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From Sunshine to a Common Agent. The Evolving
Understanding of Transparency in the WTO

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Abstract

Transparency obligations have undergone substantial transformations since the inception of the GATT in 1947. The paper begins by tracing the evolution of transparency principles during the WTO era. From an obligation to publish general laws affecting trade, the system now includes peer review by governments (monitoring and surveillance), and efforts to inform the public. The system is remarkable for what has been accomplished, but much remains to be done. Originally designed for a handful of developed countries, the system now provides an expanded knowledge base that benefits states, economic actors and citizens with inadequate resources to acquire information on their own. Fulfilling this emerging objective will require a stronger role for the WTO Secretariat as a “common agent” for Members. Transparency in the WTO is based on an assumption that agency matters. The evolution of the system reflects an increasingly expansive view of whose agency counts for trade policy, and therefore of what kinds of information should be available, in what form, and what use ought to be made of it. Our expectation is that the continued evolution in the multilateral understanding of agency in trade policy will be reflected in growing sophistication of WTO transparency practices.

Keywords

Transparency, WTO

JEL: K40

1. The Real Jewel in the WTO Crown

Formal rounds of negotiations and resort to the dispute settlement system are the traditional ways of thinking about the role of the World Trade Organization (WTO), but the third dimension of its work, which can be broadly grouped as ‘transparency and accountability mechanisms’, may be the most important. Transparency is part of the WTO’s DNA, traceable at least through the 1947 General Agreement on Tariffs and Trade (GATT) back to a 1923 treaty on customs cooperation. This essential element of WTO institutional design is intended to let sunshine illuminate trade policy practices to the benefit of both governments and traders. The WTO’s 20th anniversary is an appropriate moment to describe the impressive evolution of its transparency mechanisms, assess their effectiveness, and reflect on what more must be done if the WTO is to fulfil its potential as the central institution for the governance of the global trading system.

The first use of sunshine as a metaphor for transparency as a policy tool is attributed to the American jurist Louis Brandeis. In writing about efforts to regulate finance, Brandeis (1914, 92) stated:

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.

The Brandeis view assumes that agents whose actions are exposed will hew more closely to shared understandings of the common good. If not, then other agents provided with information can exercise appropriate discipline. In this view of agency, sunlight contributes more to social order than does coercion. Sunlight plays this role in the trading system by reducing information asymmetries. If one of the points of signing trade agreements is that binding commitments reduce policy uncertainty that would otherwise reign over trade relations, then the credibility of those commitments matters. Transparency ought to improve the operation of the trading system by allowing verification by all Members that national law, policy, and implementation achieve the objective intended by the agreements.

The assumption of the drafters of the GATT in 1947 was that publication alone was all that the relevant agents needed. Over time, participants in the trading system learned that a more active form of publication was needed to draw relevant information to the attention of other governments in the form of “notifications” through the Secretariat (GATT, 1978). By the 1970s, it was becoming clear that governments needed a forum to discuss such notification with each other and the GATT Council began a biannual review of notifications (WTO, 1995a). Neither that review nor the notifications themselves were sufficient, so as part of the establishment of the WTO as a new international organization, the Uruguay Round agreements created a much more elaborate structure of committees, with a working group on how to make the many new notification requirements work.

Creating opportunities to discuss new measures in advance can reduce the potential for conflict between states, for example when the measure is modified to accommodate the interests of partners, but it only provides time for economic actors to adjust if the information is available to them. The original GATT transparency system assumed that the primary agents were government officials in developed countries, and traders with the sophistication to make use of published information. The picture changed dramatically over the years as more and more countries joined the GATT/WTO (expanding membership from the original 23 to today’s 160), and the amount of trade-relevant regulation proliferated as well. Less than 10 years after the creation of the WTO, Members had already concluded that more needed to be done to make information available to developing countries, the public and economic actors.

