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International
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TRANSPARENCY IN THE
WTO SPS AND TBT
AGREEMENTS

The Real Jewel in the Crown

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Book Launch
WTO TBT Webinar

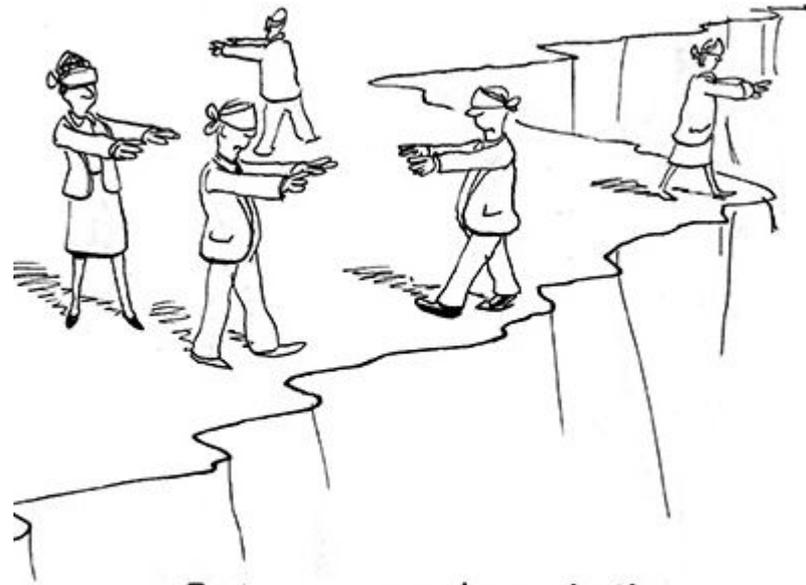
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Introduction

- 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



Just an average day navigating
government regulations.

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-ping 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

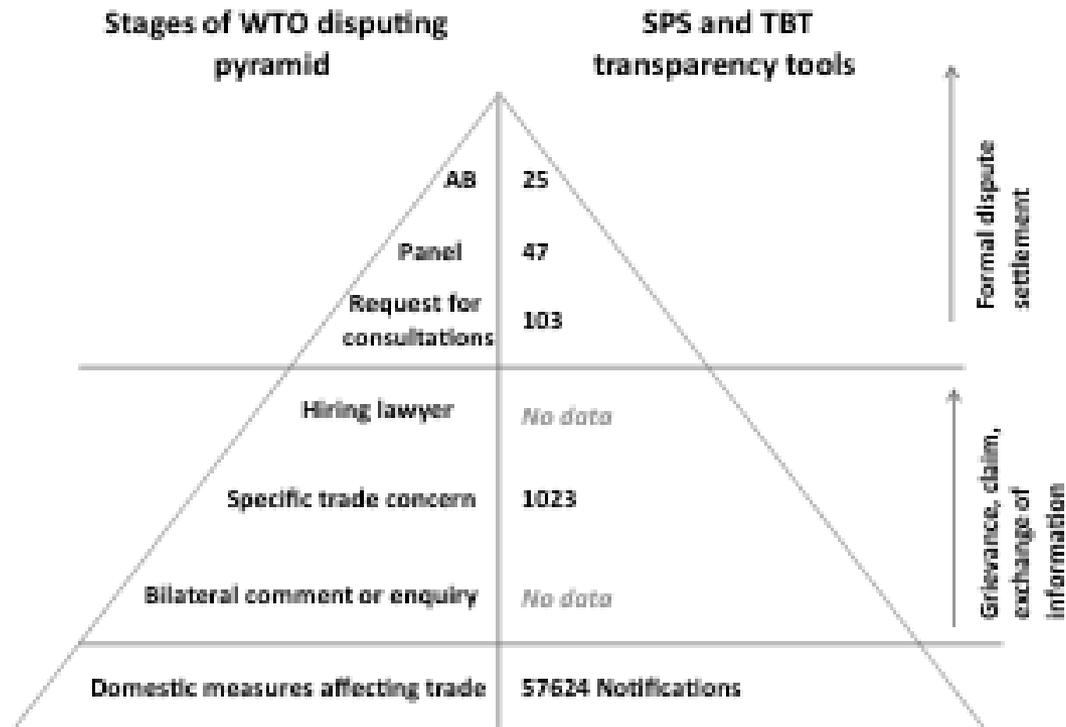


Figure P2.2 SPS and TBT disputing pyramid, from transparency to dispute settlement, 1995–2018.¹³

