

Improving Transparency, Information Flow and Monitoring in the WTO: Analysing Current Proposals & Thinking Outside the Box

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EXECUTIVE SUMMARY

Transparency is crucial to all aspects of the WTO. It aids the administration of WTO agreements and disputes settlement, allows agenda setting for negotiation for new disciplines, and fosters trust between WTO Members by increasing predictability in trade relations.

This report examines transparency obligations at the WTO, with the special focus on the Agreement on Subsidies and Countervailing Measures (SCM), the General Agreement on Trade in Services (GATS) and the Trade Policy Review Mechanism (TPRM). The level of compliance with the abovementioned agreements is poor and, in recent years, has further deteriorated.

There are two main reasons for non-notification: (i) capacity constraints; and (ii) unwillingness to notify. The over-broad and ambiguous formulation of notification obligations, a lack of inter-ministerial cooperation and capital rotation, and lack of human resources have been identified as the main constituents of capacity constraints that Members face. On the other hand, Members without such capacity constraints may choose not to notify as they see little added value in making notifications, fear the possibility of dispute settlement and do not view transparency as a public good.

Over the years, Members have submitted various proposals to strengthen the transparency obligations in the WTO through various different approaches: a) the application of penalties in case of non-compliance; b) award compliance through some incentives; c) technical assistance for countries lack of capacity; d) consultations for information exchange; e) promoting inter-organizational cooperation; and f) formulating new transparency rules.

In order to address the issue of transparency, practices of other international organisations may prove useful. A descriptive review of International Monetary Fund, Organisation for Economic Co-operation and Development, World Bank, United Nations Conference on Trade and Development, Global Trade Alert, Universal Periodic Review under the UNHCR and the United Nations Framework Convention for Climate Change demonstrates that these mechanisms have certain elements that may strengthened transparency in the WTO. These elements include broadening the mandate of the secretariat vis-à-vis data collection; the promotion of inter-governmental cooperation; a multi-layer and wider-membership participation; and making greater use of information and communication technologies.

Transparency in the WTO may be improved in various ways which may be applied exclusively or simultaneously: (i) lifting the burden from the Members by reducing the number of requirements with priority; (ii) setting up new Working Group or Committee dedicated to notifications in order to provide tailored technical assistance; (iii) encouraging private sector participation through direct communication or external website; (iv) amending existing notification obligations; (v) applying administrative measures against non-complying Members; (vi) naming and shaming non-complying Members in strengthened Committees; (vii) introducing divided, thematic committee sessions for service notifications; (viii) empowering the Secretariat to independently collect data; (ix) introducing incentives and disincentives for better compliance.

1. INTRODUCTION

Since the creation of the World Trade Organization (WTO) in 1995, there have been efforts to reform and enhance the functioning of the Organization. Many proposals and suggestions to improve various dimensions of the Organization have been made, both by WTO Members as well as civil society. One such crucial strand of reform efforts is concerned with enhancing transparency, notification and information exchange within the Organization. The objective of this report is to make a contribution to these reform efforts, focusing particularly on enhancing transparency and improving compliance with notification obligations in WTO.

This report has been prepared at the behest of the Grupo Punta del Este (PEG), an independent network of individuals who aim to defend the multilateral trading regime and reform the WTO.¹ The mandate of this report is threefold: (i) identifying the reasons why compliance with notification obligations and other transparency requirements at the WTO is low; (ii) cataloguing and classifying all the proposals made by WTO Members as regards transparency obligations at the WTO; and (iii) providing innovative solutions, inspired both by proposals submitted by WTO Members as well as independent research conducted by the authors of this report, to improve transparency at the WTO.

The report is structured as follows: the first chapter of the report introduces and defines the issue of transparency at the WTO and explicates the importance of the issue, both for the Organization as well as its Members. The second chapter provides an overview of transparency and notification requirements at the WTO, classifying these obligations in three categories: (i) general obligations; (ii) agreement-specific obligations; and (iii) the trade

¹ For more information on PEG, see <http://grupopuntadeleste.com/en/> (last accessed 10 November 2019).

policy review mechanism (TPRM). The following chapter illustrates the practical difficulties in achieving compliance with the above-stated transparency obligations, including both the inability as well as unwillingness of WTO Members to meet their notification obligations. This chapter also explains how and why these two factors prevent the achievement of complete transparency at the WTO. The fourth chapter catalogues and classifies all the proposals regarding transparency obligations made by WTO Members to date. In doing so, the chapter categorises the kinds of solutions WTO Members have suggested to improve compliance with notification obligations. The fifth chapter provides a brief overview of transparency mechanisms employed by other international organisations and agreements in an effort to shed light on what lessons may be learnt from the experience of these other institutions that may be useful for and transposed into the WTO. The sixth and final chapter concludes.

2. TRANSPARENCY: WHAT IS IT AND WHY DOES IT MATTER?

Overview

- ★ Transparency refers to the various mechanisms, requirements and obligations at the WTO that require and ensure that Members keep their domestic trade regimes open and reviewable to other Members.
- ★ Such obligations include Members' obligations to notify trade measures to other Members through the Secretariat.
- ★ It also includes the Trade Policy Review Mechanism conducted periodically by Members with the assistance of the Secretariat.
- ★ Transparency is crucial to all aspects of the WTO.
- ★ It aids the administration of WTO agreements and dispute settlement.
- ★ Transparency obligations also allow agenda setting for negotiation of new disciplines.
- ★ Transparency fosters trust between WTO Members by reducing unpredictability in trade relations.

2.1 What is transparency at the WTO?

As stated before, this report aims to make a contribution to enhancing transparency and information flow at the WTO. It is crucial, therefore, to first define what transparency refers to in this context, what it does not refer to, and the limitations of the scope of this report.

Transparency in the context of this report refers to the various mechanisms, requirements and obligations at the WTO that require and ensure that its Members keep their domestic trade regimes open, transparent and reviewable to other Members. In other words, transparency includes Members' obligations to notify to other Members through the WTO their domestic trade

policies as well as any changes to them. It also includes the comprehensive review of Members' trade laws and policies conducted by the WTO secretariat every few years (this is known as the trade policy review mechanism). These obligations and requirements will be discussed in greater detail in the next chapter.

In the context of this report, transparency *does not* mean or include holding international institutions such as the WTO accountable to the global community. There is much conversation surrounding the opacity in the negotiation and dispute settlement processes of the WTO.² As a result, there have been greater calls by civil society to make institutions such as the WTO more accessible to the public. Transparency in the context of this report does not include these aspects. This report focuses solely on the responsibility and accountability of WTO Members towards other WTO Members within the framework established through the WTO Agreements.

In doing so, and as stated above, this report will focus on the trade policy review mechanism and the notification obligations of WTO Members. As regards the latter, there are numerous notification obligations contained in WTO Agreements. Given the constraint of time, this report does not focus on each and every notification obligation at the WTO. In addition to examining the general obligations to notify, the report will focus solely on two specific agreements and the obligations contained in them: (i) the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and (ii) the General Agreement on Trade in Services (GATS). These two agreements have been chosen because compliance with notification obligations is particularly weak in these areas. The reasons for this have been discussed in the following chapter.

² Lori Wallach & Patrick Woodall, *Whose Trade Organization? A Comprehensive Guide to the WTO*. New York: New Press, 2004; Greenpeace, *Why is the WTO a Problem?*, 2003, available at <http://www.greenpeace.org/international/en/publications/reports/why-is-the-wto-a-problem/>; Martin Khor, *Developing Countries Decry WTO's Secretive Talks*, Third World Network, available at <http://www.twn.my/title/1972.htm>.

2.2 Why does transparency matter?

Transparency is crucial to the functioning of the WTO. Along with promoting freer trade and ensuring non-discrimination, transparency forms part of the three essential pillars on which the WTO stands. Without complete transparency, other functions of the WTO are severely hampered.

2.2.1 Administration of WTO Agreements and Dispute Settlement

Transparency is vital to administering the agreements of the WTO that all Members have agreed to complying with. WTO agreements discipline a number of areas, including subsidies, intellectual property, non-tariff barriers, services. In addition to complying with the notification obligations contained in these agreements, Members are required to comply with certain substantive obligations that discipline Members' ability to implement trade policies that do not respect principles of free trade or non-discrimination, among others. In case Members consider that another Member's non-compliance with these substantive obligation affects them, they may bring the non-complying Member to dispute settlement. Dispute settlement has been touted as one of the most crucial elements of the WTO. This element, however, has little value if complaining Members may not be able to gather necessary evidence regarding the responding Member's WTO non-compliant trade laws. Therefore, transparency allows Members to be aware of non-compliance with WTO agreements by their fellow-Members. It also allows Members to anticipate disputes and facilitates the expeditious settlement of such disputes. .

2.2.2 Negotiations and Agenda-Setting

Transparency is also crucial to the negotiation of future agreements and setting of future agendas for consideration. Since the creation of the WTO,

successive ministerial conferences have been held in order to negotiate and arrive at new disciplines for areas of trade that were not disciplined during the Uruguay Round. These include e-commerce, fisheries subsidies and domestic regulation of services, among others. In the absence of information sharing by Members about their economic policies, it is impossible to determine the direction of these new disciplines. For instance, in the absence of knowledge about the total amount of production by a certain Member, it is impossible to know how to set the *de minimis* for subsidy granting pegged on said amount of production. Similarly, in the absence of knowledge about Members' domestic trade policies, it is difficult to determine new agenda for negotiation.

2.2.3 Fostering Trust between Trading Partners

In addition to the above, transparency and information sharing also fosters trust between trading partners and takes away the element of unpredictability in trade relations. It also allows Members to draw on the experiences, methods and policies of other Members to better their own trade policies for the future, while remaining in compliance with the commitments made at the WTO. Finally, at a time when there are multiple voices questioning the relevance of the WTO as the future of the dispute settlement remains uncertain, it is necessary to recall that another central function of the WTO is information exchange and monitoring, something that will always ensure that the WTO is important and relevant.

