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Research Report

Notification and transparency issues in the WTO and the US' November 2018 communication

Research Paper, No. 92

Provided in Cooperation with:

South Centre, Geneva

Suggested Citation: Kwa, Aileen; Lunenborg, Peter (2019) : Notification and transparency issues in the WTO and the US' November 2018 communication, Research Paper, No. 92, South Centre, Geneva

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Research
Paper
March 2019

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**NOTIFICATION AND TRANSPARENCY
ISSUES IN THE WTO AND THE US'
NOVEMBER 2018 COMMUNICATION**

Aileen Kwa and Peter Lunenborg



RESEARCH PAPERS

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NOTIFICATION AND TRANSPARENCY ISSUES IN THE WTO AND THE US' NOVEMBER 2018 COMMUNICATION

Aileen Kwa and Peter Lunenborg *

SOUTH CENTRE

MARCH 2019

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ABSTRACT

Various WTO Members submitted a Communication to the WTO in November 2018 which, if accepted, would affect the implementation of Members' transparency and notification obligations at the WTO. It would strengthen the already burdensome notification obligations and introduce new punitive administrative measures should obligations not be complied with. This paper provides information about WTO Members' current notification obligations and their level of compliance; looks at the history of discussions on notifications, particularly in the Working Group on Notification Obligations and Procedures which took place in 1995 – 1996; and provides an analysis of the Communication. The analysis focuses on the extent to which the elements are consistent with or go beyond the current WTO disciplines. It concludes that non-compliance with notification obligations is real. However, rather than expanding obligations and introducing punitive measures, constructive and effective solutions should be based on nuancing of obligations in the context of a Special and Differential Treatment approach and through the use of incentives. It also acknowledges that countries with a chronic lack of capacities will continue to struggle with the WTO's complex notification obligations and requirements until they attain higher levels of development and, thus, improved institutional capacities.

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A. INTRODUCTION

Various WTO Members including Argentina, Australia, Costa Rica, the European Union (EU), Japan, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have co-sponsored a US Communication entitled ‘Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements’.¹ This Communication was first circulated on 1 November and presented at the WTO’s Council for Trade in Goods (CTG) on 12 November.²

Prior to the 11th WTO Ministerial Conference, which took place in December 2017 in Buenos Aires (MC11), the US had submitted a similar proposal for a Decision by Ministers at the Ministerial.³ This proposal failed, however, to garner consensus at MC11.⁴

Transparency is one of the pillars of the multilateral trading system. Transparency obligations are spelled out across all WTO Agreements, including those in the GATT, the GATS and the TRIPS Agreement. Notifications are one of the means to ensure transparency; they are important for all Members and for the functioning of the WTO system. Despite this, not a single WTO Member is in full compliance with all their notification obligations, including the US, EU or Japan. Moreover, it is a well-known fact that many developing countries struggle to comply with their notification obligations due to capacity issues. More than others, LDCs are lagging behind in their notifications.

This paper examines the proposals made in the referred to Communication, with the primary aim of analysing the extent to which they i) are consistent with or go beyond the current WTO disciplines and ii) effectively address one of the basic causes for non-compliance by a large number of members: the lack of capacity to collect, validate, analyse and submit the information required under a multiplicity of notification requirements and procedures.

The paper also discusses the proposed punitive administrative measures that would be triggered if a Member would slip on their enhanced notification requirements.

This paper provides in

¹ JOB/GC/204; JOB/CTG/14 2018 and their Addenda ‘Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements’, 1 November.

² The issue of transparency was also raised in Ottawa (25 – 26 October 2018) where thirteen Ministers of WTO Members noted: ‘We should strengthen the monitoring and transparency of members’ trade policies which play a central role in ensuring WTO members understand the policy actions taken by their partners in a timely manner. We are concerned with the overall record of compliance by WTO members with their notification obligations and we agree that improvements are required to ensure effective transparency and functioning of the relevant agreements. Specific improvements in this area can be achieved in the near term. Our officials will engage on concrete ideas put forward in this area’. The 13 countries are Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, <https://www.canada.ca/en/global-affairs/news/2018/10/joint-communicue-of-the-ottawa-ministerial-on-wto-reform.html?from=groupmessage&isappinstalled=0>;

³ JOB/GC/148; JOB/CTG/10 of 30 October 2017

⁴ In expressing its endorsement to the US submission commented here, Argentina noted that it represented ‘an evolution with respect to the document presented by the United States before this same Council a year ago’. It also noted: ‘we believe that it is possible to adjust certain issues and in that sense we hope to be able to make contributions in a near future’. See Statement by Argentina, CTG, 12-11-18, AGENDA WTO/AIR/CTG/12, item 13.

- Section B: information on Members' notification obligations and Members' level of compliance
- Section C: a look at the history of discussions on notification, particularly in the Council for Trade in Goods, and the Working Group on Notification Obligations and Procedures which ran for 2 years from 1995 – 1996
- Section D: comments on the proposal
- Section E: a brief orientation regarding mandates and procedures of the Council for Trade in Goods (CTG)
- Section F: conclusions.

B. ABOUT NOTIFICATION OBLIGATIONS AND MEMBERS' LEVEL OF COMPLIANCE

The title of the US et al. proposal suggests that its scope extends to all WTO Agreements. Yet, the proposed disciplines are confined to WTO Agreements within the remit of the Council for Trade in Goods.

1. What Kinds of Notification Obligations Exist and How Heavy are these Obligations on Members?

There are three types of notification obligations and procedures in the WTO Agreement's Annex 1A ('Multilateral Agreements on Trade in Goods'):

- i) Ad hoc notifications which are specifically required when certain actions are taken by a concerned Member
- ii) 'One-time only' notifications, most of which are required to provide information on the situations existing at the entry into force of the WTO Agreement for a Member
- iii) The regular periodic notification obligations (semi-annual, annual, biennial, triennial).⁵

According to the Working Group on Notification Obligations and Procedures (which was in place from 1995 – 1996), 175 notification obligations or procedures are found in Annex 1A Agreements.⁶ These include:

- 106 ad hoc notification requirements – to be submitted when certain actions are taken
- 43 one-time only obligations – upon implementation of the Agreements or accession
- 26 regular notification requirements (semi-annual, annual, biennial and triennial).

Note that these numbers are approximations when applied to obligations today. They include the Agreement on Textile and Clothing (now expired) and do not take into account the Sanitary and Phytosanitary Agreement (SPS) Agreement, the new Trade Facilitation Agreement and some other notification obligations.

A collation of the notifications required from WTO Members under Annex 1A Agreements can be found in G/NOP/W/2, 30 June 1995. Not only is there a large number of notification requirements; they are complex and require voluminous data and analysis based on often complex methodologies.

In the Technical Cooperation Handbook on Notification Requirements ('Handbook') compiled in 1996, there are 18 booklets setting out the notification requirements and procedures in the area of goods, totalling 821 pages (the WT/TC/NOTIF series). In addition, in some areas such as agriculture, new booklets have been developed on Members' notification requirements⁷. The new Agriculture booklet alone is 135 pages. Notification

⁵ G/L/112 1996 'Report of the Working Group on Notification Obligations and Procedures', 7 October, para 13.

⁶ This was the count taken in 1996, see para 50 of G/L/112

⁷ 'Handbook on Notification Requirements Under the Agreement on Agriculture', https://www.wto.org/english/tratop_e/agric_e/ag_notif_e.pdf

obligations in the goods area introduced after the compilation of the Handbook are not covered in the Handbook, such as the annual notification of tariffs and import statistics under the Decision on the Supply of Information to the Integrated Data Base⁸, notifications under the RTA transparency mechanism⁹ or the Trade Facilitation Agreement.

The implication is that it is no small task for Members with limited staff to familiarise themselves with the entire breath of WTO Agreements and prepare notifications which are ‘highly technical’ and require technical expertise.¹⁰

2. There is Already On-Going Monitoring by the WTO Secretariat of Members’ Compliance with their Notification Obligations

WTO Members’ notifications and level of compliance with their notification obligations are closely monitored by the WTO Secretariat and reports are published yearly:

- For Annex 1A Agreements (minus TFA and a couple of other elements) - the G/L/223 series, ‘Updating of the listing of notification obligations and the compliance therewith as set out in Annex III of the report of the Working Group on Notification Obligations and Procedures’
- For Agriculture - the G/AG/GEN/86/series, ‘Compliance with notification obligations - Note by the Secretariat’; there is also the Agriculture Information Management System, <http://agims.wto.org/>
- For Services – the JOB(09)/10/series, ‘Overview of notifications made under relevant GATS provisions - Informal note by the Secretariat’
- For Quantitative Restrictions – G/MA/W/114/ series, ‘Quantitative restrictions : factual information on notifications received - Report by the Secretariat’
- The SPS Information Management System, <http://spsims.wto.org>. Under ‘Reports’ in the menu there is a ‘Transparency table’. It shows for each Member whether it has notified an SPS Enquiry Point and National Notification Authority, and whether a Member has ever notified an SPS measure.
- The TBT Information Management System, <http://tbtims.wto.org>
- TRIMS Art 6.2 Notifications where Publications of TRIMS can be found in G/TRIMS/N/2/ series
- Notifications to the Integrated Database (IDB) - the G/MA/IDB/2 series, ‘Status of submissions to the IDB - Note by the Secretariat’
- The Government Procurement Agreement (plurilateral)¹¹

These documents or sites provide information about which countries have notified and which have not, and often the years they have or have not notified. The Agriculture notification tables (In both the G/L/223 and G/AG/GEN/86 series) even provide for each WTO Member, the percentage of compliance from 1995 to the present. For now, these figures range from 0% to 100%.

