



Is World Trade Organization Information Good Enough?

How a Systematic Reflection by Members on Transparency Could Promote Institutional learning

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² This paper draws on ideas I have previously published – see (Shaffer, Wolfe and Le, 2015; Wolfe, 2017a; Collins-Williams and Wolfe, 2010; Wolfe, 2013; Mavroidis and Wolfe, 2015; Wolfe 2015b; Wolfe 2015a). It also draws without explicit attribution on confidential interviews in Geneva and Paris. I'm grateful for the comments and suggestions of Terry Collins-Williams, Mark Halle, Bernard Hoekman, Barbara Martin, Petros C. Mavroidis, Charles Pentland, Roy Santana, David P. Shark, and Alice Tipping, none of whom is to blame for the results.

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Bertelsmann Stiftung High-Level Board of Experts on the Future of Global Trade Governance

In the light of rising threats to the multilateral trading system, the Bertelsmann Stiftung has set up a High-Level Board of Experts on the Future of Global Trade Governance. Composed of seasoned trade diplomats and distinguished experts, it is identifying feasible options for reinvigorating the World Trade Organization (WTO). To inform the Board's discussions, Bertelsmann Stiftung has commissioned additional research. This paper by Prof Robert Wolfe suggests that systematic discussion of transparency by encouraging institutional learning could help Members of the WTO to recover a shared sense of collective purpose. It reflects the author's views which are not necessarily those of the Board.

Further information on the High-Level Board of Experts and its work can be found on futuretradegovernance.org and ged-project.de.

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1 Introduction

The World Trade Organization (WTO) has three primary tasks: to negotiate new rules, monitor implementation, and settle any disputes that arise. It is not fulfilling any of these tasks very well at the moment. Should Members just muddle along, hoping for the best, or seek external advice on how to change the WTO operating system? I suggest a third possibility: should Members encourage institutional learning?

It helps that at least some Members know that they have a problem. In July 2017, a communication to the General Council from a group of 47 developing and developed Members said, first, that the political will to find compromises and to forge consensus is lacking (WTO, 2017c). WTO Members have failed for years to agree that the Doha Round is dead so a new negotiation framework cannot be created. The second observation from the group informally known as the Friends of the System is that compliance with notification obligations is often unsatisfactory, thereby undermining the WTO's monitoring function because information is late, incomplete or of low quality. These two self-criticisms, about political will to find consensus, and insufficient provision of information, are related: both are a symptom, not a cause; both signify the lack of a shared understanding of what WTO is for.

Some of the explanations for the WTO's difficulties lie outside the organization in a general malaise of multilateralism (Wolfe, 2015b; Wolfe, 2017b), now exacerbated by an Administration in Washington that in putting America First sees a competitor, not a partner, in China, but continuing as before and hoping for a better outcome would be foolish. Muddling through is no solution, and outsiders cannot help. Could a systematic discussion of transparency help Members to recover a shared sense of collective purpose?

The challenges and opportunities for the WTO were both on view in the discussion of fisheries subsidies at the 11th WTO ministerial conference (MC11) in Buenos Aires in December 2017. Members could not conclude the long-running negotiations, but as part of agreeing to keep talking, they recommitted to existing notification obligations. Here is an example of where working on transparency provides a way forward for the WTO. Indeed, at the first meeting of the Rules negotiating group after the ministerial, the U.S. suggested that rather than keep banging away at the well-known impasse, Members should ask the Secretariat and other international organizations to compile better information on IUU fishing and over-fished stocks. The implication is that WTO does not have enough information on fisheries to be able to do its job. In both the Rules negotiating group and the subsidies committee, Members should be asking themselves how this gap in their knowledge could be addressed.

At a time when the negotiation function is blocked, and the dispute settlement system is stressed, I suggest a new emphasis on the WTO as the best repository of trade policy information in the world, and an indispensable place for analysis and discussion of that information. Transparency reduces the inherent information asymmetry when a government knows more about its domestic policies than do its trading partners, although it starts by a country learning enough about itself to provide the relevant information to the WTO. Whether WTO information is good enough, and the Friends of the System think it is not, has little to do with formal obligations—it is a judgment Members have to make in each committee. If information is fundamental for the WTO, then Members should be able to assess it. On the basis of such a detailed vertical review, they might be able to come to a horizontal consensus on how to improve the functioning of the system, at least on this aspect.

Analysts often prescribe institutional reform as a solution to the WTO's negotiating difficulties, but under assumptions of bounded rationality, in which future institutional choices are heavily constrained by the status quo, I think that Members of the WTO are unlikely to make radical departures from the current system unless it proves no longer "good enough" (Jupille, Mattli and Snidal, 2013). Hence my suggestion that Members ask themselves that question about their information, which could promote institutional learning. And it may not. Members are adept at seeking tactical advantage in any situation instead of considering the strategic implications for the trading system. Some may see in any discussion of information an attempt by large countries to impose new obligations. But that

is not my intent. Better information might help Members navigate current negotiation impasses, but that is an incidental benefit of a discussion in each committee about whether the organization is doing as well as it can in monitoring current obligations.

In the next section I discuss what I mean by institutional learning, and in section 2 I consider whether other international organizations have lessons for the WTO on how to do it, with particular emphasis on the OECD In-depth Evaluation of Committees process. Rather than focus on inadequate compliance with notifications, which not all developing countries think is serious, in the third section I suggest reframing the debate on transparency by asking first whether WTO information is good enough, then why Members do not notify as much as they might. If Members think that they lack information on the trading system, the trade policy review process might help, a possibility I take up in section 4. Efforts to improve WTO transparency are not new, as I show in the fifth section. Finally, I conclude with a proposal on how WTO can encourage institutional learning by a systematic discussion in each committee of whether WTO information is good enough.

2 What is institutional learning?

My task is to consider how the WTO can encourage institutional learning, but that assumes that such learning is at least possible, in theory. Learning models depend on factors endogenous to negotiations: something happens at the multilateral table in addition to bargaining, something that alters the understanding of themselves and their interests that allows participants to see their preferences in a new way. That something is learning. Following Joseph Nye (1987), I distinguish between simple and complex learning. In simple learning, using the terms of a classic in the field, actors know their own Best Alternative to Negotiated Agreement (BATNA) but need information about the BATNA of others (Fisher and Ury, 1981).

Such simple learning rests on a deeper process of complex learning. Although Members bring their exogenous interests to the WTO, until they talk to each other about a given problem, they cannot know where consensus might lie. As opposed to simple bargaining, this arguing view is one in which parties gradually articulate shared interpretations of events while developing new consensual understanding of causal relationships (Haas, 1990, 9, 23). If the perception that Members increasingly lack a shared understanding of the purpose of the WTO is right, then that helps to explain what some observers have called a lack of trust among delegations in Geneva, or a toxic atmosphere. Simple learning cannot solve that problem. It requires complex learning, involving all Members, including officials in capitals, which is why I call it institutional learning.

The answer to whether an institution needs fixing depends on what you think it is for. The WTO was explicitly designed to serve the needs of commercial policy, with a structure of rules intended to reduce uncertainty for governments and economic actors. Is that cooperation among states still what firms in global value chains need? Developing countries think WTO ought also to serve the needs of social justice. Do the rules and practices erode so-called policy space? Is the WTO needed to help countries learn how to reduce trade costs? Finally, is WTO capable of asking itself if it is meeting all the objectives of the Preamble of the WTO Agreement, including sustainable development, and are those still the best ends to be served by WTO?

WTO Members have a lot to talk about. Complex learning, institutional learning, requires a different conversation than the one they have been having. They need to change the channel. How can they do that? One way, drawing on the experience of other international organizations, is to work with outside experts, perhaps in a formal evaluation process. Another way would be to try to go around the blockages in the current decision making process by creating some sort of executive board. In the next section I show why such top-down ideas are unlikely to lead to institutional learning in the WTO.

3 Lessons from other international organizations

If the WTO needs to learn, could the process be fostered by outside experts? Are there lessons from other international organizations that have an independent evaluation function with the mandate to self-initiate assessments of specific areas and activities that are of importance for the organization and its stakeholders?

The evaluation in view here would be substantive, not administrative, but the capacity to reflect on whether an organization is meeting its own objectives is rare. Moreover, few international organizations have the capacity to assess whether their agreements are having the intended effects. Based on a survey of 50 international organizations, the OECD found that only a limited number systematically track the implementation of their instruments, and most mainly monitor the use of their instruments rather than the outcome of this use, largely because of methodological challenges and lack of resources (OECD, 2016, 18). I found few examples where an evaluation process is explicitly thought to enhance learning by or in an international organization; instead, evaluation is usually intended to foster accountability, not learning. For example, the Multilateral Organisation Performance Assessment Network (MOPAN) is used by a handful of rich donor countries to assess how certain development organizations spend their money.

A focus more on administrative and management practices is the case for most evaluation units. The international financial institutions all have some form of mechanism like the Independent Evaluation Group of the World Bank, which reports directly to the Board and not through the President. Many also have something like the Bank's Inspection Panel, made up of outsiders with a mandate to review complaints made by stakeholders in the project area who believe that the Bank is not implementing its own rules (Gu, 2017). Measures of autonomy tell part of the story—IMF and World Bank have more autonomy from states, and more agency, so oversight and accountability are important. Since they spend large amounts of money, with conditionality, it is appropriate to have a process to consider whether their advice and conditions were correct or appropriate. WTO as an international organization and especially its Secretariat has no such autonomy.

Of the many ways to assess international organizations (e.g. Tallberg, Sommerer, Squatrito and Lundgren, 2016), most are not immediately attractive when it comes to looking at the WTO. The results of a complex construction and analysis of a new dataset show that international organizations that have policy autonomy relative to states tend to show higher levels of performance, but WTO is a remarkable outlier: it is considered to have high effectiveness but low *de jure* and *de facto* policy autonomy (Lall, 2017, Figures 2 and 3). Another empirical analysis concluded that the WTO Secretariat has less autonomy than the staff of the World Bank or the IMF (Ege and Bauer, 2017, Figure 1). And looking at personnel and financial resources relative to the Bank and the Fund, “the WTO has fewer capabilities for performing a broader array of more complex tasks. Consequently, we consider the WTO to have become less powerful in individual tasks and issue areas (Heldt and Schmidtke, 2017).”

3.1 OECD evaluation of committees

I have found one evaluation process that may be relevant for the WTO. The OECD “In-depth Evaluation of Committees” (IDE) provides “systematic and objective assessments of the relevance, effectiveness and efficiency of the OECD’s substantive committees *inter alia* to inform Council decisions on mandate appropriateness and renewal... aimed at promoting learning across the Organisation” (OECD, 2017b, 111). Members of the OECD are notoriously reluctant to allow the public to see into the workings of the organization, including in the area of evaluation. So, the documents prepared by the Evaluation Committee, even its most recent annual reports, are not readily available beyond the organization’s core stakeholders, although there are indications that more openness is coming. What I know therefore comes from interviews and a presentation by the head of the unit (Williams, 2015).