3. TRANSPARENCY OBLIGATIONS AT THE WTO

Overview

- ★ The GATT, GATS and TRIPS contain a general obligation to publish all laws or measures enacted by Members. These obligations cut across all sectors and types of measures.
- ★ Article III:3 of the GATS requires that Members promptly notify all measures that significantly affect trade in services covered by their specific commitments.
- ★ Most WTO agreements also contain specific obligations to notify measures to other Members through the WTO.
- ★ A crucial aspect of transparency at the WTO is the Trade Policy Review Mechanism. All WTO Members are subject to review by the Trade Policy Review Body. The Secretariat prepares a report on the Member under review with the coordination of that Member.
- ★ Article 25.1 of the SCM Agreement requires Members to notify all specific subsidies as well as those subsidies that cause increased exports or decreased imports.

There are a number of transparency related requirements at the WTO. These are contained in the agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization. Some obligations require Members to promptly publish domestically any laws or measures enacted by the Member.

A second category of transparency requirements, which are the focus of this report, relate to notification obligations of Members. Several WTO Agreements require Members to notify other Members through a notification to the WTO secretariat of any new laws or measures enacted by the Member. For instance, Article 2.9 of the Agreement on Technical Barriers to Trade (“TBT Agreement”) requires that Members “notify other Members through

the Secretariat of the products to be covered by [a] proposed technical regulation, together with a brief indication of its objective and rationale”, if such technical regulation is not based on an existing international standard.³ Such obligations, especially pertaining to the SCM Agreement, the GATS and the TRIMS, have been discussed in greater detail below.

A third category of transparency requirements at the WTO pertains to the Trade Policy Review Mechanism (TPRM), an exercise conducted by WTO Members on the basis of a report prepared by the Secretariat in order to review the laws and policies of each Member with their cooperation. These reviews are conducted every few years (depending on the Member in question) and provide a holistic view of the trade policy of the Member, including the Member’s outstanding notification obligations. TPRM is discussed in greater detail below.

3.1 General Obligations

General obligations to notify and publish measures exist across a range of sectors and measures. For instance, the obligation to publish trade regulations contained in Article X of the GATT applies to all goods and a range of measures specified in the text of the Article.⁴ Similar obligations covering trade in services and trade in intellectual property rights are found in Article III of the GATS⁵ and Article 63 of the TRIPS⁶. Together these form the general

³ Article 2.9, Agreement on Technical Barriers to Trade.

⁴ Article X of the GATT states: “Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.”

⁵ Article III:3 of the GATS states: “Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.”

⁶ Article 63 of the TRIPS states: “Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the

obligations on transparency contained in the WTO agreements. These obligations require Members to promptly publish domestically any laws or measures of the nature mentioned in the provision enacted by the Member.

3.2 Agreement-specific Notification Obligations

This report focuses on specific notification requirements that have been identified as some of the most crucial obligations but also ones where compliance is relatively low. These are the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Trade in Services (GATS). In the following sub-section the different obligations under those agreements have been described in detail.

3.2.1 Agreement on Subsidies and Countervailing Measures

The WTO Agreement on Subsidies and Countervailing Measures contains a considerable number of notification requirements. Under Article 25.1 of the SCM Agreement Measures, all specific subsidies (as defined under Articles 1 and 2 of the agreement) as well as any other subsidy which causes increased exports or decreased imports must be notified. Additionally, GATT Article XVI:1 requires notification of any subsidy (whether or not specific) that directly or indirectly causes trade effects.

Members' subsidy notifications are reviewed at special meetings of the Committee on Subsidies and Countervailing Measures, during which Members may raise questions regarding a notified programme, the failure to notify a programme, or the failure to submit any notification.

subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.”

In addition to the above-mentioned obligation, Article 25.12 requires Members to notify the authorities competent to initiate and conduct countervailing duty investigations, as well as domestic procedures governing the initiation and conduct of such investigations.

Further, according to Article 25.11, countervailing duty actions like (a) initiations, (b) preliminary determinations/ provisional measures; and (c) final determinations/ definitive measures also have to be notified without any delay once an action has been taken.

Article 25.11 requires all Members to submit a semi-annual report of all countervailing duty-related actions taken within the preceding six months. Members also must provide a list of all countervailing measures in force. However, in certain cases a one-time nil notification may be made. If a Member has not established an authority competent to initiate and conduct investigations and has never taken any countervailing actions, the Member may so notify the Committee, instead of submitting a 'nil' notification for competent authorities, or submitting a report every six months.

3.2.2 General Agreement on Trade in Services

The General Agreement on Trade in Services contains a number of notification requirements. Article III:3 of the GATS provides that Members shall promptly, and at least annually notify all introductions of new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by their specific commitments. Pursuant to Article III:5, any Member may counter-notify any measure taken by another Member that it considers affects the operation of this Agreement.⁷

⁷ World Trade Organization, Technical Cooperation Handbook on Notification Requirements - General Agreement on Trade in Services

The GATS also obliges Members to notify various specific measures taken by Members. These include, but are not limited to: the establishment of enquiry/contact points; economic Integration Agreements and their enlargement or significant modifications; labour markets integration Agreements; existing recognition measures; opening of negotiations on recognition; granting of new monopoly rights; emergency safeguard measures; security exceptions; an modification of schedules.

3.3. Trade Policy Review Mechanism

The Trade Policy Review Mechanism (TPRM) was introduced into GATT in 1989, following the Mid-Term Review of the Uruguay Round. The mechanism was confirmed as an integral part of the WTO in Annex 3 of the Marrakesh Agreement establishing the World Trade Organization and serves as one of the main channels to promote accountability, predictability and transparency at the WTO.

All WTO Members are subject to review under the TPRM and the frequency of trade policy review (TPRs) varies according to the Member's share of world trade. The four largest traders (currently the European Union, the United States, China and Japan) are reviewed every three years. The next 16 largest are reviewed every five years, and other members every seven years.

Reviews are conducted by the Trade Policy Review Body (TPRB) established by Annex 3 on the basis of a policy statement by the Member under review and a report prepared by officials in the Secretariat's Trade Policy Review Division.⁸

In preparing its report, the Secretariat seeks the cooperation of the Member, but has the sole responsibility for the facts presented and views expressed.

⁸ Trade Policy Review Mechanism (TPRM),
https://www.wto.org/english/tratop_e/tpr_e/tprm_e.htm.

Secretariat sends missions to those countries under review in order to gather information and showcase best practices. Apart from that, the Secretariat makes full use of information and communication technology tools and engages private parties during this process in order to gather as much information as possible.

The reports consist of detailed chapters examining the trade policies and practices of the Member and describe trade policymaking institutions and the macroeconomic situation of the Member. The Secretariat report usually contains the following chapters⁹: Economic Environment, Trade and Investment Regimes, Trade Policies and Practices by Measures, Trade Policies by Sector, and targeted areas. The report may also contain Member-specific elements. For example, in the case of China, it includes “Boxes” for China-specific regulations/policies, such as Belt and Road Initiative, Summary of main changes in the 2017 Investment Catalogue etc.¹⁰

The Secretariat report and the Member’s policy statement are published after the review meeting, along with the text of the TPRB Chairperson’s concluding remarks delivered at the conclusion of the meeting. TPRM is now a regular feature of the WTO. Almost all countries have undergone a review at least once. Technical assistance and additional funding have been offered since 2000 to conduct reviews of LDCs. Each TPR is a combination of reporting by the Secretariat and the government, formal questioning by other member states, and active debate and discussion during review meetings. This dynamic and interactive communication provides the Members an opportunity to better understand the processes and trade policies of other Members.

⁹ This format shall initially be based on the Outline Format for Country Reports established by the Decision of 19 July 1989 (BISD 36S/406-409).

¹⁰ WT/TPR/S/375, 6 June 2018, Trade Policy Review Report by the Secretariat (China).

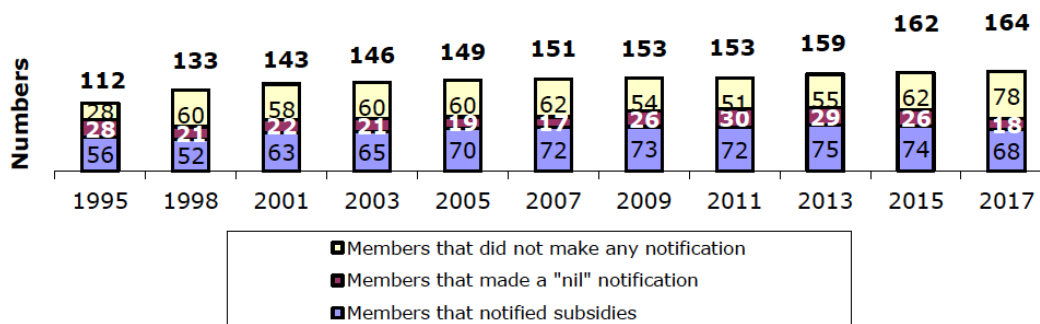
4. DIFFICULTIES IN ACHIEVING TRANSPARENCY

Overview

- ★ There are two main reasons for non-notifications: (i) capacity constraints; and (ii) unwillingness to notify.
 - (i) Capacity constraints:
 - ★ The overall number and broad or ambivalent formulation of notification obligations may disincentivize Members from notifying
 - ★ Lack of inter-ministerial cooperation and capital rotation might lead to a lack of awareness among trade officials as to which measures should be notified.
 - ★ Some Members also experience a lack of human resources and therefore choose not to prioritise notifications.
 - (ii) Unwillingness to notify
 - ★ Members may not see the value of notifications due to the limited substantive discussion in Committees.
 - ★ Members also may not notify out of fear of self incrimination or dispute settlement
 - ★ Members may not notify their measures due to a lack of notifications from other Members in other agreements or areas.
 - ★ Mistrust between trading partners and their reluctance to acknowledge information flow and transparency as a public good also disincentivises notifications.