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

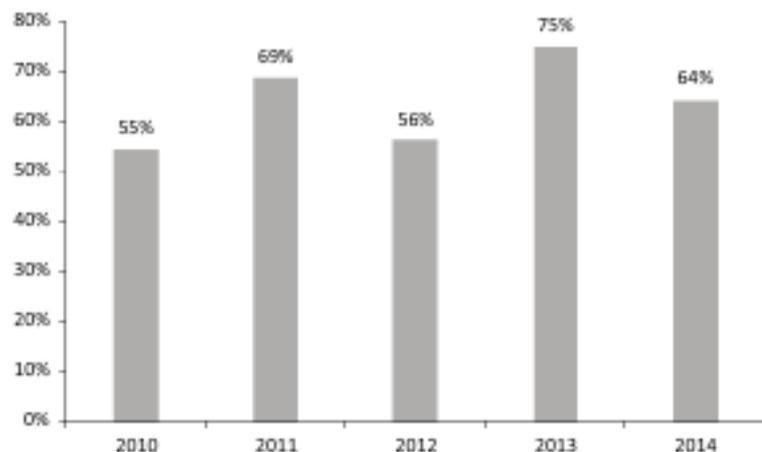


Figure 4.7 Share of SPS STCs raised against non-notified measures, 2010–2014.²⁸

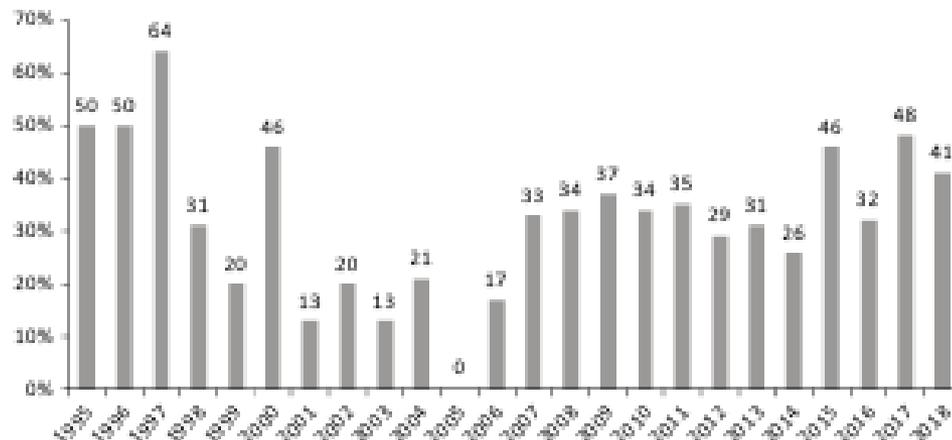
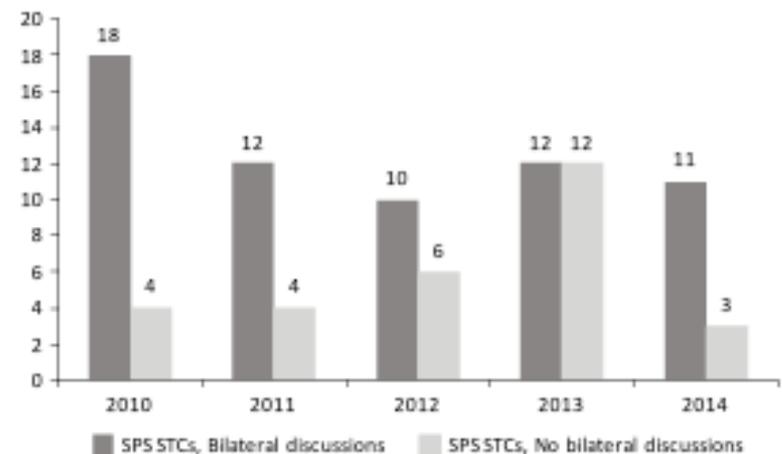
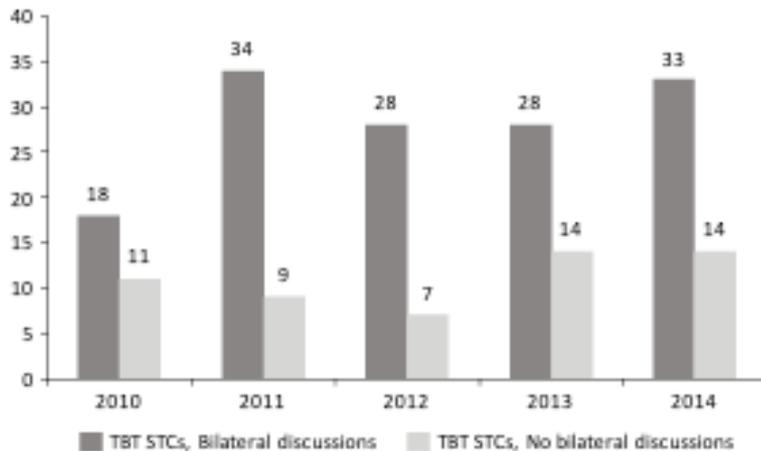


