

8 Notifications, trade policy reviews and monitoring

Quis custodiet ipsos custodes? [Who watches the watchmen?]

Juvenal
Satire VI, lines 347–348 (c. 100 AD)

Introduction

One of the functions of the WTO is to collect, assess and disseminate information about members' trade policies. It does so principally through three mechanisms: the notifications that members are required to make about their own laws and policies, the reviews conducted by the Trade Policy Review Body (TPRB) and the monitoring activities that the Secretariat revived when the financial crisis broke in 2008. These activities can be arrayed along a spectrum of Secretariat activism and analysis, such that the notifications are principally the responsibility of the members themselves and are strictly factual and narrowly focused; the trade policy reviews (TPRs) are comprehensive investigations conducted cooperatively by the members and the WTO Secretariat, and involve some degree of judgment of the members' policies; and the monitoring activities are conducted cooperatively with other international organizations, and are explicitly aimed at identifying any "backsliding" by members.

These activities serve two and possibly three different purposes. The principal purpose is to promote transparency and compliance. Each of these activities is, to varying degrees, a relatively low-pressure form of enforcement that relies on moral suasion rather than the threat of retaliation. Together they provide a means of determining whether members are abiding by the commitments that they make in the WTO while also revealing the extent to which they utilize the "policy space" permitted within the terms of the agreements and their schedules. This can be as important to the member in question as it is to that member's trading partners. It is quite possible that legislators or other policy-makers in a country might unknowingly enact laws or otherwise pursue policies that run afoul of their commitments. That can be an especially large problem in those areas that were not traditionally part of the GATT system (e.g. services). When members are required to report on their own measures, and are also subject to periodic reviews and regular monitoring, both they and the larger community in which they form a part may be more likely to catch potential violations of commitments either before they take place or, if they have been enacted, before some trading partner feels compelled to raise the matter in the Dispute Settlement Body. The Trade Policy Review

Mechanism (TPRM) and the monitoring activities undertaken since 2008 occupy something of a middle ground between notification (self-surveillance) and dispute settlement, entailing a more active, investigative role for the Secretariat and implying the possibility that members with non-conforming measures will be named and shamed. The links between TPRs and the Dispute Settlement Understanding are nevertheless attenuated by the rule specifying that the reports produced in this process cannot be cited in disputes.

A second function is to provide more information to and about the trading system. Notifications, TPR reports and monitoring all add to the sum of facts and analysis available to negotiators, policy-makers, journalists and scholars. Some types of information are more useful to certain groups than they are to others. Notifications on such matters as sanitary and phytosanitary (SPS) measures or changes in a country's non-preferential rules of origin are unlikely to be of interest, or even comprehensible, to anyone who is not an expert in those fields, but TPR and monitoring reports are more accessible to the lay reader. TPR reports are an especially useful reference work, and have come to be considered required reading for anyone seeking to familiarize themselves with the trade and other economic policies of a given country. The monitoring reports may be the most reader-friendly of all, and receive more press coverage – and thus presumably attract more attention from policy-makers – than the other instruments.

The third, and most controversial, function that these activities might perform is to influence policy-making. The aim here would be to go beyond the limited goal of ensuring compliance to the more ambitious aim of guiding countries into adopting better policies. This is something that members might be persuaded to do on an autonomous basis, in which they might be urged to view their commitments as floors rather than ceilings. This is one of those issues that lays bare the division between lawyers and diplomats on the one hand and economists on the other, especially in the case of the TPRs. These reports are principally factual accounts and contain the kinds of information that lawyers and negotiators find useful. The TPRs also engage, to a limited degree, in economic diagnosis. That is not the same as prognosis, however, and is farther still from prescription. To committed free-traders, that might seem like a lost opportunity to counsel members on the more active steps that they might take to open their markets, reduce government intervention in the economy or otherwise improve their laws and policies. TPRs have moved a bit in that direction over the years, but going as far as some critics suggest would require a major departure from the established limits within which the membership allows the WTO Secretariat to operate.

This chapter reviews the experience with each of these instruments, proceeding in a chiefly chronological manner. The notification requirements are the oldest of the mechanisms, being an inheritance from the GATT period. The only important difference in the WTO period, apart from the greater accessibility of the notifications in the Internet age, is in the larger number of topics that fall within the system and hence a greater number of notifications that countries are required to make. The TPRM straddles the late GATT and WTO periods, having been provisionally established in 1988 as part of the somewhat misnamed “mid-term review” of the Uruguay Round. It has evolved ever since then, the most important change being the

emergence of the WTO Secretariat report as the principal focus of TPRB activity and the downgrading of the reports prepared by the members themselves. The monitoring programme is the newest of these activities, being a product of the crisis atmosphere of 2008.

Notifications

Notifications have been a part of the multilateral trading system since its inception. Another historical constant for notifications is the failure of many GATT contracting parties and now WTO members to comply fully with these requirements. While most developed countries appear to file most of the required notifications most of the time, and the same can be said for some of the developing countries, the record is less encouraging among developing countries in general and especially among the poorer and smaller ones.

Notification is a complement to the general requirement for transparency and the publication of measures, obliging countries not only to make their measures known via government gazettes or other domestic outlets but that they also provide information to their trading partners via the WTO. A notification will typically consist of a short statement that follows a standard format in which the member identifies the law, regulation or action that is at issue, the precise content of which varies according to the agreement and topic involved. This document is filed with the WTO and made available to other members and the public. Specific agreements may also require that members take other steps to promote transparency. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), for example, requires not only that members publish all SPS measures and notify changes that are made to them, but further requires that they identify a single central government authority responsible for the notification requirements (i.e. the National Notification Authority) and establish a National Enquiry Point responsible for answering questions from other members about SPS measures and related issues.

Transparency has always been recognized as a cardinal virtue in the multilateral trading system. It is encouraged by GATT Article X (Publication and Administration of Trade Regulations), which provides in Paragraph 1 that “[l]aws, regulations, judicial decisions and administrative rulings of general application” on matters related to trade “shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.” Paragraph 2 further provides that “measure[s] of general application” affecting duties, or “imposing a new or more burdensome requirement, restriction or prohibition on imports” or payments cannot “be enforced before such measure has been officially published.” The article also requires, among other things, the publication of “[a]greements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party,” thus providing the trade policy complement to the Wilsonian principle of “open covenants openly arrived at.”

Other GATT articles supplemented this general principle of transparency and publication by requiring the notification of certain types of measures. For example, GATT Article XVI:1 provided in part that any contracting party that offered subsidies to its industries had to notify

GATT in writing “of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary.” Other notification requirements in GATT 1947 are found in articles XVII:4 (state-trading enterprises), XVIII:7 and XVIII:14 (governmental assistance to economic development), and XXIV:7 (customs unions and free trade areas). The scope of notifications expanded with the agreements negotiated in later rounds, as well as with the horizontal requirement set by the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.¹ This Tokyo Round instrument provided that “to the maximum extent possible” a GATT contracting party had to –

notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

The contracting parties thus had an extensive experience with notifications by the time that the Uruguay Round commenced in 1986, but not always a satisfactory one. While the topic was not explicitly included in the list of issues that the ministerial declaration laid out for the Functioning of the GATT System (FOGS) negotiations it arose in that group’s deliberations. In March 1988, for example, the European Community noted the “widespread concern that the level of compliance leaves much to be desired and that the notification system continues to be excessively fragmented,” and stressed that “[n]otification of trade measures is a basic transparency requirement and provides the backbone for effective surveillance.”²

One consequence of the improvement in information technology in the years since the Uruguay Round is a shift in the perceived nature of the problem with the notification system. At the start of the round one of the principal problems that contracting parties observed concerned the retrieval of notifications that had been made. Declaring that the GATT system for handling notifications was “decentralized and unwieldy,” the United States proposed that “the GATT could institute and maintain a central repository of all notifications of measures subject to GATT surveillance” that would be copied on any notifications that were made to the relevant committees for those notifications.³ Other participants in the FOGS negotiations expressed similar concerns, including the European Community, Jamaica and New Zealand. That proposal for a central registry came at a time when all manner of information was still submitted, stored and disseminated either exclusively or primarily in hard copy, a medium that is inherently more costly and time-consuming to manage than electronic documents. The problem was only worsened by the fragmentation of the GATT system. These concerns were addressed by the Uruguay Round Decision on Notification Procedures, one provision of which established a Central Registry of Notifications. The larger solution to the problem developed outside the GATT/WTO, as the Internet itself is a central repository on a

scale and degree of user-friendliness that trade negotiators could only imagine in the late 1980s. In the GATT period, a trade ministry received a regular blizzard of documents from Geneva that would soon be lost or buried if they were not properly catalogued in a well-maintained library. In the WTO period, which happens to coincide precisely with the Internet age,⁴ those same documents are far more easily searched, downloaded and used. Creation of the Central Registry of Notifications became almost a moot point with the rapid spread of the Internet and the virtual centralization of all electronic information about activities in the WTO.

