stated were aimed to protect US traders from unclear and informal administrative process in other countries, and to increase the level of the playing field, since US administrative procedures had been made more transparent with the enactment of the United States Administrative Procedures Act (APA) 1946. See GATT *Analytical Index: Guide to GATT Law and Practice* (vol 1, WTO, 1995) at 309; Padideh Ala'i "From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance" (2008) 11(4) JIEL 779 at 782.

51 According to Charnovitz, the rule requiring national governments to manifest transparency through notification procedures is one of the most positive but least known features of GATT/WTO law. See Steve Charnovitz "The WTO and Cosmopolitics" (2004) 7(3) JIEL 675 at 678.

52 The Appellate Body stated that "Article X:2, General Agreement, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises ... The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions" in *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* WT/DS24/AB/R, 10 February 1997 (Report of the Appellate Body) at [29].

53 For instance, Articles X:1 and X:2 of the GATT reflected in Article 7 The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Article III General Agreement on Trade in Services (GATS), Article 12 Custom valuation and Article 63 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Moreover, Article X:3(b) on independent review reflected in Articles 13 Anti-Dumping Agreement [ADA], Article VI:2(a) GATS and Article 41.4 TRIPS Agreement. See Steve Charnovitz "Transparency and Participation in the World Trade Organization" (2004) 56 Rutgers L Rev 927 at 935-936.

54 Lacarte, above n 37, at 683.

55 Gabrielle Marceau and Peter N Pedersen "Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-governmental Organizations and Civil Society's Claims for More Transparency and Public Participation" (1999) 33(1) JWT 5 at 5. According to Marceau and Pedersen, non-governmental interest groups were never formally present in the negotiation room; the discussion, negotiation, representation and participation in the GATT had been always limited to governments' representatives.

well.[56] The work and negotiation culture of the GATT were inherited by its successor, the WTO. The primary actors in the WTO meetings are the Members, and the trade interests of Members remain the *raison d'être* of the WTO.[57]

The dilemma is that trade agreements under the WTO are more far-reaching than under the GATT. The agreements not only deal with border measures such as tariff reductions, but also behind-the-borders measures such as domestic regulations covering health, technical and environmental standards.[58] As elaborated by Petersmann, a "deeper integration" pursued in the framework of the WTO has contributed to a growing number of agreed international minimum standards and the harmonisation of divergent domestic regulations.[59] Therefore, it is not surprising that numerous NGOs criticise the WTO rules for contravening the rights of citizens, and demand increased access to and participation in WTO activities to ensure the representation of all interests.[60]

During the negotiations to create the never formed International Trade Organisation (ITO),[61] the negotiating parties had included a provision concerning the participation of NGOs. Article 87 of the Havana Charter provided that "[t]he Organization may make suitable arrangements for consultation and co-operation with non-governmental organizations". That Charter never came into force, and therefore the establishment of ITO never became a reality, but the GATT survived.[62] The GATT 1947 was an

56 At 6; Lacarte, above n 37, at 683.

57 At 6.

58 Robert W Staiger *Non-Tariff Measures and the WTO* (Staff Working Paper ERSD-2012-01, 2012) at 2. The first generation of barriers is tariffs. Non-tariff measures such as export subsidies, quantitative restrictions anti-dumping measures, technical norms and standards, labelling requirements, have been referred to as a second generation of barriers. A third generation of non-tariff barriers covers various issues ranging from domestic farm support to restrictive regulation of service industries and investments, as well as the protection of intellectual property. See Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds) *The World Trade Organization: Legal, Economics and Political Analyses* (Springer, United States, 2005) at 1052-1053; Thomas Cottier *The Legitimacy of WTO Law* (NCCR Working Paper No 2008/19, November 2008) at 5.

59 Ernst-Ulrich Petersmann "From Negative to Positive Integration in the WTO: The TRIPs Agreement and the WTO Constitution" in Thomas Cottier and Petros C Mavroidis (eds) *Intellectual Property: Trade, Competition, and Sustainable Development* (University of Michigan Press, Michigan, 2003) at 23.

60 Marceau and Pedersen, above n 55, at 6.

61 After World War II, the United States and the United Kingdom submitted proposals to the Economic and Social Council [ECOSOC] of the United Nations concerning the establishment of an international trade body [ITO]. ECOSOC convened a conference to consider the proposals in 1946, and the draft of the ITO Charter was approved in Havana, Cuba in 1948. The ITO Charter is often referred to as the Havana Charter.

62 Since the draft of the ITO Charter was ambitious, some participants had begun talks to reduce custom tariffs. The talks were aimed to boost the process of trade liberalisation as soon as possible. The first round of negotiations resulted in a set of trade rules and tariff concessions, known as the GATT of 1947. For more information see WTO "The GATT Years: From Havana to Marrakesh <www.wto.org>.

agreement among its signatory parties, and was not a formal international organisation. It is therefore reasonable that the provisions did not say anything about external transparency or its relationship with NGOs.

When Members adopted the Marrakesh Agreement establishing the WTO, they included an explicit reference to NGOs in Article V:2.[63] Subsequently, the General Council adopted a set of guidelines to clarify this framework in 1996. The guidelines state that "Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities".[64] Nonetheless, they also provide a limitation: due to the current view, it is not possible for NGOs to be directly involved in the work of the WTO or its meetings.