Full compliance with notification obligations has been difficult to achieve. For instance, the statistics below reveal that in 2017, almost half of the membership of the WTO did not notify the presence or absence of subsidies under the notification obligation contained in Article 25.1 of the SCM Agreement.

**Status of Compliance With Subsidy Notification Obligations Under
Article 25.1 of the SCM Agreement (Notification Years 1995-2017)
As of 29 March 2019**

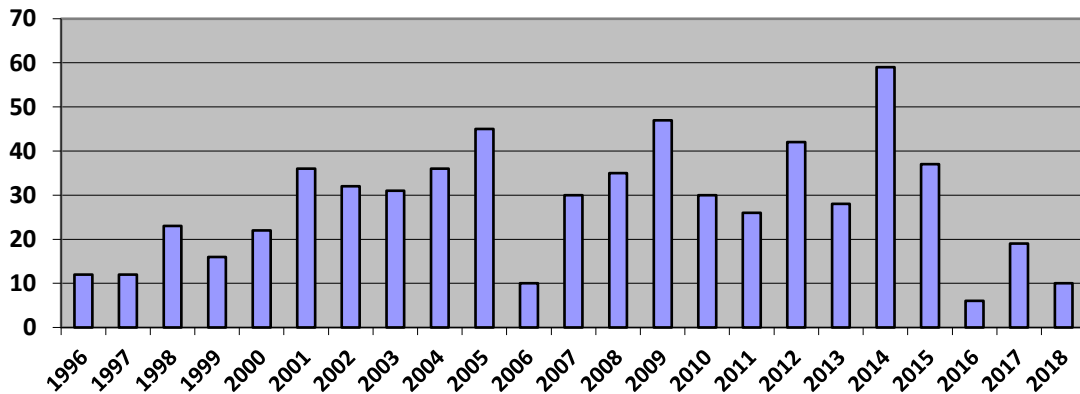


Source: Notification Provisions under the Agreement on Subsidies and Countervailing Measures, Note by the Secretariat, G/SCM/W/546/Rev.10, p. 3

| New and full subsidy notification | Per cent share of total | | | | | | | | | | |
|--|-------------------------|------|------|------|------|------|------|------|------|------|------|
| | 1995 | 1998 | 2001 | 2003 | 2005 | 2007 | 2009 | 2011 | 2013 | 2015 | 2017 |
| Members that notified subsidies | 50% | 39% | 44% | 45% | 47% | 48% | 48% | 47% | 47% | 46% | 41% |
| Members that made a "nil" notification | 25% | 16% | 15% | 14% | 13% | 11% | 17% | 20% | 18% | 16% | 11% |
| Subtotal notifying Members | 75% | 55% | 59% | 59% | 60% | 59% | 65% | 67% | 65% | 62% | 52% |
| Members that did not make any notification | 25% | 45% | 41% | 41% | 40% | 41% | 35% | 33% | 35% | 38% | 48% |

Source: Notification Provisions under the Agreement on Subsidies and Countervailing Measures, Note by the Secretariat, G/SCM/W/546/Rev.10, p. 4

As regards the notification obligation contained in Article III:3 of the GATS, over a period of 22 years, from 1996 to 2018, only 644 notifications have been made by 83 Members. In 2018, only 10 such notifications were made.



Source: *Overview of Notifications Made Under Relevant GATS Provisions, Informal Note by the Secretariat, JOB(09)/10/Rev.9, p. 2*

As is clear from the statistics above, the problem of non-compliance with notification obligations in the SCM Agreement and GATS is pervasive and long-standing. In order to tackle this issue, it is imperative to first identify and elucidate the reasons for non-notification by Members.

There are two main reasons why Members fail to meet their notification obligations: (i) Members are either unable to meet the burdensome notification requirements (capacity constraints); or (ii) Members do not wish to make notifications for a variety of reasons (unwillingness to notify). These two reasons are discussed in greater detail below.

4.1 Capacity Constraints

Lack of capacity has been cited by various Members in their proposals to improve transparency at the WTO¹¹. Capacity constraints encompass a variety of issues that prevent Members from fulfilling their notification obligations. Certain issues relate to resource constraints while others stem from the obligations themselves. These constraints are discussed below.

¹¹ Cuba, India, Nigeria, South Africa, Tunisia, Uganda, and Zimbabwe, Communication, *An Inclusive Approach to Transparency and Notification Requirements in the WTO*, 27 June 2019, JOB/GC/218, JOB/CTG/15

4.1.1 *The Formulation of Notification Obligations*

Often notification requirements are complex and burdensome due to the manner in which they have been formulated. Obligations are at times worded in broad terms that may encompass a wide variety of measures that would need to be notified. For instance, the notification obligation contained in Article III of the GATS requires Members to notify “...*the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by specific commitments [the GATS]*”¹².

This obligation is formulated in a manner that is broad and unclear and uses the ambiguous term “significantly”. The formulation allows for a lot of discretion as to which measures to notify. It calls upon Members to determine which measures “significantly” affect trade in services. Members’ ministries tasked with the obligation to make the notification may lack the capacity to make such an assessment. Therefore, this requirement places an interpretative and administrative burden on Members and may dis-incentivise notifications.

Another example of such a complex obligation is contained in Article 25.1 of the SCM Agreement. The Article obliges Members to notify “*any subsidy as defined in ASCM Art.1:1 which is specific within the meaning of ASCM Art.2 as well as any other subsidy which causes increased exports or decreased imports within the meaning of GATT 1994, Article XVI:1.*”¹³

Once again, in order to meet the notification obligation under this Article, Members will need to engage in an interpretative exercise as to what constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement. The existence of a subsidy is often only clarified through dispute settlement, an exercise that calls upon the technical expertise of the highest quasi-judicial body of the WTO. It is known from the extensive jurisprudence

¹² Art. III: 3, General Agreement on Trade in Services.

¹³ Art. 25.1, Agreement on Subsidies and Countervailing Measures.

of the Appellate Body that concluding the existence of a subsidy is no easy task. This is particularly true for more complex forms of government or corporate assistance. Understandably, an obligation such as this may easily become the cause of burdensome confusion.

4.1.2 The Number of Notification Obligations

In addition to the complexity of language, Members often fail to comply with their notification obligations due to the number of obligations contained in WTO agreements. There are about 175 notification obligations in total – 106 of these are ad hoc notifications, triggered when a Member takes an action that requires it to notify the WTO; 43 of these are one time notifications, usually made at the moment of implementation of the agreement or accession; and 26 of these are regular notifications which are to be made periodically.¹⁴

Members with smaller ministries that have fewer officials find the frequency at which notifications are to be made burdensome. Often Members may not even be aware when notifications are due, simply due to the number of notifications that may need to be made in a given year. Furthermore, making a notification to the WTO is often not a priority for a ministry that implements a new measure.

As regards trade in services, this problem is intrinsic to the agreement due to the all-encompassing nature of services. The universe of services is too large as regards what may or needs to be notified. While the number of obligations contained in the GATS is rather limited, the scope of those obligations is anything but. This often means that Members are unclear as to what measures trigger a notification.

¹⁴ World Trade Organization, Report of the Working Group on Notification Obligations and Procedures, 7 October 1996, para 50.

4.1.3 Lack of Coordination and Capital Rotation

Measures that may trigger a notification obligation are implemented by different ministries in any given Member. For instance, a measure that bans the production and sale of a certain chemical may be implemented by the health ministry, while a measure relating to air pollution is likely to be implemented by the ministry of environment. In order to effectively comply with their notification obligations, the ministry or officer tasked with this obligation would need to coordinate effectively with all relevant ministries at all times. This, however, is often not the case, and the officer in charge may not even be aware of the existence or implementation of a trade-related measure. This issue exists not only between ministries at the same level, but may also be observed in federal systems, where the federal ministry responsible for notifications may not be aware of measures implemented at the sub-federal levels.

Another reason why Members often lack capacity to notify is due the lack of institutional knowledge in the Capital. Governmental officials who possess knowledge of the notification regime of the WTO may be moved to a different governmental department or agency, or may retire. New or remaining officials may not be aware of notification obligations. This issue may persist despite technical assistance from the WTO in the form of workshops and seminars, as rotation of individual also means rotation of the technical know-how.

4.1.4 Lack of Human Resources/Prioritisation

Members may simply not have the requisite human resources in their trade ministries so as to be able to comply with all notification requirements. As a result, governments may not prioritise notification obligations, especially in Members facing other severe crises. In order to comply with all notification

requirements, Members often have to fill out long and complex documents, which may contain over 30 questions (as in the case of the Agreement on Import Licensing). Given the complexity and frequency of notifications at the WTO, Members may not have enough officials to meet their obligations.

4.2 Unwillingness to Notify

The second reason for non-compliance with notification obligations is Members' unwillingness to notify. This affects a cross-section of WTO Members across the developed and developing/LDC divide. There may be various reasons for why Members may not want to fulfil their notification obligations, despite their ability to do so.

4.2.1 Perceived lack of value addition through notifications

As regards GATS, Members may not see the added value in notifying measures. This may be due to the fact that there is limited discourse within the services committees. In theory, a well-functioning notification mechanism would lead to a question and answer process within the committee. In practice, however, this rarely happens with regard to trade in services, in part due to the self-judging nature of the notification requirement in Article III:3 of the GATS. Only measures that have been notified are discussed, not measures that have not. The discussion process may not yield enough useful information to delegates that would encourage Members to notify themselves.

