Deepening Rules-Based Trade Cooperation Under Existing Agreements

Robert Wolfe

November 2019
Tough to find transparency cartoons..

- Citizens, firms, and other governments need a text, and analysis
- Even harder to make a joke out of WTO reform...

https://www.lamontagneart.com/cartoon/usmca/
What’s the problem for deepening cooperation?

• Negotiation of new rules slow
  – But rules don’t implement themselves anyway

• Formal enforcement seems problematic
  – But dispute settlement is not the only tool

• WTO transparency ought to be an alternative
  – But reform of the deliberative function is needed
Basic proposition for WTO reform

• Discussion of specific trade concerns (STCs) can lead to clarification and even resolution of trade irritants before recourse to the procedures of the Dispute Settlement Body (DSB) need be considered.
  – Canadian 2018 discussion paper for the Ottawa Group (WTO 2018a)

• What is a “specific trade concern”?  
• Why might they make a difference?
March 2019 Technical Barriers to Trade meeting

3.3.5 European Union - Chlorothalonil (pesticide active substance) (IMS ID 5798)

G/TBT/N/EU/625

3.26. The representatives of the United States and Colombia raised concerns with the EU’s measure on chlorothalonil. The full statements are contained in G/TBT/W/607 and G/TBT/W/600, respectively.

3.27. The representative of Guatemala expressed concern with respect to the measure notified in G/TBT/N/EU/625 of 4 December 2018, with respect to the non-renewal of the approval of the active substance chlorothalonil, a substance generally used by some agricultural producers as a fungicide to control certain pests. Her delegation reiterated its belief that the EU should take a risk-assessment approach based on sufficient scientific evidence in determining control levels, particularly those established in the Codex Alimentarius. Guatemala considered that changes to agricultural practice required a more extensive process and that it was important to be adaptable in seeking alternatives as regards the use of pesticides. She pointed out that as these processes were lengthy, transitional periods should be set accordingly.
Not just SPS/TBT: Trade concerns widely discussed

Committee on Market Access
28 May 2019
WTO members discuss Brexit and Huawei's ban at Market Access Committee meeting

Trade-related Investment Measures (TRIMs)
6 June 2019
Local content measures scrutinized by WTO members in investment committee

Committee on Agriculture
Meeting on 25th - 26th June 2019
Heated debates on over 200 questions, record number in agriculture policy review
Outline

1. Transparency as trade policy discipline
2. How does transparency work in WTO?
   - Notifications
   - Committee discussion
3. Reform proposals
First justification for transparency

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. Brandeis (1914)

• Knowing what is going on is first step in managing conflict
Second justification for transparency

...the essence of the rule of law lies in the fact that men affected by the decisions which emerge from social processes should have some **formally guaranteed opportunity to affect those decisions.**

Fuller (1963)

• Opportunity to talk about policy changes is second step in managing conflict
A caveat: just western principles?

- Chinese government resists fishbowl transparency (public can be a fly on the decision maker’s wall)
- Also resists reasoned transparency (asking officials to provide reasons for their decisions)

Cogliansese (2009)
Benefits of transparency mechanisms

1. Governments learn from and about what other countries do
2. Weak policies are exposed to the public, and investors;
3. Verification that differences in national law, policy, and implementation are consistent with obligations.
4. Reduced uncertainty helps everybody make better decisions
How does transparency work in WTO?

• In principle?
• In practice?
Three generations of WTO transparency

• “Right to know” since GATT 1947
  – Publication at home; notification in Geneva reduces information asymmetry
  – Sunlight as disinfectant, but not enough, thus:
• Monitoring and surveillance since the Tokyo Round
  – Chance to question, affect decisions, but only includes Members, thus:
• Reporting and engagement since 2002
  – e.g. various online databases, extensive website, publications
  – ePing to push notifications to firms
  – Wolfe (2013)
WTO notifications = “right to know”

“A transparency obligation requiring member governments to report trade measures to the relevant WTO body if the measures might have an effect on other Members.”

• Dozens and dozens of obligations
• Compliance varies by committee and by member
Chart 6.1 Total outstanding notifications per type of notification requirement per year (1995-2016)

Agriculture
WTO 2018b

Note: MA:2 - imports under tariff and other quotas, MA:5 - special SGs, DS:1 - domestic support, ES:1 - export subsidies, ES:2 - total exports.
Source: WTO Secretariat.
Who are the weak notifiers in agriculture?