As noted earlier, the non-commercial matters in the WTO agreements have been criticised by many people and NGOs, particularly anti-globalisation groups. Worries, concerns and criticisms often escalate to public protests, and the outcry reached its pinnacle during the WTO Ministerial Conference of 1999 in Seattle. After the battle of Seattle, Members placed the issue of external transparency at the top of the WTO's agenda, and the improvements have been praised.[65] There are three areas in which the WTO has acted in a more transparent way.[66] They are access to documentation,[67] public participation in dispute settlement,[68] and public participation in WTO sessions, fora, consultation and discussion.[69]

Although NGOs have become regular attendees at the WTO Ministerial Conferences, their attendance is limited to the main plenary sessions, and they are excluded from other meetings such as WTO Committee and Working Group sessions.[70] Other intergovernmental organisations, in contrast, can have access to the meetings and sessions of WTO bodies as observers.[71] For example, the World Intellectual Property Organization (WIPO) has observer status in the Council for Trade-related Aspects of Intellectual Property Rights, and the representatives of the World Health Organisation (WHO) may attend meetings of the Committee on Sanitary and Phytosanitary

63 WTO "Relation with Non-Governmental Organizations/Civil Society" <www.wto.org/english/forums_e/ngo_e/intro_e.htm>.

64 WTO *Guidelines for Arrangements on Relations with Non-Governmental Organizations* WT/L/162, 23 July 1996 (Decision adopted by the General Council on 18 July 1996).

65 Perez-Esteve, above n 24, at 5.

66 Gabrielle Marceau and Mikella Hurley "Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms" (2012) 4(1) Trade L & Dev 19.

67 For example, the WTO's website plays an important role in keeping the public informed of the WTO's daily activities and provides public access to various WTO documents.

68 For example, NGOs may submit *amicus curiae* briefs to the WTO panels or Appellate Body. Panels and/or the Appellate Body have conducted open hearings in certain disputes.

69 For example, the WTO Secretariat hosts pubic information sessions, consultations, discussions, and also holds an annual WTO public forum.

70 Marceau and Hurley, above n 66, at 40-41.

71 As observers, the intergovernmental organisations may have the right to speak in the meetings of WTO bodies. See *Rules of Procedure of the Ministerial Conference and Meetings of the General Council* WT/L/161, 25 July 1996, Annex 3, at [8].

Measures.[72] WIPO, WHO, and other intergovernmental organisations have been praised by NGOs with regard to transparency, public participation, and accessibility.[73] WIPO, for example, allows NGOs to attend the WIPO General Assembly and Committee meetings and broadcasts its negotiation sessions.[74] The openness of these organisations may create indirect access to information about WTO meetings for NGOs.

The current trade negotiation round of the WTO is the Doha Development Agenda (DDA) which was launched in Doha, Qatar in November 2001. To date, the talks are still going on; there is no indication of when the round will be concluded.[75] The slow progress of the Doha Round has spawned a proliferation of bilateral and plurilateral FTAs around the world. A study conducted by Meltzer, for instance, demonstrates that the United States had FTAs with only four countries in 2001, and by April 2011 it had concluded FTAs with 17 countries, signed another three and now is negotiating the TPP with Pacific-rim countries.[76] This phenomenon is not only experienced by the United States but also other countries throughout the world. Bhagwati, in his article "US Trade Policy: The Infatuation with Free Trade Agreements", refers to this phenomenon as a "spaghetti bowl".[77] The proliferation of FTAs has made "anti-globalisation" NGOs and civil society groups mobilising their movement to focus more on bilateral, plurilateral, or regional FTAs.[78] They find the negotiating strategy of the bilateral and plurilateral FTAs more disturbing and shrouded in extreme secrecy.

72 WTO "International Intergovernmental Organizations Granted Observer Status to WTO Bodies" <www.wto.org>.

73 For instance Knowledge Ecology International provides that the negotiation of World Health Organisation (WHO) Framework Convention on Tobacco Control was highly transparent. See: Knowledge Ecology International, above n 10, Attachment 1. Moreover, it has praised WIPO for providing webcast of meetings in session and video-on-demand of 2012 sessions on the WIPO website. See Knowledge Ecology International "Applauding WIPO Webcast and Video-on-Demand" <www.keionline.org>.

74 Knowledge Ecology International, above n 10, at 2-3.

75 Then-WTO Director-General Pascal Lamy urged diplomats to "change gears" in order to boost up the round, because "the credibility lies in the capacity to produce results, not statements." See WTO "Lamy Reports to General Council on Doha Round and Urges Negotiators to 'Change Gears'" (news item, 25 July 2012).

76 Joshua Meltzer *The Challenges to the World Trade Organization: It's All about Legitimacy* (Global Economy and Development at Brookings Policy Paper 2011-04, Brookings Institution, Washington DC, April 2011) at 5.

77 Jagdish Bhagwati "Trade Policy: The Infatuation with Free Trade Agreements" in Jagdish Bhagwati and Anne O Krueger *The Dangerous Drift to Preferential Trade Agreements* (AEI Press, Washington DC, 1995).

