Introduction

> If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects.
>
> Louis D. Brandeis (1891)

With these words, Associate Supreme Court Justice Louis Brandeis gave voice to the pioneers introducing transparency into the American legal system. His metaphor of sunlight and its 'disinfectant' benefits has been cited extensively in domestic law in favour of transparency policies and their potential advantages. Recently, Mavroidis and Wolfe have applied this image in the context of the World Trade Organization (WTO), noting that 'transparency contributes more to social order than does coercion' and that '[t]ransparency ought to improve the operation of the trading system by allowing verification by all Members that national law, policy, and implementation achieve the objective intended by the agreements'.[1]

Taking this now-famous image as its starting point, this book explores the provisions set out in two WTO agreements that establish an obligation of transparency, aiming to 'purify' or 'disinfect' domestic trade regulations. In other words, it examines the provisions that encourage WTO Members to share information in a way that results in better compliance with WTO obligations.

This book argues that, in the specific contexts of the WTO Agreements on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement, or SPS) and on Technical Barriers to Trade (the TBT Agreement, or TBT), transparency has a crucial role to play, acting both as a substitute for and a complement to dispute settlement. On the one hand, Members use it to ensure that trade policies are predictable, to improve the quality of domestic policies by means of co-operation and to address

[1] Petros C. Mavroidis and Robert Wolfe, 'From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO', RSCAS Research Paper No. PP 2015/01/Columbia Public Law Research Paper No. 14-461, 25 April 2015, 9. http://papers.ssrn.com/abstract=2569178.

trade frictions before they escalate to the level of formal dispute. As such, transparency is a substitute for dispute settlement because it defuses tensions and prevents formal disputes from arising. On the other hand, in those few cases in which frictions persist, the information gathered at the different levels of transparency can support Members raising a dispute. Transparency in relation to SPS and TBT measures is essential if all Members are to be able to settle such cases and to pursue dialogue alongside formal dispute proceedings. Transparency therefore complements dispute settlement by equalising Members' access to the WTO Dispute Settlement Body (DSB).

The underlying aim of this book is to show that the strength of the WTO legal system goes beyond its dispute settlement mechanisms. Indeed, while the DSB is a unique achievement in terms of enforcing obligations among sovereign States, the transparency obligations established under the SPS and TBT Agreements allow Members themselves to co-operate and monitor their own and others' implementation of the same. As such, the transparency framework established under the SPS and TBT Agreements is particularly relevant in ensuring coherence among domestic regulations without requiring the convergence of domestic policies.

I Why Have Transparency Obligations within the WTO System?

The multilateral trading system is characterised today by a fragmentation of production cycles across different countries and companies in what is commonly referred to as 'global value chains', multiplying the regulations applicable to the goods and services traded. Consider cigarettes. At the very outset, tobacco plants may be subject to measures restricting genetic engineering or the pesticides used in their production, such restrictions aiming to protect the environment and limit the effects on human health. The chemicals and additives used during processing of the tobacco leaves may be subject to specific limitations, aiming to mitigate the impact their use may have on human health and safety. The design of the cigarettes' packaging may also be subject to certain conditions requiring labels that inform consumers of the risks that cigarettes pose to their health. Finally, imported cigarettes may be subject to a tariff, aiming to control their flow into the country.

From a trade perspective, all these measures represent obvious added costs for the companies producing the cigarettes and seeking to sell them in different markets. The tariff imposed at the border when cigarettes are

imported is the most typical form of 'trade barrier' addressed by signatories to the General Agreement on Tariffs and Trade (GATT) since 1947 and its level is the subject of negotiations among the parties. The legality of such tariffs is therefore relatively simple to determine, because it depends on the concessions agreed to by the country in question. In the case of the cigarettes, the other three types of measure described, which aim to protect the environment, protect human health or mandate consumer information, concern conditions for the sale of cigarettes in a specific market and therefore represent measures 'beyond the border'. In the GATT of 1947, they were restricted only to the extent that they were discriminatory. In other words, Members could decide on whichever policies they thought relevant as long as they applied them equally to both domestic and foreign producers. However, as countries became increasingly conscious of the significant costs of trade that domestic regulations could represent, additional agreements were negotiated and concluded under the auspices of what became the WTO in 1995.[2]