In what follows, we will first examine the evolution of the discipline within the world trading system (Section 2), before we perform a ‘reality check’ and discuss whether the transparency obligations have been observed (Section 3). Next we suggest (section 4) that trade policy information

is a public good, especially for traders and for smaller Members, a public good that will be underprovided without a strong role for the Secretariat. We conclude (Section 5) with two proposals on the optimal future evolution of the transparency obligation.

2. One, Two and Three Generations of Transparency

WTO transparency has evolved through three generations.¹ First generation refers to the original GATT policies on information from 1947 as elaborated over the years, while second generation refers to the monitoring and surveillance mechanisms introduced with the conclusion of the Tokyo Round negotiations in 1979, and enhanced in the Uruguay Round negotiations that led to the creation of the WTO in 1995. Third generation refers both to managing an enlarged WTO with 160 Members, and to greater openness to the public, facilitated by the emergence of the internet, especially after a 2002 decision on access to documents.

2.1 First Generation Birth Defects

Most of the first generation WTO transparency provisions relate to the obligations incumbent on governments for trade policy transparency at home. This principle is first seen in Art. X GATT on “Publication and Administration of Trade Regulations”, but it is now found in many other WTO agreements. Publication, which remains essential, proved to have at least two limitations.

First, publication is restricted to laws of ‘general application’, which is sensible, since otherwise a cost will be imposed on WTO Members to provide information that might be of little use to traders. Disputes have arisen (and continue to arise) on what ‘general application’ means, which is one of the reasons that over 40 WTO disputes concern GATT Article X. WTO Members have consistently preferred to be parsimonious about what they publish.

Second, the emphasis is placed on ‘unveiling’ information, somewhere. Procurement of information however, can be costly. Are most traders helped, for example, by information about subsidies published in a local newspaper that is not in a WTO official language? Publication at home does not mean notification to other Members of the WTO. The only significant GATT notification requirements were in Art. XVI, which required notification of subsidies, and Art. XXIV, which required notification of FTAs (GATT, 1978).

2.2 From Publication to Notification

Notification obligations began to expand in the 1980s as the new Tokyo Round obligations too the GATT “behind the border”, and expanded much more with the advent of the WTO in 1995. Publication at home is barely enough when most trade measures have their effects at the border, but much more transparency is needed when obligations concern domestic measures that can affect trade. To encourage submission of information, in one of the “decisions” adopted with the creation of the WTO (WTO, 1995b), Members agreed that notification would not prejudice views on the consistency of measures. They established a Central Registry of Notifications to receive and maintain notifications, to inform each Member annually of their regular notification obligations, and to draw the attention of individual Members to regular notification requirements that remain unfulfilled. By 2011, the central database covered 176 notification requirements, of which 42 are recurring requirements (semi-annual, annual, biennial, triennial) (WTO, 2011a, Box 1). This number has increased with the new Trade Facilitation Agreement.

¹ This section is based in part on (Collins-Williams and Wolfe, 2010; Wolfe, 2013).

Notification is one leg of second-generation obligations, the other being the establishment of monitoring and surveillance mechanisms. Members review each other's implementation of the Agreements in the various WTO committees, often with an opportunity to ask each other questions about their respective notifications. The Agriculture Committee, for example, devotes a significant part of each regular meeting to the review of notifications. The Committee on Regional Trade Agreements' (CRTA) new Transparency Mechanism allows discussion of notification of new RTAs to expose the potentially negative aspects of an RTA without requiring Members to give it formal approval (Mavroidis, 2011). Peer review of the ensemble of a country's trade policy (but not consideration of specific obligations) is also found in the Trade Policy Review Mechanism (TPRM). Discussion there is based on major reports written both by the WTO Secretariat and the Member under review (WTO, 2011a, para 178 ff).

The most elaborate monitoring and surveillance mechanism is now known as the "specific trade concerns" (STC) procedure. That term is not mentioned in the text of any WTO agreement, although many agreements encourage a process where Members may engage in ad hoc "consultations". The STC process has evolved the most in the SPS (Sanitary and Phyto-sanitary Measures) and TBT (Technical Barriers to Trade) committees Horn et al. (2013).