4.2.2 Fear of Dispute Settlement

Members may not notify their trade measures due to the fear of dispute settlement. Often Members implement measures with the knowledge or suspicion that the measure in question may violate their substantive WTO obligations. As mentioned earlier, transparency is the oxygen for effective dispute settlement. If Members do not notify, other Members economically affected by such measure may not be able to bring a dispute against the

implementing Member early enough simply because they may be unaware of the existence of such a violating measure. By the time the Member is made aware of the measure (usually through the injured industry), the economic effect of the measure may have become irreversible. This is especially true for subsidies.

In the context of the GATS, Members might read the notification requirement as negatively framed, and therefore may not notify due to fear of dispute settlement. Article III:3 of the GATS contains the phrase “significantly affects” trade in services. Members may understand this to mean “significantly restricts”. Therefore, a notification on this front may be seen as ammunition for dispute settlement. This would lead to even greater reluctance to notify measures.

4.2.3 Reciprocal non-notification

Another reason why Members may refuse to notify their measures may be due to lack of notification from other Members in other areas or agreements. For instance, developing Members may refuse to notify their subsidies due to the lack of notification from developed Members under the GATS. A similar issue has been highlighted in South Africa’s proposal on transparency and notification obligations, submitted in response to the proposal put forth by the United States.¹⁵

4.2.4 Mistrust between trading partners & disregard for information exchange

A final reason why Members may not notify their measures is due to mistrust between trading partners, and their reluctance to acknowledge information flow and transparency as a public good. Members may view some notification requirements as unimportant or unnecessary, and may not notify

¹⁵ Cuba, India, Nigeria, South Africa, Tunisia, Uganda, and Zimbabwe, Communication, *An Inclusive Approach to Transparency and Notification Requirements in the WTO*, 27 June 2019, JOB/GC/218, JOB/CTG/15

as a result. Since there are no real consequences for non-notification, Members may freely disregard their obligations if they so wish.

The next section lists the various proposals submitted by WTO Members as regards reforming transparency and notification at the WTO, some of which have already been referred to.

5. CURRENT PROPOSALS FOR REFORM

| Overview | |
|---|--|
| <ul style="list-style-type: none">★ Over the years, Members have submitted various proposals to strengthen transparency obligations in the WTO. | <ul style="list-style-type: none">★ Provision of technical assistance especially for developing members |
| <ul style="list-style-type: none">★ The application of penalties in case Members don't comply with their notification obligations | <ul style="list-style-type: none">★ Consultations for information exchange★ Promoting inter-organizational Cooperation. |
| <ul style="list-style-type: none">★ Providing incentives/ disincentives to Members for compliance/ non-compliance. | <ul style="list-style-type: none">★ Formulating new transparency Rules |

Over the years, Members have submitted various proposals to reform the WTO, including proposals to strengthen transparency obligations in the WTO. Often these proposals have focused on better implementation of notification obligations contained in various agreements discussed above.

Various proposals on how to reform the WTO transparency mechanism are already circulated among government, academia or within the WTO. A significant part of the solutions proposed could be classified into these main groups: (i) penalizing non - notifications (ii) incentivising notifications (iii) enhancing assistance with notifications; (iv) consultation process; (v) promoting inter-organizational cooperation; and (vi) framing new rules on transparency. These proposals have been classified and briefly described below. For a comprehensive catalogue of these proposals, please see Annex I.

5.1 Penalizing non-notification

Certain Members have proposed the application of penalties in case Members don't comply with their notification obligations. The nature of penalties, or "actions", as they refer to them, vary based on the egregiousness of the non-compliance. The proposal by the United States, sponsored by other Members including Argentina, Japan and the EU,¹⁶ aims to implement such a system of penalties.

The proposal states that Members be penalised after one year from non-compliance with the notification deadline (but before two full years) with the following actions:

- (i) representatives of the non-complying Member may not be nominated to preside over WTO bodies;
- (ii) questions posed by the non-complying Member to another Member during a Trade Policy Review need not be answered;
- (iii) the non-complying Member will be assessed a supplement of [x][5] percent on its normal assessed contribution to the WTO budget, to be effective in the following biennial budget cycle;
- (iv) the Secretariat will report annually to the Council for Trade in Goods on the status of the Member's notifications; and
- (v) the Member will be subject to specific reporting at the General Council meetings.

After two years of non-compliance with the notification obligation, the penalties would reach as far as being granted the status of an Inactive Member, with the Member being identified as such when it takes the floor at the General Council. In addition, representatives of the Member are to be called upon in WTO formal meetings after all other Members have taken the floor, and before any observers. This punitive approach to notification

¹⁶ Communication from Argentina, Costa Rica, the European Union, Japan, and the United States, 'Procedures to enhance Transparency and strengthen Notification Requirements under WTO Agreement', 1 November 2018, JOB/GC/204 JOB/CTG/14.

obligations has been opposed by several developing Members. Their counter proposal is discussed below.

5.2 Incentivising notifications

In the context of subsidies, given the long-term poor compliance rate and even a deterioration in recent years, the European Union proposed in two of its reports¹⁷ that the notification (or lack thereof) would entail consequences for the treatment of subsidies schemes under the SCM. Those notified subsidies would benefit from a rebuttable presumption of non-actionability or an increase in the standards for action under the provisions of Part II or III of the SCM, such as de minimis subsidy or serious prejudice thresholds. On the other hand, failure to notify subsidies would also lead to a rebuttable presumption of actionability under relevant provisions.

In particular, with regard to fisheries subsidies, the United States and Australia have made a proposal,¹⁸ suggesting that the balance between abandoning subsidies which contribute to overfishing and supporting especially low scale fishermen should be struck with the help of individual “subsidy caps”, above which fishery subsidies should not be permitted. The proposal also notes that for such a system to work, transparent notification of all the subsidies in place is key. In order to incentivise Members to keep their notifications up to date, the proponents of this approach propose that only Members that comply with their notification obligations would be eligible to continue benefiting from their subsidy cap or their earlier granted exempt status.

¹⁷ Submission of the European Union, ‘Rules Negotiations – Transparency, Communication from the European Union’, 16 July 2015, TN/RL/W/260; Submission of the European Union, ‘Improving Disciplines on Subsidies Notification, Communication from the European Union’, 29 May 2017, TN/RL/GEN/188.

¹⁸ Submission of Australia and the United States, ‘A CAP based approach to addressing certain fishery subsidies’, 22 March 2019, TN/RL/GEN/197.

5.3 Technical assistance

Proposals, particularly those from developing Members, suggest the provision of technical assistance. Members identify the cause of non-notification to be the lack of technical capacity to comply with the already burdensome transparency obligations contained in WTO agreements. In light of this, certain Members have opposed a punitive approach to achieving greater transparency in the WTO.

Indeed the proposal by the United States on penalty-based compliance with notifications also recognises the importance of technical assistance to developing Members. In addition to an enhanced penalizing mechanism, the proposal also strongly focuses on technical assistance and the possibility for developing countries to request such assistance. In case of such request for assistance, the non-complying Member may be exempted from the punitive measures discussed above.

South Africa, together with many developing countries, like India, Mauritius, Nigeria, calls for an "inclusive approach" to transparency as developing and least developed countries are constrained in their capacity to fulfil notification obligations.¹⁹ South Africa proposes a more cooperative approach to fulfill the obligations rather than through a punitive approach. This proposal further suggests simplified notification formats for developing countries, such as prolonged timeframes.

Australia, Canada, Mexico, New Zealand and Switzerland emphasized the importance of the transparency for the service market access.²⁰ Considering

¹⁹ Communications from Cuba, India, Nigeria, South Africa, Tunisia, Uganda, and Zimbabwe, 'An Inclusive Approach to Transparency and Notification Requirements in the WTO', 27 June 2019, JOB/GC/218, JOB/CTG/15 JOB/SERV/292, JOB/IP/33 JOB/DEV/58, JOB/AG/158.

²⁰ Submission by Australia, Canada, Mexico, New Zealand and Switzerland, "Council for Trade in Services - Special session - Communication from Australia, Canada, Mexico, New Zealand and Switzerland - Exploratory discussions on Mark access in services", 27 September 2019, JOB/SERV/293.

the trend of the trade in the future, the service will dominate the future trade and there is an urgent need to improve the transparency on GATS.

In a recent meeting of the TRIPS Council, the African Group, Cuba, India and Oman once again noted that discussions on transparency obligations should take into account the fact that “developing countries often struggle to comply with notification obligations due to capacity and resource constraints”, while developed countries do not comply with the obligations fully either, or if they do, they do so selectively.²¹ These Members also noted that “capacity of developing members to comply with this obligation is inextricably linked with their level of economic development and access to resources, and urged developed members to not underestimate their capacity and resource constraints”.²²

5.4 Consultations for Information Exchange

In the context of fisheries subsidies negotiations, some Members have suggested the use of a consultations process when a Member believes that a prohibited subsidy has been granted. The proposal suggests that such Member may request in writing consultations with the other Member, through the Committee XX, in order to clarify the facts of the matter. In its request for consultations the Member shall provide sufficient factual information as to allow other Members to understand the matter at issue. The consultation process is meant to be utilized to review possible results of the alleged subsidies as well as the situation believed to have triggered the prohibition as a means to find a common understanding. This consultation is envisaged to be without prejudice to the consultations held under the dispute settlement process.²³ Consultations may be held via video-conferencing.

²¹ Members debate way forward on non-violation complaints at TRIPS Council, available at https://www.wto.org/english/news_e/news19_e/trip_18oct19_e.htm.

²² Members debate way forward on non-violation complaints at TRIPS Council, available at https://www.wto.org/english/news_e/news19_e/trip_18oct19_e.htm.

