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Does sunshine make a difference?

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Does sunshine make a difference?
How transparency brings the trading system to life

Robert Wolfe

Reports of the death of the World Trade Organization (WTO) are exaggerated. Even with the Doha Round of multilateral trade negotiations in suspended animation since 2011, the importance of the WTO to the daily life of the trading system is undiminished. Formal rounds of negotiations and resort to the dispute settlement system are the traditional ways of thinking about the role of the WTO, but the third dimension of ongoing WTO work, which can be broadly grouped as transparency and accountability mechanisms, may be the most important. Some think transparency is the antechamber to dispute settlement; I think dispute settlement, useful for managing a limited range of conflict, is what happens when transparency and accountability mechanisms fail. Drafting a new agreement and entertaining legal arguments about what such an agreement might mean—both forms of codification—are less important in this constructivist interpretation of social life than the interaction structured by the agreement. The focus of this chapter, therefore, is on how Members use the WTO agreements to make the trading system a living thing. Sunshine is the foundation.

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, he said, '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' (1914, 92). Americans certainly brought these ideas with them to the international organizations created in the last century, but they were not alone. Others have argued that Article X of the GATT 1947 on 'Publication and Administration of Trade Regulations', like the US Administrative Procedures Act of 1946, whose language it appears to replicate (Ostry 1998, 16), was based on an American belief that transparency was the best way to control the discretion of administrative agencies (Ala’i 2008, 873). Article X was partly based on Articles 4 and 6 of the 1923 International Convention Relating to the Simplification of Customs Formalities (WTO 2005, para. 3), while transparency and independent judicial review had been part of English administrative law since the 17th century (Arthurs 1985).

Sunshine as a policy paradigm is not especially novel, or American, but it is associated with the powers that once dominated the trading system. Do newer players attach the same importance to transparency? In 1980 only eight OECD member countries had legislation on access to information, but by 2004 only two of the then 30 members did not have such legislation, with
the biggest increase coming after 1990 (OECD 2005, 36). Now such laws are spreading widely in developing countries too. Is sunshine effective in the presence of great imbalances in power and wealth? Rich countries with sophisticated bureaucracies are better able to take advantage of transparency and accountability mechanisms, but those mechanisms do bring institutional power into play, which is distributed differently than material power (Barnett and Duvall 2005). Transparency is increasing at the WTO, no doubt in part because of the transparency wave in governance generally, which extends well beyond the Atlantic core of the original GATT. Transparency matters for the ability of citizens to hold their governments accountable, but it also has its own logic in global economic governance.

In the first section of this chapter, I discuss the logic of transparency in general. In the next section I describe three generations in the evolution of transparency in the trading system as a means of explaining how transparency works in the WTO. A subsequent section explores improvements to the process of notification, mainly the ‘right to know’ policy. The last section concludes that sunshine does make a difference, but not always a positive one. While new players in the trading system seem to accept the transparency paradigm, its full deployment may be beyond the capacities of many developing countries.

Why think about transparency?

Transparency is generally accepted as both legitimate in itself and essential to modern governance (Florini and Stiglitz 2007). Transparency is often seen as part of a basic right of access to government information, a principle that has become more important, especially in OECD countries, over the last 30 years, notably with respect to environmental governance. This trend is exemplified in Europe in the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. In the trading system, however, the WTO transparency norm is not directly about whether governments and other centres of authority disclose enough information to the public (Holzner and Holzner 2006). In the first instance the objective is neither to enhance the capacity of citizens nor to promote domestic objectives that can be achieved without the need for international obligations. Transparency is not necessarily a virtue in itself in trade policy terms—it is instrumental to enhancing the implementation of obligations through improved monitoring and surveillance in the WTO.

Many familiar approaches to international relations are not interested in what happens inside international organizations. Models that stress the salience of power or material interests do not expect WTO procedures to alter the interests of domestic actors. My approach belongs with those models that assume that something happens inside the international organization that alters either the understanding of themselves and their interests or preferences that participants brought to the table, or how they understand the nature of social reality in the domain. Regimes depend on the constant evolution of shared understandings of the essential rules and norms of the system. Where the social interaction essential to such normative evolution is constrained, the regime may be ineffectual; where it is robust, the regime can evolve along with a changing context (Wolfe 2005; Brunnée and Toope 2010).

