
The Hidden World of WTO Governance

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Abstract

In academic literature the WTO is largely viewed as synonymous with its novel system for the settlement of disputes. We seek to demonstrate in this article that there is more to the WTO than this, and to exemplify this claim by reference to two specific sites of non-judicial governance in the WTO. We suggest that these two WTO committees perform important functions which are largely hidden from view. In particular, we point to the role that they play in generating and disseminating information, and as facilitators of technical assistance and regulatory learning. We also suggest that these committees contribute to the emergence of interpretive communities which serve to elaborate upon the open-ended norms laid down in the relevant agreements. Having surveyed the activities of these two sites of non-judicial governance in the WTO, we then situate them in the context of three contemporary narratives of global governance (transgovernmental networks, global administrative law, and managerialism), and use these as a way of critically evaluating the developments we describe. It is our view that the material that we have uncovered in relation to these two examples is sufficiently rich to justify further research in this domain.

1 Introduction

This article seeks to draw attention to a number of 'hidden' sites of governance within the World Trade Organization, the significance of which we feel has so far been under-explored. The vast bulk of present research into the operation of the WTO focuses either on the dynamics of high-level international trade negotiations or on the functioning of the WTO's legalized dispute settlement system. But operating in parallel with both negotiation and dispute settlement – and relatively neglected in the academic literature – is a large infrastructure of over 35 committees, working parties, and review

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bodies. Our continuing exploration of these bodies, of which this article represents the first fruits, began with the intuition that these committees perform functions vital to the ongoing operation of the WTO, and that a greater awareness of their functions may helpfully challenge and enrich dominant perceptions of the roles that the WTO does (and doesn't) play in the governance of the international economy. These governance spaces, it seemed to us as we began, apparently operate on the basis of premises which are quite different from those which characterize formal dispute settlement. Indeed, they seemed to reveal a picture of the WTO which is at least potentially more dynamic, more cooperative, more reflexive, and more regulatory re-enforcing than is nearly always thought to be the case, based exclusively upon an examination of the dynamics of multilateral trade negotiations and dispute settlement.

Changing our focus to the administrative hinterland of the WTO may be particularly timely, given the difficulties which have beset the Doha Round. If these difficulties presage – or perhaps accelerate – a broader shift in the role of the WTO, from a forum for the creation and enforcement of binding legal commitments to an institution for the supervision, monitoring, and management of (certain aspects of) the international trading system, then it is a relatively urgent task to build better maps and create thicker descriptions of what is going on within the administrative infrastructure of the WTO. The work of these committees, it should be acknowledged, is mundane: it is primarily concerned with the administration of trade agreements, deliberately eschews matters of high politics, is frequently technical, and is hardly noticed among most scholars of international organizations. But this is of course why we have chosen to study them – in our view, it is precisely on the basis of this ordinary world of apparently mundane activity, on the day-to-day interactions which together constitute the practice of governing, that we ought to build our understanding of what global governance is and ought to be.

This article begins by outlining the operation of two parts of the WTO's committee system, the first being the Services Council and its subsidiary bodies, and the second the Committee on Sanitary and Phytosanitary Measures (SPS Committee). Neither of these case studies is offered as a definitive or complete account of the operation of these bodies – rather, our aim is to highlight a number of intriguing processes taking place in them, which we believe are relevant to those interested in the evolution of structures of global economic governance generally. These case studies are deliberately descriptive, and as far as possible we try to let them simply speak for themselves, without trying to force them into a particular narrative or normative frame. Then, in the subsequent three sections, we set out a number of alternative contemporary narratives about the trajectories of global governance, and attempt to situate our case studies in relation to them: namely, the literature around the growth of transgovernmental regulatory networks, the growing body of work on global administrative law; and the critical scholarship concerning the emergence of a 'managerialist' ethos in international law. While no one of these contemporary literatures fully accounts for the practice of WTO administrative infrastructure, we nonetheless offer them as useful as frames of reference which can help orient the questions we ask about the operation of WTO committees, and inform our views as to both the promise they offer and the risks they create.

2 Administration of the General Agreement on Trade in Services

The new General Agreement on Trade in Services was concluded in 1994 as part of the final package of the Uruguay Round of multilateral trade negotiations. These negotiations established for the first time a multilateral legal framework governing the liberalization of international trade in services of all kinds, roughly analogous to the legal framework covering trade in goods found in the GATT. At the same time, they also established an administrative infrastructure associated with this legal framework, under the auspices of the World Trade Organization. The primary WTO administrative body in the area of services is the Council for Trade in Services, which is established by Article IV.5 of the Marrakesh Agreement Establishing the World Trade Organization. The legal framework governing the operation of this body is very open. The primary mandate of the Council is simply to 'oversee the functioning of the General Agreement on Trade in Services'.¹ It is empowered also to determine its own rules of procedure, and has done so.² It has the authority to establish any subsidiary bodies that it sees fit.³ It meets according to its own timetable, on average once every six weeks or so.

There are at present four subsidiary bodies to the Services Council. At its first meeting in 1995 the Council created a Committee on Trade in Financial Services, which was tasked essentially with the administration of all GATS-related matters as they pertained to the financial services sector.⁴ The following year, the Council then created the Committee on Specific Commitments. This obscurely-named committee oversees Members' 'specific commitments' – that is, the liberalization commitments agreed to in negotiations and entered in their schedules – a task which includes holding discussions on how to 'improv[e] their technical accuracy and coherence', as well as monitoring the modification of these commitments under GATS Article XXI.⁵ In addition to these two Committees, there are two Working Parties – the Working Party on GATS Rules, and the Working Party on Domestic Regulation – which are tasked with

¹ Marrakesh Agreement Establishing the World Trade Organization, Art. IV.5, available at: www.wto.org/english/docs_e/legal_e/04-wto_e.htm. In addition, more specific functions of the Council are set out in the General Agreement on Trade in Services, e.g., receiving notifications of measures affecting trade in services (Art. III), of Economic Integration Agreements (Art. V), of Labour Market Integration Agreements (Art. Vbis), of recognition agreements (Art. VII), of BOP restrictions (Art. XII), of modification of Schedules (Art. XXI), as well as developing disciplines on domestic regulation (Art. VI), taking measures as requested relating to monopolies and service suppliers (Art. VIII), conducting an assessment of trade in services (Art. XIX), drawing up procedures for the modification of Schedules (Art. XXI), carrying out various tasks in relation to dispute settlement (Art. XXII), and making decisions on technical assistance (Art. XXV).

² WTO Doc. S/L/15.

³ Marrakesh Agreement Establishing the World Trade Organization, Art. IV.6.

⁴ See Decision on Institutional Arrangements for the General Agreement on Trade in Services, available at: www.wto.org/english/docs_e/legal_e/44-dsvin_e.htm, and WTO Docs S/L/1 and S/C/M/1, at paras 6–7. Although there has been a proposal to create at least one other sectoral committee, this remains the only one so far.

⁵ See WTO Docs S/L/16, S/CSC/M/1.

carrying out further negotiations on matters which remained unresolved at the end of the Uruguay Round, as required by Articles VI, X, XIII, and XV of the GATS.

The rules of procedure of these bodies are only very thinly specified in their constituent documents, so that each is broadly empowered to determine its own rules of procedure as it sees fit. Participation in the formal meetings in all of these bodies is open only to representatives of WTO Members, and participants tend to be drawn from career diplomats posted to missions in Geneva. However, Members have full discretion as to who they send to the committees to accompany their usual representatives, and each of the committees as a whole has considerable discretion to extend invitations to other organizations to participate in meetings as observers, to make presentations and answer questions, or in any other capacity. Thus, for example, the IMF, World Bank, UNCTAD, and UN have all been granted permanent observer status in the Services Council and its subsidiary bodies.⁶ The International Civil Aviation Organization, World Health Organization, International Telecommunications Union, World Tourism Organization, Universal Postal Union, and OECD have also been granted observer status on an *ad hoc* basis to particular meetings of the Council and its subsidiary bodies.⁷ In addition, many more organizations have been involved in informal seminars and other meetings which occur around the formal committee meetings.

Although these administrative bodies carry out a wide range of activities, much of their work can appear mundane. Committees receive notifications of new regulatory measures submitted by Members, compile databases of these measures, monitor the ratification of legal texts, conduct technical verification of documents, endlessly discuss how to carry out their own business, and request and discuss background documents from the Secretariat in preparation for all of these activities. Moreover, the minutes of these bodies paint (at least at first glance) a frankly uninspiring and relatively bland picture of long and inconclusive discussions, and few concrete decisions, with little by way of immediate consequences. Nevertheless, it is one of our starting premises that it is in the day-to-day interactions between delegates, in such apparently insignificant and highly technical discussions, that our understanding of transnational governance structures must begin. In what follows, then, we focus in on two hardly noticed elements in the work programme of these administrative bodies – the first relating to processes of ‘information exchange’, and the second relating to their ‘norm elaboration’ function.

A *Information Exchange*

The Services Council and its subsidiary Committees can act as venues for the exchange of information among WTO members, as well as between these Members and officials from other international organizations. We use the term ‘information exchange’ broadly, to cover not just the provision and transmission of knowledge, but also the associated processes of discussion, contestation, elaboration, and justification that

⁶ WTO Docs S/C/M/1, at para. 4 (on an *ad hoc* basis), and S/C/M/17 (making that decision permanent).

⁷ See WTO Docs S/C/M/42, S/C/6. For a list of pending requests for observer status see WTO Doc. S/C/W/19, including Rev. 1–6.

occur in and around such exchange. A good number of the different programmes of these bodies could fall within this description; we will focus on just three. While at present they present a mixed picture in terms of their significance and extent, we draw attention to them as indicating an important potential in the operation of the committee system.

The first is conducted through the Committee on Trade in Financial Services. At almost every meeting of this Committee, under an agenda item entitled 'Recent Developments in Financial Services Trade', Members are encouraged to make presentations to the Committee on their recent experience with liberalization and 'regulatory reform' in the financial services sector. This presentation, often accompanied by a written submission from the Member's representative, will typically focus on the substance of recent legislative changes, as well as the challenges and difficulties that the country has faced in the process of liberalization, and the tools it has used to deal with such challenges. The floor will then be opened, and other delegates will comment on the presentation, ask clarifying questions, and at times offer their own views on the appropriate lessons to be drawn from the experiences related. Written responses to the questions raised in the Committee will often be circulated in the weeks after a meeting, and the discussion will sometimes continue for a number of future meetings afterward. Those Members who make presentations do so on a voluntary basis, and there is usually only one presentation (sometimes two) at each meeting of the Committee.

A number of examples will help to give the flavour of these presentations. In late 2002, a representative from Hong Kong's regulatory authority for the financial services sector attended the Committee meeting to give a presentation on the challenges that 'e-banking' posed for financial services regulators and recent initiatives that Hong Kong had established to address them.⁸ This was followed a short time later by a paper and presentation from the Swiss delegate, setting out not only the Swiss regulatory framework covering e-finance issues, but also drawing attention to the work of the Basel Committee on precisely this issue.⁹ Other presentations have focussed less on specific regulatory issues, and more on recent changes to national regulatory frameworks: Japan introduced a paper in the Committee soon after it established its Financial Services Authority informing other countries of its basic structure and operation;¹⁰ Canada informed the Committee when it restructured its regulatory framework in 2000;¹¹ a representative of the China Banking Regulatory Commission described the gradual transformation of the Chinese banking sector over the last 20 years;¹² and the US provided detailed information on the processes which led up to the passing of the 'Gramm–Leach–Bliley Act' in 1999.¹³ In addition, there have been a number of presentations – particularly from those developing countries suffering from financial crises of some sort – which provide a counterpoint to the more benign

⁸ WTO Docs S/FIN/M/38, S/FIN/W/25.

⁹ WTO Docs S/FIN/M/40, S/FIN/W/26.

¹⁰ WTO Docs S/FIN/M/27, at para. 45, and S/FIN/W/15.

¹¹ WTO Doc. S/FIN/M/27, at para. 46.

¹² WTO Doc. S/FIN/M/50.

¹³ WTO Doc. S/FIN/M/32.

portraits of financial sector liberalization which characterize many of these presentations. Personnel from Turkey's Banking Regulatory Authority and the Turkish Treasury, for example, gave a detailed account of the Turkish government's response to its financial crises in 2000 and 2001.¹⁴ Argentina also presented a cautionary tale from its own experience.¹⁵ Malaysia, too, presented its view of the need to carry out financial sector liberalization in a 'careful and phased manner' on the basis of its experience of the Asian financial crisis.¹⁶ Mexico also shared the lessons it had learnt from its own experience of financial instability.¹⁷

In addition to providing a forum for exchange between delegates from different Members, the Committee on Trade in Financial Services can also help to expose these delegates to the work other international organizations and transnational networks in the field of financial services. This happens in a variety of semi-formal and informal ways. For example, when delegates are discussing recent domestic reforms in their own countries, they will typically make sure to mention that this process has been carried out in consultation with international organizations such as the World Bank or IMF, and where it has been carried out in accordance with the guidelines set by such bodies as the Bank for International Settlements or the Basle Committee.¹⁸ More directly, the Committee has organized an information-gathering trip to the Bank for International Settlements for delegates.¹⁹ In addition, the International Monetary Fund was invited to put together a briefing session for Committee members on its Financial Sector Assessment Program.²⁰ The World Bank has also made a presentation to Committee members (in an informal seminar context) on the role of financial sector liberalization in processes of economic development.²¹ At a different level – and as some of the examples given earlier demonstrate – national regulators have themselves on numerous occasions visited the Committee to share their knowledge, and there have been some efforts to increase the presence of capital-based experts in the work of the Committee.²² Interestingly, however, proposals to coordinate the work of the Committee more directly with transnational standard-setting bodies such as the International Association of Insurance Supervisors have at times been met with a degree of guarded scepticism, particularly from developing countries – perhaps partly because of a perceived danger of incorporating over time the standards promulgated by such bodies into WTO law itself.²³

All of these occasions provide delegates with opportunities to air their differences about how the financial services sector ought to be organized and regulated, to

¹⁴ WTO Doc. S/FIN/M/40.