²³ Unofficial Room Document, Negotiating Group on Rules – Fisheries Subsidies, Proposed Draft Text on a Possible Consultation Mechanism, RD/TN/RL/100, 12 July 2019.

5.5 Promoting Inter-organizational Cooperation

In their Unofficial Room Document on Fisheries Subsidies (Fuel Subsidies to the Fisheries Sector), the Negotiating Group on Rules has pointed out the importance of promoting inter-organizational cooperation in data sharing and information exchange. In Section 2.1 of the document, it introduces the data sources for preparation of the paper based on a close cooperation among the WTO, OECD, APEC and others (including other NGOs and academia). Though the definition of “subsidies” or other terms may vary among different organizations, the inter-governmental data sharing makes it feasible to collecting as much reliable and relevant data as possible before establishing relevant data sets for further research and analysis. The coordination among different databases in respective organizations greatly expands the scope of the data available and complements the limitations on data collection based on different rules. Furthermore, the academic research and theoretical approach provides inputs from a more forward-looking perspective to future reforms. In the Secretariat paper, one scholar has put forward a concept to group countries into 3 categories:²⁴ Group 1: data-rich countries; Group 2: data-sparse countries; and Group 3: countries/territories with few information available. The interchange opinion between theory and practice would generate dynamic discussions.

5.6 Propose New Transparency Rules

Initiated by H.E. Mr. Juan Carlos González from Colombia, the Structured Discussions on Investment Facilitation for Development are making steady progress since April 2017. The discussion aims to add new concrete rules on the transparency and predictability of the investment measures. Under this general framework, Members take the following steps one by one, and tried to come up with a roadmap to a potential new agreement on investment

²⁴ Ussif Rashid Sumaila, et al. "Fuel subsidies to global fisheries: Magnitude and impacts on resource sustainability." Fisheries Centre Research Reports 14.6, 2006, p. 38.

facilitation. First, identify existing issues by a “Checklist of Issues” raised by Members; second, organize the examples of the Member States as best practice submitted in a coherent and user-friendly manner; third, create Mapping Table include elements aimed at improving the transparency and predictability of investment measures mainly from the following four perspectives: publication and availability of measures and information; notification to the WTO; enquiry points; and exceptions.

Till now, the main issues in the investment facilitation have been identified and summarized in a “Checklist of Issues” agreed by the Member States, and over 20 countries till now have submitted their examples to showcase best practices in reality. The Chair of the Negotiating Group on Rules proposed special transparency rules for the LDCs and proposed the draft text as below: “5.19 [Notification requirements shall not be burdensome on developing countries with capacity constraints, especially LDCs.]”; and “5.20 [The notification requirements referred to under Article 6 shall not apply to LDC Members]”. The EU, in its proposal, particularly emphasized the requirement to explain the objective and rationale of transparency measures, considering specific relevance of transparency for SMEs, the need for immediate publication of new or amended measures of general application. Also, the EU suggests solidifying the specific transparency requirements for Members to provide information in one of the official WTO languages and make the online publication the main channel.

6. TRANSPARENCY IN OTHER INSTITUTIONS AND AGREEMENTS

Overview

- ★ Transparency is a crucial issue in many other international institutions and agreements.
- ★ The IMF acts proactively in the data collection, particularly by involving private parties and empowering the capacity of its member countries.
- ★ The OECD established dynamic and wide-reaching networks with national agencies and other international organisations.
- ★ The World Bank relied heavily on the statistical systems of member countries, thus invested large amount of resources in capacity building programs.
- ★ The UNCTAD collects data through various means under the auspice of its Statistics Quality Framework.
- ★ Global Trade Alert makes full use of the modern technologies, especially through its self-developed web crawler for data collection purpose.
- ★ The Universal Periodic Review process under the UNHRC provides formal channel for NGOs' participation in the process.
- ★ The UNFCCC designed a multi-layer and wide-membership participation in its environmental reporting and verification process.

The first step towards greater transparency is greater access to relevant data and to make it available to relevant parties. It may be fruitful to examine the data collection and information gathering practices employed by other organisations in order to assess what lessons the WTO may draw from them. The following seven organizations/agreements/mechanisms have been examined catergorised to address the two main reasons for non-notification: “capacity constraints” and “unwillingness”.

| Issues | Organizations Mechanisms | Lessons for the WTO |
|---------------------------------|-----------------------------|---|
| Capacity Constraints | IMF | Involving private parties and empowering the capacity of government authorities |
| | OECD | Establishing data networks with national agencies and in particular international organisations. |
| | WB | Helping countries building up their own statistical systems by a variety of capacity building programs |
| | GTA | Self-developed web crawler to collect information |
| | UNCTAD | Providing a streamlined process through the Guideline to assist Member States. |
| Unwillingness | UNHCR | Providing formal channel for NGOs' participation in the process. |
| | UNFCCC | A multi-layer and wide-membership participation in its environmental reporting and verification process |

6.1 How other Organisations deal with Capacity Constraints

Lack of capacity to notify or the relatively low priority of notification obligations on the missions' to-do-list is one of the main issues raised by developing countries and LDCs.

In International Monetary Fund (IMF), though in the publication of country documents is "voluntary but presumed" and a member's consent to publication is obtained on a "non - objection" basis, this system has proved to

be mostly effective, as the data provided by the IMF shows²⁵ that in 2017, 99% of member countries published at least a press release or statement summarizing the IMF Executive Board's assessment, and 95% of members published the IMF country report. Further, 100% of member countries that used an IMF program published the reports, and 98% published their letters of intent, memoranda on economic and financial policies, and 100% published their technical memoranda of understanding.

It should be noted, that in the context of the IMF's collection of information and its further use, the responsible staff cooperates much more actively with the members' authorities. It collects information by itself, rather than imposing burdensome reporting obligations on the Member States. It also seems to actively support its members and guide it through the procedure of information collection and further use, including more effective technical assistance. While collecting information the IMF staff not only refers to governmental authorities, but also the private sector, unions and industries. This is particularly useful in areas with a high threshold of experience and expertise of the staff, which developing countries or LDCs usually don't have. The involvement of private parties, to some extent, lifts burden of notification obligations from the shoulders of the member states and stimulates the communication between the organization and Member States.

Organisation for Economic Co-operation and Development (OECD) also serves a great example in data collection and analysis. The Organisation obtains a large amount of statistical information from national agencies and other international organisations that are fed into the extensive range of policy recommendations and analytical reports produced each year.²⁶ In fact,

²⁵ International Monetary Fund, Factsheet Transparency at the IMF, <https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/35/Transparency-at-the-IMF>

²⁶ Organisation for Economic Co-operation and Development, Meeting of the High Level Group on Statistics, Data and Metadata Collection: Future Strategy for the OECD, 27 May 2002, p. 2.

a large portion of the on-going data needs of the OECD is obtained via hundreds of file transfers each year and from extractions from source agency websites and publications.²⁷ A more active role of the OECD in data collection saves resources and avoids lengthy inter-ministerial coordination among Member states, which proves to be much more effective.

In the case of the World Bank (WB), another data hub for research and analysis, it relied heavily on the statistical systems of member countries, and the quality of its data depends hugely on how well these national systems perform.²⁸ Thus, the WB works extremely hard to help countries improve the capacity, efficiency and effectiveness of national statistical systems by providing targeted funding for its capacity building. In particular, developing countries face a number of problems in providing statistics that both reliable and relevant. The WB is committed to helping developing countries break out of the embarrassing dilemma, since under-investment in national statistical systems constrains collection activities and results in data of poor quality, which policymakers are unwilling to rely on. The WB's work includes investments in statistical activities, creating and implementing standards and frameworks for data collection, analysis and dissemination, strengthening the international statistical system, and compiling global data sets. Furthermore, a priority of the WB's efforts to improve the statistical infrastructure of developing countries is the preparation of targeted national strategies for the development of statistics as recommended in the *Marrakech Action Plan for Statistics*. These country-driven plans look at the needs of the whole statistical system and provide the basis for coordinated and prioritized donor assistance. Many other capacity building programs in the WB include *Improving Statistical Capacity*, *Trust Fund for Statistical Capacity Building* and *International Comparison Program*.

²⁷ Organisation for Economic Co-operation and Development, Meeting of the High Level Group on Statistics, Data and Metadata Collection: Future Strategy for the OECD, 27 May 2002, p. 4.

²⁸ The World Bank Data, <https://data.worldbank.org/about>.

United Nations Conference on Trade and Development (UNCTAD), as the legacy of the G77 Group and part of the UN Secretariat, collects data through various means including Delegates Portal, civil society, journalists and technical cooperation under the auspice of the UNCTAD Statistics Quality Assurance Framework (SQAF). The framework addresses three areas of quality: institutional; output; and process, accompanied by definitions, guidelines and a quality assessment checklist. For example, its *Guidelines to Collect Data on NTMs*²⁹ in 2016 provides a sample practice of the data collection process for the NTMs. This *Guideline* tries to streamline and ease the process for every country to grasp the gist of the NTMs, explains the rationale behind the collection process, and separates the complexity of the measures *per se* with the simple actions taken to collect relevant data.

Apart from the international organizations, the efficiency and active engagement of private parties shall never be underestimated. Global Trade Alert (GTA) is an online platform that tracks governmental activities (regulations, laws, policies etc.) which have a huge impact on international trade between nations. The comprehensive database of the GTA provides information about the treatment of foreign commercial interests vis-à-vis the treatment of domestic commercial interests. GTA uses a self-developed web crawler that searches through hundreds of thousands of press clippings to identify certain key words that might highlight some form of commercial change. The role technology plays in GTA is crucial. It provides the basis for the comprehensiveness and accuracy of the source data without huge investment of human and financial investment.