In brief, IDE looks at relevance, or the extent to which a Committee's mandate and work programme objectives are aligned with Members' policy needs and concerns; at effectiveness, or the policy impacts resulting from the Committee's products in relation to objectives; and at efficiency or the extent to which the Committee is functioning well and producing products of the requisite quality. Outputs can include OECD knowledge products and instruments, such as statistics, reports, peer reviews, workshops, guidelines and formal agreements. Policy impacts might include committee recommendations that have been proposed to be enacted as legislation, or raised in major public forums as being authoritative for policy direction.

The Evaluation Unit has four staff, supplemented by consultants for data gathering. The unit has the advantage of being inside the OECD, which gives it complete access to all information and data, with no need for staff to keep re-learning how the organization works. The data comes from a variety of internal sources—including records of attendance at a committee's meetings, and the biannual Programme Implementation Reporting (PIR) survey that asks officials of member countries to rate OECD outputs. This data is supplemented by additional questionnaire surveys, and interviews in Paris, in capitals, and with other relevant international organisations.

The evaluation unit, when conducting IDEs, works at arm's length from the Secretariats of the evaluated committees. The IDE framework does not include a direct review of the directorate that supports a particular committee, and the evaluations do not make organizational recommendations. The evaluations are not an audit—which would be hard to do in any event since OECD resources are organized by directorate, not committee. But when there are critical findings relating to committee performance, the committee secretariats, which are responsible for the technical and logistical aspects of committees, are conscious that the quality of their work is being questioned. For this reason, tensions may arise between the evaluators and other parts of the Secretariat. Tensions may also arise between Members when their priorities and interests in specific areas of OECD work are challenged by evaluation results.

The unit also has the benefit of working with two subsets of the membership—the half dozen ambassadors on the Evaluation Committee, and the “bureau” of the committee being evaluated. The bureau of an OECD committee is typically comprised of the chair, vice chair, and a representative handful of active countries; it steers the committee's work. The terms of reference for each evaluation are agreed with the Evaluation Committee and the bureau. The Evaluation Committee also reviews intermediate and draft final reports, providing steering to the evaluators as the evaluation progresses and, at the final stage, checking for completeness, tone and messaging, etc. before the report goes to the bureau of the committee under review for discussion and validation.

The draft final IDE report is not a negotiated document, but the interaction with the bureau helps the Evaluation Committee to understand any concerns the bureau might have about the conclusions and, in particular, to test the relevance and feasibility of recommendations. The recommendations can cover mandate and work programme development; meeting preparation and conduct; work programme oversight; vertical coordination and horizontal working; and communication and dissemination. The results of an evaluation are not a diktat to the committee but recommendations that aim to provide a direction of travel that is embarked upon by the Committee through a set of actions that it devises and agrees on. These actions are subsequently monitored for implementation by the Evaluation Committee over the year or so following the approval of the recommendations by the OECD Council.

3.2 Two approaches to international organization evaluation compared

The academic literature appears to have little to say on how contemporary international organizations learn. The best-known example is the attempt by the IMF to institutionalize independent evaluation as a means of assessing its performance. Weaver's analysis of the Independent Evaluation Office (IEO) illustrates the challenges of fostering a culture of learning (Weaver, 2010). The most recent external evaluation of the IEO (Ocampo, Pickford and Rustomjee, 2013) observed that despite the “inherent tension between the two basic functions of the IEO of oversight and enhancing the Fund's learning culture” the Office has been reasonably effective in finding a balance. But: “Although there is an increase in the proportion of Staff that view the IEO's recommendations as being taken

seriously by the Board, Management and their Departmental Heads (Figure 2.A), only 17 percent of Staff think the IEO is changing the IMF's culture and more than half responded "don't know" (Figure 2.B)."

In contrast, insiders believe that organizational improvement is happening as a result of IDE. Under OECD rules, the mandate that the Council agrees for each committee sunsets periodically. The results of the IDE process are used as part of the mandate renewal process. While committees are rarely closed own, clarifications of a committee's objectives and working methods are valuable. There have also been efforts to foster organizational learning and improvement through the conducting and sharing of case studies of good committee practices as part of the IDE methodology. The IDE process is like an internal evaluation of a government department whose reports to senior management help thinking about how to better achieve the organization's objectives. Arm's length insiders who understand the system help a committee to take a hard look at itself.

The IMF IEO is the acknowledged gold standard for independent evaluation, but that independence may be an impediment to learning. The OECD IDE process appears to be the gold standard for internal approaches to learning. Neither IDE nor IEO is perfect, and both would be resisted at WTO. Would a different approach fare better?

3.3 Would an executive board help?

The first lament of the Friends of the System placed the emphasis the WTO's inability to reach consensus on a lack of political will. Some people think this absence is actually a problem of institutional design, as if reform of decision making would make everything alright (Goldstein, 2017). I think the argument is misplaced: no decision rule would facilitate agreement in the absence of shared purpose, but in Annex 4 I consider what we know about WTO decision making and the prospects for reform. Here I consider just one idea.

The fourth recommendation of the Sutherland Report (Sutherland, Bhagwati, Botchwey, et al., 2004) was for a senior officials' consultative body to be chaired and convened by the Director General. It would meet 2-4 times a year, but without executive powers. Membership would be restricted to officials from capitals (perhaps accompanied by Geneva-based ambassadors). When necessary, the consultative body could meet wholly or partially at ministerial level. Its activities would be limited to discussing the "political/economic environment as well as current dossiers" and occasionally providing "some political guidance to negotiators".

Executive "boards" of some sort are frequently found in international organizations (on the variety of models and powers, see Wessel, 2016), but the only common characteristic is that they are non-plenary. Sometimes they are meant to exercise oversight over the parts of an international organization; other times they are meant to speed up decisions. A detailed comparison of the governance structures of the IMF, World Bank and WTO concluded that a consultative body of 25-30 Members could be useful (Alvarez-Jiménez, 2010).

Despite the many proposals, such a group has not been created, perhaps because formal small groups are no panacea. It is unacceptable for a handful of Members to make decisions that are hard for others to reject, and the work of specialist committees is hard to delegate upwards. Moreover, proposals for internal boards as for external experts are based on faulty diagnoses which lead to incorrect prescriptions. The assumption is that smart or powerful people can look at the WTO either from the top or from outside, see what is wrong, and tell it how to change. Organizational culture affects how an international organization learns and adapts (Nelson and Weaver, 2016). This culture is hard to observe, but everybody who has worked in or studied the WTO has observed its attachment to consensus decision-making, and the defining belief that the WTO is a "member-driven" organization. The required learning cannot be fostered by outsiders.

Members need to talk to each other, and they need to do it in the many WTO committees which are the link both to capitals and to experts. Committees and negotiation groups will not reach consensus any more quickly as a result of interventions by a Board or an expert group. Institutional learning is a collective process.

4 Reframing the debate on WTO transparency

The second lament of the Friends of the System was that compliance with notification obligations is often unsatisfactory, thereby undermining the WTO's monitoring function. Everybody knows notification is a problem (WTO, 2017g, para 6.2), with periodic efforts to do something about it—see Annex 1 below—but performance is if anything getting worse. Reframing might make progress possible on this longstanding issue.

I see two reasons to focus on transparency as a way to encourage a process of institutional learning. First, transparency matters in itself, as the foundation for everything WTO does. Second, discussing what is needed to improve transparency is a way to discuss what Members want from the WTO. The mechanics of transparency are well understood—the problem is rebuilding an understanding of its purpose.

Notification is an obligation, but unsatisfactory performance undermines more than monitoring, because Members do not learn about themselves, and traders do not learn about new markets. I suggest that instead of a focus on obligation, as if notification is merely something a country owes to others, although it is, Members should ask themselves if the information available to each committee is good enough. But first we need to know more about the problem, and what is already being done to address it. I begin by discussing the transparency principle in the WTO, and the questions any international organization should ask about its information. I then discuss what we know about why Members do not notify.

4.1 The transparency principle

Transparency in WTO includes:

1. The process for developing a rule or a policy domestically, and subsequent publication
2. How other Members are notified of a policy change
3. How notifications are discussed in Geneva, and the results published.

Both the information and the discussion are necessary to bring the disciplines to life, and publication is essential for economic actors and citizens.

Transparency has two purposes. First, it is essential for surveillance of implementation (Art. III.1 of the WTO Agreement). This first task for transparency helps to reduce the inherent information asymmetry when a government knows more about its domestic policies than do its trading partners. Reciprocity is a foundational norm of the WTO, but it is measured by rules, not outcomes. Members (with one prominent exception) care whether their partners implement the agreed rules; not whether the results lead to any particular set of trade flows. The transparency system is part of how they know. And it can influence how Members implement the rules—one study found that the trade policy review process dampens a propensity to raise tariffs (Groppo and Piermartini, 2014).

The second task for transparency is understanding Members' trade policies and practices (Art. III. 4 and Annex 3 of the Agreement); this task for transparency is more about good policy than consistency with obligations. While this task is assigned explicitly to the Trade Policy Review Body (TPRB), both surveillance and analysis are the responsibility of all WTO bodies. And most committees indeed discuss both implementation and good practice, although some Members may think that discussion should only concern existing formal obligations.

I think that the lament of the Friends of the System should be read as applying to both transparency tasks. Discussion of how well WTO is doing on these tasks is worthwhile, because providing transparency is one of the

most important things any international organization does. WTO should be asking whether its information is good enough. Box 1 contains a list of some of the questions to ask.

Box 1: is WTO information good enough?

How good is WTO information:

- for surveillance of implementation?
- for analysis of trade policy objectives?
- for helping economic actors navigate new markets?
- For helping citizens to see inside the system?

Is WTO data:

- comprehensive?
- high quality?
- integrated in accessible online databases?
- tracking emerging issues, such as e-commerce?

Is WTO information a burden or a benefit?

- Are Members willing suppliers of information (statistics, notification)?
- Do Members see the value of the information in a notification differently between committees?
- Do the difficulties of preparing a notification differ between on-time, ad hoc, and regular notifications?

Does the WTO Secretariat support the process effectively?

- Is more detailed analysis of available information needed?
- Should the Secretariat do more background work on emerging issues?

Questions for each committee to consider

- Does the committee need better information and analysis to do its work?
- Does it need better databases of questions and answers in the committee?
- How many questions in the committee are due to absent or incomplete notification?
- Do governments understand how to use preparation of the notifications to learn about themselves, and how to learn from the questions asked in the committee by partners?

4.2 Why do Members not notify?

Having asked the questions suggested in Box 1, Members ought to conclude that WTO information is not good enough. What do we know about the reasons?

First, notification compliance varies by type of notification. A one-time obligation, say of the existence of an enquiry point, means finding out what your policy is, and notifying it. Ad hoc notifications, for example of a proposed new animal health regulation, are also relatively straightforward. But some regular notifications require being able to monitor your own policy every year, which can be harder when the responsible authority is not the trade ministry. In others, like the notifications of quantitative restrictions (QRs), they have to notify not only the measure, but also why they think the measure is WTO compatible.