The more enduring problem concerns not the storage, dissemination and access to notifications but their generation in the first place. This is a problem that rests with the members rather than the Secretariat, as there are many among them that do not keep up with the notifications that are required by the Uruguay Round agreements. To cite an example, Annex B of the SPS Agreement provides in part that:

Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall ... notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account.

Article 2.9 of the Agreement on Technical Barriers to Trade includes very similar language with respect to "relevant international standard[s]." To cite another example, Article 16.4 of the Anti-dumping Agreement⁵ provides that:

Members shall report without delay to the Committee [on Anti-Dumping Practices] all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

Article 25.11 of the Agreement on Subsidies and Countervailing Measures establishes substantially the same obligation with respect to countervailing duty investigations.

One horizontal product of the Uruguay Round was the Decision on Notification Procedures. Noting the members' desire "to improve the operation of notification procedures," and hearkening back to the understanding reached in the Tokyo Round, this decision reiterated and extended that understanding while also providing an Indicative List of Notifiable Measures (see Box 8.1). Even that list underestimates the number of requirements; there are altogether more than 200 provisions in WTO agreements requiring notifications, most of them related to non-tariff measures.⁶ The decision also called for a working group to undertake a

“thorough review of all existing notification obligations ... with a view to simplifying, standardizing and consolidating these obligations to the greatest extent practicable, as well as to improving compliance with these obligations.” That working group issued a report in 1996 that reviewed concerns over duplicative notification requirements across some pairs of agreements (e.g. between the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures), the provision of technical assistance to developing countries in carrying out these obligations, and the simplification and standardization of formats. It declined to make recommendations on some of these matters but did so on others, including its suggestion that “a comprehensive listing of notification obligations and the compliance therewith by all WTO Members be maintained on an ongoing basis and be circulated semi-annually to all Members.”⁷ That recommendation was not followed in its entirety, insofar as there is no single document one may consult in order to identify which members have or have not made which notifications, but specific committees of the WTO do periodically issue reports providing that information with respect to the notification requirements under their purview. Those reports suggest that compliance with these obligations is not only spotty but may be declining over time.

Box 8.1. Indicative list of notifiable measures

Taken from WTO, Annex to the Decision on Notification Procedures.

In the Decision on Notification Procedures reached in the Uruguay Round, members agreed “to be guided, as appropriate, by th[is] annexed list of measures” in fulfilling their notification obligations:

- Tariffs (including range and scope of bindings, GSP provisions, rates applied to members of free-trade areas/customs unions, other preferences)
- Tariff quotas and surcharges
- Quantitative restrictions, including voluntary export restraints and orderly marketing arrangements affecting imports
- Other non-tariff measures such as licensing and mixing requirements; variable levies
- Customs valuation
- Rules of origin
- Government procurement
- Technical barriers
- Safeguard actions
- Anti-dumping actions
- Countervailing actions
- Export taxes
- Export subsidies, tax exemptions and concessionary export financing
- Free-trade zones, including in-bond manufacturing
- Export restrictions, including voluntary export restraints and orderly marketing arrangements
- Other government assistance, including subsidies, tax exemptions
- Role of state-trading enterprises
- Foreign exchange controls related to imports and exports
- Government-mandated countertrade
- Any other measure covered by the Multilateral Trade Agreements in Annex 1A to the WTO Agreement

Two examples may be cited to illustrate the decline in members' compliance with notification requirements and the types of countries with the least complete history of filings. Article 25.1 of the Agreement on Subsidies and Countervailing Measures requires that members make their subsidy notifications no later than 30 June of each year. Article 25.6 further provides that "Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing." This requirement thus offers a good test of the overall level of compliance with notification requirements, insofar as all members are supposed to make a filing each year, regardless of whether or not they provide subsidies. In 1995, when there were 132 WTO members, 58 of them notified subsidies and 27 made a "nil" notification of no subsidies; that left 47 members (35.6 per cent) of the total that failed to meet the obligation to notify. In later years, the number of subsidy notifications rose (reaching 62 in 2009), while the number of "nil" reports declined (down to 10 in 2009), but the greatest rate of growth was in the number and share of members who made no notification. By 2009, this group had grown to 81 members, or 52.9 per cent of the 153 members that year. For several years, about half of all members, sometimes a bit more and sometimes a bit less, failed to make any sort of notification.⁸

Table 8.1 offers a more detailed look at different members' levels of compliance with another notification requirement. As noted earlier, the SPS agreement requires that members notify certain changes in their measures. Unlike the subsidy notifications discussed in the previous paragraph these notifications are not required on an annual basis, but instead are filed as needed. Given the fact that many WTO members have made at least one such notification per year since the start of the system, often making several of them, it is reasonable to suppose that in most WTO members in most years there is likely to have been at least one action taken or contemplated on an SPS measure that might have required notification. As can be appreciated from the data in the table, however, there are only 23 members that notified SPS measures in all or nearly all years from 1998 to 2011. All but two of the developed countries achieved this level of frequency, as did 16 of the developing countries. Counting all EU member states as one,⁹ these 23 members comprised less than one fifth of the total membership as of 2011. The members that never filed even one notification during that period comprise a much larger group (49).

What explains the frequency with which different countries file these SPS notifications? In some cases, the country may not have taken any action requiring notification, but it would strain credulity to suppose that this would be the case for 14 years in a row. The principal explanation would appear to be capacity: notifications rise in tandem with the size and income of a country, such that those developing countries that make notifications in most or all years tend to have relatively high incomes and large economies. The frequency generally declines in direct proportion to income and size, to the point where the members that have never filed a single notification are among the smallest and poorest. Over half (25) of the 49 members that did not file a single notification from 1998 to 2011 were located in Africa, and 22 of the members that made no notifications were least-developed countries (LDCs). These are general rules to which one finds exceptions. Poverty and a relatively small size did not prevent Nepal from achieving one of the higher levels of SPS notification among developing countries; conversely, while Nigeria, Pakistan and Tunisia are larger and have higher incomes than Nepal, they were each among the members that did not make a single notification.

Table 8.1. Frequency of members' filings of SPS notifications, 1998-2011

	1-29%	30-59%	60-89%	90-100%
Developed countries			Norway	Australia
			Switzerland	Canada
				European Union*
				Japan
				New Zealand
			United States	
Developing countries	Antigua and Barbuda	Albania	Costa Rica	Argentina
	Barbados	Armenia	Ecuador	Brazil
	Belize	Bahrain, Kingdom of	Guatemala	Chile
	Benin	Saudi Arabia, Kingdom of	Honduras	China
	Bolivia, Plurinational State of	Dominican Republic	India	Colombia
	Brunei Darussalam	Egypt	Kenya	El Salvador
	Cuba	Israel	Malaysia	Hong Kong, China
	Fiji	Jamaica	Mexico	Indonesia
	The Gambia	Jordan	Nepal	Korea, Republic of
	Georgia	Mauritius	Nicaragua	Peru
	Kuwait, State of	Morocco	Panama	Philippines
	Macao, China	Oman	South Africa	Singapore
	Madagascar	Paraguay	Sri Lanka	Chinese Taipei
	Malawi	Turkey		Thailand
	Mongolia	Uruguay		Ukraine
	Qatar			Viet Nam
	Saint Vincent and the Grenadines			
	Senegal			
	Swaziland			
	Tanzania			
	Former Yugoslav Republic of Macedonia			
	Uganda			
	United Arab Emirates			
	Venezuela, Bolivarian Republic of			
	Zambia			
	Zimbabwe			

Notes: Percentage of years that a member filed a notification in the G/SPS/N Series; adjusted for acceding members' length of membership. *Some EU member states file SPS notifications of their own but most do not. None of them are shown here. The 49 WTO members not shown here did not file a single notification during the period 1998 to 2011. This number does not include the countries that acceded in 2012.