¹⁵ WTO Doc. S/FIN/M/32.

¹⁶ WTO Doc. S/FIN/M/41.

¹⁷ WTO Doc. S/FIN/M/46.

¹⁸ See, e.g., WTO Docs S/FIN/M/32, at para. 19, and S/FIN/M/16, M/39.

¹⁹ WTO Doc. S/FIN/M/40.

²⁰ E.g., WTO Doc. S/FIN/M/35, at paras 36–37.

²¹ This presentation is referred to in WTO Doc. S/FIN/M/38.

²² WTO Doc. S/FIN/M/33.

²³ WTO Docs S/FIN/M/25, S/FIN/M/27.

develop shared ideas about the common challenges faced by regulators in the sector, to transmit ideas on different available tools and techniques to address them, and to exercise a form of multilateral peer review of one another's policies. We do not wish to paint an idealized picture of a Committee in which conversations are always open and frank, and in which a spirit of cooperative endeavour necessarily prevails. Indeed, when this agenda item was first established – in the context of the financial services negotiations after the conclusion of the Uruguay Round – the presentations seem at times to have been little more than self-justifying descriptions of recent efforts of liberalization, intended in part to influence the ongoing negotiations. At that time, presentations elicited few responses, and even less open discussion. Even later, once a greater degree of interactivity had been established, the dialogue seems often to have been conducted with an eye on future negotiations. *Demandeurs* in financial services negotiations, for example, often make self-serving presentations in these committees extolling the virtues of financial sector liberalization, while those countries which are more cautious about the process tend to make presentations highlighting the challenges that it poses in their specific contexts. In addition, the discussion at times can become mildly adversarial – for example, when competing interpretations of the causes of Malaysia's financial crisis, and the effectiveness of its policy responses, were put forward in the Committee. Similarly, we do not wish to overstate the extent of communication between the Committee on Trade in Financial Services and other transnational governance bodies working on financial issues. There are many who would see current levels of communication as seriously inadequate.

At the same time, these discussions do seem to contribute to a process of creating a shared knowledge base from which delegates proceed. Some delegates have expressed appreciation of the extent to which they have 'increased awareness of possibilities and limitations deriving from the specificities of the situation' in each country, and thereby led to a change in the expectations of trade partners in concurrent negotiations.²⁴ In addition, smaller countries in particular have expressed appreciation for the opportunities these discussions afford to ask questions of and learn lessons from countries which have already progressed some way down a path that they are considering.²⁵ On a number of occasions specific programmes and measures implemented in one country have been said by other delegates to be of direct relevance to problems faced in theirs.²⁶ Provided that they do not stray into the territory of defining a single standard of appropriate regulation, or evaluating Members' measures according to putatively universal guidelines, many delegates appear to appreciate the opportunity to share regulatory experience and ideas, as a way of assisting the process of reform, and as a 'form of technical assistance'.²⁷ Even

²⁴ WTO Doc. S/FIN/M/17, at para. 10.

²⁵ WTO Doc. S/FIN/M/14.

²⁶ E.g., WTO Docs S/FIN/M/42 (Turkey establishing local capital market); S/FIN/M/18, 24, 32, 42 (discussion of Malaysia's and others' response to financial crises); S/FIN/M/27 (Mauritian financial services regulator).

²⁷ WTO Docs S/FIN/M/49, S/FIN/M/29, S/FIN/M/31.

if they do not agree on a single solution, they do seem to develop common frameworks for describing and making sense of problems, on the basis of which a range of alternative available viewpoints as to how to address them can be expressed.

A second programme, with somewhat different contours, has been organized through the Services Council itself. As is well known, the GATS envisages a progressive process of liberalization in services through successive rounds of negotiations. Article XIX of the GATS mandated the commencement of the first round of such negotiations by 2000. In preparation for these negotiations, the Council was required by the same Article to 'carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement'. One of the reasons for including this requirement was to avoid a repetition of some of the difficulties that were faced during the Uruguay Round as a result of the lack of data on services trade, which made it difficult for negotiators to determine the consequences of any liberalizing commitments that they made. The purpose of this assessment, then, was in part to provide delegates with usable information – and, just as importantly, a usable analytical framework – to help them collectively set appropriate ambitions and objectives for the negotiations.

The Council approached this task in two phases. The first phase was called an Exchange of Information programme, and it focussed primarily (though not exclusively) on collecting information on existing barriers to services trade. The Secretariat produced background papers on 16 different service sectors, drawing attention to relevant scholarly work, and addressing such issues as the economic importance of the sector at issue, recent market developments, the benefits and challenges of liberalization, existing regulatory frameworks and incidence of current trade barriers, and so on.²⁸ In concert with similar papers prepared by those delegations with the time and inclination, these papers formed the backbone of a set of discussions within the Services Council from June 1998 to April 1999.²⁹ The second phase was the 'Assessment of Trade in Services' itself. This Assessment was envisaged to be backward-looking, in the sense that it was to take stock and evaluate the outcomes of liberalization under the GATS, with a view to assessing the underlying policies encouraged under the agreement.

But such an assessment, it was soon realized, was 'rendered difficult by the paucity of statistics, particularly acute for developing countries, by the lack of information on whether GATS commitments had actually improved on trade regimes, and by the fact that various liberalization initiatives . . . had been negotiated too recently for any economic consequences to be observable'.³⁰ Efforts were therefore made to facilitate the assessment process by drawing on evaluations which had been made elsewhere, in other institutions. Japan prepared an informal paper setting out an assessment of its own experience of services liberalization.³¹ Norway submitted research from a

²⁸ See the reports contained in WTO Docs S/C/W/37–40, 43–47, 49–52, 59–62; as well as the discussions in WTO Docs S/C/M/28–31.

²⁹ WTO Docs S/C/M/28–35.

³⁰ WTO Doc. S/C/M/35, at para. 23.

³¹ WTO Doc. S/C/M/34, at para. 32.

Norwegian research institute which it said could provide a model to aid in the production of national assessments.³² For its part, the WTO Secretariat prepared notes on existing statistics covering services trade, on the economic effects of services trade liberalization, and on recent developments in services trade – though, perhaps inevitably, Members found these to contain insufficient detail.³³ UNCTAD, too, gave its own assessment of the potential benefits and costs of services liberalization for developing countries, setting out the key areas in which in its view developing countries had a comparative advantage (and which they did not), and identifying key opportunities for developing countries.³⁴ These examples – and in particular the UNCTAD presentation, as well as UNCTAD’s later work – seem to have been influential in shaping the agendas and ambitions of developing country coalitions in the Doha Round. They helped to provide a shared conceptual framework and a practical model for Members’ own national-level assessments. In addition, they provided the occasion for processes of ‘collective sense-making’ among delegates in the Services Council, as these delegates discussed and debated amongst themselves (albeit without approaching formal consensus) the different lessons that could and ought to be drawn from recent experience with liberalization. And at a more fundamental level, they helped to build a practically authoritative store of collective knowledge, shared amongst negotiators and delegates, about the dynamics of the services economy, and the ways in which they were likely to affect different countries’ interests. While these discussions within the Council were hardly the only source of information for delegates, they do seem to provide one venue through which evolving expert knowledge about global services trade is disseminated amongst the Geneva trade community.

The third programme we wish to highlight relates to the apparently mundane and technical task of data collection. International trade negotiations are highly information intensive, and in the services context the availability of an adequate knowledge base has presented a problem from the beginning. As other commentators have chronicled, data on services trade – indeed, any kind of maps of the services economy – hardly existed at the time the GATS was being negotiated. This was partly to do with the fact that such data had simply not been collected, but also partly because no common framework for their collection existed. Common answers to a number of fundamental questions were needed if the data collected by statistical agencies and other institutions engaged in knowledge production were to be useful and comparable across jurisdictions. Where, for example, does ‘trade in services’ end and ‘immigration’ or ‘trade in goods’ begin? How is one to describe and classify the different kinds of services that are traded? Which, among the almost infinite forms of regulatory interventions which affect services trade, are ‘barriers to trade’ and which are ‘domestic regulation’? In order to measure and map the current state of the global services economy, it is necessary collectively to settle on a shared way of mapping reality in terms of the core concepts of trade

³² WTO Doc. S/C/M/39.

³³ WTO Docs S/C/W/27, S/C/W/26, S/C/W/94.

³⁴ WTO Doc. S/C/M/38.

vocabulary. Once this common basis is settled, the process of collecting data on services trade, modelling the potential implications of services liberalization, and determining strategic interests can begin.

The point we wish to make here is that the WTO has been deeply involved in the processes by which collective knowledge about the global services economy is being produced, and disseminated amongst delegates to the WTO and more broadly. Most obviously (though this is outside the GATS committee structure we have been focussing on thus far) the WTO has since 1995 been involved in a major statistical project called the Interagency Task Force on Statistics of International Trade in Services. This Task Force is a collaboration between the OECD, the WTO, the IMF, UNCTAD, Eurostat, and the UN Statistics Division. Its purpose is to identify sources of existing data on services trade, isolate the inadequacies of these data sources from the perspective of GATS negotiators, determine appropriate ways to address these inadequacies, and then promulgate guidelines to national (and relevant international) statistical bodies on how to collect data in a more usable way. In 2002, this body produced the *Manual on Statistics of International Trade in Services*, which sets out a series of first steps towards that agreed framework.³⁵

Services committees themselves are involved in processes of data production in a different way. Services negotiations require data not only on the nature and extent of trade flows, but also the nature and incidence of existing barriers to trade in services. As part of its surveillance function – by which the WTO is tasked to monitor the trade policies of its Members – various bodies within the WTO have begun to collect precisely this kind of information. The most obvious example is the Trade Policy Review Mechanism, through which each WTO Member has its trade and economic policies periodically subject to review and criticism by its peers. The reports generated by this mechanism provide one source of data on the trade policies of Members and how they have changed over time. In addition, the Council for Trade in Services itself receives and compiles information on certain trade barriers imposed by WTO Members pursuant to a number of transparency disciplines contained in the GATS. For example, Article III:3 requires Members promptly to inform the Council of any new measures they establish which significantly affect trade in services covered by its liberalization commitments. Even the schedules of commitments entered into by each participant in the Uruguay Round negotiations produced a database – albeit an imperfect one – of information about existing barriers to trade in services.

Research in this area has consistently drawn on these WTO-compiled sources of data to ground expert analysis. The very first attempt comprehensively to map global barriers to trade in services, in 1995, used precisely GATS schedules as its data source.³⁶ More specifically, answers to a questionnaire sent out by the Working Party

³⁵ *Manual on Statistics of International Trade in Services* (2002).

³⁶ Hoekman, 'Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services', World Bank Policy Research Working Paper No. 1455, May 1995, available at: http://econ.worldbank.org/external/default/main?pagePK=64165259&piPK=64165421&theSitePK=469372&menuPK=64216926&entityID=000009265_3961019105408.

on Professional Services, in respect of domestic regulations in the accountancy sector, has been helpful for those attempting to map trade restrictions in the accountancy sector.³⁷ Earlier, during the Uruguay Round, the Negotiating Group on Maritime Transport Services distributed a questionnaire requesting information from Members on the different kinds of trade restrictive measures they had in place, which has proven to be an important source of information for policy analysis in that sector.³⁸

Of course, the information captured through these and other mechanisms is neither comprehensive nor in some cases sufficiently reliable without further verification. It is not our claim that the WTO, including its committee system, has established itself as the only authoritative source of statistical data on barriers to services trade. Rather, the significant observation to be drawn from this is that – like other international economic institutions before it – the WTO seems to be beginning to take on a role as a producer of knowledge in the area of services, starting to position itself as a key institution in the collection and dissemination of data about the global services economy, and that administrative spaces within the WTO represent important venues in which this is taking place.

B Norm Elaboration

In addition to the function of information exchange, GATS committees also engage in processes of norm elaboration. In part, this work is treaty-mandated: the GATS itself requires ongoing negotiations to produce new general rules relating to four distinct issue areas: safeguards, subsidies, government procurement, and so-called ‘domestic regulation’.³⁹ The Working Party on GATS Rules (WPGR) was established in March 1995 in part to facilitate and host negotiations on the first three of these issues, while the Working Party on Professional Services (now the Working Party on Domestic Regulation) addresses the last.

