

A crisis looming in the dark: Some remarks on the reform proposals on notifications and transparency

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1. Introduction

In seeming contrast with the other contributors to this Question, I am not much concerned with the systemic causes of the WTO's current crisis and with proposing plans for its modernisation. For one thing, I have neither the space nor, frankly, the ability to address in depth such issues.¹ For another, I believe that December 2019 marked the end of a certain era in the history of the WTO, but also that news about its death are premature and, in the end, unfounded.² In other words, I do agree with Steve Charnovitz that '[t]o the Question of whether there is a

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¹ Outstanding scholars have been offering their reflections on these matters over the last few months. To start with, see the other contributions to this QIL *Zoom-out* that have been published so far, ie, those by S Charnovitz, 'A WTO If You Can Keep It' (2019) 63 QIL-Questions Intl L 5; G Sacerdoti 'The Stalemate Concerning the Appellate Body of the WTO: Any Way Out?' *ibid* 35; and P-T Stoll, 'A Washington Wake-up Call and Hybrid Governance for World Trade' *ibid* 59. Cf also, JJ Weiler, 'Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System' EJIL:Talk! (25 July 2018) <www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system>; J Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22 J Intl Economic L 297; TJ Schoenbaum, DCK Chow, 'The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony', (2019) 30 Stanford L & Policy Rev 115; B Hoekman, PC Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis' Robert Schuman Centre for Advanced Studies Research Paper No RSCAS 2019/56 (1 July 2019).

² Borrowing from Sacerdoti (n 1) 37, 50: 'What transpires' from the US attack to the dispute settlement system 'is a desire to get rid of the rule-based operation of the WTO, reverting to the power-based system of the GATT, whose panel reports could be blocked by the opposition of the losing party.' Whether or not such debilitation of the dispute settlement system is lasting is, at present, difficult to divine.



“meaningful place” for the WTO in the “Future of International Economic Law”, the answer is an unabashed yes.³

I am turning instead to what seems *prima facie* a minor matter vis-à-vis the afore-mentioned problems, ie the current and prospective role of surveillance schemes and transparency obligations within the multilateral trading system. While in a year of unprecedented crisis for the organisation the event did not make many news headlines, on 12 April 2019, the Trade Policy Review Mechanism (TPRM) commemorated its 30th anniversary.⁴ Together with the many rules on notifications, publication and reporting embodied in the multilateral trade agreements, the TPRM, established to ensure greater awareness of national trade policies, is the main channel used by the WTO to promote accountability, predictability and transparency.⁵

³ Charnovitz (n 1) 5.

⁴ The TPRM was first introduced on the basis of the GATT Council Decision on 12 April 1989, when the GATT Council decided that the TPRM would be implemented immediately, albeit on a provisional basis. Cf Trade Policy Review Mechanism: Programme of Reviews – 1989-2000, GATT Doc L/6554 (19 July 1989). Some five years later, the TPRM was confirmed as an integral part of the WTO under Annex 3 of the Marrakesh Agreement Establishing the WTO, which was signed on 15 April 1994 (WTO Agreement, Annex 3, 1869 UNTS 480). It became effective in December 1989 with a review of the US trade policy. Through the TPRM the membership as a whole periodically reviews the trade regimes of Members. The reviews are supplemented by an annual report by the Director-General that provides an overview of developments in the international trading environment. More recently, the WTO has expanded its trade monitoring role, producing on a regular basis reports looking into trade-policy trends across the WTO membership as a whole. Launched in early 2009 following the outbreak of the global financial crisis, these WTO-wide trade monitoring reports have further strengthened the transparency objectives of the TPRM. Every six months, the WTO issues a new report outlining how WTO Members and observers are implementing a broad range of policy measures that facilitate or restrict trade flows. For a thorough account, cf M Kende, *The Trade Policy Review Mechanism. A Critical Analysis* (OUP 2018).

⁵ A requirement of transparency in this context means several different things. The law-making process is transparent if it publicly airs the various viewpoints and purposes of the laws to be enacted. A statute or law is transparent if the intended economic effect is clearly predictable and expected from the law’s means. For example, a tariff as a trade policy instrument is transparent because its end, restriction of imports, is predictable from its means, a rise in price, and because tariffs have traditionally been used for restricting imports. Transparency with respect to national policies is simply a requirement that policymakers not disguise the purpose or tendency of national trade policies.



Overall, the main goal of such surveillance schemes and notification/publication obligations is ‘the smoother functioning of the multilateral trading system.’⁶ This is attained through improved adherence by all Members to the multilateral trade rules, disciplines and commitments, which, in turn, depends on greater transparency in, and understanding of, their respective trade policies and practices.⁷ Interestingly enough, despite their different views on the role and prospect of the Dispute Settlement System (DSS) and other modernisation reforms for the organisation, the major trading entities of the world, *including* the United States (US),⁸ agree on the importance and need of strengthening the monitoring role of the WTO.⁹ Discussions on reforms within the organisation almost invariably underscore that transparency remains an important and contentious issue within the operation and monitoring function of the WTO.¹⁰ Proposals coming from the developed Members specifically fo-

⁶ PC Mavroidis, ‘Surveillance Schemes: The GATT’s New Trade Policy Review Mechanism’ (1992) 13 *Michigan J Intl L* 374, 378.

⁷ J Chaisse, M Matsushita, ‘Maintaining the WTO’s Supremacy in the International Trade Order: A Proposal to Refine and Revise the Trade Policy Review Mechanism’ (2013) 16 *J Intl Economic L* 9, 13-14.

⁸ Various WTO Members including Argentina, Australia, Costa Rica, the European Union, Japan, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have co-sponsored a US Communication entitled ‘Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements’. Cf JOB/GC/204, JOB/CTG/14 and its Addenda ‘Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements’ (1 November 2018). Prior to the 11th WTO Ministerial Conference, which took place in December 2017 in Buenos Aires (MC11), the US had submitted a similar proposal for a Decision by Ministers at the Ministerial. This proposal failed, however, to garner consensus at MC11.

⁹ Cf EU Commission Concept Paper on WTO Modernisation (18 September 2018) <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf>; Discussion Paper from Canada on Strengthening and Modernizing the WTO (21 September 2018) <<https://docs.wto.org>>; and China’s Proposal on WTO Reform (13 May 2019) <<https://docs.wto.org>>.

¹⁰ WTO, General Council for Trade in Goods, Council for Trade in Services, TRIPS Council, Committee on Trade and Development, Committee on Agriculture, An Inclusive Approach to Transparency and Notification Requirements in the WTO Communication from Cuba, India, Nigeria, South Africa, Tunisia, Uganda, and Zimbabwe, JOB/GC/218, JOB/CTG/15, JOB/SERV/292, JOB/IP/33 JOB/DEV/58, JOB/AG/158 (27 June 2019) para 1.1. See also ‘Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements’, Statement delivered by Ambassa-

cus on strengthening notification/surveillance and developing more effective mechanisms for dialogue on regulatory policies that may create negative spillovers, a position widely shared by experts.¹¹

Hoekman puts it well: ‘transparency is a critical input into WTO processes as well as an important output of the organization.’¹² And monitoring clearly interfaces with its other main functions.¹³ Accordingly, this article offers some reflections on the operation of WTO transparency obligations and monitoring with a view to contributing to both the diagnosis and prognosis of its present ‘disease.’ The remaining of the article is therefore divided into three parts. Section 2 summarises the logic of transparency in the multilateral trading system. Section 3 provides an assessment of the performance of the WTO monitoring schemes and transparency rules with regard to selected issues that are significant for the present and near future of the multilateral trading system. Against such backdrop, Section 4 concludes by discussing the proposals for a more effective monitoring of national trade policies and practices and making some tentative considerations on its prospective role in light of the ‘extinction’ of the Appellate Body (AB).

dor Dennis C Shea in the WTO Council for Trade in Goods (11 April 2019) <<https://geneva.usmission.gov/2019/04/12/procedures-to-enhance-transparency-and-strengthen-notification-requirements-under-wto-agreements>>.

¹¹ See recently Chaisse, Matsushita (n 7) 19-33; PC Mavroidis, R Wolfe ‘From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO’ (2015) 21 *Brown J World Affairs* 117, 123-29.