⁸ WT/L/225, 18 July 1997

⁹ WT/L/671, 18 December 2006

¹⁰ See paras 15 and 53 of G/L/112 on the difficulties faced by developing country delegations and the highly technical nature of notifications.

¹¹ https://www.wto.org/english/tratop_e/gproc_e/notnat_e.htm. In the GPA Committee, the US initiated a small group to discuss collection and reporting of statistical data. See e.g. GPA/WPS/STAT/29 of 5 October 2018, ‘Work Programme on the Collection and Reporting of Statistical Data - Compilation of submissions in response to the questions for further reflection circulation by the USA’.

3. No Member Fully Complies with All their WTO Notification Obligations, Not Even Developed Countries

The level of complexity and detail required in notification obligations and the challenge this poses is evidenced by the fact that LDCs are most often the Members that are unable to fulfil their notification obligations. However, even developed countries, despite their human resource capacities, are not in full compliance with all their WTO notification obligations.

In one area – Domestic Supports, for the DS:1 table, the WTO Secretariat notes that only 17 Members WTO Members are in 100% compliance, that is, 13% of the Membership. 31 Members or 23% have a compliance rate of 0% i.e. they have not submitted any DS:1 notification since they joined the WTO.¹²

Even though the LDCs have the lowest level of notification compliance, all Members, including the US and the other co-sponsors of the referred to Communication fall short in one area or another when it comes to fulfilling their WTO notification obligations. A look at Members' areas of notification difficulties also explains why the US has asked for flexibility in the area of agriculture notifications in the proposal (for notifications to be extended to 2 years). From the G/L/223/ series, it can be seen that the US is usually at least two years behind in their agriculture notifications. (The regular agriculture notifications 'should' be submitted 90 days after the calendar year, or no later than 120 days¹³).

Examples of Notification Compliance in Agriculture (as of 13 February 2019)

Notification obligation	WTO Member	Year to which notification refers	Date of latest notification (date of circulation to WTO Members)	Compliance (%)
DS:1 Domestic Support. 'For all Members with base and annual commitment levels...Notification should be made no later than 90 days following the end of the calendar...year in question'. 'Those with no commitment levels... should submit an annual notification...'	Australia	2016	27 June 2017 (30 June 2017)	96
	Canada	2014	18 May 2018 (30 May 2018)	87
	EU	2015/ 2016	19 July 2018 (23 Aug 2018)	91
	US	2016	24 Sep 2018 (31 Oct 2018)	96

Sources: Members' WTO Notifications; G/AG/GEN/86/Rev.34 'Compliance with Notification Obligations: Note by the Secretariat'

¹² G/AG/GEN/86/Rev.34 of 15 February 2019, 'Compliance with Notification Obligations: Note by the Secretariat'

¹³ G/AG/2 1995 of 30 June 1995, 'Notification Requirements and Formats: Adopted by the Committee at its meeting on 8 June 1995'

Notification Compliance – Agreement on Import Licensing Procedures – Replies to Questionnaire (Art 7.3)

All Members are required to provide replies to questionnaire on import licensing procedures by 30 September each year	United States – latest notification – 2017; missing notifications – 2001 – 2005; 2007 EU – latest notification – 2017 – no missing notifications Japan – latest notification – 2017; missing notifications – 2000 -2001; 2003; 2006. Canada – latest notification – 2016; missing notifications: 2000-2001; 2003 – 2005; 2017
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Source: G/L/223/Rev.25, 21 February 2018

Note: Members with latest notification for the year 2017 were up-to-date with their notifications, nevertheless, most still have missing notifications in various years earlier.

With respect to trade in services, GATS, Art III.3 is not being complied with by many developed countries including the US. This Article states:

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

According to the WTO Secretariat, since 1995, the US made only 2 notifications in this area, once in 2000 and another time in 2010. It is not possible that this low number of notification is because the US has not introduced laws and regulations which affect trade in services covered by its commitments all this time. In contrast, over the same period, other Members have made many more notifications: Albania (122), Switzerland (65), China (58 – China has notified yearly since 2002 after becoming a Member), South Africa (22).¹⁴

The EU also has not been properly notifying. Under GATS Art III.3, the EU did submit notifications from 2013 – 2016. However, for 13 years (from 2000 – 2012), they had not submitted any notifications.¹⁵

In conclusion, all Members have slipped in one area or another in their notification obligations, including those that have the most human resource capacities. While this affects the effectiveness of the principle of transparency, the question is how to address this problem and whether the solution is to expand or strengthen administrative punitive measures, or rather to re-examine the rationale for and operationalization of various notification requirements, address the capacity constraints through special and differential treatment and specific waivers, and provide incentives for compliance.

4. The Decision on Notification Procedures for Quantitative Restrictions (QRs) (G/L/59/Rev.1) - An Area where Few Have Notified and Could Lead to Repercussions Under the Proposal

This decision is mentioned in the co-sponsors' proposal (para 1b). This is another area of some concern as WTO Members' recent track record in compliance has been rather low.

¹⁴ JOB(09)/10/Rev.8 2018 'Overview of Notifications Made Under Relevant GATS Provisions: Informal Note by the Secretariat', 9 February.

¹⁵ JOB(09)/10/Rev.8, 9 February 2018

The QR Decision provides that Members 'shall' notify all QRs in force, irrespective of whether they affect imports or exports. The Decision, adopted by the Council for Trade in Goods on 1 December 1995 (G/L/5) was revised by the CTG on 22 June 2012 (G/L/59/Rev.1).

Under the current QR decision, Members were to have submitted notifications of their QR regime by 30 September 2012, and then in two yearly intervals. I.e. Members should have submitted 3 notifications in all since September 2012.

At the time of the last WTO Secretariat report (April 2017)¹⁶, only 32 Members had submitted notifications. Only 3 have made submissions for all three biennial periods; 9 for two periods and 14 Members for one biennial period only. Further, the quality of the notifications have been rather dismal. According to the WTO Secretariat, of the 32 notifications, 20 contain partial or no information on the tariff codes affected.¹⁷ Members were also supposed to provide the justification for the QR. 13 Members did not provide a WTO justification on 85 QRs or 9.5% of QRs notified.¹⁸

The grounds on which Members can provide QRs include:

- Exceptions to Art XI – General Elimination of QRs
- Annex 5 of the Agreement on Agriculture – providing deviation from the Agreement on Agriculture's Art 4.2 (Members shall not maintain measures which have been required to be converted into customs duties)
- Balance of payments restrictions (Art XII and XVIII of the GATT)
- Emergency Action (Safeguard) on imports (Art XIX of GATT and Agreement on Safeguards)
- Safeguard Action for Development purposes (Art XVIII GATT and Enabling Clause Decision of 1979)
- State-Trading Enterprises
- General Exceptions – protection of human, animal or plant health (Art XX)
- Security Exceptions – national security interests (Art XIX)
- Waivers to derogate from a provision approved by Members (Art IX(3), Marrakesh Agreement)
- Non-WTO Agreements – The most cited international conventions in the QR notifications include: Montreal Protocol on Substances that Deplete the Ozone Layer; CITES; The Rotterdam Convention; The Basic Convention on Hazardous Wastes etc. (See box below on non-WTO Agreements).