As all commentators agree, these negotiations have been far less successful than had been hoped, at least in terms of the production of agreed rules and texts. They have generated a good deal of activity – meetings, discussion papers, reports, draft texts, and so on – but very little by way of concrete result. The documentary record of the safeguard negotiations, for example, yields a picture of discussions which are largely ungrounded and rudderless, disclosing ‘no common basis’⁴⁰ on which to draft rules. The subsidy negotiations have foundered in part because of fundamental disagreements about what kinds of measures should and should not be classified as subsidies. The negotiations of government procurement in services have been affected by the heightened political sensitivity around all discussions of government procurement in the WTO, at least in Cancún.

³⁷ See Nguyen-Hong, ‘Restrictions on Trade in Professional Services’, Productivity Commission Staff Research Paper, AusInfo, Canberra, Australia, Aug. 2000.

³⁸ See McGuire, Schuele, and Smith, ‘Restrictiveness of International Trade in Maritime Services’, in C.C. Findlay and T. Warren (eds), *Impediments to Trade in Services: Measurement and Policy Implications* (2000), at 201.

³⁹ See GATS Arts X:1, XV:1, XIII:2, VI:4.

⁴⁰ WTO Document S/WPGR/9, at para. 18.

The work on domestic regulation was initially more successful, producing after roughly three years an agreed text containing new disciplines on domestic regulation in the accountancy sector.⁴¹ Since then, the WPDR has continued its work drafting more general disciplines on technical standards, licensing, and qualification requirements relating to all service sectors. It has sought input and advice from a carefully selected group of non-governmental organizations, based on suggestions from Members, as to how these disciplines might be amended and updated to apply to alternative service sectors.⁴² But progress on this front has to some extent been tied to the success of the Doha Round of negotiations more generally. By and large, then, there is good reason for the common perception that services committees have largely failed so far as venues for the elaboration of new formal norms and principles.

It would be misleading, however, to leave the story there. There are at least two important ways in which these committees are involved in the gradual development of shared norms, even in the absence of new formally agreed texts. First, where there is a particular ambiguity in an existing legal provision which a delegation wishes to have clarified, or where a new service arises and it is not clear whether and how existing law applies to it, issues related to the content or application of legal norms can sometimes be brought to a Committee for discussion. An interesting example is contained in a discussion initiated in a meeting of the Committee on Trade in Financial Services in December 2002, in which Brazil raised the question of the distinction between 'liberalization of financial services trade' and 'capital account liberalization'.⁴³ The representative of Brazil complained that in the course of negotiations it had been asked to make commitments which in his view amounted to a full opening of capital account transactions, rather than simple liberalization of financial services. This, in the view of the representative of Brazil, was not the intention of the GATS legal framework – capital account liberalization raising a range of special and controversial economic and policy questions – and he requested a discussion clarifying the 'common understanding' of participants as to the meaning and intent of the relevant GATS provisions. In the discussions which followed, it was clear that this issue was new to a number of delegates, but of intense interest to many. A representative of the IMF was invited to make a presentation on the issue, in which that representative drew a distinction between 'domestic financial sector reforms', 'capital account reform', and 'trade in financial services' as 'inter-related, yet distinct processes', and set out the IMF's views on the benefits and challenges of each. On the basis of this presentation (as well as a paper from the World Bank) delegates exchanged views on two questions: first, whether capital account liberalization was generally desirable and if so in what circumstances; and secondly, whether GATS commitments in their current form required capital account liberalization.

⁴¹ See WTO Doc. S/L/64.

⁴² For an interesting account of this process see Terry, 'Lawyers, GATS and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions', 22 *Penn State Int'l L Rev* (2005) 696, esp. at 706–710.

⁴³ WTO Docs S/FIN/M/38–40.

Perhaps unsurprisingly, these discussions were inconclusive, and certainly led to no formal agreement. Nevertheless, they performed three potentially significant functions to aid in the ongoing elaboration and evolution of GATS legal norms: they highlighted a common agreement among participants that there is a distinction between ‘trade in financial services’ and ‘capital account liberalization’ (even if it is still not clear where one ends and the other begins); they drew attention to many Members’ intentions *not* to commit to capital account liberalization; and they provided a venue in which the trade community could look to financial services experts for guidance on how they ought to understand and interpret the meaning of GATS commitments in the financial services sector. This last point is perhaps the most important: regardless of the lack of formal legal authority of these discussions, in practice they do provide a mechanism by which certain kinds of expert knowledge come to shape and inform legal interpretation in this area.

There are other examples which can be mentioned. The United States, for example, considered that as a matter of strict legal interpretation the imposition of different tax treatment by sub-federal units (states) may *in itself* constitute discrimination, and raised this as a point of concern in the Services Council.⁴⁴ After some discussion, in which a number of countries expressed their view that this was never the intention of GATS negotiators, it was agreed to keep the matter under consideration and not to bring the question before dispute settlement.⁴⁵ This informal settlement has been honoured. Similarly, delegates were willing to come to a consensus that ‘spectrum management’ measures in the area of telecommunications regulation were not intended to be limited by GATS obligations – whatever the strict wording of the agreement.⁴⁶ And, when it was noted that the growing practice of outsourcing manufacturing to specialist providers of ‘manufacturing services’ could expand the scope of the GATS to many areas always thought to be covered only by the GATT, delegates after some discussion drew a distinction between ‘services provided to manufacturers’, ‘services incidental to manufacturing’, and ‘manufacturing services’, and came to a preliminary view that the last category ought not to be covered by GATS provisions.⁴⁷

In these examples, it appears that discussion within Committees are performing the important function of knitting together a kind of interpretive community for the GATS – not going so far as to settle on particular formal interpretations of GATS norms, but rather to agree on common understandings about the limits and boundaries of trade liberalization in the services context, which can provide a background against which GATS obligations are then interpreted. Discussions of this type can over time help to build common conceptual frameworks and shared ideas about the fundamental objectives and limits of the GATS. Of course, these discussions should be distinguished from the formal processes of authoritative legal interpretation conducted through the dispute settlement mechanism, and (in principle at least) by the General Council and Ministerial Council of the WTO.⁴⁸ Discussions within GATS Committees have very

⁴⁴ WTO Doc. S/C/M/1.

⁴⁵ WTO Doc. S/C/M/2.

⁴⁶ WTO Doc. S/C/M/18.

⁴⁷ E.g., WTO Doc. S/CSC/M/17.

⁴⁸ Marrakesh Agreement Establishing the WTO, Art. IX.

little formal legal authority, often none at all.⁴⁹ But their ability to command practical adherence has so far been considerable, particularly where they take the form of exhortations to refrain from dispute settlement.

Such processes of norm elaboration do, of course, have their own limits, and vary in their efficacy and significance. It is interesting to note that much of this informal norm elaboration occurred in the early years of the operation of GATS committees, and much less has occurred more recently. This, it has been suggested, may have to do with the departure from Geneva of the original negotiators of the GATS, who felt a degree of stewardship of the agreements, as well as a certain authoritative knowledge of their intended spirit. It may also have to do with a desire not to pre-empt judicial decision-making. For example, in the context of the work programme on e-commerce, questions were raised about whether services delivered over the internet could be considered 'like' services provided by other means (a term of art in WTO non-discrimination jurisprudence), and whether services provided over the internet fell within the definition of 'Mode 1' or 'Mode 2' services delivery under GATS Article I:2. By and large, delegates refused to answer such questions directly, considering them legal issues properly directed to the judicial organs of the WTO.⁵⁰

Secondly, services committees have been indirectly involved in processes of norm elaboration in the context of their relationships with international regulatory and standard-setting bodies. These relationships can take a number of forms. We drew attention above to the few instances of informal information exchange which has at times occurred between the Committee on Trade in Financial Services and bodies such as the Bank for International Settlements.⁵¹ In addition, the text of the GATS itself establishes an indirect role for standard-setting organizations in the WTO's services-related activities. For example, paragraph 5(b) of Article VI provides that:

In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.

(The obligations in paragraph 5(a) are interim obligations on the application of licensing and qualification requirements and technical standards pending the entry into force of new disciplines on domestic regulation.) Footnote 3 to that provision then goes on to specify that the 'relevant international organizations' are 'international bodies whose membership is open to the relevant bodies of at least all Members of the WTO'. Article VII.5 of the GATS further provides that:

In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

⁴⁹ For a leading account of the formal authority of WTO 'secondary law', potentially including decisions of this kind, see Mavroïdis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts', 102 *AJIL* (2008) 421.

⁵⁰ E.g., WTO Doc. S/C/M/31.

⁵¹ See *supra* note 19, and accompanying text.

The Decision establishing the Working Party on Professional Services (the precursor to the WPDR, tasked with conducting negotiations under Article VI) also required that body to ‘take account of the importance of the governmental and non-governmental bodies regulating professional services’.⁵² This provision has helped to provide an impetus for the development of relationships between the WPPS/WPDR and certain professional standard-setting organizations. For example, in the context of the negotiations on disciplines in the accounting sector, international standards promulgated by the International Federation of Accountants and the International Accounting Standards Committee were carefully analysed at an early stage,⁵³ the IFAC was invited to give a seminar to the WPPS,⁵⁴ information on existing domestic regulation was informally shared between the IFAC and the WPPS,⁵⁵ information on the use of IFAC and IASC standards within WTO Members was collected,⁵⁶ and Members expressed their support for the ongoing development of international standards by IFAC, IASC, and IOSCO.⁵⁷ In addition, in subsequent negotiations extending beyond accounting services, actors within the trade regime have reached out to a variety of other professional organizations, such as the International Bar Association, the International Organization for Standardization, and many others, requesting their input on the appropriate form that new disciplines could take in relation to their sector.⁵⁸

One lesson from these and other examples is that – even where the WTO committees are not themselves producing new texts and formal rules – they seem in some cases to be becoming part of broader networks of associations and organizations which are themselves very much in the business of creating (soft) international standards and norms. The precise role that WTO committees play in these broader networks varies, and depends on context. Their activities may help to promote awareness of international standards across new constituencies, informally encourage governments to participate more actively in the work of these standard-setting bodies, contribute to the effort of monitoring domestic implementation of standards, and help to disseminate international standards by using them to orient discussion.

While forms of cooperation between WTO committees and these standard-setting bodies remain relatively thin at this stage, there are some who see the potential for it to develop further. There is, for example, clearly a concern among some members about the direction in which these thin forms of cooperation are heading. Discussions around the ‘prudential carve-out’ in the Annex on Financial Services provide one illustration.⁵⁹ In the middle of 1999, the Australian delegate to the Committee on Trade in Financial Services raised the issue of the meaning of this

⁵² See WTO Doc. S/L/3, final sentence.

⁵³ E.g., WTO Doc. S/WPPS/W/2.

⁵⁴ See the reference to the seminar on such standards in S/WPPS/M/5 and S/WPPS/1.

⁵⁵ See the reference to this process in S/WPPS/M/1.

⁵⁶ See the questionnaire attached to WTO Doc. S/WPPS/W/7.

⁵⁷ Singapore Ministerial Declaration, WT/MIN(96)/DEC, at para. 17.

⁵⁸ For a full list of all the organizations see WTO Doc. JOB(01)/98, available at: www.wtocommerce.org/tw/SmartKMS/fileviewer?id=2457.

⁵⁹ See para. 2(a) of the Annex on Financial Services to the GATS.

carve-out – different countries clearly had different ideas of what constituted ‘prudential’ regulation, and what could properly be brought within this exception. In the interests of clarity, the Australian delegate suggested an exchange of views on the subject, and observed (along with some other delegates) that the development of a common understanding among participants might be facilitated by the consideration of the views of other international bodies such as the Basel Committee and the IAIS, as well as regulators themselves.⁶⁰ This proposal generated very strong resistance, particularly from developing countries. In these countries’ view, it was not the role of the WTO to develop uniform standards for prudential regulation, and it was far preferable to have a prudential carve-out which was unclear but was sufficiently flexible to cover different approaches. The delegate of Malaysia noted the tendency even for information-gathering efforts to turn into standard-setting exercises, and disputed the need for a ‘common understanding’ of prudential measures.⁶¹ It seems likely that these delegates’ concerns were motivated precisely by their recognition of the important normative consequences to which such discussions can potentially lead in practice.

3 The Committee on Sanitary and Phytosanitary Measures

The SPS Agreement forms part of the WTO Agreement. It covers measures applied to protect against a range of specified risks to animal, plant, and human health, including those arising from additives, contaminants, toxins, or disease-causing organisms in food.⁶² It is concerned with food safety regulation, and with the regulation of pests and diseases in agriculture. The SPS Agreement imposes a series of open-ended obligations on Member States. These are controversial in that they take the WTO beyond a discrimination-based approach to international trade, and place great emphasis upon testing the adequacy of the scientific foundations of regulation.⁶³ Article 5.1 is exemplary in this respect, insisting that national protective measures be based upon a risk assessment, this being construed as implying not only the existence of a risk assessment, but also a ‘rational relationship’ between this and the measure in question.⁶⁴ The WTO ‘courts’ have been active in giving shape and meaning to the requirements laid down.⁶⁵ In so doing they perform the

⁶⁰ WTO Doc. S/FIN/M/25.

⁶¹ WTO Docs S/FIN/M/24–26.

⁶² See Annex A(1) for the definition of an SPS measure. This concerns measures applied to protect human, animal, or plant health from one of the specified risks.