Members and the Secretariat have addressed the problem of incomplete notifications from two directions. One approach views the number and complexity of the requirements as the root of the problem, with some members – especially developing countries – proposing that

the burden be reduced. At the 1996 Singapore Ministerial Conference, for example, Brunei Darussalam said that notification requirements impose a serious burden on small countries, Malaysia called for streamlining them and Saint Lucia commended the Secretariat's efforts to simplify the procedures. The ministerial declaration noted that compliance with notification requirements has not been fully satisfactory. While inviting members who have not submitted timely or complete notifications to renew their efforts, it also called for the simplification of procedures. These concerns, which have continued to be expressed in subsequent years, led to several steps intended to simplify or clarify the process of notification. One example is the publication of the *Procedural Step-by-Step Manual for SPS National Notification Authorities & SPS National Enquiry Points*, a 126-page guidebook with detailed instructions on how to meet the notification requirements of the SPS Agreement.¹⁰ Some committees have also worked to simplify procedures for the notifications that fall within their purview. In 2009 and 2010, for example, the Committee on Agriculture explored "best practices" for improving the timeliness and completeness of notifications. While this exercise produced enough recommendations from members to fill a ten-page note by the Secretariat, the members did not agree on which of these objectives – timeliness or completeness – merited the higher priority.¹¹

The other response to this problem has been for the Secretariat to provide greater assistance to developing countries in complying with these obligations. This is, together with accessions and scheduling, one of the highest priorities in the technical assistance that the Secretariat offers to members. The results-based management approach in the WTO technical assistance and training plans aims to improve members' compliance in this area, as described in the 2012 to 2013 plan. "Baselines will be established using the information from previous years' reports," and "if a country has had some difficulties in complying with its notification obligations, the programme is designed in such a way that after its completion the country would be in a position to fulfil its notification obligations."¹²

The Trade Policy Review Mechanism

Where notifications must ultimately rely on the ability of the individual member to monitor and report on its own trade-related activities, the TPR process is a joint product of the member under review, the Secretariat and the other members participating in the TPRB. Both the member and the Secretariat prepare reports that are scrutinized and discussed by the members, but over time the national report has receded in importance. Virtually all of the attention in TPRB meetings – apart from the customary expressions of diplomatically mandatory appreciation for the words of a visiting minister or vice minister – is devoted to a discussion that revolves around the Secretariat report. This is a surveillance exercise that covers a wide range of issues in the conduct of a member's trade policy, including the economic environment in a country, the structure and procedures of its policy-making bodies, its laws and policies on trade and related matters, sectoral laws and policies, and the actual composition of its trade, among other matters.

The origins, purpose and significance of the TPRM cannot be understood without taking note of the environment in which both it and the Uruguay Round were launched. The decision to start those negotiations “was taken against a background of large external imbalances in the major industrial economies, instability in the international monetary system, [and] growing protectionist pressures,”¹³ as ministers would later observe at the 1988 Montreal Ministerial Conference. The period between the end of the Tokyo Round in 1979 and the launch of the Uruguay Round in 1986 was especially difficult, as summed up in Bergsten’s “bicycle theory” of trade liberalization: if the system is not moving forward with new market-opening initiatives, it may fall over into protectionism. That is precisely what appeared to be happening then, with developed countries resorting to the use of safeguards, anti-dumping, and other trade-remedy laws to restrict imports, developing countries invoking balance-of-payments measures with that same end in mind, and the proliferation of “voluntary” export restraints and other grey-area measures in such key sectors as steel and automobiles. There was then a widespread concern that the multilateral trading system itself was in danger, and that steps had to be taken to dissuade policy-makers from erecting barriers to trade.

One idea promoted in several quarters, not least in the office of GATT Director-General Arthur Dunkel, was that protectionist policies were less likely to be adopted if the process by which they were advanced was open to greater public scrutiny. Closer and more active surveillance of members’ policy-making processes was thought necessary not just to keep a country’s trading partners informed on what it might be up to, but also in hopes that the citizens of the country itself might know – and oppose – costly and self-defeating initiatives. Those proposals eventually made their way into the FOGS negotiations of the Uruguay Round, with the TPRM being one of several items approved in an “early harvest” at the 1988 Montreal Ministerial Conference.

The TPRM that emerged from these negotiations was less ambitious in one respect than some of the earlier proposals. The Secretariat’s reports are generally more descriptive than analytical; they neither explicitly pass judgment on the compliance of members’ laws nor make detailed prescriptions for their policies. The TPRM is also more ambitious in another respect, however, insofar as it involves more active on-site investigation on the part of the Secretariat than members were initially willing to contemplate. The TPRM is the premier example of a function in which the members have vested greater responsibility in the WTO Secretariat than they had been willing to cede to its GATT predecessor. The proposals that were floated in the years before this mechanism was created were primarily based on self-examination by countries, with little or no role having been proposed for the GATT as a whole or its Secretariat in particular.

Proposals floated prior to the Uruguay Round

It is unlikely that the TPRM would have been established without the leadership of Mr Dunkel. He made the creation of this mechanism a priority, having promoted it in concept in the early 1980s and in practice later in the decade. Mr Dunkel believed in the value of peer pressure and publicity as a means of ensuring that countries listened to the better angels of their

natures and did not succumb to the temptations of protectionism. He also appears to have been inspired by the greater powers that the International Monetary Fund (IMF) exercised in this area. The IMF conducts surveillance of individual members in order to highlight possible risks to stability and to advise on needed policy adjustments. Mr Dunkel's interest in having GATT perform a comparable function was evident in 1990 when he hired Clemens Boonekamp (see Biographical Appendix, p. 574), then an IMF staffer who knew the surveillance process, to work on TPRs. "Dunkel wanted somebody with an understanding of the IMF approach to writing staff reports,"¹⁴ Mr Boonekamp would later recall. Mr Dunkel was adamant that staff visits to countries were necessary, and although the notion was initially opposed by most contracting parties, he was able to force the issue.

Mr Dunkel took a strategic approach, working for several years to prepare the way for the TPR process. The first step came in 1983, when he appointed an "eminent persons group" to identify the fundamental problems then affecting the world trading system. Among the topics that he asked the Leutwiler Committee to address were "the factors underlying protectionism, and what can be done to improve the commercial policy making process at the national level?"¹⁵ The group was to explore the ways that increased transparency might improve the policy-making process, including:

- (a) To what extent does publicizing protectionist policies (including estimates of their costs) reduce their chances of being adopted?
- (b) What means are available to increase the public discussion of the costs of protection – who gains, who pays, what are the repercussions of border measures and subsidy programmes affecting trade?
- (c) What other kinds of "leverage" are available to resist protectionist demands (e.g. impact of subsidy programmes on government budget deficits, threat of foreign retaliation, etc.)?¹⁶

Chaired by a Swiss banker, Fritz Leutwiler, the body produced a report in 1985 entitled *Trade Policies for a Better Future: Proposals for Action*, which called for formal scrutiny of protection. It proposed that "trade policy should be brought into the open" and that to this end more information should be made available to analyse the costs and benefits of both existing and prospective trade actions. "Private and public companies should be required to reveal in their financial statements the amount of any subsidies received," and:

Any proposal for protective action should be systematically analyzed. This could be done by what might be called a 'protection balance sheet'. Such statements, similar in aim to the 'environmental impact' statements now required for construction projects in some countries, would allow periodic appraisal of existing measures and informed judgements on proposed new measures. They would set out the benefits and costs to the national economy of protectionist measures, as compared with withholding protection and/or providing adjustment assistance (GATT, 1985: 35).

This proposal was much less ambitious than what would become the TPRM, limited as it was to transactional reports that would be prepared by a domestic institution. The only role that the committee proposed for GATT was the further development of this idea by the Secretariat, “possibly in the form of a technical handbook available to policy makers and the public” (*Ibid.*).

The Organisation for Economic Co-operation and Development (OECD) took up a similar idea. “Member governments should undertake ... as systematic and comprehensive an evaluation as possible of proposed trade and trade-related measures as well as of existing measures when the latter are subject to review,” according to a recommendation that the OECD Council adopted in 1986, using an Indicative Checklist for the Assessment of Measures as the basis for these evaluations.¹⁷ It further provided that countries should “respond as positively as possible to requests for consultations by other Member countries which express concern about the impact on competition in their markets of measures.” That checklist consisted of 13 questions, ranging from “Is the measure in conformity with the country’s international obligations and commitments?” to “What could be the expected economic effects of the measure on other sectors of the economy, in particular, on firms purchasing products from, and selling products to, the industry in question?”

Yet a third proposal came from the London-based Trade Policy Research Centre, which commissioned a high-level study group chaired by former GATT Director-General Olivier Long (1968-1980). This was the first such proposal to draw a link between a review mechanism and GATT (and by implication its successor), yet did so in only a tentative way. Explicitly seeking “to minimize objections to placing domestic procedures on the GATT agenda” and “avoid needlessly arousing political and institutional sensitivities,” it proposed the establishment within each country of an independent body to prepare annual reports to their governments on public assistance to industries. More specifically, the reports of such a domestic body –

should be prepared both on request and on its own initiative and they should cover all forms of public assistance, including measures under laws on ‘unfair trade’ practices, to all industries. The reports should be made public so that they are a vehicle for public scrutiny of industry support (Long et al., 1989: 51).