The WTO system changes through the day-to-day interaction of participants recognized or accommodated or encouraged through three explicit processes: discussion in a regular committee, dispute settlement proceedings and formal negotiations. Some authors stress the importance of attention to these committee processes in the WTO (Lang and Scott 2009a; Lang and Scott 2009b); others think that they are mere manifestations of underlying interests and power (Steinberg 2009). I think that what matters to eventual codification are the opportunities for the people involved to learn through talking to each other. The ultimate codification is not
necessarily the most significant ‘outcome’—the real outcome is changed expectations of mutual obligations. The point of an agreement, therefore, is not the thing itself but the capacity to generate agreement, to structure the future interaction of the parties (Soltan 1999, 396). That interaction would be empty without information.

Transparency is a representation of reality. As with a painting or a photograph, what we choose to include within the frame, and how it is portrayed, depends on what we think is important. 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’ (2013). The glossary definition necessarily requires choices both about how to be transparent and what to be transparent about. It refers to a number of interrelated actions, including how: a rule or a policy is developed domestically; the rule is enforced or a policy is implemented; the rule is published; the other Members of the WTO are notified of the new rule or a policy action; a notification is discussed in Geneva; and the results of the Geneva process are published. The concept of transparency refers, therefore, both to generating information and to generating agreed interpretations of the information.

The ultimate objective is reducing information asymmetries among governments, and between the state, economic actors and citizens. Acquiring information is costly, and much of the relevant information will be held asymmetrically, which can be a particular problem with contracts that are necessarily incomplete: even rational actors cannot anticipate every contingency (WTO 2007, 162–63). In this context, ‘a useful definition of transparency is the presence of symmetric information’ (Geraats 2002, F534). One way in which trade agreements make a difference to economic activity is by reducing uncertainty about policy both for trading partners and economic actors. Under conditions of ‘imperfect information’, everybody would be better off if partners reduce their asymmetrical information about each other. One of the questions in any international legal regime is the extent to which differing national laws are functionally similar, or recognizably similar. Good faith implementation of international obligations need not and does not result in identical national law. The purpose of transparency mechanisms in reducing information asymmetry is thus to allow verification by other Members that national law, policy and implementation achieve the intended objective. Even more important is creating transparency about the beliefs and intentions of actors without which no regime can function. The trading system is based on diffuse reciprocity, which requires trust, which requires transparency, part of a mutually constitutive process in which trading partners learn about each other and the nature of the system. Members work together to adjust their behaviour to the needs of the trading system, to ensure that everyone knows what the appropriate behaviour might be. 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, and it provides time for economic actors to adjust.

A trade agreement is first a set of rules that should govern policy in a given domain. If nobody knows what the policy is, however, the agreement cannot work. Simple 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. An ad valorem tariff imposed at the border is transparent in itself and can readily be compared to the rate bound in a Member’s published schedules, but trading partners cannot see what is going on ‘behind the border’ without help. Domestic standards and regulations, notably those related to product safety and animal health, are hard to observe, and they are ambiguous in trade policy terms.
Transparency serves three purposes. First, it lets actors know what others are doing, so they can act accordingly. Information users make better choices based on new information; information disclosers improve practices in response to the changed behaviours of users. Second, it is the basis for one actor to try to influence another actor to act differently, perhaps through some form of participation. Third, it is the basis on which an actor can be held accountable for obligations, both those inherent in holding an office, and those accepted as part of some formal or informal agreement. Depending on how each of those purposes is understood, what needs to be represented will differ. Why information is made available, and for whom, affects the process. Similarly each of those purposes implies a set of relations among actors, often expressed as a multiplicity of accountability relationships. The possibly relevant actors include any individual affected by policy; economic actors trying to operate in a particular market; other governments; and citizens.

WTO obligations require both transparency at national level and transparency in Geneva. The necessary information, and the relation among actors, will differ between these locations, as summarized in Table 3.1.

The right-to-know principle applies to everybody at both levels, in the first column, but the ability to influence decisions, in the second column, and to seek accountability, differs. Accountability relations in the third column can be horizontal, including among governments, or vertical. In Geneva only governments are full participants, although NGOs have some capacity to influence debate and, as delegates of citizens, have some engagement in accountability mechanisms.

Against this complex background of the motivation for WTO transparency, in the next section I describe an analytic framework for understanding how it works. Transparency can be categorized for convenience as first-, second- and third-generation policies as shown in Table 3.2, a typology developed to think about the evolution of transparency policies in advanced economies (Fung et al. 2007), where the paradigmatic importance of transparency is now unquestioned.

The first generation is the emergence of open government or ‘right to know’ policies; the second is regulation by disclosure; and the third is e-government. When adapted for analysis of the WTO, first generation refers to the original GATT policies 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 159 Members and to the greater openness to the public, facilitated by the emergence of the internet, especially after a 2002 decision on access to documents (WTO 2002).