The second problem with notification does not begin with the WTO. The narrowest definition of transparency is “the willingness of a government to release policy-relevant information” (Hollyer, Rosendorff and Vreeland, 2011, 1193). And that willingness manifestly varies across countries. Open data is valued by OECD governments (OECD, 2017a), but they are a small subset of WTO membership. The World Bank obtains the data for the World

Development Indicators from other international organizations, who get it from national governments, who vary in their willingness or ability to provide the data. In one inflation time series, for example, 25% of the possible observations are missing because governments did not provide the information (Hollyer, Rosendorff and Vreeland, 2011, 1195).

The government of China, for example, attempts to comply in a mechanical fashion with WTO publication requirements, including the translation into English of trade-related laws and regulations (WTO, 2016, 69), but transparency is far from being an embedded principle of governance (Potter, 2014, 24), and the results, as detailed in a recent American analysis (USTR, 2018), are not entirely satisfactory.

Henry Gao's assessment of China's notification performance, which is more nuanced and detailed than the USTR analysis, may be relevant for many developing countries. He found that implementation of transparency obligations at the Central Government level is better than at the local government level; and that among the Central Government ministries, the trade ministry has a better record than others, as do agencies whose work has a significant trade-related dimension. Turf wars are also a factor in China. Other ministries might see requests from the trade ministry for information not as a WTO obligation but as attempts to grab power from them, especially agencies higher in the bureaucratic hierarchy, such as the Ministry of Finance (MOF). Gao also found that many government officials lack familiarity with WTO obligations, or the trade implications of their work, especially at the local government level. Even when WTO rules are part of an official's everyday work, ensuring consistency with the substantive obligations of the WTO is more important than implementation of procedural obligations. Moreover, he concludes, "as obligations such as translations and [the Transitional Review Mechanism] only benefit foreigners, they are often side-lined by the officials who have to give priorities to serving their domestic constituencies (Gao, Forthcoming, 26-7)."

What then are the circumstances under which Members are more likely to notify? The first is evident benefits: providers of information must see how doing so helps them meet their own objectives. Do they believe that the information they provide will be analysed, aggregated and disseminated in a way that is helpful to them or crucial for the trading system? If countries do not think they are learning about themselves in preparing a notification, or responding to a TPR questionnaire, and if they do not see the public good aspect of such information, then notification is indeed merely a burden.

Second, and related, notification is also easier when the same agency is the authority for a measure, is responsible for notification, and is the user of the results in WTO. We see this virtuous circle in the SPS committee, where the measures subject to notification are well-defined, what is being notified is concrete changes in policy, and where the outcome is engagement in a dialogue that normally takes place among officials responsible for the policies being notified. The experts from capitals who attend SPS meetings are the people who must provide notifications and who rely on other countries' notifications. They know the issues and are not caught up in other political issues within the WTO that trouble Geneva delegates. The TBT Committee also attracts experts from capitals, but unlike SPS, technical regulations can be the responsibility of many ministries, increasing the importance of coordination by trade officials in the capital. In the subsidies committee (SCM), the Geneva delegates typically report to treasury ministries, who have a considerably different interest in the use of public money in their own and other countries than operational ministries, or sub-national governments. Fewer experts from capitals attend the Agriculture Committee, and capital-based attendance is rare for import licensing (ILP).

Third, bureaucratic capacity affects notification. The Secretariat provides some assistance to delegations, but could do more (WTO, 2017g). The Integrated Database (IDB), for example, contains bound, applied and preferential tariffs, and data on import flows at the tariff-line level, but it has been hampered by poor notification. The Secretariat now has flexibility to collect missing information from official sources and, after approval from the Member concerned, to integrate it in the IDB. Therefore, the information included in the IDB is either directly notified to the Committee on Market Access by Members, or collected by the Secretariat (WTO, 2009b). The IDB data collection policy could serve as an example of good practice for other in-house notification requirements, whereby a network of external reliable data providers can be used to ease the notification burden of Members (WTO, 2017g, para 6.33, 6.4). It would be impossible to do for other types of notifications. The more a Member

needs to interpret or justify in the notification requirement, the more difficult it is to comply with the requirement. Notifying facts and giving copies of legislation is much easier.

Another way to address inadequate notification by a trading partner is to supply the missing information yourself. The “specific trade concerns” procedure in many committees is often used now as a means to call attention to the practices of other Members. Rather than waiting for China to notify certain subsidies and state-owned enterprises, the Americans submit “counter notifications”, a procedure that they think other countries should use more often. In recent years, however, the ASCM 25.10 procedure has only been used by the U.S., and only four times with respect to China and once with India (G/SCM/W/546/Rev.8).

In sum, notification is a problem when trade officials lack knowledge about complicated domestic programmes or when they are unsure about what to notify (definitions matter). Domestic officials may not think in the terms required by WTO, or not see the information as a public good. The QR notification is an extreme example of a situation where Members need to coordinate with a large number of agencies that range from Customs and security agencies to the ministry for the environment. Finally, countries may fear criticism, or fear of exposure in the dispute settlement system.

A hypothesis I am now trying to explore empirically is that notified measures, especially those that are discussed in a committee, are rarely subject to a dispute. For example, a colleague found only a handful notifications with a fish connection from 13 Members under any agreement in 2015 (WTO, 2017i), and so far as we know, none of these notifications led to a dispute. In fact, I am only aware of one dispute ever on fisheries subsidies (DS489), on which China and the US reached an agreement regarding the dispute through a MOU. Should we be surprised? At any point in time there are considerably more violations that might subject to dispute settlement than even a large country can afford to take on. And countries do not spend resources on disputes that would yield no effective remedy.

The panel in Brazil – Certain Measures Concerning Taxation and Charges reasoned that a notification of a regional trade agreement to the Committee on Trade and Development under paragraph 4 a) of the Enabling Clause is a procedural step that allows a subsequent claim that the provisions are eligible for special and differential treatment. Does lack of notification remove one justification for exceptions to MFN? This would be a novel justification for notification if confirmed by the Appellate Body, and another indication that notification can be a protection from rather than a provocation of a dispute. Rather than fearing notification as self-incrimination, perhaps Members should fear the reverse.

But maybe notification requirements are too onerous. What are the benefits to a country, and the system, given the costs? Over 170 notification obligations are embedded in the original agreements. Does anybody read or use the submitted notifications? Notifying quantitative restrictions is important, but the notification is hard to prepare and in the committee meetings, detailed questions come largely from the U.S., the EU and Switzerland (WTO, 2018). The results of this committee review are available to all Members in the minutes, but do they use it to better understand import prohibitions imposed by their trading partners? In short, are the notification obligations accepted when the WTO was created in 1995 the right ones for today’s trading system? If nobody is using notifications then the effort is merely annoying. Committees should be asking themselves such questions. If the information is valuable, but difficult to obtain, is there a greater role for the Secretariat to help, perhaps through the trade policy review process?

5 A role for the TPRB in improving WTO information?

The objective of the Trade Policy Review Mechanism (TPRM) is “to contribute to ... the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.” The Trade Policy Review Body (TPRB) provides the platform for discussions among WTO Members of the two monitoring reports produced by the WTO Secretariat each year and of the Director-General’s annual report on the trading system. These reports provide an overview of trade trends and of the implementation

of trade policies of Members. The reports also review the work of the WTO itself in such areas as compliance with notification provisions as well as trade concerns raised in meetings of WTO bodies, based on data collected by the Secretariat of each committee. The TPRB also discusses the periodic trade policy review reports prepared on each member.

The core of each TPR report is based on the notifications from Members, but each report builds on a far wider range of information. The Secretariat collects data from official sources, which include questionnaires to Members under review, and non-official sources, including other international organizations, media reports, and NGOs. To ensure accuracy, the Secretariat seeks to verify data that comes from non-official sources when discussing the draft of its report with the Members. The Secretariat ought to play a greater role as the common agent of WTO Members in acquiring, aggregating, analysing and disseminating information. The U.S. idea of providing notifications for Members (see below) might be awkward, because a notification is a legal document. But in the trade policy review process, where comments on a member's obligations are not allowed, the Secretariat can obtain information beyond official notifications for its reports. Here are five examples of where the TPR Secretariat could seek more information from other international organizations, business, and NGOs, not in place of a formal notification, but to supplement the information available to the WTO where that information is not good enough.

First, understanding the incidence of agriculture subsidies poses special difficulties. Because they are based on a Member's obligations, and do not use comparable methodologies, WTO notifications of domestic support are not an accurate measurement of the value of support to producers, even if they were timely. It would be helpful to use OECD data for analytic purposes, although the OECD's Producer Subsidy Equivalent (PSE) is not a measure of trade distortion but of transfers to agricultural producers (WTO, 2012). If used to enhance the timeliness of the data available for understanding national trade policy, but not as a tool for enhancing accountability obligations, they can be thought of as "shadow notification" or "pre-notification" (Josling and Mittenzwei, 2013). The issue has apparently provoked lively debate in the TPRB, since developing countries led by Brazil and India think that the Secretariat should not use OECD data.

Second, another under-exploited source of trade policy data is economic actors—large firms must navigate the trade policy landscape every day, yet they may not realize what they know. Firms may be as unwilling as Members to make what they know available for fear of drawing attention to themselves, and yet they know more than anyone about policies that are detrimental for them.

Third, in many environmental agreements, in contrast to WTO, NGOs are directly engaged in the work of the organization, notably CITES, where NGOs like TRAFFIC help gather additional information the organization's transparency mechanisms may miss (Wolfe and Baddeley, 2012). At WTO NGOs could play a role in providing information on fossil fuel subsidies (Casier, Fraser, Halle and Wolfe, 2014).

Fourth, notification of fisheries subsidies is especially poor. Members need to know more in support of ongoing negotiations, but no new templates will be possible until those negotiations conclude. But the TPR Secretariat could prepare a useful background analysis using WTO notifications, along with data from the OECD, FAO, UNCTAD, and regional fisheries management organizations (Appleton, 2017, 17).

A final way that the WTO could obtain more information would be if it established common "open data" standards for publication, and all governments used that format to publish their information online, then the Secretariat could use Google to find the information and download it into the TPR database, subject to verification by the Member. Members could flag information obtained in this way as a formal "notification" if they wished. This method would not work for all notifications, such as notifications requiring an interpretation or providing a justification for a measure, but it would be a start in cases where what is needed is facts, statistics, or copies of legislation.

A stronger role for the TPR process may not be welcomed by all Members. Countries do not want to put the WTO Secretariat in a position of even appearing to pass judgement on their trade policies. If the TPR were more independent, the task might be easier, but it might then lack access to the information that the Secretariat now has as insiders.

6 Learning from past attempts at reform

Members know they have a problem and have been taking about improving notification since the beginning of the Doha Round in 2001 in negotiating groups, in committees and at ministerials, including at MC11. Annex 1 describes a number of efforts to improve notification. The results have been discouraging. Before outlining my proposed actions, I want to look at three other efforts that have not worked well: the follow ups to Paragraphs 28 and 29 of the Nairobi ministerial declaration, and a recent U.S. proposal.