¹² B Hoekman, ‘Proposal for WTO Reform: A Synthesis and Assessment’ in A Narlikar, M Dauton, RM Stern (eds), *The Oxford Handbook of the World Trade Organization* (OUP 2012) 743, 765.

¹³ Governments use WTO as a forum for intervening in the design of another Government’s regulations. In this sense, the practices of WTO committees make for stronger and more extensive governance networks. One of the ultimate purposes of transparency is to ensure accountability for commitments, in this case by Governments holding each other to account. Transparency was the central component of the novel accountability mechanism Members developed to restrain protectionist impulses associated with the Great Recession. Cf R Wolfe, ‘Protectionism and Multilateral Accountability During the Great Recession: Drawing Inferences from Dogs Not Barking’ (2012) 46 *J World Trade* 777-814; S Charnovitz, ‘Rethinking WTO Sanctions’ (2001) 95 *AJIL* 792, who opines that transparency procedures, or giving the information to the relevant actors, is sometimes more effective than sanctions. See further *infra* s 2.



2. *The logic of transparency in the multilateral trading system*

Transparency is commonly understood as the quality of being easy to see through, a quality that reality may or may not possess. It has become one of the distinctive traits of contemporary Western culture.¹⁴ Everybody has an intuitive understanding of what transparency is, but it is not a distinct legal concept and its contours are blurred.¹⁵ Its nature and normative content are far from clear in international law too. Despite mounting expectations regarding transparent international institutions, rules, procedures, meetings and documents, transparency is not a coherent category.¹⁶ But its nature and quality may become more definite when examined through specific international treaties/regimes. There is, indeed, a large number of international agreements that prescribe transparency in different interactions and on different issues.¹⁷

¹⁴ Cf the different essays in H Steiner, K Veel (eds), *Invisibility Studies. Surveillance, Transparency and the Hidden in Contemporary Culture* (Peter Lang 2014); and A Florini, JE Stiglitz, *The Right to Know: Transparency for an Open World* (Columbia UP 2007). A Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in A Bianchi, A Peters (eds), *Transparency in International Law* (CUP 2013) 1, 7, recalls that legal studies 'on the existence of concepts and/or values that find their roots in the societal body and contemporary culture is not novel, ... somewhat reminiscent of Roberto Ago's notion of meta-legal principles of a general nature that would shape the content, interpretation and enforcement of international legal rules, ... a notion that has been more recently taken up and expanded upon by Antonio Cassese.' See R Ago, *Lezioni di diritto internazionale* (Giuffrè 1943) 65.

¹⁵ Bianchi (n 14) 9.

¹⁶ A Peters, 'Towards Transparency as a Global Norm' in Bianchi, Peters (n 14) 534, 599-607. A general normative status may be arguably attributed to transparency only considering the issue of normativity outside the traditional discourse on the doctrine of sources and referring to Vaughan Lowe's theory of the existence of 'interstitial norms.' These norms would operate in the interstices of primary rules in order to ensure that the international legal system adheres to the contemporary ethos. Interstitial norms – often expressed in terms of principles – would operate as permanent connectors between the law and the changing societal realities, hence directing normative processes and the interpretation of legal prescriptions. Cf V Lowe, 'The Politics of Law-making: Are the Method and Character of Norm Creation Changing?' in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 207-26, esp 221: '[i]nterstitial norms are the points where general culture obtrudes most clearly into the processes of legal reasoning.'

¹⁷ Peters (n 16) 583. See also A Chayes, A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Norms* (Harvard UP 1995).



The several transparency obligations in international trade agreements are a case in point. The dozen and dozen transparency procedures and rules in the WTO agreements, go beyond what is normally found in other multilateral regimes.¹⁸ Transparency finds its place within the WTO in three distinct, albeit interconnected, settings. The first relates to the WTO decision-making procedures and is broadly about the ‘accountability’ or transparency of the WTO itself, a common theme in the literature on international organisations.¹⁹ The second is concerned with the WTO dispute settlement mechanism as laid down in the Dispute Settlement Understanding (DSU).²⁰ The WTO transparency norm, however, is more about a third aspect, which concerns the institutional and procedural rules aimed at reducing uncertainty about domestic policy, both for trading partners and economic actors.²¹

As to the first aspect, the WTO was conceived as a negotiating hub for its Members: trade negotiations traditionally carried out through discreet channels in order to give policymakers margins for manoeuvre and to avoid negative coalitions against trade liberalisation. As it is known, trade negotiators ‘have difficulties to come to terms with increased transparency internationally as well as the enhanced consultations processes that come with it.’²² Therefore, in the WTO decision-making, the implementation of transparency principles are hampered ‘by the difficulty of

¹⁸ Only GATT 1994 makes no less than 41 references to ‘transparency,’ and these are more specific than the references found in the Tokyo Round. The Agreement on the Application of Sanitary and Phytosanitary Measures includes its own article (and annex) on the transparency of such provisions, as does the Agreement on Trade-Related Investment Measures and the Trade Related Aspects of Intellectual Property Rights Agreement. See WTO Agreement, Annex 1A, 1867 UNTS 190.

¹⁹ Cf, eg, RW Grant, RO Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *American Political Science Rev* 29; TN Hale, ‘Transparency, Accountability, and Global Governance’ (2008) 14 *Global Governance* 73; S Chesterman, ‘Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law’ (2008) 14 *Global Governance* 39; and, with specific reference to the WTO, P Delimatsis, ‘Transparency in the WTO’s Decision-Making’ (2014) 27 *Leiden J Intl L* 701.

²⁰ WTO Agreement, Annex 2, 1869 UNTS 401. Cf H Horn, PC Mavroidis, ‘International Trade: Dispute Settlements’ in AT Guzman, AO Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar 2007) 177; G Marceau, M Hurley, ‘Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms’ (2012) 4 *Trade, L & Development* 19.

²¹ T Collins-Williams, R Wolfe, ‘Transparency as a Trade Policy Tool: The WTO’s Cloudy Windows’ (2010) 9 *World Trade Rev* 551, 553 ss.

²² Delimatsis (n 19) 725.



distinguishing between bargaining in negotiations (which requires a certain degree of confidentiality) and institutional law-making (which would call for greater openness, checks and balances for executives and civil society scrutiny).²³ Whereas adjustments towards increased transparency have been introduced with the institutionalisation of the multilateral trading system – especially, from a documentary perspective,²⁴ and through the WTO institutionalised policy of contact with NGOs and civil society bodies²⁵ – the tradition of decision-making through consensus means that several negotiations take place informally in meetings to which reference is made succinctly in the WTO documents and, on occasions, do not even appear in them.

Regarding transparency in the WTO dispute settlement mechanism, suffice it here to recall few elements. Although transparency is mentioned only once in the DSU,²⁶ this says little about the level of transparency in the WTO dispute settlement system. According to Article 3(2) DSU, the system is instrumental in providing legal certainty and predictability in the multilateral trading system. The system has also developed a number of due process norms that have increased the accountability of WTO adjudication, including on the staff members of the Secretariat who assist(ed) the AB members, the panelists, arbitrators and experts, who are

²³ LM Hinojosa-Martinez, 'Transparency in International Institutions' in T Cottier, K Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar 2017) 216, 221.

²⁴ The present applicable law on access to WTO documents is the Decision of the General Council of 14 May 2002 on Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Only the documents of the Committee on Government Procurement and on Trade in Civil Aircraft, as well as the WTO documents issued before 15 May 2002 follow different rules (see GPA/72, TCA/8, WT/L/160/Rev.1), while the general rule is that all WTO official documents are unrestricted and available on the WTO website. Any confidential document originating in a WTO body is automatically unrestricted within 60 or 90 days. Minutes of the meetings are derestricted after 45 days after the date of circulation. A minor exception is the possibility for a Member, when it submits a document as restricted, to keep it confidential indefinitely if it renews the qualification each 30 days.

²⁵ Cf Guidelines for Arrangements on Relations with NGOs, Decision of the General Council, WT/L/162 (18 July 1996). The WTO regularly provides information and holds briefings with NGO representatives and has organised the WTO Public Forum every year since 2006. On the WTO's engagement with civil society see M Perez-Esteve, 'WTO Rules and Practices for Transparency and Engagement with CSOs', WTO Staff Working Paper ERSD-2012-14 (18 September 2012); Charnovitz (n 1) 33-34.