Table 6.3 Average compliance with notifications by region (1995-2016)

<table>
<thead>
<tr>
<th>Region</th>
<th>Average compliance (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>49</td>
</tr>
<tr>
<td>Asia</td>
<td>65</td>
</tr>
<tr>
<td>CIS, including associate and former member States</td>
<td>67</td>
</tr>
<tr>
<td>Europe</td>
<td>78</td>
</tr>
<tr>
<td>Middle East</td>
<td>65</td>
</tr>
<tr>
<td>North America</td>
<td>97</td>
</tr>
<tr>
<td>South and Central America and the Caribbean</td>
<td>69</td>
</tr>
<tr>
<td><strong>WTO Members</strong></td>
<td><strong>62</strong></td>
</tr>
</tbody>
</table>

Source: WTO Secretariat.
SCM notifications also weak

**Table 6.1 Status of subsidy notifications**

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>New and full subsidy</strong></td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td><strong>notification</strong> (due on 30 June of the years shown)**</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Members that notified subsidies</td>
<td>50</td>
<td>39</td>
<td>44</td>
<td>45</td>
<td>47</td>
<td>48</td>
<td>48</td>
<td>47</td>
<td>47</td>
<td>46</td>
<td>41</td>
</tr>
<tr>
<td>Members that made a &quot;nil&quot; notification</td>
<td>25</td>
<td>16</td>
<td>15</td>
<td>14</td>
<td>13</td>
<td>11</td>
<td>17</td>
<td>20</td>
<td>18</td>
<td>16</td>
<td>11</td>
</tr>
<tr>
<td>Sub-total notifying Members</td>
<td>75</td>
<td>55</td>
<td>59</td>
<td>59</td>
<td>60</td>
<td>59</td>
<td>65</td>
<td>67</td>
<td>65</td>
<td>62</td>
<td>52</td>
</tr>
<tr>
<td>Members that did not make any notification</td>
<td>25</td>
<td>45</td>
<td>41</td>
<td>41</td>
<td>40</td>
<td>41</td>
<td>35</td>
<td>33</td>
<td>35</td>
<td>38</td>
<td>48</td>
</tr>
</tbody>
</table>

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*a As at 19 October 2018.

Source: WTO Secretariat.  
WTO (2018b)
Compliance also varies by type of notification

- A **one-time** obligation, say of the existence of an enquiry point, means finding out what your policy is, and notifying it.
- **Ad hoc** ex ante notifications, for example of a proposed new animal health regulation, are also relatively straightforward.
- Some **regular** ex post notifications require being able to monitor your own policy every year, which can be harder when the responsible authority is not the trade ministry.

Wolfe 2018
Why do Members not notify?

• Trade officials lack knowledge about domestic programs
• Domestic officials may not think in WTO terms
  – Lack of clarity on what to notify
  – Complex templates
• Fear of public criticism, and/or disputes
• Inability to see information as a public good
  – Transparency relies on Members wanting to be good citizens
When is notification more likely?

• Evident benefits: providers of information must see how doing so helps them meet their own objectives.
  – Notification is not merely an obligation
  – If countries do not think they are learning about themselves in preparing a notification, then notification is merely a burden

• Notification easier when same agency is the authority for a measure, is responsible for notification, and is the user of the results in WTO
  – We see this virtuous circle in the SPS committee, but not in Council for Trade in Services
PROCEDURES TO ENHANCE TRANSPARENCY AND STRENGTHEN NOTIFICATION REQUIREMENTS UNDER WTO AGREEMENTS

COMMUNICATION FROM ARGENTINA, AUSTRALIA, CANADA, COSTA RICA, THE EUROPEAN UNION, JAPAN, NEW ZEALAND, THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU, AND THE UNITED STATES
Coercion won’t improve notification

• Proposal suggests consideration of both systemic and specific improvements that can help Members improve compliance with notification obligations—no substance.
• Mostly coercive so going nowhere
  – China will never accept it
  – Possible sanctions actually inhibits transparency improvements
• Better for committees to ask what info is needed for their work and do they get it
  see Wolfe (2018)
## Monitoring and surveillance mechanisms

<table>
<thead>
<tr>
<th>Principle</th>
<th>Examples</th>
</tr>
</thead>
</table>
| General clarity in domestic trade policy | **Trade Policy Review Mechanism**  
- country reviews  
- Annual report on trading environment  
WTO (2018b) |
| Peer review | **Committee review**  
- “specific trade concerns” formal in SPS/TBT; growing use in other bodies. Questions similar |
| Seek clarification | |
| Ask about what should have been notified | |
| Seek changes in a measure | |
| Third party adjudication | **Dispute settlement system** |
| Formal complaints of breaches of the rules | |
SPS and TBT as benchmark—the inverted pyramid

Source: WTO.
Note, Data valid as of March 2019.
WTO and OECD, 2019
Four takeaways from the inverted pyramid

1. Publicity (Brandeis): Huge number of SPS/TBT notifications
2. Discussion (Fuller):
   - STCs seek clarification; can lead to modification/withdrawal of a measure
   - Can signal support of an aggrieved domestic interest without a dispute
3. Formal procedures, good databases means we know about these committees
4. Dispute settlement is at the tip of the pyramid
   - Great many more STCs than disputes
   - Disputes are not the universe of WTO conflict management*

* not a new idea: see Horn, Mavroidis and Wijkstrom, 2013
Pyramid metaphor should apply across WTO

• All agreements have permissive language similar to TBT Art. 13.1:
  – The Committee shall afford Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives...