The SPS Agreement and the TBT Agreement are two particularly relevant WTO instruments in relation to our cigarettes example. Broadly speaking, the SPS Agreement applies to domestic regulations aiming to protect human, animal and plant life and health, while the TBT Agreement applies to measures aiming to protect human, animal or plant life or health and the environment, or to prevent deceptive practices. Both Agreements underline WTO Members' freedom to adopt domestic measures to fulfil these objectives, while setting out some conditions that aim to preclude such measures being unnecessarily restrictive of international trade or discriminatory against foreign producers.

This 'negative integration' approach – whereby Members agree to fulfil certain obligations, but remain free to determine what specific policies to apply domestically – results in a highly heterogeneous regulatory environment, with as many regulations and policy issues as there are countries, all of which have the potential to affect trade.

To mitigate the unnecessary trade costs resulting from that heterogeneity, the drafters of the SPS and TBT Agreements introduced a transparency framework that fosters coherence between Members' policies by facilitating regulatory co-operation at the early stages of the domestic policy cycle. A system of information and dialogue centred on the WTO Secretariat

[2] GATT Contracting Parties became conscious of the 'non-tariff barrier' problem at the end of the 1960s, realising that, beyond those measures that were outright illegal, there were also a number of 'legal' non-tariff barriers that called into question the scope of the GATT. See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Salem, NH: Butterworth Legal, 1990), 231–2.

and available to all 164 WTO Members positions SPS and TBT transparency as a crucial factor both aligning domestic approaches when possible and ensuring the quality of domestic measures, as well as granting public access to information when different policies might be proposed.

In this sense, the 'transparency' on which this book focuses is about the sharing of domestic regulations and the rights that this entails for other Members, as expressed in the notions of 'regulatory transparency' or 'reasoned transparency'.

At the domestic level, *regulatory* transparency can be defined as 'the capacity of regulated entities to express views on, identify, and understand their obligations under the rule of law'.[3] The regulatory transparency mandated under the WTO system not only implies parity of benefits across regulated entities but also allows WTO Members to exercise their rights to identify, express views on and understand their obligations to other Members and interested parties.

Regulatory transparency therefore involves something more than a simple disclosure of information, aiming instead to engender a deeper understanding. Coglianese describes this as '*reasoned* transparency' – something more than what he calls simple 'fishbowl transparency' – and this deeper transparency 'demands that government officials offer explicit explanations for their actions'.[4] For Coglianese, '[s]ound explanations will be based on application of normative principles to the facts and evidence accumulated by decision makers – and will show why other alternative courses of action were rejected'.[5] Only with these 'sound explanations' will the observer achieve insights into the decision-makers' rationale.

II An Overview of Transparency within the WTO

To illustrate the variety of transparency tools available within the WTO, we can describe the different forms of transparency as a three-generation process through which transparency mechanisms adapt to the growing range of areas covered by WTO agreements, benefiting from the institutionalisation of the WTO, while also following trends in transparency

[3] Evdokia Moïsé, 'Transparency Mechanisms and Non-tariff Measures', OECD Trade Policy Papers No. 111, 1 April 2011, 26. www.oecd-ilibrary.org/content/workingpaper/5kgf0rzzwfq3-en.

[4] Cary Coglianese, 'The Transparency President? The Obama Administration and Open Government', *Governance* 22, no. 4 (2009): 529–44.