First, at the 2015 Nairobi ministerial, Brazil was the leading proponent of Paragraph 29 of the declaration (WT/MIN(15)/DEC), which reads:

We agree to reinvigorate the regular work of the Committees and direct the General Council to consider the need for adjustments in the structure of their subsidiary bodies in light of their relevance to the implementation and operation of the Covered Agreements.

This paragraph did not generate much follow up, and such discussions that took place as described in Annex 2 did not get anywhere, perhaps because this mandate launched the discussion in the wrong way. It is hard to fix the machinery without thinking first about the policy.

Second, Brazil was also the main proponent of Paragraph 28 of the Nairobi ministerial declaration, which reads

... we instruct the Committee on Regional Trade Agreements (CRTA) to discuss the systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules. With a view to enhancing transparency in, and understanding of, RTAs and their effects, we agree to work towards the transformation of the current provisional Transparency Mechanism into a permanent mechanism ...

The first sentence of Paragraph 28 assumes a non-existent consensus about systemic implications of RTAs. The second sentence does not address the flaws in the Transparency Mechanism. Brazil tried hard in the CRTA to lead a discussion of paragraph 28, but failed, as described in Annex 3. In his final meeting as Chairman of the CRTA in April 2017, Ambassador Daniel Blockert of Sweden said that he had hoped that paragraph 28 would provide some urgency but Members had different views on the importance of Ministerial Declarations, and that had been a hard lesson to learn. The impossibility to move forward on making the Transparency Mechanism permanent was unfortunate, but there was no appetite among Members to make it a priority. He added that he was sometimes baffled by the fact that Members were not putting more effort into monitoring since RTAs would continue to increase both in scope and number. Moreover, RTAs were developing trade rules in a way that the WTO was not doing at the moment. It had been shown clearly during the CRTA that the Agreement on Trade Facilitation contained a lot of work that had been done in RTAs. Ignoring RTAs negotiated at that time meant ignoring what would be in WTO agreements in ten years' time (WT/REG/M/84). He was right, but the committee could not get there.

And the committee ought to go farther by instructing the Secretariat to collect ongoing information about the operation of RTAs (Mavroidis and Wolfe, 2015). Members know little, if anything, about the workings of those schemes after their review by the CRTA has been completed. Yet these agreements are full of TBT+, SPS+, and GPA+ disciplines, which at least potentially affect each and every WTO member and trader. A bridge must be built to ensure a steady flow of information about the operation of RTAs. Such exercise of transparency and dissemination matters for RTA participants themselves as well, because most such agreements have weak institutional structures, no strong notification obligations, and no Secretariat to process notifications in any case.

Third, USTR Lighthizer said at MC11 that "it is impossible to negotiate new rules when many of the current ones are not being followed. This is why the United States is leading a discussion on the need to correct the sad performance of many Members in notifications and transparency (USTR, 2017)." He had in mind a detailed proposal made by the U.S. delegation in October that reviewed how compliance with notification obligations under the

Goods agreements (services was ignored) is inadequate. The U.S. proposal included punishment for Members who are behind in their notifications to the WTO (WTO, 2017h), using a model applied by the Budget Committee where limiting access to services paid for by Members makes some sense as a sanction for countries that are behind on their contributions (WT/BFA/W/410).

The U.S. proposal was presented to the Council for Trade in Goods at its meeting on November 10, 2017 (G/L/1204). All of the 29 Members who spoke (counting the EU as one) were in agreement that enhancing transparency and improving Members' compliance with notification requirements were important objectives. A number of Members took issue with the administrative measures in the US proposal and said that punishing Members would hurt those who were genuinely struggling to meet the requirements. Some of the notification requirements under the WTO Agreements were too technical, they said, and were not fully understood by the different authorities designated to produce the submissions.

6.1 The lessons of WTO experience

What lessons can be drawn from the examples described above and in the Annexes below?

1. Brazil started with some ideas about WTO machinery instead of provoking a conversation about what the WTO is for. Organizational change should be determined by the needs of the policy to be implemented.
2. Some delegations always want a written proposal for the capital, although the committee minutes record the proposal as given.
3. Some delegations are always active participants (U.S., EU, Australia, Canada, India, Brazil); others always say something, though not always adding much detail; and too many developing countries say nothing.
4. Some of the more engaged if still inconclusive discussion of paragraph 29 took place in two committees with significant participation from capitals: Safeguards and subsidies.
5. Members are always worried about anything that might affect their rights and obligations.
6. The paragraph 28 discussions were muddled by the usual concerns about notification being too burdensome, and by the longstanding debates about whether agreements negotiated under the Latin American Integration Association (LAIA) were properly notified.
7. No part of the Secretariat had a mandate to prepare a background document to help focus discussion in committees.
8. While the 2017 American proposal contained an analysis of deficiencies in many committees, the recommendation was for a decision by ministers, not committees.
9. The U.S. proposal began by assuming the value of the information required in notifications; and further assuming that because notification is an obligation, Members should just do it. Rather than arguing that Members should tell the U.S. more about their policies, Members should be thinking of ways to encourage countries to tell more themselves.

In sum, proposals for change in the WTO are always easy to derail. Anyone proposing action in the WTO, and I will in the conclusion, should recall the U.S. intervention in the November 2017 CRTA meeting (WT/REG/M/87) on Nairobi Paragraph 28: "The Committee had discussed having a discussion but Members had not discussed what they wanted to discuss and no one had prevented anyone from discussing that."

7 Conclusion: how can the WTO encourage institutional learning?

Members of the WTO are trapped in debates about their rights and obligations, debates that obscure what the WTO is for. Perhaps Members worry too much about what the WTO asks of them, and not enough about what

they can ask of the WTO. Further high-level discussions about institutional reform would be sterile, a pointless descent into endless talk about process. It would be equally futile to have a lengthy discussion about one Member's proposal for how other Members ought to behave better. Engagement in discussion of transparency is welcome, but it has to be a collective effort.

I also see no value in asking outsiders for help. The Sutherland Report (Sutherland, et al., 2004) recommended the creation of an expert group—for example to discuss plurilateral deals, which could be seen as a device to encourage learning—but did not discuss the implications. Why in a “Member-driven” organization is it useful to ask outside experts to do a study, and how are the results of such work to be brought into the regular bodies? The reception of the Sutherland Report itself illustrates the problem, since there was no obvious home in the committee structure for receiving its recommendations. Members have to discuss these issues themselves, and the locus for the necessary conversations should be the committees. Committees are charged with monitoring the implementation of the agreements—and they engage different ministries and other stakeholders.

What is needed is a systematic assessment of information in each committee, based on the questions in Box 1. The process could be launched by the General Council setting up an ad hoc committee to write a mandate, which could then be sent in a letter from the chair of the General Council to the chair of every committee. Along the lines of the OECD Evaluation Committee, a small group within the Secretariat could support the ad hoc committee, and later draft a synthesis report to be discussed in the TPRB, a forum that allows a genuine conversation rather than one conducted in the shadow of negotiations.

The mandate as developed by the ad hoc committee of the General Council has to be framed as one that leads to a review of what the committee is for, how it works, and what information it needs. The mandate should ensure that no committee need engage in negotiations affecting Members' rights and obligations. But it should explicitly envisage the possibility of new guidelines at the committee level interpreting notification requirements. The format should not leave any committee an opening to debate the best way do this review. Hence the mandate should provide some precision on the terms of the question, and guidance on how to proceed, including standard questions that would help committees compare themselves to each other. For example, can the notification template based on a given agreement be simplified? Informal or thematic sessions should be encouraged, a role for consultations by the chair as needed could also be encouraged, but the review should be a standing item on the committee agenda until a report has been prepared for the TPRB.

The role of the TPRB is three-fold. First, it should review itself. Members could start by asking how the annual review by the Director-General could be improved, perhaps with more background analysis by the Secretariat. Could the annual World Trade Report be more fully integrated within the work of the WTO?

Second, the TPRB could support other bodies. Using the data already available, it could do a note for each committee on the quality of the information it assembles and the questions it generates. A start was made in 2016 when the Secretariat wrote to committees asking about all “concerns” raised formally, which led to a new section on “Trade Concerns Raised in Other WTO Bodies” in the annual monitoring report (WTO, 2017g). Unlike SPS and TBT reporting, however, it does not have any summary statistics about the number of concerns, who raises them, and the subjects.

Finally, the TPRB should be tasked to prepare a “TPR of the system”, a synthesis report based on reports from all the committees. Each body can and should draw the implications of their review for their own work, but only with such a central report could Members answer all of the questions in Box 1, consolidating institutional learning and identifying any necessary actions.

Box 2: Fisheries subsidies as an example

The SCM Committee can act to improve WTO knowledge about fisheries subsidies without waiting for the Rules negotiations to conclude. With better fisheries subsidies transparency, Members could:

1. Identify where fisheries subsidies may be having negative environmental effects
2. Support the process of domestic reform of fisheries policies
3. Facilitate use of WTO as a venue for Members to learn about their own fisheries policies as well as those of others
4. Use sunshine to provide discipline on the trade effects of subsidies while avoiding the dispute settlement system

The committee needs no approval to hold a regular thematic session on fisheries subsidies. Experts would be encouraged to attend from capitals, and relevant international organizations could be observers and suppliers of information. The discussion could be supported by a WTO Secretariat report based on Members' notifications and by information from other international organizations. Such a special session ought to be an occasion to ask the questions outlined in Box 1 about whether the information available to Members on fisheries subsidies is good enough for them to do their work. If it is not, what can be done? As an incidental benefit, the process of notifying the subsidy along with information about the fish stock affected could lead to learning about environmental effects of the subsidy, and thereby motivate domestic reform. Similar opportunities exist in every committee.

The discussion proposed for the subsidies committee in Box 2 could be a valuable contribution to institutional learning about fisheries subsidies as well as an example of what other committees could do. For example, the real value of the Transparency Mechanism is to improve detailed information about how an RTA operates, and to learn about its innovations, which ought to feed into consideration of the systemic implications. How could Members best organize thematic discussion of systemic issues posed by RTAs so that they can learn more about what is going on, and think about lessons for revisions or additions to multilateral rules, without automatic implications for anybody's rights and obligations?

Members should be reassured that the point of this process is not necessarily to increase the rate of notifications, and certainly not to create additional burdens, but to improve notifications, a process which requires helping Members to see that WTO is designed to serve governments. The first reason to notify is to learn more about your own government by gathering the necessary information. The second reason is to help trading partners and economic actors to understand your country's policy. A third reason is that experience in writing a notification helps in reading the notification of a trading partner, an essential part of monitoring compliance with WTO rules.

Yes, notification is a legal obligation, and notification obligations are embedded in the original agreements, but are they realistic? Does anybody read the notifications, or use them? Should they be reviewed to align them with Members' objectives? If notification does not serve the needs of Members, it is pointless. The question to committees has to be: are YOU getting the information you need, about yourselves, about others, and about the system? Everybody should answer, no. So how can Members get that information in a way that lessens the burden? Is the notification format the best one? Do some Members need more assistance in preparing the notification? And how can the dissemination of information be improved? The WTO should lead the way in facilitating trade-related "open data" in a way that can be easily disseminated through multiple channels, including international organizations, government websites, and new non-governmental platforms.