2.3 Into the Great Wide Open

Third generation transparency focuses on the efficiency of procuring information. The TBT Agreement is the frontrunner here. It requires the establishment of 'inquiry points', where private traders can seek information from national authorities about the workings of technical regulations. Traders therefore do not have to depend on their government, which will receive similar information in the TBT Committee. Inquiry points are the first step towards 'single windows' in each Member to reduce the "search costs" of information procurement. In similar vein, the new Integrated Trade Intelligence Portal (I-TIP) provides a single entry point for information compiled by the WTO on trade policy measures. I-TIP covers both tariff and non-tariff measures affecting trade in goods as well as information on trade in services, trade in government procurement markets, regional trade agreements and the accession commitments of WTO members. This transparency system looks good on paper, but does it work?

3. Reality Check

The evolution of the GATT/WTO through three generations of increasing complexity and sophistication has created a remarkable window on the trading system, but it remains cloudy. The Central Registry system with its detailed annual reports is both essential and frustrating, because only experts can make sense of the data. More valuable is the section of the periodic TPR reports on each country that details their notification performance. But this kind of "naming and shaming", which also takes place in some committees, has not led to a large increase in notification.

Four sorts of reasons can be advanced in explanation of why governments do not improve notification. The first is bureaucratic incapacity, which is the case for many developing countries whose trade ministries lack the data or knowledge. Second, Members might worry about opening themselves to criticism in a dispute, perhaps about a measure they suspect might be illegal, or worry that a notification might require showing one's cards in a negotiation. Third, there is lack of trust between trade negotiators and other government agencies in capitals, which is said to be more significant than any lack of trust in Geneva. This lack of trust inhibits the ability of trade officials to gather information for notification of domestic policies, which are the policies where notification is most valuable. Fourth, there is ambiguity about what to notify. What is 'law of general application'? What is a 'subsidy'?

In the latest in a long series of efforts of such efforts, the chairperson of the General Council wrote to the chairs of all WTO bodies in February 2009 asking them “to consult with Members on ways to improve the timeliness and completeness of notifications and other information flows on trade measures.” The subsequent annual overview of the trading system by the Director-General (WTO, 2009) contained a new section on transparency, since repeated every year. What it shows is that required notifications are late or incomplete, or never submitted at all. No Committee has a perfect record, though some are better than others. The record of notification of industrial subsidies is especially poor (Collins-Williams and Wolfe, 2010). While many of the poor performers are small countries of little overall significance in the trading system, some of the recalcitrant are among the largest traders. In April 2013, the chair of the Subsidies and Countervailing Measures (SCM) Committee listed the 71 Members that had not made 2011 notifications, including 4 of top 30 merchandise exporters: China, Indonesia, Thailand and the United Arab Emirates.² The excuses offered included technical and capacity constraints, and coordination difficulties.. A related problem is the inability or unwillingness of many Members to use second-generation transparency mechanisms by asking questions in committees. The nearly 900 questions asked in the SCM committee from 2008 to 2012 were asked by only 16 Members, all but two of whom are G-20 countries, although the questions were posed to 58 Members (counting the EU as one in both cases). This reticence may be a manifestation of the “glass house syndrome”. Or if Members do not ask questions, it could be because they do not see the value of either notification or surveillance.

Violations of transparency obligations are, like any other obligation, justiciable. The de facto system of prospective remedies that WTO Panels have adopted means that all WTO Members, that have failed on their obligation to disclose information have to do, is notify the WTO ex post facto. A highly illustrative case is the ‘Trondheim’ litigation, (Mavroidis 1993), where Norway had failed to respect its transparency obligations under the Government Procurement Agreement. The United States found out, and prevailed in the subsequent GATT dispute, but had to be content with to a ‘Pyrrhic’ victory. All the Panel requested from Norway was a promise never to repeat this behaviour. In practice, therefore, the only discipline on transparency obligations, is transparency. We think more is needed.