Figure 4.8 Share of TBT STCs raised against non-notified measures, 1995–2018.

- **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

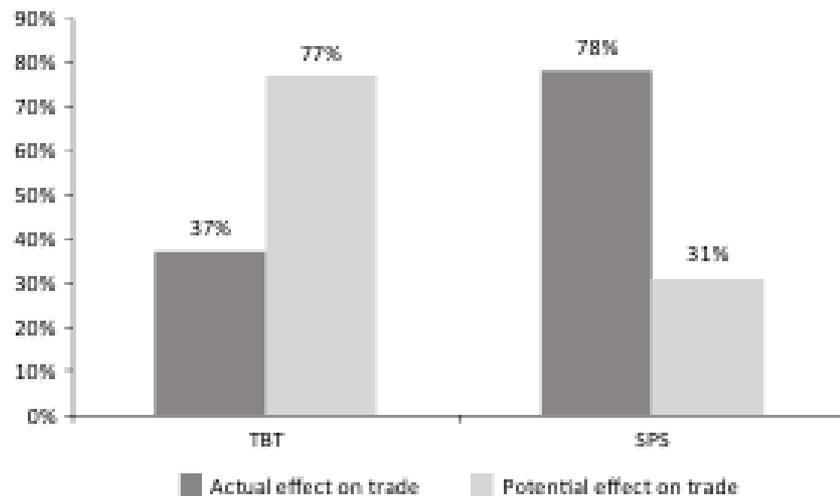


Figure 5.3 STCs about actual or potential trade effects. Source: Author's own based on SPS Committee minutes, SPS IMS, <http://spsims.wto.org/>.