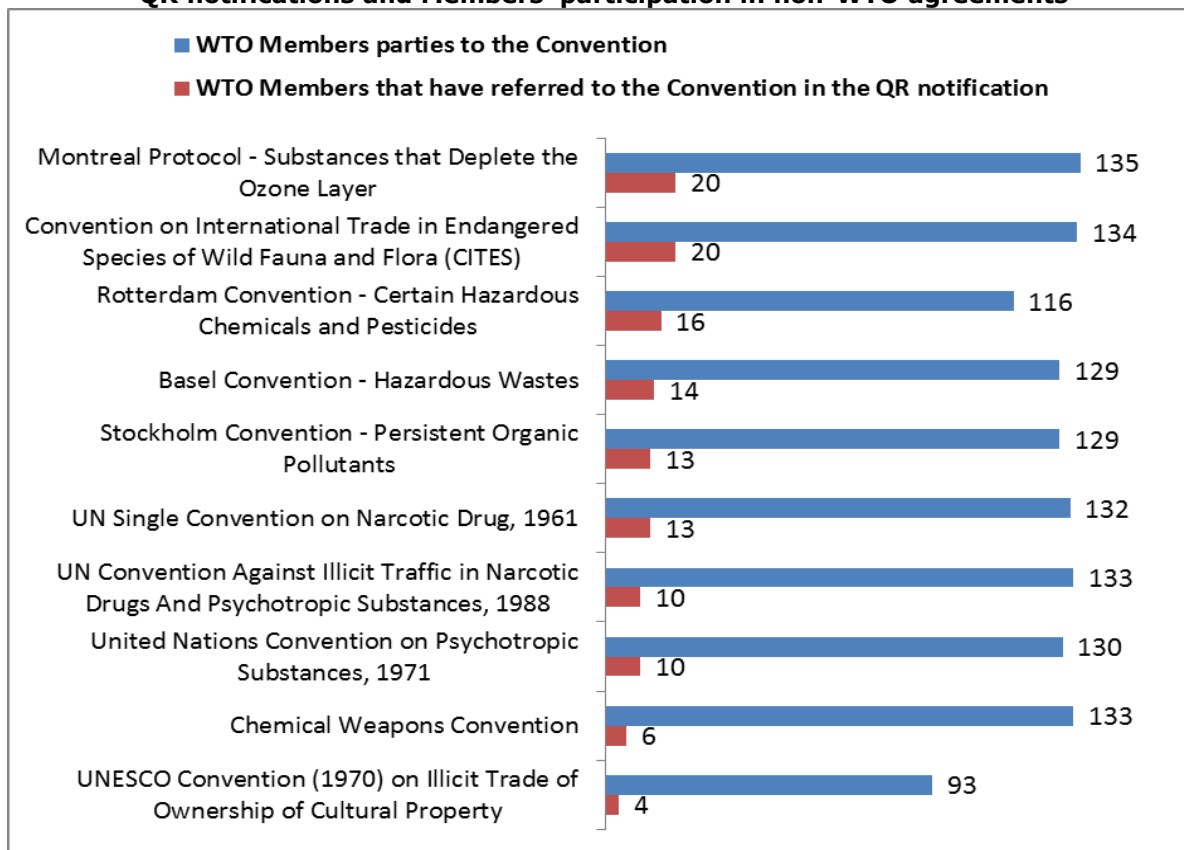
It should be noted that the Sanitary and Phytosanitary Agreement and Technical Barriers to Trade Agreements are not covered by the QR Decision.

¹⁶ G/MA/W/114/Rev.1, 27 April 2017

¹⁷ See para 3.8 of G/MA/W/114/Rev.1, 27 April 2017

¹⁸ See para 3.4 of G/MA/W/114/Rev.1, 27 April 2017

QR notifications and Members' participation in non-WTO agreements



Source: G/MA/W/114/Rev.1, 27 April 2017 by WTO Secretariat based on QR notifications and the websites of the different Conventions, Chart 6

Note: EU-28 counted as one for both bars.

From the box above, it would seem that many WTO Members probably impose quantitative restrictions for various reasons but are not notifying them to the WTO, most likely due to various factors but primarily capacity constraints.

5. Ongoing Work on Notifications Is Already Taking Place in the Council on Trade in Goods or its Committees

There has been a tremendous amount of ongoing work to improve on transparency and notifications and to support Members to implement their notification requirements. This work has been and continues to take place in many Committees of the CTG, including in recent years. The question therefore is whether or not there is need for a specific Decision today? The following are some examples.

Committee on Anti-Dumping Practices

- The Committee on Anti-Dumping Practices has adopted a new notification format pursuant to Articles 16.4 and 16.5 of the Agreement – the ‘one-time notification format’ to be used by Members who have never established an anti-dumping authority or have never taken anti-dumping actions and do not intend to do so in the foreseeable future.¹⁹

¹⁹ Para 3.2, G/L/223/Rev.25

- The Committee on Anti-Dumping adopted a decision in 2009 establishing that all Members submit their anti-dumping notifications in electronic form.²⁰

Committee on Subsidies and Countervailing Measures

- In 2001, the Committee on Subsidies and Countervailing Measures reached an understanding that new and full notifications are to be submitted and reviewed every two years. This understanding was extended indefinitely in 2005.
- The Committee on Subsidies and Countervailing Measures adopted a revised format for subsidy notifications.²¹
- Notification for all ad hoc countervailing actions must be notified to the Committee. The Committee adopted a revised format for minimum information for submission.²²
- The Committee adopted a one-time notification format for Members that do not have an investigating authority and do not anticipate taking countervailing action.²³

Working Party on State Trading Enterprises and the Council for Trade in Goods

- The Working Party on State Trading Enterprises (STEs) recommended that new and full notifications on STEs are to be presented every two years. This was agreed by the CTG on 22 June 2012.
- Notifications of STEs are made in accordance to a format provided in the November 2003 Questionnaire on State Trading.²⁴

Committee on Sanitary and Phytosanitary (SPS) Measures

- The Committee has elaborated on the Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement to help Members fulfil their transparency obligations under Art 7 and Annex B of the SPS Agreement regarding notification of SPS regulations etc.²⁵
- The Committee adopted a 'Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members' when applying SPS Measures.²⁶ This was revised in the 28-29 Oct 2009 meeting.²⁷

Committee on Market Access

- The Committee adopted a 'Framework to enhance IDB notifications compliance'. Under the Framework, if Members have 'significant gaps in their IDB submissions'²⁸, the Secretariat will step in to play a proactive role, with checks from Members.
- Electronic facilities to facilitate notification of tariff and import data by Members have been established, the 'IDB File Exchange Facility'.²⁹

²⁰ Para 3.4, G/L/223/Rev.25

²¹ G/SCM/Rev.1

²² G/SCM/3/Rev.1, 2 Nov 2009

²³ G/SCM/129

²⁴ G/STR/3/Rev.1

²⁵ G/SPS/7/Rev.4, 4 June 2018

²⁶ G/SPS/33, 27 October 2004

²⁷ G/SPS/33/Rev.1, 18 December 2009

²⁸ G/MA/239, 4 September 2009

²⁹ RD/MA/42, 27 April 2016

6. Attempts to Advance Notification and Transparency Have Not Always Been Supported by US Et Al. – C4 Proposal on Transparency in Green Box Was Rebuffed

It would seem that the US and other developed countries may have a rather selective attitude towards transparency and notification. The Cotton 4 countries very concretely included transparency provisions for the Green Box pertaining to cotton (see box below) in their 11 October 2017 proposal.³⁰ This proposal was motivated by the fact that very little detail is now provided on Green Box supports. There is no information, for example, about

- how much cotton is being supported through Green Box programmes in the US or the EU, or
- what the size of these programmes / subsidies are in relation to total cotton production in a country, or
- the types of programmes that account for these cotton supports and how they function.

It is not clear, however, why the US and others had refused to engage in greater transparency in this area.

C4 Proposal of Oct 2017 – Section on Transparency in Green Box Cotton Support (reproduced from TN/AG/GEN/46; TN/AG/SCC/GEN/18)

1.1.4 Transparency of Green Box Support

8. During the transition period defined in paragraph 7 above, when a Member with final bound total AMS commitments prepares, proposes to adopt or maintains a measure that it declares or will declare to be consistent with paragraphs 5 to 13 of Annex 2 to the Agreement on Agriculture, and which will entail support in favour of cotton producers, the Member concerned:

- a) shall publish promptly all information relating to the measure, if possible by electronic means, in a non-discriminatory and easily accessible manner;
- b) shall promptly notify the Committee on Agriculture of any measure applied or envisaged. The notification to the Committee on Agriculture shall indicate how the information concerning a proposed measure may be obtained so that the interested parties may take cognizance of them. The notification shall include the procedures to publicize the proposed measures, for comments by the interested parties;
- c) shall provide Members with the possibility, without discrimination, to submit their written comments on a proposed measure and shall take those comments into account;
- d) shall publish, in paper form or by electronic means, any comment made or a meaningful summary of the comments made in writing by Members with regard to a proposed measure;
- e) shall publish, in paper form or by electronic means, its replies to the important comments received;
- f) shall notify the proposed measures to the Committee on Agriculture for them to be examined at least twice at the official meetings, prior to their implementation;
- g) at the request of another Member, shall furnish information to show that it has taken or proposes to take into account the basic requirement that the planned measure will have no, or at most minimal trade-distorting effects or effects on production and that it has taken or proposes to take into account the obligation whereby the support in question shall not have the effect of providing price support to producers;
- h) further to Article 18, paragraph 3 of the Agreement on Agriculture, shall supply the following information:
 - a summary of the measure;
 - the base periods and yields;
 - the sources where full details may be found;