Right to know in the WTO

Citizens cannot hold governments accountable and firms cannot navigate global markets if they do not know what tariffs or rules apply, and whether they are likely to change. Governments
need to know how their trading partners are implementing their obligations. Most of the first-generation WTO transparency provisions listed in Table 3.3 relate to the obligations incumbent on governments for trade policy transparency at home.

The basic right-to-know principle (1) is publication of all trade-related international obligations, most notably the codification of Members’ specific mutual obligations in the thousands of pages of ‘schedules’ attached to the general obligations of the WTO agreements. Data on bound tariffs is now available on the WTO website in the Consolidated Tariff Schedules database, and a growing share of Members’ applied tariffs is available in the Integrated Data Base (Bacchetta et al. 2012, 19).

Table 3.2 Transparency generations

<table>
<thead>
<tr>
<th>Generations</th>
<th>Principle</th>
<th>WTO example</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Right to know</td>
<td>Mandate access to most government processes and files with the general aim of informing the public and guarding against arbitrary government action.</td>
<td>Allow governments and economic actors to know the trade policy environment at home and abroad.</td>
</tr>
<tr>
<td>2. Targeted transparency, or monitoring and surveillance</td>
<td>Mandate access to precisely defined and structured factual information from private or public sources with the aim of furthering particular policy objectives.</td>
<td>Move government actions in direction of consistency with implicit norms and explicit obligations of the trading system.</td>
</tr>
<tr>
<td>3. Collaborative transparency, or reporting</td>
<td>Employ new technologies to combine information from first- and second-generation policies with a new user-centred orientation.</td>
<td>Combine first- and second-generation results in a user-friendly format so that the public can readily understand more about what states and firms are doing.</td>
</tr>
</tbody>
</table>

Source: Based on Fung et al. (2007, 25)

Table 3.3 WTO right-to-know provisions

<table>
<thead>
<tr>
<th>Principle</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publication of international obligations</td>
<td>GATT Article II; GATS Article XX (schedules); trade agreements</td>
</tr>
<tr>
<td>Publication of laws and regulations</td>
<td>GATT Article X; GATS Article III:1; TRIPS Article 63</td>
</tr>
<tr>
<td>Enquiry points for trading partners and economic actors</td>
<td>SPS; TBT; GATS Article III:4</td>
</tr>
<tr>
<td>Independent administration and adjudication, including rights for foreign firms</td>
<td>GATT Article X; GATS Telecoms reference paper; Agreement on Government Procurement, Articles XVIII and XIX</td>
</tr>
<tr>
<td>Notification through WTO</td>
<td>Notifications can be classified by the form they take or by the use to which they are put in WTO</td>
</tr>
</tbody>
</table>

Source: An earlier version of this table was in Collins-Williams and Wolfe (2010); for a legal description of the provisions see Ala’i (2008)
Equally important for economic actors are the many provisions requiring publication of all legal requirements affecting trade (2), and publication in sufficient time for anyone affected by the rules to know about them before they come into force, both to allow time to comment and time to prepare to take advantage of the new opportunities created. ‘Notice and comment’ provisions are common in many administrative law systems. The WTO obligation is first to do it domestically, and then to extend the same courtesy to trading partners.

Given the complexity of measures affecting trade, some agreements require the establishment of an Enquiry Point (3), where other Members can obtain information on domestic regulations. The GATS even provides for the establishment of ‘contact points’ where private companies from developing countries can obtain relevant information. An important right-to-know obligation is having regulators who are independent of the executive (4), whose actions are therefore made more visible. This principle is first seen in the GATT/WTO system in Article X of GATT 1947, but it is also found in other WTO agreements, most obviously Government Procurement, where transparency before and after the fact is meant to discipline the discretionary award of government contracts. Arms-length administration is an essential aspect of the competitive principles for services regulation embodied in the Reference Paper for the basic telecoms agreement.

All of the preceding right-to-know provisions are subject to notification requirements (5), as listed in part A of Table 3.4.

In the WTO Glossary, a ‘notification’ is defined as ‘a transparency obligation requiring member governments to report trade measures to the relevant WTO body if the measures might have an effect on other Members’ (2013). The requirements are all inherently ambiguous, in that Members are asked to notify something that other Members might find negative, from a new food safety rule to the level of subsidies to farmers. The basic principles were codified at the creation of the WTO, based on GATT practices that had been evolving since 1947 (Bacchetta et al. 2012). In one of the ‘decisions’ adopted at the end of the Uruguay Round (WTO 1995), Members recalled the general obligations to notify, ‘such notification itself being without

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**Table 3.4 Types of WTO notifications**