²⁶ DSU, Appendix 3: Working Procedures, para 10.



bound by rules of conduct aimed at ensuring integrity, independence, the avoidance of conflict of interest and the confidentiality of the proceeding.²⁷ Some authors argue that a right of public access could be stronger, with more documents made available, and greater recognition of *amicus curiae* and submissions by citizens and economic actors.²⁸ Although scholars tend to agree that the WTO DSS is sufficiently transparent,²⁹ it is, at the same time, acknowledged that the system is more ‘confidential’ than other international adjudicatory mechanisms.³⁰

The third main setting of transparency disciplined by WTO law is the most important for the ends of this paper. It is not about the institutional transparency *in* the organisation (decision-making or adjudication). Instead, trade policy transparency (or transparency as disclosure) addresses the imperfect information about domestic policies and practices by Members that can impair trade liberalisation.³¹ The WTO Glossary defines ‘transparency’ as the ‘[d]egree to which trade policies and practices, and the process by which they are established, are open and predictable.’³² WTO obligations require both transparency at the national level and transparency in Geneva. Transparency, therefore, refers to a number of interdependent actions, including how a rule or a policy is developed domestically; how the rule is enforced, or a policy is implemented; how

²⁷ See further P Eeckhout, ‘The Scale of Trade: Reflections on the Growth and Functions of the WTO Adjudicative Branch’ 2010 (13) *J Intl Economic L* 3.

²⁸ GV Puig, B Al-Habbab, ‘The Transparency Deficit of Dispute Settlement in the World Trade Organization’ (2011) 8 *Manchester J Intl Economic L* 2, 2-17.

²⁹ Marceau, Hurley (n 18) 19-44.

³⁰ The entire procedure is confidential, and covers the consultations (art 4(6) DSU), the panel procedure until the circulation of the report (arts 14(1) and 18(2) DSU and para 3 of the Working Procedures in Appendix 3 to the DSU), and the proceedings of the AB (art 17(10) DSU). It is true that Members may make use of their right to disclose their own submissions to the public (art 18(2) DSU and para 3 of the Working Procedures in Appendix 3 to the DSU). The reports of panels and the AB also give a description of the proceeding, including the positions taken by the various participants. However, this does not give non-participants any opportunity to contribute to the dispute settlement proceeding while it is ongoing (ie before decisions are made). For that reason, there is a great deal of interest in the question of who can participate in dispute settlement proceedings. Cf, eg, G Sacerdoti, ‘The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges’ in M Elsing, B Hoekman, J Pauwelyn, (eds), *Assessing the World Trade Organization. Fit for Purpose?* (CUP 2017) 147.

³¹ R Wolfe, ‘Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?’ (2017) 16 *World Trade Rev* 713.

³² WTO Glossary <www.wto.org/english/thewto_e/glossary_e/glossary_e.htm>.



the rule is published; how a new rule or a policy action is notified to the other Members of the WTO; how a notification is discussed in Geneva; and how the results of the Geneva process are published.

As submitted by Collins-Williams and Wolfe '[o]ne way in which trade agreements make a difference to economic activity is by reducing uncertainty about policy, both for trading partners and economic actors.'³³ A necessary condition for both negotiations and enforcement of WTO agreements (and international treaties in general) is indeed information.³⁴ Specifically, on the enforcement side of the equation information 'is needed to determine if Members are implementing commitments or if an action by a partner is a violation.'³⁵ The operation of the TPRM and the WTO transparency processes and rules aim at the generation of information through notification requirements; publication obligations; formal surveillance; the possibility of cross-notification; review of proposed measures in committees; etc.³⁶ There exist over 200 notification requirements embodied in the various WTO agreements and mandated by Ministerial and General Council decisions.³⁷ The WTO Secretariat has to provide a listing of notification requirements and members' compliance on an ongoing basis and circulate this semiannually to all Members. By reducing asymmetrical information, trade policy transpar-

³³ Collins-Williams, Wolfe (n 21) 553.

³⁴ Hoekman (n 12) 750: 'Any negotiation requires the parties to understand the others' positions. A process of learning is required to identify what is negotiable and what is not. Negotiations are multi-level games with a complex process of domestic interactions between interest groups (including lobbying, advocacy, etc.) determining what a country can offer/wants.'

³⁵ *ibid* 750. Despite their political significance, trade policy reviews have no legal effect. Domestic action based on reviews remains voluntary. Part A(i) of the TPRM clarifies that the TPRB is not intended to serve as a basis for enforcing specific obligations under the WTO, nor can it impose new trade policy commitments on Members. Moreover, Appendix 1 to the DSU stipulates that the TPRM is not a 'covered agreement' and, thus, is not subject to judicial review by the DSB.

³⁶ For insightful illustrations of the different categories of transparency requirements in the WTO legal system see R Wolfe, 'Letting the Sun Shine in at the WTO: How Transparency Brings the Trade System to Life', WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2013-03 (6 March 2013); A Kwa, P Lunenburg, 'Notifications and Transparency Issues in the WTO and the US' November 2018 Communication', South Centre Research Paper 92 (March 2019) 3-11.

³⁷ Hoekman (n 12) 765.



ency (or transparency as disclosure) provides assurance for WTO Members about what trading partners are doing,³⁸ so that they can act accordingly. Information users make better choices based on new information; information disclosures on trade policies improve practices in response to the chanced behaviour of the users. In the multilateral trading system too, in this sense, transparency is educational: when WTO Members receive new information about themselves, become aware of alternatives, or perceive the social acceptability of particular norms, they may adopt new trade policies or practice.³⁹ Moreover, having an occasion to discuss a measure with trading partners can help to avoid trade tensions and prevent disputes. In other words, transparency is also the foundation of collaborative approaches where information is shared, and WTO Committee examinations may promote understanding of questions before they transform into trade disputes. Finally, transparency is the basis on which Members can be held accountable for obligations accepted as part of the WTO multilateral agreements.

In a first instance, therefore, the objective of transparency as disclosure is to enhance the effectiveness of the WTO agreements.⁴⁰ But disclosure of relevant information has a second import, favouring the organisation's adaptive governance. Transparency may work to facilitate continuous learning through the acquisition of information and their interpretation by actors involved in the regulatory process with a view to understanding and learning how to solve new (or newly defined) problems, adapting, if possible, the relevant rules and practices to changing conditions.⁴¹ For multilateral trading relationships, the WTO role is in fact

³⁸ Collins-Williams, Wolfe (n 21) 554, adding: '[s]imple publication of tariff schedules, though still an essential form of transparency, is no longer sufficient. Now trading partners and economic actors need to have information about a wide range of domestic policies that have the capacity to affect the flow of transactions across borders, domestic policies that are increasingly subject to WTO obligations.'

³⁹ On this adaptive function of transparency see generally RB Mitchell, 'Transparency as Governance: The Mechanisms and Effectiveness of Disclosure-Based and Education-Based Transparency Policies' (2011) 70 *Ecological Economics* 1882.

⁴⁰ Hoekman (n 12) 766-67.

⁴¹ Cf ATF Lang, R Cooney, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade' (2007) 18 *European J Intl L* 523, 534, who underscore that: 'perhaps, the defining characteristic of adaptive governance is its focus on facilitating continuous learning as a necessary part of any response to pervasive uncertainty and systemic unpredictability.'



analogous to that of any regulator, who needs information from the regulatees without which it cannot know enough about a problem to be sure how to proceed. Mavroidis makes the point that the GATT/WTO system is a set of solutions to problems in commercial relations between states, which fits well with the familiar notion that the system is a contract.⁴² Precisely – as the framers could not regulate the thousands of domestic policies to which the rules might apply, nor could they imagine the evolution of such policies – the GATT/WTO resembles a necessarily incomplete contract. As the same author contends, however, the trading system is also a relational contract and the Members' relationship is ongoing, evolves over time and, hence, depends on building and maintaining reciprocal trust. The explicit terms of the contract are just an outline as implicit terms and understandings among parties determine their behaviour.⁴³ However, there are still policies and issues that are simply too cloudy, areas in relation to which the definition of the problem, the objective of the regulators and the relations with other trade issues lack of consensual understanding among the Members. In such areas, relations of trust are yet to emerge.⁴⁴ Premature attempts to complete the contract are unlikely to succeed and the lack of consensual understanding impairs the very possibility of designing a legal discipline, which may yield clear, predictable and sound rule. Where the legal framework is inadequate to reflect a dynamic and evolving reality, transparency as a trade policy tool may permit the acquisition of information for stimulating the iterative process of redefining the relevant problem and revisiting the question of what constitutes relevant knowledge about that particular problem. The operation of transparency rules and schemes, thus, *precede* and *permit* the definition of the problem. In so doing, the same mechanisms can trigger the adaptive process hinted above.