³⁰ TN/AG/GEN/46; TN/AG/SCC/GEN/18

- the expected budgetary outlay under each Uruguay Round reform programme;
 - a description of any measures aimed at minimizing the production- or trade-distorting effects of the reform programme;
 - a description of any measures aimed at ensuring that the support in question will not have the effect of providing price support to cotton producers;
 - a practical description of how the reform programme operates, including: the admissibility criteria, the definition of admissibility criteria, the type of cotton covered by the measure (including, where necessary, the corresponding tariff lines), the expected budgetary outlay by product;
 - statistical information concerning: number of admissible producers, average income per producer, average level of production per producer, average yield, average domestic price, domestic consumption, stocks at the beginning and end of the year, value and quantity of imports, and value and quantity of exports, where possible by port of export and country of destination;
 - any other information which the Committee on Agriculture might decide to include.
- i) provide, in its notifications submitted in the DS:1 table series, information on every support measure, including the details of the calculation of support for each measure, the monetary value, by cotton product, of such support, the value of production by product, the total value of agricultural production, the number of producers benefiting from the measure in question, and the sources for the information and data included in the notification.

C. BACKGROUND TO THE WTO'S PAST DISCUSSIONS ON NOTIFICATIONS AND MEMBERS' OBLIGATIONS

1. 1994 Decision on Notification Procedures and the Working Group on Notification Obligations and Procedures

As part of the Uruguay Round package, Members had agreed to a 'Decision on Notification Procedures' in Marrakesh, April 1994.

One of the mandates in this Decision was a review of notification obligations and procedures via a Working Group which would make recommendations to the Council for Trade in Goods (CTG) by the end of 1996 (two years after entry into force of the WTO Agreement).

Decision on Notification Procedures (agreed in Marrakesh 1994)

'The Council for Trade in Goods will undertake a review of notification obligations and procedures under the Agreements in Annex 1A of the WTO Agreement. The review will be carried out by a working group, membership in which will be open to all Members. The group will be established immediately after the date of entry into force of the WTO Agreement.

'The terms of reference of the working group will be:

— to undertake a thorough review of all existing notification obligations of Members established under the Agreements in Annex 1A of the WTO Agreement, with a view to simplifying, standardizing and consolidating these obligations to the greatest extent practicable, as well as to improving compliance with these obligations, bearing in mind the overall objective of improving the transparency of the trade policies of Members and the effectiveness of surveillance arrangements established to this end, and also bearing in mind the possible need of some developing country Members for assistance in meeting their notification obligations;

— to make recommendations to the Council for Trade in Goods not later than two years after the entry into force of the WTO Agreement.'

Source: Decision on Notification Procedures, 1994

The Working Group on Notification Obligations and Procedures was established on 20 February 1995 by the Council for Trade in Goods to carry out the mandate in the Decision. The Working Group held 11 meetings between July 1995 and October 1996. Its final recommendations plus recommendations by the Council for Trade in Goods can be found in G/L/112 (7 October 1996).

A key component of the output of the Working Group can be found in 'Annex III' of its report (G/L/112) where the Secretariat compiled

- i) a listing of regular/periodic and 'one-time' notification obligations under Agreements in Annex 1A of the WTO Agreement and which Members these notification requirements applied to, and
- ii) an identification of which Members had, until that time fulfilled their notification requirements, and which ones had not.

This document G/L/112 is the genesis of the CTG's G/L/223 series (the latest being G/L/223/Rev.25, 21 February 2018), which is updated yearly by the WTO Secretariat, and

contains in one document, the majority³¹ of Members' regular notification obligations under Annex 1A Agreements (i.e. Agreements pertaining to Goods) and the extent to which they have adhered to these obligations. (The Trade Facilitation Agreement has not been included). Ad hoc notification requirements are also not included in this document.³²

2. The Working Group on Notification Obligations and Procedures had Discussed Issues that were about Implementation of Existing Notification Obligations

The discussions in the Working Group on Notification Obligations and Procedures were not intended to and did not lead to new obligations for Members. The Group identified four general subjects for examination and these discussions were pursued in the two years that the Working Group met:

- i) Duplication of notification obligations
- ii) Simplification of data requirements and standardisation of formats
- iii) Improvements in the timing of the reporting process
- iv) Possible assistance to some developing countries in meeting their notification obligation.³³

3. The Working Group Realised that Failure to Comply with Notification Obligations for Developing Countries Were To A Large Degree Due to Limited Capacities

A key issue that came through in the Working Group's discussions was that some developing countries could not keep up with all their notification obligations because of human resource limitations, not helped by the complexity of the notification requirements. Some suggested that there should be additional Special and Differential Treatment (S&D) to meet existing obligations where appropriate e.g. simplified formats with more detailed information provided when requested, or prolonged time-frames. That discussion is captured in the box below.

Report of the Working Group on Notification Obligations and Procedures Regarding Discussion on Developing Countries' Lack of Capacities (G/L/112)

'16. As the Group expanded the scope of its discussions, particularly in the latter stages of its work, it became increasingly aware of the importance of two other topics - improvement in the rate of compliance with notification obligations and the need for assistance in this regard to some developing country Members. Increasingly it was recognized that much work needed to be done to improve compliance rates in all agreements, to ensure the efficient operation of the agreements, to ensure maximum transparency and to bring all Members fully into the functioning of the WTO system.

'17. It was further recognized that the key to improved rates of compliance, at least with respect to certain developing country Members, was extensive and carefully focused technical assistance in a number of forms. A concerted effort from three sides was considered to provide the best means of providing this assistance: (i) intensive training to inform Members of their obligations; (ii) guidance in setting up systems in the domestic administration to channel the obligations and the responses; and (iii) a practical handbook to provide detailed information on the preparation of notifications.

³¹ One annual notification left out is the notification of tariff duties and import statistics: 'Supply of Information to the Integrated Data Base for Personal Computers: Decision Adopted by the General Council on 16 July 1997', WT/L/225. The Decision says that 'WTO Members shall supply to the Secretariat, on an annual basis, the information referred to in document G/M/IDB/1/Rev.1.

³² This is noted in para 1.1 of G/L/223/Rev.25

³³ Report of the Council for Trade in Goods to the General Council, G/L/134, 5 November 1996

The Need of Some Developing Country Members for Assistance in Meeting their Notification Obligations

'53. Opening the consideration of this item, some developing country participants pointed out that in view of the ever-increasing workload, combined with limited resources in the small delegations, they had great difficulty in advising their governments on all aspects of the notifications required. Many developing countries had difficulty understanding the frequently complex and highly technical information demanded, and therefore faced a prohibitive task in providing complete responses to the notification requirements and formats. While they recognized that these notifications were part of their Membership obligations and they were prepared to respond to the maximum of their abilities, there were serious constraints to what they could achieve due to their limited resources. In this regard it was recognized that the WTO Technical Co-operation and Training Division was aware of the problem, had developed two workshops for delegations on this specific topic in 1995 and 1996 and would continue to provide assistance on notification obligations through their seminars and other programmes. More generally, the Group noted that the Committee on Trade and Development was in the process of drawing up guidelines for the technical cooperation activities of the WTO as they relate to developing country Members.

'54. As participants considered the specific needs of the developing, and particularly of the least-developed country Members, a number of questions were raised including: whether some additional forms of special and differential treatment in respect of the obligations themselves should be considered or if greater technical assistance to meet the existing obligations would be the most appropriate. With respect to the former, it was suggested that simplified formats might be developed for the developing countries with more detailed information being provided to the committees only when requested. In some situations, prolonged time-frames might be considered.'

The final observations by the Working Group adopted by the Council for Trade in Goods was as follows:

It 'agreed to forward to the Committee on Trade and Development the recommendation that "active consideration be given ...to the development of a special programme of assistance to developing country Members and particularly to the least-developed country Members providing more intensive technical assistance, possibly with the participation of other organizations, focusing on the development of systems and structures required to respond to notification obligations".³⁴

Source: Report of the Working Group on Notification Obligations and Procedures, G/L/112, 7 October 1996

If notification compliance issues still persist today, it may not be due to the lack of technical assistance programmes, but that technical assistance programmes, even if available and useful, still cannot make up for the limitations in human resources. If a country has only a small handful of staff (including Geneva based and those in the capital) dealing with all WTO issues, these capacity problems cannot be resolved with technical assistance, for instance, by way of workshops. The creation of effective capacity to collect, validate, analyse and submit (in accordance with the required formats and procedures) the required information goes far beyond just educating about the methodologies needed for that purpose.