4. Empowerment of the Common Agent

The objective of WTO transparency is not only to reduce information asymmetries among governments, but also between the State, economic actors, and citizens. Article x.1 GATT requires publication of certain trade policy information for the benefit of both governments and traders. Article X.3 requires creation of independent administrative law tribunals to allow prompt adjudication of customs matters. More recent WTO agreements go further in specifying domestic administrative law requirements. While we think of the WTO as a contract among governments, therefore, its rules are also meant to serve traders. The rights of private parties under the Government Procurement Agreement (GPA), their effective protection through the obligation to establish ‘inquiry points’ under the TBT and SPS Agreements go in the same direction. These differing objectives create a trilemma. The surveillance system is designed to monitor official obligations on behalf of governments, but citizens and analysts are interested in the economic or social impact of policy, not the implementation of commitments, while traders are only served if governments publish information at home, and if all WTO data is accessible, in user-friendly form. Uncertainty for economic actors, including about the rules in foreign markets, can be crippling. In short, everyone needs more information, and they need efficient access to it.

² G/SCM/W/546/Rev.4/Corr.1; G/SCM/M/85.

4.1 Whose Agency?

It is by now commonplace to treat ‘information’ as a commodity. There are undeniable search costs when trying to unearth information, and some agents cannot bear them. It is typically poor, developing countries in the WTO that profit from transparency, since procurement of information is costlier for them: they export few goods and services to few countries, and they lack a large diplomatic network of officials gathering commercial information abroad. Similarly, smaller traders lack in-house trade intelligence capacity, and cannot afford to procure it from big multinational law firms. Our analysis shows that small countries and small firms, in particular, need more from the WTO. The Secretariat has some capacity to act as the common agent of the Members. We think that this role should be enhanced.

When it comes to honouring their transparency obligations, WTO Members seem more often to have placed the accent on their ‘right to divulge’, or not, and less on the consequence of this exercise of their discretion; that is, that others may be limited in their ‘right to know’ about measures affecting trade. Moreover, one should not underestimate the collective action problem that arises, even for large Members. Why should the U.S. incur the cost of procuring information through reverse notifications when all Members will benefit from the information thereby revealed? The U.S. has submitted extensive reverse notifications of Chinese and Indian subsidies, for example, but few other Members have the capacity to generate such analysis of another Member’s policies. And the U.S. in other similar occasions might have an incentive to keep similar information to itself rather than serving the general good with a reverse notification, or a detailed question in a committee.

Given the missing incentives to notify, which are unlikely to change soon, one solution might be to cut through the trilemma by enabling a disinterested party to acquire and disseminate information as the “common agent” of all participants in the trading system.

4.2 What happens already

The WTO has multiple principals who are themselves agents in the trading system—160 Member governments, but also citizens, and hundreds of millions of traders. Sunshine as now practiced is not properly serving their agency, their ability to discipline other agents who may not be playing by the rules. Two things are needed, which can only come from a common agent: active efforts to increase the amount of information available, and then to make that information widely available in a useful way. The move towards increasing the role of the common agent (the WTO Secretariat) is the (implicit) response to the failure to submit notifications by WTO Members.

The core of each TPR report is based on the notifications from Members, but each report builds from a far wider range of information. The Secretariat collects data from official sources (questionnaires to Member under review) and non-official sources, including from other international organizations, media reports, and NGOs. To ensure accuracy, the Secretariat seeks verification of the data from non-official sources when discussing the draft of its report with the Member (WTO, 2011a, para. 180).

Members created a new mechanism in response to the Great Recession that began in 2008. After the G-20 asked the WTO and other international organizations to monitor their collective commitment to avoid protectionism, the WTO began issuing periodic crisis monitoring reports, a novel extension of the mandate of the TPRB (WTO, 2012). The Director-General claimed that he had the authority under the WTO agreements to conduct the crisis monitoring, but Members only formalized this role in December 2011 (WTO, 2011b). Members had discovered that the periodic Secretariat reports were factual and useful, especially for smaller Members who could not begin to generate such data on their own, and that the Secretariat was not trying to add to the dispute settlement system through the back door (Wolfe, 2012).