78 According to Choudry, bilateral trade deals took place under the radar of many activists, because they had a far lower profile than multilateral negotiations under the WTO - see Aziz Choudry "Fighting FTAs, Educating for Action: The Challenges of Building Resistance to Bilateral Free Trade Agreements" (2010) 2(1) Journal of Alternative Perspective in the Social Science 281 at 288. Lester and Mercurio refer to plurilateral free trade agreements (FTAs) as "'loose regional trade agreements' which may or may not be in somewhere close proximity to each other, but do not necessarily include all countries from that area" in Simon Lester

Under WTO law, any WTO Member deciding to enter into a free trade area shall promptly notify other Members and make available to them information regarding the proposed area.[79] Paragraph 7(a) of Article XXIV of the General Agreement on Tariffs and Trade (GATT) delineates the transparency requirement for all regional trade agreements (RTAs) under the WTO. The concept of transparency under Paragraph 7(a) of Article XXIV is similar to Article X of the GATT. Both Articles refer to internal transparency obligations in the WTO. Nothing in the Agreements talks about external transparency for FTA negotiations.

After all, trade negotiations under the multilateral trading system are more open and transparent than in any bilateral or plurilateral trade agreements. Bilateral and plurilateral FTAs are international agreements in which the negotiations normally proceed in a secret way. In contrast, the WTO, the legal and institutional foundation of the multilateral trading system, has developed its rules and practices for transparency and public participation over the years.[80] The improvements are primarily because of the efforts of the WTO Secretariat.[81] The problem is that multilateralism is struggling which has led to an increasing number of bilateral and regional trade agreements. The slow pace of the Doha round negotiations has demonstrated that it is not an easy task to conduct global trade talks. However, if governments which are the Members of the WTO can advance the multilateral negotiations, not only do they make significant steps forward towards concluding the Doha Round but also they focus again in the multilateral negotiating system which provides greater transparency and participation in its activities.

## V. Transparency Versus Secrecy: The Nature of Trade Agreement and the Successful Campaigns of Anti FTAs Groups/Activists

De Magalhães once stated that the notion of a secret negotiation as opposed to an open negotiation contains a set of false ideas. Although De Magalhães' view regarding the conceptual confusion between secret foreign

and Bryan Mercurio (eds) *Bilateral and Regional Trade Agreements: Case Studies* (Cambridge University Press, Cambridge, 2008) at 2-3. The ACTA and the current negotiated TPP Agreements are examples of plurilateral FTAs.

79 Paragraph 7(a) of Article XXIV of the GATT. On 14 December 2006, the General Council established a new transparency mechanism which provides for early announcement of any regional trade agreements (RTAs) and notification to the WTO. RTAs notified under Article XXIV GATT and Article V GATS will be under the auspices of the Committee on Regional Trade Agreements (CRTA), and RTAs falling under the Enabling Clause will be considered by the Committee on Trade and Development (CTD). See *Transparency Mechanism for Regional Trade Agreements: Decision of 14 December 2006* WT/L/671, 18 December 2006.

80 It is important to note that there is still the ongoing debate regarding transparency and public participation in the WTO; however over the years, the WTO has worked to enhance transparency and participation in its work and activities. Marceau and Hurley discussed the efforts of the WTO to address these issues. See Marceau and Hurley, above n 66.

81 Peter Van den Bossche "NGO Involvement in the WTO: A Comparative Perspective" (2008) 11(4) JIEL 717 at 747.

policy and secret diplomacy is reasonable, we cannot exclude the fact that that the dilemma "transparency versus secrecy" in the context of trade negotiations will always remain. The nature of trade agreements and the successful campaigns of anti FTAs groups/activists contribute most to this dilemma.

Trade agreements are often treated as either legislation or contracts.[82] Schoenborn describes this dilemma as the legislation/contract paradox.[83] It is about legislative openness on the one hand, and contractual confidence on the other hand.[84] Each requires a different formulation process and environment.[85]

The legislative process in a democratic country requires an open system. Public input is significant because the result of the law-making process establishes domestic policy for the country. The treaty making process in New Zealand, for example, demands that all multilateral treaties and major bilateral treaties of particular significance be presented to the House of Representatives before binding treaty action is taken.[86] The legislation implementing the treaty in New Zealand's domestic law should not be introduced into the House until the treaty has been presented to the House.[87] Accordingly, in this sense, a trade agreement is treated as a piece of legislation and so typical domestic requirements mandate an open process.

A trade agreement is however also a contractual arrangement between states concerning their trade relations. Similar to a contract, it is voluntarily entered into, negotiated and agreed by two or more states. Parties to the agreement put their proposals on the table, and the agreement represents the compromises of their divergent positions. In the multilateral trading system, the Appellate Body has affirmed the "contract" character of the WTO Agreement by stating that "the WTO Agreement is a treaty – the international equivalent of a contract".[88] Generally, the executive branch of government has the prerogative to negotiate international agreements.[89] This includes the right to decide whether the negotiation is conducted in an open or closed-door manner. Due to the sensitive atmosphere surrounding trade

82 Brian J Schoenborn "Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?" (1995) 4 Minn J Global Trade 103 at 135.

83 At 135.

84 At 138.

85 At 135.

86 MFAT "The Treaty Making Process in New Zealand" <www.mfat.govt.nz>.

87 MFAT, above n 86.

88 *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996 (Report of the Appellate Body) at [15]. The Sutherland Report also noted that the WTO is "founded on negotiated contractual commitments among governments" – see Report by the Consultative Board to the Director-General Supachai Panitchpakdi (The Sutherland Report) *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (WTO, 2004) at 46.