4. About the Technical Cooperation Handbook on Notifications (WT/TC/NOTIF/INF/3) (cited in the US et al proposal, para 5)

The Technical Cooperation Handbook is mentioned by US et al. in their proposal. Proponents are suggesting that Members in the Decision they propose instruct the Secretariat to update the Handbook. In 1996, the Working Group on Notification Obligations and Procedures had made the following observations about the Technical Cooperation Handbook on Notifications:

³⁴ This recommendation, together with several others are contained in the Council of Trade in Goods Report to the General Council (G/L/134, 5 November 1996) which in turned formed part of the General Council's Report that was transmitted to the Singapore Ministerial Conference, see WT/GC/W/46, 7 November 1996.

‘The Group recognized (a) the considerable information made available through the notification seminars which had been arranged by the Secretariat and encouraged their continuation on a regular basis; and (b) the benefit a practical handbook would provide to many Members and supported the initiatives to prepare and circulate it as soon as possible. It was noted that these activities were being carried out by the Technical Cooperation and Training Division as part of that Division's regular work programme. The handbook would be updated, as necessary, by that Division’ (p. 11, G/L/112, 7 October 1996).

Through the years, some updating of Members’ notification requirements has already taken place. The agriculture handbook mentioned earlier is additional to the WT/TC/NOTIF series, which was published in June 2015.

D. COMMENTS ON THE TRANSPARENCY AND NOTIFICATION PROPOSAL SUBMITTED TO THE NOVEMBER 2018 COUNCIL FOR TRADE IN GOODS JOB/CTG/14; JOB/GC/204 (ANNEX 2)

1. The communication examined here in the proposal is largely the same one as that which the US had submitted to the General Council and the Council for Trade in Goods (CTG) on 12 March 2018³⁵ with a few modifications. The genesis was the US proposal on 30 October 2017³⁶.

2. Coverage of the present proposal

As noted above, the proponents are asking for enhanced notification requirements for Goods Agreements – see the list in Para 1 of the proposal.

Members' ad hoc notification requirements are mostly not covered (they are not covered in G/L/223/Rev.24 and its revisions – see Para 1 of the proposal). This is with the exception of the ad hoc notifications under the Decision on Notification Procedures for Quantitative Restrictions (see G/L/59/Rev.1 which has been mentioned in para 1 of the proposal) and ad hoc notifications required for agriculture (see para 8c of the proposal).

3. The Proposal contains elements which go well beyond Members' Existing Notification Obligations and even Takes Members Rights Away if Notifications are Incomplete i.e. it changes the balance of Members' rights and obligations. The proposal expands Members obligations in the following ways:

- **Agriculture** (para 4 of the proposal): This proposal suggests 'strengthen(ing) and enhanc(ing) the effectiveness of the review process of the implementation of commitments in the AoA' by reviewing and updating the Notification Requirements and Formats in G/AG/2.

Such strengthening would change Members' rights and obligations if 'should' notification commitments, in the operationalization of the proposed Decision, were in effect converted into 'shall' requirements, for instance, if punitive measures kicked in when 'should' notification requirements were not complied with. G/AG/2 containing Members' notification obligations for agriculture says that :

- 'For all Members with base and annual commitment levels...a notification should be made no later than 90 days following the end of the calendar...year in question.'
- 'For those Members with no base or annual commitment levels...all Members with the exception of least-developed Members should submit an annual notification...'³⁷

- **Trade Policy Review Body (TPRB)** (para 6 of the proposal): The proposal would expand the scope of the current TPRB to specifically include monitoring of Members' notification obligations and compliance. It proposes to include "a specific, standardized focus on the Member's compliance with its notification obligations under the agreements listed in paragraph 1".

³⁵ JOB/GC/148/Rev.1; JOB/CTG/10/Rev.1

³⁶ JOB/GC/148; JOB/CTG/10

³⁷ G/AG/2, p. 11

This would seem to go a step further than the existing rules. The Trade Policy Review Mechanism (TPRM) already addresses the link between notifications and the Members' Trade Policy Reviews. Section D of the TPRM on "Reporting" (last sentence), however, only states that "Information contained in reports should to the greatest extent possible be coordinated with notifications made under provisions of the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements."³⁸ This mandate is, clearly qualified as it needs to be implemented 'to the greatest extent possible'.

Furthermore, proposals for changes in the TPRM should first and foremost be raised in the TPRB. The conclusions of the 6th appraisal of the TPRM stated: "[t]he next Appraisal should include an assessment of the implementation of the conclusions reached at this Appraisal, inter alia, in terms of the transparency of Members' trade policies."³⁹

- **Counter-notifications** (para 7 of the proposal): 'Members are encouraged to provide counter notifications on behalf of another Member' for all the Goods Agreements named in para 1 of the proposal. This again is beyond the scope of current obligations. Counter-notifications are provided for in some but not all Agreements. For example, they are provided for regarding State Trading Enterprises, Agreement on Agriculture, but not in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Technical Barriers to Trade (TBT) or the Agreement on Trade Related Investment Measures (TRIMS). Until now, Members could only file counter-notifications in cases where this has been provided for in the Agreements. Expanding the possibility to make counter-notifications would imply a major change in the rights of Members in Agreements where counter-notifications are not provided for. In addition, it is unclear how, and in accordance with which procedures, a Member may act 'on behalf' of another Member without affecting sovereign decisions reserved to individual members.

Another problem is that the language in the proposed Decision would seem to allow countries to file counter-notifications without even any prior communication, discussion or attempt to resolve the matter bilaterally. As seen in the table below, some agreements allow for others to go ahead to counter-notify. Others require prior communication with the concerned Member.

Agreements providing for Counter-Notifications

Agreement / Decision	Possibility of reverse/counter-notifications?
Article XVII GATT (State trading enterprises)	Yes, Para 4 of Understanding on Article XVII of the GATT 1994: "Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned." ⁴⁰
Agreement on Agriculture	Yes. Para 7 of Article 18 ('Review of the Implementation of Commitments'): "Any Member may bring to the attention of the Committee on Agriculture any measure which it considers ought to have been notified by another Member."
Agreement on Subsidies and Countervailing Measures (ASCM)	Yes, Para 10 of Article 25 ('Notifications') "Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the

³⁸ https://www.wto.org/English/docs_e/legal_e/29-tprm_e.htm

³⁹ WT/MIN(17)/9, 4 December 2017

⁴⁰ https://www.wto.org/english/docs_e/legal_e/08-17_e.htm

	attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.”
Safeguards Agreement	Yes, Para 8 of Article 12 (‘Notification and Consultation’) “Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.”
Decision on Notification Procedures for Quantitative Restrictions, adopted by the Council for Trade in Goods on 22 June 2012 (QR Decision).	Yes, para 5 of the QR Decision: “5. Members shall be free to make reverse notifications, which shall be made using the format in Annex 1 of this Decision and shall identify the Member maintaining the restriction, as well as the known elements of paragraph 2 above. These notifications will also be automatically included in the agenda of the Committee on Market Access. The Member who is the subject of the notification will have two months from the date of circulation of the notification to comment in writing on whether the notified measure is in force and to correct any information element contained therein. If such comment is not provided within such a time frame, the Secretariat shall input into the database the information contained in the reverse notification.” <i>Note:</i> the 2012 QR decision was the outcome of the mandate of the Committee on Market Access under paragraph (d) of document WT/L/47 – “conduct the updating and analysis of the documentation on quantitative restrictions and other non-tariff measures, in accordance with the timetable and procedures agreed by the CONTRACTING PARTIES in 1984 and 1985 (BISD 31S/227 and 228, and BISD 32S/92 and 93”
GATS	Yes, Para 5 of Article III (‘Transparency’): “Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.”