⁶³ See especially Arts 2.2 and 5.1, and J. Scott, *The Sanitary and Phytosanitary Measures Agreement: A Commentary* (2007), at ch. 2.

⁶⁴ See in particular *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, for an elaboration of this.

⁶⁵ See especially *ibid.*, and *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R; *Australia – Measures Affecting the Importation of Salmon*, WT/DS18/AB/R; and most recently *United States – Continued Suspension of Obligations in the Hormones Dispute*, WT/DS320/AB/R.

important function of delimiting the scope of Member State regulatory autonomy in sensitive policy areas, including in relation to food safety.

The existence of the much-discussed WTO 'courts' does not however exhaust the institutional architecture of the SPS Agreement. Article 12 SPS establishes an SPS Committee, and lays down a number of tasks to be performed by it.⁶⁶ It is established to provide a regular forum for consultations, and is charged with carrying out the functions necessary to implement the agreement and to further its objectives. The agreement is skeletal in its specifications regarding the committee, and offers little by way of insight into its composition, role, and mode of operation. We are told that it operates by consensus and little more.⁶⁷ As such, and to a significant degree, the committee is a creature of its own making. The study of the committee is a study in institutional practice, rather than a study in static institutional form.

The committee comprises representatives of WTO Member states. These tend to be either diplomats attached to UN or WTO missions in Geneva, or specialists drawn from a relevant ministry within the Member States. A chairperson is appointed on an annual basis,⁶⁸ and the committee is assisted by a secretariat. The committee has adopted its own working procedures,⁶⁹ which require that at least two meetings be held each year. In reality, three or four regular meetings are arranged, with additional informal meetings arranged around the edge. In addition, special meetings may be convened by the chair on his or her own initiative, or at the request of a Member, to consider a matter of significant importance or urgency. A number of inter-governmental bodies enjoy permanent observer status in the committee. These include the relevant international standard-setting bodies (the so-called sister organizations), the Codex Alimentarius, the World Organization for Animal Health (OIE), and the International Plant Protection Convention.⁷⁰ Other bodies have been granted *ad hoc*, but on-going, observer status.⁷¹ In principle 'observer status should be granted to organizations which objectively contribute to the functioning and implementation of the SPS Agreement'.⁷² It is notable that non-governmental observers are not admitted.

The SPS Committee performs three primary functions. First, it operates as a forum for the raising by Members of 'specific trade concerns'. Secondly, it has

⁶⁶ See also Arts 3.3 and 5.5 SPS Agreement which identify further tasks for the committee.

⁶⁷ Consensus means that no Member formally objects. The committee frequently makes decisions on an *ad referendum* basis, which entails the adoption of a decision by a certain date if no objection is circulated.

⁶⁸ The Chair is selected by the Council for Trade in Goods, in consultation with the committee, and is often drawn from a list of possible candidates forwarded by the committee to the Council.

⁶⁹ See WTO Docs G/SPS/1 and G/L/170.

⁷⁰ Others included are the Food and Agricultural Organization (FAO), International Organization for Standardization (ISO), International Trade Centre (ITC), United Nations Conference on Trade and Development (UNCTAD), the World Bank, and the International Monetary Fund (IMF).

⁷¹ These are the Organization for Economic Cooperation and Development (OECD), the African, Caribbean and Pacific Countries (ACP), European Free Trade Association (EFTA), the Latin American Economic System (SELA), the Inter-American Institute for Cooperation on Agriculture (IICA), and the Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA).

⁷² WTO Doc. G/SPS/W/98, at para. 7.

established a procedure to monitor the harmonization activities of its sister organizations, the international standard-setters in the field. Thirdly, the committee has emerged as an important site for the elaboration of the open-ended norms laid down in the agreement. We will consider each of these in turn, before turning to analyse the nature and significance of interactions in the committee.

A Specific Trade Concerns

One important mechanism for information exchange which has grown up organically in the committee is its routine consideration of specific trade concerns.⁷³ Members consider at each meeting new trade concerns, and re-visit some of those previously raised. The Member raising any such concern may receive the support of other Members. Here, the committee operates as a multilateral forum in which Members are called upon to explain and justify their (proposed) regulations. One example concerned an EU safeguard measure relating to the importation of fruit, vegetables, and fish from four African countries. This had been attributed to an outbreak of cholera in these countries, and to the alleged risk of transmission of cholera through foodstuffs containing fresh water. The issue was raised by Tanzania in the committee, with the support of the observer representative of the WHO. The WHO representative observed that cholera was not only a problem in these four countries, and that at least 50 per cent of countries worldwide were affected by regular outbreaks. He pointed to the almost non-existent risk to countries importing food from cholera-affected countries, and expressed the view that the EU measure was not necessary.⁷⁴ He drew attention to the WTO guidance on the topic, and to the finding that '[a]lthough there is a theoretical risk of Cholera transmission associated with some food commodities moving in international trade, this has rarely proved significant and authorities should seek means of dealing with it other than by applying an embargo on importation'.⁷⁵ The WHO also assisted in ongoing bilateral consultations between the countries concerned. Though the EU objected that WHO intervention was not appropriate, it removed the measure following consultations and reassurances that the necessary guarantees to protect public health were in place.⁷⁶

Since 2000, the SPS secretariat, at the request of the committee, has prepared an annual paper summarizing the specific trade concerns which have been raised. During the years 1995–2007, 261 specific trade concerns were raised. Developing countries have been active participants in this process. They have raised 126 specific trade concerns and supported 177 other such concerns raised by other Members. In 125 cases, the specific trade concern raised related to measures maintained by a developing country. Of

⁷³ The secretariat has devised an SPS Information Management System which makes the process of obtaining, and searching for, information much easier. This includes information on specific trade concerns, but also on other issues such as equivalence. See: <http://spsims.wto.org/>.

⁷⁴ WTO Doc. G/SPS/R/10, at para. 57.

⁷⁵ WTO Doc. G/SPS/204/Rev.5/Add. 3, at para. 55.

⁷⁶ WTO Docs G/SPS/R/11, at para. 99, and G/SPS/GEN/204/Rev. 5/Add.3, at paras. 55–56.

the 245 trade concerns raised, around one third have been reported as resolved or partially resolved.⁷⁷ Resolution of a specific trade concern may flow from an adjustment in the regulatory expectations of an importing Member. The Member in question may abrogate, mitigate, or delay the introduction of the (proposed) measure. To illustrate, Australia modified its tolerance level for benzoic acid in sauces.⁷⁸ The Philippines deferred on an indefinite basis its demand for independent third party certification of HACCP plans.⁷⁹ And Korea indicated that its zero tolerance criteria for listeria would no longer apply to meat for further processing or cooking.⁸⁰ Resolution of specific trade concerns may also flow from an enhancement in the capacity of the exporting Member to meet the applicable standards, or to demonstrate its capacity to do so. Thus, Indonesia lifted its restrictions on New Zealand fresh fruit, having verified that fruit fly had been successfully eradicated.⁸¹ The EU lifted its emergency measures on dioxin in citrus pulp, following a re-evaluation of Brazilian control systems.⁸² China lifted its ban on Dutch products of animal origins, following an inspection visit and the conclusion of a risk assessment.⁸³ And Australia lifted its ban on Californian table grapes, following negotiated agreement on a series of risk management procedures, to be re-evaluated after one year.⁸⁴

It is hard to be certain about cause and effect when it comes to the resolution of specific trade concerns. Three factors seem to play a particularly important role in facilitating agreement between Members.

First, the raising of a specific trade concern often operates as a catalyst for close cooperation between representatives of the Member States concerned. It may lead to inspection visits, and to an increase in understanding and knowledge of the protection systems in place in other states, or to the establishment of a joint working group.⁸⁵ Resolution may flow not so much from an adjustment in concrete regulatory expectations or performance, but from a shift in perception as to the regulatory capacities of other states, and from an increase in levels of mutual trust.

Secondly, in certain cases it seems clear that the raising of such concerns operates to sensitize Members as to the external impact of their regulatory proposals, and to alter their expectations in the light of this. For example, the EU altered its proposal for the setting of maximum aflatoxin levels in certain foodstuffs, following deliberations in the committee and in Codex, and in the light of strong and repeated representations by a number of Members (including developing country Members) spelling out

⁷⁷ WTO Doc. G/SPS/GEN/204/Rev. 8, at para. 8. The committee acknowledges that others may have been resolved and not reported as such. 75 have been resolved and 18 partially resolved.

⁷⁸ WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at paras 12–15.

⁷⁹ WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at paras 96–98. HACCP stands for Hazard Analysis and Critical Control Points and embodies a management-based approach to regulation.

⁸⁰ WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at paras 64–67.

⁸¹ WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at paras 59–60.

⁸² WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at paras 53–54.

⁸³ WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at paras 28–33.

⁸⁴ WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at paras 21–24.

⁸⁵ See, e.g., the establishment of a joint EC–Australia expert working group following the raising of a specific trade concern by the EU in relation to Australian restrictions on the importation of pig meat: WTO Doc. G/SPS/GEN/204/Rev. 5/Part 4, at para. 56.

the profoundly negative consequences of the proposal for them.⁸⁶ More recently the EU delayed the introduction of measures on wood packaging, following protests from Canada and the United States emphasizing the extent of the disruption to trade that would ensue.⁸⁷ Though hard to verify empirically, it seems that the activities of the committee generate greater empathy between Members and a heightened awareness of the needs and difficulties of other states.

Thirdly, and related to both of the above, the raising of a specific trade concern often acts as a prelude to the provision of technical assistance, in a bid to facilitate, and in some cases finance, compliance with the regulation forming the subject matter of the complaint. The aflatoxin example is relevant once more. Here, the EU agreed to provide substantial technical assistance to Bolivia in order to assist with compliance with EU standards, although the exact amount made available remains unclear.⁸⁸ This assistance was directed in the main at the introduction of a national certification and accreditation mechanism which would allow for certification of compliance by accredited domestic laboratories prior to export, thus greatly mitigating the disruptive effects on trade. EU officials assisted in identifying private laboratories able to carry out the necessary tests, and technical exchanges on certification took place.⁸⁹ Such efforts are apparent also following the raising by Mexico of a specific trade concern relating to an emergency ban imposed by the United States on the importation of cantaloupe melons. This was due to the presence of salmonella in a number of previously imported consignments.⁹⁰ The United States resolved to work closely with the government of Mexico and Mexican cantaloupe producers, pending the introduction by Mexico of a certification programme based on good agricultural and manufacturing practice. To this end, officials from the US Food and Drugs Administration (FDA) reviewed the Mexican government's guidelines to assist the cantaloupe industry achieve compliance. FDA officials also worked closely with individual producers to ensure the submission of appropriate information and data to facilitate abrogation of the ban on a case-by-case basis.

It is clear in the light of these technical assistance activities that the committee should not be seen only as generating peer pressure in favour of de-regulation. There is much evidence to support the view that the activities of the committee lead to a ratcheting up of standards, by virtue of its role in enhancing the regulatory compliance capacities of Member States.

All that said, it should not be forgotten that the activities of the committee take shape in a system which is not 'merely' cooperative, but characterized also by

⁸⁶ The aflatoxin saga is a long-running one. See, e.g., WTO Docs G/SPS/R/10, at para. 24, G/SPS/R/11, at para. 15, and G/SPS/R/12, at para. 11.

⁸⁷ See, especially WTO Docs G/SPS/R/20, at para. 33, G/SPS/R/35, at para. 30, and G/SPS/R/36, at para. 65. The US continues to express concern about this requirement and is not satisfied with the scientific basis for it. An IPPC standard is under development. See G/SPS/R/37, at para. 65.

⁸⁸ The EU claims to have provided \$17 million, whereas Bolivia 'clarified' that the amount was less than this. See WTO Doc. G/SPS/R/25, at para. 28.

⁸⁹ WTO Doc. G/SPS/R/27, at para. 31.

⁹⁰ WTO Docs G/SPS/R/28, at para. 179, and G/SPS/29, at para. 208.

the presence of binding, if open-ended, norms, susceptible to enforcement by the WTO 'courts'. The committee operates in the shadow of hierarchy. As with the cholera example above, discussions sometimes proceed by reference to the obligations laid down in the SPS Agreement; for example the risk assessment requirement in Article 5.1.

B International Harmonization

The agricultural and food policy domain is densely populated at the international level. Together with the SPS Committee, and other WTO organs, there exists a range of inter-governmental actors including various standard-setting bodies. Three such bodies (the sister organizations referred to above) are identified in the SPS Agreement and their standards accorded special status by it.⁹¹ The relevant organizations are the Codex Alimentarius Commission with responsibility for food safety,⁹² the World Organization for Animal Health (OIE) with responsibility for animal health and welfare⁹³ and animal production food safety issues, and the International Plant Protection Convention, concerned with preventing the spread and introduction of pests in plants and plant products, and promoting appropriate measures for their control.⁹⁴

The SPS Agreement confers special status on standards emanating from these bodies. It does this in two ways. First, it creates a default expectation that Members will base their measures on relevant international standards.⁹⁵ While binding, departure from these standards is conditional upon this being necessary to achieve a Member's higher level of SPS protection.⁹⁶ Secondly, the scope of the agreement's transparency requirements is defined by reference to the existence of international standards. The notification obligation which seeks to ensure timely publication of regulatory proposals bites only in respect of measures which are not substantially the same as an international standard, or where no such international standard exists.⁹⁷ Many of the specific trade concerns raised by Members relate to measures which are notified in this way. Also, where a national measure is not based on an international standard, or where no relevant standard

⁹¹ See Annex A(2), and Arts 3.1 and 3.3 SPS. See also Art. 3.4 which provides that Members shall play a full part, within the limits of their resources, in the activities of these bodies, to promote within them the development and review of SPS standards. Other bodies may be identified by the committee, acting by consensus. See Annex A(3)(d).