There is only so much that a Secretariat can do though. It too faces search costs and its powers of naming and shaming are limited.

4.3 A Look into the Future

Transparency for other WTO Members and for individual traders cannot have the same content. Irrespective whether we talk customs matters, technical barriers to trade, or government procurement, the ‘intensity’ of information should be different. Traders do not possess sophisticated bureaucracies that will ‘process’ supplied information for them. The level of ‘dis-aggregation’ should be different when information is meant to accustom traders to trade policies. This is an area where the WTO can substantially improve, and it will be a very welcome accompanying measure to ‘single windows’ that should, if possible, find application across the spectrum of trade policies. We see a role for the WTO as the common agent to supply information when it is under-supplied. In this respect, we would like to see two innovations that would support the changing role that the WTO ought to play in international trade relations.

First, we would like to see a more proactive WTO when it comes to collecting information and making it available, which would require some internal re-organization of the staff, and probably some additional investment as well. The inadequate notifications by WTO Members can be partially mitigated by giving the Secretariat increased scope, and resources, to act as the common agent of Members in assembling information that ought to have been notified. This authority to try fill the gaps in the information provided by Members should be subject to the principle that such information should be subject to “verification” by Members. For example, the Secretariat could keep a data set with the number of notifications in general and by agreement for each WTO Member say for a 5 year period. If in any year, a given WTO Member is below the ‘mean’, then WTO officials should target it on priority basis. In similar vein, if important developments happen (signing a new regional agreement; acceding to a plurilateral agreement; end of transitional period etc.), and there is no ‘upwards’ deviation from the ‘mean’, then again this WTO Member should be reviewed on priority basis.

Second, one area worthy of special attention by the Secretariat as common agent is regional or preferential trade agreements (PTA). The WTO is not the only game in town, since over 500 regional trade schemes have been established, and some mega regional schemes are about to be established. We know little, if anything at all, about the workings of those schemes after the ‘train has left the station’, and the review by the CRTA has been completed. And yet, these agreements are full of TBT+, SPS+, GPA+ disciplines, which at least potentially affect each and every WTO Member and trader. A bridge must be built to ensure a steady flow of information about the operation of PTAs. Such a transparency and dissemination exercise matters for PTA participants themselves, because most such agreements have weak institutional structures, without strong notification obligations, and no Secretariat to process notifications in any case.

5. Sunshine needs a stronger lens

Justice Brandeis might have overstated the ‘efficiency’ of sunshine, but he certainly did not overstate the case for transparency. The work of Nobel prize winning economists (Akerloff, Stiglitz, Spence, Williamson) demonstrates that information should be treated like all other scarce commodities. It is costly, and not equally accessible. Transparency obligations aim to equalize conditions of procuring information across all trading nations and their traders, assuming of course fair play by all. In the case of international trade, where (almost) all government intervention affects the trade outcome in one way or the other, the quest for equalizing access to information is also a quest for ‘efficient’ access to information. It does not help traders much to know that information is available, if they do not also know where it is available. We see a need to strengthen the existing disciplines, but also, inevitably so,

a greater role for the WTO to act as a lens, helping to shine a more focused light where it is needed, enabling many more actors to have the information to discipline the efforts of the few to restrict trade at the expense of the many. It is high time that the WTO acts =in line with its original mandate, the forgotten ‘inconvenient’ truth: it is a government-to-government contract that greatly affects the lives of individuals. In this vein, our recommendations suggest a more active role for the WTO Secretariat, and a wider use of the information provided. As more developing countries come to participate in global value chains, and micro-firms in all countries participate in rapidly expanding internet-enabled trade, a much wider group of economic actors count, and the problem of information asymmetry will become exponentially more complex. No PTA can create the necessary apparatus; WTO can, but only with an expanded role for the Secretariat as common agent collecting, aggregating and disseminating trade policy intelligence.

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