⁴² PC Mavroidis, *The Regulation of International Trade*, vol 2 (*The WTO Agreements on Trade in Goods*) (MIT Press 2016) s 36.1.3.2.

⁴³ *ibid.*

⁴⁴ Wolfe (n 31) 730-32.



3. *On the operation of transparency rules and surveillance schemes in the WTO at 25*

With the advent of the silver anniversary of the WTO in 2020 and the 30th of the TPRM in 2019, it is only natural to question how well WTO surveillance schemes and transparency obligations have performed so far. Yet, this is a complex question, which does not have a unique answer. Looking specifically at the TPRM, since 1989, the TPRB – consisting of all WTO Members – has conducted more than 500 reviews (as of April 2019), covering 157 of the 164 WTO Members, most of them multiple times. Overall, the operation of the TPR process has been effective in contributing to increase information and understanding of Members' trade policies and practices.⁴⁵ Still, the TPRM for WTO Members has had less impact than originally envisaged when it was put in place. Ghosh concludes that reviews do not generate peer pressure and are often silent on important matters – as reflected in a limited correlation between disputes initiated against a country and whether these were identified in a TPR report.⁴⁶

In considering the rest of notification and publication requirements and other similar obligations, some economists maintain that the public good of information is currently undersupplied by the WTO and this reduces its value as a tool to promote better policies in Members.⁴⁷ Whether or not this statement is close to the target, it is commonly acknowledged that WTO Members are not taking notification requirements seriously enough; in many cases notifications are incomplete and often are not made on a timely basis when they occur.⁴⁸ Notification is a legal obligation, but compliance is largely voluntary in practice, with no

⁴⁵ See, eg, Collins-Williams, Wolfe (n 21) 560-62; Chaisse, Matsushita (n 7) 11-13; S Laird, R Valdés, 'The Trade Policy Review Mechanism' in Narlikar, Dauton, Stern (n 11) 464, 482, asserting that '[o]n the whole, WTO members and the Secretariat can take a good deal of satisfaction from the operation of the TPRM' which 'has been very effective and useful for the trading community.'

⁴⁶ In part, this is explained by Secretariat staffing and resource constraints. Cf A Ghosh, 'Developing countries in the WTO Trade Policy Review Mechanism' (2010) 9(3) *World Trade Rev* 419-55, cited also by Hoekman (n 12) 765.

⁴⁷ See A Stoeckel, H Fisher, *Policy Transparency: Why Does It Work? Who Does It Best?* (Center for International Economics 2008) esp 70-75; PA Messerlin, 'The Doha Round', GEM Policy Brief (October 2010) <<https://pdfs.semanticscholar.org/cc0c/683ad145509a70ce8f686038dc68b4f71c40.pdf>> 52-56.

⁴⁸ Hoekman (n 12) 765-66.



tangible or coercive penalty for non-compliance. Even in the area where information is the best – barriers to trade in goods – the focus of data collection (and thus analysis) is mostly on statutory most-favoured-nation tariffs. Data on the types of certain non-tariff barriers that are increasingly used by countries, such as subsidies, are not collected on a comprehensive and regular basis.⁴⁹ Matters are much worse when it comes to information on policies affecting services trade. The obligation under Article III(3) of the General Agreement on Trade in Services (GATS)⁵⁰ to notify any changes to laws, regulations and guidelines that ‘significantly affect’ trade in scheduled sectors has been widely ignored, including by rich Members with sophisticated services regimes, like the US and the European Union (EU).⁵¹ The record of notifications is not dismal everywhere though. The observance of notification provisions in WTO agreements seems to vary relative to what is being notified and who is the agent of notification. The clearer and better defined is the subject matter of the notification, the more likely WTO Members notify. Not surprisingly, the closer the agent of notification within the notifying Member is to the subject of notification, the more consistent the record of notification.⁵² A lack of notification, for example, under Articles III(3) and VII(4) GATS is likely due to the fact that it is normally the trade ministry that must submit the notification, but the latter cannot compel the domestic authorities responsible for the regulation to provide the relevant information.⁵³

⁴⁹ Wolfe (n 42) 16.

⁵⁰ WTO Agreement, Annex 1B, 1869 UNTS 183.

⁵¹ According to the WTO Secretariat, since 1995, the US made only two notifications in this area, one in 2000 and another one in 2010. It is not possible that this low number of notifications is because the US has not introduced laws and regulations that affect trade in services covered by its commitments all this time. In contrast, over the same period, other Members have made many more notifications: Albania (122), Switzerland (65), China (58) – China has notified yearly since 2002 after becoming a Member – South Africa (22). The EU also has not been properly notifying. Under art III(3) GATS, the EU did submit notifications from 2013–2016. However, for 13 years (from 2000 to 2012), it had not submitted any notifications. Cf WTO Council for Trade in Services, ‘Overview of Notifications Made Under Relevant GATS Provisions: Informal Note by the Secretariat’ JOB(09)/10/Rev.8 (9 February 2018).

⁵² Collins-Williams, Wolfe (n 21) 577.

⁵³ R Adlung, ‘Service Liberalization from a WTO/GATS Perspective: In Search of Volunteers’ Staff Working Paper ERSD-2009-05 (February 2009) 4-5, 21-22.



Although transparency is generally well established as a trade policy tool and its value appears to be increasingly appreciated,⁵⁴ few multilateral trading agreements are designed from the ground up to use transparency as a tool. Analysis of all WTO transparency provisions and their operation in practice is evidently beyond the ambitions of this paper, but comparisons among certain multilateral agreements can be drawn. Not only do these comparisons illuminate under what circumstances transparency work better, but they also tell something about the current and prospective role of transparency as a trade policy tool vis-à-vis certain important issues and challenges for the present and future of the WTO legal regime. In particular, the operation of notification requirements and surveillance mechanisms in multilateral trade agreements dealing with different non-tariff policies and practices increasingly used by WTO Members sheds light on the relative weight of transparency as a trade policy tool in key fields for trade liberalisation both retrospectively and prospectively. Technical barriers to trade, the use of subsidies and the trade issues concerning State-owned enterprises (SOEs) are telling cases.

As it is known, while entry-restricting regulation continues to exist for some sectors (especially in some services), regulation changed in nature in the 1980s and 1990s. With the caveat of State-controlled or State-owned enterprises, it is no longer dominated by efforts to control the behaviours of firms in sectors in which entry is restricted. Instead, the focus of regulation is on ensuring that that markets are contestable and the use of market conduct and liability rules that are (supposed to be) applied equally to domestic and foreign goods and services and to do so, complemented by mechanisms to elicit relevant information by firms on their costs.⁵⁵ The source of regulatory trade costs lies in the *differences* and the need to comply with the requirements of multiple regulatory bodies in different jurisdictions.⁵⁶ As to subsidies, the multilateral trading system

⁵⁴ See, eg, EU Commission (n 9).

⁵⁵ Back in 1999, an academic project led by Peter Watson offered a proposal to amend the WTO to ensure internationally contestable markets. PS Watson, JE Flynn, CC Conwell, *Completing the World Trading System* (Kluwer 1999) 342-59; TJ Schoenbaum, 'The Concept of Market Contestability and New Agenda of the Multilateral Trading System' (1996) 1 ASIL Insights.