⁹² See, for further information, www.codexalimentarius.net/web/index_en.jsp.

⁹³ See, for further information, www.oie.int/eng/en_index.htm.

⁹⁴ See, for further information, www.ippc.int/IPP/En/default.jsp.

⁹⁵ See Art. 3.1 SPS.

⁹⁶ See Art. 3.3 SPS. Arts 3.1 and 3.3 have been construed by the AB in *EC – Hormones*, *supra* note 69, and the equivalent provisions in the TBT Agreement were construed by the AB in *EC – Trade Description of Sardines*, WT/DS231/AB/R. For the purpose of dispute settlement, the default expectation that measures should be based on international standards has been deemed not to give rise to a burden of proof penalty, and hence even where a measure is not based on an international standard, in disputes before a panel the complaining party will still bear the initial burden. For a full discussion of this case law see Scott, *supra* note 63, at ch. 7.

⁹⁷ See Annex B(5) SPS.

exists, Members incur a reason-giving requirement. They must, upon request by another Member, provide an explanation of the reasons for the measure.⁹⁸ Again, exchanges within the committee serve to reinforce this. The centrality of international standards in defining the scope of Members' procedural obligations to notify measures and to give reasons in relation to them has been somewhat reduced by a recent revision to the committee's recommended procedures for implementing the transparency obligations.⁹⁹ These now 'encourage' Members to notify regulations which are based on, or conform to, international standards, where these are expected to have a significant impact on trade.¹⁰⁰ This is a point to which we will return below.

Still on the theme of international standards, the SPS Agreement calls upon the committee to develop a procedure to perform two functions, one of which is to monitor the use by Member States of international standards.¹⁰¹ To this end the committee is to establish a list of international standards deemed to have a major trade impact, and of Member states' reliance on them. Where it is revealed that a Member departs from international standards, that Member is obliged to provide reasons for this, indicating in particular whether it considers that the standard is not stringent enough to achieve that Member's SPS objective. This monitoring procedure was established in 1997, and now operates on a permanent basis.¹⁰²

This procedure serves an oversight function, constituting an on-going form of peer review of Member States' use or non-use of international standards. But it does more than this. In keeping with the second function identified in Article 12.4, it also serves to monitor the process of international harmonization. This monitoring procedure is intended to assist in identifying where a new standard is needed, or when an existing standard is not appropriate, including because of perceived deficiencies in the level of protection which it provides. Thus, the monitoring process serves as a catalyst for dialogue between the committee and the sister organizations, with the committee inviting the relevant body to consider adopting or revising a standard, and to provide information, either in writing or through presentations in committee, on standards under consideration or undergoing revision. On the basis of this procedure, the SPS secretariat will submit a written annual report to the body in question, setting out the results of the monitoring procedure.¹⁰³

This process of monitoring, dialogue, and exchange of information situates the committee as an interlocutor in the process of international harmonization. It has

⁹⁸ See Art. 5.8 SPS.

⁹⁹ See WTO Doc. G/SPS/7/Rev. 3, adopted on 20 June 2008.

¹⁰⁰ *Ibid.*, at para. A(8).

¹⁰¹ See Art. 12.4 SPS.

¹⁰² See, most recently, WTO Doc. G/SPS/40, and also for recent revisions to the procedure WTO Doc. G/SPS/11/Rev.1.

¹⁰³ See, e.g., WTO Doc. G/SPS/42 (8th report).

led in a small number of cases to the adoption of new standards, or to the revision of existing ones.¹⁰⁴ On other occasions, the sister organization in question has reported back to the committee on work in progress – including the constitution of technical and scientific reviews, and progress to date in the adoption of new standards. On at least one occasion, the organization in question rejected the need for a specific text,¹⁰⁵ and on another it issued a communication which aimed at clearing up ‘apparent misunderstandings about the nature and purpose of the OIE international standards, their implementation and interpretation’.¹⁰⁶

The monitoring procedure is in practice largely focussed upon substance, in terms of the existence or adequacy of standards. The committee has been less successful and more reticent when it comes to monitoring the *process* of international harmonization in accordance with the language of Article 12.4. While it renders the activities of these bodies more transparent, and exposes them to some sort of external oversight, the committee has been somewhat reluctant to give voice to process concerns expressed by Members, relating in particular to the capacity of developing country Members to participate effectively in the work of the standard setting bodies. Nonetheless, these concerns have been repeatedly expressed, and the sister organizations have taken some important steps in a bid to facilitate developing country participation.¹⁰⁷ They have reported in some detail on these initiatives to the committee, in keeping with the idea of information exchange. Along the same lines, it was proposed in the context of the Doha Development Agenda that a facility be established within the Global Trust Fund for ensuring the attendance and effective participation of developing country Members in the relevant standard-setting bodies.¹⁰⁸ The SPS Committee was unable to put forward any clear recommendations in respect of this (or any other) proposal, merely setting out some ‘initial elements’ for further discussion. Discussion of developing country participation in standard-setting is conspicuously absent from even these elements laid out. This would seem to reflect the sense of the committee that one of the constraints on framing positive recommendations was the fact that a number of proposals submitted ‘would require action outside the sphere of influence of the SPS Committee, such as actions by the international standard-setting bodies’.¹⁰⁹

C Norm Elaboration

The SPS Committee performs an important norm elaboration function. This involves, in part, an elaboration of rules and principles for the operation of the committee, such

¹⁰⁴ See 8th report (*ibid.*), at paras 4–9, 7th report (WTO Doc. G/SPS/37), at para. 11; 3rd report (WTO Doc. G/SPS/18), at paras 8 and 10.

¹⁰⁵ See 2nd report (WTO Doc. G/SPS/16), at para. 12 concerning the scientific impossibility of providing certification of raw meat products regarding the absence of pathogens.

¹⁰⁶ See the 6th report (WTO Doc. G/SPS/31), at para. 4.

¹⁰⁷ See for a discussion WTO Doc. G/SPS/35, at paras 26–29.

¹⁰⁸ WTO Doc. G/SPS/35, at para. 17, and for the proposal WTO Doc. TN/CTD/W/3/Rev.2.

¹⁰⁹ WTO Doc. G/SPS/35, at para. 38. This mirrors the reluctance of the AB to impose process conditions on standard setting bodies as a condition for their authority in the TBT and SPS Agreements.

as its rules of procedure or its development of criteria for the granting of observer status. However, it extends beyond this, and also involves the elaboration of the opened provisions of the SPS Agreement. This is closely tied to the role of the committee in regularly reviewing the operation and implementation of the agreement in the light of Member states' experiences.¹¹⁰

The committee has adopted five instruments elaborating upon obligations laid down in the SPS Agreement.¹¹¹ These take a variety of forms: guidelines, recommendations, and decisions.

First, and in accordance with the agreement, the committee has adopted guidelines to further the practical implementation of the Article 5.5 consistency requirement.¹¹² Secondly, the committee has issued and updated recommended notification procedures.¹¹³ As noted previously, these build upon the transparency obligations laid down in the SPS Agreement.¹¹⁴ Thirdly, the committee has adopted an equivalence decision in response to a request by the General Council that it examine the concerns of developing country Members regarding the equivalence of SPS measures, and that it develop concrete options in ascertaining how to address these concerns.¹¹⁵ Fourthly, the committee has elaborated a procedure to enhance the transparency of special and differential treatment in favour of developing countries.¹¹⁶ This builds upon proposals put forward by Canada and Egypt, and upon the recommended notification procedures highlighted above. Finally, the committee recently adopted guidelines on regionalization,¹¹⁷ in recognition of the difficulties which Members have experienced in the practical application of this concept. These are essentially procedural in nature, setting out the 'typical administrative steps' in recognizing an area as pest- or disease-free.

These instruments inject an element of dynamism into the SPS Agreement. The measures build upon the relevant norms on an ongoing rather than on a one-off basis, with revisions and addenda being added on a regular basis.¹¹⁸ The committee, and notably its secretariat, is proactive in eliciting information from Members, repeatedly encouraging or inviting them to provide insights from their experiences in implementation, and to submit specific suggestions for consideration by the committee.

¹¹⁰ The committee has adopted a procedure for the conduct of this review (G/SPS/10) and has adopted two review reports to date (WTO Docs G/SPS/12 and G/SPS/36). The review obligation is set out in Art. 12.7 SPS.

¹¹¹ The substance of these is discussed fully in Scott, *supra* note 63, especially in chs 2 and 4.

¹¹² WTO Doc. G/SPS/15. See *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, at para. 84, where its obligation to do so was presented as a collective obligation of the Member States.

¹¹³ Most recently WTO Doc. G/SPS/7/Rev. 3.

¹¹⁴ See Art. 7 and Annex B SPS.

¹¹⁵ See WTO Doc. G/SPS/19/Rev. 2. This concerns Art. 4 SPS.

¹¹⁶ WTO Doc. G/SPS/33.

¹¹⁷ See WTO Doc. G/SPS/W/218. These relate to Art. 6 SPS.

¹¹⁸ See, e.g., at para. 4 of the decision on special and differential treatment (WTO Doc. G/SPS/33) which provides that the committee shall review the proposed notification process to evaluate its implementation and to determine whether any changes are required or its continuation warranted. Even where the measure concerned does not lay down a periodic review/revision requirement, this anyway seems to occur, as experience with the revision of the recommended notification procedures shows.

The dynamic quality of the committee's work may be seen with respect to the equivalence decision. Having adopted the decision, the committee then set out a multi-annual programme for further work on this subject. This led to the convening of regular informal meetings, providing repeated opportunities for consideration of information submitted by Members and relevant international organizations, as well as for review and revision of the text. The work programme having been completed, equivalence remains a standing item on the committee's agenda.

The issue of the status of the committee's decisions *vis-à-vis* Member States is an important one. With the exception of the equivalence decision, the committee's language is noticeably deferential. The elaboration of the notification procedures is framed in the form of recommendations. As was noted above, a recent revision to these goes beyond the terms of the SPS Agreement, by *encouraging* Members to notify regulations even where these are based on or conform to international standards. Even if it should transpire that the practical impact of this is profound, the guidelines are clear that this revision does not create an obligation in law.

When it comes to the theme of consistency under Article 5.5, it is notable that not only is the committee's intervention on this subject in the guise of guidelines, but these guidelines are also muted in the authority which they claim. They are said to be intended to provide assistance to Members, and that the accompanying comments are intended to facilitate understanding of the guidelines through the provision of merely illustrative examples and clarifications. The guidelines are emphatic in asserting that they neither add to, nor detract from, the existing rights and obligations of Members, nor do they provide any legal interpretation or modification of the agreement.

Even the committee's 'decisions' are careful in the language they use, in particular by mostly avoiding prescriptive rather than indicative forms. The decision on transparency in special and differential treatment uses the prescriptive (shall) only in respect of the basic notification obligation. This obligation is anyway binding because of its inclusion in the agreement. Otherwise, in so far as the decision is addressed to Members, the softer 'should' (or sometimes 'would') is deployed. Likewise, the decision lays down a 'proposed procedure' and is said to be without prejudice to the rights and obligations of special and differential treatment obligations under Article 10.1. SPS.

The equivalence decision,¹¹⁹ by contrast, looks somewhat different. Right at the outset it looks more like a legislative measure.¹²⁰ It includes a preamble, setting out its origins and functions, and the premises underpinning its enactment. Still, it is equivocal in the authority which it claims. According to the decision, Members shall, when requested, seek to accept equivalence, and shall respond in a timely manner to any request for recognition of equivalence.¹²¹ Exporting Members shall provide

¹¹⁹ WTO Doc. G/SPS/19/Rev. 2.

¹²⁰ This was said in an interview with a member of the secretariat merely to reflect the fact that it was drafted by the director of legal affairs, whereas the special and differential treatment decision was based on a proposal put forward by Member states.

¹²¹ WTO Doc. G/SPS/19, at paras 1 and 3.

appropriate science-based and technical information to support their claim to equivalence, and shall provide reasonable access to the importing Member for inspection, testing, and other relevant procedures. Beyond that, the decision sets out what Members *should* do. In its prescriptive vein, it is not clear that the decision goes much beyond Article 4, which outlines the basic equivalence obligation. The decision adds a temporal dimension not articulated in the agreement, and fleshes out the concept of objectivity by reference to scientific and technical information.