Agreements Not Providing for Counter-Notifications

Agreement	Possibility of reverse/counter-notifications?
SPS Agreement	No “In response to queries, the Secretariat clarified that the process for receiving and responding to comments was bilateral. Comments of general interest could be circulated through a G/SPS/GEN series document. If substantive changes were made to the original notification, a revision could be submitted. Furthermore, the Secretariat explained that although counter-notifications did not exist under the SPS Agreement, it was possible to raise concerns regarding another Members' measure by raising a specific trade concern in the SPS Committee” (‘Report – Workshop on Transparency’, WTO document G/SPS/R/89 of 19 March 2018, para 3.4)
TBT Agreement	No
TRIMs Agreement	No
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)	No
Trade Facilitation Agreement	No
TRIPS Agreement	No

- **Imposition of ‘Administrative Measures’** (para 12 of the proposal): The main avenue suggested by the commented proposal to address the problem relating to notifications is by introducing highly punitive administrative measures, which will kick in if Members fail to comply with notification obligations after one but less than two years, and after two but less

than three years. Other mechanisms to increase transparency through notifications may be, however, more effective and take into account capacity issues. The proposal, in addition, goes far beyond existing commitments:

i) Such Administrative Measures have never been implemented with regards to lapses in notifications;

ii) The idea has been borrowed from the Administrative Measures when Members are in arrears (Annex B of the WTO's Financial Regulations⁴¹, reproduced in Annex 2 of this document). However, they go even beyond what is in Annex B in very significant ways:

- after missing deadlines for a year, Members will have to pay [x][5]% more for their contribution to the WTO

- after missing deadlines for two years, 'representatives of the Member will be called upon in WTO formal meetings after all other Members have taken the floor and before any observers'.⁴² This will have a significant impact on a Member's ability to influence debates/ negotiations in the various bodies.

- Notifications Which 'Should' be Submitted Seem Now to be An Obligation with Punitive Measures if Not Submitted

Paragraph 12 language in the proposal is problematic as it does not seem to distinguish between notifications which are framed with a 'shall' or 'should' language. To name only some examples, these include

- most of the agriculture notifications⁴³;
- ad hoc changes to quantitative restrictions which 'should' be notified not later than 6 months from their entry into force.⁴⁴

If a notification has not been submitted for more than one year, or more than 2 years, in accordance with the proposed Council Decision various punitive measures 'shall be applied'. Members' obligations would thus become amplified significantly.

4. More Flexibilities in Agriculture Especially for the Benefit of Mainly Developed Members (para 8 of the proposal):

Ironically, whilst strengthening notification obligations in various ways which would prove challenging for developing Members, the proposal has expanded flexibilities for especially developed Members in the area of agriculture notifications. As noted earlier, G/AG/2 containing Members' notification obligations for agriculture says that for all Members with Aggregate Measures of Support (AMS) commitments, 'a notification should be made no later than 90 days following the end of calendar year...'. Most developing countries, as they have 0 AMS commitments, 'should submit an annual notification'. LDCs 'should' submit Domestic Support tables 'every two years'.

⁴¹ WT/L/156/Rev.3

⁴² JOB/CTG/14; JOB/GC/204

⁴³ See G/AG/2

⁴⁴ See Decision on Notification Procedures for QRs, G/L/59/Rev.1

In the proposal (para 8), US et al. is suggesting 2 years for all agriculture notifications. In WTO discussions, the US has said that they have faced difficulties gathering information by the 3 month deadline.

5.. Penalisation if Past Notifications Have Not been Fulfilled?

The punitive Administrative Measures in para 12 also kick in if a country has provided their latest notification but still has notifications that are missing. See language in para 8 of the proposal: ‘or has failed to provide any prior required notification...’. In situations like this, a logical option would be to consider specific waivers in order to avoid an excessive and unnecessary burden on Members.

6. Penalisation if Notifications are not ‘Complete’?

Para 12 language says that Administrative Measures kick in ‘if a Member fails to provide a complete notification...’. What does ‘complete’ mean? Who judges if a notification is ‘complete’ or not?

Under the Agreement on Subsidies and Countervailing Measures (ASCM), Members are required to notify their subsidies under Art 25 (on notification). The questionnaire format for subsidy notifications⁴⁵ also requires that ‘Statistical data permitting an assessment of the trade effects of the subsidy’ is provided.

Even the US does not provide what is requested, see G/SCM/N/315/USA (14 March 2018), which is US’ subsidy notification under Art 25 of the ASCM. For their Agriculture Income Support and Marketing Assistance programmes for covered commodities, as well as their Disaster Assistance and Risk Management Assistance programmes (all these include many commodities including cotton and dairy), the US under ‘trade effects’ simply states: ‘It is difficult to determine to what extent, if any, these programs have affected trade, given the existence of other policy instruments that affect agricultural trade’.⁴⁶ A similar response is given for all other subsidy programmes.

Under this proposal, can Members be penalised if they have not answered certain questions or if they have not answered ‘adequately’, and who makes that judgement?

7. The Working Group on Notification Obligations and Procedures is Not an Existing Body; Consensus Would be Required for its Re-establishment

The Working Group on Notification Obligations and Procedures is mentioned five times in the proposal as if it already exists but, as noted above, it does not. The Body was formed in 1995 as a result of the mandate in the Decision on Notification Procedures. That mandate required recommendations to be provided to the CTG 2 years after entry into force of the WTO. The Working Group delivered on its mandate and thereafter ceased to exist. Note too that it does not feature in the Secretariat’s organogram of the organisation.⁴⁷

⁴⁵ G/SCM/6/Rev.1, 11 Nov 2003

⁴⁶ G/SCM/N/315/USA, p. 11

⁴⁷ https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm

Establishing a Working Group will require a consensus decision by the General Council or Ministerial Conference. To give an example, the 1994 Decision which provided the mandate for the Working Group says:

- ‘The review will be carried out by a working group...
- ‘The group will be established immediately after the date of entry into force of the WTO Agreement...
- ‘The terms of reference of the working group will be...’.⁴⁸

8. Role for the Secretariat in Notifications [Paras 10 and 12 of the proposal]

- Para 12: Administrative measures in para. 12 (a) and 12(b) apply if a Member ‘has not requested assistance from the Secretariat...’, ‘or if such assistance is requested but the Member has not cooperated with the Secretariat’.

The WTO Secretariat is envisaged in this proposal to play a central role in Members’ notification processes. Paragraph 12 of the document would effectively require Members who fall behind in their notifications to request support from the Secretariat or face the punitive administrative measures in para. 12a and 12b. Given that the majority of developing countries (if not all) are behind in one area of notification or other, this could mean that the Secretariat would be involved in almost all developing countries’ notification efforts. An immediate question is whether the Secretariat will have the capacity to face the massive work required to provide the necessary assistance. Involving the WTO Secretariat much more in notifications would imply a major increase in Secretariat staff time, which may not be available.

Another question is how the failure to ‘cooperate with the Secretariat’ will be judged? Who will be given the power to establish when such a failure has occurred including, for instance, when there was no agreement between a Member and the Secretariat on the extent or procedures for engaging into such cooperation?

In addition to the complexity of collecting, validating, analysing and submitting the data, in many cases, notifications cannot be done relying only on publicly available data. Seeking Secretariat support would mean giving the Secretariat access to a broad range of information that could be confidential. Furthermore, giving the Secretariat access to sensitive information may have ramifications, particularly when the Secretariat is drawn upon to provide missing information.⁴⁹

Notifications can sometimes be very political, sometimes pitting one Member against another. Hence, the proposed enhanced role of the Secretariat in notifications and counter-notifications should be seen in the light of Article VI.4 of the Marrakesh Agreement (the WTO’s foundational treaty) which stipulates that ‘the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on

⁴⁸ Decision on Notification Procedures, 1994

⁴⁹ This has been suggested in the Canadian WTO Reform paper, JOB/GC/201. It talks about gaps in notifications and counter-notifications as well as using information gathered by the Secretariat which could fill in the gaps: ‘Based on this review (of notification requirements), updates to the requirements could be considered or incentives and technical assistance could be provided to countries that have fallen behind. Counter-notifications from other Members and independent information gathering by the Secretariat might fill in the remaining gaps’.

their positions as international officials'. The Secretariat should be protected and it should not be put in positions where its actions could be seen as being partisan.

Currently, the 'Framework to enhance IDB notifications compliance', referred to earlier, adopted by Committee on Market Access in 2009⁵⁰ also provides for a very proactive role of the WTO Secretariat. However even this procedure does not go as far as what the US is proposing. The range of data sources the Secretariat can obtain information from are predefined under this Framework. The Secretariat must also inform Members where they have obtained the data from, even including agency name, contact person or website, date of receipt, as well as provide the Member with the 'actual data in the form it has been received'. Members can object to the source proposed or data retrieved. Such checks and balances are not within the US et al. proposal. In fact, in the US et al proposal, if Members object to certain data or data sources, there might even be the possibility that they could be judged to be not cooperating and be subjected to the punitive Measures in para 12.

9. Expanding the Fisheries Subsidies Negotiations Mandate Regarding Transparency (para 14 of the proposal)

According to the MC11 Decision on Fisheries Subsidies, Ministers said that 'Members re-commit to implementation of existing notification obligations under Article 25.3 of the Agreement on Subsidies and Countervailing Measures thus strengthening transparency with respect to fisheries subsidies'.⁵¹

The MC11 Decision is about implementing existing notification obligations. This US et al. proposal seems to aim at broadening that MC11 mandate: 'The Rules Negotiating Group will develop enhanced notification procedures as part of the ongoing fisheries subsidies negotiations...' (para 14).