Instead of debating "obligations", Members should debate what information is actually needed. Better information about WTO and about the trading system in itself facilitates learning, including about what WTO is (good) for. Better information (aggregation and accessibility) may help citizens see that WTO is working for them. And the process of reflection will be a form of learning about WTO governance.

Annex 1: Efforts to improve notification

Discussion of ways to improve notification is not new. This Annex reviews recent proposals in the light of past experience.

Although a number of good proposals were made early in the Doha Round (WTO, 2003), Members showed no inclination to discuss subsidies transparency in the Rules negotiations. The EC argued in that negotiating group that uncertainty about how national authorities use their anti-dumping regimes can be harmful for exporters. The EC proposal for something like a TPR process where the ADP Committee could review a Member's policies and practices on the basis of separate reports prepared by the Member concerned and the Secretariat (WTO, 2006) was retained as a proposed new Annex III in the Rules Chair's draft texts (WTO, 2008b). The chair reported, however, that while some delegations welcomed the EC proposal, other delegations either expressed serious concerns or strong opposition to the proposal on the familiar grounds that the new procedure would either be duplicative, or too burdensome, or both (WTO, 2008a).

Proposed improvements to transparency in TBT were blocked, in part because of worries about how to use information from non-governmental stakeholders (WTO, 2011a, Annex C). Important revisions were proposed for Article 18 of the Agreement on Agriculture (WTO, 2008c, Annex M) as were provisions on enhanced transparency with respect to domestic regulation of services (WTO, 2011b).

Given the limited trade policy resources available to many Members, the intensity of the early Doha Round negotiations may have distracted attention from notification. The 2008 breakdown in the round created time for Members to devote to neglected routine work at the same time as efforts to monitor the response to the financial crisis highlighted weaknesses in WTO as a repository of trade policy data. The chairperson of the General Council wrote to the chairs of all WTO bodies in February 2009 asking them "to consult with Members on ways to improve the timeliness and completeness of notifications and other information flows on trade measures." They were asked to report to the Chair of the TPRB on the results. The subsequent annual overview of the trading system by the Director-General (WTO, 2009a) contained a new section on transparency, since repeated every year. The letter from the chair of the General Council led to many committees working to improve their notification formats and to facilitate online submission. Many of the annual committee reports are increasingly informative on notification, including indications of who is late in filing and the questions raised. These improvements are ones where the Secretariat can do the work as long as Members provide the mandate.

At the 2011 Geneva Ministerial Conference, the EU failed to gain support from other Members for a proposal to improve adherence to notification commitments, although Members did promise to "comply with the existing transparency obligations and reporting requirements needed for the preparation of these monitoring reports, and to continue to support and cooperate with the WTO Secretariat in a constructive fashion (WTO, 2011c)."

The EU picked up the problem of transparency across the Rules issues in 2015 with interesting ideas on a rebuttable presumption of non-actionability for notified subsidies and ways to improve fisheries notifications (WTO, 2015). The EU brought the issue up again in the Rules negotiations in 2017 (WTO, 2017f). At a negotiating group meeting in July, a Geneva trade official reported that while many delegations agreed with the EU's assessment that the current state of subsidies notifications by WTO Members is, in the EU's words, "dismal and deteriorating," most felt that the EU's proposed remedies – including the idea that non-notified subsidies would automatically be assumed to be in violation of WTO rules – went too far and raised fundamental legal issues which they were not prepared to engage on at this stage, for example on differences of views on the specificity of the subsidies in question (RD/TN/RL/37).

In April 2017, the EU joined by the U.S., Japan and Canada (G/SCM/W/572/Rev.1 24 April 2017) called attention to the alarmingly low level of subsidies notification, and said that if Members are to address effectively those subsidies that contribute to the excess capacity currently plaguing a number of industrial sectors, they need as an indispensable first step to know more about them. At a July 2017 meeting of the Rules group the EU said that it

was surprised to hear that now was not the right time to discuss these issues. The EU also said that it believed efforts to address the problem in the SCM committee and Goods Council had failed, discussions have been going on for several years with the only result an ever-deteriorating situation. Because these efforts have failed, Members need to come up with new ideas which would incentivise Members to do something about the problem.

The NAMA chair told the TNC in November 2017 (TN/MA/31) that there was recognition by a number of Members that a proposal which enhanced the transparency and access to information on regulatory measures (TN/MA/W/144/Rev.2) would facilitate the integration of small and medium-sized enterprises (SMEs) into the multilateral trading system. In the view of these Members, difficulties in accessing such information did effectively constitute a non-tariff barrier. But concerns were expressed by several other Members, including on the issue of curtailing regulatory policy space and the burdensome nature of the proposal. The large group of Members who had wanted to create a work program on MSMEs at MC11 (WT/MIN(17)/24/Rev.1) had to content themselves with a Joint Ministerial Statement creating an Informal Working Group (WT/MIN(17)/58), that will discuss, among others, issues related to improved access to information for MSMEs.

The dozen countries that issued a ministerial statement on fossil fuel subsidies reform at MC11 (WT/MIN(17)/54) called for enhanced transparency and reporting that would enable the evaluation of the trade and resource effects of fossil fuel subsidies programmes.

The inadequate state of notification played out in an interesting way in agriculture at MC11, where Members did not reach an agreement on a permanent solution to the problem of public stockholding for food security purposes. The Cairns Group and the EU were clear that better transparency had to be part of any solution, but Inside Trade reported in advance that India and Indonesia -- on behalf of the G-33 group -- said the transparency obligations contained in the Bali declaration are already too onerous and that many developing countries are unable to meet their notification requirements. But after MC11, it was reported that "India will fast-track its food subsidy notification obligations at the multilateral body to use an interim reprieve agreed in 2013 to ensure it does not violate WTO rules."

An instructive example of how hard it is to advance the notification issue is what happened when New Zealand raised it at the November 2016 meeting of the Council for Trade in Goods (WTO, 2017e), saying that they wanted to encourage a through discussion at the next meeting of the Council. All delegates who spoke agreed about how important notifications are and how compliance could be improved, with Brazil stressing not only the need to recognize "Members' *individual* additional efforts but also the need for a *collective* effort to increase adherence to transparency obligations." (emphasis added) At the next meeting in April 2017 (WTO, 2017d), New Zealand again called on the Council to engage in a deeper discussion of how Members met their notification obligations and welcomed ideas on how the Secretariat could perhaps present its annual report on notifications (WTO, 2017a) in a more user-friendly way. For example, New Zealand asked, might it be possible to identify the best and worst-performing Members with a diagnostic element enabling Members better to understand why they were not always meeting their notification requirements? All the delegates who spoke again endorsed New Zealand's initiative, except Brazil, who thought that more time was needed to reflect on the idea of changing the report. Brazil suggested that each Committee take a closer look at the notifications situation in its subject area, bearing in mind the particular circumstances that existed in each Committee, before resuming a discussion of this subject at CTG level. In its annual report the CTG simply states that the Council took note of the statements made on this occasion, statements by only 15 Members, counting the EU as one.

Annex 2: Reinvigorating the work of Committees (Nairobi Paragraph 29)

Paragraph 29 of the Nairobi ministerial declaration (WT/MIN(15)/DEC) reads

“We agree to reinvigorate the regular work of the Committees and direct the General Council to consider the need for adjustments in the structure of their subsidiary bodies in light of their relevance to the implementation and operation of the Covered Agreements.”

This paragraph did not generate much follow up and such discussions that took place didn't get anywhere. Brazil appears to have been the main proponent of the paragraph, as it had been of the related paragraph 28 on RTAs. The excerpts below from the minutes of meetings where follow up was discussed are highly edited; the document symbols allow checking the full text.

At the General Council meeting on May 12, 2016 (WT/GC/M/162) the Chair made a statement on “Implementation of the Bali and Nairobi Outcomes”, which was later circulated (JOB/GC/93). His remarks were based on a meeting with the Chairpersons of regular bodies to discuss the whole range of implementation issues. With respect to paragraph 29, he said that he had started to consult with the proponents and would further discuss with all interested delegations to see how to take this issue forward. A statement with this title was repeated at a number of subsequent meetings, but these subsequent statements never again mentioned paragraph 29.

At the May 2016 General Council meeting, Brazil said that it was an appropriate time to propose that the important work performed by the regular bodies of the WTO be bolstered as part of the post-Nairobi agenda. Brazil was engaging with numerous colleagues to encourage a more substantive debate within the committees on streamlining their structure and tackling some systemic issues that made the organization less efficient than it could and should be. The initial focus of those talks had been to explore with other Members the idea of creating Working Groups on the implementation of the Subsidy and Countervailing Measures and Safeguard Agreements, which would be based on the positive and fruitful experience of the Committee on Antidumping Practices. Another body in which there was room for improvement was the Council for Trade in Services, where Brazil shared the view with other Members that the discussions held in the existing Working Groups could easily be absorbed by the broader Council's agenda. Brazil was also concerned about the difficulty to reach conclusions on some technical committee documents and had continued to favour a more flexible attitude to avoid paralysis of Committee work.

Paraguay and Argentina were supportive. New Zealand and Australia thought that part of that reinvigoration should be for all Members to urgently update their notifications. Notifications were vital for transparency and for the ongoing negotiations. Canada was pleased to hear the Chairman highlighting paragraph 29. As Brazil had suggested, Members should consider the kinds of subsidiary bodies and working procedures, working parties or ad hoc groups that could provide more hospitable vehicles for more meaningful dialogue than set pieces. Thinking about the committee structure itself was a horizontal question and should come under the Chairman's coordination when taking views of the Membership. As New Zealand had highlighted, all the architecture in the world would not get Members ahead unless they themselves fulfilled their responsibilities through active engagement, which most importantly meant notifying and responding to questions from other Members. Japan echoed Brazil on the importance of regular work in committees and argued that increased transparency through Members' timely notifications and reviews of the implementation of existing rules were critical. The European Union also noted that notifications were lagging far behind – a serious concern that undermined the credibility of the system.

At the SPS committee meeting of June 30 and July 1, 2016 (G/SPS/R/83), Brazil presented a proposal for the creation of a working group on the implementation of the SPS Agreement in the spirit of Paragraph 29. Brazil stressed that the overall objective would be to increase knowledge on how Members implement the SPS Agreement, which would have an added benefit in helping to avoid potential conflicts. Some delegations welcomed and supported Brazil's proposal but others questioned the necessity of a working group. Chile, supported by Canada,

considered that another approach, such as thematic sessions or informal discussions, would be better suited to the Committee's needs. Brazil indicated that it would submit a written proposal before the next meeting. At the meeting (G/SPS/R/84) Brazil promised a written proposal in advance of the March 2017 meeting. I have found no such proposal.