<table>
<thead>
<tr>
<th>A. Self-reporting</th>
<th>Information provided by an actor on its own behaviour</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘One time only’</td>
<td>Notification of laws, regulations or other measures implementing WTO obligations at a time specified in the agreement</td>
</tr>
<tr>
<td>Ad hoc</td>
<td>Some notifications are required when Members take or propose to take certain actions—e.g. new standards in SPS, or new measures in ILP</td>
</tr>
<tr>
<td>Regular or periodic</td>
<td>Many agreements have requirements for regular notification, like ASCM, Agriculture</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. Other-reporting</th>
<th>Information provided by an actor on other actors’ behaviour</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reverse notification</td>
<td>Many agreements allow Members to notify measures that they think a trading partner should have notified, which then creates the basis for peer review, but such provisions are rarely used</td>
</tr>
<tr>
<td>Dispute settlement</td>
<td>The formal complaint that launches a dispute is a form of other-reporting</td>
</tr>
<tr>
<td>Third parties</td>
<td>Many sources are used by the Secretariat in the crisis monitoring reports, with a request for ‘verification’ by Members—these reports often have better and more recent data than other WTO sources</td>
</tr>
<tr>
<td></td>
<td>Provisions on RTAs allow the secretariat to draw information to the attention of Members</td>
</tr>
</tbody>
</table>
Table 3.5 Notification obligations as of 2011

<table>
<thead>
<tr>
<th></th>
<th>Regular</th>
<th>Ad hoc</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Development</td>
<td>7</td>
<td></td>
<td>7</td>
</tr>
<tr>
<td>Government procurement</td>
<td>3</td>
<td>8</td>
<td>11</td>
</tr>
<tr>
<td>Intellectual property</td>
<td>3</td>
<td>23</td>
<td>26</td>
</tr>
<tr>
<td>Services</td>
<td>3</td>
<td>11</td>
<td>14</td>
</tr>
<tr>
<td>Trade in goods</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agriculture</td>
<td>8</td>
<td>7</td>
<td>15</td>
</tr>
<tr>
<td>Market access</td>
<td>9</td>
<td>27</td>
<td>36</td>
</tr>
<tr>
<td>Rules</td>
<td>7</td>
<td>34</td>
<td>41</td>
</tr>
<tr>
<td>Technical barriers to trade</td>
<td>1</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>TRIMs</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>General</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Balance of payments</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>RTAs</td>
<td>6</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>TPRM</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>42</td>
<td>134</td>
<td>176</td>
</tr>
</tbody>
</table>

Source: WTO (2011b, Box 1)

prejudice to views on the consistency of measures with or their relevance to rights and obligations. They established a Central Registry of Notifications to receive and maintain the 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. As shown in Table 3.5, the central database now covers 176 notification requirements, of which 42 are recurring requirements (semi-annual, annual, biennial, triennial).

Current data based on formal notifications are inadequate in two dimensions: it can be hard to know if the notified data are accurate, or complete, especially for non-tariff measures (WTO 2012b); and real-time monitoring is hampered by late notifications. In response to both inadequacies, Members have assigned the Secretariat of the Trade Policy Review Body (TPRB) an increasingly active role. The core of each TPRB report is based on the notifications of the Member under review, but each report depends on a far wider range of data and information than is available from official WTO notifications, represented in part B of Table 3.4. The Secretariat collects these data from official sources (questionnaires to the Member under review) and non-official sources. The use of data collected in this way is a form of other reporting, or ‘reverse notification’. To ensure accuracy, the Secretariat seeks verification of the data and information when discussing the draft of its report with the Member (WTO 2011b, para 180). The crisis monitoring reports and annual reports on the trading system use a similar method, but the 2012 mid-year monitoring report notes that ‘Replies to the request from the Director-General for information on measures taken during the period under review were received from less than 20% of the total number of Members and Observers’ (WTO 2012a, para 18). At the 2011 ministerial the European Union (EU) failed to gain support from other Members for a proposal to improve adherence to notification commitments, although Members did promise to ‘comply with the existing transparency obligations and reporting requirements needed for the preparation of these monitoring reports, and to continue to support and cooperate with the WTO Secretariat in a constructive fashion’ (WTO 2011c).

Notification is the means of assembling detailed high-quality information on the trading system and the trade policies of WTO Members, but it does not work as well as it should. At
the end of September 2011, only 20% of the Members were in full compliance with their agriculture notification obligations up to the end of 2009. In one recent year, for another example, only 22 GATS notifications were received, from four Members (WTO 2011b).