10. The implementation of the proposed Decision Will be More Burdensome on Developing Countries

As noted, compliance with notification commitments is highly dependent on a Member's human resource capacities. The same applies to the ability to use the information obtained from notifications of other Members to pursue a Member's own interests. As a result,

- LDCs are the members that most often fall behind on their notification obligations; many developing countries with limited capacities also fall behind.⁵²
- In the relevant Committees, developed countries are those that cross-examine developing countries' notifications and their policies and programmes referenced in these notifications, rather than vis-versa.

Hence, this proposal will affect developing countries far more substantially than developed countries.

11. All Members are Subjected to the Same Obligations – no Special and Differential Treatment

⁵⁰ G/MA/239 of 4 September 2009

⁵¹ WT/MIN(17)/64; WT/L/1031

⁵² See G/L/223/Rev.25

The possibility for Members to escape sanctions if they request assistance in accordance with para. 12 (chapeau) of the proposal, may be seen as providing some flexibilities, but only in notification timelines, subject to a 'case-by-case' consideration and, as noted, to uncertainty as to when there has been or not Member's 'cooperation with the Secretariat'.

Given the noted capacity constraints, however, rather than aiming at ensuring that each WTO Member complies with all and the same notification obligations, reduced obligations (e.g. less detailed information required, less frequent notifications) would need to be considered in the context of an S&D treatment.

Members may be asked to justify in the committees when they present their case, why they require this assistance or why they have not cooperated.

12. Members who are in Arrears Will be Doubly Punished

Members who are already in arrears with outstanding payments of up to 3 years are denied training or technical assistance under the WTO's Financial Regulations (see Annex 1 of this document)⁵³. For these Members, this proposal would be a double punishment as they would not be able to request the WTO Secretariat technical assistance in order to avoid the punitive measures in para 12(a) and 12(b) of the US et al. proposal.

⁵³ Annex B of WT/L/156/Rev.3, 27 February 2015

E. PROCEDURAL ISSUES

The Mandate of the Council for Trade in Goods (CTG) is set out in Art IV.5 of the Marrakesh Agreement:

‘The CTG shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A... These Councils [CTG, the Council for Trade in Services and the TRIPS Council] shall carry out the functions assigned to them by their respective agreements and by the General Council’.

This means that the Councils, including the CTG, are to implement existing commitments arising from the WTO Agreements. Anything else they do can only take place if assigned by the General Council.

The practice at the WTO so far has been that issues beyond the implementation of existing commitments have been addressed in negotiations taking place in Special Sessions, not in regular bodies. Therefore, this new issue of enhancing and strengthening notification and transparency, if agreed to by consensus, should be addressed in a negotiating body.

There was, however, no consensus on this proposal in the CTG that took place on 12 November 2018. According to Rule 33 of the rules of procedure of the CTG, ‘[w]here a decision cannot be arrived at by consensus (in the CTG), the matter at issue shall be referred to the General Council for decision’.⁵⁴

If the issue is taken to the General Council, Rule 33 of the General Council will apply:

‘The General Council shall take decisions in accordance with the decision-making provisions of the WTO Agreement, in particular Article IX thereof entitled "Decision-Making"’.⁵⁵ I.e., decisions will have to be taken by consensus in the General Council.

⁵⁴ This is in G/C/W/2, adopted by the General Council on 31 July 1995, WT/GC/M/6

⁵⁵ WT/L/161

F. SUMMARY AND FINAL CONCLUSIONS

1) The Proposal Goes Beyond Implementation of Existing Notification Requirements. The Communication aims to address the problem of notification compliance through strengthening notification requirements in the following ways:

- encourages counter notifications ‘at any time’⁵⁶ (without differentiating agreements which do not contain the possibility for counter-notifications);
- expands the TPRM’s oversight in the area of notifications;
- seems to change notification requirements from ‘should’ to effectively a ‘shall’;
- current or even old notifications which have been missed may trigger punitive administrative measures which would remove some of Members’ existing rights. I.e. even if a Member were up to date in notifications but had not notified in a particular year, punitive measures could be taken.

2) Deeper levels of ‘transparency’ have substantive linkages and implications. For instance, in Agriculture – ‘enhancing transparency’ could mean more probing into Members’ agriculture programmes e.g. developed countries’ Green Box farm programmes. This is probably why developed countries have refused the Cotton 4 (C4)’s suggestion for more transparency on Green Box notifications relating to cotton.⁵⁷

3) The Proposal gives the Secretariat a central role in Members’ domestic efforts in complying with notification requirements. If the proposed punitive administrative measures are to be avoided, Members must have sought assistance from the Secretariat (para 9 and 12) and they must have cooperated with the Secretariat (para 12). The proposal is unclear regarding the extent of the ‘cooperation’ that would be required. Questions arise also with regard to access to confidential information and its possible further use by the Secretariat, for instance, when it is drawn upon to provide missing information.

4) The Proposal, if adopted, would Hit Developing Countries Much Harder than Developed Countries Due to Capacity Issues

Developing countries already have difficulties complying with the present obligations. This is particularly so in the case of LDCs. They would therefore feel the weight of this proposal much more than developed countries. Further, technical assistance, for example, through more workshops cannot fully resolve the capacity issue when Members simply have too few staff working on all WTO matters.

In addition, it is also mostly developed countries that will have the capacity to use the information in notifications to question developing countries in the Committees, and to put in counter-notifications. Developing countries, instead, would not have the same capacity to use the enhanced notifications regime in the relevant Committees to demand developed countries to align their subsidies, programmes and policies with the WTO substantive obligations.

5) The CTG Mandate is the Implementation of Existing Commitments, Not Negotiations

⁵⁶ Para 7, JOB/GC/204; JOB/CTG/14

⁵⁷ TN/AG/GEN/46; TN/AG/SCC/GEN/18, 11 October 2017

This proposal contains measures that go beyond the implementation of existing commitments and, therefore, it is beyond the mandate of the CTG, unless a decision is taken by the General Council by consensus.

6) In conclusion: While the problem of non-compliance regarding notifications is real, constructive and effective solutions based on the nuancing of obligations in the context of an S&D approach and incentives, rather than stronger punitive measures, should be sought. It is not in developing countries' interests to expand their notification obligations any further. Regular committees should continue to monitor the implementation of compliance obligations. Technical support sessions could be held within the regular body meetings to plug the technical gaps that may exist. The Secretariat may organize workshops at the national level to support better notification and compliance. However, notifications are complex and require not only familiarity and training in respect of the WTO Agreements and obligations, but also capacity to collect, validate, analyse and present the required information. Whilst all this additional support is very important, there should also be an understanding that countries with chronic lack of capacities are likely to still struggle to varying degrees to meet the multiple notification requirements, until they attain higher levels of development and, thus, improved institutional capacities.

ANNEX 1:

FINANCIAL REGULATIONS OF THE WORLD TRADE ORGANIZATION WT/L/156/Rev.3 of 27 February 2015

ANNEX B ADMINISTRATIVE MEASURES FOR MEMBERS AND OBSERVERS IN ARREARS

Category	Administrative Measures
I	<p>After one but less than two full year's assessed contributions remain outstanding at the end of the year:</p> <ol style="list-style-type: none"> 1. Representatives of Members will not be nominated to preside over WTO bodies 2. Documentation will not be posted to delegations in Geneva nor to the Members' and Observers' capitals. 3. At the beginning of each year, the Director-General will notify the Ministers of the Members and Observers responsible for the WTO of the applicable administrative measures. 4. The Director-General will contact annually the Minister of the Members' and Observers' responsible for the WTO, or any other official at the appropriate level emphasizing the question of arrears. 5. The Secretariat will report annually to the Committee on Budget, Finance and Administration on the implementation of administrative measures. 6. Members and Observers will be subject to specific reporting at the General Council meetings.⁵⁸
II	<p>After two but less than three full year's assessed contributions remain outstanding at the end of the year, in addition to the measures of Category I:</p> <ol style="list-style-type: none"> 1. The access of the WTO Members' web site will be discontinued.⁵⁹ 2. The ability of Members to act on the recommendations by the Committee on Budget, Finance and Administration to the General Council on financial matters will be removed. 3. Observers will be denied access to training or technical assistance. <p>The Chairs of the accession working group of Observers will remind the delegation of Observers, during their working group meeting, of their financial obligations.</p>
III	<p>After three full year's assessed contributions remain outstanding at the end of the year, in addition to the measures of Categories I and II:</p> <ol style="list-style-type: none"> 1. Members and Observers will be designated as Inactive Members and Inactive Observers, respectively. 2. Inactive Members will be denied access to training or technical assistance other than that necessary to meet their WTO Article XIV-2 obligations. 3. The accession working groups do not meet either formally or informally. WTO will suspend its request for annual contributions from Inactive Observers. Request for annual contributions will resume the year the Observers are not anymore designated as Inactive.⁶⁰ 4. Inactive Members and Observers taking the floor in the General Council will be identified as such.