Two questions:
1. What happens in practice?
2. Who participates?
<table>
<thead>
<tr>
<th>WTO Body</th>
<th>Review of notification compliance</th>
<th>Extensive detail on “concerns” in minutes</th>
<th>Q&amp;A Document Series</th>
<th>Database of STCs or Q&amp;A</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPS</td>
<td>detailed</td>
<td>√</td>
<td>-</td>
<td>√</td>
</tr>
<tr>
<td>TBT</td>
<td>detailed</td>
<td>√</td>
<td>-</td>
<td>√</td>
</tr>
<tr>
<td>AoA</td>
<td>basic</td>
<td>√</td>
<td>-</td>
<td>√</td>
</tr>
<tr>
<td>Market Access</td>
<td>basic</td>
<td>X</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>TRIPS</td>
<td>basic</td>
<td>X</td>
<td>√</td>
<td>Pending</td>
</tr>
<tr>
<td>TRIMs</td>
<td>detailed</td>
<td>√</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>ADP</td>
<td>detailed</td>
<td>√</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>SFG</td>
<td>detailed</td>
<td>√</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>ILP</td>
<td>detailed</td>
<td>√</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>ITA</td>
<td>X</td>
<td>X</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>SCM</td>
<td>basic</td>
<td>√</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>ROO</td>
<td>basic</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>TFA</td>
<td>detailed</td>
<td>√</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Customs</td>
<td>basic</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td>CTS</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>GPA</td>
<td>Very basic</td>
<td>[some in Ann. report]</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>CTG</td>
<td>-</td>
<td>√</td>
<td>-</td>
<td>Pending</td>
</tr>
</tbody>
</table>

√ has

X does not have

(Subject to verification)

Source: Wolfe 2019
Implications

• Many bodies have something that looks like an STC
  – Common terms: “questions”, “consultations”, “issues”, as well as “concerns”
• But practice is uneven
  – Related to type & number of notifications? Whether delegates from capitals?
• Few committees have a searchable database
  – No quantitative data to create comparable pyramids
• Lots of room for improvement on the form of STCs
Who participates in STCs?

- Scholars know a lot about which Members participate in SPS and TBT
- I am trying to learn more about participation in other bodies
- Start with dispute settlement system as a baseline
Participation in DS proceedings: Complainants

- 25 Members have acted as complainants in 2017-2019 (111 did not)
- The 25 Members account for 80% of world exports

(Note: We count the EU28 as one member in our measures of participation in the DSU)

Fiorini, Hoekman, Mavroidis, Saluste and Wolfe, 2019
Chart 22: Ten Members that raised most new STCs during 1995-2018

Source: WTO 2019
Developing countries raise slightly more SPS STCs than developed countries but pattern similar to TBT.
Chart 6.4 Number of questions raised per type of Member\textsuperscript{a}

The term "mixed" refers to a question raised by both developed and developing country Members.

Questions in the Agriculture committee

WTO (2018b)
Why so few frequent flyers?

• Large literature on dispute settlement constraints
• Glass house syndrome
• Do developing countries lack capacity to analyze e.g. notifications?
  ➢ Countries with sophisticated alert systems and good internal coordination receive more comments from industry, and from other ministries
  ➢ Hence launch more disputes and raise more STCs than other Members
• Would improved WTO procedures help?
But first: does this page work?

- Reaction this morning suggested few businesses know about it or use it
- Kind of buried—need to know it’s there to find it
- Not a lot of information asked for on the form
PROCEDURAL GUIDELINES FOR WTO COUNCILS AND COMMITTEES ADDRESSING TRADE CONCERNS

DRAFT GENERAL COUNCIL DECISION

Communication from Albania; Australia; European Union; Hong Kong, China; Republic of Korea; Republic of Moldova; New Zealand; Norway; Panama; Qatar; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; Turkey; and Ukraine
Objectives of the 777 proposal

• Council and committee meetings offer possibility to discuss and resolve concerns with trade-related measures

• Desiring to strengthen the ability of regular WTO councils and committees to facilitate the effective resolution of such concerns by equipping them with horizontal procedural guidelines, taking into account the specific rules set by individual councils and committees;
777 proposal: easy parts

• Paras 1-5 concern timelines and other meeting arrangements

• Paras 6-7 encourage use of written questions and answers
  – Important for efficient use of committee time
  – Transparency for other Members, or firms, having same concern
  – Can facilitate work of small Geneva delegations who need to consult capitals, which in turn helps capitals learn
Para 8. The Secretariat will establish and manage a database on trade concerns in which all WTO documents pertaining to trade concerns are recorded, including written questions and replies, relevant minutes of meetings and relevant notifications. The database will contain a search facility to make all documents related to a particular trade concern easily accessible.

- A better, integrated database is vital
- Public facing element also need improvement:
  - Firms search by markets and products not by committee let alone STC
777: will it improve participation?

Para 15. A developing country Member encountering difficulties to respond to a trade concern or to implement these Procedural Guidelines is encouraged to request assistance from the WTO Secretariat.

• Developing countries also need help to know they have a concern worth raising
• It is capitals that need help to formulate a concern, and to respond to concerns of others
One big idea in the end

• Both information and discussion are necessary
  – To bring disciplines to life
  – To deepen cooperation

• Reform is needed to make both work better
  – Ottawa Group is on the right track, but efforts to improve participation are also needed
References


See also