Four sorts of reasons can be advanced as an explanation of why governments do not improve notification. The first is bureaucratic incapacity, which is the case for many developing countries that lack the data, knowledge or clout with other departments to generate the notification. The second is a refusal to see information as a public good. One Secretariat official argues privately that governments do not value information enough, or that they value it too much, but in the wrong sense. That leads to a third reason, a conscious unwillingness to notify, which may be the case for subsidies issues, where Members might worry about opening themselves to criticism, perhaps in a dispute; or where a notification might require showing one’s cards in a negotiation. And yet everybody would like to have information about their partners. The final reason advanced for poor notification is an inability to characterize an issue in WTO language, which is perhaps the case with emerging issues, like green subsidies, or issues where Members still lack an agreed definition of the issues.

More positively, one can think of circumstances under which Members are more likely to notify (Collins-Williams and Wolfe 2010). The first is evident benefits: providers of information must see how doing so helps them meet their own objectives. Do they believe that the information they provide will be analysed, aggregated and disseminated in a way that is helpful to them or crucial for the regime? It follows that notification is better where the text of the agreement is clear, and well-understood, perhaps because of extensive ongoing participation by the responsible authorities in WTO discussions, and when the notification format is easy to complete. Notification is also easier when the same agency is the authority for a measure, is responsible for notification and is the user of the results in the WTO.

This last factor may be critical, as we will see in the next section. The experts from capitals who attend technical barriers to trade (TBT) and sanitary and phyto-sanitary (SPS) meetings are the people who must provide notifications and who rely on other countries’ notifications. In the Subsidies Committee (SCM), in contrast, the Geneva-based delegates typically report to treasury ministries, who have a very different interest in the use of public money in their own and other countries than operational ministries or sub-national governments. Fewer experts from capitals attend the Agriculture Committee, and capital-based attendance is rare for import licensing (ILP), and GATS has no committees that would engage experts from capitals in a review of complex notifications.

**Monitoring and surveillance**

Some WTO notifications are effectively ‘tombstone’ data because no discussion takes place, but some are linked to the possibility of review by a relevant WTO body before or after the measure takes effect. Second-generation transparency at WTO refers, therefore, to a set of monitoring and surveillance mechanisms listed in Table 3.6.

Monitoring means any activity where Members review each other’s implementation of the agreements. The meetings are opportunities for Members to learn more about the incidence of a particular policy (e.g. subsidies) and understand the reason for their use. Surveillance might focus on checking whether governments have created national legislation that incorporates an agreement into law; or on whether those laws are adequately enforced. Monitoring takes place in the various WTO committees, often with an opportunity for Members to ask each other questions about notifications and sometimes with a formal ‘Specific Trade Concerns’ (STC) procedure, as discussed below. Peer review is also found in the Trade Policy Review
Mechanism (TPRM), which aims at ‘achieving greater transparency in, and understanding of, the trade policies and practices of Members’. Discussion in the TPRB is based on major reports written by the WTO Secretariat and the Member under review (WTO 2011b, para 178 ff). The reports, and a record of the discussion, are subsequently published, as is the Director-General’s annual report to the TPRB, an overview of developments in the international trading environment.

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 2012a). 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 2012b). One factor that contributed to legitimizing this more autonomous role for the Secretariat was simply experience with the mechanism. Members 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 build a new form of dispute settlement through the back door.

One of the ultimate purposes of transparency is to ensure accountability for commitments, in this case by governments holding each other to account (Wolfe 2011). As a result of questions and challenge in a committee, a government may provide more information, change policy, or pressure other units of government to respond. Beyond holding each other to account, governments also use the WTO as a forum for intervening in the design of another government’s regulations. They act in part on behalf of economic actors in their country who may be affected by new regulations—engagement with regulatees usually diminishes potential conflict, while leading to better regulation. In this sense the practices of WTO committees, notably SPS and TBT, make for stronger and more extensive governance networks (Downes 2012, 523).

Transparency can also be seen as educational: when actors receive new information about themselves, they may adopt new behaviours (Mitchell 2011, 1882). Governments are then assumed to be likely to change their behaviour because they learn about the benefits of socially acceptable policy action. (Related ideas are found in the liberal convergence literature—see Simmons et al. 2006). The extent of such learning, however, is limited by the small number of Members to whom questions are addressed in committees and by the small number of active questioners. Delegates from small countries ask questions sent by capitals, and not always well-informed questions. Collins-Williams and Wolfe (2010) found in Subsidies and Agriculture that a small number of Members consistently ask questions, and are also consistently targets