89 Article 7 of the Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) sets out the rules on who can represent a state in the capacity of concluding a treaty.

agreements, governments often opt for a closed-door negotiation strategy. For instance, if the USTR or other negotiating partners expose all aspects of the TPP Agreement to public scrutiny and debate during the negotiation process, there is a concern that the parties will be unable to achieve their objectives and find middle ground to conclude the agreement.

Furthermore, the successful campaigns of anti-globalisation or anti-FTA groups and activists have played an important role not only in creating the "evil" image of closed-door negotiations, but also in delivering the message of "secret trade deals" to the public attention. The current TPP negotiations are an example. Numerous NGOs and activists have launched public protests and online campaigns against the secrecy of the negotiations. The message "secret TPP negotiations" has resonated well with the public, and successfully grabbed media headlines. The internet is the key in facilitating the campaigns of NGOs and activists.[90] The failure of the OECD negotiations for the Multilateral Agreement on Investment (MAI) in 1998 is a good illustration of the effectiveness of NGOs' "virtual" campaign in bringing down the international negotiations.[91] The protest against the proposed MAI negotiations was the first successful protest movement using the internet.[92] Following the breakdown of the MAI negotiations, NGOs focused their protests and virtual resistance on the WTO Ministerial Meeting of 1999 in Seattle. The failure of the WTO Ministerial Meeting to launch the new round was a significant landmark for anti-globalisation movements. After Seattle, it appears that almost every meeting of international economic organisations has attracted protests from activists and NGOs.[93] The uncertain future of the Doha Round and the growing number of bilateral and regional trade agreements have led activists and NGOs to focus their attention on all types of trade negotiations – bilateral, regional and plurilateral. NGOs and activists criticise these trade agreements for introducing so-called "WTO-plus" provisions.[94]

90 Bilateral.org is, for example, an open-publishing website where people who are against bilateral trade agreements exchange information and build cooperation. The website was collaboratively initiated by several organisations such as Asia-Pacific Research Network, GATT Watchdog New Zealand, Global Justice Ecology Project, GRAIN, IBON Foundation, and XminusY in 2004. See <www.bilateral.org>; Choudry, above n 78, at 298.

91 A major concern regarding the proposed MAI was the investor protection mechanism which NGOs argued replicated the investment provisions in the NAFTA by which private parties could bring an action against government regulation that affects their investment. See Sylvia Ostry "The Future of the World Trade Organization" (1999) Brookings Trade Forum 167 at 178.

92 Peter Van Aelst and Stefaan Walgrave "New Media, New Movements? The Role of the Internet in Shaping the 'Anti-Globalization' Movement" (2002) 5(4) Information, Communication & Society 465 at 468.

93 As Ostry put it: "the lesson from the MAI were put to use in preparing for Seattle and the Seattle experience was helpful for planning to Washington and Prague and Porto Allegre and Davos and Quebec City and so on". Sylvia Ostry "Global Integration: Current and Counter-Currents" (Walter Gordon Lecture, Massey College University of Toronto, 23 May 2001) at 13.

94 The term "WTO-Plus" commonly refers to trade agreements outside of the WTO which have adopted greater obligations or commitments than those currently imposed or required by the WTO.

The successful campaigns of anti-globalisation or anti-FTA groups have contributed much to the "transparency versus secrecy" debate. It is through these campaigns that the public have become more aware of the "transparency versus secrecy" issue in trade negotiations. The notorious image of secret trade negotiations has generated a public call for transparency and, more generally, public opposition to trade agreements.

## VI. Are Trade Talks Really Kept Secret?

Trade negotiations are usually conducted behind closed doors. However, trade talks today are not as secret as they were in the past. The criticisms from lawmakers, academics and civil liberties groups have over the years resulted in states releasing limited information about their negotiations in the form of press releases, meeting agendas, fact sheets, negotiation summaries and discussion papers.[95] Trade ministries and foreign affairs departments have also created websites dedicated to the negotiation of specific agreements. NGOs also play an active role in providing information to the public. Sometimes, NGOs obtain leaked drafts of a negotiating text and publish these online.[96]

Previous FTAs may also serve as a model for subsequent FTAs and, although not always, some FTAs follow a similar structure or framework. For example, Drahos notes that the FTA between the United States and Jordan would "serve as a model for the other FTAs being negotiated with Chile and Singapore."[97] Additionally, the United States' FTAs with Chile and Singapore "are intended to be bellwethers for future FTAs in both regions, some bilateral and others plurilateral, as well as to set the substantive parameters for the hemisphere wide Free Trade Area of the Americas".[98] Lewis also provides that "the TPP has the potential to create a new paradigm for trade agreements, to form the basis for a Free Trade Area of the Asia Pacific (FTAAP)".[99]

In terms of New Zealand's approach to trade agreements, the Australian Government Productivity Commission's report on bilateral and regional trade agreements provides that it has similarities to that of Australia.[100] The report notes that New Zealand "pursues comprehensive agreements, with a

95 Yu, above n 12, at 1015-1016.

96 For instance, the Citizen Trade Campaign has published on their website a leaked draft of the TPP investment chapter: Citizens Trade Campaign "Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations" (13 June 2012) <www.citizenstrade.org>.

