Book Launch
WTO TBT Webinar
19 June 2020
Introduction

• Background: where this book started
• What is transparency? Why is it important?
• Scope: WTO Agreement on Application of Sanitary and Phytosanitary Measures (SPS) and Agreement on Technical Barriers to Trade (TBT)
• Does transparency prevent disputes, or help raise more disputes? It can do both!
• Outline:
  I. Why the SPS and TBT Agreements? A legal framework in support of regulatory quality
  II. Transparency: The Most Effective Compliance Tool in the WTO?
  III. Transparency, Information and Dialogue for a Mutually Acceptable Solution
Part 1.

Why is Transparency So Important for the SPS and TBT Agreements?
A Legal Framework in Support of Regulatory Quality
The Legal Principles Applying to Domestic Regulations under the SPS and TBT Agreements

- Aim: reducing undue regulatory barriers to trade
- How? by « rationalising » regulatory interventions
  - Scope of Agreements: SPS measures, technical regulations, standards and conformity assessment procedures
  - Justifications of domestic measures: necessity, scientific evidence basis, legitimate objective of measures
  - Consistent levels of protection, non-discrimination within the limits of regulatory autonomy

Strong need for transparency and regulatory co-operation to help implement these « fuzzy » disciplines
Transparency tools available to Members & interested parties

- **Decentralised transparency:** enable a ‘right to know’ but require searching of information in different sources
  - Publication of a notice – forward regulatory planning – hook for early dialogue
  - Publication of adopted regulations

- **Targeted, centralised transparency:** ‘accessing’ information via single source
  - Notifications: alert to all Members via Secretariat about draft measures with significant impact on trade, diverging from international standards
  - Electronic tools to enhance the effectiveness of centralised transparency (E-paning web portal, IMS website, electronic notification…)

- **Collaborative transparency:** enabling bilateral and multilateral dialogue among WTO Members
  - Responding to enquiries and comments and take this into account
  - Enquiry points provide information to other Members and interested parties
  - Specific trade concerns (STCs): a unique mechanism of multilateral regulatory dialogue
International regulatory co-operation (IRC): an important corollary of transparency

- IRC can help countries work towards greater coherence in regulatory approaches and limit costs of regulatory divergences

- IRC is *encouraged* under the SPS and TBT Agreements
  - Pursuit of *harmonisation*, through the adoption of international standards
  - *Mutual recognition* of domestic regulations
  - *Good regulatory practices*

- IRC is *enabled* by the SPS and TBT institutional framework
  - Platforms for exchange of information, data collection and policy analysis, developing guidance on implementing Agreements
  - Monitoring implementation, specific trade concerns, dispute settlement
Part 2.

Transparency: The Most Effective Compliance Tool in the WTO?
WTO « disputing pyramid »: from domestic measures to disputes
The basis of the pyramid: access to measures of all WTO Members

- **Strong Members’ engagement** in SPS/TBT notifications, including developing Members

- Potentially **many more measures could be notified**: High shares of STCs about non-notified measures

- **Remaining practical difficulties to notify**
  - Resource constraints, and difficulty to provide sufficient details in notifications
  - Lack of co-ordination at domestic level
From information to bilateral and then multilateral dialogue

- **Information triggers dialogue**
  - Notifications trigger bilateral and multilateral dialogue
  - STCs help raise awareness and improve understanding of measures

- **Bilateral dialogue as a precedent to STCs**: high share of STCs, esp. TBT, mention previous bilateral dialogue. See also EU e.g.

- **Behind the scenes**: important role of private sector in measuring the impact of domestic regulation. e.g. at least 65% of TBT STCs between 2010-2014
The content of STC discussions: what do Members need to know?

1. Transparency, information and clarification
2. Contribution to domestic regulatory processes
3. Practical impediments to trade

When is transparency enough to manage conflicts?

- SPS « resolved » STCs: procedural questions and practical impediments to trade, regarding large or small trading nations alike
- TBT STCs assumed as resolved: transparency and measures with potential trade effects

NB: 57% TBT and 70% SPS STCs are « Minor » STCs – discussed only once or twice.
Part 3

Transparency, Information and Dialogue towards a Mutually Acceptable Solution
Transparency and disputes: Where is the difference?

• Broad tendency to raise STC dialogue before or in parallel to formal dispute proceedings, particularly by developing countries

• STCs used to raise issues about a measure’s consistency with core SPS and TBT obligations that may be solved through better understanding of mutual perspectives

• Formal disputes: issues requiring interpretation/clarification from third party

Figure 6.3 Issues raised in TBT STCs and requests for consultations.8

Figure 6.4 Issues raised in SPS STCs and requests for consultations. Source: Author’s own
Transparency: a useful complement to formal dispute

- **Climbing the pyramid towards a mutually acceptable solution:** Information, resources and alternative fora for discussions are key to raise/solve trade disputes

- **SPS / TBT transparency tools are key to help « climb the pyramid »:** potential to address Members’ transparency needs in the pre-litigation phase

<table>
<thead>
<tr>
<th>Information Need</th>
<th>Stages in Pre-Litigation Phase</th>
<th>TBT/SPS Transparency Mechanisms</th>
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<tbody>
<tr>
<td>Knowledge of a measure</td>
<td>Identify trade barrier</td>
<td>Publication of adopted measures</td>
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<tr>
<td>Awareness of the measure</td>
<td></td>
<td>Notification of draft</td>
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<tr>
<td>Understanding of content of the measure</td>
<td>Assess scale and scope</td>
<td>Response to enquiries on notification</td>
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<tr>
<td>Understanding of the measure's (potential) impact</td>
<td></td>
<td>Internal process, esp. dialogue with private sector; facilitated by electronic tools</td>
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<tr>
<td>Use of information: reaction to the measure</td>
<td>Input into foreign policy-making process</td>
<td>Comment on notification; STCs</td>
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<td></td>
<td>Negotiate settlement</td>
<td>STCs; bilateral meetings in the margins of STCs</td>
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How can SPS and TBT transparency still be improved?

1. Improving the availability of information
   • More and better notifications, with stronger incentives for transparency and greater support from Secretariat to complement information gaps
   • Broader information available, about the entire regulatory policy cycle, trade effects of regulations (eg. through RIAs and dialogue with private sector), and bilateral dialogue.

2. Enhancing the scope and benefits of regulatory cooperation
   • Leverage STCs to identify priority areas for further regulatory cooperation
   • Increase national co-ordination between trade and regulatory communities
   • Support regulatory dialogue for all Members: comments to notifications + STCs
Conclusion

• **Transparency is a crucial pillar of the multilateral rules-based system**, often underestimated: supports implementation of SPS and TBT Agreements, helps manage conflicts and raise better disputes.

• **Still space for more and better transparency and dialogue** within SPS and TBT frameworks to mitigate regulatory barriers to trade through increased coherence of regulatory approaches.

• **High momentum for transparency today**: more essential than ever to ensure predictability of global trade and access to essential goods, and to maintain continuous application of Agreements.
Thank you!

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