The report further provided that this information “would be available to GATT member countries and could assist them in understanding and evaluating the policies of governments as presented in international negotiations” (*Ibid.*: 52).

All three of these proposals provided for systems of review that were voluntary and conducted at the national level, and all but the Long report proposed scrutiny of specific initiatives (e.g. individual safeguard cases or draft legislation) rather than conducting assessments of the totality of the country’s regime. The proposals were also primarily economic in their orientation, rather than legal or political. If we take them as an accurate barometer of the intellectual climate of the time, it is all the more remarkable that the FOGS negotiators took up, and ultimately approved, an approach to reviews that would instead be obligatory,

conducted by the Secretariat of an international organization and comprehensive, covering legal and institutional as well as economic issues.

The Uruguay Round FOGS negotiations

As discussed in Chapter 2, one of the agreed aims of the FOGS negotiations was “to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system.” This rather spare language in the Uruguay Round Ministerial Declaration of 1986 left undefined the meaning of “surveillance” and “regular monitoring”, not to mention the scope of what constituted “trade policies and practices”. The declaration provided no further guidance on such key questions as what form the surveillance would take, which countries might be targeted and on what basis, how frequently they would be under scrutiny, what would be the scope of issues subject to investigation, what the roles of the other contracting parties and the Secretariat would be in the exercise, whether information would be gathered solely in Geneva or through visits to the countries, how the information developed in the course of this surveillance would relate to the dispute settlement procedures, where the review itself would take place (e.g. in Geneva or in the capital city of the country being reviewed), whether the facts that were unveiled and the conclusions that were reached would be made public and so forth. It thus fell to the FOGS negotiators to put a great deal of flesh on the rather bare bones they received from the ministers.

The most important question at the start of the negotiations concerned whether the form of surveillance would be the “hard” type favoured by Japan and the United States or the “soft” form that the European Community preferred. The first of these positions was based on “surveillance as a mechanism for applying pressure on countries to comply with their GATT obligations and as something that contracting parties should submit to individually,” as opposed to the EC notion that “surveillance is really about ... transparency and increasing understanding among trading partners of each other’s trade policy environment.”¹⁸ Yet a third view, as espoused by developing countries such as India and Jamaica, was that additional surveillance was not needed if the real problem lay with the major trading nations, and “there was not much point in tinkering with the surveillance system if the requisite political will to make the system work was absent.”¹⁹ That last argument made little headway, as there was a general acceptance among those same, major trading nations that some form of enhanced surveillance was needed in order to promote greater compliance. The final result of the negotiations leaned more towards the soft than the hard form of surveillance, being explicitly dissociated from dispute settlement procedures and taking the form of broad reviews rather than search-and-destroy missions that sought to unearth specific examples of gross non-compliance.

The main points of debate then focused not on whether surveillance was needed but on how it should be done. What roles should be assigned in these reviews to the countries that were under scrutiny, the other contracting parties and the Secretariat? Which of these parties would take the lead in the process? The proposals seemed to draw upon existing precedents in other GATT activities. One would be to base reviews principally upon the individual country’s reporting on its

measures, thus being something like an expanded form of the notification procedures reviewed above. Another option would be for the review to be conducted principally by a small group representing the other contracting parties, which might be formed as a panel (a term that brought to mind the GATT dispute settlement system) or a working party (which might be compared to the way that accession negotiations were conducted). Yet a third option was to follow the models of the IMF and the OECD, both of which provided for detailed examination of their member states' policies by their respective secretariats. That last option seemed to be the most radical at the time, and the proposals that gave a larger role to the GATT Secretariat faced the strongest resistance (especially but not exclusively from developing countries), and yet this is where the TPRM eventually headed. That was a slow process, however, and one that depended as much on the evolution of the TPRM in actual practice as it did on the terms agreed to in principle. As originally approved in the Uruguay Round, the mechanism provided roles for all three participants: the country under review would prepare a report on its own practices, this would be supplemented by a report prepared by Secretariat staff, and both reports would be reviewed by a designated discussant and by the rest of the contracting parties meeting as the TPRB. It took some years for the system to evolve into one in which the Secretariat report would become the star of the show and the country's own report would be relegated to a minor, supporting role.

The first step towards the translation of the fairly vague language of the Uruguay Round Ministerial Declaration into the TPRM came with a paper that Australia tabled in March 1987. Like the pre-round proposals summarized above, the Australian proposal would rely more on self-assessment by the contracting parties, but also provided for the compilation of reports by the Secretariat for more extensive review of the trade policies of the larger countries.²⁰ Other proposals followed in June, with Switzerland calling for establishment of a Trade Policy Committee to monitor contracting parties' trade policies²¹ and Japan proposing that the major developed and developing countries be subject to review on a rotational basis (the reviews to be conducted by two or three contracting parties with assistance from the Secretariat).²²

Among these early proposals it was the US offering that most closely resembled what the TPRM would eventually become. The United States advocated reviews by the Secretariat of individual contracting parties' trade policies and practices.²³ The US ideas may have gotten greater traction in part because former US Assistant Secretary of State Julius Katz (see Biographical Appendix, p. 582), "whose unorthodox ways ... earned him the sobriquet of 'GATT's 96th Contracting Party',"²⁴ chaired the FOGS group at the start of the Uruguay Round. He took a leading role in translating the ideas that his own and other countries put forward in the FOGS negotiations into a discussion paper, then negotiating with his peers and the Secretariat to move those ideas from concept to proposal to an early harvest.

The principal negotiations over the shape of the TPRM took place from late September 1987 through late October 1988, and centred on the development of a progressively more detailed draft that became the basis for the decision adopted in an "early harvest" at the Montreal Ministerial Conference in December 1988. The original draft for this paper, dated 29 September 1987, bore neither a title nor an author's name. With some relatively minor changes, it formed the basis for the discussion paper that Mr Katz issued the next month.

Drawing on the ideas presented thus far in the FOGS meetings, Mr Katz's draft provided for reviews of all contracting parties through self-reporting by the countries in an agreed format, and reviews that "might last three or four days" that would focus "on a paper by the secretariat taking into account the information supplied by governments." This review "would be carried out by a body composed of a small number of government representatives with experience in trade policy questions," and the actual review – as opposed to the research for the paper that would form the basis of the review – would be conducted "in capitals, to the extent feasible." The proposal then specified that the review body would –

draw up a report on each review which would summarize the questions raised, the answers given and any other points made, and would propose conclusions. It would be forwarded to a supervisory body – the GATT Council or a new body such as a Trade Policy Committee – which would provide an opportunity for all contracting parties to make statements, and would adopt the report. The reports would be made public.²⁵

The FOGS negotiations focused on several of these points over the ensuing year, with parallel discussions taking place within the GATT Secretariat. The lines separating the negotiations between contracting parties and the deliberations within the Secretariat were rather blurry, with Director-General Arthur Dunkel taking a close interest in the matter. Among the more important points of contention concerned the role of the Secretariat in the reviews, a subject that came up in internal meetings that the director-general held on 16 July and 1 October 1987. Mr Dunkel noted with approval in the latter meeting that the Katz proposals "in many ways marrie[d] with the views already developed by the secretariat," but also observed that "in one or two respects they presented major differences."²⁶ Other staff present at the meeting suggested that because Mr Katz had not yet circulated the draft there was still time for discussing with him "the possibility of amending some of the proposals in it."²⁷ That may have included the question of how active the role of the Secretariat would be in reviews. Despite the reluctance that some countries expressed, the Secretariat appears to have been advocating a role for itself from the start. Whereas in Mr Katz's draft the Secretariat would be limited to "prepar[ing] a draft of appropriate questions for the review body,"²⁸ the internal note instead suggested that "reports by governments would form one basic input for fuller reports which would be prepared by the secretariat." Taking this approach "would have substantial staffing and budgetary implications for the secretariat" (*Ibid.*: 2).