### Table 3.6 WTO monitoring and surveillance mechanisms

<table>
<thead>
<tr>
<th>Principle</th>
<th>Examples</th>
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</thead>
<tbody>
<tr>
<td>General clarity in domestic trade policy</td>
<td>Trade Policy Review Mechanism</td>
</tr>
<tr>
<td></td>
<td>– country reviews</td>
</tr>
<tr>
<td></td>
<td>– Annual Report</td>
</tr>
<tr>
<td></td>
<td>– monitoring reports</td>
</tr>
<tr>
<td>Peer review</td>
<td>Committee review</td>
</tr>
<tr>
<td></td>
<td>– “specific trade concerns” in SPS, TBT</td>
</tr>
<tr>
<td></td>
<td>– similar procedure in ASCM, Agriculture, ILP, GATS</td>
</tr>
<tr>
<td>Third party adjudication</td>
<td>Dispute settlement system</td>
</tr>
</tbody>
</table>
(notably Canada, the USA, the EU, Australia and New Zealand), yet having to think your way through an answer to a question is also a form of learning. In Agriculture, Canada and the EU make a point of trying to ask questions of smaller Members, because it helps them learn. The Trade Policy Review Body must deal with 26 country reports a year, so most questions from Members will be planted by the Secretariat. Countries with well-developed domestic transparency mechanisms, and strong analytic capacity, are also best able to participate in Geneva. TPRB questioning is dominated by a few large Members, most notably the USA and the EU (Ghosh 2010). Asking questions depends on knowledge and expertise that smaller countries may lack, yet Members who do not engage in the deliberative process will learn less about the rules and the process than those that do. While the ability to engage in the process may not have been a major preoccupation of the Atlantic countries that created the GATT in the 1940s, it is increasingly critical now.

**Reporting and engagement**

Third-generation transparency is represented at the WTO by greater attention to what is done with the information available. Information is aggregated in new ways and made more readily available. Reporting and engagement groups a set of practices on how the WTO reports on its work, and efforts to create an inclusive decision-making process so that everyone has access to and can use information. This dimension has greatest relevance for civil society, for smaller developing countries and for less developed countries (LDCs), which may not have the capacity to analyse the right-to-know information, or be full participants in monitoring and surveillance mechanisms. Rather than producing information, then, this type of transparency, as shown in Table 3.7, is more about communicating information and listening to the views of stakeholders. This aspect of WTO work is the focus of critics who see the WTO as undemocratic, arguing that civil society cannot properly participate in the organization and that many small countries are severely disadvantaged by the WTO’s practices.

With what is sometimes called collaborative transparency, the internal challenge is to create a more inclusive decision-making process in Geneva, ensuring that all Members have and can make use of information. Whether developing countries have the capacity to analyse the information generated by the transparency mechanisms affects both the operation of existing

### Table 3.7 Reporting and engagement

<table>
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<th>Principle</th>
<th>Examples</th>
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| Internal transparency for Members | – Rules of procedure for committees and negotiations  
– Extensive reporting on STCs in TBT and SPS  
– Database of questions and answers in Agriculture  
– Minutes of questions and answers in ASCM, ILP |
| External transparency for citizens and economic actors | – Documents publicly available on the website  
– Publish TPR reports, WTO Annual Report, and annual World Trade Report  
– Development of a searchable ‘umbrella’ database of all notification, STCs, questions and answers in committees and in TPR reports |
| Role for NGOs | – Annual Public Forum  
– *Amicus Curiae* briefs  
– Limited use of third-party data |
agreements and new negotiations. Where standards are concerned, having the capacity to understand the science and influence the evolution of new rules is also a factor for developing countries.

As to external transparency, the challenge is to enable better policymaking in capitals, engaging both economic actors and citizens. Domestic transparency, including an active process of seeking information from economic actors and consulting citizens, can be daunting (Halle and Wolfe 2007). Even helping people outside the WTO understand what is going on inside takes effort (Bonzon 2008). Encouraged by environmental NGOs, meetings of the Committee on Trade and the Environment were the first to use the internet to make the results of the meetings quickly accessible to the public (Shaffer 2001, 75). By 2002, Members had agreed that all official WTO documents should be available to the public on the WTO website, including minutes of meetings, dispute settlement reports and the results of negotiations (WTO 2002). In practice Members have found myriad ways around these fine principles. The rules apply only to documents in an official WTO series, but the most sensitive issues in negotiations often surface first in un-numbered ‘room documents’ handed out during a meeting (available on a separate internal website), or in documents with the ‘JOB’ code that are generally not made available on the website. Documents on ‘accession’ to the WTO are released only when the working party created to examine an application reports to the General Council, but the negotiations can drag on for many years, without the public formally knowing what is going on. Draft dispute settlement reports are released to the parties to a dispute long before they become generally available, and the submissions of the parties may never be released (Marceau and Hurley 2012).