At the meeting of the Safeguards committee on October 24, 2016 (G/SG/M/50), the Chair recalled that the issue of creating a working group on implementation ((G/SCM/W/567–G/SG/W/236 AND G/SCM/W/568–G/SG/W/237) was first discussed at the spring 2016 Committee meeting, and there was a joint informal meeting of this Committee and the Subsidies Committee on 20 October 2016. He further recalled that at that informal joint meeting, Members had expressed divergent views on this idea. Brazil explained that its idea of creating a working group was aimed at improving the functioning of this Committee. Brazil was aware that many capital-based experts attended each meeting of the Committee. Taking advantage of the presence of these experts, Brazil saw merit in having a more horizontal discussion regarding SG proceedings, apart from individual issues. That would also contribute to increasing transparency. While some delegations were supportive, others who spoke wondered if there was sufficient time during the Rules week for another working group and saw more merit in having a frank discussion without worrying about the ultimate outcome in the form of possible recommendations. In the event that Members could find common ground, Brazil did not think that the possibility of making a recommendation should be entirely foreclosed. On the other hand, Brazil agreed that it should not become a negotiation.

At the April 2017 Safeguards meeting (G/SG/M/51), the Chair explained that this agenda item was requested by Brazil, and that while many Members expressed support for the idea in previous discussions, the Committee was not ready to agree to it. Some delegations remained open to further discussions, others wanted more detail from Brazil. Some were open to creation of a working group but others saw no utility in this. Some still worried that the proposal required the development of recommendations, especially ones that might create new obligations. The Chair noted that Members could not agree to the proposal yet and stated that the Committee would revert to this item in future meetings if Members so wished. It never did.

At the SCM Committee meeting of October 25, 2016 (G/SCM/M/99), the chair noted that Members had had the chance to discuss the proposal for a working group on implementation in an informal session held jointly with the Committee on Safeguards a few days earlier. During that session, Brazil had explained that its idea had been to establish a Working Group to discuss issues of interest to Members in respect of the conduct of countervailing duty investigations and application of such measures, in the same manner as was done in the Anti-dumping Working Group on Implementation. Brazil had also noted that this proposal should be seen as a step to improve the work of the Committee, as instructed by the Ministers in Nairobi the previous year. The Chair recalled that at the informal session Members had expressed divergent views on Brazil's proposal. Some Members had indicated that they could consider creation of such a Working Group on the condition that the Group's scope be widened to cover implementation of the SCM Agreement as a whole, rather than being limited to a particular portion of it. Concern also had been expressed about how sufficient time could be allocated to such an activity during the Rules week. Other Members had indicated that the scope of the proposed Working Group should be limited to countervailing actions only as proposed by Brazil. Those delegations had noted that the discussions on subsidy notifications already taking place in the Committee were sufficient and that there were many important issues regarding countervailing actions which require focused discussion. The Chair noted that there had been no real convergence of views on which to propose that the Committee took a concrete action on the proposal at the meeting.

At this meeting:

- The European Union thought that the most urgent problem of the Committee was the lack of transparency. A Working Group on Implementation could be a useful forum to tackle the problem and the EU remained interested in such work.
- While supporting the proposal, again, China did not believe that it was necessary to include the issue of notifications because the completeness and timeliness of subsidy notifications could be addressed at the special and regular meetings of the Committee.

- Canada in contrast thought that subsidy notifications were an essential aspect of transparency under the SCM Agreement and they should form a part of the agenda of any Working Group.
- The Russian Federation saw value in a technical discussion for investigating authorities, but if notification requirements were included, the discussions might drift away from *how* to implement the Agreement to *whether* the Agreement was implemented.
- India also noted that it could only agree if the discussions focused only on countervailing duty investigations and it would not support the discussions on notification-related matters.
- Australia thought transparency was a vital element for the work of the Committee. As the first step in a CVD investigation was to determine the existence of the subsidy, which was obviously related to transparency on subsidies, any Working Group needed to look at transparency issues and the SCM Agreement as a whole.
- The United States thought the continued poor compliance with the transparency obligations of the Agreement required urgent attention of the Membership. The burden of the proposed group would fall disproportionately on a small number of Members which took countervailing duty actions. The US did not see a basis to engage in further discussions regarding the adoption of this proposal until the nature and scope of responsibilities were addressed.
- Brazil recognized that the lack of transparency was behind the suggestions for an expanded scope. However, as stated by China and India, timeliness and completeness of the notifications were already dealt with under a separate agenda item.
- Although lack of notifications had been discussed at the Committee Meetings, the US noted that it was looking for a different format, namely a dialogue between Members.

The Chair indicated that the Committee was not ready to take action on the proposal as the positions had not changed since the joint informal session held previous week. He noted significant divergence of views among Members on the issue of scope, time constraints and the role on recommendations. He encouraged Members to continue to discuss the proposal among themselves. The committee did not take up the issue again.

At the June 2016 meeting of the Council for Trade in Services (S/C/50), Brazil proposed that Members consider how to restructure the work of the subsidiary bodies to the Council, given how their relevance had declined over the years (S/C/M/127). Specifically, Brazil suggested that the Committee on Trade in Financial Services be discontinued and the Working Party on GATS Rules and the Committee on Specific Commitments suspended; in lieu, a standing item would be added to the agenda of the Council for Members to discuss the issues that were currently addressed in those bodies. The Working Party on Domestic Regulation (WPDR) should continue its work if Members engaged in text-based negotiations, or also be suspended otherwise. The Council agreed that the Chairman would organise informal consultations on the issue. Although at those consultations no consensus emerged on Brazil's proposal, an item entitled "Future Work and Timing of the Next Meeting" was added to the agenda of each subsidiary body, to offer delegations an opportunity to discuss what future work might be undertaken.

At the June 2016 meeting (S/C/M/127) the Nigerian delegate asked if Brazil could put its proposal on paper to enable him to consult with his capital, a requested echoed by others including Benin, which added that consideration had to be given to which adjustments would favour LDCs and indicated that the LDC Group would revert to Brazil's suggestion.

The United States welcomed Brazil's proposal. It was difficult to argue that the cluster of services meetings just concluding had been productive and not stuck in the past. Indeed, most meetings could have been conducted by relying on 10-year old notes. Australia and India were not convinced that suspending the work of services bodies was warranted, although a meeting should not be held during the Services week if there was nothing to discuss. China believed that continuous discussions under the CTS and its subsidiary bodies were imperative and valuable. Switzerland noted that the mandate for the WPDR was contained in the GATS itself and its terms of reference were based on GATS provisions. In response to a later question from Nigeria the Secretariat confirmed that the CTS had the authority to abolish its own subsidiary bodies.

Argentina wondered if a written proposal would not be counterproductive, with Members spending time discussing the proposal instead of using it to reinvigorate services discussions. Brazil said that it would be difficult to put its ideas on paper as such a paper would require internal clearance. The idea was not to put forward a formal proposal, but to raise an issue and suggest ideas. The Chairman said that it was Brazil's prerogative to decide whether to submit its proposal in writing but noted that many delegations had indicated that a written contribution would be very helpful. He said that he would be holding consultations on the proposal and suggested that the Council take note of the statements made.

The Working Party on GATS rules held a rambling and inconclusive discussion in October 2016 on future work and the timing of the Working Party's next meeting in which paragraph 29 was mentioned (S/WPGR/M/91). The Working Party has not met since.

At an informal meeting of the Council for Trade in Services held on 20 July 2017 (S/C/53), the Chairman shared some of his ideas on possible elements for future work of the Council, while calling on Members to put forward their suggestions. At the October meeting, the Council took up the issue but decided, due to lack of interest on Members' part, that it would revert to the item only if Members so requested.

The Chairman of the Committee on Trade and Development said in July 2016 (WT/COMTD/M/99) that he had met bilaterally with several delegations in the previous weeks. He explained that he was looking to reinvigorate the CTD's work in the context of paragraph 29 of the Nairobi Ministerial Declaration. He remained open to continue to meet bilaterally with delegations to discuss the CTD's work, and in this regard invited interested Members to contact him. He also noted that he would consider convening informal meetings in small groups or in other configurations in order to explore ways to make progress on specific items on the CTD's agenda. The issue does not seem to have come up again.

At the meeting of May 12, 2017 (G/TRIMS/M/42), the chair of the Committee on Trade-Related Investment Measures reported that she had circulated an open invitation to delegations in November 2016 with an indicative list of questions that Members might want to address pursuant to paragraph 29, including on: (i) the frequency of Committee meetings; (ii) the Committee's current question and answer process; (iii) whether anything could be done to improve the timing or quality of questions and responses; and (iv) whether interested Members had any other suggestion to improve the functioning of the Committee. Only six Members attended her meetings in December but, because all of them were active in the Committee, including by raising questions and by providing answers, the consultations provided a useful indication of the perception of the functioning of the Committee. The Chair felt a general sense that the Committee was working reasonably well and there was no pressing need to introduce changes in the immediate future.

Annex 3: RTA transparency and systemic implications (Nairobi Paragraph 28)

Paragraph 28 of the Nairobi ministerial declaration (WT/MIN(15)/DEC) reads:

“... we instruct the Committee on Regional Trade Agreements (CRTA) to discuss the systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules. With a view to enhancing transparency in, and understanding of, RTAs and their effects, we agree to work towards the transformation of the current provisional Transparency Mechanism into a permanent mechanism ... ”

The CRTA has not been able to fulfil this mandate. The excerpts below from the minutes of meetings where follow up was discussed are highly edited; the document symbols allow checking the full text.

At the General Council meeting on May 12, 2016 (WT/GC/M/162) the Chair made a statement on “Implementation of the Bali and Nairobi Outcomes”, which was later circulated (JOB/GC/93). On paragraph 28 he said that he understood from the CRTA Chairman that preliminary discussions had taken place at the last meeting of the Committee, and that the Chair was also consulting on the second part of the mandate, which provided that work should be conducted on the transformation of the current provisional Transparency Mechanism into a permanent mechanism. In subsequent reports (e.g. JOB/GC/146 in October 2017) the chair added: “I will continue to provide updates on this issue, as more information becomes available.”

There was a substantial discussion in the RTA committee in September 2016 (WT/REG/M/82), launched by a statement from the then chair, Ambassador Daniel Blockert of Sweden. On the second part of Paragraph 28, he reported that he had found in his consultations that the appetite for negotiating a permanent Transparency Mechanism was not that strong. As for the first part, the difficulty was to identify what type of systemic discussion Members wanted and how it should be organized.

The United States thought it was important to bear in mind the origins of paragraph 28, which had been championed by one delegation. Some Ministers had agreed to what one Minister had wanted and that Minister had not come forward with a plan yet. On the Transparency Mechanism, there were some serious compliance problems—was that because of a design problem, or was it just that Members chose to be non-transparent and would not comply with the Transparency Mechanism? On the first part, if there was no serious appetite for looking at the systemic issues that underlay the origins of the Committee, then they could not be forced. If Members were not willing to engage and ask questions then they probably were not willing to engage in a serious conversation about the systemic implications of things such as partial scope, limited coverage of agricultural products, or other issues that had an actual impact on what Members were doing in their RTAs and the overflow impact on the multilateral trading system.