Over the course of the next several months, the FOGS negotiators moved progressively towards a system that gave more investigative authority to the Secretariat and relied less on the initiative of the member governments. That progression was only hinted at in the October discussions, where one view "was that the Secretariat should merely be a postbox for information supplied by governments," but "[o]thers were willing to concede a more substantive rôle to the Secretariat."²⁹ The proposed level of Secretariat activism rose in subsequent versions of the discussion draft. The 7 January 1988 text still provided that the reviews would be conducted by governmental representatives, but specified that the "information reported by contracting parties" would be "supplemented by a factual background paper by the Secretariat."³⁰ By the time of the second revision the next month, the text

referred to reviews being based on annual reports from the contracting party itself and “a report, to be drawn up by the Secretariat, based on these annual reports and on discussions between a ‘review team’ of Secretariat and governmental experts” who would travel to the capital to pose their questions.³¹ In a FOGS meeting the next month, “Switzerland argued convincingly against mixed government–Secretariat review teams,” with “the general feeling [then] moving toward purely Secretariat teams.”³² The discussion had matured to a point in late April where brackets could be inserted into the text of the third revision, thus suggesting both what was approved and what was not. It called for the report “to be drawn up by the Secretariat, based on the information provided by the contracting party or parties concerned and on discussions between a [Secretariat] [information gathering] team and officials of the contracting party under review.”³³ By May, those brackets had disappeared, with the fourth revision of the text specifying that it was the Secretariat that would draw up the report.³⁴

The disappearance of the brackets did not signal an end to debate, however, as the role of the Secretariat remained a point of dispute well into 1988. Representatives of the developed countries had concluded that the Secretariat report needed to be independent and analytical, so as to avoid what Mr Katz called “leaving the goats to mind the cabbages.”³⁵ Canada and Sweden were among the principal advocates of an active Secretariat role, although at least as late as March 1988, Japan still held the view that the “review team might be Secretariat plus representatives of two or three countries.”³⁶ Developing countries continued to express concerns about granting new powers to the Secretariat, however, especially with respect to on-site investigations. Brazil, India, Malaysia and Yugoslavia were all identified as “hard liners” in opposition to site visits, and proposed that the text provide that “[a]n individual contracting party *may invite* the Secretariat to *assist in* the task of information-gathering *on a voluntary basis* in the relevant capital.”³⁷

The conflict over this matter was so deep that a number of developed countries that insisted upon on-site investigation said they were “prepared to give up the TPRM if this [were] not agreed.” The De la Paix Group of developed and developing countries (see Chapter 3) helped to smooth over these differences. As finally approved in paragraph C(v)(b) of the TPRM agreement, one aspect of the review – in addition to a report by the member being reviewed – was to be a report “drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Member or Members concerned.” Beyond providing that the Secretariat “should seek clarification from the Member or Members concerned of their trade policies and practices,” the agreement did not further specify what this report would contain or how it would be produced.

Several other points occupied the FOGS negotiators. One concerned the degree to which the results would be made public, with Japan proposing that only press releases be issued and that the report itself remain unpublished. In keeping with the broader objective of transparency for both the country under scrutiny and the trading system itself, the negotiators eventually agreed to make public all of the documents: the Secretariat report, the government report and the minutes of the meeting in which they were discussed.

The Secretariat also dealt in greater detail with technical matters such as the format and content of the reports that contracting parties would submit on their policies, as well as the

cycle by which contracting parties would come up for review. Both of these topics were addressed by a six-page internal memorandum prepared for Mr Dunkel on the same day that Mr Katz issued the first version of the chairman's discussion draft. In one point that remained in place from that day forward, in broad principle if not in the specifics, this note of 6 October 1987 proposed a three-tier cycle in which the frequency of reviews would be determined by the size of the member. The 1987 proposal would cover the seven to ten largest countries every 18 to 24 months, and an undefined middle group would be reviewed every three to four years, but for the rest of the countries – which the paper referred to as “the marginals” – examinations “would be rare.”³⁸ As finally agreed to in Article C(ii) of the TPRM agreement, the four largest trading entities (measured by their share of world trade in a recent representative period), and counting the European Community as one, are subject to review every two years. The next 16 are to be reviewed every four years, and other members every six years, “except that a longer period may be fixed for least-developed country Members.”

Use of the Trade Policy Review Mechanism

The agreement establishing the TPRM, as approved at the Montreal mid-term review of the Uruguay Round in 1988, was later incorporated as Annex 3 of the Agreement Establishing the World Trade Organization (WTO Agreement) and remains the basis of the system to this day. There was still preparatory work to be done before the first reviews could be conducted. At Montreal, the contracting parties tasked Deputy Director-General Madan Mathur with chairing a technical group on the format of the reviews, which he proceeded to do in coordination with Frank Wolter (see Biographical Appendix, pp. 585 and 597), the first head of the TPR Division. By 1989, it was under way. The TPRB itself was not yet in place during those final years of the late GATT period, so its functions were instead filled in the early years by the GATT Council of Representatives.

TPRs, the members and disputes

Mr Wolter insisted that these reports be prepared on the Secretariat's own responsibility and needed to be kept independent. Unlike the reports prepared by some other intergovernmental organizations, these were not negotiated documents whose content was the product of haggling between the Secretariat and the member. A government that did not like the content of the report could write what it wished in its own report and raise objections in the council, but the staff would not dicker with them over the content of the Secretariat report. Despite the fact that this was agreed to in principle in the FOGS negotiations, it took some time for governments to become comfortable with the notion of being investigated and critiqued by international civil servants. The preparation of these reports by the Secretariat under its own responsibility represented a fundamental break from the past practice in which the role of the GATT staff was strictly limited and almost exclusively of a clerical, logistical or technical nature. The countries' concerns over that first point are illustrated by one senior official's recollection of the first time that he went on mission to a particular developing country, when he received an unusual summons:

I was in my robe at ten o'clock in the evening and I was called down to the front desk and went down in flip-flops. Two soldiers were waiting for me at the door of the lift. I stepped out of the lift and these soldiers took me by the arm and said, "Come with us." They took me to a car and there was the president, and he said, "Explain to me what the TPR is." And I did. Thereafter we got all the information we needed for the Secretariat's report.³⁹

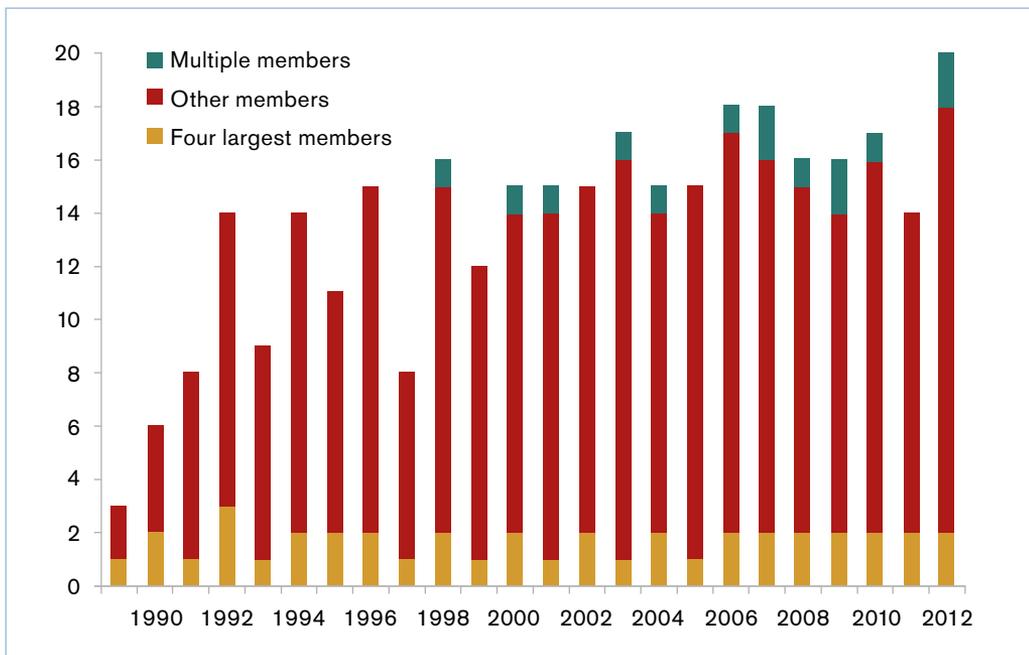
The relationship between the TPRM and the Dispute Settlement Understanding (DSU) is complex and delicate. The results of these reviews can help to identify areas where a country's laws and policies may need to be brought into compliance, but is (according to TPRM Article A) explicitly "not ... intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members." This is a point that Secretariat staff frequently stress when on missions to members, assuring officials that nothing cited in a TPR can, by itself, form the basis of a complaint under the Dispute Settlement Understanding. This is not to say that when a measure is mentioned in a TPR report, it somehow enjoys safe harbour; a measure that is so listed may give a "heads-up" to other members, and if they wish to pursue the matter in dispute settlement they need only verify the information through some other source. It is impossible to know how often, if ever, TPR reports have brought a matter to the attention of a future complainant for the first time. In a comparison of the content in TPRs and the subsequent filing of formal disputes, Ghosh (2008: 21) found that in 53 per cent of the cases brought to the dispute settlement system the law or policy in question was mentioned, highlighted or analysed in a Secretariat TPR report prior to the initiation of the dispute. In only a quarter of the cases, however, "did future complainants send in advance questions to the party under review," thus suggesting that "member states did not consider the TPR process to be the effective forum for applying pressure."