⁵⁸ See General Council procedures.

⁵⁹ Applicable to Members and Observers. Under current policy, Observers have a differentiated access to documents posted on the Members' Website.

⁶⁰ To be enforced starting 1 January 2013.

ANNEX 2:

JOB/GC/204; JOB/CTG/14, 8 November 2018 (Two other countries have since been added to the list of co-sponsors: The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Australia)



WORLD TRADE
ORGANIZATION

JOB/GC/204
JOB/CTG/14

1 November 2018

(18-6887)

Page: 28/48

General Council
Council for Trade in Goods

Original: English

**PROCEDURES TO ENHANCE TRANSPARENCY AND STRENGTHEN
NOTIFICATION REQUIREMENTS UNDER WTO AGREEMENTS**
COMMUNICATION FROM ARGENTINA, COSTA RICA, THE EUROPEAN UNION,
JAPAN, AND THE UNITED STATES

The following communication, dated 1 November 2018, is being circulated at the request of the Delegations of Argentina, Costa Rica, the European Union, Japan, and the United States.

Draft General Council Decision

**Procedures to Enhance Transparency and Strengthen Notification Requirements
Under WTO Agreements**

Decision of X Date

The General Council,

Recognizing that transparency and notification requirements constitute fundamental elements of many WTO agreements and a properly functioning WTO system, and thus of Members' obligations;

Acknowledging the chronic low level of compliance with existing notification requirements under many WTO agreements; and

Desiring to strengthen and enhance transparency and improve the operation and effectiveness of notification requirements;

Decides:

General

1. To reaffirm existing notification obligations and recommit to providing complete and timely notifications under the WTO Agreements within the remit of the Council for Trade in Goods, for which there is regular annual reporting provided by the Secretariat (G/L/223/Rev.24 and its revisions), including the:

- (a) Agreement on Agriculture

- (b) Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping)
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards
- Understanding on the Interpretation of Article XVII of the GATT 1994 (State Trading)
- Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation)
- Agreement on Import Licensing Procedures
- Agreement on Rules of Origin
- Agreement on Preshipment Inspection
- Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1)
- Agreement on Trade Related Investment Measures
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Technical Barriers to Trade.

2. To instruct appropriate committees, working groups or other bodies, such as the Working Group on Notification Obligations and Procedures (Working Group), to assess and report annually to their designated supervisory bodies on Members' compliance with notification obligations under the agreements listed in paragraph 1, take appropriate steps to reinforce compliance with the notification requirements under such agreements (for example, by carrying out notification workshops), and to make recommendations, as appropriate, on means by which greater compliance can be encouraged and achieved.

3. To instruct the Working Group to meet before [x date] to develop recommendations on improving Member compliance with notification obligations under the agreements listed in paragraph 1. The Working Group will consult with appropriate committees, other working groups and bodies as appropriate, and consider both systemic and specific improvements that can help Members improve compliance with notification obligations. The Working Group will also consult with the WTO Secretariat as appropriate, including the WTO Institute for Training and Technical Cooperation (ITTC) to assess the contribution of WTO trade-related technical assistance to improving notification compliance, as well as the Central Registry of Notifications. The Working Group will report to the Council for Trade in Goods on its findings before [x date], and provide updates at each subsequent meeting.

4. In light of the particular importance Members attach to the WTO's work to reform agriculture, and in order to strengthen and enhance the effectiveness of the review process of the implementation of commitments in the Agreement on Agriculture, the Committee on Agriculture is requested to review and update its Notification Requirements and Formats (G/AG/2), taking into account recommendations made by the Working Group and other bodies described in paragraphs 2 and 3.

5. To instruct the Working Group to work with the Secretariat to update the Technical Cooperation Handbook on Notifications (WT/TC/NOTIF/INF/3) and present it to the Council for Trade in Goods for its [x date] meeting.

6. To instruct the Trade Policy Review Body to ensure that beginning in 2019 all trade policy reviews include a specific, standardized focus on the Member's compliance with its notification obligations under the agreements listed in paragraph 1.

7. At any time, Members are encouraged to provide a counter notification of another Member concerning notification obligations under the agreements listed in paragraph 1.

8. That beginning in [x date], a Member that fails to provide a required notification under an agreement listed in:

- (a) paragraph 1(a) within [720 days] [2 years] following the year that a notification is required by the Committee on Agriculture's Notification Requirements and Formats (G/AG/2) or has failed to provide any prior required notification, that Member is encouraged to submit to the Committee on Agriculture by [x date] of each subsequent year an explanation for the delay, the anticipated time-frame for its notification, and any elements of a partial notification that a Member can produce to limit any delay in transparency;
- (b) paragraph 1(b) by the relevant deadline or has failed to provide any prior required notification is encouraged to submit to the relevant committee by [x date] and by [x date] of each subsequent year an explanation for the delay, the anticipated

time-frame for its notification, and any elements of a partial notification that a Member can produce to limit any delay in transparency; and

- (c) paragraph (1a) as far as ad hoc notifications are concerned, the Member shall follow current practice under G/AG/2.

9. A developing country Member encountering difficulties to fulfil notification obligations or the information required under paragraph 8 is encouraged to request assistance and support for capacity building from the Secretariat, either in the form of WTO trade-related technical assistance or as ad hoc-assistance for a particular notification. The Secretariat shall advise Members on the most appropriate assistance available.

10. Each developing country Member is encouraged to submit to the relevant committee and to the Working Group by [x date] and by [x date] of each subsequent year information on those notifications under the agreements listed in paragraph 1 that it has not submitted due to a lack of capacity, including information on the assistance and support for capacity building that the Member requires in order to submit complete notifications.

11. If a Member fails to provide a complete notification within one year of the deadline set out in paragraph 8(a) or (b), the Member may request that the Secretariat assist the Member in researching the matter and, in full consultation with the relevant Member, and only with the approval of that Member, provide a notification on its behalf.

12. For an agreement listed in paragraph 1, if a Member fails to provide a complete notification within one year of the deadline set out in paragraph 8(a) or (b) and that Member has not requested assistance from the Secretariat identified in paragraph 9 or if such assistance is requested but the Member has not cooperated with the Secretariat, the following administrative measures shall apply to that Member:

- (a) After one but less than two full years from a notification deadline, the following measures shall be applied to the Member at the beginning of the second year:
 - (i) representatives of the Member cannot be nominated to preside over WTO bodies;
 - (ii) questions posed by the Member to another Member during a Trade Policy Review need not be answered;
 - (iii) the Member will be assessed a supplement of [x][5] percent on its normal assessed contribution to the WTO budget, to be effective in the following biennial budget cycle;
 - (iv) the Secretariat will report annually to the Council for Trade in Goods on the status of the Member's notifications; and
 - (v) the Member will be subject to specific reporting at the General Council meetings.
- (b) After two but less than three full years following a notification deadline, the following measures shall be applied to the Member at the beginning of the third year, in addition to the measures in subparagraph (a):
 - (i) the Member will be designated as an Inactive Member;
 - (ii) representatives of the Member will be called upon in WTO formal meetings after all other Members have taken the floor, and before any observers; and
 - (iii) when the Inactive Member takes the floor in the General Council it will be identified as such.
- (c) The administrative measures identified in paragraph 12(a) and 12(b) shall not apply to Members that have submitted information on the assistance and support for capacity building that the Member requires, as set out in paragraph 10.

13. At the beginning of each year when measures will be applied to any Member, the Director-General will notify the Ministers of those Members responsible for the WTO of the administrative measures being applied with respect to those Members. Once any such Member comes into compliance with its notification requirements, the measures will cease to apply.

14. Taking into account the decision of Ministers at the 11th Ministerial Conference to recommit to the implementation of existing notification obligations for fisheries subsidies (WT/MIN(17)/64;WT/L/1031), and recognizing the significant contribution that enhanced fisheries subsidies notifications would make to the negotiation and implementation of prohibitions on harmful fisheries subsidies, the Rules Negotiating Group will develop enhanced notification procedures as part of the ongoing fisheries subsidies negotiations in that body, in consultation with the Committee on Subsidies and Countervailing Measures as appropriate.

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ISSN 1819-6926