6.2 How other Organizations deal with Unwillingness

²⁹ UNCTAD, *Guidelines to Collect Data on NTMs*, <https://unctad.org/en/Pages/DITC/Trade-Analysis/Non-Tariff-Measures/NTMs-Guidelines-to-Collect-Data.aspx>.

The other main reason why Members fail to notify, as we identified above, is the opaque behaviour of Member states or their “unwillingness” to notify. This concerns especially, but not exclusively, developed Member states without capacity constraints.

With regard to the problem of unwillingness, we look into the Universal Periodic Review (UPR) process under the auspices of the UN Human Rights Council (UNHRC)³⁰. The UPR is a State-driven process, involving a review of the human rights records of all UN Member States. It serves a similar role as what the TPRM does in the WTO, providing the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil human rights obligations. However, compared to the TPRM, one of UPR’s unique features is the experts’ and NGOs’ formal participation in the process. The information provided by national human rights institutions and non-governmental organizations is contained in the “other stakeholders” report, which is a crucial document during the review. A 9-page *Technical Guidelines*³¹ for the submission of stakeholders were provided. This, to some extent, solves the problem of countries “reluctance” or “unwillingness” to share the sensitive information, and complements the UPR’s information provided by the State under review in the form of “national report”. Information the NGOs provide can be referred to by any of the States taking part in the interactive discussion during the review at the Working Group meeting. NGOs can even attend the UPR Working Group sessions and can make statements at the regular session of the HRC when the outcome of the State reviews are considered.

Another good example of data collection and review is the practice of United Nations Framework Convention on Climate Change (UNFCCC). Obviously,

³⁰ Resolution adopted by the General Assembly on 15 March 2006 [without reference to a Main Committee (A/60/L.48)] 60/251. Human Rights Council.

³¹ Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism [as of July 2008], <https://www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf>.

to achieve the objective of the Convention, Parties need reliable, transparent and comprehensive information on greenhouse gas (GHG) emissions, climate actions and support. Under the Convention, all Parties are obliged to communicate to the Conference of the Parties (COP) information relevant to the implementation of the Convention (Article 12).

The arrangements for national reporting of the Convention and its Kyoto Protocol have evolved over the past two decades into a more comprehensive measurement, namely reporting and verification (MRV) framework³². In the latest *Paris Agreement*, the review process is composed of reporting, technical expert review and multilateral facilitative consideration, which is supported by annual meetings of lead reviewers, which provide guidance on to ensure the consistency of reviews across all Parties and provided suggestions on how to improve the quality and efficiency of the reviews. This multi-layer and wide-membership participation make it less likely for countries to “hide” any inconsistent measures within the system.

³² UNFCCC, December 2014, *Handbook on Measurement, Reporting and Verification for Developing Country Parties*.

7. SOLUTIONS TO ACHIEVE TRANSPARENCY

Overview

- ★ Transparency at the WTO may be improved in ways, which may be applied individually or cumulatively.
- ★ Strengthening the functioning of the TPRM through WTO Secretariat, Members, procedure and other aspects,
- ★ Reducing the number of notification requirements and prioritization.
- ★ Implementation of a new working group or committee dealing exclusively with the issue of notifications in order to provide tailored technical assistance.
- ★ Allowing Private sector participation in order to enlarge the pool of available information to the Secretariat, Committees, and also to other Members.
- ★ Amending existing transparency obligations to reduce complexity.
- ★ Administrative/punitive measures against non-notifying Members.
- ★ Naming and shaming in committees; raising of specific trade concerns and counter-notifications.
- ★ Introduction of sector-specific thematic committee sessions for services.
- ★ Empowering the Secretariat to collect information on its own.
- ★ Providing positive incentives for compliance with notification obligations and disincentives for non-compliance.

As stated before, this report aims to make a contribution to enhancing transparency and information flow at the WTO especially with regard to notification obligations of WTO Members.

Having identified the main causes for non-compliance with notification obligations, the report identifies solutions to improve compliance by specifically addressing the TPRM mechanism as well as the two main causes

of non-notification: inability and unwillingness to notify. The report identifies a non-exhaustive menu of solutions that may help improve transparency at the WTO. These approaches, although different from one another, are not mutually exclusive, and may be applied cumulatively in different permutations.

7.1 Improving TPRM

To begin with, the current TPRM leaves room for improvement to help achieve better transparency in the WTO. A brief summary table with the identified problems and possible solutions can be found below.

| | Problems | Solutions |
|------------------------|-------------------------------|--|
| WTO Secretariat | Capacity constraints | Allocate more resources (staff and finance) to the TPRD and send targeted missions before/during/after the review |
| | Content-impartial Report | Emphasize the impartial position of the Secretariat and no legal judgments shall be made regarding Members' trade policies |
| | Lack of Committee Cooperation | Make cross-committee cooperation a common practice during the preparation for Secretariat report |
| Members | Lack of Participation | Raise awareness of the importance for Members' active participation in the review |
| Procedure | Efficiency of the Q&A Session | Designed formal Q&A procedure to allow smooth and full participation of the Members. |
| | Lack of Follow-up Actions | Hold relevant workshops and showcase best practices during the post-review period and collect feedbacks from Members |
| Others | Lack of Media Attention | Design a promotion strategy for better media exposure, e.g. the |

| | | |
|--|--|---|
| | | lengthy report shall be broken down into bullet points for publication. |
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7.1.1 Capacity

First, the capacity challenges both at home and at the WTO is the most practical challenge facing the mechanism right now. With growing WTO membership and the complexity of current trade issues, there is constant pressure to increase the frequency and depth of the reviews. Improved staff expertise, better communication channels with the capitals and reliance on joint reviews have aided the optimization of the whole process. Meanwhile, more staff and finances were devoted to the trade policy review division (TPRD), though still not to the extent needed. Compared with other WTO divisions, resource allocation to the TPRM does not fare too poorly. It is the second largest division barring general secretarial work. Partly due to the capacity constraints, the TPRM has never been able to match the number necessary to maintain the cycle of reviews. The discrepancy between desired and actual reviews in the early years is justified by the fact that the mechanism was new and tentative. However, two decades since it first began operating, the TPRM continues to struggle to conduct the necessary number of reviews.

7.1.2 Content-impartial reports

The second challenge is to provide content-impartial Secretariat reports. Trade delegates, WTO officials, and business groups all note the importance of the material contained in TPR reports. As mentioned above, the Secretariat has the task of preparing reports that cover the macroeconomic environment, the domestic institutional structures for trade policymaking, and full examination of trade policies by measures and by sectors. However, the impartial position of Secretariat in preparing the reports becomes crucial. Any legal judgments shall not be made about Members' trade policies. The TPRM provides the platform for information sharing and shall not be used as a tool against any Members. Thus, the intricate balance of the reports to be content-

impartial while remaining relevant by containing information and analysis on issues of greatest concern to member states is a big challenge for the Division.

In fact, the TPRM has the potential to increase compliance with trade rules at home and abroad before any cases are brought to the DSB. However, according to the empirical analysis conducted by Ghosh³³, Members do not usually use the TPR as an opportunity to raise questions about the disputed issue. Thus, to shape the transparency mechanism as a pre-recalibration tool for Members to adjust their trade policy to avoid disputes would be a great incentive for Members to be more involved.

7.1.3 Lack of participation

Another challenge facing the TPRM is the lack of participation by Members. Participation in review meetings takes many forms. In theory, Members are allowed to pose questions in advance of the meetings and raise issues of concern during the meetings in order to solve the potential disputes. However, the participation rate in review meetings is rather low and a majority of WTO Members has not participated in even half of the meetings.

7.1.4 Improving the Q&A session

Additionally, the efficiency of the TPRM Q&A session may be improved. The design of the Q&A session aims to involve all Members to raise questions for countries under review and provide the platform for sharing the best practices among Members. However, it does not function as well as expected. For example, it is very common for certain Members to receive over a thousand questions the day before the session, which makes it impossible to address them all with special focus.

7.1.5 Lack of follow-up

³³ Arunabha Ghosh (2010), Developing countries in the WTO trade policy review mechanism, *World Trade Review*, 9(3), pp. 419-455.

Another concern is the lack of follow-up actions after the TPRM has been exercised. Under most circumstances after the publication of TPR reports, no effective actions are taken to tackle the problems identified in the reports. The TPRD or other Members would need to actively follow-up in the post-review period. Additionally, it may be useful to hold relevant workshops, share best practices among Members, collect feedback and follow-up with the Members on steps taken.

7.1.6 Lack of committee coordination

Furthermore, there appears to be a lack of cooperation among various WTO Committees during the TPR process. The TPR reports cover a broad range of topics regarding the countries' economic situations and trade policies, and the TPRD officials are not always in the best place to address the issues, especially in those highly technical areas. Thus, it would be extremely useful to bring the experts from different WTO Committees together during the drafting process, which to some extent also brings greater attention to the TPRM from Members.

7.1.7 Lack of media attention

Finally, the TPRM process does not receive enough media attention. As one of the three pillars in the WTO, the TPRM is always considered as a "hidden jewel" or "sleeping beauty" of the system. The media exposure has been relatively low compared to other functions of the WTO, resulting in the lack of understanding of the mechanism and low priority in Members' agendas. In order to tackle this, a targeted promotion strategy for the TPRM may be designed, and more importantly, lengthy reports may be broken down into more user-friendly content for media exposure.

7.2 Tackling Capacity Constraints

7.2.1 Number of Notification Requirements and Prioritisation

Reducing the number of notification obligations may help Members achieve notification requirements. This may be done on the basis of a priority list,

where all notification requirements are categorised between high and low priority notifications, depending on how Members wish to make that classification.

Feasibility

In a membership as diverse as the WTO's, where interests of Members do not always align, it would be nearly impossible for Members to find consensus on which notifications are to be categorised as low priority.