Although the TPR reports are a surveillance exercise and are intended in part to uncover any areas in which a member is out of compliance with its obligations, these documents involve no direct criticism of members' policies and measures. In particular, they never directly state whether a given policy (actual or proposed) is either compliant with or in violation of any WTO agreement or commitment. Strict free-traders would prefer prescription over description, and would want the reports explicitly to identify not only those measures that are WTO-illegal (thus asking the TPR Division to arrogate to itself a function reserved for the Dispute Settlement Body) but also to highlight those policies that may be WTO-legal but are ill-advised. The system is instead based on a less provocative approach. As Laird and Valdes (2012: 10526-10532) observed, "one of the strengths of the TPRM is its role as a forum where policies can be explained and discussed, where information can be sought, and concerns can be expressed on a largely non-legalistic (and non-confrontational) basis." Some analysts take a less favourable view of the relationship. The TPRs "are partially the result of a process that is influenced by political considerations," in Bown's opinion (2009: 219-220), "and thus they are written so as not to provoke disputes or to provide useful evidence in litigation."⁴⁰

The quantity and quality of reports

It took several years for the TPRs to be produced in relatively large numbers, as may be appreciated from the data illustrated in Figure 8.1. In its first year of operation, just three TPRs were conducted, all of them culminating at the end of the year. In a series of special meetings on 12-14 December 1989, the GATT Council conducted TPRs of Australia, Morocco and the United States (in that order). Ambassador Rubens Ricupero (see Biographical Appendix, p. 590) of Brazil presided over these meetings in his capacity as chairman of the council, and Ambassador Hassan Kartadjoemena of Indonesia served as lead discussant for the first TPR. In those early years, the government and Secretariat reports had roughly equal weight and even approximately the same page lengths. For Australia and the United States, both the government and Secretariat reports were in the range of 125 to 200 pages each; the Secretariat report on Morocco was 106 pages, as compared to a 70-page government report. In later years it was established that, in principle if not always in practice, Secretariat reports would aim to be no longer than 100 pages. The capacity and the productivity of the division rose in the years that followed. In 1990, which was the first full year of operation for the TPRB, the Secretariat allocated one director, nine professional posts, and three general service posts. That year, the TPRs focused on Canada, the European Community, Hong Kong,⁴¹ Hungary, Indonesia, Japan, New Zealand and Sweden.

Figure 8.1. Trade policy reviews conducted, 1989-2012



Sources: Tabulated from data at www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically (for 1995-2012) and from GATT annual reports and press releases (for 1989-1994).

Notes: Multiple members = TPRs in which more than one member is reviewed in a single exercise. Data shown are for numbers of TPRs rather than numbers of members covered by them. Four largest members = Canada (to 2003), China (since 2006), the European Union, Japan and the United States.

It was not until years later that the pace of TPRs achieved the level needed in order to meet the schedule implied by the agreement. Every year the TPRB should review two “majors” (i.e. the four largest members that are each done every two years), as well as four countries in the middle tier (i.e. the 16 countries that are each done every four years), plus a variable and growing number of members that are each done every six years. The formula is thus six large and mid-sized members plus one sixth of the remaining members (not counting the EU membership) from the 21st largest onward. By the end of the GATT period, when there were 128 contracting parties (12 of which were EC members), the TPRB would need to consider 20 reviews per year in order to meet the quota. It was then operating at about half that level in the average year. The task became more difficult as the number of members rose. At the start of 2012, there were 155 members (27 of them in the European Union), meaning that if the TPRB reviewed each member separately it would have to do 24 reports per year (i.e. four more than at the start of the WTO period). That task has been eased somewhat by the practice of doing some reports on a regional basis, with two or more members included in a single report. In 2012, for example, the TPRB considered one report that covered Burundi, Kenya, Rwanda, Tanzania and Uganda, and another that covered Côte d’Ivoire, Guinea-Bissau and Togo. When combined with the 18 single-member reports that same year, the TPRB considered reports in 2012 that reviewed 26 members. That was actually two more than needed to meet the full quota. It was also a considerable increase over 2011, a year in which there were no multiple-member reports and only 14 members were examined. On average, from 2008 to 2012 the TPRB considered 16.6 reports per year covering 19.4 members. In 2013, the TPRB is scheduled to consider 15 reports covering 20 members.⁴²

The quality of reports is more important than the quantity, and in that area the TPRM evolved over time. Within the first decade of its operation there were growing concerns over the operation of the TPRB, and when Mr Boonekamp became director of the division in late 1998, he instituted several reforms. Perhaps the most important reform, and one in keeping with the pattern by which the membership came to entrust the Secretariat with ever more responsibility in carrying out the TPRM mandate, was to persuade members to move from a system in which their own reports were given equal consideration to one in which the government and Secretariat reports had different aims. This reform responded to a practice on the part of many members to use the Secretariat report as a template for their own, submitting a parallel document that differed only in its “spin”. Mr Boonekamp instead built upon a precedent that Canada had set in 1996, when it kept its own report down to a concise statement regarding the aims and priorities of its trade policy. He urged other members to follow this practice, and since then the government reports have been brief (generally 10-15 pages) policy declarations that help to set the tone of the TPRB meeting rather than factual reviews that form the basis for the examination. Another reform was to shorten the Secretariat reports and consolidate their structure from six to four chapters, and to introduce a greater degree of analysis into them by stressing the importance of the summary observations.

The scheduling of TPRB meetings was also a concern. Members had fallen into the bad habit of postponing and rescheduling TPRB meetings, often leading to many being held in a short

period that precluded adequate examination of the reports. Mr Boonekamp worked with members to set and keep to a strict timetable for the preparation and completion of each TPR and the annual programme as a whole, with the TPRB meetings spread out more evenly across the year. The emphasis on improving quality also meant that, for a short time, quantity would be sacrificed. In 1999, there were just 12 TPRs prepared, down from 16 the year before. One way that resources were deployed better was through the preparation of TPRs in which more than one country in a regional group was covered. This was first done in 1998 and has been the way that one or two reports have been done in most years thereafter. The WTO also expanded the staffing of the TPR Division and, with support from the Dutch and the German governments, established a Sfr 500,000 annual fund that allowed Mr Boonekamp to bring in consultants and eventually increase the number of TPRs. That fund also allowed the division to adopt what became the standard practice of conducting two in-country missions for most reviews of developing countries, the first mission being devoted to an introduction to the TPRM process and the initial research and the main business of the second being a review of the Secretariat's initial draft and the filling-in of blanks.

Assessments of the Trade Policy Review Mechanism

The TPRM offers an example of the watchers being watched, to return to Juvenal's famous turn of phrase. It has been under scrutiny from the start, with both the WTO members and academic critics offering their views. Several of the issues that were controversial in the negotiation of the TPRM remain so in critiques of the programme. The agreement itself provides for periodic appraisals of the TPRM, four of which have been conducted to date. They have resulted in a number of procedural changes, subsequently incorporated in revised Rules of Procedure for Meetings of the TPRB. As Laird and Valdes (2012: 10725-10738) summarized the reforms proposed in these reviews:

They called for, among other things: priority to be given to reviewing all members at least once as soon as possible; improvements in the focus and readability of reports; greater use of grouped reviews; the reports by the Secretariat and the member under review to be distributed, and advance questions to be sent to the member under review, five and two weeks, respectively, before a review meeting; the member under review to provide written answers at the start of the first session; and the Secretariat reports to highlight the changes to policies and measures during the period under review. The appraisals also concluded that steps should be taken to make the review meetings more interactive.

The fifth appraisal of the TPRM is to be prepared in 2013 for the Bali Ministerial Conference.

The reviews of the TPRM in the scholarly community, especially among economists, range from the constructively critical (Keesing, 1998; François, 1999; and Grammling, 2009) to the scathing (Stoeckel and Fisher, 2008). What is at issue in these reviews is not so much the way that the Secretariat executes the TPRs as it is the underlying purpose of the exercise as approved by the members. Comparing the TPRM with the review processes of other

institutions, Stoeckel and Fisher (2008: 71) called it “the poorest of all transparency exercises of trade policy.” They based this conclusion on the assertion that the “reviews contain no economic analysis at all – let alone economy-wide analysis,” and “there is no indication of what policy changes would be in the national interest.” Zahrnt (2009: 21) made similar criticisms and concluded that “the TPRM should be redesigned from scratch.” He urged that reports –

should follow a standardized analytical grid that improves readability, allows easy comparison across time and countries, and asks all countries of similar levels of development the same tough questions. Using studies from scientifically reputable sources, it should rigorously analyze trade and welfare effects – including non-economic repercussions on broader sustainability objectives. It should also inspect policymaking processes, applying best practice benchmarks and again relying on pre-existing in-depth studies. To improve the quality of its reports, the Secretariat should receive additional resources and independence. The process of writing reports should become more transparent and participatory.