⁵⁶ Cf R Posner, 'The Concept of Regulatory Capture: A Short Inglorious History' in D Carpenter, D Moss (eds), *Preventive Regulatory Capture: Special Interest Influence and How to Limit It* (CUP 2013) 49-56; B Hoekman, C Sabel, 'Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy' EUI Working Paper RSCAS 2017/36 (2017).



has struggled with the question of what to do with them for long time. Part of the reasons are exquisitely technical: the definition itself and measurement of subsidies turn out to be extraordinarily complex. Beyond that, the question is inherently political: with subsidies, what is ultimately involved is a confrontation between different ideological, political, and social conceptions of the role of State intervention in the economy. Related to subsidies, the issue of SOEs has lately emerged as highly problematic in the multilateral trading system and is also worth analysing through the lenses of transparency. It is no secret that the murky operation of China's SOEs has exacerbated the trade tensions between China and other WTO Members with the US at the forefront.⁵⁷ The quantitative and qualitative transformations of modern State capitalism around the globe raise issues of increasing importance for the international trading system. State interventions in the market stand out among the stated and unstated causes of current tensions among the major trading powers.⁵⁸ Moreover, like subsidies, the issues related to the operation of SOEs are essentially political and ideological: with the two instruments, what is ultimately involved is a confrontation between different philosophical and political conceptions of the relations between the State, market, and society; ie the normative social ethos shaping the role of law in the international trading system.

How do monitoring and transparency obligations address these trade issues and challenges to the multilateral trading system?

⁵⁷ Discipline of SOEs, for example, was an explicit objective articulated by the trade promotion authority granted to President Obama in 2015. In this case, the aim was to eliminate both trade distortions and unfair competition 'through disciplines that eliminate or prevent discrimination and market-distorting subsidies and that promote transparency.' Cf US, Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pl 114-26, Title I, s 102. For a vivid journalistic account, see P Blustein, *Schism. China, America and the Fracturing of the Global Trading System* (Centre for International Governance Innovation 2019) 141-67.

⁵⁸ Cf, eg, M Wu 'The "China Inc." Challenge to Global Trade Governance' (2016) 57 *Harvard Intl L J* 261, 298-305; JP Trachtman, 'US-Chinese Trade: Interface and Lawfare' *EUI Working Paper RSCAS 2017/11* (2017); Schoenbaum, Chow (n 1) 168-76; S Katz, 'Why the WTO Should Constrain the Power of China's State-Owned Enterprises' *Harvard Business Rev* (11 December 2017) <<https://hbr.org/2017/12/why-the-wto-should-constrain-the-power-of-chinas-state-owned-enterprises>>.



Starting from the disciplines established by the Technical Barrier to Trade (TBT) and the Sanitary and Phytosanitary (SPS) Agreements⁵⁹ for product-specific domestic regulation, notification and publication requirements are important in both. Transparency seems to be the favoured form of discipline of TBT and SPS measures.⁶⁰ In this respect, Hoekman argues that the regular work of the TBT and SPS Committees, including notifications and the opportunity to raise specific concerns, ‘can be emulated in other areas of regulation.’⁶¹ Specifically, in the SPS agreement, the use of transparency tools seems more active than in the rest of the WTO.⁶² The central trade problem for risk analysis in food safety is whether regulatory action is legitimate or protectionist. It may be difficult to tell the difference, however, between a necessary measure, and protectionism. One of the ways that the SPS Agreement seeks to address the tension is regulatory transparency.⁶³ Transparency here is a device for managing administrative discretion. It refers not only to Members keeping each other informed about their SPS measures, but also to ensuring that other Members, citizens, and producers are able to ask whether a given SPS measure is the most appropriate solution to a problem.⁶⁴ Importantly, Article 12(2) of the Agreement provides for informal *ad hoc* consultations on any SPS issue. Members raise what have come to be called ‘specific trade concerns’ under this provision at each meeting of the SPS Committee. Specific trade concerns are regularly tracked by

⁵⁹ Respectively, WTO Agreement, Annex 1A, 1868 UNTS 120; WTO Agreement, Annex 1A, 1867 UNTS 493.

⁶⁰ Collins-Williams, Wolfe (n 21) 577.

⁶¹ B Hoekman, ‘Behind-the-Border Policies: Regulatory Cooperation and Trade Agreements’ in CA Primo Braga, B Hoekman (eds), *Future of Global Trade Order* (European University Institute 2017) 147, 166, who adds: ‘Here, an obvious area to prioritize is services and regulations that impact on the ability of firms to buy products that are connected to/use ‘the cloud’ (data localization requirements, etc.)’

⁶² Cf SPS Information Management System <<http://spsims.wto.org>>. The system allows users to track and obtain information on measures that Member Governments have notified to the WTO (an obligation for WTO Members), specific trade concerns, documents of the WTO SPS Committee, Member Governments’ national enquiry points and their authorities handling notification.

⁶³ Cf, eg, JHB Pauwelyn, AT Guzman, JA Hillman, *International Trade Law* (3rd edn, Wolters Kluwer 2016) 615-16.

⁶⁴ Collins-Williams, Wolfe (n 21) 578-79, to whom I refer for a detailed illustration of the *ex-ante* and *ex-post* notifications in the SPS Agreement, a quantitative appreciation of the operation of corresponding rules and the work of the SPS Committee.



the Secretariat.⁶⁵ They have proved to be much more numerous and more significant than the small number of formal SPS cases in the DSS,⁶⁶ and an important venue for Members to learn about adaptation to scientific uncertainty regarding new health threats.⁶⁷

Transparency is also important in TBT Agreement, with several provisions specifying good practice in adopting new regulations and maintaining an Enquiry Point. Many provisions require *ex ante* notification both of the procedures used and of proposed measures.⁶⁸ Although knowing what to notify and how is sometimes not straightforward, the total TBT notifications per Triennial Review period has steadily increased, turning to the peak of 7,687 in the Eighth (2016-2018) from 1,736 in the First (1995-1997) period.⁶⁹ Furthermore, the TBT Agreement like the SPS Agreement has a 'specific trade concerns' procedure, which is actively used. The TBT Committee takes transparency seriously.⁷⁰ In the 2016-2018 period, for example, most of the Committee's exchange of experiences took place in the context of three thematic sessions held on the topics of conformity assessment procedures and risk assessment.⁷¹ Importantly, the topic of conformity assessment procedures was then also discussed in the context of regulatory cooperation between Members. Also, the triennial reviews required in the TBT Agreement seem to be the most systematic effort to keep transparency provisions under review. Most committees take general note of compliance with their provisions, but Members are loathed to direct too much attention to each other's

⁶⁵ Wolfe (n 36) 12, who qualifies specific trade concerns procedure as 'the most formal monitoring and surveillance mechanism.' The issues covered by specific trade concerns and similar questions in committees generally concerns how a Member is implementing its obligations and requests to clarify a measure that has been notified.

⁶⁶ *ibid* 24.

⁶⁷ Lang, Cooney (n 41) 546-50.

⁶⁸ The TBT Agreement contains transparency provisions in: arts 2 and 3 (technical regulations); arts 5, 7, 8 and 9 (conformity assessment procedures); Annex 3, paras J, L, M, N, O and P (standards); and arts 10 (general transparency provisions) and 15 (final provisions). A number of decisions and recommendations have been made with a view to facilitating access to information and further improving the implementation of transparency procedures under the Agreement.

⁶⁹ WTO Committee on Technical Barriers to Trade, 'Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4' G/TBT/41 (19 November 2018) 17.

⁷⁰ Collins-Williams, Wolfe (n 21) 577.

⁷¹ These sessions were held on 10 March 2016, 28 March 2017 and 13 June 2017.

shortcomings. Overall, transparency seems to work best in the trading system where it furthers goals of sharing information and increasing understanding of the intent of trade measures: the TBT and SPS Agreements provide examples of collaborative approaches where information is shared, and Committee examination promotes understanding of questions before they transform into trade disputes.

In contrast, the record of industrial subsidies notifications under the Agreement on Subsidies and Countervailing Measures (ASCM)⁷² is disappointing. Besides elaborating a new structure for the discipline of subsidies, the ASCM expanded the notification obligations of WTO Members, by setting out detailed conditions for annual notification of any defined subsidy (Article 25) and mandating the WTO Committee on Subsidies Countervailing Measures (SCM Committee) to assess these notifications on a regular basis (Article 26). However, while the ASCM requires notification by each WTO Member State to the Committee of all specific subsidies by June 30 of each year, it does not provide for any effective sanction if reports are not submitted or if they are incomplete. Moreover, there is a difference between notifying practices that could be subject to a dispute (actionable subsidy, or a measure that 'significantly affects trade in services'), and those that involve some policy change (SPS, TBT).⁷³ The rather predictable result is a consistently poor compliance record with the transparency obligations established by the ASCM. Information collected through the notification system are often incomplete and demonstrably understate the value of subsidies that should be reported.⁷⁴

Some authors argue that the poor quality of the information on subsidies gathered through the notifications are due to the ambiguities and inadequacies of the notification questionnaire: some questions require detailed information that may exceed certain Members' capacity.⁷⁵ Most

⁷² WTO Agreement, Annex 1A, 1869 UNTS 14.