[5] Ibid.

policies at the national level.[6] It is important to note that this classification into three generations does not denote any hierarchy between the transparency measures; rather, the measures 'have proven complementary and overlapping'.[7]

A *Right-to-Know Transparency: The Availability of Information*

The first-generation transparency provisions are those that respond to a 'right to know', essentially requiring open access to government practice, so that governments can be accountable for their actions. In the GATT integration process, this corresponds to those transparency measures that emerged during the early stages of the GATT. With the GATT's focus then on reducing tariff barriers, the transparency mechanism most referred to at that time was publication of the ceilings that the Contracting Parties negotiated for their import tariffs, known as 'schedules of concessions'.

Article X GATT on the publication and administration of laws – today considered to be the general transparency provision – was also included in the GATT 1947, but it played a limited role in terms of transparency, equivalent only to the first 'right to know' laws in the United States.[8] Panels referred to it as a 'subsidiary' claim[9] and Contracting Parties preferred to base their claims on more 'substantive' provisions, such as Article XI on quantitative restrictions.[10]

[6] The three generations are mainly developed in Archon Fung, *Full Disclosure: The Perils and Promise of Transparency* (New York: Cambridge University Press, 2007). Wolfe has analysed WTO transparency provisions in light of these three generations: Robert Wolfe and Terry Collins-Williams, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows', *World Trade Review* 9, no. 4 (2010): 551–81; Robert Wolfe, 'Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life', Staff Working Paper No. ERSD-2013-03, 22 November 2013. http://papers.ssrn.com/sol3/Delivery.cfm?abstractid=2229741. See also Mavroidis and Wolfe, 'From Sunshine to a Common Agent'.

[7] Fung, *Full Disclosure*, 25.

[8] Article X is said to have been adopted on the basis of a proposal made by the United States in 1946, with very similar language as that in the original US draft, inspired by its recently adopted national legislation – in particular, the US Administrative Process Act (APA) of 1946, cf. §§553 et seq.: Sylvia Ostry, 'China and the WTO Transparency Issue', *UCLA Journal of International Law and Foreign Affairs* 3, no. 1 (1998): 1–22. On right-to-know laws, see Fung, *Full Disclosure*.

[9] For example, GATT Panel Report, *Japanese Measures on Imports of Leather*, BISD 31S/94, adopted 15 May 1984 (*Japan – Leather II (US)*), esp. §57.

[10] Padideh Ala'i, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance', *Contributions to Books*, 6 February 2010. http://works.bepress.com/padideh_alai/3.

This first-generation transparency within the WTO can also be described as 'decentralised' transparency, whereby governments are required to publish their measures with an effect on trade[11] and interested Members are expected to look for the information themselves, making access to information a costly and time-consuming process.

While first-generation transparency is essential to create a predictable trading environment, its effect on the quality of the regulation remains limited. Indeed, while some traders with in-house lawyers who closely follow the official gazettes in relevant countries may become acquainted with the published measures, in practice the majority of traders find out about changes to legislation only when researching the regulatory environment in any given country – or when their products are stopped at the border for non-compliance with the new requirements.

A more accessible source of information is therefore key if traders around the world are to be well aware of the regulations with which they must comply in each different export market. The WTO provides a privileged platform on which to centralise such information – particularly through second-generation 'targeted' transparency.

B Targeted Transparency: Access to Information

Second-generation, or 'targeted', transparency 'mandates access to precisely defined and structured factual information from private or public sources with the aim of furthering particular policy objectives'[12] and aims to provide 'facts that people want in time, places, and ways that enable them to act'.[13]

In the WTO, the second generation of transparency rose to prominence after the reforms of the Uruguay Round (1986–1994), which triggered a paradigm shift in transparency, benefiting from the establishment of the WTO. Notification obligations became more systematic and were followed up with reviews by special 'committees' within the WTO Secretariat.

[11] For example, Art. X GATT. The interpretation of this article has also evolved, however, from what was considered to be only a subsidiary claim under the GATT to become a 'principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality': Appellate Body Report, *US – Underwear*, §20. On this evolution, see Padideh Ala'i, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance', *Journal of International Economic Law* 11, no. 4 (2008): 779–802.

[12] Fung, *Full Disclosure*, 25.