More provocatively, he also suggested that “TPRs should be resolutely aimed at shaping domestic politics” (*ibid.*: 2). This could be done, he argued, “by focusing the attention of domestic constituents and the media on their country’s trade policies” in order to “convince readers of the benefits of liberal reform and serve as a reference in domestic policy debates.” He thus returned to the spirit of the original proposals made in the 1980s.

As suggested earlier, the view one takes of the TPR depends heavily on one’s perspective. The information presented in the Secretariat reports is more of a legal and political nature than economic *per se*, and the purpose is more descriptive than prescriptive. That is the content that the WTO membership has opted to commission from the Secretariat. Carmichael (2005: 71) recognized that point when, after offering criticisms of his own, he acknowledged that the TPRM “cannot now be turned into an agent of domestic reform” because the “WTO charter recognises that the sovereignty of individual member countries is absolute and inviolate.” He called for reforms in the domestic policy environments of the countries themselves.

The monitoring programme adopted in the financial crisis

The Secretariat had originally been tasked not just with writing the TPRs but also preparing an annual overview of developments in the international trading environment that affect the multilateral trading system. These overviews were suspended after 2005, however, out of concern that they duplicated work already underway in other WTO publications (e.g. the *Annual Report* and the *World Trade Report*). Just a few years later, the outbreak of a global financial crisis inspired the Secretariat to take a broader view once again and to assign this task to the Trade Policies Review Division.

The outbreak of the financial crisis in September 2008 set off alarms in the trade community. Facing the widest and deepest downturn since the Great Depression of the 1930s, many feared that the dark spectre of protectionism would soon return. The association between downturns and protectionism is at least as old as the panic of the 1890s, and was solidified by the role that the Hawley–Smoot Tariff Act of 1930 played in deepening, spreading, and prolonging the Great Depression. From 1929 to 1930, the problems began in one section of the US economy (agriculture) and spread from there to the stock market before the US Congress made matters worse through the enactment of protectionist legislation. It was widely expected that the only difference this time would be in the sector that started the cycle of destruction, which in 2008 was housing rather than agriculture. These fears led economists to warn that the “political pressures demanding import protection to protect employment are surfacing with increasing intensity around the world” (Gamberoni and Newfarmer, 2009) and that “the risk of a devastating resurgence of protectionism is real” (Dadush, 2009a: 1). Many policy-makers shared these concerns.

In retrospect, those fears now appear to have been overblown. “*Ex post*,” one collection of studies concludes, a “fundamental distinction between the Great Depression and the Great Recession is that the 2008-9 global economic contraction did not result in a massive wave of new protection” (Bown, 2011: 1). This begs the question of why countries did not react as many expected. One argument is that it is the commitments that countries had made in generations of GATT and WTO negotiations that stayed their hands. That is a difficult point to argue, however, when one considers the considerable leeway that countries are left in their commitments. Many countries have a great deal of “water” in their tariffs, such that they could raise their applied rates far above the levels that prevailed just before the crisis broke; many tariff lines are entirely unbound, meaning that a country could raise its tariffs on those items to confiscatory levels without breaking its commitments. Countries also had at their disposal several other WTO-legal instruments by which they could have acted to restrict trade, including anti-dumping and other trade-remedy laws. One cannot convincingly argue that protectionism was held at bay solely by the commitments that members made in WTO agreements and other trade instruments, because it would have been quite easy for them to shut down much of world trade without ever running afoul of the letter of their obligations.

Imposing new restrictions would have been contrary to the spirit of members’ commitments in the WTO, however, and it is here that this organization and other bodies in the global economic community may have helped to avert a worsening spiral. Formal organizations such as the WTO, acting in concert with the less formally constituted Group of Twenty (G20) and with individual countries, worked together to promote a sense of collective economic security and the need for restraint. That was achieved in part through the “soft law” of communiqués issued by leaders and ministers, and in part through the monitoring that the WTO and other institutions conducted. They mobilized their resources to report on steps that countries might take to restrict their markets or bail-out industries, with a view to naming and shaming – and, in the process, deterring countries from backsliding. The World Bank inaugurated a new Temporary Trade Barriers Database,⁴³ for example, and provided support for the Global Trade Alert project.⁴⁴ The highest-profile action of any international group during this period came at

the G20 summit on 14-15 November 2008. There the assembled leaders approved a “standstill” pledge in which they rejected protectionism and declared that for the next year –

we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports. Further, we shall strive to reach agreement this year on modalities that leads to a successful conclusion to the WTO’s Doha Development Agenda with an ambitious and balanced outcome. We instruct our Trade Ministers to achieve this objective and stand ready to assist directly, as necessary. We also agree that our countries have the largest stake in the global trading system and therefore each must make the positive contributions necessary to achieve such an outcome.⁴⁵

By the time that the G20 met, the monitoring work in the WTO had already been under development for a month. Its first step came on 14 October 2008, when Director-General Pascal Lamy reported to the General Council that he had “constituted a Task Force within the Secretariat to follow up the effects of the financial crisis on our different areas of work.”⁴⁶ He suggested that WTO members “keep the situation under review, and be ready to act as necessary.” Members asked that any information developed in the WTO’s monitoring operations be shared, hoping to restrain protectionist impulses among themselves and their partners. On 12 November 2008, the director-general convened an informal heads-of-delegation meeting in order to de-brief members on trade finance issues discussed in the expert group. The Secretariat took the language that the G20 approved in Washington three days later, as well as existing language in the TPRM agreement calling for an annual report on developments in the trading system, as a mandate for active reporting. Mr Lamy informed the General Council at its 17 December 2008 that the first monitoring reports would be ready the next year.

Mr Lamy presented the first of what would become quarterly reports to an informal meeting of the TPRB on 9 February 2009. On releasing the report he reassured the members “that the seeds for this initiative were not sown in Davos, nor in the G20,” but that it was instead “a home-grown initiative that started in the WTO and ... should continue in the WTO as long as the global economic situation justifies it.”⁴⁷ Two weeks before the release of the second such report on 14 April 2009, however, the G20 leaders met once again and called “on the WTO, together with other international bodies, within their respective mandates, to monitor and report publicly on our adherence to these undertakings on a quarterly basis.”⁴⁸ Still one more WTO report came out on 13 July, before the fourth report in the series, as issued 14 September, was truly a joint undertaking. Prepared together with the OECD and the United Nations Conference on Trade and Development (UNCTAD), this report – which preceded yet another G20 leaders meeting in Pittsburgh later that month – found no “widespread resort to trade or investment restrictions as a reaction to the global financial and economic crisis.” It nonetheless found that there had “been policy slippage since the global crisis began.” The heads of these three organizations cited new non-tariff measures, trade defence mechanisms, the re-introduction of agricultural export subsidies and higher tariffs:

These measures, along with reports of additional administrative obstacles being applied to imports, are creating “sand in the gears” of international trade that may retard the global recovery. The fiscal and financial packages introduced to tackle the crisis clearly favour the restoration of trade growth globally, but some of them contain elements that favour domestic goods and services at the expenses of imports. It is urgent that governments start planning a coordinated exit strategy that will eliminate these elements as soon as possible.⁴⁹

Although issued as a joint report of the three institutions, the report followed essentially the same format as the second and third monitoring reports that the WTO had issued.⁵⁰ These included current economic data, illustrative lists of measures that countries had adopted to facilitate or restrict trade, tables on specific initiatives such as anti-dumping cases, and detailed annexes on specific actions taken by countries. The three institutions continued thereafter to produce these reports on a joint basis, but at the crisis itself abated the pace decelerated. The reports remained on a quarterly basis from September 2009 to June 2010, but beginning with the November 2010 report they have instead been issued twice a year.

The Secretariat had to exercise special care in how it worded the summation of actions taken by members, especially in the earliest and most critical months of the crisis. There was on the one hand the need to provide assurance that countries were not engaged in a headlong race towards 1930s-style protection, so as not to place trade ministers around the world in the position of trying to explain to their cabinet colleagues, to legislators, and to the public why they alone seemed to be resisting an obvious temptation. On the other hand, it was also necessary to identify the actual cases in which members were taking action that appeared to violate the letter of their commitments or, in some cases, merely the spirit of the trading system; to do otherwise would have given licence to those who were so engaged. Neither of these competing needs could dominate the requirement that they compile as accurate and comprehensive a record as they could of the steps that countries were in fact taking.

