

## TRANSPARENCY IN THE WTO SPS AND TBT AGREEMENTS

Transparency of trade regulations among all WTO Members is essential for open, fair and predictable trade relations. A myriad of different regulations apply across WTO Members and have the potential to affect international trade. The Agreements on the Application of Sanitary and Phytosanitary Measures and on Technical Barriers to Trade offer the most comprehensive frameworks in the WTO within which to address the costs arising from regulatory diversity, by providing for regulatory transparency and co-operation. This book gives a detailed account of the legal principles of the two Agreements, an in-depth discussion of dialogue between WTO Members and an overview of the few cases that end up in formal dispute settlement. It shows that the strength of the WTO legal and institutional system goes well beyond its dispute settlement system, with transparency enabling implementation of WTO obligations as a result of better information sharing and co-operation among Members themselves, through non-judicial means.

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Marianna B. Karttunen

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Processes of economic regionalisation and globalisation have intensified over the last decades, accompanied by increases in the regulation of international trade and economics at the levels of international, regional and national laws. At the same time, significant challenges have arisen with respect to economic liberalization, rule-based systems of trade and investment, and their political and social impacts. The subject matter of this series is international economic law, in this contemporary context. Its core is the regulation of international trade, investment, finance and cognate areas such as intellectual property and competition policy. The series publishes books on related regulatory areas, in particular human rights, labour, environment and culture, as well as sustainable development. These areas are horizontally interconnected and vertically linked at the international, regional and national levels. The series also includes works on governance, dealing with the structure and operation of international organisations related to the field of international economic law, and the way they interact with other subjects of international and national law. The series aims to include excellent legal doctrinal treatises, as well as cutting-edge interdisciplinary works that engage law and the social sciences and humanities.

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To Nicolas and Léonard, in memory  
of the oceans we have crossed together  
and in anticipation of the many yet to come

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## FOREWORD

The relationship between transparency and adjudication has been the focus of analysis for economists, political scientists and lawyers alike. Marianna Karttunen has brought all this work under one roof and added her own perspective. This is nothing short of the most comprehensive and penetrating volume discussing transparency in the new-generation agreements dealing with domestic policies, 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). The author has provided a one-stop shop in which the rationale for transparency is adequately explained and its impact on litigation is clarified.

The SPS and TBT Agreements are used in fact as a test bed for the author to examine the validity of theories regarding the relationship between transparency and adjudication, and more precisely whether they are complements or substitutes, or both. Specific trade concerns (STCs), a hybrid between transparency and adjudication, provided her with the most appropriate tool to explore this relationship. An ever-increasing number of STCs has led to an ever-decreasing number of TBT/SPS disputes. The latter, nevertheless, could also be the result of increased predictability of case law as a result of jurisprudential evolution and/or the increasing number of free trade areas (FTAs) with provisions on this score, as well as many other factors.

One thing is clear though: STCs have contributed in reducing trade friction and there is wide acceptance of the usefulness of STCs – otherwise why contemplate emulating this mechanism in other areas/agreements dealing with non-tariff barriers?

What the author masterfully shows with her work is how STCs have become the antechamber for a better understanding of regulatory choices and how they have enhanced regulatory co-operation. Even within a context of negative (shallow) integration, like the WTO, with no institutional watchdog overlooking consistency of national policies, never mind

positive integration, STC s have managed to provide a pathway that allows affected third parties to become familiar with national preferences.

A lot still remains to be done and the author points, in the last chapter of Part III of this volume, to the work that lies ahead, suggesting ways of addressing current observed inadequacies. This volume is must-read work not only for those who want to familiarise themselves with the TBT/SPS systems of transparency and adjudication but also every one interested in exploring the relationship between transparency and adjudication in general.

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Despite the sincere gratitude I express to everyone mentioned, the views and mistakes in this book are exclusively my own.