⁷³ Collins-Williams, Wolfe (n 21) 579.

⁷⁴ See, eg, WTO Document Series G/SCM/253, according to which, as of 28 October 2014, only 40 Members had notified measures and 22 Members had notified that they did not maintain any notifiable subsidies, pursuant to these provisions, while all the remaining ones did not submit any notification. Similar patterns are documented also in the following years. Cf, recently, WTO, 'Subsidies Committee members express concerns on lack of notifications' (23 October 2018) <www.wto.org/english/news_e/news18_e/scm_26oct18_e.htm>.

⁷⁵ Collins-Williams, Wolfe (n 21) 573-74.



problematic to answer are the requests for statistical data permitting an assessment of the trade effects of subsidies. This is further complicated by the uncertainty surrounding the concept of ‘specificity.’⁷⁶ Virtually all Members have been negligent in providing statistical data, not least because the ASCM is virtually silent on quantification and measurement. In sum, current notifications do not provide a clear or accurate picture of subsidies in each Member. As to other surveillance schemes, the SCM Committee minutes reveal that the questioning is dominated by a few large Members. The purpose of discussion in the Committee, disciplined by Article 26 ASCM, could be to (i) verify the adequacy of the notification, and (ii) learn more about the incidence of subsidies, and understand the reason for their use, and, perhaps, (iii) deliberate over the meaning and evolution of the disciplines. The first goal is impaired by the poor quality of notifications; the second and the third by the scarcity of active questioners.⁷⁷ These deficiencies have real consequences. The opacity on a given subsidy, especially when it is worth billions and is given in key industries, can have a tremendous impact on the competitive process, making trade partners’ producers less competitive both in their home and in the subsidy-supplier’s market, ultimately contributing to the loss of several jobs in the sector, while the ASCM remains helpless. Finally, the TPRM does not add much sunshine in this area. The availability of subsidies data in TPR reports is known to be highly variable, and substantive references to Members’ subsidy notifications occur only occasionally.⁷⁸

Issues surrounding the operation of SOEs in the multilateral trading system are still an understudied area and yet one of increasing importance.⁷⁹ This is due to size and importance of Chinese SOEs and the rise and quantitative and qualitative transformations of modern State capitalism around the globe.⁸⁰ Studies on the matter have lately increased

⁷⁶ On specificity see, eg, Pauwelyn, Guzman, Hillman (n 63) 523-24.

⁷⁷ Collins-Williams, Wolfe (n 21) 575.

⁷⁸ See, eg, WTO, *World Trade Report 2006: Subsidies, Trade and the WTO* (World Trade Organization 2006) 110.

⁷⁹ See PC Mavroidis, ME Janow, ‘Free Markets, State Involvement and the WTO: Chinese State-Owned Enterprises in the Ring’ (2017) 16 *World Trade Rev* 571, 573-78.

⁸⁰ SOEs are not limited to China: they are an integral part of the economic structure of several countries both in the Western and Eastern hemisphere, for instance, countries in the Asia Pacific region and post-socialist Central and Eastern European States. In Russia and Brazil companies in which the State has either a majority or a significant minority stake account for 30-40% of capitalisation. Despite the pro-market climate in the EU,



in number: the dominant narrative is that, in the stalemate of the multilateral trade negotiations, the inclusion of rules in PTAs addressing the concerns surrounding SOEs is a much welcome progress, a needed move towards the regulation of entities which, unlike their predecessors, have been transformed into powerful tools for global competition, shrouded under corporate veils. I critically examine the emerging trade disciplines on SOEs elsewhere.⁸¹ Here my focus is merely on the significance of transparency as disclosure for challenges posed by SOEs to the multilateral trading system. So far, only one author, Robert Wolfe, has questioned whether the solution to such issues is better served through increased transparency, concluding that what we know about SOEs inside the WTO, including in the TPRM, is not much.⁸² Let us consider why.

The multilateral trade agreements include rules on transparency that, in theory, could allow WTO Members to obtain some information concerning the position and treatment of SOEs located in their trade partners. Disclosure of such information is key to understand the extent to which State action – the only thing subject to international trade rules – alters the terms of competition in relation to the operation of SOEs. To start with, Article XVII GATT imposes on the WTO Members transparency obligations in the form of notification of the products which are imported into or exported from their territories by State trading enterprises and information to supply to other parties.⁸³ However, the main challenges of the Working Party on State Trading Enterprises since it

SOEs are important economic actors also in Western Europe. Even in such bastions of economic orthodoxy as Sweden and the Netherlands, they account for a significant portion of market capitalisation. Countries like Canada have successfully used State enterprise in developing traditional agricultural sectors. Other, such as Singapore, use SOEs to foster modern service sectors and drive innovation. Similarly, following the 2008 financial crisis and major bailouts operations, the US owned majority interests in several companies, including car producers.

⁸¹ See L Borlini, 'When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements' (2020) 33 *Leiden J Intl L* (forthcoming).

⁸² Wolfe (n 31) 713-32.

⁸³ Art XVII 4(a)-(d) GATT.



first took up its mandate in 1995 and until today,⁸⁴ continues to be improving the rate of compliance by the WTO Members with the duty to notify. Looking at the different Annual Reports of the Working Party the rate of compliance can be qualified as very low. For example, the 2018 Annual Report of the Working Parties notes in this respect that, as of 23 October 2018, only 26 notifications had been received for the 2016-2017 notification period and 112 members had not submitted any notification for this period.⁸⁵ This is a problem that has been addressed in the formal meetings of the Working Party, but up to now, no practical and effective solution has been found. Several WTO Members simply lack the technical expertise, manpower, policy imperative or political will to complete and submit a questionnaire on the State trading enterprises operating in their economies. Other simply submit a one-page notification announcing that there are none.

As noted, Article 25 ASCM requires all WTO Members to notify the SCM Committee of any industrial subsidy, regardless of whether they are conceded to a private enterprise or a SOE, that falls under the definition provided by Article 1(1) and is specific under the meaning provided by Article 2 of the same treaty. This obligation is particularly relevant for SOEs because the competitive advantages which they frequently enjoy often take the form of subsidies (direct or indirect). Yet, as illustrated above, the duty to notify of subsidies in the industrial sector is not enforced by any sanctions and, historically, WTO Member State compliance with this provision has been extremely low.⁸⁶ Information about SOEs is also collected through TPRM. As known, the mechanism is based primarily on information furnished by the Members themselves through the compilation of replies to questionnaires sent by the Secretary, but each report is then edited on the basis of information collected (and later verified) from other sources (including documents from other

⁸⁴ The Working Party on State Trading Enterprises was established by the Council for Trade in Goods at its meeting on 20 February 1995, pursuant to para 5 of the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994.

⁸⁵ WTO, 'Report of the Working Party on State Trading Enterprises' G/L/1268, G/STR/21 (23 October 2018) paras 9-10.