[13] Ibid., xv.

The Trade Policy Review Mechanism (TPRM) was established, with the specific goal of contributing 'to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members'.[14] The creation of the TPRM was a fundamental step by means of which the WTO guaranteed, from a central position in its institutional framework, transparency of the multilateral trading system. More broadly, the TPRM was to ensure transparency in and an understanding of trade policies and practices among all Members, improving their likely adherence to their obligations under the WTO.[15] With this major innovation, the WTO Secretariat started to increasingly 'centralise' information, assuming some responsibility for gathering the information, providing a platform for Members to discuss the measures disclosed and even eventually offering recognition of the impact of those measures on the multilateral trading system.[16]

Many new agreements were also concluded under the WTO framework, most of them including general transparency provisions, with a wide range of specific transparency requirements. This led to the further centralisation of information with the WTO Secretariat that is in evidence today. This centralised transparency covers very different types of measure and may, for example, require Members to notify their measures to the WTO Secretariat,[17] to report on their measures and submit their trade policy landscape to review by a special body,[18] or to notify any other Members not yet notified of the measures.[19]

C Interactive Transparency: Information Enabling Dialogue

Third-generation, or 'collaborative', transparency – also known as 'interactive' transparency – is based on 'efficiency of procuring information'.[20] While they aimed at improving transparency by means of centralised information, some WTO agreements also introduced transparency provisions that enable dialogue between WTO Members. The SPS and TBT Agreements are among them, requiring Members to allow

[14] Marrakesh Agreement, Annex III, para. A.
[15] See Annex III, para. A(i), WTO.
[16] I owe this distinction between 'centralised' and 'decentralised' transparency to conversations with Petros C. Mavroidis.
[17] For example, Art. 63.2 TRIPS.
[18] For example, Annex III, para. C(v), GATT.
[19] For example, Art. III.5 GATS.
[20] Mavroidis and Wolfe, 'From Sunshine to a Common Agent', 3.

reasonable time for comments on notifications, to take these comments into consideration and to discuss these comments, for example.[21] To this end, the SPS and TBT Agreements require Members to establish enquiry points.[22] In addition, practice has evolved enabling such dialogue among Members within the SPS and TBT Committees. As such, Members now raise in those spaces specific trade concerns (STCs) about other Members' trade policies or practices. This is critical progress towards improving the accessibility of the information, facilitating and reducing the cost of accessing information when Members and other interested parties need to find answers.

More recently, practice has evolved to make use of the opportunities offered by new information technologies, empowering information users to improve the information source by contributing to public platforms and ensuring timely updates. This evolution started in the WTO in the early 2000s, when the WTO Secretariat encouraged Members to use online tools to publish and notify trade measures in various sectors. The aim is now less about 'producing information' and more about 'communicating information, listening to the views of stakeholders, and improving WTO decision-making procedures'.[23] While these new tools came into being after other transparency mechanisms and hence can be seen as part of the third generation of transparency, the way in which they are used in practice suggests that they enable centralised (second-generation) transparency more than they do interactive transparency.

III Transparency in the SPS and TBT Agreements: A Case Study of Right-to-Know, Targeted and Interactive Transparency in the WTO

The SPS and TBT Agreements are the most revealing illustration of the three-generation transparency system at work in the WTO's highly developed transparency framework, thanks to both the obligations set out in the Agreements themselves and substantive Committee practices aiming to improve transparency. Notifications under both SPS and TBT together represent around 90 per cent of all notifications submitted to

[21] See Annex B, para. 5(b)–(d), SPS; Art. 2.9.2 and 2.9.4 TBT.
[22] Article X.1 TBT; Annex B, para. 3, SPS.
[23] Wolfe, 'Letting the Sun Shine in at the WTO', 13.

the WTO for trade in goods.[24] Therefore not only is transparency highly developed under the SPS and TBT Agreements but also Members are actively fulfilling their transparency obligations under these two in comparison with other WTO agreements.