Yet in one important respect the equivalence decision seems to be at odds with the text of Article 4. Whereas Article 4 evaluates equivalence by reference to a Member's stated level of SPS protection,¹²² the equivalence decision takes as its benchmark the level of protection actually achieved by the regulation in question. 'If an exporting Member demonstrates by way of an objective basis for comparison . . . that its measure has the same effect in achieving the objective as the importing Member's measure, the importing Member should recognize both measures as equivalent.'¹²³ Where there is a disjuncture between the deemed and actual level of protection, the latter is to prevail in an equivalence determination. The committee's position seems to represent common-sense and to have much to commend it. It is more in keeping with the idea of equal treatment. Also, on this reading, equivalence emerges as an instrument of peer review between Members, as they potentially contest the capacity of a measure to achieve its deemed or stated level of protection.¹²⁴

One way to think about the measures adopted by the committee is in the language of 'hybridity'.¹²⁵ They represent a soft law elaboration of hard law obligations. But, given the open-ended and contested contours of the hard law obligations, in practice the line between hard and soft law will be hard to draw. It remains to be seen whether the dispute settlement bodies will defer in any way to decisions of this kind. To date, in an SPS setting, one panel has merely 'confirmed' its interpretation of the concept of 'significant effect on trade' by reference to the committee's recommended notification procedures.¹²⁶ Also, to describe the measures as 'soft' is not necessarily to suggest that they are weak in their impact. This is an empirical question. The recommended transparency procedures have, for example, been acknowledged as authoritative as a result of repeated and consistent practice in relation to them. The decision on transparency

¹²² It should be recalled here that the AB has inferred an obligation for Members to identify the appropriate level of protection pursued by a measure, and only in the absence of them so doing will it infer the appropriate level of protection by reference to the measure itself: *Australia – Salmon*, *supra* note 69, at paras 199–207.

¹²³ WTO Doc. G/SPS/10/Rev. 2, at para. 9.

¹²⁴ See Scott, *supra* note 63, at 166–167 for a fuller discussion.

¹²⁵ See Trubek and Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry or Transformation', 13 *Columbia J European L* (2007) 539.

¹²⁶ *Japan – Apples* (Panel), *supra* note 64, at n. 422. There are other examples in different spheres. For example in *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219), the panel looked to a recommendation adopted by the Anti-Dumping Committee in arriving at its conclusion, and in *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (WT/DS174), a panel observed that its interpretation was consistent with a decision of the TBT Committee, specifically citing the relevant part of the committee decision (at para. 7.451).

in special and differential treatment perhaps less so. There is more work to be done in assessing the impact that the committee's pronouncements have on law and practice in the WTO.

4 The WTO and Contemporary Narratives of Global Governance

Having described the activities and operation of two quasi-administrative bodies in the WTO, we wish in this section to explore the nature of the governance practices at work within these bodies by tentatively situating them within a range of contemporary narratives about the nature and dynamics of global economic governance. From among the many accounts available to us, we have chosen the three which seem the most relevant to us: the literature on 'transgovernmental networks' associated most prominently with the work of Anne-Marie Slaughter; critical perspectives on technocratic global governance; and the rapidly growing body of work on 'global administrative law'.

Each of these three frameworks captures different aspects of governance in our two committees, and exposes different elements of their operational dynamics. They help to thicken our descriptive account of global governance in this setting, and serve also as tools for critical engagement, sensitizing us to the risks inherent in the governance practices we describe. But our relationship with these three frameworks is not entirely passive. We aim also to illustrate how an exploration of committee governance in the WTO can allow us to build upon these established theoretical accounts, and to enrich the frameworks that they provide.

A *Transgovernmental Networks*

The literature on transgovernmental networks¹²⁷ is familiar enough by now to require only a brief recapitulation. The idea of transgovernmental networks was introduced by Slaughter in the mid-1990s, at a time when many felt that globalization was rendering existing understandings of global politics increasingly anachronistic. It was explicitly offered as an alternative to two other dominant accounts—the traditional, state-centred, 'liberal internationalist' model which focussed on interstate politics as played out in international institutions and through treaty regimes; and the 'new medievalist' school which primarily emphasized the decentring of the state as the central actor and authority in international politics.¹²⁸ Drawing on

¹²⁷ We use this term interchangeably with other terms used in the literature, such as government networks, transnational government networks, and others.

¹²⁸ Slaughter, 'The Real New World Order', *Foreign Affairs* (Sept.–Oct. 1997) 183, at 183. See also Slaughter, 'Governing the Global Economy Through Government Networks', in M. Byers (ed.), *The Role of Law in International Politics* (2000); Slaughter, 'Global Government Networks. Global Information Agencies, and Disaggregated Democracy', 24 *Michigan J Int'l L* (2003) 1041; Slaughter and Zaring, 'Networking goes International: An Update', 2 *Annual Rev L and Social Science* (2006) 211.

earlier work by Keohane, Nye, Picciotto, and others,¹²⁹ Slaughter painted a picture of a world in which the state remained central, but state power was deployed in new ways – through flexible, informal networks composed of substate actors, working outside centralized state control. This was a vision, not of a decentred state, but a disaggregated state, working through and interpenetrated by a variety of transgovernmental networks of this type.

As has been noted by others, the concept of a transgovernmental network is a broad one, and in principle could cover a very broad range of different organizational forms. In more recent work, therefore, Slaughter has helpfully distinguished three different types of network: government networks within international organizations; government networks with the frame of an Executive Agreement (such as the G-22); and ‘spontaneous government networks’. The last category, according to Slaughter, can be further subdivided into ‘agreements between regulatory agencies of two or more states’ and transgovernmental regulatory organizations.¹³⁰ Each of these three categories should themselves be distinguished from *non-state* supranational regulatory networks about which a large cognate literature also exists.¹³¹

It is this last kind of network – the transgovernmental regulatory organization – which we will focus on here. Such networks are characterized by a number of distinctive features.¹³² They are composed of sub-state actors, often professional regulators. Their internal structure tends to be highly informal and flexible, with a small permanent secretariat operating by consensus with few formal decision-making procedures. Typically, their deliberations and consultations are in secret, though in that respect there is variation both between networks and across time.¹³³ They are functional, or ‘task-specific’, in the sense that they structure their activities and objectives around the perception of a common problem requiring cooperative effort to resolve.¹³⁴ To the

¹²⁹ E.g., Keohane and Nye, ‘Transgovernmental Relations and International Organizations’, 27 *World Politics* (1974) 39; R.O. Keohane and J.S. Nye (eds), *Transnational Relations and World Politics* (1972); Picciotto, ‘Networks in International Economic Integration: Fragmented States and the Dilemma of Neo-Liberalism’, 17 *Northwestern J Int’l L and Bus* (1996–1997) 1014; Picciotto, ‘Fragmented States and International Rules of Law’, 6 *Social and Legal Studies* (1997) 259. More recently, see also Picciotto, ‘Regulatory Networks and Global Governance’ (2006), available at: http://eprints.lancs.ac.uk/232/1/Reg_Networks_&_Glob_Gov.pdf.

¹³⁰ Slaughter, ‘Global Governance Networks’, *supra* note 128, at 1048ff. See also Stewart, ‘US Administrative Law: A Model for Global Administrative Law?’, 68 *L and Contemporary Problems* (2005) 63, at 65.

¹³¹ See, e.g., Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’, 2 *Regulation and Governance* (2008) 137.

¹³² See Zaring, ‘International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations’, 33 *Texas Int’l LJ* (1998) 281, at 301ff.; Zaring, ‘Informal Procedure, Hard and Soft, in International Administration’, 5 *Chicago J Int’l L* (2005) 547, at 569ff.; Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’, 43 *Virginia J Int’l L* (2002–2003) 1, at 19; Craik and DiMento, ‘The Environment and Trade: Environmental Cooperation in the (Partially) Disaggregated State: Lessons from the Security and Prosperity Partnership of North America’, 8 *Chicago J Int’l L* (2008) 479, at 488ff.

¹³³ Zaring, ‘Informal Procedure’, *supra* note 132, at 571–580.

¹³⁴ Zaring, ‘Other Means’, *supra* note 132, at 317–319.

extent that these networks seek to promulgate and enforce particular standards or rules of behaviour, they do so through ‘soft’ mechanisms – non-binding voluntary guidelines supplemented by persuasion, supervision, and interpersonal contacts. In many cases, such mechanisms are highly effective. Very often, these networks form strong, if informal, links with other networks and organizations of a similar kind, embedding themselves in broader webs of interpersonal connections and sites of governance.¹³⁵

What do these networks do, and how do they work? At one end of the spectrum, they act as forums for discussion, helping regulators to define common problems and raise awareness of them, share experience in dealing with those problems, and exchange views on appropriate regulatory responses. This may often include the collection and dissemination of research or statistical and other technical information to assist regulators in dealing with problems identified. Importantly, these processes of information exchange occur in the context of an orientation towards regulatory *harmonization*. That is to say, it is precisely through such processes of information exchange and dissemination that regulators can build ‘shared normative expectations’, and create consensus around common regulatory standards. Compliance with these standards is then closely monitored by the network itself – indeed, as Raustiala has noted, they often come to adopt a proselytizing role, helping to disseminate particular regulatory ideas and practices through subtle processes of socialization. In addition to the promulgation of regulatory standards, transgovernmental networks can also act as conduits for the provision of technical assistance and capacity-building, typically from regulators in advanced industrialized countries to those in the developed world. This can include the provision of advice, publishing material on ‘best regulatory practice’, drafting and disseminating model laws, and so on. Finally, these networks facilitate cooperation between regulators as regards the enforcement of national laws.¹³⁶

Originally, Slaughter introduced the concept of transgovernmental networks not only as a useful descriptive framework, but also in a laudatory fashion as a model for future forms of international cooperation.¹³⁷ Others have taken a different view, raising a number of different concerns about the growth of such

¹³⁵ E.g., Zaring, ‘Informal Procedure’, *supra* note 132, at 580–585.

¹³⁶ Zaring, ‘Other Means’, *supra* note 132, at 295–301, sets out a useful list of the various functions which government networks perform, including standard-setting, acting as a forum for the exchange information and views and the generation of perceptions of common problems, facilitating regulatory harmonization through consensus, monitoring compliance with and implementation of standards, collecting and disseminating statistical and other technical information, conducting research, drafting model laws, and so on. Other functions include facilitating cooperation between regulators in the context of extraterritorial enforcement of regulatory standards, aiding in the provision of technical advice and assistance, and promulgating ‘best practice’ guidelines for regulators: see Slaughter, ‘The Real New World Order’, *supra* note 128, at 190–196; Raustiala, *supra* note 132, at 23–46; Zaring, ‘Informal Procedure’, *supra* note 132, at 551, 572, and 584.

¹³⁷ E.g., Slaughter, ‘The Real New World Order’, *supra* note 128, at 195–197.

networks.¹³⁸ For the moment, we wish to put these concerns to one side and consider only how accurately this descriptive framework captures the kind of governance practices we set out in the case studies set out earlier. It is helpful to begin with the distinction just drawn between ‘transgovernmental regulatory organizations’ and more traditional ‘government networks within international organizations’. It is of course quite uncontroversial that the GATT/WTO system has helped to create a governmental network of the second kind – a relatively close-knit community of trade negotiators and governmental officials with a defined ‘ethos’, a sense of common purpose, broadly shared normative commitments, and common ways of defining and analysing problems.¹³⁹ From this perspective, WTO committees represent one kind of social space in which this community is sustained, and its shared ideas are created and disseminated. The Information Exchange programme conducted in the Council for Trade in Services, for example, can be understood as a process which helps to solidify among a ‘services community’ a common understanding of existing challenges, a common way of describing problems and of quantifying their magnitude, as well as a common framework through which to determine one’s national interest in relation to those problems. Similarly, the processes of informal norm elaboration which occur in these committees represent key mechanisms for the creation and maintenance of normative consensus across significant parts of the trade community. We gave examples earlier of controversial normative issues raised by the ambiguity of WTO legal texts – such as the treatment of spectrum management measures under the GATS – which were the subject of discussion within the Council for Trade in Services, ultimately leading to a degree of normative convergence amongst delegates.¹⁴⁰

But there is more to the story than this. The WTO’s committee system seems not simply or solely to be helping to maintain the kind of governmental network which has been central to the operation of the GATT system since its inception. Our case studies provide interesting examples of the ways in which activities more often associated with newer forms of transgovernmental regulatory networks have begun to emerge in and around the international trade regime. For example, we saw that the SPS committee has helped to provide a forum for food safety regulators to meet on a reasonably regular basis, exchange information, and discuss common problems. It has been, in Zaring’s phrase, a ‘conduit for ongoing flexible relationships’.¹⁴¹ We noted also the way that the committee’s specific

¹³⁸ Concerns have been expressed by those who worry about the potential sidelining of existing international institutions (e.g., Raustiala, *supra* note 132, at 70–89), about the legitimacy of networks of this kind (see, e.g., Zaring, ‘Other Means’, *supra* note 132, at 330, arguing for an ‘international law of administrative procedure’; Craik and DiMento, *supra* note 132, at 506 and 509; Raustiala, *supra* note 131, at n. 14 and accompanying text, also at 25; Slaughter, ‘Global Government Networks’, *supra* note 128; Zaring, ‘Informal Procedure’, *supra* note 132, at 597ff.; Howse, ‘Transatlantic Regulatory Cooperation and the Problem of Democracy’, in G.A. Bermann *et al.* (eds), *Transatlantic Regulatory Cooperation* (2000), among many others), and about their tendency to re-enforce a general trend towards technocratic governance (e.g., Picciotto, ‘Regulatory Networks’, *supra* note 129).