The WTO has learned to be more engaged with civil society (Esteve 2012), although, with the exception of amicus curiae briefs in the dispute settlement system, NGOs have no ability to speak direct in any WTO meeting. Most meetings, including most dispute proceedings, are closed to the public, although the WTO dispute settlement system is considerably more open than comparable economic international organizations (Marceau and Hurley 2012). In many environmental agreements, in contrast, NGOs are directly engaged in the work of the organization, notably CITES, where NGOs like TRAFFIC help gather additional information that the organization’s transparency mechanisms may miss while providing on-the-ground support and resources within states (Wolfe and Baddeley 2012). The WTO could make much more effective use of such third-party information. In the case of crisis monitoring, for example, the Secretariat made use of data published by the Global Trade Alert, but did not have any kind of formal or systematic engagement with this NGO (Wolfe 2012).

Having in mind GATT practice, Members discussed the need for annual reporting as soon as the WTO was created (WTO 1995). Subsidiary bodies are to report either to the respective sectoral Councils (Goods, Services and TRIPS—Trade Related Investment Measures), or directly to the General Council, which itself must prepare a report. The required reports are to be factual in nature, containing an indication of actions and decisions taken. The Secretariat is also required to report annually on compliance with notification requirements by country and by agreement (WTO 1996), but the report is opaque to all but experts (WTO 2011d). And of course the Secretariat reports to the Committee on Budget, Finance and Administration. All of this information provides the basis for the relevant discussion, which may be more anodyne, in the WTO Annual Report, which is aimed at the interested public.

WTO Members are committed to making information available in Geneva, but that information is largely a by-product of information otherwise generated by the WTO transparency mechanisms that serve Member governments. Only some information is published with civil society organizations, economic actors or citizens in mind. For example, the Trade Policy Review reports are written for Members, and in a specialist language, but the summary
observations are written for a general audience. When a Member wishes, more active steps will be taken to disseminate the results at home. The crisis monitoring reports are explicitly aimed at Member governments, but the Secretariat has been working hard to report the results on the internet in a way that makes complex data readily accessible to an interested but not necessarily professional audience. Many of the reports on committee meetings are also increasingly informative.

**Conclusion: Does sunshine make a difference?**

Transparency is the foundation for the trading system as a living thing, not just a legal text stored in a Geneva filing cabinet. Some think transparency is the antechamber to dispute settlement; I think dispute settlement, useful for managing a limited range of conflict, is what happens when transparency and other accountability mechanisms fail. We have seen that the WTO’s windows on its Members and on the trading system are cloudier than they ought to be. But they are not equally cloudy. The notification of obligations and the monitoring procedures are a disappointment in some areas and for some Members, and excellent in others. Transparency does contribute to accountability for commitments, and informal mechanisms can be more effective than formal dispute settlement, but not all Members use either one, and neither is useful in all circumstances.

Sunshine may well be the best disinfectant, as Brandeis wrote, but too much sunlight can be harmful. Transparency might hurt if it encourages posturing by negotiators and politicians. If constituents perceive a negotiation as purely distributive, they will be critical of a negotiator who pursues the possibility of an integrative outcome. Thompson (1998, 159) suggests that, given the natural desire to save face, ‘[n]egotiators who are accountable to constituents are more likely to maintain a tough bargaining stance, make fewer concessions, and hold out for more favorable agreements compared to those who are not accountable’. The transparency that modern governance demands undermines the privacy essential for negotiations (Stasavage 2004). It might also undermine liberalization, or force protection into less transparent forms (Kono 2006).

The tough questions are always: Transparency for whom and to what end? What causes a problem that transparency can remedy? More than simply making information available, second-generation policy tools, also known generically as ‘regulation by disclosure’, try to use information to achieve policy objectives more readily than through other types of tools, such as regulatory standards or formal adjudication. The assumption is that some interested public will respond to information in a way that changes a targeted actor’s behaviour. If the obstacles in a given market are understood, economic actors can make alternative decisions, which might induce the government to change policy to maintain the benefits of investment. Such illumination might also generate domestic political pressure for change.

People easily muddle the distinction between transparency as a tool for governments and its benefits for economic actors. On the one hand, an emerging body of literature conjectures that greater transparency improves trade flows (Lejarraga 2011; Helble et al. 2009), perhaps by reducing fixed or sunk costs and policy uncertainty (van Tongeren 2009; Handley and Limão 2012). Transparency about product quality through ISO (International Organization for Standardization) certification (labels are a form of transparency) increases developing country exports (Potoski and Prakash 2009). Still, some argue that imperfect information may not be much of a problem for the US economy (Winston 2008). Moreover, it would be naïve to think that transparency achieves its effects in isolation. As Stiglitz (2010, 27) observes, for example, disclosure requirements may need to be buttressed by regulations that require or prohibit certain actions. On the other hand, transparency is invaluable for governments to understand
policy changes made by their trading partners and to observe the implementation of multilateral obligations. Information asymmetry exacerbates power imbalances between governments. By reducing such information gaps, the WTO helps to level the playing field. Transparency was the central component of the novel accountability mechanism that Members developed to restrain protectionist impulses associated with the Great Recession (Wolfe 2012).