ABBREVIATIONS

ACWL	Advisory Centre on WTO Law
APEC	Asia-Pacific Economic Co-operation
AQSIQ	General Administration of Quality Supervision, Inspection and Quarantine (China)
ASCM	Agreement on Subsidies and Countervailing Measures (WTO)
ASF	African swine fever
BRICS	Brazil, Russia, India, China and South Africa
BTA	bilateral trade agreement
CAP	conformity assessment procedure
CETA	Comprehensive Economic and Trade Agreement (EU–Canada)
COOL	certain country of origin labelling
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
ECJ	European Court of Justice
EU	European Union
FDA	Food and Drug Administration (US)
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Co-operation Council
GDP	gross domestic product
G-Mark	Gulf Conformity Mark (GCC)
GMOs	genetically modified organisms
GMP	Good Manufacturing Practices (Brazil)
GNP	gross national production
GRPs	Good Regulatory Practices
IEC	International Electrotechnical Commission
IGO	intergovernmental organisation

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IMS	Information Management System (WTO)
IPPC	International Plant Protection Convention
IRC	International Regulatory Co-operation (OECD)
ISO	International Organization for Standardization
ITC	International Trade Centre
LDCs	least-developed countries
MRA	mutual recognition agreement
MRLs	maximum residual limits
NAMA	non-agricultural market access
NGO	non-governmental organisation
NSS	Notification Submission System (WTO)
OECD	Organisation for Economic Co-operation and Development
OIE	World Organisation for Animal Health
PPMs	processes and production methods
PRA	pest risk analysis
PTA	preferential trade agreement
REACH	registration, evaluation, authorisation and restriction of chemicals
RIA	regulatory impact assessment
RTA	regional trade agreement
SPS	sanitary and phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures (WTO)
STC	specific trade concern
TBT	technical barrier to trade
TBT Agreement	Agreement on Technical Barriers to Trade (WTO)
TFA	Trade Facilitation Agreement (WTO)
TPP	Trans-Pacific Partnership
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TPR	trade policy review
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO)
TTIP	Transatlantic Trade and Investment Partnership
UNDESA	United Nations Department of Economic and Social Affairs
USDA	US Department of Agriculture
USMCA	United States–Mexico–Canada Agreement
WHO	World Health Organization
WIRSPA	West Indies Rum and Spirits Producers’ Association
WTO	World Trade Organization

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<i>Australia – Apples</i>	Appellate Body Report, Australia – Measures Affecting the Importation of Apples from New Zealand, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
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# COUNTRY CLASSIFICATION

This country classification is used throughout the book to reflect the WTO Members active in the WTO transparency and dispute settlement mechanisms, beyond the traditional division between developed and developing countries and least-developed countries. It adds nuance to definitions of developed and developing countries, and therefore aims to distinguish those who truly engage in the system from those who remain passive.

- BRICS    Brazil; Russia; India; China; South Africa
- DEV    (Developing countries) Albania; Antigua and Barbuda; Argentina; Armenia; Bahrain; Barbados; Belize; Bolivia; Botswana; Brunei Darussalam; Cabo Verde; Cameroon; Colombia; Congo; Costa Rica; Côte d'Ivoire; Cuba; Cyprus; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Fiji; Gabon; Georgia; Ghana; Grenada; Guatemala; Guyana; Honduras; Indonesia; Jamaica; Jordan; Kenya; State of Kuwait; Kyrgyz Republic; Macao; Malaysia; Maldives; Malta; Mauritius; Moldova; Mongolia; Montenegro; Morocco; Namibia; Nicaragua; Nigeria; Oman; Pakistan; Panama; Papua New Guinea; Paraguay; Peru; Philippines; Qatar; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Samoa; Saudi Arabia; Sri Lanka; Suriname; Swaziland; Chinese Taipei; Tajikistan; Thailand; The Former Yugoslav Republic of Macedonia; Tonga; Trinidad and Tobago; Tunisia; Ukraine; United Arab Emirates; Uruguay; Venezuela; Viet Nam; Zimbabwe
- G2    EU; US
- IND    (OECD Members and other industrialised countries) Australia; Canada; Chile; Hong Kong, China; Iceland; Israel; Japan; Korea; Luxembourg; Liechtenstein; Mexico; New Zealand; Norway; Singapore; Switzerland; Turkey
- LDCs<sup>1</sup> (Least-developed countries) Afghanistan; Angola; Bangladesh; Benin; Burkina Faso; Burundi; Cambodia; Central African Republic; Chad; Democratic Republic of the Congo; Djibouti; The Gambia; Guinea; Guinea-Bissau; Haiti; Lao People's Democratic Republic; Lesotho; Madagascar; Malawi; Mali; Mauritania; Mozambique; Myanmar; Nepal; Niger; Rwanda; Senegal; Sierra Leone; Solomon Islands; Tanzania; Togo; Uganda; Vanuatu; Yemen; Zambia

<sup>1</sup> This list comprises the WTO Members who are considered LDCs according to the United Nations Conference on Trade and Development (UNCTAD). <http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>.