¹³⁹ See generally, e.g., Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’, in R.B. Porter *et al.* (eds), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millenium* (2001), at 334.

¹⁴⁰ See *supra* note 46.

¹⁴¹ Zaring, ‘Other Means’, *supra* note 132, at 302.

complaints procedure has, on occasions, facilitated the provision of problem-oriented technical advice and assistance from experienced regulators to those wishing to establish new regulatory agencies, particularly in the developing world. The operation of the SPS committee is more formalized than many transgovernmental networks, but its mode of operation is still characterized by the flexibility and adaptability of governmental networks. On the services side, the analogy with transnational regulatory networks is less strong, as the direct participation of regulators in the work of these committees is at present not as significant. Even here, however, there are some echoes of the kinds of activities which are the focus of attention in the transgovernmental network literature. The practice of the Committee on Trade in Financial Services of inviting domestic regulators to report on recent experiences, and subjecting this report to discussion and peer review, may be one example.¹⁴² Similarly, although not coordinated through the Committees described above, the WTO's emerging work on technical assistance and capacity-building in services resonates strongly with similar work being carried out through transgovernmental networks. Our case studies, then, provide tentative support for Raustiala's proposition that formal treaty regimes need not be understood as alternatives to transgovernmental networks, but rather as helping to foster and encourage the creation of such networks – even if unevenly and contingently – so that new networks of this kind can spring up in the shadow of treaty regimes.¹⁴³

Furthermore, our case studies offer interesting insights into the different kinds of links which can develop between international institutions such as the WTO and existing transgovernmental regulatory networks, and the different ways in which they can influence one another's work. They suggest at least two different models of such interaction. First, as our case studies illustrate, there are clearly occasions on which these committees act as conduits for the importation of policy ideas and forms of analysis from these networks to the trade community – another element, in other words, of a transgovernmental network's mechanism for the broad dissemination of common regulatory ideas and practices. In this model, interactions between formal regimes and networks can to some extent transform the former, so that they take on some characteristics of networks as sites of learning and socialization. Secondly, we also saw the way that the international trade regime can actively support and encourage ongoing standard-setting efforts within transgovernmental networks. The paradigmatic case is of course Article 3 of the SPS agreement, which can be understood as a form of quasi-delegation of normative authority to Codex (among other organizations). In the services context, the equivalent is Article VIII of the Accountancy Disciplines, which performs a broadly similar function in respect of the International Federation of Accountants and the IASC.¹⁴⁴ As described above, both of these provisions have helped to provide the impetus for a variety of mechanisms of informal cooperation and information exchange through the work of committees. Interestingly, as the experience of Codex has taught us, this relationship can at least in some cases help to shine a spotlight on the network itself, and bring a measure of transparency and greater participation to its operation. Our work therefore serves to

¹⁴² Raustiala, *supra* note 132, at 87.

¹⁴³ *Ibid.*, at 84–88.

¹⁴⁴ For an interesting discussion see, e.g., Arnold, 'Disciplining Domestic Regulation: the World Trade Organization and the Market for Professional Services', 30 *Accounting, Orgs and Society* (2005) 299.

reinforce the calls made elsewhere for further research which maps the different ways in which international institutions and transgovernmental networks interact, and identifies the different dynamics of such interaction.¹⁴⁵

B Legitimacy and Global Administrative Law

We noted above that the rise of transgovernmental networks, while celebrated by some, has been accompanied by serious concerns about their legitimacy. With their informal processes and often secret deliberations, transgovernmental networks seem to bypass the accountability mechanisms which have been developed both domestically and (to some extent) in more traditional international institutions. The developments described by Slaughter and others therefore raise squarely one of the principal challenges of global governance, arising as a result of the decision-making autonomy of private and public actors; actors who can no longer always be viewed as accountable to governments or parliaments back home.¹⁴⁶

If it is true that the activity of some WTO committees resembles that of transgovernmental networks in important ways, then legitimacy questions also loom large for the WTO. Who participates in the activities of these committees? What kinds of accountability mechanisms are in place? To what extent does this ‘hidden world’ of WTO governance parallel the shadowy world of transgovernmental networks? These are significant questions, and we want to register their importance and relevance for studies of non-judicial governance in the WTO. There is of course a lively debate about the legitimacy of the WTO in general, and a number of proposals exist to develop additional mechanisms to improve accountability within this system as a whole. It is important, in our view, that the same kind of work be done in relation to WTO committees, where legitimacy concerns register at least as strongly. But in this section we want to take a different path. Here, we will argue that WTO committees may constitute a means of at least partially *addressing* legitimacy concerns. We see processes occurring in these committees which provide at least the promise of enhanced accountability. Our focus here is on the SPS Committee.

Our argument in this section may be most usefully framed in the now familiar language of global administrative law. This concept is defined in the following terms:

These developments lead us to define global administrative law as comprising the mechanisms, principles, practices, and supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.¹⁴⁷

¹⁴⁵ Raustiala, *supra* note 132.

¹⁴⁶ See Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’, 2 *Regulation and Governance* (2008) 137; Cohen and Sabel, ‘Global Democracy?’, 37 *NYU J Int’l L and Politics* (2005) 763; Stewart, ‘The Global Regulatory Challenge to US Administrative Law’, 37 *NYU J Int’l L and Politics* (2005) 695; Slaughter, ‘The Accountability of Government Networks’, 8 *Indiana J of Global Legal Studies* (2001) 347.

¹⁴⁷ See Kingsbury, Krisch, and Stewart, ‘The Emergence of Global Administrative Law’, 68 *L and Contemporary Problems* (2006) 15, at 17.

Global administrative law is concerned with the accountability of global bodies, international organizations and transgovernmental networks among them.¹⁴⁸ Crucially, for our purpose, the concept of what is to count as a global body is broadly drawn. It can include even 'domestic regulatory agencies, where domestic bodies take decisions on issues of foreign or global concern'.¹⁴⁹ They are characterized as 'distributed administrations' when they take decisions with transnational effects and are included within the reach of global administrative law.¹⁵⁰

The founders of global administrative law acknowledge that uncertainty remains when it comes to identifying the norms which make up this body of law and in defining their status. One thing though seems clear. The content of global administrative law is not only informed by rules, but is shaped also by procedures and practice. By surveying the procedures and practices of the many actors which occupy global administrative space, it becomes possible to spot commonalities in approach, such that standards of behaviour and procedures not formally codified as rules, which may come to count as global administrative law.

The founders of global administrative law provide a tentative list of its components. Procedural requirements are prominent, including transparency, participation, reasoned decision-making, and the possibility for independent review.¹⁵¹ Certain substantive standards, proportionality and means/end rationality among them, are also included on this list.¹⁵²

The WTO is sometimes viewed as an engine of global administrative law,¹⁵³ and indeed the famous *Shrimp/Turtle* decision is treated as almost canonical in this respect.¹⁵⁴ But while the WTO has featured prominently in discussions about global administrative law, it is the dispute settlement system, which provides for quasi-judicial review, which has been the focus for attention in this and so many other respects. Our task here is to turn away from the dispute settlement system and to illustrate how WTO committees lend themselves to analysis in the language of global administrative law.

The SPS Committee may be viewed as an engine for the generation of global administrative law and as an agent for its enforcement. The committee establishes processes which aim to enhance the accountability of Member states. This is most clearly apparent in the operation of its complaints procedure, which provides an opportunity for states to raise specific trade concerns. While not codified in law, this process is firmly

¹⁴⁸ *Ibid.*, at 17.

¹⁴⁹ *Ibid.*, at 21.

¹⁵⁰ *Ibid.*, at 9.

¹⁵¹ *Ibid.*, at 37–42.

¹⁵² *Ibid.*, at 40.

¹⁵³ For a discussion see S. Cassese, 'Global Standards for National Administrative Procedure', 68 *L and Contemporary Problems* (2006) 109. The *Shrimp/Turtle* case is *United States – Export Prohibition in Shrimp and Certain Shrimp Products*, WT/DS56/AB/R.

¹⁵⁴ *Ibid.*, and see also Kingsbury, 'Global Regulation, Jus Gentium and Inter-Public Law' (two papers), available at: www1.law.nyu.edu/kingsburyb/fall06/globalization/papers/Kingsbury.NewJusGentiumandInterPublic1.pdf, at 16.

entrenched in the day-to-day practice of the committee. It may be thought to represent an institutional expression of the transparency principle, and the instantiation of a reason-giving requirement. These activities of the committee both serve to render visible the transboundary effects of ‘domestic’ regulation, and require that regulating Member states explain and justify their decisions in the light of these. The complaints procedure reflects a participation model of accountability, where ‘those affected [Member states] hold power-wielders [other Member states] accountable directly through participation’.¹⁵⁵ The SPS Committee takes the question of participation seriously, monitoring involvement, and seeking to enhance opportunities for the participation by developing country representatives.¹⁵⁶

It is not only in relation to Member states that the SPS Committee can be viewed as enforcing global administrative law. It does so also in relation to international organizations occupying the same policy sphere. It invites its ‘sister organizations’ such as Codex to attend its sessions and has established a procedure to monitor processes of international harmonization. There can be little doubt that the SPS Committee has played an important role in fuelling concerns about the (limited) participation of developing countries in Codex, and in adding impetus to efforts to achieve reform.¹⁵⁷

In addition, the SPS Committee is itself a global administrative body, occupying global administrative space. While established by the SPS Agreement, the relevant text is skeletal in its demands. The committee is largely a creature of its own making, and is subject to its own internally-generated body of global administrative law. It is the committee which has adopted its own working procedures, and it has established procedures for reviewing the operation and implementation of the agreement.

It is clear even from this brief account that many of the activities of the SPS Committee can be convincingly captured by the language of global administrative law. For scholars committed to this perspective, the committee represents an important case study, attesting to the emergence of norms and procedures which aim to promote accountability in global governance. This case study also lends some support to the proposition that improved accountability can lead to substantive change. It is quite often the case that interactions in the committee induce Members to adjust their regulatory demands, and to do so with a view to mitigating adverse external effects.

Perhaps more importantly, analysis of the SPS Committee may contribute to our understanding of global administrative law. The activities of this committee are suggestive of a missing dimension; one which could be important in determining the ability of this framework to respond to legitimacy concerns. The SPS Committee reveals

¹⁵⁵ Grant and Keohane, ‘Accountability and Abuses of World Power in Politics’, 99 *Am Political Science Review* (2005) 29, at 32.

¹⁵⁶ See, e.g., WTO Doc. G/SPS/36 (2nd Review Report), at para. 71, and WTO Doc. G/SPS/R/37/Rev. II.

¹⁵⁷ For a fuller discussion see Scott, *supra* note 63, chs 7 and 8. See also Livermore, ‘Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation and the Codex Alimentarius’, 81 *NYU L Rev* (2006) 766.

an approach to governance which is strongly reflexive.¹⁵⁸ It is characterized by a critical self-awareness about its own role and operation and about the agreement which it administers. This is reflected in the iterative nature of its work. The committee revisits its own procedures and decisions on a regular basis, with a view to amending and improving them in the light of lessons learned. Reflexivity emerges, along with transparency, contestation, and reasoned decision-making, as a key feature of the committee's approach. Consistent with the idea that the content of global administrative law is to be at least as much determined by practice as it is by rules, this commitment to reflexivity begs the question whether the reflexive approach of this committee might not be suggestive of a new candidate norm. It is our view that there are strong arguments in favour of endorsing reflexivity as a component of global administrative law.

Perhaps the strongest argument in favour of the incorporation of a reflexivity norm is the danger that, without it, global administrative law may seem complacent in the face of established power. While it seeks to promote enhanced accountability, it often does so by reference to established rules, principles, or standards. In the SPS Committee, for example, Member states are called upon to justify their decisions by reference to the science-based standards laid down in the SPS Agreement, or by comparison with international standards. Similarly judicial review proceeds on the basis of established rules and principles, and proportionality operates within the framework of categories of costs and benefits which tend to be settled in advance. The point here is that global administrative law does not operate in a normative vacuum; it takes shape in settings which are already populated by precepts and premises which reflect particular values and distributive outcomes. Thus, to say with approval that global administrative law operates in favour of enhanced accountability is to say that it operates in favour of those rules, principles, and standards which are already entrenched in the relevant regime. There is consequently a danger that global administrative law will be passive in relation to the underlying benchmarks for accountability which it serves, and as somewhat oblivious to the consequences or fairness of these.¹⁵⁹

The introduction of a reflexivity could change this, signalling that one key function of global administrative law is to generate information about the impact and implications of these benchmarks, including information about their costs and distributive consequences.

¹⁵⁸ There is a large literature on 'reflexive law'. For a nice introduction, reviewing a book which offers a philosophical as well as legal account, and which ties this concept to the literature on democratic experimentalism, see Dorf, 'The Domain of Reflexive Law', 103 *Columbia L Rev* (2003) 384. This concept is being used here to capture the idea that institutions can play a role in shaping the content of norms over time, by reflecting on their appropriateness in the light of on-going evaluation and experience. As Dorf notes, there are clear similarities between the idea of reflexive law and the idea of democratic experimentalism which he and Charles Sabel developed. See Dorf and Sabel, 'A Constitution of Democratic Experimentalism' 98 *Columbia L Rev.* (1998) 267.