⁸⁶ See, by way of example, the observations contained in US Trade Representative, *2018 Report to Congress on China's WTO Compliance* <<https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>>.



international organisations, academic papers, and ONG documents). The requested and supplemented information in theory allows for greater knowledge of the position and treatment of SOEs. Nonetheless, the TPRM, too, especially with regard to countries with little transparency,⁸⁷ fails to provide a picture that is sufficiently complete and truly useful for understanding the actual and potential impact of negative spillovers on the trading system as a result of SOEs' operations.⁸⁸ For that matter, the reports from the EU, where many of these enterprises are established, despite being sufficiently complete in terms of quantitative data on 'public undertakings' and information concerning their legal regulatory framework (which, for members of the Union that are also members of the Organisation for Economic Co-operation and Development is facilitated by their participation in the activities of the latter organisation, including the SOE database) do not allow for a reconstruction that goes beyond what is necessary for applying the relevant provisions of multilateral and plurilateral agreements.⁸⁹ WTO Members are obliged to report to Geneva concerning what they have agreed on in the WTO agreements. Absent explicit WTO obligations in an area, the trade policy reviews are mute. Thus, without a shared definition of SOEs, an understanding of the reasons why these enterprises should be subjected to multilateral rules or how they can violate the principles of non-discrimination, it is

⁸⁷ Reports on China, for example, often lack important information. The Secretariat of the WTO estimates the total amount of contributions to SOEs, but the Chinese Government regularly objects to these numbers as inaccurate. It is difficult even to compile a simple list with the most important Chinese SOEs, because China distinguishes between SOEs, State-controlled enterprises and State-invested enterprises, see WTO Secretariat, 'Trade Policy Review: China' WT/TPR/S/342 (15 June 2016) 96. The very nature of the TPRM is often at the basis of the disagreements between China, the Secretariat, and other Members, which often ask very detailed questions in the drafting of the reports on which entities should be classified as SOEs and on the content and the kind of details that must be provided about them.

⁸⁸ From the last report about China, for example, it is clear that trade partners are seriously concerned by the distorting effects of Chinese State capitalism, affecting competition (cf WTO TPRB, 'Trade Policy Review: China – Minutes of the Meeting' WT/TPR/S/342 (26 September 2016) para 3.172), but there are no precise details about the programs subsidising several areas (eg fishing), which the Government would finance through loans provided by State-run banks, and with goods provided by SOEs, for a price lower than the value on the market (ibid paras 3.19-20).

⁸⁹ WTO Secretariat, 'Trade Policy Review: The European Union' WT/TPR/S/357 (17 May 2017). See further Wolfe (n 23) 714-21.



not possible to derive a general duty of transparency on the impact of negative spillovers on the trading system as a result of SOEs' operations.⁹⁰

In sum, the observance of transparency in the selected matters of domestic product-centric regulation, subsidies and the operation of State-controlled entities confirms that the record on monitoring and surveillance is spotty. The operation of transparency seems to work best in areas where it furthers goals of sharing information and increasing understanding of the intent of trade measures. By contrast, in the case of subsidies the nature and detail of the information required may give rise to apprehension of self-incrimination. As a result, Members' record of notification is abysmal and the SCM Committee's capacity to assess the impact of subsidy practice is hamstrung. Another issue, noted here only briefly, is that the current design of WTO surveillance scheme and transparency obligations do not offer a useful corrective to the scarce information Members have about the extent to which State action alters the terms of competition in relation to the operation of SOEs. In a somewhat ironic isolation, Wolfe raises a valid point when he opines that, in the absence of reliable data, concerns with the potential for negative spillovers on the trading system as a result of SOEs' operations may appear to be ideological rather than empirical.⁹¹

4. *Reforming monitoring: More transparency with less enforceability*

The genuine causal question, *why* a certain system is construed in a certain manner, and not otherwise, can find its legitimate answer simply in the explanation of its evolution. It was only with the creation of the WTO that the multilateral trading system was endowed with the organisational structure designed to perform 'as facilitator of trade liberalization negotiations, as an occasional forum for secondary lawmaking ... as a monitor of national openness to trade, and as a forum for mandatory dispute settlement.'⁹² The WTO has rendered the GATT more properly

⁹⁰ R Wolfe, 'An Anatomy of Accountability at the WTO' (2015) 6 *Global Policy* 13-23.

⁹¹ Wolfe (n 31) 721-23.

⁹² JP Trachtman, 'Trade' in J Katz Cogan, I Hurd, I Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 347, 353.



legal, strengthening dispute settlement and deepening engagement with national legal regulations.⁹³ Its establishment as a full-fledged international organisation in 1995 aimed *inter alia* to provide international trade relations with an organic set of rules that would enable commerce between enterprises and nations to develop in the mutual interest in a framework of certainty, stability and predictability; non-discrimination (nationally and internationally); equal application of the rules; fairness and mutual advantage.⁹⁴

It is commonly said that the WTO exists either to negotiate or to settle trade disputes, a view that obfuscates transparency mechanisms – the third way through which WTO rules and practices influence the trading system. The foregoing discussion shows that transparency (as disclosure) is a necessary condition for the trading system as a *living thing*, not just as a system of legal texts stored in a Geneva filing cabinet.⁹⁵ It also confirms that notification of obligations and surveillance schemes are a disappointment in some areas, especially for some Members, and effective in others. Furthermore, it illustrates that the absence of specific WTO rules on an emerging and seemingly critical problem such as the operation of SOEs in the trade arena, leads to the lack of transparency about the trade implications of the same issue. Essentially, in these cases, the lack of transparency does not affect the effectiveness of the WTO agreements, but leads to a possible lacuna in the system.

These problems notwithstanding – or, probably, also in order to address them – several WTO Members have recently put forward proposals for improving the monitoring function of the organisation,⁹⁶ hence, giving testimony of their confidence about the importance of transparency mechanisms for the future of the WTO. In terms of merits and notifica-

⁹³ The WTO legal system is based on rules that are precise, regarded as binding, and the interpretation of which is delegated to a third adjudicatory body. Cf KW Abbott, RO Keohane, A Moravcsik, A-M Slaughter, D Snidal, 'The Concept of Legalization' (2000) 54 *Intl Organization* 401, 404.

⁹⁴ J Hillman, 'Moving Towards an International Rule of Law? The Role of the GATT and the WTO in its Development' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO The Development of the Rule of Law in the Multilateral Trading System*, (CUP 2015) 60-76.

⁹⁵ Wolfe (n 36) 34.

⁹⁶ See *supra* s 1, fns 8-10.



tions, these proposals vary with the proponents. However, some significant elements in common and, especially, their differences stimulate reflections about the role transparency could have now that the jewel in the WTO crown, the DSS, has been damaged. So far as I am aware very little work has been done on this matter.⁹⁷ My discussion of such potential ‘spillover’ has to remain general and tentative. Below I first summarise the main features of the proposals for strengthening WTO monitoring. Then, I briefly discuss the possible role of transparency vis-à-vis the current crisis of the WTO DSS.

To start with, the proposals advanced so far almost invariably suggest reviewing and streamlining the notification requirements to ensure that they are not unnecessarily complex and burdensome.⁹⁸ Based on such a review, updates to the requirements should be considered or incentives and technical assistance could be provided to countries that have fallen behind.⁹⁹ It is also suggested that opportunities for discussions in regular bodies about specific trade measures are improved, by making more robust mechanisms available in all regular bodies, sharing information about specific concerns between relevant bodies, and providing referral to confidential third-party mediation and conciliation when appropriate.¹⁰⁰

Moreover, the submitted proposals generally acknowledge that, for greater transparency of policies and outcomes to have an impact on policy in WTO Members it is important that it feeds into, and is used in, domestic policy formulation and assessment processes.¹⁰¹ Ironically though, none of the proposals recommends a greater involvement of

⁹⁷ As observed, for the most part, articles on the current crisis of the WTO explore the alternatives to a non-operational AB. For a discussion of bilateral and ‘plurilateral’ agreements that willing Members may sign to re-establish compulsory dispute resolution, besides the works already referred to in this paper, see G Vidigal, ‘Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis’ (2019) 20 *J World Trade & Investment* 862.

⁹⁸ See, eg, Discussion Paper from Canada on Strengthening and Modernizing the WTO (n 9) Theme 1, para 1; ‘Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements’, Statement delivered by Ambassador Dennis C Shea in the WTO Council for Trade in Goods (n 10).

⁹⁹ Discussion Paper from Canada on Strengthening and Modernizing the WTO (n 9) Theme 1, para 1.

¹⁰⁰ *ibid* Theme 1, para 3.

¹⁰¹ Cf, eg, EU Commission Concept Paper on WTO Modernisation (n 9) 9.

think thanks, policy institutions and other domestic stakeholders. Similarly, while for the Secretariat to do more to compile data on a comprehensive basis, WTO Members must give it the mandate and resources to do so, the point is not comprehensively addressed by any of the submitted proposals.