As Australia had outlined in previous interventions on the topic, this was because the emerging body of RTAs and RTA practice raised some relevant issues for the multilateral trading system and the interplay between these two universes merited further consideration and discussion among WTO Members.

The most constructive intervention came from Hong Kong, China who said they would welcome any discussion to be pursued along thematic lines, i.e. to discuss specific areas that were the subject of rule-making in RTAs. Topics of interest to Hong Kong, China included ecommerce, digital trade, competition, investment, and regulatory cooperation. It might be useful to have presentations by Members of a specific topic, sharing their experience of RTAs to be complemented by an analytical assessment prepared by the Secretariat, for example on global trends, and the emerging body of RTA rules or practices vis-à-vis relevant WTO rules, if any. This could be followed by a discussion among Members. On the process, Hong Kong, China was open to having such discussions held in dedicated sessions of the CRTA or separate seminars held back-to-back with CRTA meetings. Canada agreed with the U.S. about the compliance problem, and supported the systemic suggestions of Hong Kong, China, as did Japan, Norway, Singapore and Switzerland. The EU took a similar line, suggesting

trade facilitation as a possible topic for systemic consideration. South Africa reiterated that the outcomes of such exchanges should not be taken as rules or recommendations that Members would have to take on board.

The U.S. was surprised that Members were now pretending that "thematic" was the same as "systemic" as he saw a huge difference between the two. Brazil was satisfied that the topic-by-topic approach would be a suitable way to begin systemic discussions.

Before returning to the Paragraph 28 discussion at the November meeting (WT/REG/M/83), the United States made a presentation on procedures to facilitate and improve the examination process. The United States had taken note of the decreasing level of engagement by Members in the factual presentation review process. Few Members submitted written questions, and even fewer took the opportunity to speak during the Committee's meetings. He would find it useful to hear from Members why they believed participation levels were low, and perhaps more importantly, if there might be space – through a discussion among Members – for some new or fresh ideas for actions that could make some improvements in participation. The U.S. believed that the transparency provided in the factual summaries was intended to assist Members with any future discussion on systemic implications of RTAs for the multilateral trading system. And if Members were not getting the kind of information out of the reviews, then they ought to discuss ways to address that. He then posed a series of questions for discussion: notably, did Members find that the content of the presentations by delegations provided information that was timely or spoke to relevant issues? Finally, recalling its 2011 proposal (TN/RL/W/248) the U.S. continued to believe that the division of RTA factual presentation reviews between the CRTA and the CTD had created inefficiencies, administrative burdens and had weakened the overall effectiveness of the TM.

Canada agreed with the United States' observation that engagement in the CRTA could be improved upon. It was no secret that it was often the same seven, eight or nine Members that actually engaged and provided written questions and made commentary in the Committee. The EU had also noted the decreasing engagement in the examination process of RTAs and would be interested in looking at how Members could in operational terms improve that performance. India's preliminary position was clear: the CTD should consider the factual presentations of RTAs notified under the Enabling Clause. Australia said that the examination of individual RTAs was the core business of the CRTA and for Australia, having recently gone through the experience, the real value was the factual presentation prepared by the Secretariat. If Members could try to bring more value to that document and the work done to bring out more about RTAs that would be of benefit to everyone. Paraguay found it difficult to follow all the examinations, as there were sometimes several, and that created a resource problem. He asked the United States if its proposal would be limited exclusively to the examination process in the CRTA where the factual presentation was considered or whether it was a broader idea to reform the Transparency Mechanism completely. Paraguay would be interested in the latter. Among generally anodyne comments from other delegations, China echoed the statement by India regarding the mandate of the Transparency Mechanism which required the CTD to be the venue for consideration of RTAs under the Enabling Clause.

The U.S. responded to the many requests to put something in writing by observing that the minutes of the meeting would reflect the issues he had raised. If he were to put something in writing it would simply be, why did Members think that participation was so low? At the same time that there was an increase in the desire to discuss the importance of RTAs and their systemic implications, there was less discussion and engagement in the actual process that was supposed to feed into that. He then wondered how many Members in the Committee knew that in the following week an RTA would be reviewed in the CTD, how many had submitted questions on it, and how many Members would attend the meeting. A resolution of the venue question firmly sat in paragraph 28 which was concerned with making the Transparency Mechanism permanent and there were changes to the Transparency Mechanism that the United States wanted to see in order to make it permanent. The Committee had spent two hours the previous day discussing the status of notifications and there was some confusion about who should even discuss the record keeping of compliance. So he thought it was fair to throw it in but it could be bracketed and discussed separately if Members did not think that it had anything to do with participation levels. He was at a loss as to why the CRTA was not competent to review an Enabling Clause agreement. He thought the Committee was quite competent and he would review an RTA in the CTD the following week. So Members could not escape the United States by changing venues. The Chair concluded there was one issue about which he was not neutral

and that was that he agreed with the general description that Members were not fulfilling their duties in the Committee. Members were not doing what the Transparency Mechanism told them to do, nor upholding some of the fundamental WTO accession obligations. The difficulties the Committee had, for instance with regard to the venue, had led to a situation where RTAs were not being discussed at all and that was a problem.

At the same November 2016 meeting (WT/REG/M/83) the chair also informed Members that the systemic discussion would be on the Agenda for the April meeting as an informal item based on a presentation on the EU's experience on trade facilitation provisions in their FTAs. He understood that a few other delegations intended to present on the same issue. Any presentations or other documents would be circulated as room documents only and no formal conclusions would be drawn from the discussion. He knew that some delegations felt that the Committee should set parameters for how a systemic discussion should take place, which issues should be discussed, and in which format. However, based on the consultations he had held, he did not believe that the CRTA would be able to agree on such parameters, at least not at the moment. The Committee might risk spending years on a discussion that eventually would lead nowhere. After the informal meeting in April members could judge whether the discussion had been helpful.

Australia's view was that adding this important dimension to its regular work would revitalize the Committee and comply with the instruction by Ministers in paragraph 29 of the Nairobi Declaration. A regular, without-prejudice, informal discussion on a topic of broad interest based on experience sharing and the exchange of knowledge would indeed be a modest, but valuable step forward in breathing new life into the Committee and would serve as a clear example of the pragmatic multilateralism which many Members had long been calling for. However, regrettably, the Committee's discussions in the day's meeting had shown that even this modest outcome was not immune to linkages and sequencing that had plagued progress in other aspects of the WTO's work.

South Africa again stressed that the discussion should not aim at arriving at agreed conclusions or recommendations on which further actions would be needed as this would be beyond the mandate given to the CRTA in Nairobi. There could be no a priori assumption that issues addressed in RTAs were of common interest to all WTO Members. The delegate also stressed the importance of procedure over substance, and that it was vitally important to ensure fuller participation of Members from all levels of development in all aspects of the discussions, although it seems only a few Members used the opportunity of the meeting to take the floor. South Africa also thought that the transformation of the provisional Transparency Mechanism into a permanent Mechanism was the first order of business, but without prejudice to questions related to notification requirements.

Still at the November 2016 meeting (WT/REG/M/83) Brazil then presented its non-paper on improvements to the Transparency Mechanism (RD/RTA/41). Brazil's ideas for discussion were divided into five topics. The first was related to the notification model. Members were encouraged to adopt the notification model proposed at the CRTA, which had been used by the majority of Members in the notification of the RTAs in which they were engaged. The notification model was simple, short and straightforward. However, in light of the discussions on the systemic impacts of RTAs, Members could consider modifications to the current notification model in order to also include, in the same clear and straightforward way, the nature of the obligations undertaken in notified agreements, in particular when such agreements involved commitments in areas not covered by WTO disciplines. Parallel considerations related to the coverage of the agreements could also be contemplated in a new notification model.

Second, Members could ask the Secretariat to report on cases of early notification of RTAs under negotiation and what treatment had been given to information provided by notifying Members. Members should also discuss measures to streamline the assessment of newly notified agreements, as well as considerations on the disadvantages of the delay in the analysis of such agreements. Third, Section "F" of the Transparency Mechanism provided for technical assistance to developing countries, especially LDCs, in the preparation of information to be submitted to the WTO Secretariat. Members should identify the main obstacles to the fulfilment of the obligations of transparency by Members that were entitled to special and differential treatment. Next, while the Secretariat is required to prepare a "factual presentation" on notified RTAs, discussion was assigned to the CRTA for agreements notified under Article XXIV of GATT 1994 and Article V of GATS, while the CTD should do so for RTAs falling under the Enabling Clause. Members should discuss how the CRTA and the CTD had implemented the

Decision, and what were the available means to promote greater transparency, in line with the obligations assumed by Members, without overloading the regular work of both Committees. Finally, the provisional Transparency Mechanism did not provide for the appointment of an enquiry point that could be reached either by the Secretariat or by other Members in order to obtain additional information on notified RTAs.

Other members welcomed Brazil's proposal, though comments focused more on where it should be discussed—NGR or CRTA? The Chair said the committee would revert to the issue.

At the April 2017 CRTA meeting (WT/REG/M/84), the Chairman said that there was a large interest among Members in having a systemic discussion on the relationship between RTAs and the multilateral trading system but there were divergent views on the format. But the committee was able to have an informal horizontal discussion of the systemic implications of trade facilitation provisions in RTAs based on presentations by the EU, Japan and Australia.

Whether or not some agreements among Latin American Integration Association (LAIA) agreements have been properly notified is a longstanding issue in the CRTA. The LAIA members claim that most of the RTAs are not new agreements but only "modifications" of the initial 1980 Montevideo agreement (see WT/COMTD/W/217). Modification of existing RTAs under the Transparency Mechanism is subject to a much less detailed and stringent review process than new RTAs. This position irritates developed countries which want more information on the LAIA agreements. The issue also turns in part on whether agreements between developing countries need only be discussed in the CTD or whether they ought to be discussed in the CRTA under the Transparency Mechanism. If an agreement is only notified under Article 2(c) of the Enabling Clause, it need only be discussed in the CTD, but if it was also notified under GATT Article XXIV or GATS Article V, then the factual presentation would have to be discussed in the CRTA as well. Hence in its November 2016 proposal to the CRTA, the U.S. had recalled its 2011 Doha Round proposal (TN/RL/W/248), saying that it continued to believe that the division of RTA factual presentation reviews between the CRTA and the CTD had created inefficiencies, administrative burdens and had weakened the overall effectiveness of the Transparency Mechanism.

Seemingly arcane debate at the April 2017 CRTA meeting about notification templates reflects disagreements on what kind of information committees need to do their work. In this, his final meeting as Chairman of the CRTA, Ambassador Daniel Blockert of Sweden said that nobody could deny that the LAIA issue had been a wet blanket over the CRTA and the CTD for many years. He recognized that the issue remained unresolved.

Ambassador Walid Doudech of Tunisia assumed the chair for the June meeting of the CRTA (WT/REG/M/85), and he informed Members of his intention to continue informal consultations on paragraph 28.