97 Peter Drahos "BITs and BIPs: Bilateralism in Intellectual Property" (2001) J World Intel Prop 791 at 794.

98 Sidney Weintraub "Lesson from the Chile and Singapore Free Trade Agreements" in Jeffrey J Schott (ed) *Free Trade Agreements: US Strategies and Priorities* (Institute for International Economics, Washington DC, 2004) at 79; Peter K Yu "Sinic Trade Agreements" (2011) 44 UC Davis L R 955 at 970, footnote 73.

99 Meredith Kolsky Lewis "The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?" (2011) 34 B C Int'l & Comp L Rev 27 at 28.

100 Productivity Commission *Bilateral and Regional Trade Agreements* (Research Report, Canberra, 2010) at 58.

similar chapter framework to the Australian agreements."[101] Moreover, it is expected that FTAs involving the United States will have a detailed chapter on intellectual property.[102] In contrast, FTAs that do not include the United States may contain a more modest chapter on intellectual property.[103] With regard to dispute settlement, Drahos points out: "within this growing web of bilateral dispute settlement chapters there are important variations, but in general terms these chapters follow the same structure."[104]

The increase in recent years of available information about trade negotiations provides people with a broad picture of the provisions or chapters of trade agreements being negotiated by governments. However, what this provision of information does not do is address the question of public input or participation in trade talks.

## VII. Access to Information – Yes in Principle, But With Some Exceptions

Generally, governments are bound by their constitution to promote openness and to guarantee their people the right of access to information. In New Zealand, such a right is protected under the Official Information Act (OIA) 1982. In principle, the general public in New Zealand own the information that is held by the New Zealand government. The government is required to make the information available unless there is good reason for withholding it.[105] Section 6 of the OIA outlines several reasons for withholding the information. One of the grounds for withholding information is that it concerns the security, defence or international relations of New Zealand. It is also considered good reason for withholding information if the making available of that information would be likely "to damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue government economic or financial policies relating to … the entering into of overseas trade agreements."[106]

Similarly, the United States Freedom of Information Act (FOIA) allows for the full or partial disclosure of information or documents held by the United States government.[107] The Act also outlines nine exemptions. One of

101 At 58. According to the report, there is, however, a case of interest in terms of trade partners. New Zealand has already concluded an FTA with China, while Australia's negotiations with China have not yet been concluded. In contrast, Australia has signed an FTA with the United States while New Zealand is still seeking negotiations with the United States towards an FTA.

102 At 164. For example, the Australia-US FTA contains a number of additional IP provisions and was the only agreement entered by Australia that required legislative changes.

103 Peter Drahos "The Bilateral Web of Trade Dispute Settlement" (paper for the workshop on "WTO Dispute Settlement and Developing Countries: Use, Implication, Strategies, Reforms", University of Wisconsin at Madison, 20-21 May 2005) at 9. As noted by Drahos, Australia's FTAs with Thailand and Singapore contain a mere five and seven articles on intellectual property.

104 At 9.

105 Official Information Act 1982 (NZ), s 5.

106 At s 6(e)(vi).

107 Freedom of Information Act 5 USC § 552.

the exemptions is where the documents or information are properly classified as "in the interest of national defense or foreign policy".[108] In June 2013, the US Court of Appeal for the District of Columbia reversed the judgment of the district court ordering the disclosure of a classified document, a white paper circulated by the USTR during sessions of the Free Trade Agreement of the Americas Negotiating Group on Investment in 2000 setting out the US government's interpretation of the phrase "in like circumstances". The Court held that the USTR had satisfied its burden to explain that the disclosure of documents "reasonably could be expected to cause damage to the national security".[109] Therefore, the disputed document was "properly classified as confidential" and the USTR properly withheld the document as exempt from disclosure under the FOIA.[110]

The exemption related to the national security or international relations is often linked to the maintenance of good foreign relations with other negotiating parties.[111] The General Secretariat of the Council of the European Union, for example, provided that the exception for "protection of the public interest with regard to international relations" was the ground to deny full public access to six ACTA-related documents requested by the applicant (Mr Ante Wessels).[112] In a draft reply to the European Ombudsman, the Council explained that the disclosure of the documents in question "would be seriously prejudicial to the EU's capacity to conduct those negotiations in a climate of confidence and in a constructive co-operation with its negotiating partners".[113]

To maintain mutual trust and confidence among negotiating parties during the negotiation process, governments often sign a confidentiality agreement. For instance, the USTR refused NGOs' demands to have full access to the TPP text claiming that it had signed a confidentiality agreement together with other TPP negotiating parties.[114] The New Zealand Ministry of Foreign Affairs and Trade (MFAT) has published the model letter of confidentiality arrangement on its website. According to the model letter, the

108 At Exemption 1.

109 Section 1.1(a) of the Executive Order 12958 (17 April 1995) states that "'[n]ational security' means the national defense or foreign relations of the United States".

110 *Center for International Environmental Law v Office of the United States Trade Representative and Ron Kirk, in His Official Capacity as the United States Trade Representative* No 12-5136 (DC Cir, 7 June 2013) at 10-11.