Has the monitoring made a difference in policy outcomes, or has it merely served to record and report those outcomes? The answer to this question depends in part on whether the concept in physics known as the “observer effect” is applicable to the world of trade policy. This refers to changes that the act of observation itself will make on a phenomenon that is being observed. To a physicist, this means (for example) moving an object ever so slightly when shining a flashlight upon it, as the photons from that instrument act upon the item under observation. In trade policy, this might mean moving policy-makers, or perhaps making them less eager to move in a given direction, when they know that the light of scrutiny will illuminate their actions.

This was the original inspiration for Mr Dunkel and others in the early 1980s, when they proposed what was to become the TPRM. The peer pressure and publicity that they hoped would make politicians think twice about imposing new restrictions on trade, or providing new subsidies to domestic industries, were inspired by that same notion of an observer effect. The

TPR reports are too infrequent to have much of an effect in a crisis atmosphere, being at most biennial, but the monitoring reports that Mr Lamy inaugurated in 2009 and that the WTO continues to issue with its partners come out more regularly. They are emblematic of an international organization that takes a more active role than its GATT predecessor was permitted, and in which its members have placed more trust.

Endnotes

- 1 See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT BISD 26S/210, 28 November 1979.
- 2 See *Communication from the European Community*, GATT document MTN.GNG/NG4/W/20, 22 March 1988, p. 3.
- 3 See *Communication from the United States*, GATT document MTN.GNG/NG14/W/9, 23 June 1987, pp. 2-3.
- 4 There is no one date or year that can be identified as the "start" of the Internet, the antecedents for which date to the early 1960s, but the key events in the transformation of the Internet from a closed system used by US government-affiliated bodies to a global instrument of communication came during 1993 to 1995. That corresponds precisely to the end-game of the Uruguay Round and the transition from GATT to the WTO. See the timeline at www.zakon.org/robert/internet/timeline/.
- 5 The agreement is more formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
- 6 See Bacchetta (2012: 33).
- 7 See *Report of the Working Group on Notification Obligations and Procedures*, WTO document G/L/112, 7 October 1996, p. 14.
- 8 See *Notification Requirements under the Agreement on Subsidies and Countervailing Measures*, WTO document G/SCM/W/546/Rev.3, 12 April 2012, p. 4.
- 9 Some EU member states file SPS notifications on a regular basis (e.g. the Netherlands), and some do so occasionally (e.g. France), but many do so rarely or never.
- 10 Written by Sally Jennings of the New Zealand Ministry of Agriculture and Forestry with contributions from the WTO Secretariat and the Australian Department of Agriculture and Forestry Biosecurity, this 2011 publication of the WTO is posted at www.wto.org/english/res_e/booksp_e/sps_procedure_manual_e.pdf.
- 11 See *Improvement of Timeliness and Completeness of Notifications: Members' Suggestions of "Best Practices"*, WTO document G/AG/W/73/Rev.2, 6 September 2010.
- 12 See *Biennial Technical Assistance and Training Plan 2012-2013*, WTO document WT/COMTD/W/180/Rev.1, 3 February 2012, p. 10.
- 13 See *Mid-Term Meeting*, GATT document MTN.TNC/11, 21 April 1989.
- 14 Author's interview with Mr Boonekamp on 24 September 2012.
- 15 The terms of reference for the group are contained in an 11 October 1983 proposal for funding that Mr Dunkel submitted to the Ford Foundation. The quote above is from Annex I, "Background Notes for Use in Preparing the Study Group's Terms of Reference", p. 1.
- 16 *Ibid.*, p. 8.
- 17 See *Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies*, OECD document C(86)65/FINAL, 23 October 1986.

- 18 GATT Secretariat note on the second FOGS meeting (30 June 1987), p. 1. The EC concerns over the TPRM were also motivated by an interest in ensuring that the GATT reviews "be clearly focused on trade policies and practices and on their impact on the functioning of the GATT system" insofar as anything beyond that "would raise problems, for example of Commission/Member State competence." Paraphrasing of comments made by EC Ambassador Paul Tran at the 29 September 1987 FOGS meeting, in a GATT Secretariat note (6 October 1987), pp. 1-2. The EC position was also complicated in later discussions by the insistence of Japan that individual EC member states' policies must be examined in the reviews.
- 19 *Ibid.*
- 20 See *Communication from Australia*, GATT document MTN.GNG/NG14/W/1, 3 April 1987.
- 21 See *Communication from Switzerland*, GATT document MTN.GNG/NG14/W/7, 18 June 1987.
- 22 See *Communication from Japan*, GATT document MTN.GNG/NG14/W/8, 23 June 1987.
- 23 See *Communication from the United States*, GATT document MTN.GNG/NG14/W/9, 23 June 1987.
- 24 See "Foggy Outlook for FOGS?", SUNS, 10 November 1987, at www.sunsonline.org/trade/process/during/uruguay/fogs/11100087.htm.
- 25 See "Trade Policy Review Mechanism/Chairman's Discussion Paper", 6 October 1987. Numbers omitted from the paragraphs (paragraphs cited here are numbers 3 and 5).
- 26 Mr Dunkel's comments paraphrased in a GATT Secretariat note, "Strengthening Surveillance in GATT: Summary of internal discussion of 1 October 1987", 7 October 1987, p. 1.
- 27 *Ibid.*
- 28 This observation applies to paragraph 4 of both the 29 September draft (which was the version discussed at the Secretariat's 1 October meeting) and the 6 October version as distributed by Mr Katz to his peers.
- 29 GATT Secretariat note, 19 October 1987, p. 2. The note does not associate these views with any specific countries.
- 30 "Trade Policy review mechanism, Chairman's Discussion Paper, Revision", 7 January 1988, p. 2.
- 31 "Trade Policy Review Mechanism, Chairman's Discussion Paper, Second Revision", 12 February 1988, p. 2.
- 32 Memorandum from John Croome to the Director-General, "FOGS meeting 21-23 March", 23 March 1988, p. 2.
- 33 "Trade Policy Review Mechanism, Chairman's Discussion Paper, Third Revision", 25 April 1988, p. 2.
- 34 "Trade Policy Review Mechanism, Chairman's Discussion Paper, Fourth Revision", 5 May 1988, p. 3.
- 35 Quoted by Peter Tulloch, "Confidential Note on Meeting of 24-28 October 1988", 8 November 1988, p. 2.
- 36 GATT Secretariat, "Compendium of comments made in discussion of Chairman's discussion paper (second Revision) in formal and informal meetings in March 1988", 27 April 1988, p. 4.
- 37 *Ibid.*, emphases in the original.
- 38 Memorandum from Robin Davies to the Director-General, "Surveillance/Format for Country Reports", 6 October 1987, p. 2.
- 39 Correspondence with the author.

- 40 Bown's critique focused on the potential utility of the TPR in uncovering WTO-inconsistent measures that might then be brought into line by way of dispute settlement cases. He proposed instead that an outside body, which he called the Institute for Assessing WTO Commitments, be established to perform this role. Its role would be to monitor WTO compliance actively and to assist developing countries to be more effective litigators. The focus would "be on institutionalizing much of the prelitigation provision of economic, legal, and political support about potential cases," he proposed (Bown, 2009: 230), in order "to help remedy the market failure by generating information on potential cases to pursue that the private sector does not provide."
- 41 Hong Kong was not yet reunited with China at this time.
- 42 Mongolia and Tonga had been scheduled for 2013 but, in view of the difficulty of scheduling TPRB meetings in December 2013, those meetings were postponed to early 2014.
- 43 The database is available online at <http://data.worldbank.org/data-catalog/temporary-trade-barriers-database>.
- 44 The Global Trade Alert is another monitoring programme that emerged in the immediate aftermath of the financial crisis and the G20 standstill pledge. This database is an initiative of the Centre for Economic Policy Research and is funded by the World Bank and donors in Canada, Germany and the United Kingdom. It allows users to search measures by the implementing jurisdiction, the affected jurisdictions, sectors involved, type of measure, among others, and is accessible at www.globaltradealert.org.
- 45 See *Declaration: Summit on Financial Markets and the World Economy*, 15 November 2008, pp. 4-5.
- 46 Report by the Chairman of the Trade Negotiations Committee, posted at www.wto.org/english/news_e/news08_e/tnc_chair_report_oct08_e.htm.
- 47 Comments posted at www.wto.org/english/news_e/news09_e/tpr_09feb09_e.htm.
- 48 See *London Summit: Leaders' Statement*, 2 April 2009, p. 7.
- 49 See OECD/UNCTAD/WTO, *Report on G20 Trade and Investment Measures*, 14 September 2009, preface.
- 50 The first of the reports had a different format and was never made public. The second and all subsequent reports are posted at www.wto.org/english/news_e/archive_e/trdev_arc_e.htm.