7.2.2 Technical Assistance

The framework of the WTO already provides for extensive technical assistance to Members in certain areas, e.g. within the Committee on Agriculture. However, tailored technical assistance based on the individual needs of each Member may be more effective. The secretariat may take note of which agreements or obligations specific Members struggle with and direct their assistance to those areas.

Another component of this could be the creation of a new working group or a new committee on notifications, the sole purpose of which would be to monitor Members' notification performance, analyse why Members fall behind and provide tailored technical assistance to those Members. This centralised committee would liaise with all other Committees established under various WTO Agreements to gather data on notifications.

Feasibility

The solution of targeted technical assistance is feasible, especially with view of the extensive technical assistance mechanisms already in place in the WTO. However, some Members may not appreciate targeted assistance in the absence of specific requests from Members themselves. In addition, the solution of establishing an independent notification working group or

7.3 Tackling Members' Unwillingness to Notify

7.3.1 Private Sector Participation

With a view to enlarging the available sources of information, it may serve well to allow private sector entities, especially industry associations and chambers of commerce to submit information to the WTO. The role of the private sector would remain limited – to provide information to the Secretariat. It would then be up to the Secretariat to process this information. Such a system could be introduced on an experimental basis, in order to amend or abandoned it after an initial testing period.

A special focus should be put on the selection of actors which would be eligible to participate in this process. Parties should be registered beforehand, and only those private parties should be allowed to submit information, whose range of activities closely relates to trade, like industry unions, chambers of commerce, or NGOs having a strong focus on trade related issues. The latter point is especially crucial in order to avoid including NGOs that want to obliterate the system or raise general policy dissatisfactions, which is a point of concerns for some governments.

One of the ways to achieve this could be through a link on the WTO website where registered private sector entities could provide information. This information could be received directly by the Secretariat as well as Members. A mechanism similar to e-ping, utilised in the context of TBT and SPS Agreements, could be used to achieve this.

In the alternative, private sector entities could submit information directly to the respective Committees in order to channel the information flow directly to the respective issue areas and Members involved. This could be also done through various links on the WTO website. Committee Members could then

directly seek information from the respective Member. Such an approach would ensure that the WTO remains a state-to-state organization, while enlarging the information resources available to Committees. Such direct communication of information to the Committees also have the benefit of not unduly burdening the Secretariat.

Another alternative to enlarge the information database through private sector participation could be the creation of a platform outside the framework of the WTO, where the private sector could submit such information, which would then be assessed and analysed by this external receiving entity. This information could then be submitted to the Secretariat for further dissemination within the WTO. Such an external platform would preserve the state-to-state nature of the WTO. It would also prevent burdening the Secretariat as they would receive processed and catalogued information from the receiving entity. Such a platform may even be embedded in the framework of TradeLab.

It is worth noting that allowing private parties to submit information would be especially fruitful as regards trade in services, where compliance with notification obligations is abysmally low. Most of the issues faced by Members with regard to GATS notifications stem from the universal nature of trade in services. This means that there are a great number of notification to be made. Unfortunately, due to the rudimentary nature of the agreement, Members' governments, ministries and delegates lack of knowledge and experience in the area, whereas private entities may be better informed.

Feasibility

A considerable number of WTO Members, if not all, would likely oppose the inclusion of the private sector, even within the context of information gathering, despite the existence of similar practices in the TPRM. Members would fear that this would erode the state-to-state nature of the

organization and it would be argued that the private sector could always submit information directly to its own government.

7.3.2 Amending Obligations

As described previously, the manner in which notification obligations are formulated may affect Member's ability or willingness to notify certain measures, as is the case with Article III:3 of the GATS and Article 25.1 of the SCM Agreement. Therefore, if the language of the obligation could be altered in order to clarify the obligation as well as make it less burdensome, it may improve Members' record on notifications. For instance, narrowing down the scope of Article III:3 of the GATS could considerably reduce Members' burden of notifying.

Feasibility

Given the impasse in negotiations among the WTO Members, and the inability of Members to conclude new agreement, it seems unlikely that Members would agree to amend existing agreements.

7.3.3 Administrative Measures

In keeping with the proposal submitted by the United States, administrative measures may be introduced if Members do not fulfil their notification obligations. While the proposal in its current form may not find support (as is evident from South Africa's counter-proposal), softening the administrative measures in the proposal may help gather greater support. For instance, the application of administrative measures may be limited to specific committees. In other words, a Member that does not comply with notification obligations in the SCM Agreement may not be allowed to chair the subsidies committee and may be deemed an inactive Member as regards that committee only. In this respect, it is important to note that such practices already exist within the

WTO framework. For instance, Members are prevented from chairing WTO committees if they have failed to meet their budgetary dues.

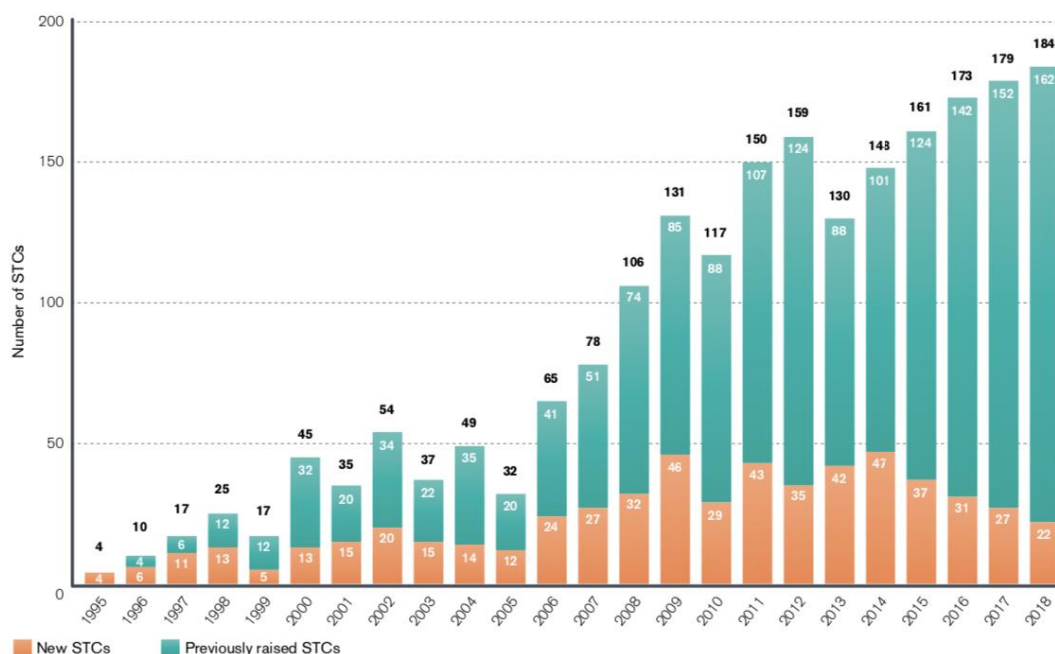
Feasibility

The proposal by the United States has been met with significant resistance among the Membership of the WTO. It is unlikely, therefore, that it would be adopted as such. A “softer” version may also find opposition, as Members opposed to such measures claim that any kind of punitive measures will only make notification obligations more burdensome. In order for such a solution to be adopted, the role of technical assistance will need to be emphasised, and the application of punitive measures would need to be presented as the absolute last resort.

7.3.4 Naming and Shaming in Committees

The practice of the TBT and SPS Committees may be generalised to other areas of the WTO. The graph below reveals that the number of specific trade concerns raised in the TBT Committee has consistently been increasing, particularly from 2006 onwards. This reveals deeper engagement and information gathering by WTO Members.

Figure 5.3: Number of TBT STCs raised from 1995 to 2018



Source: WTO & OECD, Facilitating Trade Through Regulatory Cooperation, p. 72

Therefore, in order to achieve greater transparency in other areas, Committees may be strengthened in order to allow for greater information exchange. Committees could meet more regularly and allow Members to raise specific trade concerns vis-à-vis notification practices of other Members. This solution effectively seeks to introduce counter-notifications in committees with a view to “name and shame” non-complying Members.

However, it must be kept in mind that TBT and SPS are highly technical areas, and that the nature of SPS and TBT measures is profoundly different from, for instance, subsidies. Nevertheless, it may serve well to think about how committee work may be arranged in a more beneficial and constructive way.

With regard to Article III:3 of the GATS, another functional change in the services committees might prove useful. Since services stretch across various sectors, sub-committees may be introduced for specific sectors, such as “legal services” or “telecommunications”. This would allow Members to tackle services-related trade concerns in a streamlined manner and this would also allow Members to microscopically track each other’s notifications.

In case this proves to be an administratively demanding exercise, the existing services committees alternatively may introduce thematic sector-based sessions to the same effect. That would mean that the committee would focus its discussion only on one specific sector (“legal services”, “telecommunications”) and their notifications in that session.

Feasibility

To enhance the information exchange in Committees is likely to be one of the easiest solutions to implement since it does not require any

restructuring of WTO bodies or establishment of new obligations, roles or processes. It is a solution based generalising existing successful practices in the WTO.

It is worth noting, however, that the success of this exercise would depend entirely on the Members' willingness to engage in deeper and more active discussions.

7.3.5 Empowering the Secretariat

In comparison to the WTO, the secretariat and staff of other international organizations like the IMF play a much more active role in gathering information. In the context of the WTO, it may serve well to empower the secretariat to independently seek information regarding measures implemented by each Member and to then verify the same with the Member concerned. Such information gathering by the WTO Secretariat is not meant to substitute Members' obligations to notify under the agreements. The Secretariat may simply gather and disseminate information that may be useful for the membership.

Empowering the Secretariat necessarily goes hand-in-hand with a few other solutions that have been proposed in this report. For instance, private sector participation would make information gathering easier and more effective. Formal cooperation with other organisations such as the OECD, World Bank, IMF may also facilitate greater information flow between all organisations and help achieve greater transparency. Finally, the Secretariat may use the Global Trade Alert software as inspiration to develop its own technological tools to extract information from publications available online.