Steps to remedy the notifications gaps – through strengthening and more effective enforcement of notification requirements, counter-notifications, as well as direct collection of data (including from secondary sources) – are a commonly discussed element too.¹⁰² Yet, only the EU and US documents add teeth to the transparency provisions by means of administrative penalties. The point of secondary rules on sanctions for the violation of the obligations on transparency is, in fact, highly controversial.¹⁰³ Noticeably, while underscoring that ‘[i]t is imperative to enhance the transparency of Members’ trade policies’ and that ‘[g]reater transparency will help create an open, stable, predictable, equitable and transparent international trading environment,’¹⁰⁴ China does not put forward any substantial action to remedy to wilful and reiterated notification gaps.¹⁰⁵

The EU recommends systemic improvements in committee-level monitoring, notification compliance and effective, fair and commensurate sanctions for wilful and repeated non-compliance.¹⁰⁶ With regards to

¹⁰² *ibid* 4, 9; Discussion Paper from Canada on Strengthening and Modernizing the WTO (n 9) Theme 1, para 2; China’s Proposal on WTO Reform (n 9) para 2.27.

¹⁰³ The document ‘An Inclusive Approach to Transparency and Notification Requirements in the WTO Communication from Cuba, India, Nigeria, South Africa, Tunisia, Uganda, and Zimbabwe’ (n 10) paras 1.2-3, remarks: ‘In general it can be said that the capacity of developing countries to comply with notification obligations is inextricably linked with their level of economic development and access to resources. The capacity and resource constraints that developing countries face cannot be underestimated,’ adding that ‘[i]f developing countries are not able to meet current notification obligations, there would be no possibility of meeting even higher notification requirements in future.’ For this reason, developed Members emphasised the importance of calibrated technical assistance to developing Members to comply with the obligations at stake. Cf, eg, ‘Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements’, Statement delivered by Ambassador Dennis C Shea in the WTO Council for Trade in Goods (n 10).

¹⁰⁴ China’s Proposal on WTO Reform (n 9) para 2.27.

¹⁰⁵ *ibid* para 2.28.

¹⁰⁶ EU Commission Concept Paper on WTO Modernisation (n 9) 9.



subsidies in particular, the EU has identified ways to improve transparency and subsidy notifications, for example, the creation of a general rebuttable presumption according to which if a subsidy is not notified or is counter-notified, it would be presumed to be a subsidy or even be presumed to be a subsidy causing serious prejudice.¹⁰⁷ Finally, the EU concept paper advocates a better capture of SOEs essentially through a normative clarification of what constitutes a ‘public body’ under the ASCM, ‘on the basis of a case by case analysis to determine whether a state-owned or a state-controlled enterprise performs a government function or furthers a government policy, as well as how to assess whether a Member exercises meaningful control over the enterprise in question.’¹⁰⁸ In addition, the EU also proposes rules capturing other market-distorting support provided by SOEs ‘when used as vehicles to pursue government economic policies rather than focusing on their own economic performance, including, *inter alia*, transparency with regard to the level and degree of state control.’¹⁰⁹

In turn, the main venue proposed by the US to address the problem relating to notifications is the introduction of ‘highly punitive measures,’ which will kick in if Members fail to comply with notification obligations after one but less than two years, and after two but less than three years.¹¹⁰ Accordingly, after missing deadlines for a year, Members will have to pay [x][5] % more for their contribution to the WTO.¹¹¹ After missing deadlines for two years, representatives of the Member will be called upon in WTO formal meetings after all other Members have taken the floor and

¹⁰⁷ *ibid* 4.

¹⁰⁸ *ibid*.

¹⁰⁹ *ibid*. On 14 January 2020, Japan, the EU and the US have ramped up pressure on Beijing over its model of State-sponsored capitalism, calling for tougher WTO curbs on Government subsidies. In a rare example of the Trump administration turning to allies for help in solving trade problems, the three issued a joint statement on a proposal for more stringent global rules to prevent Chinese companies relying on State support to gain advantage over foreign rivals. The proposed rule changes take aim at core parts of China’s economic model, calling for a wider WTO ban on various types of State support and for Governments to do more to prove that aid to companies does not distort trade. The proposals amount to a joint manifesto for closing what the US and others argue are loopholes in the WTO rule book that have been exploited by Beijing. Cf J Brunsden ‘US, Japan and EU Target China with WTO Rule Change Proposal’ *Financial Times* (14 January 2020).

¹¹⁰ Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements (n 8).

¹¹¹ *ibid* para 12.

before any observers.¹¹² This will have a significant impact on a Member's ability to influence debates/negotiations in the various bodies. The US proposal would also expand the scope of the current TPRB to specifically include monitoring of Members' notification obligations and compliance.¹¹³

Due to the uncertainty about the future of the WTO a comprehensive assessment of what such different proposals indicate in terms of prognosis for the WTO seems hardly possible now, but three tentative and general points can be made. The first point concerns the enduring role of transparency in the WTO. Whether or not the monitoring function will be effectively strengthened, its nature will not change. The TPRM and most of the multilateral transparency rules are not intended to serve as a basis for the enforcement of specific obligations under the WTO agreements or for dispute settlement procedures. Yet, by publicly deploring inconsistencies with WTO law of a Member's trade policy or practice, the schemes and rules in question intend to 'shame' Members into compliance and to support domestic opposition to trade policies and practices inconsistent with WTO law. Thus, while transparency (and, even, 'more transparency') cannot substitute for the DSS in terms of compliance enforcement, it will still allow Members to know what the trading partners are doing and act accordingly.

Strictly related to the first, the second point is more pragmatic and is about the course of action that Members can undertake once they are indeed informed that a given trading partner's policy or practice is at variance with WTO law. Leaving aside here the option of starting a dispute,

¹¹² *ibid.*

¹¹³ This proposed change has been recently back up by a number of WTO members including the EU, Australia, Canada, Japan and New Zealand. Cf WTO General Council for Trade in Goods, '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', JOB/GC/204/Rev.1, JOB/CTG/14/Rev.1 (1 April 2019) para 4. Specifically, in the Commission's concept paper, the EU proposes to increase the effectiveness of the TPR exercise by empowering the Secretariat to go further in assessing notification performance in its report for a Member's review. The information on notifications could be expanded into a separate chapter and made more informative by systematically highlighting qualitative aspects of compliance and describing how the Member's notification performance has evolved since the last review. Cf EU Commission Concept Paper on WTO Modernisation (n 9) 11.

two main developments are possible. On the one hand, transparency can stimulate collaborative approaches in negotiations. Similarly, committees where information is shared may well promote understanding of questions before they transform into trade disputes. Furthermore, a larger availability of information can also increase the bargaining chips of Members whose capacity and resource to gather independently accurate information on trading partners are significantly limited. On the other hand, in the absence of a fully functional DSS, WTO Members, especially the most powerful ones, may also misuse information on their partners' trade policies and practices. Tactical consideration and political/reputational costs seem to be important here. The logic is very simple – Governments can opportunistically justify their unilateral trade actions by 'relying' on the official information provided by the WTO. Here it is worth recalling that, whilst it may be desirable,¹¹⁴ the TPRM and the other surveillance schemes do not incorporate into their present, limited mandate a dose of legalistic argument. Nor the modernisation proposals analysed in this section suggest amendments in this regard.

The third point relates to the general resilience of the multilateral trading system. The WTO is sometimes depicted as a dragon with six heads, four of which – facilitating the administration of WTO agreements; technical assistance to developing Members; cooperation with other organisations; and trade policy review – have performed well enough; one head – the negotiations of new/improved rules on international trade – is deeply troubled; and the last head – the DSS – has done very well so far but is now in a rather poor health. Arguably no State wants to be seen as the destroyer of a current multilateral trading system. However, even assuming a substantial strengthening of one head – the WTO monitoring, as the US advocates – one may wonder how long the dragon will survive in case not even a temporary way to ensure the availability of an effective, impartial, two-tier, rule-based dispute settlement system is found. It should be clear that 'without some actions along [these] lines ..., it is the law of the jungle, i.e. the law of the strongest, which in 2020 and beyond prevails in international trade relations.'¹¹⁵

¹¹⁴ See Mavroidis (n 6) 414.

¹¹⁵ P Van den Bossche, Initial intervention at the public hearing 'Can We Save the Appellate Body?' European Parliament (3 December 2019) <www.europarl.europa.eu/ep-live/en/committees/video?event=20191203-1500-COMMITTEE-INTA>.