The activity of Members under the SPS and TBT Agreements offers important insights into the functions of transparency as a tool in ensuring that domestic regulatory frameworks comply with WTO obligations. Transparency in the SPS and TBT Agreements is arguably all the more unique in that it bridges the wide gap between supranational obligations at the WTO level and the everyday regulatory processes of Members' domestic authorities. Not only do the transparency provisions facilitate the essential sharing of information on Members' national policies, but also their role in compliance means that the provisions can preclude the need for dispute settlement.

The WTO's dispute settlement system is hailed as the 'jewel' in its crown – that is, as one of the WTO's major achievements. It is a compulsory third-party adjudication system that is unique in inter-state relations and essential for the enforcement of all WTO instruments.

According to Article 3.2 of the WTO's Dispute Settlement Understanding (DSU):

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

However, like any judicial system, not only is it costly to use, requiring that Members have access to information and resources if they are to argue a case before the DSB in Geneva, but also any such case may have political consequences. A more flexible and accessible mechanism that allows Members to address trade frictions without resorting to adjudication is therefore desirable and this is precisely how the WTO wields its transparency requirements. While it may not draw on the authority of a third-party adjudicator, the system of transparency mechanisms can fulfil the three functions of providing security and predictability in the multilateral trading system, preserving Members' rights and obligations, and clarifying existing provisions.

[24] These figures come from http://i-tip.wto.org/. The exact data from this website might be incomplete because it does not coincide exactly with that of the specific http://tbtims.wto.org and http://spsims.wto.org, but the shares of notifications do seem to be relatively accurate.

The first links between transparency and dispute settlement in the WTO were established in the TPRM during the Uruguay Round.[25] The texts defining the TPRM[26] – confirmed by case law[27] – underline that it should not serve the purposes of the WTO's dispute settlement procedures and yet several authors have pointed out its potential to enhance enforcement of WTO obligations, doing just that.

Mavroidis predicted that, although its effect was still limited at the time of its adoption, 'if the TPRM progresses to become a more integrated scheme, the boundary between transparency and legal assessment will become more indistinguishable and, ultimately, the latter will replace the former'.[28] Qureshi argued that transparency is a 'precondition' and a 'facet' of enforcement (which he defined as a technique for facilitating adherence), and that the 'TPRM constitutes a significant attempt at surmounting the problem of adherence to the WTO code'.[29]

The transparency mechanisms of the SPS and TBT Agreements go further in ensuring implementation than the already major benefits of the TPRM by encouraging Members to consult whenever they are concerned by a specific measure. In particular, in this book the empirical study of the uses made of transparency will demonstrate that it has become an important tool to ensure implementation of Members' obligations under the SPS and TBT Agreements. On the one hand, it is useful for regulating Members, who can gather feedback on their draft measures and ensure that they better align with their substantive obligations. On the other hand, it allows Members to monitor their trading partners' domestic approaches and alert those partners when the trade effect seems overly burdensome, contrary to all Members' obligations under the SPS and TBT Agreements.

Finally, when trade frictions persist and a third party needs to intervene, the transparency framework must indeed give way to the WTO's dispute

[25] The TPRM was provisionally effective as of 12 April 1989, when the Negotiating Group on the Functioning of the GATT System (responsible for negotiating the terms of a surveillance scheme for the GATT) reached an agreement. It became fully part of the WTO institution with the establishment of the Organization at the end of the Uruguay Round.

[26] The TPRM is not 'intended to serve as a basis for the enforcement of specific obligations under the Agreement or for dispute settlement procedures, or to impose new policy commitments on Members': Annex III, para. A:2, GATT.

[27] See *Canada – Aircraft*; *Chile – Price Band System*.

[28] Petros C. Mavroidis, 'Surveillance Schemes: The GATT's New Trade Policy Review Mechanism', *Michigan Journal of International Law* 13, no. 2 (1991): 374.

[29] Asif H. Qureshi, 'The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?', *Journal of World Trade* 24, no. 3 (1990): 142–60.