Firm-Level Transparency in the WTO: Why multilateralism begins at home

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Outline

1. Why ask about firms and transparency?
2. Case studies on domestic remedies
3. Geneva remedies for firms

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1. Why ask about firms and transparency?

Traders are why we are here

- Our previous work starts with needs of states
- Policy objective for international law: reduce uncertainty and trade costs for firms
- Information is a significant cost, especially at the extensive margin
  - Intelligence on market conditions
  - Content of government policy
- Matters for importers as well as exporters
  - Information enables participation in global value chains

Information is a Scarce Commodity

- Haves and Have Nots
  - Asymmetric distribution of costly information

- Haves: large incumbent firms in rich countries know a lot about their markets
  - Self-disclosure faces limits—prisoner's dilemma

- Have nots have limited options

How Trade Agreements Can Help

- In equilibrium everything affects trade
- Reduction/elimination of surprise effects requires publication
- What to be transparent about must be specified—hence WTO notification obligations
- A common agent can turn private information (of firms and governments) into a public good

Do firms have rights in WTO?

- A new question for us
- Firms are users of the govt-to-govt contract, with no direct voice
- BUT does GATT Article X* create private rights?

*Amplified by Trade Facilitation Agreement (TFA). Similar principles in many agreements

GATT Article X

1. Laws, regulations, judicial decisions and administrative rulings… shall be published promptly in such a manner as to enable governments and **traders** to become acquainted with them.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports … shall be enforced before such measure has been officially published.

3. (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters.

2. Case studies on domestic remedies

Domestic Remedy for Private Actors?

- Is there a remedy for deficient transparency as specified in Article X?
- What is the experience with Article X?
- We have so far looked at Brazil, Canada, China, EU, India, and the US

Our questions in each case

- Who introduced an administrative forum? Or procedures?
- Is there judicial review?
- Has implementation of X:3 b) been effective?
  - What sort of claims have been adjudicated?
  - Are the procedures used for X:1 and X:2?
- What are the obstacles blocking adequate implementation?

United States

- Heavily used administrative and judicial fora

- Customs and Border Protection (CBP) main enforcement agency
  – Claims relate to customs rulings, rate of duty, valuation etc.

- Appeals from CBP go to Court of International Trade then Court of Appeals for the Federal Circuit, and finally Supreme Court.

Canada

- Heavily used administrative and judicial fora.

- Canada Border Services Agency (CBSA) administers regulations under Customs Act and Customs Tariff
  - Complaints deal with determination or redetermination of origin, tariff classification and value of duty.

- Can be appealed to Canadian International Trade Tribunal (CITT)
  - Independent, investigative and quasi-judicial decision-making body.

- Appeals from CITT go to Federal Court of Appeal and Supreme Court of Canada.

EU

- Mix of competence means there are two routes for firms

EU first route: Indirect Appeal

- Firm challenges local customs decision before domestic customs authority.
  - Cases deal with tariff classification, customs duties, and exclusions.

- Appeal to national courts: sometimes a general civil court (e.g. France); others a specialized customs / trade court (e.g. Germany and Italy)

- Firm requests national court to refer question of validity of underlying EU measure to Court of Justice of the European Union (‘request for a preliminary ruling’).

EU second route: Direct Appeal

- Established in Article 263 of TFEU to reform indirect route
  - US had challenged indirect route as violating GATT Article X uniformity requirement

- Allows firms to directly challenge an EU customs measure before the EU General Court
  - Hard: must show they are directly and individually concerned
  - Easier in e.g. India and Brazil

- Decision can be appealed to the Court of Justice of the European Union.

Brazil

- Customs matters handled primarily in administrative fora
  - No specialized tribunals
  - Judicial review is possible—and frequent

- Claims most commonly adjudicated involve sanctions applied for violation of customs rules and procedures
  - e.g. non-payment of tariffs or other charges by the importer

- Obstacles for firms
  - Complexity of tax and customs regime
  - Lengthy proceedings–high volume of cases, both judicial and admin.
  - Not enough familiarity of adjudicators with customs issues

India

- Decisions, review and correction of administrative action on customs matters by a mix of quasi-judicial authorities (including specialized tribunals) and courts.
  - Customs officials are first authorities/adjudicators for customs matters
  - Tribunal hears appeals by firms against orders
  - Judicial review of tribunals by courts depending on subject matter

- Cases may concern valuation for customs duty, imposition of penalties and confiscation of goods.

- Problems in implementation include volume of cases, time taken for resolution, and large number of appeals filed against orders of adjudicating authorities

China

- Administrative decisions by Customs authorities challenged by applying for administrative reconsideration to next higher authority under applicable laws.

- Firms/exporters still aggrieved can file a lawsuit before an Intermediate People's Court under the Administrative Litigation Law
  - Cases concern valuation and levy of customs duty, tax disputes, import licensing, and administrative penalties.

- Difficult to assess consistency with Art. X obligations:
  - limited information available in official translations
  - blurred lines between judicial review and administrative proceedings
  - independence of tribunals from initial authorities not clear

Domestic remedies for deficient publication?

- We have not found claims about deficient publication (Art X:1) before tribunals identified above. As for retroactivity (Art X:2)
  - Canada: under Statutory Instruments Act no penalty can be imposed for contravention of an unpublished regulation
  - US: ex ante publication required by Administrative Procedures Act
    - Have not found complaints in trade bodies
    - Allows complaint to courts about trade-related due process
  - EU: No equivalent of Statutory Instruments Act
  - Not so straightforward elsewhere

Domestic implementation is not perfect

- Variance in accessibility and backlogs of Art X:3 mechanisms
- Not often used to address Art X:1 and X:2 transparency
- What can WTO surveillance contribute for firms?

3. Next steps: Geneva remedy?

Remedy in Geneva for Private Actors?

- Traders can raise foreign publication deficiencies with their own trade ministry who may then raise in Geneva
  - National procedures to accept firm requests highly asymmetric

- We will ask about Art X in **dispute settlement** and **specific trade concerns (STCs)**

- How many complaints are about transparency?
  - Publication, operation of enquiry points, opportunities to comment, tribunals

This is an ongoing project…

Corrections and comments welcome:

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