¹⁵⁹ In fairness to the founders of global administrative law, they are explicitly concerned to encourage evaluation of its consequences: see Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Order', 17 *EJIL* (2006) 1, where they speak of the 'normative potential and problems' of global administrative law (at 5). The point here is to suggest that this normative dimension needs to be built into the framework itself, not just in relation to the norms which make up global administrative law, but also in relation to the rules, principles, and standards which form the benchmarks for accountability.

Not only might such information provide impetus for reform of the underlying legal framework (the SPS or TRIPS Agreement for example), but it could serve also to facilitate resistance to established norms. The information collected might highlight the failure of an agreement or rule to achieve its stated objectives. After all, the WTO's objectives are broad, going well beyond trade liberalization to encompass sustainable development for example. The WTO Agreement also acknowledges the need for positive efforts to ensure that developing countries secure a share in the growth of international trade which is commensurate with their economic development needs. WTO committees, by contrast to the dispute settlement system, are capable of providing mechanisms to assess the overall performance of the WTO by reference to both its overarching and specific goals.

While the activities of the SPS Committee illustrate the value of a reflexive approach, the concept of reflexivity may equally shed light on the limitations inherent in the current system. The SPS Committee is charged with administering the SPS Agreement. This agreement is open-ended and its consequences are difficult to anticipate in advance. While the SPS Committee can make an important contribution to understanding the real world impact of this agreement, it cannot offer a comprehensive account when acting alone. The SPS Agreement is just one part of the WTO package-deal and one instrument which aims, among other things, to liberalize trade in agricultural products. The Agriculture Agreement, the Subsidies Agreement, and the GATT are all likewise implicated in efforts to achieve this goal. Thus, while the SPS Committee may examine the consequences of this agreement and the distribution of benefits and costs which flow from it, it cannot be expected to look in a more systematic way at the overall consequences of liberalization of agricultural markets. As such it is indispensable that any reflexivity norm operate at different levels of analysis, not only in relation to a particular Member state's regulation (micro), or in relation to a particular agreement (meso), but also in relation to the trade regime as a whole (macro). This is necessary to guard against the danger that a positive assessment at any one level may operate to enhance support for a regime which, when viewed across the board, is seen to be in urgent need of reform. This realization hints at the very important institutional implications which could be associated with endorsement of a reflexivity norm in global administrative law. It could speak not only to the mode of functioning of a particular committee, but also to the interaction between committees, and to the vital importance of maintaining an institutional viewpoint which is overarching rather than discrete.

C Managerialism and the Politics of Expertise

There is a third important line of thinking on global governance, which also provides a useful framework for interpreting our case studies. It is based on a story of the rise of managerialism in international politics – the colonization of international politics by professional experts and their technical discourses, and the hollowing out of the traditional political processes we normally associate with international institutions. Koskenniemi, for example, has described in some detail the process of 'deformalization'¹⁶⁰ which he sees

¹⁶⁰ E.g., Koskenniemi, 'The Fate of Public International Law', 70 *MLR* (2007) 1, at 9ff.

at work throughout international law and international institutions, by which international law comes to be understood solely as ‘an instrument for particular values, interests, preferences’.¹⁶¹ In this world, ‘a managerial mindset’¹⁶² takes over, and ‘the law retreats solely to the provision of procedures or broadly formulated directives to experts and decision-makers for the purpose of administering international problems by means of functionally effective solutions’.¹⁶³ The result is a movement towards technocratic, expert-oriented forms of governance, through the transnational consolidation of global professional cultures and transnational networks of expertise common to specific functional issue areas.

The collectives described in this literature are epistemic in nature. At heart, they are expert communities held together by shared bodies of knowledge and ways of knowing and analysing the world, as well as a common professional training and identity. Moreover, the politics of such networks, as well as their primary modes of influence, are in the knowledge that they create, disseminate, and deploy, and in the shared vocabularies which structure their thought and action. These networks tend to socialize members into a common framework of norms through processes of professionalization. Power is exercised ‘on the basis of professional or scientific techniques’,¹⁶⁴ and works primarily through persuasion and the deployment of information and knowledge via particular cultures of rationality. They operate within a mode of governance which is functional, or ‘problem-oriented’, in the sense that participants see their role as the performance of limited well-defined tasks, and tend to take as given particular ways of understanding common problems. In this mode of governance, overt political contest is therefore marginalized in favour of ‘cooperation by experts’, and ‘struggles over global governance are to a great extent ... fought through the debates waged within and between various scientific and professional disciplines and their universalising discourses’.¹⁶⁵

This story tends to be associated with a deep scepticism about the desirability of the entrenchment of expert networks. Kennedy writes, for example, of a world ‘increasingly governed by experts’, containing ‘only the most marginal opportunities for engaged political contestation’.¹⁶⁶ The growth of these networks is associated with a ‘sort of technical rule-making in which politics are theoretically downplayed and expertise is valued’.¹⁶⁷ There are concerns about the ways in which expert rule mystifies and disguises political and distributional choices;¹⁶⁸ worries about the way the turn to managerialism undermines norms of participation and accountability,¹⁶⁹ and scepticism about the quality of decision-making which is produced through appeals to the

¹⁶¹ Koskenniemi, ‘Constitutionalism, Managerialism and the Ethos of Legal Education’, 4 *European J Legal Studies* (2007) 1, available at www.ejls.eu/1/3UK.htm.

¹⁶² Koskenniemi, ‘Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalisation’, 8 *Theoretical Inquiries in Law* (2007) 9, at 13.

¹⁶³ *Ibid.*

¹⁶⁴ Picciotto, ‘Networks in International Economic Integration’, *supra* note 129, at 1037.

¹⁶⁵ *Ibid.*

¹⁶⁶ Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’, 27 *Sydney J Int'l L* (2005) 5, at 6.

¹⁶⁷ Zaring, ‘Other Means’, *supra* note 132, at 317.

¹⁶⁸ E.g., Kennedy, ‘The Politics of the Invisible College: International Governance and the Politics of Expertise’, 5 *European Human Rights L Rev* (2001) 463.

¹⁶⁹ Picciotto, ‘Regulatory Networks’, *supra* note 129, at 13ff.

false universalities of particular forms of rational knowledge. As a result, much work in this line is oriented precisely towards reopening space for politics within domains of apparently technical decision-making, and countering the self-presentation of expert decisions as ‘determined, rather than “free”’.¹⁷⁰

Our paper follows the lead of this literature in focusing attention not on the ‘foreground’ of negotiations and judicial decision-making, but on the spaces in which the ‘background norms’ of international economic governance are produced in less formal ways. Our hope is that others will follow in that same path and expand our map of these background spaces. In addition, the work of Kennedy, Koskenniemi and Picciotto prompts us to ask probing questions about these governance practices occurring within WTO committees. Are they contributing to the entrenchment of a kind of ‘managerialism’ within the governance of international trade – or the opposite? To what extent and in what way do they affect the authority and influence of experts within global governance? What role do these practices play in the creation, maintenance, and evolution of the forms of knowledge which structure the deployment of political power in international life?

These questions resonate particularly strongly with our study of the services committees. We have shown above that the operation of these committees has helped to shape the role of expert communities in the governance of services trade in a variety of ways. For example, the establishment of the GATS has helped to constitute a relatively new domain of expertise – expertise on ‘trade in services’. We saw, for example, how negotiations on trade in services have created a strong demand for new information – on existing trade flows of services, and existing barriers to trade in services, on the economic and other consequences of liberalization of trade in services. A new and relatively well-defined community of ‘trade in services’ experts – economists, econometricians, political scientists, lawyers, and so on – has emerged to fill this need for data on trade in services, and to provide interpretation of them for negotiators and policy-makers.

Moreover, the services committees themselves act as venues in which government delegations are exposed to the knowledge produced in these expert communities, and come to share some of its precepts – whether through formal presentations by bodies such as the OECD and UNCTAD in the Services Council or through more informal interactions broadly facilitated through the work of these committees. Interactions within and around the trade regime can therefore act as one important vector for the transmission and dissemination of expert knowledge through the community of trade negotiators and more broadly to governmental trade policy-makers globally. The information exchange programmes, mechanisms of peer review, workshops and seminars, and other activities described earlier demonstrate the increasing integration of the committee system, and the trade regime more generally, into existing networks of knowledge dissemination.

Furthermore, we saw also the way in which delegates at times looked to expert communities for guidance as they discussed the interpretation of ambiguous legal norms and concepts. In this sense the activity of the committees provides additional venues

¹⁷⁰ Kennedy, *supra* note 166, at 27.

and opportunities for various bodies of expert knowledge to mediate and influence the evolution of GATS norms and their interpretation.

There is, of course, much more work to be done to track the relationship between the work of WTO committees and the activity of particular expert communities, but it seems that that work on the WTO's committee system may be a useful launching point for detailed research into the deployment of expertise and professional cultures through global governance, and the ways in which these cultures and knowledge are transforming the modalities of international public power. Among other things, such research will be necessary to uncover spaces for the contestation of managerialism on its own terms, as well as institutional mechanisms for the destabilization of expert knowledge and the repoliticization of their choices. After all, we might expect that the venues in which structures of knowledge are contested will be the same as those in which they are produced and disseminated.

It is easy to anticipate that the technocratic perspective might have some purchase in the SPS Committee too. After all, this committee is charged with administering an agreement which accords a central role to science.¹⁷¹ In this agreement, more than any other which forms part of the WTO package-deal, the language of law is the language of science. This is reflected in the work of the SPS Committee. Most obviously, when Member States raise or respond to complaints about a given regulation, they frequently call science to their aid. We saw this in relation to the cholera example highlighted above. Here, deliberations focussed upon the sufficiency of the scientific basis for regulation, and upon the question whether there was sufficient evidence of risk. It is also the case that the committee serves to bring together scientific experts from different countries. Many bilateral exchanges grow out of the formal committee sessions, providing occasions for experts to exchange information and to seek to resolve disagreements about regulatory right and wrong.

While the focus upon science in the SPS Committee should alert us to the danger of managerialism, two mitigating observations need to be made. First, it should be recalled that the SPS Committee facilitates the contestation of claims to scientific truth put forward by Member States. It serves to unsettle these claims by opening them up to new interpretations and to conflicting data, offering assistance to poorer countries in their bid to challenge scientific truth claims put forward by richer, regulating, states. The presence of the 'sister organizations' such as Codex is crucial in this respect. Thus, the vision of science which underpins the activities of this committee is one which sees science as contested, and as open to conflicting interpretations and change over time. Secondly, it is not at all the case that the only language spoken in the committee is the language of science. On the contrary, claims and arguments are frequently put in very different terms. When Members raise specific trade concerns their complaints are frequently framed in distributive terms, with a view to exposing the external costs and burdens that will be imposed by regulation. We see this clearly in the aflatoxin and

¹⁷¹ For a full discussion see Scott, *supra* note 63, esp. ch. 3, and Peel, 'Risk Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick', Jean Monnet Working Paper 02/04, available at: www.jeanmonnetprogram.org/papers/04/040201.pdf.

Mexican cantaloupe examples noted above. Thus, while the committee does endorse the technocratic (scientific) logic of the SPS Agreement, it also softens this to some degree. In the committee, science represents just one part of a deliberative process which is concerned not only with scientific evidence but with achieving a more rounded understanding of the global costs and consequences of SPS regulation. By contrast to the dispute settlement bodies, and in a manner which is not apparent without careful analysis of its day-to-day activities, the SPS Committee offers an opportunity for Members to step outside the scientific frame and to expand the range of arguments which they deploy in challenging trade-restrictive regulations adopted elsewhere.

5 Conclusion

In academic literature the WTO is largely viewed as synonymous with its novel system for the settlement of disputes.¹⁷² We have sought to demonstrate in this article that there is more to the WTO than this, and to exemplify this claim by reference to two specific sites of non-judicial governance in the WTO. We have suggested that the two WTO committees under discussion here perform important functions which are largely hidden from view. In particular, we have pointed to the role that these committees play in generating and disseminating information, and as facilitators of technical assistance and regulatory learning. We also suggested that the activities of these committees contribute to the emergence of interpretive communities which serve to elaborate upon the open-ended norms laid down in the relevant agreements.

Having surveyed the activities of these two sites of non-judicial governance in the WTO, we then situate them in three contemporary narratives of global governance. We use these narratives as a way of critically evaluating the developments we describe, for example by assessing whether committee governance might amount to a form of managerialism which conceals and entrenches inequalities in political power. We suggest also that our case studies provide material for those who seek to confirm or challenge contemporary narratives about the nature and dynamics of global governance, and that studies of this kind can facilitate efforts to build upon these accounts. For example, our services case study provides tentative support for the idea that trans-governmental networks need not be viewed as alternatives to formal treaty regimes, while our SPS case study attests to the emergence of global administrative law, and is at least suggestive of how this concept might be developed and improved.

We stated at the outset that there are more than 35 sites of non-judicial governance in the WTO, comprising committees, working parties, review processes, and the like. We have examined only two of these in this article. It is our view that the material that we have uncovered in relation to these two examples is sufficiently rich to justify further research in this domain. We hope that the hidden world of WTO governance will not remain hidden for too long.

¹⁷² One exception is Wolfe, 'See You in Geneva? Legal (Mis) Representations of the Trading System', 11 *European J Int'l Relations* (2005) 339.