111 Section 1.1(l) of the Executive Order 12958 (17 April 1995) provides that "'[d]amage to the national security' means harm to … foreign relations of the United States …". See also Yu, above n 12, at 1003.

112 The letter from the General Secretariat of the Council of the European Union to the applicant (Mr Ante Wessels) can be found at <http://action.ffii.org/acta/Analysis?action=AttachFile&do=get&target=08-1835en.wes.ws-jj.doc>.

113 Council of the European Union "Complaint 90/2009/(JD)OV made by Mr Ante WESSELS to the European Ombudsman" Draft Reply to European Ombudsman Document No 8355/09 (Council of the European Union, Brussels, 17 April 2009) <http://register.consilium.europa.eu/pdf/en/09/st08/st08355.en09.pdf> at 6.

114 Maira Sutton "The Secrecy Must be Stopped: Congress Members Probe USTR on the Confidential TPP Negotiations" (27 September 2012) Electronic Frontier Foundation <www.eff.org>.

negotiating documents may only be provided to "government officials", or "persons outside government who participate in that government's domestic consultation process and who have a need to review or be advised of the information in these documents."[115]

Who are "persons outside government who participate ... and who have a need to review or be advised of"? The model letter does not explicitly specify this. However, in its recent decision, the General Court of the European Court of Justice agreed with the European Commission's view that in the context of free trade agreements, they are industry or corporate entities. The General Court in its June 2013 decision stated that the European Commission did not violate EC Regulation No 1049/2001[116] when refusing the applicant (the watchdog group Corporate Europe Observatory) full access to several documents relating to the FTA talks between the European Union and India, even though the Commission had already shared such documents with other corporate entities.[117] The Corporate Europe Observatory had claimed that the exception relating to the protection of the public interest as regards international relations was inapplicable because the documents at issue had entered the public domain since the Commission had disclosed them to business and private entities. In contrast, the Commission argued that the documents were provided to trade associations and companies with the sole purpose of enabling them to fulfil their roles as experts and advisers to the Commission, through the work of the advisory committee and of the working groups on market access. Consequently, the dissemination of the documents by the Commission "cannot be regarded as having intended to, and liable to, make those documents known to the public".[118] The Court concluded that the applicant objectively lacked the status of "experts or advisers", and that objective difference "justifies the difference in treatment in relation to access to the documents at issue".[119]

The EU General Court's decision has raised the question concerning who the primary stakeholders to the trade talks are. Governments often look at major industries and export interests as the experts and major stakeholders to trade agreements. Trade advisory committees primarily consist of the representatives of industries, trade associations and large corporations. Governments regularly ask and listen to their opinions and input, and provide them greater access to the negotiating documents.[120] As public interest in the area of trade agreement increases, meaningful changes in perspective and practice are needed.

115 MFAT "Model Confidentiality Letter" <http://mfat.govt.nz/downloads/trade-agreement/transpacific/TPP%20letter.pdf>.

116 This is a regulation on public access to European Council, European Parliament and European Commission documents.

117 Case T-93/11 *Stichting Corporate Europe Observatory v European Commission* (GCE 7 June 2013).

118 At [39].

119 At [83].

120 Public Knowledge provides that "in the U.S. certain industry groups, including representatives of the largest film and movie trade associations, are provided privileged access to negotiating texts and other information about the TPP's IP chapter." See Public Knowledge "Deep Dive"

Governments also need to seek public views and participation. Lacarte once stated that "legitimate trade agreements should not be driven exclusively by export interests."[121] Trade agreements nowadays are not primarily related to cutting tariff or quotas, or exchanging tariff concessions; they also involve non-trade obligations or standards which have far-reaching ramifications behind the borders. Thus, trade agreements definitely have implications for people or individuals either as consumers or producers.

According to Bennett and Colón-Ríos, the term "participation" is based on the notion that "those affected by regulatory decisions should have the opportunity to influence those decisions, 'in proportion to their stake in the outcome'".[122] Moreover, "those affected by regulatory decisions" can be citizens (public participation) or a certain group of people (participation by stakeholders).[123] By entering into an agreement, a state will have to introduce or impose new obligations, rules, standards, enforcement or penalties system. Put differently, any international trade agreements entered into by a country such as New Zealand will have the potential to undermine the political, economic, and social welfare of its people. Accordingly, the public should be given the opportunities to participate in trade negotiation processes.

## VIII. From the Right of Access to Information to the Right to Participate

As discussed previously, trade negotiations are no longer as secret as they were in the past. There is information provided by government to the public, but it is limited. In the absence of more detailed information from government, the public instead rely on unofficial documents or leaked information to identify the content of trade deals being negotiated by their government. When public understanding is merely informed by news reports, internet campaigns and leaked documents, it may lead to widespread misunderstanding.[124] For example, the leaked texts of a TPP chapter have

<http://tppinfo.org/resources/deep-dive/>. Senator Ron Wyden, a member of the US Senate Finance Committee, expressed his concern stating that "the majority of Congress is being kept in the dark as to the substance of the TPP negotiations, while representatives of U.S. corporations – like Halliburton, Chevron, PHRMA, Comcast, and the Motion Picture Association of America – are being consulted and made privy to details of the agreement." See Senator Ron Wyden "IYCMI: Wyden Statement Introducing "Introduction of the 'Congressional Oversight over Trade Negotiations Act'" (23 May 2012) <www.wyden.senate.gov>.