Will such tools remain effective as power shifts to the emerging economies? The relation between the environment and trade could be said to be a preoccupation of rich countries. If so, one might expect that new WTO Members would attach less importance to related transparency mechanisms than the original Members who drafted the rules. The assumption can be probed with the database of TBT STCs. Figure 3.1 shows the increasing number of such concerns raised each year. The USA and the EU are the target of nearly 55% of environmental TBT STCs but are complainants in only 27%. Almost a quarter of all environmental TBT STCs are developing countries raising issues with EU and US measures. Initiating an STC may be easier than submitting one’s own notification, so a different probe is to query the database of all environment-related notifications in all WTO agreements (WTO 2010) with a focus on China, the most important emerging power.

For convenience Figure 3.2 reports only TBT notifications, probably the most important for environmental matters, which in most years are between 9% and 13% of all notifications.

The dark line in the figure shows, on the right-hand scale, the absolute number of notifications; and the bars show, on the left-hand scale, the share of the EU, USA and China in the total. Since it joined in 2001, China has submitted over 850 TBT notifications, many of which are environmental notifications, in some years exceeding the more established Members. Of course it has been said that China emphasizes codification rather than implementation—the government may find it easier to file WTO notifications than to make real changes in how things work.

![Figure 3.1 Number of TBT specific trade concerns raised per year](Chart 4 in WTO, 2013)
Nevertheless, in the final ‘transitional review’ by the TBT Committee, other Members praised China for making many of its regulations and policies more transparent and predictable (WTO 2011a). Chinese governance is not as transparent as more established Members might like, but WTO-documents are a mine of information about the domestic administration of standards and conformity assessment. Members would like to know more, and would like the administrative procedures to be more open and accessible to foreign firms, but much of what Members know that they find problematic about China’s practices they know because of WTO transparency. To take a different example, China has learned through participation in the Trade Policy Review process, willingly responding to questions in most areas of policy. They still react conservatively to requests for transparency in some areas that they think sensitive such as subsidies or government procurement— their cultural predisposition to secrecy is the obverse of the American obsession with sunshine.

Making transparency work matters because the WTO evolves and grows first through ongoing discussion among Members, not through episodic codification in rounds of negotiations or dispute settlement decisions. Many scholars have observed that the norms that have emerged in the committee now shape the governance of this domain more comprehensively than the formal rules (Downes 2012, 521). Members that do not know how to fill out a notification, or ask and answer questions in the committees, are not full participants in its evolution and cannot reap its full benefits at home. Developing country hesitancy about transparency is an obstacle to improving the mechanisms and making better use of them. But if transparency is a benefit, then the WTO needs to find ways to help.

Transparency about trade policy is a minor subset of transparency in governance generally. Transparency can comprise many instruments, each of which embeds paradigmatic assumptions about the relations between citizens and the state. Countries that struggle to make information available at home may not be able to provide any more of it to the WTO. Transparency is straightforward for Members where such provisions are a normal part of the domestic regulatory process, but more difficult for some developing countries (Wolfe 2003). Being transparent may be good for governance, good for trade and good for investment, but complying with WTO rules may not be the prime motivation.

Third-generation transparency policies reflect an awareness that it is now harder for ordinary people in every country to understand and observe the administration of public affairs, in

Figure 3.2 Environment-related notifications: technical barriers to trade
Source: (WTO 2013) and prior years
general, so Progressive era ideas about sunshine alone as the best disinfectant are no longer sufficient (Hacker and Pierson 2011, 155). Where once we could imagine that citizens could monitor politicians and sanction them effectively through voting in elections, such simple delegation models no longer describe political reality in a complex policy environment. Citizens find it even harder to hold international organizations to account, but WTO monitoring and surveillance can be seen as a kind of horizontal accountability, where governments hold each other accountable for their obligations. Such accountability requires the kind of transparency described in this chapter. Transparency is therefore essential for global economic governance.

Note

1 Parts of this chapter are derived from Collins-Williams and Wolfe 2010 as adapted in Halle and Wolfe 2010. This chapter benefits from unattributed confidential interviews with WTO delegates and officials in Geneva. I am grateful for the research assistance of Alina Kwan and for the support of the ENTWINED research consortium, a project funded by the MISTRA Foundation of Sweden.

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