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

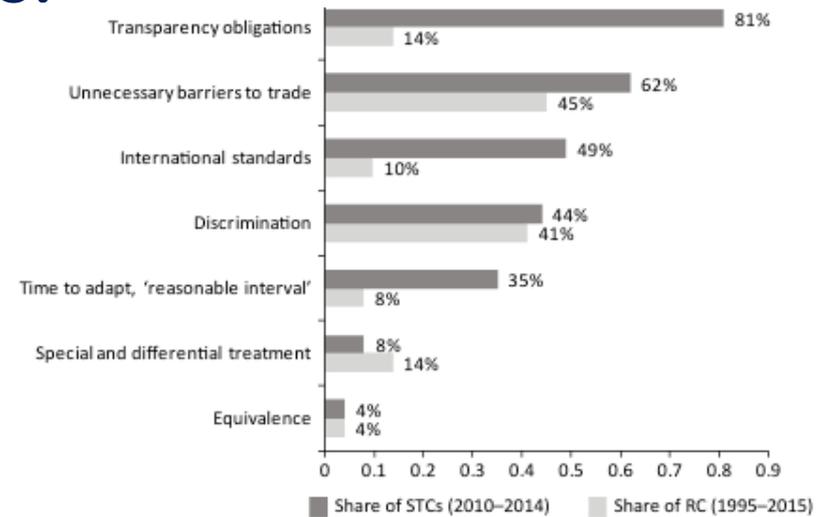


Figure 6.3 Issues raised in TBT STCs and requests for consultations.⁸

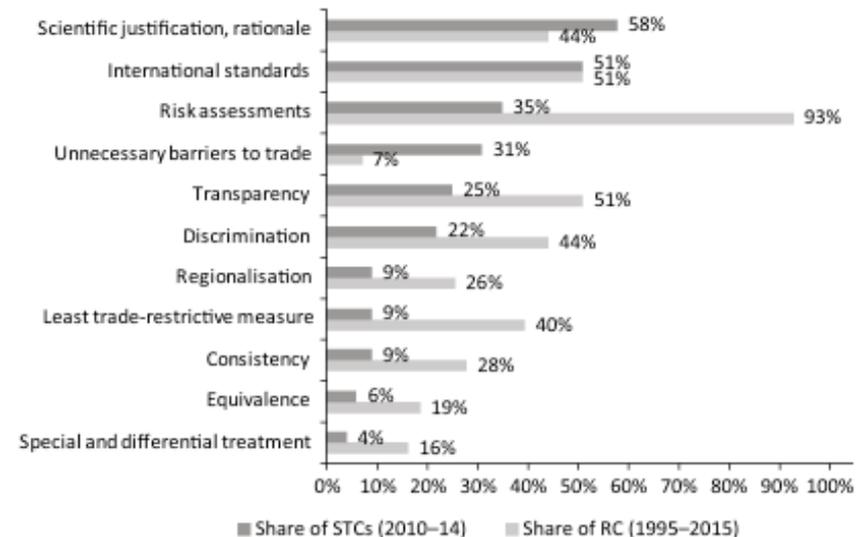


Figure 6.4 Issues raised in SPS STCs and requests for consultations. Source: Author's own

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 8.1 *SPS and TBT transparency mechanisms in response to information needed in the pre-litigation phase*

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

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.

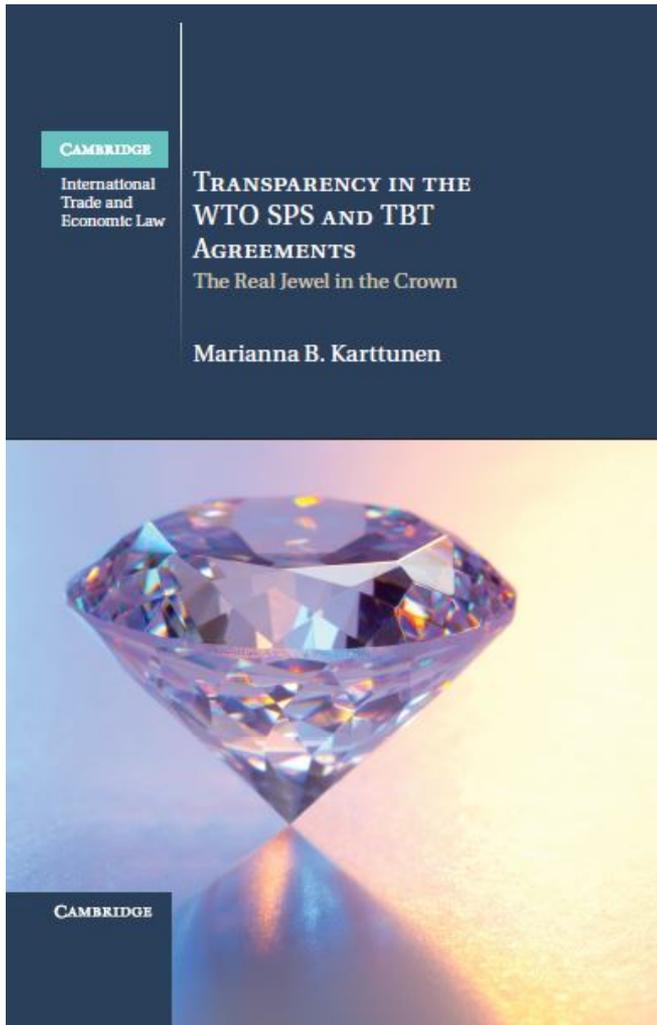
2. Enhancing the scope and benefits of regulatory cooperation

- **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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