121 Lacarte, above n 37, at 686.

122 Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 25.

123 At 28.

124 Dror points out that when "public discourse is dominated by dogmas and wild political competition ... increasing transparency and openness may open the door for more misuse rather than informed democracy and protection of citizen rights." See Yehezkel Dror "Transparency and Openness of Quality Democracy" (paper presented to Proceedings of the Second Civil Service Forum: "Openness and Transparency in Governance: Challenges and Opportunities," Maastricht, 1999) at 65-66.

sparked outrage and deep concerns regarding the Agreement.[125] The problem is that while all the information conveying the peril of trade negotiations posted on the internet might not be entirely true, it can be effective in solidifying negative public opinion on the trade talks. This is one of the reasons why more transparency is important. By being transparent, government assures not only access to reliable information but also better public understanding and knowledge of trade negotiations.

Trade agreements can have significant implications for the general public, therefore there is a strong public interest in having some input into the negotiations. In other words, the public are more concerned about active participation in trade talks than merely open negotiations. Thus, an assumption that the protest against trade negotiations will subside by opening the negotiations appears misguided. Transparency and participation, although correlated, are distinct. Transparency does not necessarily involve public participation. However for public participation to be meaningful, the public must have access to relevant and timely information. Harrison notes that transparency, at its simplest, requires access to information; however it may go beyond that by including public participation in the process.[126] Vaughn also points out that transparency laws primarily focus on "information equity," however they rarely "provide for participation or establish a right to participation".[127] In short, by ensuring active public participation, governments can also promote transparency.

In every round of TPP negotiations so far there has been a stakeholder engagement day. The event is "designed for stakeholders to make presentations on issues relating to the TPP negotiations and to exchange views with the delegates."[128] While some commentators praise the event as a concrete effort by governments to engage the public and discuss the progress of negotiations,[129] some NGOs and concerned individuals consider this event insufficient.[130] They state that the chief negotiators often do not reveal much about the substance of negotiations and simply clarify procedural matters

125 Public Citizen "Leaked TPP Chapter Sparks Outrage" (19 June 2012) <http://citizen.typepad.com/eyesontrade/2012/06/leaked-tpp-chapter-sparks-outrage-medias-attention.html>.

126 James Harrison *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration* (University of Edinburgh School of Law Working Paper Series No 2011/01) at 2.

127 Robert G Vaughn "Transparency in the Administration of Laws: The Relationship between Differing Jurisdictions for Transparency and Differing Views of Administrative Laws" (2011) 26 (4) Am U Int'l L Rev 969 at 981.

128 New Zealand Ministry of Foreign Affairs and Trade "General Information on the TPP Stakeholders' Forum and Stakeholders' Briefing" (June 2011, Vietnam) <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/General_information_on_stakeholder_program_in_TPP_Round_7.pdf>.

129 Catherine Mellor "Trans-Pacific Partnership Round 13: In the Interest of Transparency …" (2 July 2012) Free Enterprise <www.freeenterprise.com>.

130 Maria Sutton "TPP Countdown: USTR Whittles Away at Remaining Trace of Public Participation" (29 August 2012) Electronic Frontier Foundation <www.eff.org>.

such as information about future rounds. In addition, in the most recent round of TPP negotiations, presentation time for individual stakeholders was significantly reduced from 15 to seven minutes.[131]

One possible reason for this clearly inadequate process of public engagement is that governments are still sceptical about the benefits that can accrue from allowing public participation in trade negotiations. Put differently, NGOs and concerned individuals are often perceived to play a role as government antagonists rather than partners in the area of trade negotiations. The perspective is different in terms of participation by large business entities. Governments involve them as their partners because governments believe they will benefit from business involvement in trade talks.

Accordingly, governments need to be convinced of the benefits to them of public participation.[132] The Warwick Commission in its 2007 Report on "The Multilateral Trade Regime: Which Way Forward?", for example, points out that permitting NGOs to participate in the form of submission of amicus curiae briefs has "the benefit of enriching the nature and quality of information … and of contributing to the transparency of dispute settlement processes."[133] A constructive public participation can provide a positive contribution to governments' negotiation activities.

Both "bottom-up" and "top-down" approaches can be used to create more meaningful and constructive public participation. A "bottom-up" approach is a participatory approach initiated by the public. Public protests, demonstrations and consumer boycotts can be seen as "bottom-up" drivers.[134] However, these forms of action are often aimed to put pressure on government. Too much "bottom-up" pressure may disrupt the negotiation process. Thus, we also need to look at a "bottom-up" approach that can promote constructive participation. A good example is a practice that is carried out in the WTO annual public forum. The WTO public forum is intended to provide NGOs, academia and the public in general with an opportunity to debate with WTO Members. It attracts more than 1500 representatives from civil society, academia, business, governments, the media, individuals, inter-governmental organisations and parliamentarians.[135] An important element of the forum is that NGOs or academic institutions are able to suggest the themes of workshops, to organise their own events and to structure those

131 Krista Cox "19th Round of TPP Negotiations: Reduced Engagement for 'Stakeholder Engagement' Day" (27 August 2013) Knowledge Ecology International <http://keionline.org>. Knowledge Ecology International states that it is difficult in seven minutes to say anything of substance or to present much analysis.