Feasibility

Since the WTO is a Member-driven organization, it is unlikely that

Members would want to disperse greater power to the Secretariat. Members are likely to be opposed to giving the Secretariat an independent role of monitoring and examining their economies and measures. It is more likely that Members may agree to allow greater data sharing with other international organisations since the membership of these organisations tends to significantly overlap.

7.3.6 Incentives & Disincentives

As an alternative to applying punitive administrative measures, it may serve well to consider incentivising notifications and dis-incentivising non-notifications. As a first step, the importance of notifications and information exchange in each respective field would need to be clarified in detail and incorporated in every committee. There needs to be a common basic understanding of the necessity of transparency and notifications. One example of an incentive that may be introduced in the context of subsidies may be the introduction of a rebuttable presumption of lawfulness of certain subsidies. For instance, as the European Union has proposed³⁴, subsidies that are not notified may be presumed to cause serious prejudice to the interest of other Members. This presumption would be rebuttable. In contrast, subsidies that are notified may benefit from an increase in the standards of action, for example, in regard to *de minimis* or threshold for serious injury.

Feasibility

Implementing this solution would require a great amount of political will, as it entails the amendment of substantive obligations under WTO Agreements. Further, it is unlikely that Members would be willing to subject themselves to further burdensome obligations (disincentives). Positive incentives, however, such as increasing the “*de minimis*” requirement or lowering of thresholds, have a greater possibility of being

³⁴ Communication from the European Union, Improving Disciplines on Subsidies Notifications, 30 May 2017, TN/RL/GEN/188

adopted.

7.3.7 Promoting Inter-Organizational Cooperation

Currently, many international organisations have devoted a great amount of resources in developing new databases separately to collect data without sufficient cooperation. For example, the WTO, ITC, UNCTAD, OECD, APEC all have separate databases to collect the information regarding NTMs. However, these information are not frequently shared and sometimes contradict with each other, which is not only a waste of the resources, but isolate the actions the organizations may have taken collectively. The WTO may act more proactively in reaching out to relevant organizations in establishing closer cooperation in data sharing and verification. A good example would be the Integrated Trade Intelligence Portal for Services (I-TIP Services) jointly developed and supported by the WTO and World Bank. It aims to integrate the fragmented data with a single-entry point for information compiled by the WTO on trade policy measures.

Feasibility

The WTO has been working closely with other organizations in data sharing and information exchange. For example, the Integrated Trade Intelligence Portal for Services (I-TIP Services) is jointly developed by the WTO and the World Bank, providing a single-entry point for information compiled by the WTO on trade policy measures. Till now, it has contained information on over 25,000 measures, including both the tariff and non-tariff measures. During the ongoing discussion on fisheries subsidies, the WTO, OECD, APEC and other institutions with relevant information has been working collectively in sharing data regarding different standards adopted in various regions, which provides a comprehensive picture of the status quo and serves the basis for proposing new rules. Though it is not very plausible to see a full integration of the databases held by different institutions, which is not necessary either, it would be extremely helpful to

synchronize the data uploaded from different databases and keep them updated.

7.3.8 Encourage Informal Inter-Governmental Dialogues within the WTO

With the escalating trade tensions between certain countries, the consensus seems impossible to be reached in the WTO in current situation. Thus, it is crucial to encourage informal inter-governmental dialogues to seek solutions, not necessarily in formal WTO settings. The Structured Discussions on Investment Facilitation for Development is a good example for such dynamic ongoing dialogues proposed by H.E. Mr. Juan Carlos González in 2017. There are 33 Member states actively involved in this discussion. With the growing tension within the WTO, especially considering countries' different concerns, it would be more feasible for countries to enhance understanding and exchange ideas under informal settings under the auspices of the WTO. Though the bilateral or plurilateral negotiations outside the WTO has been going on anyway, the WTO shall be wary of the risks of being irrelevant in the near future.

Feasibility

The great success in the Structured Discussions on Investment Facilitation for Development proves it to be both plausible and efficient. The WTO still functions well as the main platform for plurilateral and multilateral negotiations. Without the formal setting and consensus rule Members would be more willing to exchange ideas especially among the big traders. The WTO shall encourage such dialogues under the WTO framework of the WTO to remain relevant.

8. CONCLUSION

Coinciding with the urgency of the WTO reform on transparency, this report intends to contribute to a better understanding of notification obligations under the WTO and why Members fail to comply with them.

Through a thorough examination of different causes of the non-compliance, assessment of the different proposals submitted by Members and comparisons with other international organizations, the report conveys a multi-faceted picture of the complex situation of notification obligations. The report concludes with a menu of options to address the issues identified and enhance transparency and notifications in the WTO.

Ultimately, however, it is the Members' willingness to negotiate and their commitment to the issue of transparency that will determine whether and which of proposed solutions will see the light of day.

ANNEX I: PROPOSALS FOR REFORM

| Date | Parties | Content |
|-------------------------------------|--|---|
| Penalizing Non-Notification | | |
| 1 November 2018 | Argentina, Costa Rica, the European Union, Japan and the United States | <ul style="list-style-type: none"> • Members being panelised after one year from non-compliance with the notification deadline (but before two full years). • After two years of non-compliance with the notification obligation, the penalties would reach as far as being granted the status of an Inactive Member, deprived of some membership rights. |
| Incentives and Disincentives | | |
| 16 July 2015 30 May 2017 | The European Union | <ul style="list-style-type: none"> • Notified subsidies would benefit from a rebuttable presumption of non-actionability or an increase in the standards for action under the provisions of Part II or III of the SCM (such as <i>de minimis</i> subsidy or serious prejudice thresholds) • Failure to notify would lead those subsidies to be presumed as automatically in breach of WTO disciplines, thus actionable under Part II or III. This presumption would also be rebuttable by the subsidising Member. |
| 22 March 2019 | The United States and Australia | <ul style="list-style-type: none"> • In the context of fisheries subsidies, only Members that comply with their notification obligations would be eligible to continue benefiting from their fisheries “subsidy cap” or their earlier granted exempt status. |
| Technical Assistance | | |

| | | |
|-----------------|---|--|
| 1 November 2018 | Argentina, Costa Rica, the European Union, Japan and the United States | <ul style="list-style-type: none"> • Members' lack of capacity shall request technical assistance. • In case of such request for assistance, the non-complying Member may be exempted from the punitive measures discussed above. |
| 27 June 2019 | 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 | <ul style="list-style-type: none"> • Notification workshops and Working Group on notifications, consulting with the ITTC, assessing role of trade related technical assistance; • The Committee on Agriculture is requested to review and update its Notification Requirements and Formats; • Instruct the Working Group to work with the Secretariat to update the Technical Cooperation Handbook on Notifications; • Instruct the Trade Policy Review Body to ensure that beginning in 2019 all trade policy reviews include a specific, standardized focus on the Member's compliance with its notification obligations under the agreements. |
| 27 June 2019 | Cuba, India, Nigeria, South Africa, Tunisia, Uganda, And Zimbabwe | <ul style="list-style-type: none"> • No additional transparency obligations beyond the existing one and no punitive approaches to enforce transparency obligations. • Simplified format for developing countries with additional information provided only when requested so. • Special concern with specific notifications: Agricultural Notifications, GATS Article III:3, GATS |

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| | | Mode 4, Article 66.2 TRIPS. |
| 27 June 2019 | South Africa, India, Mauritius, Nigeria | <ul style="list-style-type: none"> • Inclusive and cooperative approach to tackle capacity issue faced by developing and LDCs. |
| 27 September 2019 | Australia, Canada, Mexico, New Zealand and Switzerland | <ul style="list-style-type: none"> • Emphasize the importance of the transparency for the service market access and technical assistance for better understanding of the GATS. |
| Consultations for Information Exchange | | |
| 12 July 2019 | Unofficial Room Document, Negotiating Group on Rules | <ul style="list-style-type: none"> • In the context of fisheries subsidies negotiations, consultations process is necessary when a Member believes that a prohibited subsidy has been granted. • The written request for consultations with other Members shall be submitted to respective Committee to clarify the facts of the matter and provide sufficient factual information. • The consultation process is utilized to review possible results of the alleged subsidies as well as the situation belied to have triggered the prohibition. |
| Promoting Inter-Organizational Cooperation | | |
| 22 February 2019 | Unofficial Room Document, Negotiating Group on Rules | <ul style="list-style-type: none"> • The importance of promoting inter-organizational cooperation in data sharing and information exchange. • In the context of fisheries subsidies, a great progress has been made to collect data through the inter-organizational cooperation among the WTO, OECD, APEC, and other institutions, such as IISD. |
| Formulating New Transparency Rules | | |
| 14 November 2018 | Communication from the Chair, | Propose Special transparency rules for the LDCs due to |

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| | Negotiating Group on Rules | capacity restricts, including some waivers of transparency obligations for LDCs. |
| 27 February 2019 | The European Union | <ul style="list-style-type: none"> • Considering specific relevance of transparency for SMEs and the need for immediate publication of new or amended measures of general application; • Requires the member states to provide information in one of the official WTO languages and make the online publication the main channel. |
| 15 July 2019 | H.E. Mr. Juan Carlos González (Colombia) as Coordinator of the Structured Discussions on Investment Facilitation for Development | <p>The Structured Discussion tried to propose new rules in the area of investment facilitation based on the following steps:</p> <ul style="list-style-type: none"> • Identify existing issues by a “Checklist of Issues” raised by Members; • Organize the examples as best practice to be submitted in a coherent and user-friendly manner; • Create Mapping Table to include elements aimed at improving the transparency and predictability of investment measures |