At the September meeting (WT/REG/M/86) the Chairman said that an updated list of notifications had been circulated (WT/REG/W/119) showing that 74 RTAs that had appeared in factual presentations up to 12 September 2017 had not yet been notified. Discussion showed continuing controversy about whether some agreements among LAIA members should be on the list. As in previous meetings everyone stresses the importance of transparency but debates who should notify what, and in what form.

Some clarity on these issues may come from the report of the panel in Brazil – Certain Measures Concerning Taxation and Charges, which has been appealed. I think the panel reasoning is that a notification of an RTA to the CTD under 4 a) of the Enabling Clause is a procedural step that allows a subsequent claim that the provisions are eligible for special and differential treatment (WT/DS472/R, WT/DS497/R, 30 August 2017 at paragraphs 7.1051, 7.1056, 7.1077). If a Member did not notify a measure properly under the Enabling Clause, then it cannot later claim that the measure is protected by special and differential treatment under the Enabling Clause, hence the measure must stand on its own. While a determination on whether an agreement has been properly notified would still be one only a dispute panel can make, panels will be guided by the agreed practice of a committee, which could be another reason why the CRTA continues to debate whether LAIA agreements should be listed as not notified in committee documents. In sum, does lack of notification remove one justification for exceptions to MFN? This would be a novel justification for notification if confirmed by the Appellate Body, and a new support for my claim that notification can be a protection from rather than a provocation of a dispute.

Also at the September 2017 meeting, the Chairman said that he proposed to continue informal consultations on paragraph 28 of the Nairobi Ministerial Declaration. The United States expressed concern with respect to the rationale. Members knew what the declaration said and they had already had some discussion in the CRTA. Members did not necessarily share the same interpretation and they had yet to achieve consensus on how to pursue a consensus-based implementation of the language in the Ministerial Declaration. He failed to see how a top-down, Chair-driven approach only two months before the Ministerial Conference could be helpful. The Chairman said that he had no intention of imposing any kind of solution. He was not suggesting that the Committee had to come up with any kind of final answer but it should find a way of having an exchange of views and hearing from different delegations in order to take up the mandate extended by the Nairobi Ministerial Conference.

At the November 2017 meeting, (WT/REG/M/87) the Chairman said that his consultations had shown that there was more interest in pursuing the issue of systemic implications of RTAs on the multilateral trading system, although Members had also supported starting the review of the Transparency Mechanism. When delegations took the floor, it was clear that positions had not changed. India took no view on the systemic issue but was again insistent that making the Transparency Mechanism permanent was without prejudice to the question of notification requirements. India then went on at length about why the CTD was the right forum to review RTAs notified under the Enabling Clause, even if also notified under GATT Article XXIV. South Africa was open to informal discussions that in no way had implications for Members' rights and obligations. The EU and Japan recalled the issues were in the committee's mandate.

The U.S. delegate recalled that Paragraph 28 did not emerge from discussions in the committee, but instead had been inserted in the middle of the night. He did not think that any articulation of what Members had meant was possible as the issue had not been discussed. No formal proposals having been made since, the U.S. was content to move past it. The deep divergences were still there and he did not see why the Committee should confront them. The U.S. would not agree to limit itself to a discussion based on any kind of differentiation between a GATT Article XXIV and Enabling Clause agreement. So, Enabling Clause agreements would be included as would a conversation about what was eligible to be considered as an Enabling Clause agreement and what was not. He was not sure that that would be helpful but that was what he would bring to such a discussion. There were a number of other legal issues where Members had failed to reach consensus and that was precisely why the TM was provisional because Members had not been able to agree and had decided to move on. The United States had made a proposal, the only proposal, with respect to making the TM permanent, that included consolidating all RTAs under the CRTA. That position had not and would not change. He did not see the utility in opening up a conversation when he knew that positions had not changed. It was not effective to admonish Members to fulfil the mandate of paragraph 28 when the CRTA had not given birth to paragraph 28. The U.S. would welcome conversations in the Committee on a range of issues, but ones that the Committee had agreed, were organic and had not been imposed from on high.

The Chairman tried to conclude that delegations that had taken the floor had shown interest in continuing a discussion on the issues raised in paragraph 28. The U.S. said that this was the fourth or fifth time he had had almost the same conversation. He memorably observed: "The Committee had discussed having a discussion but Members had not discussed what they wanted to discuss and no one had prevented anyone from discussing that." The Chairman replied that if the Committee could not make any headway then they should say so and delegations could then agree to draw the debate to its conclusion. He suggested that the Committee continue its discussion on such matters in an informal way and the item would appear on the Agenda of the CRTA's next meeting under a different Chair.

Annex 4: Can WTO decision making be improved?

The first lament of the Friends of the System placed the emphasis on a lack of political will in the WTO's inability to reach consensus. Some people think this absence is actually a problem of institutional design, as if reform of decision making would make everything alright (Goldstein, 2017). I think the argument is misplaced: no decision rule would facilitate agreement in the absence of shared purpose but in this Annex I consider what we know about WTO decision making and the prospects for reform.

GATT/WTO has always relied on a process for finding ways to generalize a consensus first reached among key players. Giving all small developing countries a real voice in all WTO decisions is impossible. Ensuring that they understand those decisions, that they engage in the preliminary discussions and that new rules do not impose conditions they cannot meet, is essential. WTO has 43 bodies including councils, committees and negotiating groups. Some meet only a couple of times a year, but others meet more frequently. The Secretariat reports in its biennial budget proposals that thousands of formal, informal and private meetings take place every year (WT/BFA/W/427). Decision making, finding a way to build consensus, requires going to a lot of meetings, which is hard for most delegations and impossible for small ones. The real work is done in smaller groups, of which the (in)famous Green Room was only one (increasingly irrelevant) manifestation. The largest players attend virtually all such meetings, however constructed, but most Members are represented by the coordinator of their club, or by a Member who holds a similar position on the key issue in question.

Three sorts of clubs (or coalitions) are relevant in the WTO. Clubs based on a broad common characteristic (e.g. region, or level of development, like the Africa Group or the LDCs) can influence many issues, including the round as a whole, but only weakly. Clubs based on a common objective (e.g. agricultural trade) can have a great deal of influence, but on a limited range of issues. In the agriculture negotiations, for example, the G-33 (led by Indonesia) was formed to advance the interests of import-sensitive poor farmers because the Cairns Group (led by Australia) and the G-20 (led by Brazil) were dominated by export interests. Such single-issue lobby groups work well to make distributive demands, but badly to make integrative decisions: they are better for blocking than for building consensus. The many south-south clubs that emerged in the WTO and elsewhere this century are striking, as many scholars have commented, but such clubs exist to make demands of developed countries, not to make mutual concessions among developing countries. And no club based on common characteristics or common objectives has a balanced view of the WTO as a whole.

A third sort of horizontal club exists to bridge the gaps between opposed positions. The first "bridge club" was created in the Kennedy Round. After also being important in the Tokyo Round, the group was formalized as the Quadrilateral Group of Trade Ministers (U.S., EU, Japan, and Canada) at the 1981 Ottawa G-7 summit, and later played a central role in the Uruguay Round. That Quad has not met at ministerial level since 1999. Part of the effort to re-start the Doha Round after the failed Cancún ministerial in 2003 was a process involving the principal antagonists on agriculture: the U.S. and the EU, that are opposed to each other; and Brazil and India which were opposed both to each other and to the U.S. and the EU. During the last big push to complete the round in the first part of 2011, the core bridge club, now including China, was called the G-5, but a larger group, the G-11, also played a role. Despite trying many configurations among ambassadors at WTO, and involving ministers away from Geneva, including at Davos every year, no effective bridge club has emerged.

One persistent response to the institutional weaknesses of the trading system has been an attempt to regularize a small group forum. The ITO would have had an elaborate institutional structure, including an Executive Board designed to be representative of the Members of "chief economic importance" based on shares of international trade (Hart, 1995, 49, and Article 78 of the Charter). A similar body was also envisaged in the 1955 draft "Organization for Trade Cooperation," an unsuccessful attempt to remedy the GATT's institutional defects (Jackson, 1990, 16). A senior officials group was created, however, in 1975 during the Tokyo Round as the Consultative Group of Eighteen, known as CG-18. CG-18 was a fertile source of new trade policy ideas in the Tokyo Round, and in the early stage of preparing for the Uruguay Round (Blackhurst and Hartridge, 2004), but during the 1980s it gradually fell into disuse. Some thought a group of 22 (as it was by 1987) too large to be effective or too small

to be representative. In the 1980s, the group of eminent experts who provided some of the ideas that informed the preparations for the Uruguay Round recommended the creation of a Ministerial body whose limited Membership would be based on a constituency system (GATT, 1985, 48). Developing countries wary of the “Security Council syndrome” resisted proposals to create a successor group to CG-18, whether of officials or of Ministers. The American proposal of a Management Board, made before the WTO idea emerged in 1990, was seen as especially “hegemonic” by some developing countries (Croome, 1995, 156, 274; see also Stewart, 1993). Nevertheless, Sylvia Ostry believed that it was a mistake to create an organization with a strong dispute settlement system, weak legislative capacity, and no executive committee to provide leadership (Ostry, 1997, 192; Ostry, 1987; Ostry, 1998). Many other observers of the new organization thought that some such group would be needed (Jackson, 1990, 96; Jackson, 1995, 25; Schott and Watal, 2000; Blackhurst, 2001; Wolfe, 1996; Blackhurst and Hartridge, 2004). European and Canadian officials often returned to the idea of creating such a group at least at the level of capital-based senior officials, if not of Ministers (WTO, 2000; Lamy, 2004; Canada, 2000).

Constituting a board is never easy. Some developing countries and their civil society supporters correlate transparency both with open-ended meetings where everyone can participate, and with decisions being taken by bodies formally representative of all Members. This procedural logic of explicit inclusion is common in situations of low trust, or ones where participants are individually bound by the results. Given that the Single Undertaking commits all Members to the results, binding decisions can only be taken in formal WTO bodies where all Members are present, but such bodies cannot do the real work of negotiations. The larger and more representative a Board is, the more real discussions will continue among a smaller group.

The alternative model for committee structure is based on a logic of implicit inclusion through consultation. Where the first model imagines that all committees should simply be a small-scale replica of the principal deliberative body sitting as a Committee of the Whole, the latter model imagines that committees can be composed of delegates of the deliberative body. Here trust is expressed through the sensitivity of the processes by which opinions are canvassed and the openness with which Reports are written and discussed at the principal deliberative body. With its smorgasbord of issues and diversity of Members, coalitions ebb and flow in the WTO as the agenda evolves, which is one of the organization’s great strengths—as is the ability of a chair to call a restricted meeting only when s/he judges that the issues are ripe. The effort to crystallize the informal bodies that emerge organically might be needlessly divisive without accomplishing much. When the political will to find compromises and to forge consensus is lacking, changing the table does not change power relations, or the substance of a disagreement. A new formal body would not engage all Members in complex learning.

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