132 The advantages such as legitimacy, creating informed citizens and good quality outcomes have been pointed out generally in this article. For details, see Bennett and Colón-Ríos, above n 122, at 28-37.

133 Warwick Commission *The Multilateral Trade Regime: Which Way Forward?* (Report of the First Warwick Commission, University of Warwick, Nottingham, 2007) at 33.

134 Caspian Richards, Kirsty Blackstock and Claudia Carter *Practical Approaches to Participation* (2nd ed, SERG Policy Brief Number 1, Macaulay Institute, 2007) at 7.

135 WTO "Public Forum" <www.wto.org>.

events around the topics that are of interest to them.[136] The WTO does not interfere with the issues to be discussed or the selection of panellists, speakers or other participants. As noted by Lamy, the forums are organised through a "bottom-up" or "grass-roots" process.[137] Despite some concerns related to the forums,[138] this "bottom-up" or "grass-roots" process adds value to the WTO's growing practice of public participation.

A "top-down" approach is a participatory approach driven from the top by government. Formal-direct methods of public participation suggested by Schoenborn are an instance of a "top-down" approach.[139] "Direct" means the actual contact between government and those seeking to impact the process and "formal" requires some sort of regulatory establishment.[140] Using advisory or special committees is an example of formal-direct methods of public participation.[141] Governments are able to consult with them on issues related to trade agreements, however as the role of these committees is simply to advise the government, they do not have direct input into the negotiations themselves.[142] In selecting the members of an advisory committee or working group, government needs to ensure that in addition to industry and business entities, academics, consumer groups, public representatives or individuals are selected.

The underlying objectives of both the bottom-up and top-down approaches are essentially to provide a "two-way" constructive dialogue between government and the public, to ensure the flow of accurate information on both sides, to provide opportunities to participate for the public and to create public participation opportunities in government negotiation activities. However, it is important to be clear that any methods of public participation need not override government needs for confidentiality. Government can still conduct closed-door negotiations or decide not to share sensitive information. There is no one-size-fits-all model of public participation that can be applied in all circumstances.[143] As trade agreements evolve, the complexity of negotiations will grow and the definition of interested stakeholders will expand. This evolution is likely to shape the techniques and forms of public participation.

136 Pascal Lamy "Welcome to the WTO's 2007 Public Forum on How the WTO Can Harness Globalization" <www.wto.org>. See also Van den Bossche, above n 81, at 729.

137 Pascal Lamy, WTO Director-General "Civil Society is Influencing the WTO Agenda" (WTO Public Forum, 4 October 2007) <www.wto.org>.

138 For example, the forums do not lead to a civil society statement to the WTO Ministerial Conference or General Council: Van den Bossche, above n 81, at 731.

139 Schoenborn, above n 82.

140 At 124.

141 For example, United States Trade Act 19 US § 2155(b) states that "[t]he President shall establish an Advisory Committee for Trade Policy and Negotiations to provide overall policy advice". Article 207(3) of the Consolidated version of the Treaty on the Functioning of the European Union provides that "[t]he Commission shall conduct these [international agreements] negotiations in consultation with a special committee appointed by the Council …".

142 Schoenborn, above n 82, at 125.

143 Richards, Blackstock and Carter, above n 134, at 21.

However, ensuring meaningful opportunities for public participation and developing two-way communication processes are two key elements that should be present in any form of public participation.

While there are benefits to public participation in trade negotiations, it needs to be noted that there are also some downsides. Participatory processes require time, and human and financial resources.[144] A number of stakeholders might also develop unrealistic expectations about the outcome and become frustrated when their expectations are not fulfilled.[145] It is also necessary to keep in mind that public participation is not a substitute for government's ultimate responsibility in the area of trade negotiations. The bottom line, according to Ostry, is that "it is the role of government to make policy; transparency and participation are not a replacement for government responsibility."[146]

## IX. Conclusion

There has been considerable development in recent years as to how trade agreements should be negotiated. It started with a secretive approach. Negotiations behind closed doors were a common and widely accepted practice. This approach has been challenged by an increasing public demand for open negotiations. This change can be attributed to successful campaigns by NGOs and activists, the far-reaching consequences of trade agreements, and the advancement of technology and information.

It is the right of citizens to know what their government is doing and governments have an obligation to be transparent. However, these rights and obligations are not absolute. Under certain circumstances, governments may be exempted from the obligation to make information available to the public; confidentiality may on occasion be appropriate. This article concludes that secret negotiations are not as "evil" as some may think; however allowing merely industry and business entities to participate in government trade negotiation activities is questionable. Given the possible far-reaching effects of trade agreements on society, the public should also be given the opportunities to participate meaningfully.

This article maintains that the suggested answer to the problem of a secret negotiation is not an open negotiation, but public participation in closed door negotiations.

144 Bennett and Colón-Ríos, above n 122, at 39. Bennett and Colón-Ríos note that in the OECD's Focus on Citizens report, governments provide that resources and time were the most significant challenges to implementing participatory decision-making.

145 Ostry, above n 21, at 111.

146 At 111.